

SUPREME COURT COPY

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In the Supreme Court of the State of California

In re

ROBERT WESLEY COWAN,

On Habeas Corpus

Case No. S158073

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

**RESPONSE BRIEF RE PETITIONER'S
EXCEPTIONS TO THE REFEREE'S REPORT**

SUPREME COURT
FILED

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RESPONSE BRIEF RE PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT

INTRODUCTION

Petitioner asserts that the “referee’s findings of fact are not supported by substantial evidence” and that the “most plausible explanation for his [the juror’s] misconduct is that he wanted to finagle his way onto the jury so that he could lobby for a conviction and death sentence” so that he could “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.” (Exceptions at p. 1.)¹ Petitioner’s exceptions to the referee’s report ignore the applicable standard of review and are both speculative and contrary to the evidence adduced at the hearing. Because the referee’s findings are supported by substantial evidence they should be upheld by this Court, and the petition for writ of habeas corpus should be denied.

ARGUMENT

I. THE REFEREE’S FINDINGS SHOULD BE UPHELD

Respondent replies to the exceptions made by petitioner, organized by this Court’s questions to the referee. As will be seen, petitioner’s objections have no merit.

Question 1: Neither petitioner nor respondent take exception to this finding. Accordingly, respondent does not discuss it further.

¹ “Exceptions” refers to petitioner’s Brief on the Merits and Exceptions to the Referee’s Report filed on August 4, 2015. “Request for Adoption” refers to respondent’s Request for Adoption of Referee’s Report and Brief on the Merits filed on August 5, 2015. “RT” refers to the Reporter’s Transcript of Habeas Corpus Proceedings.

Question 2: Petitioner asserts that the referee's finding that the juror "simply overlooked the misdemeanor conviction when he filled out the questionnaire" is "not supported by substantial evidence" and asserts, "The referee cites only to portions of the record that support his ultimate finding while wholly ignoring contrary, more credible evidence indicating intentional nondisclosure." (Exceptions at p. 1, citing the referee's report at p. 3; Exceptions at p. 18.) Petitioner is wrong.

First, petitioner misapprehends the substantial evidence standard of review.

[T]he power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.

(*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1363, original italics.) "[I]t is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Ibid.*, original italics.) Thus, for purposes of a substantial evidence determination, it is irrelevant whether evidence supporting a contrary conclusion might be "more credible" to the reviewing court, since it was for the trier of fact to make credibility determinations. While, as previously stated, this Court is not bound by the referee's findings, those findings are entitled to great weight, especially where, as here, they are based on live testimony. (Request for Adoption at p. 10, citing *In re Thomas* (2006) 37 Cal.4th 1249, 1256.)

Second, despite petitioner's claims to the contrary, strong evidence supports the referee's findings. The juror consistently testified that the incident did not cross his mind, that he did not intentionally fail to disclose

the incident, and that, had he remembered the incident, he would have included it in his answers to the questionnaire. (RT 143 [“Didn’t cross my mind”], 146 [“I don’t have nothing to hide”], 147 [“I didn’t do it on purpose. . . . [I]f I would have remembered, I would have put it in”], 150 [“Probation didn’t even cross my mind at the time. . .”], 165 [juror not trying to hide anything].)

Petitioner claims it is “not plausible” that the juror overlooked his prior misdemeanor conviction at the time of his jury service, citing the juror’s statement that he was “standing up for something he believed in” the fact that he was put on probation as a result of the incident, and the fact that the other participant in the fight was apparently the ex-boyfriend of the juror’s girlfriend. (Exceptions at pp. 19-21.) First, the plausibility of the juror’s explanation was something determined by the referee in the first instance, and that determination is entitled to great weight. Second, the record shows that strong evidence supported this determination by the referee: the juror did not think he was wrongly convicted (RT 140); he associated mostly with girls when he was growing up and he initially could not recall which girl whose ex-boyfriend was involved in the fight, (RT 152-153); he was not handcuffed,² taken to jail, or booked (RT 155-156, 166-167); he did not take long to fill out the paperwork for his plea

² Petitioner cites Officer Wimbish’s report for the proposition that the juror was handcuffed. (Exceptions at pp. 20-21, fn. 4.) Officer Wimbish did not testify at the hearing, although he was present and available to testify. (RT 103.) The referee was certainly entitled to credit the juror’s sworn testimony at the hearing over the unsworn hearsay statements in the officer’s report.

