**IN THE SUPREME COURT**

**OF THE STATE OF CALIFORNIA**

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| In re MAURICE BOYETTE, | ) | No. S092356 |
| | ) | |
| Petitioner, | ) | [Related Appeal No. S032736] |
| | ) | |
| On Habeas Corpus | ) | **CAPITAL CASE** |
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**PETITIONER EXCEPTS AND REPLIES TO RESPONDENT'S RETURN**

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**PETITIONER EXCEPTS AND REPLIES TO RESPONDENT'S RETURN**

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner MAURICE BOYETTE filed a habeas corpus petition 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. Subsequently, 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 grounds that "(1) Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning his prior felony conviction and other contacts with the justice system; (2) Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning the prior criminal records of his sons; (3) Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning the fact that he had previously witnessed a violent crime, namely his son's assault of Beverly Miller; (4) Juror Pervies Ary concealed relevant facts or gave false

answers during voir dire concerning his problem with alcohol and his son's drug addiction; (5) Juror Pervies Ary introduced information into the jury deliberations concerning an alleged prior murder committed by petitioner Maurice Boyette, although no evidence of such a crime was introduced at trial; and (6) Juror Christine Rennie and one other juror, at the urging of Juror Ary, during the pendency of the jury deliberations, rented and watched a videotape of the movie *American Me* in order to gather background information for the trial." Respondent filed his return on June 26, 2007.

Petitioner hereby files his exceptions and reply to respondent's return and asks this Court to rule on the basis of the record presently before it.

## I.

## INTRODUCTION

In his habeas corpus petition, petitioner alleged that juror misconduct including materially false answers during voir dire designed to conceal and deceive, and the introduction of extrinsic information into the deliberations at both the guilt and penalty phase, 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 Fourteenth Amendments to the United States Constitution and under Article I, sections 1, 7, 15, 16 and 17 of the California Constitution.

Specifically, petitioner alleged that the justice system failed because one of the jurors at petitioner's capital trial was not only a convicted felon legally disqualified from service, but also repeatedly lied or omitted material facts when answering not one, but multiple questions, in his juror questionnaire and during voir dire. In contrast to most reported cases of

juror misconduct, there is no need to rely simply on an examination of Juror Ary's numerous false and misleading answers during voir dire to determine if he was biased. Any speculation about Juror 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. Juror Ary's repeated misconduct fatally infected both petitioner's guilt and death sentences. Petitioner has been unable to find a prior case of juror misconduct that is so blatant, so pervasive, so prejudicial and even admitted by the juror.

## II.

## INCORPORATION BY REFERENCE

Petitioner hereby incorporates and realleges by reference each and every paragraph alleged 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 petition, and the exhibits filed in support of Claim A.

Petitioner hereby incorporates all legal and factual arguments set forth in the memorandum of points and authorities accompanying this reply.

## III.

## PETITIONER EXCEPTS TO RESPONDENT'S RETURN AND ASKS THIS COURT TO GRANT THE PETITION WITHOUT AN EVIDENTIARY HEARING BECAUSE NO ADDITIONAL TESTIMONY IS NECESSARY.

This Court issued an order to show cause on petitioner's juror misconduct claim, "signif[ying] the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to

relief." *People v. Duvall*, 9 Cal.4th 464, 475 (1995). This determination by the Court places the burden on respondent to plead facts in the return which "respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful." *Id.* at p. 476.

As the Court has noted on many occasions, the People's return is important in assisting the Court "in determining what material facts are truly disputed by the parties." *People v. Duvall,* 9 Cal.4th at 483, fn. 6. Respondent must either "admit the factual allegations set forth in the habeas corpus petition, or *allege additional facts* that *contradict* those allegations." *Id.* at 483; Emphasis in original.

In disregard of these well-established rules, respondent filed a ten page Return that completely fails to comply with the Court's clearly established procedures in at least the following three important respects: (1) the Return relies entirely on hearsay statements; (2) the Return fails to identify the *material* facts in dispute; and (3) the Return fails to allege any additional facts that contradict petitioner's *material* allegations. As detailed below, respondent contravenes all well-established law and instead manufactures alleged "material" disputes. Each of these alleged disputes of nonissues is irrelevant to determining juror misconduct.

### A. Respondent Offers No Excuse For Submitting A Return Devoid of The Legally Cognizable Evidence Required By This Court.

This Court's precedent instructs respondent to "'provide such documentary evidence, affidavits, or other materials as will enable the court to determine which issues are truly disputed.'" *Id.* at 476, quoting *In re Lewallen*, 23 Cal.3d 274, 278, fn. 2 (1979). Instead, respondent has provided no documentary evidence, affidavits or other materials that would assist the Court in determining truly disputed issues. Even though respondent admittedly could have provided legally sufficient evidence, respondent offers double and triple hearsay. As is clear from the face of the Return, no impediment prevented respondent from providing a legally sufficient evidentiary basis to the Return. Such blatant disregard for this Court's pleading rules should not be countenanced.

Respondent's Return is based entirely on, and "supported" by, alleged statements of Juror Ary and other jurors to unnamed "state's investigators." Respondent not only fails to provide a sworn declaration from Juror Ary or any of the other jurors, or even the precise hearsay statements relied on in the Return, but also fails to give *any* information establishing the validity or trustworthiness of the statements or the reporters of the statements. Neither petitioner nor this Court is informed of the

following essential facts: (1) the identity of the apparently multiple state investigators who reportedly spoke to Juror Ary and the other jurors; (2) the date or date(s), times, places or other circumstances surrounding the interview or interviews;[1] (3) the precise statements made by Juror Ary or any of the other jurors.[2]

Respondent offers no excuse for his failure to submit a declaration from Juror Ary or the state investigators, and none can be found. Respondent had access to the jurors and state investigators, but simply chose to present nothing.

