IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re Maurice Boyette Petitioner, On Habeas Corpus	Case No. S092356 (S032736) **CAPITAL CASE** Related Appeal: S032736 (Alameda County Superior Court No. 114009B Honorable Richard Haugner, Judge)

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

Lynne S. Coffin (SNB 121389)
Coffin Law Group
548 Market St., #95752
San Francisco, CA 94104
Tel: (415) 218-8106
Fax: (866) 334-5441
E-mail Lsc@Coffinlawgroup.com

Attorneys for Petitioner

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E-mail Lsc@Coffinlawgroup.com

Attorneys for Petitioner

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TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner MAURICE BOYETTE filed a habeas corpus petitioner on October 19, 2000, challenging his confinement on San Quentin's Death Row. During the informal briefing, respondent conceded that petitioner was entitled to an evidentiary hearing on the issue of juror misconduct. On November 15, 2006, after reviewing the informal briefing of the parties, this Court issued an order to show cause why relief should not be granted on the ground of juror misconduct. After additional briefing by the parties, on September 9, 2009, the Court found that "based on the record in this matter and good cause appearing: The Honorable Jon Rolefson, Judge of the Superior Court of California, County of Alameda, is appointed to sit as a referee . . ." (September 9, 2009 Order.) The Court further held that "the referee shall take evidence and make findings of fact. *Id.*

Petitioner hereby excepts to the referee's report and submits this Brief on the Merits.

I.
INTRODUCTION

In his habeas corpus petition, petitioner alleged juror misconduct by Juror Pervies Lee Ary, including materially false answers during voir dire and answers to the juror questionnaire that were designed to conceal and deceive, and the introduction of prejudicial extrinsic information into the deliberations at both the guilt and penalty phases. These material omissions and false answers demonstrated juror bias and violated petitioner's right to due process of law, to confrontation and cross-examination, and to freedom from cruel and unusual punishment under the Fifth, Sixth, Eighth, and under Article I, sections 1, 7, 15, 16 and 17 of the California Constitutions.

Specifically petitioner alleged that the justice system failed because one of the jurors at petitioner's capital trial was not only a convicted felon, albeit expunged, but also repeatedly lied or omitted material facts when answering not one, but multiple questions in his juror questionnaire and on voir dire. Any speculation about Juror Pervies Lee Ary's motives for concealing information during voir dire is resolved by his admitted introduction of material and prejudicial extrinsic evidence into deliberations during both the guilt and penalty phases of petitioner's trial. At the evidentiary hearing, Juror Ary revealed that he had additional relatives who had been acccused of serious crimes and/or had experiences with illegal drugs. Moreover, Juror Ary confirmed that he also lied when he swore under oath that he would consider life without the possibility of parole as an alternative to the death sentence. Juror Ary's repeated misconduct fatally infected both petitioner's guilt and death sentences.

II.
INCORPORATION BY REFERENCE

Petitioner hereby incorporates and realleges by reference each and every paragraph in the petition for writ of habeas corpus filed on October 19, 2000, 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 A of the petitioner, and the exhibits filed in support of Claim A.

III.
PETITIONER EXCEPTS TO THE REFEREE'S FINDINGS

The referee filed his findings on Decemver 1, 2010. Petitioner excepts to each of his findings with the exception of his findings to Question 5 of this Court's Reference Order which petitioner excepts to as detailed below. Petitioner also excepts to the referee's ruling limiting and

restricting the evidence to be presented at the evidentiary hearing. EHT 15.[1]

A. The Referee Improperly Limited the Relevant Evidence to be Presented at the Evidentiary Hearing.

Petitioner was presented from presenting relevant, material evidence at the evidentiary hearing. Petitioner excepts from the referee's finding that the evidence at the hearing was limited by this Court's order to "very specific areas of inquiry" EHT 15. Petitioner argued at the evideentiary hearing that in order for the referee to make a determination of whether Juror Ary was biased against petitioner, the evidence could not be limited to questioning Juror Ary regarding his alleged reasons for falsely answering multiple items contained in the questionnaire. The referee incorrectly found that his inquiry was only to make a determination of Juror Ary's state of mind at the time he omitted material evidence from the questionnaire. The referee believed, therefore, that any evidence of Ary's actions that demonstrated juror bias during the trial, were barred. As if demonstrated by the referee's findings, he made a deterimination of whether Ary was biased against petitioner solely on Ary's self-serving statements at the hearing. As is detailed belw, to determine whether Ary was a biased juror, the referee needed to not only take Ary at his word, but to examine Ary's actions not only at the time he gave false answers on the juror questionnaire, but also during his juror service and the entirety of his testimony at the evidentiary hearing.[2]

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[1] The Evidentiary Hearing transcript is abbreviated as "EHT." The Referee's Report has unnumbered pages. For the convenience of the parties and the Court, petitioner has numbered the pages. The Referee's Report is referred to as "Ref."

[2] For example, the referee in his findings, ignored Ary's testimony at the evidentiary hearing that he had numerous additional relatives that he never named, and petitioner failed to uncover during his investigtion, who had serious criminal records involving drugs. While Ary ultimately changed his testimony to say they were not really important to him, the fact remains

The refereeimmproperly failed to take into account Ary's demonstrated juror misconduct[3] which included telling at least one juror to consider false evidence that petitioner had committed another murder, andusing his knowledge of crimes and prisons – exactly the areas that were inquired of in the quesionnaire – to convince jurors to convict petitoner of first degree murder and special circumstances and to find for the death penalty rather than sentencing petitioner to life without the possibility of parole. These actions demonstrate Ary's bias. At the evidentiary hearing, petitioner argued that the evidence barred by the referee was material and relevant to the questions poised by this Court. Petitioner argued that the barred evidence was necessary to establish the bias of Ary rather than simply showing his juror misconduct in the penalty phase.

The referee barred discussion of Ary's involvement in at least the following areas: labeling certain jurors as "naive," any discussion among some of the jurors concerning the lying in wait special circumstance; Ary's note to the trial court expressing his inappropriate hostility to petitioner.[4] The referee sustained objections from the prosecutor based on relevance and the scope of the hearing. Petitioner argued that such questions went directly to a determination of juror bias in this case. Petitioner urged the referee to consider that the law underlying a finding of juror bias and juror misconduct required the court to take evidence not simply to establish that

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that Ary volunteered the information about these relatives to support his statements that he received his information about prisons - the same information in imparted to the jurors at trial- from these heretofore unnamed relatives. This testimony was ignored by the referee in determining Ary's credibility and bias.

[3] The referee did permit the preseentation of evidence that Ary directed jurors during the penalty phase to consider improper extrinsic evidence. However, that was only because the language of Question 5 specifically requested this evidence.

[4] The referee also barred the admission of any expert testimony. The referee held all pretrial discussions off the record.

a juror lied on a juror questionnaire. Petitioner should be permitted to supplement the evidence presented at the evidentiary hearing to demonstrate that Ary's actions, throughout his service as a juror, reveal ongoing misconduct that evidence juror bias. The additional evidence includes: (1) the introduction of Ary of extrinsic evidence at the penalty phase other than his efforts urging the holdout jurors to watch the movie *American Me*; (2) the note Ary sent to the trial court demonstrating his bias;[5] (3) the conversations in the jury room not relating to the deliberative process including serious arguments about first and second degree murder; (4) the requests by jurors for extensive read backs of testimony and the reaction of jurors to this; and (5) the request to the court to explaim the legal significance of the degrees of murder. [The cour refused to do anything but read back the instructions and [the jurors] got upset and walked out.]

The referee prevented petitioner from demonstrating that particular jurors, who

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[5] Juror Ary was demonstrably the most active juror throughout the trial. Even before the close of evidence at the guilt phase, Ary was aksing numerous inappropriate questions of the trial court all the while attempting to bully other jurors into foregoing read backs of evidence or additional instruction from the court concerning guilt phase questions.

On March 9, 1993, prior to guilt phase deliberations, the court announced to counsel that it had received a multi-questions note for Ary. RT 1576. The first question was "[h]ow can a homeless person obtain such private lawyers or are the [sic] court appointed." The court responded to counsel, "[t]hats really none of his business, so we're not going to comment on that." RT 1576.

The second question was "[t]he neighbor who lived 4 houses up the street describes the size of the person he saw standing in the street or over [near] the body (sml, med, lrg) short or tall." RT 1634-1635.