(RT 171); and he was not supervised on probation (RT 172). Accordingly, it is entirely plausible the juror overlooked the misdemeanor conviction when he filled out the jury questionnaire, as the referee found.

Petitioner asserts that the juror offered other explanations that were inconsistent with him overlooking or forgetting his conviction. (Exceptions at pp. 18-19.) First, inconsistencies in the testimony were for the referee to resolve. Second, the juror's statements were not particularly inconsistent with the referee's conclusion that the juror simply forgot about his conviction at the time of jury selection. Being "real quick and short" in his answers (RT 121) might increase the chance he would overlook or unintentionally omit some detail from his questionnaire; having "no reason at all" is not at all inconsistent with the juror's contemporaneous statement that he "had nothing to hide" and that he might have "skipped" or "overlooked" the question (RT 123), or that the mall fight "[d]idn't cross my mind" when the juror filled out the questionnaire. (RT 143.)

Petitioner asserts that the "failure of the juror to consistently articulate a single, innocent explanation for his omission strongly indicates that no such innocent explanation exists." Petitioner further asserts that the "rationale for [the juror's] silence during voir dire . . . was the promotion of his own interests" which would be served by getting a seat on the jury "to lobby for a conviction and death sentence" in order to seek lenient treatment later from the District Attorney's office. (Exceptions at p. 23.)

Petitioner's assertion is entirely speculative and belied by the record. The juror specifically stated he never raised his jury service for any reason in his subsequent contacts with the criminal justice system, and petitioner has presented no evidence to the contrary. (RT 149-150.) The referee was

certainly entitled to credit the juror's sworn testimony in this regard over petitioner's unsupported speculation. As a result, petitioner's arguments with regard to Question 2 fail.

Question 3: Petitioner asserts, referring to his argument in relation to Question 2, that, "Since it is not credible that Juror No. 045882 forgot about his prior misdemeanor conviction and probation status, while completing the questionnaire or that he was unable to understand the questions, the only reasonable explanation is that the nondisclosure was intentional and deliberate." (Exceptions at p. 24.) However, for the reasons explained above and in respondent's Request for Adoption at pages 11-12, it is entirely plausible that the juror innocently overlooked his misdemeanor conviction when he filled out the questionnaire, and the referee was fully justified in reaching that conclusion. Accordingly, this Court should uphold the referee's finding that the nondisclosure was neither intentional nor deliberate.

Question 4: Petitioner asserts there was no substantial evidence to support the referee's finding that the juror's failure to disclose his misdemeanor conviction was not indicative of juror bias, stating, "[H]e was not a credible witness and his testimony should not be believed." (Exceptions at p. 25.) Petitioner again misapprehends the substantial evidence standard, under which the credibility and believability of a witness are not reviewed. For the reasons previously discussed, the referee was entitled to credit the juror's testimony that he simply overlooked the conviction at the time of his jury conviction, and, for similar reasons, the referee was entitled to credit the juror's statements that, when he filled out the questionnaire, he was being fair to both sides and he did not have any predisposition or bias towards either side. (RT 164, 182.) Petitioner's claims to the contrary fail.

Question 5: Petitioner claims the referee's finding that the juror was not actually biased against petitioner was not supported by substantial evidence. (Exceptions at p. 26.) For the reasons previously stated, he is incorrect. (RT 164, 173, 182.) Petitioner states the juror's "deliberate lies are strong evidence that he was not indifferent and that his votes for conviction and a death sentence were motivated by his bias against petitioner. (Exceptions at pp. 26-27.) However, as previously stated, the referee found that the juror simply overlooked the conviction, a conclusion supported by the record. Accordingly, petitioner's claim that the juror deliberately lied fails.