Respondent's hearsay and unsupported assertions in the Reply should be stricken. However, even if all respondent's hearsay statements

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[1] For example, did the state investigators speak with the juror by telephone or in person, or did they contact the juror by email, facsimile or some other means? Was there more than one interview, and if so, how much time elapsed between the interviews? In addition, respondent fails to state how, or from whom, he obtained the alleged juror statements. Petitioner is left to ponder a scenario in which numerous unnamed state investigators may have spoken by telephone with a person who identified himself as "Juror Ary" but whose identity was never verified. We do not even know if respondent spoke directly with the investigator or investigators who interviewed Juror Ary or the other jurors or received only third hand information.

[2] Respondent never quotes Juror Ary or any of the other jurors in his Return. He does not disclose whether the interviews were tape-recorded or if his source was the notes of one or more state's investigators. We do not know if the state's investigators relied solely on their memories when relating the alleged statements of the jurors.

are accepted as true, the fact remains that respondent does not dispute any material facts necessary to support relief for petitioner based on the pleadings before this Court.

### B. The Return Fails To Demonstrate That Any Material Factual Disputes Exist.

As early as March 28, 2002, respondent admitted that he could not dispute that the misconduct, if true, would establish petitioner was entitled to relief. Informal Response in Opposition to Petition for Writ of Habeas Corpus at 15. Respondent admitted that the actions of not only Juror Ary but also Juror Rennie "arguably raise some prospect that [these two jurors] were actually biased against [petitioner] and that as long as all parties conducted an investigation 'reasonably calculated to resolve the doubts raised about the juror's impartiality . . . the findings of the investigation [would be] entitled to a presumption of correctness.'" Return at 16, citing *Dyer v. Calderon*, 151 F.3d 970, 974 (9th Cir. 1998); *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The investigation has been conducted and concluded. Respondent and his agents interviewed numerous jurors,[3] including Juror Ary, to determine if the facts set forth by petitioner were true. All of the

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[3] Respondent does not claim that there was any juror that refused to be interviewed. Nor does respondent claim that an evidentiary hearing is necessary to compel any additional testimony from any witness.

jurors continue to maintain the truthfulness of the facts alleged by petitioner in 2000. In the eight years subsequent to the filing of the Writ, respondent's investigation has failed to reveal any material inaccuracies in petitioner's allegations of juror misconduct. To the contrary, respondent's investigation has provided additional evidence strengthening the record of juror misconduct. At the conclusion of his investigation, respondent remains unable to dispute any material fact originally alleged by petitioner.

Respondent's inexcusable failure to provide legally sufficient evidence supporting his Return aside, even if all of the facts set forth by respondent are accepted as true, they fail to provide support for concluding that any material facts are in dispute. Petitioner initially alleged facts establishing Juror Ary failed to inform the court that he was barred from service because of his prior felony conviction and then committed juror misconduct on multiple occasions[4] The trial record, the sworn declarations

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[4] Respondent does not dispute, or even address, the fact that Juror Ary is a convicted felon barred from jury service except to state that Juror Ary's apparently believed his conviction had been expunged. Return at 4. Petitioner sees no need to question the veracity of Juror Ary's beliefs since they are irrelevant to the issue of juror misconduct. It remains uncontested by respondent that Juror Ary was not eligible for jury service. Exh. 238; *see* California Code of Civil Procedure, section 203 (a)(5) (persons who have been convicted of a felon are ineligible to serve on juries; California Constitution Article VII § 8(b); *People v. Karis*, 46 Cal. 3d 612, 631 (1988) (the legislature since 1851 has concluded that ex-felons are unfit for jury service.)

of jurors, and the voluminous documentary evidence all confirm petitioner's allegations of juror misconduct. Juror Ary's bias and its prejudicial impact is demonstrated by the multiple instances of his injection of extrinsic evidence into the jury deliberations.

An unnecessary evidentiary hearing should not be ordered based on unsubstantiated hearsay allegations that they fail to contest material facts. Respondent's 10-page return includes no contradictory evidence and, in fact, accepts the reliability and credibility of petitioner's witnesses. As this Reply makes clear, no material facts are in dispute. Based on this Court's well-settled precedent, no evidentiary hearing is warranted.

This Court has stressed that "it is through the return and the traverse that the issues are joined in a habeas proceeding." *People v. Romero*, 8 Cal.4th 728, 739 (1994). "Facts set forth in the return that are not disputed in the traverse are deemed true. [Citation.]" *People v. Duvall*, 9 Cal.4th at 477. Thus, "[i]t is the interplay between the return and the Petitioner's response to the return . . . that frames the issues the court must decide in order to resolve the case." *People v. Serrano,* 10 Cal.4th 447, 455 (1995), citing *People v. Duvall*, 9 Cal.4th at p. 478; *People v. Romero,* 8 Cal.4th at 739; *In re Hochberg,* 2 Cal.3d 870, 876, fn. 4 (1970). The material issues have been joined and respondent has added little to the mix.

"Once the issues have been joined in this way, the court must determine whether an evidentiary hearing is needed. If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing." *People v. Serrano*, 10 Cal.4th at 455; *People v. Duvall*, 9 Cal.4th at 477 ("[w]hen the return effectively acknowledges or 'admits' allegations in the petition and traverse which, if true, justify the relief sought, such relief may be granted *without an evidentiary hearing on other factual issued joined by the pleading.*" Emphasis added.) While petitioner has the ultimate burden of proving the factual allegations that serve as a basis for relief, where the People have failed to dispute the factual allegations, and there are no facts in the record refuting petitioner's allegations, the Court may accept those facts as true and "petitioner has in effect been relieved of the burden of proving the factual allegations set forth in the petition." *People v. Serrano,* 10 Cal.4th at 456.