The third question was "[t]his blind person being tried also or what" RT 1576, to which the court responded to counsel, "[t]hey have been told and they would be told again in the instructions not to worry about him." RT 1577

The final question was "did the person on trial or is he willing to take a lie detector test?" The Court replied, "which is really of – none of their business as such." RT 1577.

questtioned the findings of true of one of the special circumstances, were isolated during the guilt phase deliberations and told that they were naive, and did not understand the "real world."

Further evidence of juror bias would have deomonstrated that if evidence had been taken showing Ary used the precise information that he omitted from the juror questionnaire, including evidence that Ary had valuable information about prisons, that ary was a bus driver in Oakland and Los Angeles allegedly allowing him to witness crimes of violence, and that Ary claimed he knew petitioner was guilty of additional crimes.

Ary failed to disclose on the jury questionnaire any of these areas of his "special" experrtise. Yet, Ary used his alleged unique knowledge to successfully brow-beat and ultimately to convince other jurors to vote for guilty verdicts and ultimately to agree to sentence to petitioner to death. As petitioner argued at the evidentiary hearing, the basis of a claim for juror bias begins with an examination of Ary's actions in the guilt phase. The refusal of the referee to accept briefing on the legal issues or to take evidence supporting the juror bias claim resulted in a serious restriction of petitioner's ability to demonstrate Ary's bias. EHT 2-21.

The referee also failed to appreiciate that to establish implied bias,petitioner is not required to demonstrate that Ary actually *knew* that he was biased against petition. See Memorandum of Points and Authorities for full discussion of this issue. *Fields v. Brown*, 503 F.3d 755, 808 (2007) ("Remedy for allegation so of juror impartiality stemming from *ex parte* communication and extraneous information is an evidentiary hearing at which the defendant has the opportunity to prove actual bias.")

The referee failed to udnerstant this court's reference questions. The referee determined that the reference questions only allowed evidence showing Ary's state of mind when he

completed the juror questionnaire. Ref. 24 ("[as a juror] . . . was there a 'pre-existing bias.'"). The referee stated, "I do not believe I am being asked to determne whether at some point during deliberations or as some point during the trial itself after the evidence commenced, did a bias exist." *Id.* He further stated that: "[j]ust so we are clear on the issue of the question was Ary biased against petitioner. I interpret that question given where the question is asked to relate to at the time of jury selection. In other words, what was the state of mind that he came into the trial." The referee incorrectly read this court's reference questions. Ref. 24. ("I have very specific areas of inquiry, and that is not one of them [reference to admission of Ary's questions to the court during the guilt phase." Finally, the referee told petitioner that "[w]e are not going to go on a fishing expedition." Ref. 27, 29.

The referee's refusal to take briefing on the issue of the appropriare scope of the evidence lead to his erroneous determination of Ary's bias and credibility. To determine bias and credibility he merely looked to Ary's self-serving testimony at the hearing. The referee's restrictions of the presentation of evidence was wrong and petitioner excepts from his interpretation of this Court's reference questions.

B. Petitioner Excepts to the Referee's Findings for Each Question Before Him.

Petitioner excepts from the referee's findings as to each of the reference questions.

Question One: Given that Juror Pervies Lee Ary was in 1964 convicted of a felony grant theft, was incarcerated as a result, was later charged in 1971 with six counts of robbery, later pleaded quilty to misdemeanor drunk driving in 1982, and then had his probation revoked in 1982, and given that Ary failed to disclose this information either on his juror questionnaire or during voir dire in petitioenr's trial,, what were Ary's reasons for failing to disclose thiese facts, was his nondisclosure of the above facts indicative of juror bias? Was Aru actually biased against petitioner?

The Referee Found That:

Ary did not disclose his own criminal history on voir dire because he was not asked about it. The only inquiry into this subject was a single question in the written questionnaire that asked whether he had ever been "accused" of a crime. The referee misunderstood that single question to be asking about convictions. Clearly, the question was not limited to convictions, since it not only used the word "accused," but also added the phrase, "even if the case did not come to court." The referee mistakenly found that it was relevant or significant that no further explanation provided, no additional questions on the subject, and no inquiry during voir dire that might have provided clarification. The referee mistakenly found that Mr. Ary expressed the same misunderstanding of the question while testifying at the hearing. This, while his interpretation of the question was certainly unreasonable, it is not unbelievable under the circumstances. Since his only conviction had been set aside, he believed he had none to report. Ref 3.

Petitioner excepts to the referee's findings as follows:

Ary has given numerous reasons for his failure to reveal *any* of the numerous connections of his relatives. Juror Questionnaire question number 25 asked "have you, a close friend, or relative ever been **accused** of a crime, even if the case did not come to court? Emphasis in the Original. Ary answered no. This answer was false on multiple grounds. Ary's failure to reveal the numerous times he had been accused of a crime or the connections of numerous relatives with the criminal justice system was the first indication of juror bias.

The referee's finding appears to be based, in part, on his conclusion that Juror Ary was not asked any questions about his arrests and prosecutions on voir dire. (Mister Ary did not

disclose his own criminal history on voir dire because he was not asked about it.) Ref 4. This finding misunderstands the purpose of employing a questionnaire, particularly in a capital case. A questionnaire is employed precisely so that during voir dire neither side has the need to inquire about subjects covered in the questionnaire unless the answer leads to additional questions. Both sides are entitled to presume that because the court has instructed the jury on the importance of answering the questions carefully and honestly, the court has also reminded the prospective jurors that their answers are under penalty of perjury. Since Juror Ary failed to give honest answers to these questions, neither side was aware of his extensive contact with the law nor the fact that he had numerous relatives with very significant criminal histories.

The hearing record reflects Ary's complete lack of credibility. Nevertheless, the referee failed to give any weight to the fact that Ary has given almost a dozen, every-changing reasons, for his failure to answer this question honestly. Ref. 35-70. Ary admitted that the court instructed potential jurors on the importance of the questionnaire; he knew that it was to be filled out under penalty of perjury. Ref. 35-36.[6] He also admits that he understood what the question was asking. EHT 59.

Ary's testimony relevant to Question 1 clearly demonstrates that Ary purposely withheld all information concerning his and his numerous relatives arrests and other connections to the criminal justice system. At the evidentiary hearing, Ary, for the first time, claimed to have had a telephonic conversation with someone unnamed person – possibly at the juror commissioner's

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[6] Ary acknowledges that he has a college education. EHT 129. Thus, it is not credible that he did not understand what information should be supplied to honestly answer the question.

office. This unidentified person allegedly told Ary that he did not have a felony conviction. Apparently Ary was now claiming this is the reason he did not list the felony conviction on his questionnaire. EHT 32. This statement is not credible.[7] Ary suggested that he called the jury commissioner's office because of his felony conviction - thus admitting that he believed he had a conviction and was told for the first time that the conviction had been expunged. ("That's how I found out I am still eligible for jury duties because I tried to get out of it.") EHT 33. It is highly unlikely that this alleged telephone call ever took place in light of the fact that Ary never mentioned the call to any of the investigators, including the District Attorney's. There is no credible reason why, if this telephone call had taken place, that Ary would not have revealed it.

Ary admitted being arrested in 1964. EHT 36. He admitted that he remembers that he was arrested and received six months in jail. EHT 39. He acknowledged that he served time in jail. EHT 37. He acknowledged his signature on questionnaire. EHT 39. He admitted he remembers he was arrested in 1971 for robbing the Lucky's Store. EHT 39. He admitted he had to go to court on this arrest on question from court. EHT 39.

He admitted that he remembers that he was arrested for the crime of driving under the influence of alcohol in 1982; remembered he was fined and sentenced to AA. EHT 40. He testified that he only had two beers over a five hour period.[8] He apparently remembers all of the circumstances of this arrest: he was leaving a party and got pulled over. Ary claimed that he had

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[7] If possible, Ary's claim gains new incredulity when he testifies that the jury commissioner's office said because he had top secret clearance in the military, he was eligible for jury service. EHT 33.

[8] It is not believable that he failed a Breathalyzer test with these claimed circumstances. He "blew through a machine." EHT 41.

two beers over 5 hours (41) and that at the time he was 6' 5" tall and weighted about 300 lbs. EHT 41. He also admitted that he went to court and saw the judge. EHT 42. Ary's again attempted to justify his failure to honestly disclose information: he did not disclose his arrest and conviction for driving under the influence because this conviction was, in his opinion, "not the kind of crime that the question was looking for." EHT 109. As if this explanation was not sufficient, Ary demonstrated that he had endless rationalizations for his failure to disclose the information. Ary told the court that he also "resented that question because I was leaving a nightclub. I limited myself to two beers. The police was sitting right there. He was waiting on people, and I don't feel I had no problem with no alcohol." EHT 114. This last attempt to explain his actions demonstrates that Ary made a conscious decision not to include this information. Finally, Ary admits that he simply did not want to divulge his arrest and conviction for driving under the influence. As is fully set forth in the memorandum of points and authorities, a juror's inability to follow the instructions of the court is one of the indices of juror bias. Ary had ever-changing explanations of why he failed to answer this question truthfully. These explanations included that "[i]t didn't seem important to me at that time. EHT 59; his claim that a person at the jury commissioner told him that since he had been arrested as an accessory it was irrelevant. EHT 59.

