

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

SEP - 1 2015

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

Frank A. McGuire Clerk

Deputy

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

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DEATH PENALTY

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

**PETITIONER’S RESPONSE TO RESPONDENT’S BRIEF ON THE
MERITS AND EXCEPTIONS TO THE REFEREE’S REPORT**

I. INTRODUCTION

Juror 045882 intentionally and deliberately failed to disclose his misdemeanor conviction and probation sentence during jury selection and thereby committed misconduct. This same juror was not truthful about this non-disclosure at the later evidentiary hearing held by the referee in this case. The presumption of prejudice stemming from this misconduct has not been rebutted, and petitioner’s writ of habeas corpus should be granted. (*In re Hitchings* (1993) 6 Cal.4th 97, 119.)

Respondent argues that: 1) the referee’s findings should be adopted by this Court because they are supported by substantial evidence; 2) the referee’s findings the juror inadvertently overlooked his misdemeanor conviction and that he was not biased against petitioner are fatal to petitioner’s claim of prejudicial misconduct; and 3) even assuming arguendo that the juror deliberately withheld his misdemeanor conviction, the presumption of prejudice has been rebutted by evidence that the juror was not biased against petitioner. Respondent is incorrect on all counts.

II. THE REFEREE'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Most of respondent's arguments concerning whether the referee's findings are supported by substantial evidence were addressed in Petitioner's Brief on the Merits and Exceptions to the Referee's Report. Petitioner will not repeat the points made in that pleading. However, it is worth noting a pertinent observation made by the Court of Appeal in *People v. Diaz* (1984) 152 Cal. App.3d 926, when finding prejudicial juror misconduct based on a juror's failure to disclose information about her background during voir dire. In that case, the trial court had denied a defense motion to dismiss the juror based on the juror's representation that her omission was inadvertent. The Court of Appeal explained:

Given the human propensity for self-justification, it is entirely unlikely a juror who consciously failed to disclose information during voir dire in order to sit in judgment would admit it. Likewise, where the nondisclosure was unconscious, it is unlikely the juror would admit being unable to weigh the evidence fairly. Indeed, if the juror honestly, but falsely, believes he/she is impartial, no amount of questioning will lead to an admission of bias.

(*Id.* at p. 939.)

During respondent's recitation of the factual background of the case, respondent states that other jurors beside Juror 045882 "displayed a positive attitude towards jury service" or "displayed positive attitudes towards the death penalty." (Brief at 6.) Respondent does not explain the significance of these circumstances, but perhaps is suggesting that Juror 045882's desire to serve as a juror and strong support of the death penalty were not indicative of juror bias since they were similar to the attitudes of other jurors.

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

Respondent also makes reference to the fact that some of the jurors had been charged with or convicted of various relatively minor offenses. (Brief at 6-7.) Again, respondent does not explain the significance of this fact, but perhaps is suggesting that Juror 045882 would not have reason to believe his misdemeanor conviction would cause him to be excused from the jury because other jurors with misdemeanor convictions were allowed to remain. Respondent's speculation is both legally irrelevant and devoid of any record support. There is no evidence in the record that at the time Juror 045882 completed his questionnaire he knew that any other prospective jurors had misdemeanor convictions. The convictions disclosed by the other jurors in their questionnaires were not shared with Juror 045882. (See 1 First Supp. CT 150, 251.) Nor did he know which prospective jurors

were going to be excused when he completed his questionnaire and underwent in-court questioning.

Respondent may also be suggesting that trial counsel would not have sought to excuse Juror 045882 based on his conviction since others who disclosed their prior criminal contacts were selected for the jury. Here, again, Juror 045882 was *not* similarly situated to other jurors. What distinguishes Juror 045882 from the other jurors is that only he was actually on probation at the time of petitioner's trial. The probation sentence gave Juror 045882 a motive to favor the prosecution, which other jurors did not have.