Respondent does not deny the material factual allegations necessary for the Court to issue the Writ. There are simply no factual disputes to resolve. In the interest of judicial economy, respect for this Court's habeas corpus procedures, and due deference to the jurors, petitioner requests that this Court strike its reference order and proceed to determine whether

petitioner is entitled to relief based on the undisputed record.

### C. There Is No Need To Require Additional Testimony From The Jurors.

The procedures to be followed once the Court has issued an Order to Show Cause are not only well-established, but are based on important societal concerns including facilitating an expeditious determination of petitioner's entitlement to relief and judicial economy by providing the Court with as complete a record as possible. These procedures are designed to assure that the Court is able to conduct a review of the record after it has been subjected to investigation by the parties. The rules contemplate that respondent will submit via the Return, any relevant legally sufficient evidence resulting from the investigation. There is no suggestion that respondent's investigation was impeded in anyway. Respondent was able to conduct an investigation during which he admittedly had access to all material witnesses and evidence. Yet, respondent elected to proffer hearsay statement devoid of legal legitimacy.[5]Respondent's failure to follow pleading requirements pales by comparison to his attempts to raise bogus issues to justify an evidentiary hearing. Respondent should not be permitted

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[5] Ultimately, it is not respondent's evidentiary failures that are most decisive because they fail to undermine confidence in the truth of petitioner's juror misconduct allegations.

to prolong this litigation after having been accorded an unrestricted opportunity to conduct an investigation that would have revealed material issues of fact if they existed.

Notwithstanding respondent's evidentiary failures, the record now before the Court is more than sufficient to determine that an evidentiary hearing is not warranted. Moreover, consideration should be given to whether continuing litigation is truly necessary in light of the strong societal concern against intruding into the privacy of former jurors. In light of the results of respondent's investigation, care must now be taken to protect the jurors' privacy from unnecessary, prolonged intrusion more than a decade after they have discharged their civic duty. Strong public policies "protect discharged jurors from improperly intrusive conduct in all cases." *Townsel v. Superior Court of Madera County*, 20 Cal.4th 1084, 1092 (1999) quoting *In re Hamilton*, 20 Cal.4th 273, 304, fn. 24 (1999), mod. 20 Cal.4th 1083a.

This Court has made clear that a "proper balance" must be struck between the needs of the defendant and the jurors' right to privacy. *Townsel*, 20 Cal.4th at 1092. The "uncontrolled invasion of juror privacy following completion of service on a jury is . . . a substantial threat to the administration of justice." *Id.* As this Court explained in *Townsel*, "once aware that after sitting through a lengthy trial [the juror] himself may be

placed on trial, only the most courageous prospective juror will not seek excuse from service." *Id.* It follows that if jurors face a never-ending procession of questioning by the parties even though they have already honestly revealed the details of misconduct to the best of their recollection, the result will be an undesirable chilling effect on subsequent jurors. No sensible juror would voluntarily set this process in motion by disclosing information that could subject him or her to endless invasions of privacy and time-consuming court appearances.

Here, the jurors rendered their verdict over fifteen years ago in 1993, following a lengthy and emotionally-taxing capital trial. These jurors have already been questioned by both parties, indeed many of them were interviewed more than once. The jurors have already provided the Court with their best recollections of what occurred during deliberations. Therefore, given the absence of a compelling reason to subject the jurors to additional intrusive, time-consuming interrogation at an evidentiary hearing, the jurors, after fifteen years, should be free to resume their private lives.

The detailed information already provided to the parties and the Court is more than sufficient to form the basis of the Court's legal conclusions about petitioner's allegations. The jurors' statements have been tested by both sides through unrestricted access. Neither party can point to

any relevant or material facts that can be adduced through further interrogation. In fact, respondent has not identified a single relevant matter that would be resolved by further questioning of the jurors. No additional testimony is needed, and the jurors should not be required to again disrupt their lives to revisit their completed service. The issue now before the Court is the interpretation of the known, undisputed facts.

## IV.

## REFERENCE QUESTIONS

The Court raised six reference questions in the Order to Show Cause. These reference questions must be viewed as the Court's determination of what material facts, taken separately or together, are necessary to determine whether petitioner is entitled to relief. Petitioner has established, either by a sworn declaration or legally sufficient documentation, that each reference question has been resolved in petitioner's favor by the evidence already presented to this Court. Respondent, as fully detailed below, has failed to raise any evidence, let alone legally sufficient evidence, that suggests a single material fact in dispute. Thus, no evidentiary hearing is needed to answer the referral questions and grant petitioner the relief sought.

### A. Reference Question 1: *"Juror Pervies Ary concealed relevant facts or gave false answers during voir dire*

*concerning his prior felony conviction, and other contacts with the justice system."*[6]

Petitioner established in his habeas corpus petition, with the support of official documents and the admissions of Juror Ary, that Juror Ary had previously been convicted of a felony. Exhs. 238, 239; CT 5144-67. Respondent does not refute Juror Ary's criminal record. Although Juror Ary had numerous opportunities to inform the trial court of this criminal history so that both the parties and the court could make an informed

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[6] Respondent correctly quotes this Court's Reference Question 1 in his introduction of the Return. Return at 3. However, respondent subsequently misquotes the referral question on page 4 by adding the word, "deliberately" to the inquiry regarding Juror Ary's concealment of relevant facts. Respondent then altered each of the first five referral questions again adding the word "deliberately," apparently interpreted the Court's questions to include a required mental state, i.e. deliberate concealment where none was present. In fact, the word "deliberately" is not present in any of the referral questions. While petitioner concedes that "conceal" could be interpreted to require a deliberate action by Juror Ary, the Court's question goes on to reveal that the relevant issue is whether Juror Ary concealed relevant, material facts *or* gave false answers. Contrary to respondent's alterations of the referral questions, resolving whether Juror Ary gave demonstrably *false* answers does not require any inquiry into Juror Ary's mental state.