Turning to his arrests for driving under the influence, his excuses began with his assertion that a DUI is not criminal. EHT 60. Yet, he admitted that he knew driving under the influence was a crime but "[he] fe[lt] that [he] should have never gotten it. EHT 60. Ary admits that he should have answered yes because he had been "accused" of crimes but failed to do so because "it didn't seem important to say I did at that time." EHT 60.

Next he says that he failed to reveal the information requested in Question 25 because he "read it wrong." EHT 61 followed by his next excuse or explanation is the most nonsensical in this long list. He testified "[h]ave I been convicted. That's what I was looking for and it didn't say convicted. It just said accused and I figured it was no." EHT 61. Ary follows this nonsensical response by suggesting that he thought the question meant convicted. EHT 61. The last of the long-line of ever change explanations for his perjury is "I made a mistake." EHT 61. Petitioner agrees that Ary "made a mistake" and that "mistake" was done with full knowledge by Ary that he was concealing relevant evidence.[9]

In sum, contrary to the referee's finding, Ary's explanations for his failure to reveal material, relevant information to the parties was the first indication that Ary was a biased juror. One cannot review Ary's serial, false explanations and find them credible:

An anonymous person in the juror commission office told Ary not to disclose the felony because you have a high military;

Not the kind of crime that the question was looking for;

Resented the question;

Did not want to divulge information;

It did not seem important to me at the time;

He read it wrong;

It didn't say "convicted;"

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[9] Ary's claim that he did not want to be a juror because "[he] didn't want to be responsible for sending anyone to the penitentiary" is completely controverted by his actions throughout his jury service.

It just said accused and he figured no;

Question 2: Given that two of Juror Pervies Lee Ary's sons had criminal records, and that one of Ary's cousins was convicted of murder, and given that Ary failed to disclose this information on either his juror questionnaire or during void dire in petitioner's trial, what were Ary's reasons for failing to disclose these facts? Was the nondisclosure intentional and deliberate? Considering Ary's reasons for failing to disclose these facts, was his nondisclosure of the above facts indicative of juror bias? Was Ary biased against petitioner.

The referee found that:

Again, the referee appears to absolve Juror Ary of his abject failure to honestly answer this question by stating that he did not disclose the criminal records of his relatives on voir dire because he was not asked any questions on the subject. Ref. 8. Further the referee absolves Ary for this failure because "the only inquiry into this subject was the same, single question" that the referee found was incomprehensible to Ary, a college educated man, EHT 129, who had no trouble understanding the complex questions in the questionnaire. The referee absolved Ary's perjury with the singular finding that Ary believes the question called only for "convictions." The referee found that the convictions of Pervies Ary, Jr. were "years before" and the relationship of father and son "was so distant that he didn't even occur to him." Ref. 8. The referee found that Ary was only "aware at that time of his son's arrest, but not his conviction." *Id.*

The referee further found that Ary did not reveal his younger sons arrests and convictions "because he didn't think he had to," since it was not "criminal" or a "conviction." The third category of failures to reveal requested information was not a problem because Ary said that he did not think of his cousins and nephew since they were "not people with whom he had contact." Ref. 9.

The referee found that Ary's failures were not intentional or deliberate; that Ary believed he was answering the questions accurately or his nondisclosure was due to a failure of memory. Having made this finding, it follows that the referee concluded that Ary's nondisclosures were not deliberate and did not indicate juror bias. Ref. 9.

As is detailed below, the referee's findings are not supported by the record. In fact, Ary's own testimony at the evidentiary hearing fails to support the referee's findings.

Petitioner excepts from the referee's findings as follows:

One of the most revealing aspects of Ary's testimony regarding his relatives who had been convicted of crimes, is the number of relatives in this category that petitioner was unaware of until the evidentiary hearing.

Ary's testimony first turned to his eldest son. Ary knew his eldest son had been arrested for drugs. EHT 62. It is not relevant, even if true, that Ary did not get this information from his son. EHT 62. Moreover, this testimony admittedly contradicts what he told the District Attorney's investigator. EHT 62. Finally, Ary admitted that he knew that his son had been arrested numerous times at the time of he filled out the questionnaire. EHT 63. Therefore, Ary did not fail to recollect his son's arrests.

With regard to his eldest son's criminal record he initially claimed that he did not remember his son being arrested specifically for selling cocaine. EHT 43. However, he admitted that both his sons had been arrested. EHT 43. Ary admitted that he knew his oldest son was arrested because his ex-wife telephoned him asking for money to get Pervies Ary, Jr. out on bail. EHT 43. Ary knew that his son was in trouble with the police but claims that is all he knew. With regard to this incident he testified that he told the mother of Pervies Jr "and I said for what?

Why is the only time you call me is when he's in trouble, when he needs some money?" EHT 64.

Ary's testimony demonstrates that this incident was significant for him. Years later, he remembered how angry he was with his ex-wife. Therefore, it is not credible that he failed to recollect his son's arrest.

Of course, given that the question asked for any *accusations* against relatives, the only relevant information was that he was aware that his eldest son had been arrested and failed to disclose the information. EHT 43.[10] He also admitted that he went to court with this same son, EHT 45, and this occurred prior to his jury service. EHT 46.

During the evidentiary hearing, Mr. Ary, for the first time, brought to the court's attention that he had nephews who had serious criminal records and from whom he gained his insight into prison life. ("The majority of prison life came from my nephews.") EHT 95. This information was never brought to the attention of the trial court or the parties because Mr. Ary once again failed to honestly answer the questionnaire. Apparently Mr. Ary believed that it was preferable to testify that his extrinsic information about prisons did not come from his son, but from these heretofore unmentioned relatives. This testimony was ignored by the referee.

Mr. Ary described this previously hidden relationship as follows:

> My previous marriage, my second marriage, my wife's sister had four sons. That was during the time I lived in Los Angeles. They became – the oldest one became the second largest cocaine dealer in the city of Los Angeles. They wound up – the

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[10] Ary testified that he believed the arrest of his eldest son was for "selling drugs." Ary admits that he knew " had something to do with marijuana. I know that much." EHT 44

oldest one got 37 years. The next to the oldest got 32 years. The one under him got 27 and the other one got 25. The oldest one got 37 because of the triple homicide. All four of them were dealing drugs. All these years when they got out, they started corresponding, calling me and telling me about their experience, their life in the penitentiary. EHT 95.[11]

Ary further testified that he had a "first cousin, he has life without the possibility of parole. He belongs to the Black Guerilla Family and I have a nephew, my baby brother's one and only son. He has life with the possibility of parole." *Id.* They are incarcerated in California. "And by me being the uncle and we might be together, me and my brothers, their names come up and we discuss them." EHT 96.[12]

In addition, Ary confirmed that he did not tell the court in his questionnaire, that he had a first cousin who was serving life without possibility of parole. EHT 98.

When questioned by the referee, Ary gave yet another excuse. Ary did not provide any information because he arbitrarily determined that answering this question was not important. (".

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[11] In later testimony, responding to questions from the referee, Ary did a complete turn around and said that it was not his nephews who gave him the information about prison life. EHT 97. That this flip-flopping was ignored by the referee in assessing Ary's credibility is impossible to reconcile with accepted rules of evidence. Court inquiry - never has been in direct contact with cousin (but was in direct contact with nephews).

"Not them individually, but by people themselves who are in penitentiary for life. And my nephew, and that's my baby brother's son, I have never talked to him and I had no correspondence with him since he's been incarcerated."

[12] Ary testified that he also had a first cousin who had been sentenced to life without possibility of parole. The cousin was sentence in 1989 or 1990.

. . because I would just read it and say it didn't go to court, so I said, well, that's not even important.") His decision to ignore the instructions of the court is further underscored by his testimony that he did not think accompanying his youngest son to court, EHT 67, after he was arrested, merited inclusion because he decided that "it wasn't important." EHT 66.