III. PETITIONER HAS ESTABLISHED THAT JUROR 045882 COMMITTED PREJUDICIAL MISCONDUCT

Respondent contends that “[t]he case law contains a number of examples in which a juror’s failure to disclose information more serious than the failure to disclose in the present case was ultimately found to be inadvertent and nonprejudicial.” (Brief at 14.) These cases, however, do not dictate a similar finding here. As explained in Petitioner’s Brief on the Merits, the referee’s finding that Juror 045882’s omission was inadvertent is not supported by substantial evidence and should not be adopted by this Court. In most of the cases cited by respondent, the appellate courts agreed with the referee’s findings, but that does not mean this Court should do the same in this case, given the different circumstances.

In addition, respondent’s reliance on *People v. Kelly*, *supra*, 185 Cal.App.3d 118 is misplaced. In *Kelly*, a case involving various felony sex crimes, the juror failed to reveal during voir dire that when she was young a step-uncle suggested that they both undress. The trial court held an evidentiary hearing, at which the juror testified. She explained that two

days before the trial began in *Kelly* she had been questioned as a prospective juror in a different case. She was asked in that case if she had ever been the victim of a crime. In response, she described the incident with her step-uncle. She believed she had been asked the same question during voir dire in *Kelly*. She did not answer because she was embarrassed and felt humiliated at the previous voir dire. In addition, the information she provided in the first jury selection “was discarded,” so she felt there was no reason to suffer “further humiliation” by answering the question again. She also did not believe she was actually a crime victim. (*Id.* at p. 120.)

The trial court found the juror’s testimony was credible and therefore concluded her failure to disclose the incident was not intentional. (*Ibid.*) The Court of Appeal affirmed this finding, but on a different ground. The Court of Appeal noted that although the juror testified she was questioned during voir dire about whether she had been a victim of child molestation, in fact, no such question was asked by the trial court or the attorneys. The juror “was not asked the type of questions necessary to elicit the information which was later revealed. Her nondisclosure was thus unintentional.” (*Id.* at p. 126.)

Thus, *Kelly*’s holding that the juror’s omission was inadvertent was based on the ambiguousness of the questions posed to the juror. In the present case, the questions asked were not confusing. They clearly asked for information about the juror’s prior criminal record that was not disclosed during voir dire.

Additionally, respondent’s argument that the information withheld by Juror 045882 was not serious enough to constitute prejudicial misconduct is incorrect. The excusal for cause of a juror who did not accurately disclose his misdemeanor criminal record during voir dire was

upheld by this Court in both *People v. Morris* (1991) 53 Cal.3d 152, 182 and *People v. Bradford* (1997) 15 Cal.4th 1229, 1334. In *Bradford*, the misdemeanor conviction was similar in severity to that of Juror 045882's. During voir dire, the prospective juror stated he had been convicted of disorderly conduct approximately 20 years earlier. In fact, he had suffered a misdemeanor conviction for both battery and disorderly conduct three years prior to the trial. (*People v. Bradford, supra*, 15 Cal. 4th at 1334.) This was similar to the nondisclosure here, where Juror 045882 disclosed a few details about an older arrest, but failed to disclose a much more recent arrest and sentence of probation. And in *Morris*, the juror failed to reveal two misdemeanor convictions for driving under the influence of alcohol and two misdemeanor arrests for obstructing and resisting police officers. (*People v. Morris, supra*, 53 Cal.3d at 183-184.) In both cases, the trial court's excusal of the prospective juror for cause was affirmed by this Court.

Finally, respondent argues that even assuming arguendo that Juror 045882 deliberately withheld his misdemeanor conviction, any presumption of prejudice has been rebutted by evidence that the juror was not biased against petitioner. Here, however, it is undisputed that the juror failed to disclose his misdemeanor conviction and probation sentence, this misconduct was serious because it deprived petitioner of his right to select an unbiased jury, and there was a substantial likelihood that the juror was actually biased against petitioner. The presence of only one biased juror requires the reversal of a defendant's conviction. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112.) Here, the evidence establishes a reasonable probability that Juror 045882 was unwilling to decide petitioner's case solely on the evidence before him and without consideration of his own self interest. Although the juror claimed not to have been biased at the

evidentiary hearing, it has been recognized that “the bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.” (*People v. Diaz, supra*, 152 Cal.App.3d at 928.)