As this Court has established that it is not necessary to prove that the juror's concealment of material facts must be "deliberate" to find juror misconduct. Respondent has apparently added "deliberate" in an effort to manufacture a dispute where none exists. This attempt to establish an alternate definition of materiality by misstating the Referral Question is evident throughout the Return.

decision regarding his ability to serve as a fair and impartial juror, he failed to do so on at least three occasions: 1) on his Jury Summons, which clearly indicated that he was barred from jury duty; 2) in his answers to numerous questionnaire questions, even though the court unambiguously jurors of the importance of giving full and complete answers and directing the jurors to ask questions of the Court if anything was unclear;[7] and 3) during voir dire.

Juror Ary completed and signed his questionnaire on February 3, 1993. He failed to answer truthfully each of the following material questions regarding not only his own substantial criminal record, but also his prior contacts with the criminal justice system. In question #25, Juror Ary was asked, "Have you, a close friend or relative ever been *accused of a crime, even if the case did not come to court*?" Emphasis added. As alleged in the Petition, Juror Ary answered, "no," even though this statement was false on multiple material grounds. Juror Ary is, in fact, a convicted felon and misdemeanent, and has been charged with additional crimes. Respondent has never disputed the material fact that Juror Ary is a

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[7] The trial court instructed all prospective jurors on the significance of the completion of questionnaire: "It is, however, legally appropriate, designed to provide information necessary to assist the court and counsel in determining your qualifications to sit as a juror in this case. ¶ In the interest of fairness to both sides and the efficient use of your time, I urge you to be forthcoming and thorough in your answers. There are no right or wrong answers to many of the questions." RT 149-50.

convicted felon.

Juror Ary had been charged with at least the following crimes prior to trial:

- On March 18, 1964, Juror Ary was charged in Contra Costa County Superior Court violation of two counts of violation of Cal. Pen. Code § 211 (Robbery - felony), and violation of two counts of Pen. Code § 484 (Grand theft - felony). He was convicted of felony grand theft, imposition of sentence was suspended and he was placed on felony probation, including a condition that he serve a six month sentence to the Contra Costa County Jail. Exh. 239.
- On December 30, 1971, Juror Ary was charged with seven counts of Robbery in violation of Pen. Code § 211 in the Superior Court of Los Angeles County. Exh. 240.
- On May 7, 1982, Juror Ary pled guilty in the Pomona Municipal court to violating section 23152a of the California Vehicle Code (driving under the influence of alcohol or drugs). Juror Ary was placed on probation for three years with conditions, including but not limited to attending 32 hours of drug and alcohol school and 12 Alcoholic Anonymous meetings. Exh. 241.

- On September 17, 1982, Juror Ary was ordered to appear at a probation violation hearing on October 12, 1982. Juror Ary failed to appear and a bench warrant was issued and his probation was revoked. On October 13, 1982, Juror Ary waived his right to a hearing and admitted the probation violation. Juror Ary was found by the court to be in violation of his probation. However, his probation was reinstated. On July 17, 1984, Juror Ary's probation was terminated pursuant to Sec. 1203.3 Pen. Code. Exh. 241.

Juror Ary clearly was not a novice in the workings of the criminal justice system. His known criminal record spans 18 years and involves numerous court appearances in three different jurisdictions. Moreover, the question obviously anticipated that the potential juror would reveal *all* contacts with the criminal justice system of not only the potential juror, but the juror's close friends or relatives. The question unambiguously required all contacts be revealed regardless of whether the case was ultimately adjudicated in court.[8] Given Juror Ary's numerous failures to reveal material information, this Court's question one is answered affirmatively by

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[8] Juror Ary's sons' even more extensive criminal history is discussed in detail below, but clearly should also have been revealed in response to Death Penalty Qualification Questionnaire question #25.

the record currently before this Court. Juror Ary concealed relevant facts and gave false answers during voir dire concerning his prior felony conviction and his numerous uncontested contacts with the criminal justice system.

In respondent's initial attempt to create a dispute where none exists, he offers explanations for Juror Ary's false answers. Taking the explanations in order, respondent asserts Juror Ary believed his prior felony conviction had been "expunged." Return at 4. This misapprehension might be accepted as an excuse for his initial failure to disqualify himself from jury service when he received notification warning that convicted felons were ineligible to serve as jurors. But, respondent offers no explanation or excuse for Juror Ary's failure to reveal his prior felony conviction in response to the questionnaire's clear request for any and all instances of alleged criminal misconduct *even if the case did not come to court.* Similarly, it does not excuse Juror Ary's failure to reveal his prior arrest for robbery. *Id.* This is precisely the type of information the questionnaire was designed to evoke. The question was clearly not limited to criminal convictions.

Given the concealment of his felony conviction in response to question 25, Juror Ary's explanation rings false. This is also true for Juror

Ary's explanation for his failure to reveal his criminal conviction for driving under the influence of alcohol and/or drugs – that is, he did not consider a D.U.I. conviction to be a conviction for a "major crime." *Id.* Any plain reading of this question reveals it is not limited to major crimes, let alone an individual juror's interpretation of what constitutes a "major" crime.