Ary's testimony about his eldest son is equally unpersuasive and also demonstrates his bias. He testified that he did not know his eldest son went to prison but when confronted with his statements to the District Attorney's investigators to the contrary, he admitted that he had given them contrary information. EHT 69. "I think it was selling drugs. I know it had something to do with marijuana. I know that much." EHT 72.

His testimony demonstrated the prejudicial implications of his failure to truthfully answer the questionnaire. Ary stated that he believed that life without the possibility of parole really did not mean that petitioner would never be released from prison based on his experience and from his son; he also talked to other people who had been in the penitentiary. EHT 69-70. Ary testified in response to whether he had made these statements to the District Attorney investigators, he responded with hostility – "[s]o I said it yeah." EHT. 69-70. He further admitted that he knew that his son had "dealings with the police" but then contradicted himself by denying that discussing bail for his son met that his son was accused of a crime. *Id.*

Ary at first suggested that he never talked to his son about experiences in prison. However, in the testimony that followed he admitted that "he could have told me about it. "I could have talked to numerous people about what was going on in the prisons concerning gangs." Ary demonstrated how much information he had withheld when he stated that "[d]riving buses in Los Angeles for 23 years I deal with it every day. EHT 62-63.

In an attempt to mitigate his failure to disclose information he had received from his son, he offered yet another source for the extrinsic evidence, testifying that he knew about gangs in prison before his son gave him information because "he talked to his brother who works in juvenile." At the time petitioner filed his writ of habeas corpus he was unaware of this Ary relative.

Ary did not have just one son whose contacts with law enforcement he failed to reveal. Ary testified that he knew that his younger son, Pervies Ary III, had also been arrested. EHT 47. He knew that his younger son had been arrested not once but twice. EHT 49. Although Ary failed to disclose any information when asked if he or a close friend or relative had ever been a witness to a crime, he admitted the truth at the evidentiary hearing. EHT 56.

Once again, he gave irrelevant information suggesting that he only knew that his son "did time," and he dtd not know what his son was accused of. There is no explanation of why he did not have to reveal this information. *Id.* As Ary testimony progressed his reasons for his perjury changed. Following his last explanation is testified that he did not mention his son's arrest because it was a juvenile conviction. EHT 68.

Question 3: Given that Juror Ary had previously been convicted of driving under the influence and was as a result required to attend meetings of Alcoholics Anonymous, and that one of his sons had several prior convictions for drug-related crimes and had been incarcerated at the California Rehabilitation Center at Norco, and given that Ary failed to disclose this information on either his juror questionnaire or during voir dire in petitioner's trial, what were Ary's reasons for failing to disclose these facts? Was the nondisclosure intentional and deliberate? Considering Ary's reasons for failing to disclose these facts, was his nondisclosure of the above facts indicative of juror bias? Was Ary biased against petitioner?

The referee's decision regarding this question once again relied, at least in part, on the

fact that Juror Ary was only asked once to reveal to the court that he and his sons had problems with drugs and alcohol. Ref. 9. The referee found that as far as Mr. Ary knew he was answering the question accurately because the question asked if anyone had a "problem" with alcohol or drugs. *Id.*

Petitioner accepts as follows:

The referee's findings are not supported by the evidentiary hearing record. Mr. Ary's answers to questions posed at the evidentiary hearing, in his declaration, and in his answers in the interview with the District Attorney investigators, demonstrate that the testimony of Mr. Ary at the evidentiary hearing was not credible.

As stated in reference to Question 2, Ary testified that he did not know his eldest son went to prison, but when confronted with his statements to the District Attorney's investigators to the contrary, he admitted that he had given them contrary information. EHT 69. "I think it was selling drugs. I know it had something to do with marijuana.[13] Mr. Ary testified that he was told "all about" his son's criminal history "other than the fact that when he was in prison he had a join a gang?" EHT 127.[14]

Mr. Ary attempted to convince the court that "[t]he years he spent time in the penitentiary – I had – I was not part of his life." EHT 126. However, Mr. Ary was forced to acknowledge that

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[13] Contrary to the findings of the referee, Mr. Ary has admitted that he was aware of his son's involvement with drugs prior to his jury service.

[14] Subsequently, Mr. Ary once again changed his testimony. This involved how he got his information about gangs in prisons. Mr. Ary now says he "got the majority of [his] information from my previous marriage nephew." EHT 93. This is the first time the nephew had been mentioned. His nephew is his nephew by his previous second wife. His gang info cane from his two nephews and "street talk." *Id.*

"[b]ut 1989, I believe, when I moved from Kansas back to Oakland I stayed a couple of days, maybe a week with my son until I got my own place, and he was staying with is girlfriend then." *Id.*

For the first time, Mr. Ary revealed that he had also failed to inform the court of other relatives who had serious involvement with drugs. Mr. Ary testified that through his ex-wife he had become involved with her nephews. His wife's sister had four sons. They oldest one became the second largest cocaine dealer in the city of Los Angeles. The four boys received severe sentences, which Mr. Ary explained in great detail. EHT 93.[15]

Mr. Ary explained that "[a]ll these years when they got out, they started corresponding, calling me and telling me about their experience, their life in the penitentiary." Mr. Ary explained "by me being the uncle and we might be together, me and my brothers, their names come up and we discuss them." EHT 96. Once again, Ary flip-flopped his testimony. Ary did a one-hundred-eighty turn and testified that the information about prison life did not come from first cousin or nephew. "Not them individually, but by people themselves who are in penitentiary for life. And my nephew, and that's my baby brother's son, I have never talked to him and I had no correspondence with him since he's been incarcerated." EHT 97. This testimony alone should have led the referee to find Mr. Ary incredible.

Mr. Ary could find no credible explanation as to why these relatives were not revealed in the questionnaire. He can not explain how these relatives could have given him the information

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[15] The oldest nephew received 37 years. The next oldest got received 32 years. The next one was sentenced to 27, and the youngest received a sentence of 25 years. The oldest received 37 years because he was convicted of a triple homicide. All four of them were dealing drugs. EHT 93.

that he relayed to the jurors at petitioner's trial if they gave him the information subsequent to his juror service. He, of course, could not give any answer to justify his claim that he only came have the above information after his jury service when his connection to his nephews was through his wife and his marriage was over before he served as a juror. EHT 93.

When asked to explain why he did not reveal the information about his nephews he stated, "I wasn't close to them as far as being around them to just, boom, automatically think about them." Of course, this is belied by Ary's ability to remember his talks with these nephews giving information to other jurors about gangs in prison.

Nevertheless, Ary changed his testimony once again and stated that "my first cousin, he has life without the possibility of parole. He belongs to the Black Guerilla Family and I have a nephew, my baby brother's one and only son. He has life with the possibility of parole." Again, because Ary is not very skillful in keeping his stories consistent, these changes in testimony should have resulted in a finding by the referee that his testimony was incredible. EHT 97.

With regard to his own driving under the influence (DUI) conviction, Ary stated that he has no problem with alcohol, and a conviction for DUI , did not count. EHT 70. His claimed that his assumption was that this question referred to a "drug addict or alcoholic." EHT 72. This testimony was unpersuasive because it was followed by Ary's admission that "anybody has a problem if you are selling drugs instead of making a decent living." EHT 73. Ary admitted that he knew that his son smoked marijuana, EHT 73, but claimed that there was a difference between "having a problem and being involved with drugs or alcohol. You can be a drug dealer and never touch the stuff." *Id.* This testimony does nothing to justify Ary's failure to reveal this information.

Question 4: Did Juror Pervies Lee Ary assert during jury deliberations that Petitioner had previously committed uncharged murders? If so, did this occur during deliberations at the guilt phase or the penalty phase? Did other jurors discuss this topic as well?

The referee found that:

Mr. Ary did not assert that petitioner had previously committed uncharged murders. Ref. 10.

Petitioner accepts as follows:

The referee's finding is difficult to reconcile with his finding that Juror Cynthia Lewis testified that Ary told her that she should remember that petitioner "did kill someone else." *Id.* The referee inexplicably found that Ms. Lewis "was confused." *Id.* The referee misread or ignored the question asked by this Court which clearly asked if Ary said during the deliberations that petitioner had committed an uncharged murder. It is not relevant that Ary made this statement during the penalty phase, particularly because it is further evidence jury bias and misconduct.

Ary was shown the declaration that he had signed under penalty of perjury and admitted that it was his declaration. EHT 77. He "could have" told the District Attorney investigator that the declaration was completely accurate. EHT 79. ("I wouldn't have signed it [if it wasn't accurate];" Cannot remember but he is "sure" that at the point at which he signed the declaration he believed everything it in was true and accurate. EHT 92. Responding to a question from the court, Ary stated "I'm sure it's accurate. Yes." EHT 82.