Moreover, respondent’s reliance on *People v. Carter* (2005) 36 Cal.4th 1114 is misplaced. In *Carter*, the defendant’s charges included burglary, rape and murder. The juror questionnaire asked the prospective jurors if they had ever been in a situation where they feared being hurt or killed as a result of violence of any sort. Juror K answered, “No.” (*Id.* at p. 1206.) The juror failed to disclose that approximately 14 years earlier when she was first living by herself, she was afraid of someone breaking in to her apartment to rape and murder her. One night she was unable to sleep and put a knife under her mattress so she could defend herself from a potential assailant. (*Id.* at p. 1207.)

This Court found that Juror K.’s failure to answer the question more completely was not misconduct, and that even if it was, the presumption of prejudice was rebutted by the juror’s testimony at the hearing on the motion for a new trial. Juror K. explained she had not thought about the incident with the knife under her mattress “at all for the last 12 years.” In addition, the circumstances that the incident was “very brief” and occurred more than a decade earlier, and that the juror “realized because she had been burglarized that ‘everyone has feares’ [sic], established that the omitted information was immaterial to her overall qualifications or suitability to serve as a juror.” (*Id.* at pp. 1208-1209.)

Here, in contrast, the information omitted by Juror 045882 was material to his ability to be impartial. The probation sentence was not remote, the length of the probation term was significant (three years), and

Juror 045882 was still on probation while serving on the jury. Under these circumstances, the presumption of prejudice resulting from Juror 045882's misconduct was not rebutted. Rather, the record demonstrates a substantial likelihood of juror bias, that the jury wanted to win a seat on the jury in order to curry favor with the District Attorney's Office.

Finally, it is significant that respondent fails to address the line of cases holding that a juror's failure to disclose pertinent information during voir dire, even if unintentional, may constitute prejudicial misconduct. (*People v. Diaz, supra*, 152 Cal.App.3d at 934 [A juror's concealment, regardless whether intentional, during voir dire examination of a state of mind which would prevent a person from acting impartially is misconduct constituting an irregularity for which new trial may be granted"], *see also People v. Blackwell*(1987) 191 Cal.App.3d 925, 929 ["Intentional concealment of relevant facts or the giving of false answers by a juror during the voir dire examination constitutes misconduct"].) Although other Court of Appeal decisions have disagreed with *Diaz* and *Blackwell* (*see People v. Kelly, supra*, 185 Cal.App.3d at 125 and *People v. Jackson* (1985) 168 Cal.App.3d 700, 704-706), they have yet to be disapproved.

IV. CONCLUSION

For all of the foregoing reasons as well as the reasons stated in the Brief on the Merits and Exceptions to the Referee's Report, the petition for a writ of habeas corpus should be granted.

DATED: September 1, 2015

Respectfully submitted,



MARK GOLDROSEN
Attorney for Petitioner
Robert Wesley Cowan

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITIONER'S RESPONSE TO
RESPONDENT'S BRIEF ON THE MERITS AND EXCEPTIONS TO
THE REFEREE'S REPORT uses 13 point Times New Roman font and
contains 2,239 words.

DATED: September 1, 2015

Respectfully submitted,



MARK GOLDROSEN

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 255 Kansas Street, Suite 340, San Francisco, California 94103; and that on September 1, 2015, I served a true copy of PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT on the parties below by depositing a true copy of the original thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at San Francisco, California addressed as follow:

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Executed September 1, 2015, at San Francisco, California.



MARK GOLDROSEN