On the basis of Juror Ary's hearsay statements, respondent denies petitioner's allegations and suggests that there is a "material factual dispute" that can only be resolved by an evidentiary hearing. Respondent is unavailing.

First and primary, the first referral question simply does not require a finding of intentionality. Respondent does not dispute that Juror Ary concealed relevant facts or gave false answers during voir dire concerning his prior felony conviction and other contacts with the criminal justice system. In fact, Juror Ary *admits* that the answers were false and that he concealed the truth. Whether or not Juror Ary thought he was justified in concealing this information is irrelevant to answering the question.[9]

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[9] In fact, Juror Ary's repeated justifications for concealment as opposed to acknowledging mistakes, support a find of juror bias under *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998). See full discussion of the implications of *Dyer* below.

Second, even if deliberate concealment were at issue, any reasonable review of the evidence presently before the Court exposes the mendacity of Juror Ary's protestations of lack of knowledge or intent for his concealment. While it might be argued that Juror Ary reasonably thought his felony conviction had been expunged, it is inconceivable that he felt justified in concealing his DUI conviction and his arrest for robbery.

Under these circumstances, there is no need for Juror Ary to testify at an evidentiary hearing; his concealment of material information is undisputed, and his explanations irrelevant or patently incredible.[10]

**B. Reference Question 2:** *"Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning the prior criminal records of his son."*

The answer to this question can be found in the record before this Court. Petitioner documented the extensive criminal history of both of Juror Ary's sons with court records accompanying his Petition for Writ of Habeas Corpus. Exhibits 90, 243-250. Again, respondent does not dispute or deny the concealed facts, the materiality of the concealed facts, or the authenticity of the documents submitted by petitioner establishing the

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[10] Respondent does not dispute that the concealed information was relevant or that the failure to reveal the information was material.

extensive criminal history of Juror Ary's sons. Return at 4-5. Respondent instead argues that what is "in dispute is whether Ary *deliberately* misrepresented his family's prior criminal record." Return at 5; Emphasis added. Again, respondent misunderstands or misrepresents the question presented. The issue is not whether Juror Ary had an explanation for his concealment of pertinent information, but whether he, in fact, concealed information.[11]

Even crediting Juror Ary's hearsay statements, he admits that he was aware that his son had been convicted of a crime and served time in state prison. Return at 5. Respondent states that Juror Ary told an unnamed and unidentified state investigator that his son never discussed the *nature* of his convictions with Ary, but did discuss his experiences in prison. Return at 5. This information has no bearing on the reference question. It does not negate, and indirectly confirms, the fact that Juror Ary concealed his son's relevant, material, criminal history and gave false answers at trial.

**C. Reference Question 3:** *Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning the fact that he had previously witnessed a violent crime, namely*

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[11] At best, the Court could explore Juror Ary's misrepresentations and concealments in light of the entire record. *Dyer v. Calderon*, 151 F.3d at 980.

*his son's assault of Beverly Miller, his son's former girlfriend.*

Petitioner submitted the sworn declaration of Beverly Miller, the mother of two of Pervies Ary, Jr.'s children,[12] that Juror Ary witnessed his son assault her. The court records support Ms. Miller's allegations that Pervies Ary Jr. was violent toward his family.[13] Exh. 248.

In response, respondent offers the alleged hearsay statement of investigators that Juror Ary did not witness his son commit domestic violence, although he did "hear some 'contact noise' from their bedroom." Return at 5.[14] Respondent does not refute that a court found that Juror Ary's son, with whom Juror Ary was admittedly in contact, was a danger to

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[12] Petitioner has no way to determine if the state's investigator questioned Ms. Miller. It seems a fair conclusion, based on respondent's failure to deny Ms. Miller's prior statements in her declaration, that Ms. Miller continues to stand by the truthfulness of these statements.

[13] In case # 93-05348, Contra Costa County, Beverly Miller, the mother of two of Pervies Lee Ary, Jr.'s children, requested a restraining order against Juror Ary's son from the court. On November 3, 1992, a temporary restraining order was issued. On November 23, 1992, Pervies Ary, Jr. was order to stay away from the residence, and legal and physical custody of the two children was granted to Ms. Miller. Exh. 248.

[14] So that there is no confusion, the quotation marks around "contact noise" appear in the Return. This is the sole time that Respondent uses quotation marks when setting forth the alleged statements of Juror Ary. It remains undeterminable if this is a direct quote from Juror Ary or a quote from an investigator or even respondent's interpretation.

his wife and children, Exh. 248 or that Juror Ary heard "contact noise." Return at 5. Nevertheless, respondent insists that an evidentiary hearing is necessary to determine whether Juror Ary gave a false answer when he failed to disclose that he had witnessed a violent crime. Petitioner disagrees. Juror Ary's attempts to poise a distinction between what he "heard" and what he "saw" is disingenuous at best. In fact, such false distinctions only reinforce the suggestion that he would say anything to join – and influence – petitioner's jury.

More importantly, given the other, numerous and even more egregious falsehoods of Juror Ary in response to voir dire, petitioner does not believe that a determination of this fact is necessary to proving that Juror Ary was an unqualified, biased juror. Petitioner would prefer to withdraw this allegation rather than prolong litigation in this case.