After examining his declaration, Ary changed his testimony. He now stated that "we discussed the fact that this may have been the first murder Mr. Boyette had been caught at."

EHT 78. "They could have discussed the fact that this may have been the first murder for which Boyette was been caught but he may have committed previous murders." EHT 117. The referee completely ignored this testimony and made no reference to it in his report. Ref. 10.

Mr. Ary's admission that he discussed the fact that petitioner may have committed other murders is confirmed by Juror Cynthia Lewis. Although the referee mischaracterized and dismissed Ms. Lewis' testimony in his report, Ms. Lewis was clear that she remembered what Ary said to her. Ms. Lewis testified that another juror told her that [petitioner] he was not charged with. EHT 162. Ms. Lewis described Ary as the person who told her about the uncharged murders. Describes Ary as the person who told her as the bus driver. *Id.* "[Ary] nudged me, and he said, "Now, Cynthia, you remember that he killed someone else?" EHT 172. And she responded "but aren't we supposed to mark that out or the judge said to not include that or something?" EHT 166. Ms. Lewis testified that the conversation occurred in the penalty phase.[16] After the conversation she changed her vote from life without possibility of parole to the death sentence. EHT 170.

Question 5: Did Juror Pervies Lee Ary urge other jurors, during jury deliberations, to watch the movie *American Me* in order to learn more about the nature of a prisoner's life in prison? Did any juror actually watch the movie at any time during petitioner's trial or jury deliberations?

The referee found that "Mr. Ary, along with one or more other jurors, did urge two holdout jurors to watch the movie *American Me* in order to learn more about the nature of a

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[16] While not definitive, Juror McLaren also testified that the jurors "could have" discussed the fact that this may have been the first murder for which Boyette was been caught but he may have committed previous murders. EHT 117.

prisoner's lie in prison. Ref. 10.

Petitioner excepts as follows:

There is no doubt that Ary told two jurors to watch the movie, *American Me*. Ary testified that the two hold-out jurors "needed to know what prison life was like." Ary believed it was based on a true story. EHT 99. "I said why don't you all go get it from Blockbuster. Don't look at it once, but look at it twice to get a very good understanding about what prison life is like." EHT 100-101.

The testimony made clear that the impetus for "encouraging" the two hold-out jurors to commit juror misconduct when the viewed extrinsic evidence, was Juror Ary. Moreover, the impetus for viewing *American Me* was not, as found by the referee, "to learn more about the nature of a prisoner's life in prison." Ref. 10. In fact, it was to convince the two-hold out jurors that if they did not vote for death, petitioner would kill again in prison. Mr. Ary had only one motive - to convince any jurors who were not voting for death that it was a foregone conclusion that life without possibility of parole inevitably meant death for someone else. Mr. Ary believed that there was only one possible penalty to consider.

Ary admits that he disregarded the instructions of the judge and took it upon himself to "educate" the "naive" jurors again using knowledge that he withheld from the parties and the court. [17]

Ary agreed that he told District Attorney investigators that he talked to other jurors about street fighting explaining that "they couldn't imagine things like what happened in real life.

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[17] Ary also admitted that he may have talked to other jurors during guilt phase about "street fighting."

They were overprotected." EHT 76. The jurors were "naive." *Id.* Ary further testified about the information of prison life that he imparted to the other jurors: "[m]y information that I have received over the years when it concerns prison life – your medium – mediocre facilities is not as severe as it is like in San Quentin, Vacaville, your – what do they call it, the big boys' security sentence is if you want to survive, you have to be part of a group or a gang. They call it families." EHT 94. Mr. Ary gave a different account to the District Attorney's investigator, saying that this knowledge was based on his experience and "from [his] son and talking to other people who have been in the penitentiary. *Id.*

Moreover, Ary used his knowledge - the very knowledge about prisons and prison gangs that he failed to reveal on his juror questionnaire, to influence the jurors to vote for the death penalty. This is evidence of juror bias that the referee failed to credit.
Admitted that he remembered the experience during jury deliberations and thought it was important to tell the other jurors.

Ary really could not keep his story straight: "[my son] could have told me that or where I got it from I can't say this particular person told me. It could have been my son."
Later Ary testified "The majority of prison life came from my nephews." EHT 95.

The referee found that Juror Ary, along with one or more other jurors, did urge two holdout jurors to watch the movie *American Me* in order to learn more about the nature of a prisoner's life in prison. As to the related question "[d]id any juror actually watch the movie at any time during petitioner's trial or jury deliberations" the referee found that two jurors – Julie McLaren and Christine Rennie – did watch the movie during the penalty phase deliberations. Referee at 10.

Petitioner agrees that at least two jurors, Christine Rennie and Julie McLaren, watched the movie during the penalty phase. The referee's finding omits material and relevant information concerning Juror Ary's other actions during the penalty phase.

Juror Ary testified that "[t]he two jurors which was the two young ladies, there were so naive about street life until they were so determined that he couldn't harm no one while he was in prison for the rest of his life, and we discussed this, we deliberated and discussed it, and that Friday, the judge said, well, we got to come to a conclusion. We have to do something about this because it's been deliberated too long, so I asked there two young ladies, because the rest of us had already found him guilty with special circumstances, the death penalty, but these two said he will never hurt anyone as long as he is in the penitentiary for life."

"I said you just don't know anything about prison life. I said you two go to Blockbuster and get the movie "*American Me.*" Sit down and look at it. It will explain penitentiary life to you, and you will see what a person can do while he is in the penitentiary." EHT 100. "I said why don't you all go get it from Blockbuster. Don't look at it once, but look at it twice to get a very good understanding about what prison life is like." 100-101.

Juror Ary further admits that he told two jurors to watch *American Me* to "get knowledge of prison life. . . because this is based on a true story." EHT 86. He was part of the discussion with the "two young ladies" he used his personal experiences to assist them in understanding that the death penalty was the correct decision. EHT 92. Juror Ary also admitted that two jurors talked to him the next day that they were together to deliberate. EHT 86.[18] There were two

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[18] Sustains objection as to what they said to him on hearsay grounds. EHT 88.

people who were unwilling to vote against the death penalty. The next day the jurors deliberated the jury was unanimous. EHT 86.

Ary also admitted that he could have said in his interview with the DA inv when asked were you concerned that Boyette may get involved with gangs when he goes to prison and you answered "not on death row. He is alone there."

His information was received "over the years when it concerns prison life – your medium – mediocre facilities is not as severe as it is like in San Quentin, Vacaville, your – what do they call it, the big boys' security sentence is if you want to survive, you have to be part of a group or a gang. They call it families." EHT 94. To interviewers he said this was based on his experience and "from [his] son and talking to other people who have been in the penitentiary. EHT 94. Now claims that he did not believe that his son told him. . . he could have told me that or where I got it from I can't say this particular person told me. It could have been my son."

As discussed above petitioner then testified that "[t]he majority of prison life came from my nephews." EHT 95.

Another juror, Cynthia Lewis testified that she was not initially in favor of giving Boyette the death penalty. EHT 163. She remembers discussion of American Me but does not know which phase. EHT 164. There were three people against the death penalty. CPA, teacher and her [nurse]. All women. EHT 168.

Juror Julie McLaren, remembered that the movie was discussed during the penalty phase. Ms. McLaren does not remember who suggested watching the movie. EHT 193. There were maybe three or four undecided jurors and she was one of them. Watching the movie was directed at the undecided jurors. *Id.* She was told that she should watch the movie so she would know

what life was like in prison. EHT 198, 202. She watched the movie. After she watched the movie there were further deliberations. The next time the jury was together she voted for death, confirming Ary's testimony on this point. EHT 194.

Christine Rennie, another juror, testified that the jury was more divided in the penalty phase. EHT 205. A number of people were worried that Boyette would kill again. EHT 207. Ary was very outspoken. EHT 209.[19] The bus driver (Ary) was the one that talked about watching the movie. EHT 211. She was concerned that she was not one of the people that had the life experience of having a relative in prison. EHT 213.