Petitioner nonetheless asserts that the juror's "bias was evident in the juror's demeanor at the evidentiary hearing" in that the juror "was eager to please the state by readily agreeing to answers suggested by the prosecution's leading questions" while being "more argumentative and defensive" towards defense counsel's questioning. (Exceptions at p. 27.) Respondent disputes petitioner's characterization of the juror's attitude. Regardless, the referee had full opportunity to observe the juror's demeanor at the hearing, and found the juror was not biased. The referee's findings in this regard should be upheld.

II. PETITIONER IS NOT ENTITLED TO RELIEF

Petitioner asserts he is entitled to relief, stating, "Contrary to the referee's findings, the evidence at the reference hearing established that Juror 045882 intentionally concealed his prior misdemeanor conviction and probation status during jury selection." (Exceptions at p. 28.) For the reasons previously stated, petitioner is wrong in this regard.

Petitioner also asserts that "even assuming *arguendo* that Juror 045882's failure to disclose his recent misdemeanor conviction was somehow inadvertent, it does not follow that misconduct was absent."

Petitioner asserts, again, that the juror's status as a probationer "gave him a motive to curry favor with the Kern County District Attorney" and that the juror may have thought that by helping "to convict petitioner of a capital murder he would receive in return favorable treatment from the District Attorney. . . ." (Exceptions at p. 29.) For the reasons previously stated, petitioner's argument is speculative and belied by the juror's sworn testimony that he was not biased and that he never mentioned his status as a juror in subsequent contacts with the criminal justice system. (RT 150, 182.)

Petitioner states, "Even if Juror 045882 had some other, unknown motive for seeking a seat on the jury, the fact remains he lied about his criminal background, a strong indication he was a biased juror." (Exceptions at p. 29.) Petitioner continues, "[T]he information concealed by Juror 045882 was highly relevant to the selection of a fair and impartial jury." (*Ibid.*) First, as previously stated, petitioner's claim that the juror lied about his criminal background is belied by the record and the referee's findings. Second, respondent notes that other jurors who served on the present case had similarly minor criminal histories. (Request for Adoption at pp. 6-7, and record citations therein.)

Petitioner asserts, "Juror 045882's misconduct, along with the surrounding circumstances, indicate a substantial, unrebutted likelihood the juror was actually biased against petitioner." (Exceptions at pp. 30-31.) Petitioner continues, "As a result of Juror 045882's misconduct, there is a reasonable probability that petitioner was convicted and sentenced to death by a jury that included at least one biased juror." (Exceptions at pp. 32.)

Not so. First, for the reasons previously stated, the referee reasonably concluded that the juror's omission of his misdemeanor offense from his jury questionnaire was inadvertent, and not indicative of bias. The referee's conclusions in this regard should be adopted, and are fatal to petitioner's claim.

Second, even assuming, arguendo, the juror was deliberately evasive in this regard, any presumption of prejudice was rebutted for the reasons stated in respondent's request for adoption at pages 18 through 20. (Citing *People v. Carter* (2005) 36 Cal.4th 1114, 1209.) Petitioner's claim fails.

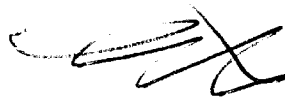
CONCLUSION

For the foregoing reasons, and the reasons stated in previously-submitted briefing, respondent respectfully requests that this Court adopt the referee's findings and deny the petition for writ of habeas corpus.

Dated: August 20, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Response Brief re Petitioner's Exceptions to the Referee's Report** uses a 13 point Times New Roman font and contains 1,984 words.

Dated: August 20, 2015.

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read 'L. Martinez', is positioned above the typed name of the signatory.

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DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

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

On August 20, 2015, I served the attached **Response Brief re Petitioner's Exceptions to the Referee's Report** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

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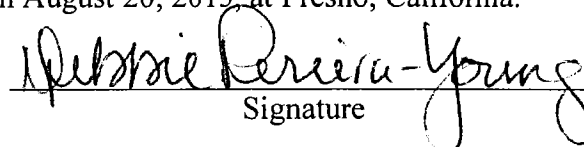
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 20, 2015, at Fresno, California.

Debbie Pereira-Young

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