**D. Reference Question 4:** *"Juror Pervies Ary concealed relevant facts or gave false answers during voir dire concerning his problems with alcohol and his son's drug addiction."*

There is no dispute, and respondent fails to provide any evidence to the contrary, that Juror Ary gave false answers regarding his problems with alcohol. The questionnaire asked each juror, "Have you, a close friend or

relative ever had a problem involving the use of drugs or alcohol?" Question 16. Juror Ary admits he was convicted for driving under the influence of drugs and/or alcohol. Exh. 241, 239. He admits that the probation order from his D.U. I. felony conviction mandated that he "absolutely refrain from the use of alcoholic beverages during his period of probation." Exh. 239. He was also ordered to attend 32 hours of drug and alcohol school and 12 Alcoholic Anonymous meetings. Exh. 241. Nevertheless, Juror Ary apparently told unnamed state investigators that he "was not an alcoholic." Return at 6. This statement is completely irrelevant to the determination of whether he gave false information when he answered Question 16.

The same is true with regard to Juror Ary's answer to the second part of the Court's inquiry regarding his son's drug addiction. Juror Ary's eldest son, Pervies Ary, Jr., had, at the time of petitioner's trial, a long and serious criminal record that included numerous felony convictions for possession and sale of drugs and a sentence to state prison. Juror Ary does not deny that he was aware of his son's sentence, but excuses his failure to reveal this information by substituting his own interpretation of what information was required.

**E. Reference Question 5:** *"Juror Ary introduced information into the jury deliberations concerning an alleged prior murder committed by petitioner Maurice Boyette, although no evidence of such a crime was introduced at trial."*

Petitioner has submitted the sworn declaration of Juror Ary admitting that he raised the false specter that petitioner had committed additional crimes including murder to convince the other jurors that they must find petitioner guilty of first degree murder and find the special circumstances true. Ary Dec., Exh. 53. Juror Ary has also, on more than one occasion, admitted that he injected highly inflammatory extrinsic evidence into the guilt phase deliberations in order to convince reluctant jurors to vote for a first degree murder conviction. *Id.* Juror Ary has sworn:

> [The jury] discussed the fact that this may have been the first murder for which Mr. Boyette had been caught but that he may have committed previous murders. If we found second degree murder, when he got out in seven years he would feel like he's gotten away with these killings and would kill again.

Ary Dec., Exh. 53.

Another juror confirms that Juror Ary attributed at least one other murder to petitioner;

> There was one juror, a black male bus driver named Pervies, who was very much in favor of giving Maurice the death

> penalty. At one point, when it was becoming clear to Pervies and others that I didn't want to vote for death, Pervies said, 'But remember the other murder.' Pervies told me that during the trial, another alleged murder was mentioned but that the judge told us not to consider it. I don't remember the judge telling us that, but it stuck in the back of my mind after Pervies told me.

Lewis Dec., Exh. 86.

Respondent admits that petitioner did *not* commit a prior murder and that Juror Ary injected this false information into the deliberations. Respondent also acknowledges the materiality of the false information. Respondent admits that Juror Lewis continues to maintain that she was influenced by the misconduct.[15] *Id*; Return at 7.

Instead, respondent attempts to change the question by suggesting that perhaps this misconduct occurred in the penalty phase rather than the guilt phase. Return at 7 ("There is thus a conflict whether the discussion of Boyette's purported 'previous murder' occurred during the guilt or penalty deliberations or both."). As the Court's reference question affirms, the material question is whether Juror Ary introduced this evidence into the deliberations, not whether one or more jurors were influenced by the admission or when the misconduct occurred. In fact, the legal relevance of

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[15] Petitioner submits that an inquiry into whether a juror "relied" on the false information would violate Evidence Code 1150; *People v. Steele*, 27 Cal.4th 1230, 1264 (2002).

the misconduct is as much to demonstrate Juror Ary's bias as it is independent evidence of juror misconduct.

Juror Ary presently appears to have no recollection of this issue so an evidentiary hearing would not expand the record and therefore is unnecessary. Return at 7. The material issue is resolved by the record before the Court, the sworn declarations of Jurors Lewis and Ary, and respondent's telling failure to refute any material facts.

**F. Reference Question 6:** *"Juror Christine Rennie and one other juror, at the urging of Juror Ary, during the pendency of the jury deliberations, rented and watched a videotape of the movie American Me in order to gather background information for the trial."*[16]

The Court's first inquiry requires proof that Christine Rennie and

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[16] As previously noted, respondent misquoted the Court in each of the first five reference questions introducing a mental state requirement that was not present. As to Reference Question 6, however, respondent's misquoting goes further. Rather than repeat this Court's referral question, respondent pulls from thin air issues that are not referenced at all. The referral question identifies four discrete, material questions of fact: (1) Did Christine Rennie and *one* other juror, (2) at the urging of Juror Ary, (3) during the pendency of jury deliberations rent and watch the movie *American Me* and (4) did they do so in order to gather background information for the trial. This question does not require any inquiry into who was a "hold out" juror or even the identity of the other juror who watched the movie.

another juror watched the movie *American Me*. Petitioner has submitted the declarations of five jurors, including Christine Rennie who admitted watching the movie. Rennie Dec., Exh. 102; McLaren Dec., Exh. 70; Mann Dec., Exh. 87; Orgain Dec., Exh. 95; Salcedo Dec., Exh. 106. While the identity of the second juror is not clear, Juror Ary told state investigators that "two of the jurors rented the movie and watched it over the weekend." Ary Dec., Exh. 53.

No less than five jurors have provided declarations that the movie was discussed during deliberations. It is undisputed that they watched the movie at the urging of Juror Ary, who freely admits his role in the misconduct. Ary Dec., Exh. 53; Return at 9.

Respondent does not dispute that Christine Rennie watched the movie, nor does he deny that it was at the urging of Juror Ary. Return at 9. Moreover, respondent does not deny that after they viewed the movie, the jurors discussed what they had learned from viewing it. *Id.* Nor does respondent deny the prejudicial nature of this evidence.