Ms. Rennie watched the movie. EHT 213. When she returned to deliberations she changed her vote to death. EHT 215. There was a discussion about watching American me. *Id.* EHT 230 (Darlene Perez). Believes Ary was the one that suggested it. EHT 222; EHT 233 (Darlene Perez). The bus driver (Ary) had seen a lot of stuff on the streets. It was in the same discussion as watching the movie. EHT 233(Darlene Perez). There was no discussion of American Me after the initial discussion. EHT 218. She remembers that Ary said "something about he'd probably kill somebody in prison anyway. EHT 221. The suggestion was directed at two young white females. Had to do with them being "young and naive" They needed to find out what prison life was about. EHT 223; Darlene Perez 229. These two jurors were told to watch the movie because they lived in the suburbs and didn't really know how life on the streets really was. EHT 229 (Darlene Perez). Darlene Perez also watched the movie. EHT 232. After

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[19] Petitioner was prevented by the referee from asking if any one suggested that if petitioner was not given the death penalty he would be out of prison in seven years.

watching the movie the division of the jurors went from10-2 to unanimous. *Id.* Prior to this there were two holdouts. EHT 233 (Darlene Perez).

IV.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Introduction

Petitioner was convicted of capital murder and sentenced to death by a jury that included a juror whose gross misconduct establishes his bias. The evidence of Juror Ary's bias and prejudice against petitioner begins with his failure to reveal his status as a convicted felon, continues through his false and misleading responses during voir dire and culminates in two highly prejudicial acts of misconduct during deliberations.

Throughout petitioner's trial, Juror Ary did everything in his power to insure that petitioner would be convicted of capital crimes and sentenced to death. The cumulative effect of his misconduct was overwhelming prejudicial to petitioner.[20] In the courtroom, the juror misconduct was abetted by the prosecutor who improperly encourage the jury to speculate that petitioner would join the Black Guerilla Family, a notorious prison gang, and baselessly argued petitioner's "future dangerousness." Inside the jury room, Juror Ary told his fellow jurors that petitioner had committed a prior murder, an egregious and devastatingly prejudicial falsehood. Then during penalty deliberations, Juror Ary improperly shared his son's experiences while incarcerated and urged the holdout jurors to watch a film that depicted the Black Guerrilla

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[20] Additional misconduct was revealed at the evidentiary hearing, including Ary's revelation of additional relatives in prison for drug dealing that he failed to reveal in the questionnaire.

Family as a violent prison gang holding sway over the inmates in California state prisons.

Rarely, if ever, has the record of a capital case contained undisputed evidence of such pervasive – and admitted – misconduct. Each of the numerous instances of misconduct, standing alone, would require reversal of petitioner's convictions and sentence. Viewed together, they reveal a shocking pattern of wrongdoing. Petitioner's Writ should be granted forthwith.

B. Juror Ary's Deceptions During Voir Dire Reveal His Patent Bias

"The whole point of voir dire [is to] elicit through careful inquiry, indications of actual, implied or merely imagined in order to impanel a fair and impartial jury. If a prospective juror responds honestly, then the markers for implied or actual bias appear. It is then up to the parties to pursue a challenge. When facts not dishonestly concealed come to light after the trial is over and there has been a full evidentiary inquiry into whether the juror was really biased, there is no longer any need to "imply" bias. We know the actual facts. *Fields*, 503 F.3d at n.10. "If a juror is honest, i.e., reveals enough information to signal follow-up then the remedy is a cause challenge. *Fields*, 503F.3d at 773. Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation] it is settled that a conviction cannot stand if even a single juror has been improperly influenced." *People v. Nestler*, 16 Cal.4th 578.

C. It is not necessary to determine if Juror Ary was actually biased against petitioner because implied bias is dispositive.

In *Green v. White*, 232 F.3d 671 (9th Cir. 2000), juror misconduct was found and a new trial was ordered, because of a pattern of misleading statements and concealment by a juror. In addition, the juror was involved in several incidents during his jury duty that impeached his impartiality. *Green*, 232 F.3d at 673. The state court believed that the misstatements were

unintentional. *Green, 232 F.3d* at 676, quoting from *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). The Ninth Circuit held that the a"pattern of lies, inappropriate behavior, and attempts to cover up his behavior introduced 'destructive uncertainties' into the fact-finding process." quoting *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998)

The Sixth Amendment guarantees a criminal defendant a fair trial by a panel of impartial, indifferent jurors. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961) *Green*, 232 F.3d at 676.

Actual bias against a defendant on a juror's part is sufficient to taint an entire trial. Green at 676; See *United States v. Allsup*, 566 f.2d 68, 71 (9th Cir. 1977).

In *Dyer*, a case directly on point with petitioner's case, an *en banc* panel of the Ninth Circuit was faced with a juror whose lies concealed information that would have kept her off the jury. While the panel was unable to find any actual bias on the part of the juror, see *Dyer*, 151 F.3d at 981, the Ninth Circuit nevertheless presumed bias on the juror's part, inferring from her pattern of lies a desire to "preserve her status as a juror and to secure the right to pass on Dyer's sentence." *Dyer*, 151 F.3d at 982, *Green,* 232 F.3d at 677. While the court was unable to say exactly what motive the juror had to stay on the jury, it believed that, "[t]he individual who lies in order to improve his chances of serving has too much at state in the matter to be considered indifferent." *Id.*

The *Dyer* court did not presume bias because of the juror's past history; in fact the court very clearly indicated that it did not know whether her past history made her biased. See *Dyer*, 151 F.3d at 981. ("it's certainly possible that anger about her brother's killing drove [the juror] to finagle a seat on the jury so she could lobby for a conviction and death sentence . . . On the other hand, the fact that many of her relatives had been arrested suggests she could have harbored

some empathy for criminal defendants. *Id.*

The court in *Green*, explained that to determine juror bias it is important to look at all the facts as a whole. Each incident should not be looked at separately b/c they might be harmless in isolation. But when [Juror Ary's] behavior is viewed as a whole, a much more sinister picture appears. *Green*, 232 F.3d at n. 10.

The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice. *Dyer,* 151 F.3d at 973; Although "bias can be revealed by a juror's express admission of that fact, . . more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence." *Dyer*, 151 F.3d at 1111-1112 quoting *United States v. Allsup*, 566 f.2d 68, 71 (9th Cir. 1977). "Unlike the inquiry for actual bias, in which we examine the juror's answers on voir dire for evidence that she was in fact partial, 'the issue for implied bias is whether an average person in the position of the juror in controversy would be prejudiced.'" Quoting *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1260-61 (10th Cir. 1999). The test for prejudice is not strength of the prosecutor's case, but whether the impartiality of the jury has been compromised. *People v. Virgil*, 191 Cal.App.4th 1474, n. 5 (2011); *See People v. Nestler*, 16 Cal.4th 561, 578-579 (1997). *Virgil*, 191 Cal.App.4th at 1488 ("reversible error for juror misconduct 'commonly occurs where there is a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, and where the misconduct relates directly to a material aspect of the case.'") Quoting *Marino v. Vasquez*, 812 F.2d 499, 506 citing *United States v. Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981)

An impartial jury is one in which no member has been improperly influenced and every member is capable and willing to decide the case solely on the evidence before it. *People v.*

Cissna,182 Cal.App.4th 1105, 115 (2010) citing *In re Hamilton*, 20 Cal.4th 273, 294 (1999). ("[T]he jury's verdict must be based upon the evidence adduced at trial uninfluenced by extrajudicial evidence . . .") *Cissna*, 182 Cal.App.4th at 1115 citing *People v. Bradford*, 154 Cal.App.4th 1390, 1413-1414 (2007). "When the record shows there was juror misconduct, the defendant is afforded the benefit of a rebuttable presumption of prejudice." Citing *People v. Pierce*, 24 Cal.3d 199, 207 (1979). This presumption is provided as an evidentiary aid to the defendant because of the statutory bar against evidence of a juror's subjective thought processes and the reliability of external circumstances to show underlying bias. Citing *In re Hamilton*, 20 Cal.4th at 295,

Juror bias does not require that a juror bear animosity towards the defendant. Rather, juror bias exists if there is a substantial likelihood that a juror's verdict was based on an improper outside influence rather than on the evidence and instruction presented at trial and the nature of the influence was detrimental to the defendant. Citing *In re Hamilton* at 294.

Juror Ary intentionally disregarded the judge's instructions by failing to honestly answer the questions in the questionnaire. Perhaps most important is that Ary lied when he said he would consider life without the possibility of parole. In fact, Ary's actions during the penalty phase of petitioner's trial establish that Ary believed that in a death penalty case the only verdict is death.

The court in *Virgil* involved "one of the most egregious types of juror misconduct." *Virgil*, 191 Cal.App.4th at 1477. During deliberations, a juror performed an experiment and reported results to his fellow jurors who were struggling with a crucial issue in the case. Id. It is absolutely forbidden for jurors to do their own investigation outside the courtroom. *Virgil,* 191

Cal.App.4th at 1483, citing *People v. Conklin*, 111 Cal.4th 616, 628 (1896).

Virgil was a college professor thereby enjoying enhanced stature in the eyes of his fellow jurors and lending credence to his conclusions. Ary also enjoyed enhanced status as a "street smart" juror foreman - the person who knew more about the criminal justice system than any of the other jurors.

Extrinsic evidence cannot be considered harmless "The fact that the experiment was performed by one juror, . . . outside of the court room and the deliberations, is more egregious and resulted in outside influences or extrinsic evidence permeating the jury's deliberations on perhaps the key factual determination on the case." *People v. Bell*, 63 Cal.App.4th at 933.

The California Supreme Court found prejudicial misconduct because the jurors conducted an experiment outside the trial setting, which created new evidence outside the trial setting, which created new evidence directly related to a "vital issue" in the case. Quoting *Conklin*, 111 Cal.4th at 314.

In this case, in the guilt phase, Juror Ary, told at least one juror that petitioner had committed another murder. He used this extrinsic evidence as well as the information he failed to reveal in his questionnaire to convince the jurors to find the lying in wait special circumstance.

Juror Ary lied on his juror question and then used the information that he failed to reveal to convince two hold-out juror to commit juror misconduct by viewing prejudicial extrinsic evidence - the movie *American Me*. After viewing the movie, the two hold-out jurors changed their votes and the jury delivered a verdict of death. Ary produced new evidence without knowledge of the parties. Presumption of prejudice - reasonable probability of actual harm

The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent

jurors. United States Constitution, Amendment VI, XIV; California Constitution, Article I, § 16; *People v. Bell*, 63 Cal.App.4th at 933. The bias or prejudice of a single juror violates a defendant's right to a fair trial. The juror in *Dyer* was found to be biased by inferring from her pattern of lies a desire to "preserve her status as a juror and to secure the right to pass on Dyer's sentence. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998); *United States v. Hendrix*, 549 F.2d 1225, 1227 (9th Cir. 1977). Juror Ary's failure to truthfully answer multiple voir dire questions deprived petitioner of his state and federal constitutional rights to a fair and impartial jury, to due process, and to a fair and reliable verdict and sentence. To enforce these rights, the defendant must also have the statutory right to exercise peremptory challenges to prospective jurors who the defendant believes cannot be fair and impartial, California Code Civil Procedure § 231, and to challenge for cause any juror harboring actual or implied bias. California Code of Civil Procedure § 225.

It is important to examine what is at stake when a juror is discovered to have secured a place on a jury, particularly in a capital case, when he is not only barred by statute from service, but has repeatedly given false answers during voir dire. As the Ninth Circuit remarked in *Dyer*, "[m]ore is at stake than the rights of [p]etitioner; 'justice must satisfy the appearance of justice.'" *Dyer v. Calderon*, 151 F. 3d at 983 quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). The selection of "those who sit in judgement 'casts a very long shadow.'" *Dyer*, 151 F.3d at 983 quoting *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987). A perjured juror is as incompatible with our truth-seeking process as a judge who accepts bribes. *Brancy v. Gramley*, 520 U.S. 899 (1997).

The result of having a jury that includes someone who has been empaneled through

dishonesty in voir dire, is the undermining of the impartiality of the jury. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc) (Dishonest answers undermine the impartiality of the jury.) When a juror lies, it reflects an inability to render an impartial verdict. *Smith v. Phillips*, 455 U.S. 209, 220 (1982); *Dyer v. Calderon*, 151 F.3d at 982.

As the Ninth Circuit held in *Dyer*:

> A perjured juror is unfit to serve even in the absence of 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 obligations to tell the truth and decide the case based on her prejudices rather than the testimony.

Dyer v. Calderon, 151 F.3d at 983.

At the outset of voir dire the trial court made clear that open and honest answers were required from the prospective jurors. The trial court stressed the critical importance of each juror "maintaining an open-minded attitude toward the case" and explained that an "unbiased" juror was a person who had "not made up their mind or [was] not so biased as to one particular position." RT 143.

If a juror "fel[t] the least bit uncomfortable answering any question [the juror] may indicate [the juror's] preference by writing 'private' or 'confidential' in the place reserved for the answer." RT 149-50. The potential jurors were assured by the court that if they answered "private" or "confidential" the juror would be "questioned individually out of the presence of the other jurors." *Id.*

The questionnaire questions that Juror Ary falsely answered were each a single simple sentence, using basic words. When the voir dire questioning (or the questionnaire) is sufficiently specific to elicit the information that is not disclosed, or to which a false answer is later shown to have been given, the defendant has established a prima facie case of concealment or deception. *People v. Blackwell*, 191 Cal.App.3d at 929, citing *Moore v. Preventive Medicine Medical Group, Inc.*, 178 Cal.App.3d 728, 742 (1986); *People v. Jackson*, 168 Cal.App.3d 700, 705-06 (1985).

In this case, the voir dire questions were more than sufficiently specific and free from ambiguity. The only inference or finding that can be supported, is that Juror Ary was aware of what information was sought, and deliberately concealed it by giving false answers. See *People v. Blackwell*, 191 Cal.App.3d at 930. Concealment is intentional if "the questions on voir dire clearly and fairly asked [the juror] to reveal [certain knowledge.]" *In re Hitchings*, 6 Cal.4th 97, 116 (1993).

It is extremely difficult to credit the referee's findings that Juror Ary misunderstood what information was sought when he was asked, "[h]ave you, a close friend or relative even been *accused* of a crime *even if the case did not come to court*?" Juror Ary's purported ignorance is even harder to understand in light of the information he received from counsel during voir dire that explicitly connected this case with drugs and drug dealing. During voir dire, Juror Ary was told that "where the killings occurred was a drug house. And some of the people that may testify, you know, may have used drugs." RT 1097. The follow-up question further inquired "[i]s that going to cause you any bias or prejudice one way or the other?" Juror Ary answered, "I don't think so." RT 1097. There were no-follow-up questions to Juror Ary's affirmation of lack of

bias because counsel and the court were unaware of Juror Ary's son's serious involvement in drugs, felony drug possession and sales convictions and status as an addict.

Evidence that Juror Ary intentionally concealed material information can also be found in his multiple failures to reveal information on numerous other relevant subjects.

In *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998), an *en banc* panel of the Court of Appeals for the Ninth Circuit, found juror misconduct in a strikingly similar, although less egregious, situation. The Court was asked to determine, based on an examination of a series of misstatements and omissions made by the juror during voir dire, these misstatements and omission demonstrated that the juror was biased against the defendant. The *en banc* panel concluded that the juror's failure to mention "every relevant event" during voir dire might have an innocent explanation, but the juror's failure "to mention *any* of her relatives had been accused of crime defies innocent explanation." *Dyer*, 151 F.3d at 980, emphasis added.

Here, Juror Ary not only failed to mention that his sons had criminal records, but unlike the juror in *Dyer*, he also failed to reveal his own extensive criminal history, including his felony conviction. The *Dyer* Court found, in the face of repeated concealment of relevant information by a prospective juror who "overlook[ed] too many incidents," that the responses or omission could not attributed to "mere forgetfulness." *Id.* Moreover, the court in *Dyer*, found it significant to a finding of bias that the juror, like Juror Ary, continued to maintain, during the post conviction investigation, that she was not required to reveal any of the concealed information.

Juror Ary's repeated false answers reflect a lack of candor that in turn points to an "[i]nability to render an impartial verdict." *See Dyer*, 151 F.3d at 981 quoting *Smith*, 455 U.S. at

220. The *Dyer* en banc panel determined that is was unnecessary to reach any conclusion on whether the juror was actually biased, i.e., whether she was disposed to cast a vote against Dyer, because the implied bias issue was dispositive. *Dyer*, 151 F.3d at 981.