Rather than address the undisputed misconduct, the Return once again argues an evidentiary hearing is necessary by manufacturing factual disputes that have no relevance to the reference question or to the determination of the ultimate legal issue. Instead, respondent asks for an

inquiry into who the "hold out" jurors were and *which* jurors watched the movie. *Id.* This determination is irrelevant.

Respondent admits that Juror Ary discussed the movie during deliberations so that "other jurors would learn what life was like in prison."[17] Juror Ary confirms that he was assisting "naive" jurors by suggesting that they acquire extrinsic information in order to vote for the death penalty. Return at 9. Juror Ary further recalls "one juror thanking him for recommending the movie." *Id.* Even after state investigators' interviews of the jurors, including Christine Rennie, respondent was unable to disprove or deny that Rennie watched the movie. Return at 9. In fact, respondent acknowledges that "most of the jurors . . . recalled a discussion about a movie during deliberations," *id.*, and that *four* of the jurors interviewed on behalf of the government, recalled that Juror Ary recommended that several jurors watch the movie *American Me*. *Id.*

Finally, respondent's suggestion that what is in dispute is how many jurors watched the movie and whether they changed their vote as a result, Return at 9, misses the point of the inquiry. There is no need to inquire into

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[17] When citing statements of jurors with quotation marks, petitioner is not quoting the juror because no actual statements were provided by respondent. The quotations are only of general statements contained in the Return as the alleged hearsay reported to respondent.

facts or issues which are irrelevant and immaterial to resolving the legal issue before the Court.

### G. Conclusion

From the outset, respondent has conceded that petitioner is entitled to an evidentiary hearing. Under *Duvall*, respondent is obligated to set forth the factual basis for a determination that petitioner has not met his burden under applicable law. In fact, respondent does not deny *any* of the material factual allegations as required by *Duvall*. Unable to challenge petitioner's factual allegations, respondent attempts to avoid admitting relief should be granted on the record before the Court by raising issues to justify an evidentiary hearing, even though a resolution of these extraneous issues would be irrelevant to determining the ultimate legal conclusion at issue. Rather than establishing the need for further inquiry, the Return underscores the fact that the underlying material factual allegations are not in dispute.

It is impossible to decipher, let alone address, respondent's contentions regarding the legal standards petitioner has set forth. In his Return, respondent neither cites a case nor addresses the controlling law, even in the most general terms. It is perhaps this absence of any legal analysis that led respondent to erroneously suggest that a hearing is necessary.

Respondent's suggested questions to be determined at an evidentiary hearing are irrelevant to assessing juror bias or establishing juror misconduct. Respondent's selection of irrelevant factual disputes and failure to address the issues within a legal framework, reveals respondent's inability to credibly or legally address the real questions at issue here.

More revealing, is that respondent's support for these manufactured factual disputes is nothing but inadmissible hearsay. Respondent asks this Court to assume the reliability of statements which are, at best, double hearsay. Respondent's failure to submit legally admissible evidence in support of its claims cannot be excused or allowed to be used as the basis for prolonging the issuance of the writ or subjecting the jurors to additional intrusive inquiries. Clearly, respondent had the resources to obtain a sworn statement from Juror Ary. Apparently, "state investigators" interviewed Juror Ary and other jurors and obtained statements from them. However, neither petitioner nor this Court has been provided with those statements. As plead, petitioner and the Court have only respondent's generalized version of what the juror allegedly said to unidentified "state investigators" who apparently reported the sum of the conversation to respondent's

lawyer.[18]

This Court has made it clear that the People's Return is an invaluable resource to the Court in determining whether to grant relief. No less so when the return is found wanting. Where, as here, respondent fails to carry its pleading burden, and "effectively admits the material factual allegations . . . by not disputing them," there is no need for an evidentiary hearing and relief must be granted to petitioner. *In re Sixto*, 48 Cal.3d 1247, 1252 (1989) [where return did not dispute material factual allegations of ineffective assistance of counsel but merely challenged claimed prejudice flowing from counsel's deficiencies, issues were resolved and relief granted without an evidentiary hearing]. Any other result would sanction respondent's perfunctory efforts and undermine the validity of the procedural requirements for habeas corpus proceedings.

This is particularly true when the only potential evidentiary hearing witnesses are the trial jurors. These jurors have been repeatedly questioned; the jurors multiple statements to both parties are materially consistent over more than eight post-verdict years and admit the misconduct in question. The conclusion that the record is factually complete cannot be contested.

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[18] If, in fact, there was a tape-recording or transcript of what was said by Juror Ary to the investigators, that document should have been attached to the petition and/or provided to counsel for petitioner.

It would be unfortunate to reward the jurors for their willingness to cooperate in this inquiry by subjecting them to additional assaults on their privacy. Their testimony at an evidentiary hearing can only result in a repeated recital of the facts already before this Court. The fact that respondent concedes in light of the overwhelming evidence both documentary and by sworn deposition that an evidentiary hearing is warranted yet fails to dispute any relevant facts, does not support the necessity of that hearing.

Moreover, when the public policy issues of speedy resolution of capital cases, judicial economy and, most important, the strong public policy protecting discharged jurors from repeated intrusive conduct following the completion of their jury service are balanced here, the Court should determine this case on the record before it.

## V.

## PETITIONER'S ADMISSIONS AND DENIALS OF RESPONDENT'S ALLEGATIONS AND EXCEPTIONS TO RESPONDENT'S RETURN.

Petitioner cannot admit or deny any of respondent's allegations of what Juror Ary told "state's investigators." Respondent does not identify the state investigator or investigators who provided the hearsay statements, let alone submit a declaration from him, her or them. Respondent has not

provided petitioner or this Court with the circumstances under which any of these hearsay statements were obtained. Respondent fails to reveal whether the jurors were interviewed in person or by telephone, when or where the interviews were conducted, the circumstances of the interviews, or *any* information that would suggest that the statements attributed to each of the jurors is reliable.[19] In fact, the alleged "statements" of the jurors are never reported verbatim but supplied in only the vaguest of terms.