The circumstances that give rise to a finding of implied bias were outlined by the Dyer Court. As in *Dyer*, Juror Ary gave every indication that he was not indifferent to service on the jury. He failed to disclose any facts that would have jeopardized his "chances of serving on [petitioner's] jury. *Dyer*, 151 F.3d at 982. His repeated mistruths give rise to the inference that Juror Ary "lied in order to preserve [his] status as a juror and to secure the right to pass on [petitioner's] [capital] sentence." *Id.* As the Ninth Circuit made clear, it is unnecessary to determine why Juror Ary cherished the right to a seat on petitioner's jury because "the individual who lies in order to improve his chances of serving has too much of a state in the matter to be considered indifferent." *Id.*[21] Whatever the juror's motivation, an excess of "zeal" to serve "introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out." *Dyer,* 151 F.3d at 982. A juror who lies materially and repeatedly in response to legitimate inquiries about his background "introduces destructive uncertainties into

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[21] It is important to recognize that the Ninth Circuit's finding of implied bias in *Dyer* was possible even without the additional misconduct present here. The juror in *Dyer* failed to reveal numerous relevant facts during voir dire but it was not alleged that she committed any additional misconduct during her service as a juror. Thus, the court's implied bias finding rests solely on her false answers to material voir dire questions. Here, the finding of implied bias is supported not only by Juror Ary's failure to truthfully answer numerous material voir dire questions about himself and his three son's criminal records and drug and/or alcohol issues, but additional indicia of bias is found in his failure to reveal his convicted felon status and his misconduct throughout the trial.

the process." *Id.* Juror Ary's "potential for substantial emotional involvement, adversely affecting impartiality" is palpable. *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990) quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977).

As a general rule, California law holds that juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted." *In re Hitchings*, 6 Cal.4th at 118, *quoting People v. Cooper*, 53 Cal.3d 771, 835 (1991); *People v. Holloway,* 50 Cal.3d 1098 (1990). In petitioner's case, because the record demonstrates undisputed subsequent egregious misconduct , the requirements of invoking the presumption of prejudice where juror misconduct is present is met. Respondent has not rebutted this presumption.

In *In re Hitchings*, 6 Cal.4th 97 (1993), this Court adopted the view of the United States Supreme Court of the fundamental importance of voir dire:

> Voir dire examination serves to protect [a criminal defendant's right to a fair trial] by exposing possible biases, both known and unknown on the part of potential jurors . . . [t]he necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

In re Hitchings, 6 Cal.4th at 109, quoting *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

Since Juror Ary deliberately failed to answer material questions honestly where truthful responses would have provided a valid basis for a cause challenge - and indeed would have required his disqualification - a new trial is warranted. *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 556 (1984); *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1163 (9th Cir. 2000). The juror's misconduct created a structural defect in the trial, resulting in a miscarriage of justice at both the guilt and penalty phases, requiring reversal of the death sentence. Cal. Const.,

art. V, VI, VIII, XIV § 13; *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927). At a minimum, the misconduct raises a presumption of prejudice that is not rebutted, but, in fact, underscored by reviewing the juror's subsequent actions throughout the case. As the *Dyer* court explained, and is so vividly illustrated here by Juror Ary's repeated injection of false and/or extrinsic evidence into the deliberations, "how can [a juror] who does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury [the juror] may believe that the witnesses also feel no obligation to tell the truth and decide the case based on [the juror's] prejudices rather than the testimony." *Dyer*, 151 F.3d at 983.

In most cases of juror misconduct, a court must determine whether a juror was biased based solely on a juror's failure to reveal material information during voir dire. In other cases, the court is confronted with a single instance of juror misconduct unrelated to voir dire and asked to determine if the misconduct is prejudicial. Here, the undisputed facts demonstrate that (1) Juror Ary was undeniably unqualified by law to serve as a juror; (2) Juror Ary failed truthfully to answer numerous material questions about not just his own background but also that of his sons; and (3) Juror Ary committed egregious acts of misconduct that conclusively demonstrated his bias against petitioner.

Juror Ary's misconduct during deliberations, standing alone, establishes that he was biased against petitioner and is, alone, sufficient to require the reversal of petitioner's conviction and sentence. This Court has explained that to determine whether a verdict will be set aside in the face of a jury receiving extrinsic evidence, the court will "assess the effect of out-of-court information upon the jury" by setting aside the verdict "only if there appears a substantial

likelihood of juror bias." *People v. Nestler*, 16 Cal.4th 561, 578 (1997) citing *In re Carpenter*, 9 Cal.4th 634, 653 (1995). Such bias may appear in two ways, either "when the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or even if the information is not inherently prejudicial if, from the nature of the misconduct and surrounding circumstances it is substantially likely a juror was actually biased." *People v. Danks*, 32 Cal.4th 269, 302 (2004); *People v. Nesler*, 16 Cal .4th at 579; *In re Carpenter*, 9 Cal.4th at 653-54.

Juror misconduct, such as the receipt of information about a party or the case that was not part of the legitimately introduced evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias. *People v. Nesler*, 16 Cal.4th at 578; *People v. Marshall*, 50 Cal.3d 907, 949-951 (1990); *In re Carpenter*, 9 Cal.4th at 650-655. The requirement that a jury's verdict "must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *People v. Nesler*, 16 Cal.4th at 578, quoting *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965). As the United States Supreme Court has explained, "due process means a jury capable and willing to decide the case solely on the evidence before it." *People v. Nesler*, 16 Cal.4th at 578 quoting *Smith v. Phillips*, 455 U.S. at 217; quoted in *In re Carpenter*, 9 Cal.4th at 648; accord, *Dyer v. Calderon*, 151 F.3d at 935; *Hughes v. Borg*, 898 F.2d 695, 700 (9th Cir. 1990).

D. Cumulative Impact of Juror Ary's Misconduct

Petitioner had a constitutional right to a trial by unbiased, impartial jurors. United States Constitution, Amendments VI, XIV; California Constitution, Article I, § 16; *People v. Nesler*, 16 Cal.4th at 578; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *In re Hitchings*, 6 Cal.4th at 110. A

defendant is entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of twelve impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." *People v. Nesler*, 16 Cal.4th at 578, quoting *People v. Holloway*, 50 Cal.3d 1098, 1112 (1990), disapproved on other grounds in *People v. Stansbury*, 9 Cal.4th 824, 830 (1995).

The undisputed record established pervasive juror misconduct throughout petitioner's trial. It also conclusively demonstrates Juror Ary's bias and prejudice toward petitioner was the basis of his motivation for jury service. His failure to reveal his convicted felon status, his multiple lies and omissions during voir dire, the four questions to the court prior to guilt deliberations, his efforts to correct the inadvertent second degree murder verdict, his injection of extrinsic and false information that petitioner committed a prior murder, his use of his concealed jail experiences and those of his sons, his exhortation that the jurors who did not favor the death penalty view a highly inflammatory movie admitted designed to convince them of the appropriateness of a death sentence and the naivety of their views, all demonstrate, individually and collectively, Juror Ary's actual bias towards petitioner. It is not a coincidence that the juror who concealed his own felony conviction and told numerous lies in order to become a member of this jury was the same juror who committed the juror misconduct detailed above.

To the extent that these acts of juror misconduct were not disclosed to petitioner, his counsel, or the trial judge during the trial, petitioner was also denied his right to counsel at critical stages of the proceedings, denied a fair and impartial jury, denied his rights to confront and cross-examine witnesses and to present a defense to the evidence against him, and denied his right to a fair, reliable, and non-arbitrary determination of guilt and penalty untainted by

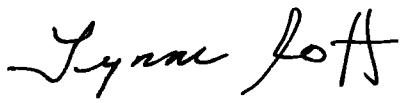
extraneous information. United States Constitution, Amendments V, VI, VIII and XIV; California Constitution, Article I, §§ 1, 7, 15, 16, and 17.

IV.
CONCLUSION

Based on the foregoing, petitioner respectfully requests that this Court grant the petition for a writ of habeas corpus.

Dated: April 5, 2011

Respectfully submitted,



LYNNE S. COFFIN

Attorney for Petitioner
MAURICE BOYETTE

DECLARATION OF SERVICE

Re: In Re Maurice Boyette No. SO32736

I, Lynne S. Coffin, declare that I am over 18 years of age, and not a party to the within cause; my business address is 1030 W. Edgeware Rd. Los Angeles, CA 90026. On this day, I served true copies of the attached:

BRIEF ON THE MERITS

on each of the following, addressed (respectively) as follows:

Christina vomSaal
Deputy Attorney General
455 Golden Gate Ave. #11000
San Francisco, CA 94102

Maurice Boyette **(hand delivery)**
H-76600
San Quentin State Prison
San Quentin, CA 94974

Office of the District Attorney
1225 Fallon St. # 900
Oakland, CA 94612

Alameda County Superior Court
1225 Fallon Street, #209
Oakland, CA 94612-4293

Each said package was then, on April 7, 2011, sealed and mailed via United States Mail at Mill Valley, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on April 7, 2011, at Mill Valley, California.

Lynne S. Coffin