Petitioner denies that whether Juror Ary deliberately misrepresented his numerous disqualifications for jury service is an issue in this case. Respondent's reliance on Juror Ary's inconsistent and ever changing explanations to support the need for an evidentiary hearing must fail. The relevant issue is not whether Juror Ary deliberately lied about being an ex-felon, but whether he was, in fact, a convicted felon, barred from serving on a jury at the time of his service at petitioner's capital trial. Since respondent does not dispute that Juror Ary had a prior felony conviction, the

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[19] Petitioner remarks on the lack of information regarding credibility only to point out that respondent has made no effort to support its allegations with indicia of reliability that can be verified by petitioner. As will be fully explored below, petitioner does not believe that the statements attributed to Juror Ary or the other jurors, even if accurate and credible, change the ultimate conclusion that Juror Ary was biased. In fact, many of the purported statements of Juror Ary and the other jurors, add evidentiary support to petitioner's claims.

issue is resolved and nothing more need be ascertained.

Juror Ary's hearsay excuses for his lapses vary from conviction to conviction, but none has legal significance. Respondent alleges that Juror Ary believes one conviction had been "expunged" and therefore was not relevant. He failed to reveal the second conviction because he allegedly did not believe that a felony conviction for DUI was a "major" crime. His first explanation belies the second. If Juror Ary was aware that a felony conviction disqualified him from jury service and therefore did not reveal it only because he believed that it had been "expunged," he would have been aware, based on his prior contact with the criminal justice system, of the implications of his second felony conviction for driving under the influence of alcohol.[20]

Petitioner denies that the alleged excuses offered to explain Juror Ary's refusal to reveal his multiple criminal convictions demonstrate that he did not deliberately conceal this information. Petitioner also denies that the juror's explanations are relevant to the question of whether he was, in fact, a convicted felon or to a determination of juror bias.

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[20] Petitioner reiterates that respondent's decision to offer unsworn and unauthenticated statements unfairly places petitioner in the position of responding to generalities rather than specific statements. Nevertheless, since even the generalized, unauthenticated statements are irrelevant, they do not undermine petitioner's material allegations.

Petitioner denies that the "dispute" is "whether Ary deliberately misrepresented his prior criminal history from decades ago or whether he believed that the record was too old to count, or was otherwise not covered by the questions asked on voir dire" or that "these issues can only be resolved by having Ary testify under oath at an evidentiary hearing about any purported bias shown by his failure to disqualify himself from jury service."

Petitioner cannot admit or deny that Juror Ary told the state investigators that he was not aware of his older son's prior convictions because he did not live with or help raise that son; that his son never discussed the nature of his convictions with Juror Ary but did discuss experiences he had in prison; that he did not recall that his youngest son had been arrested just before petitioner's trial but recalled that the arrest occurred afterwards; that he knew that a cousin had been sentenced to death for murder, but did not reveal it because they had never met and he did not consider the cousin to be part of his family. Petitioner cannot do so because respondent has failed to present legally sufficient evidence. Respondent has not provided a sworn statement from Juror Ary or anyone who interviewed him; he has not provided the precise statements made by Juror Ary or any of the circumstances under which these statements were made including, but

not limited to, the date, time and place of the alleged interview.

Petitioner denies that what is in dispute is whether Juror Ary *deliberately* misrepresented his use of alcohol or his son's use of drugs.

Petitioner denies that the issue of Juror Ary's misrepresentations of his use of alcohol or his son's use of drugs needs to be resolved at an evidentiary hearing.

Petitioner denies that documents are in conflict regarding the timing of the discussion of false and extrinsic evidence that petitioner committed another homicide. Respondent throughout its Return relies on Juror Ary's credibility. It cannot pick and chose which of his sworn statements to support. Respondent admits that Juror Ary's has sworn and declared that the false and extrinsic evidence was discussed during the guilt phase of Petitioner's trial. Return at 6. Respondent's hearsay assertion that Juror Ary does not remember this statement at this time is irrelevant. The fact that Juror Lewis believes that she heard the statement during penalty phase deliberations does not negate that Juror Ary made the statement more than once.

Given respondent's admission that during jury deliberations Juror Ary made the false and extrinsic statement that petitioner committed a prior homicide and his admission that at least one juror discussed it, petitioner

denies that there is a material dispute that needs to be resolved regarding whether there are other jurors who remember the statement or whether any of the juror's in *addition* to Juror Lewis relied on it.

Petitioner cannot admit or deny that Juror Ary told the state's investigators that it was untrue that he had lived with Ms. Miller; that he had never witnessed his son commit domestic violence upon Miller but did hear some "contact noise" from their bedroom while visiting their residence; that he was never a guardian of Ms. Miller or her children. Petitioner cannot do so because respondent has failed to present legally sufficient evidence. Respondent has not provided a sworn statement from Juror Ary or anyone who interviewed him; he has not provided the precise statements made by Juror Ary or any of the circumstances under which these statements were made including, but not limited to, the date, time and place of the alleged interview.

Petitioner denies that whether Juror Ary "heard' or "saw" his son commit the crime of domestic violence must be resolved at an evidentiary hearing and denies that whether Juror Ary deliberately misrepresented his son's domestic violence record is in dispute as it is not material to the issue of juror bias or juror misconduct.

Petitioner cannot admit or deny the hearsay statements of Juror Ary

concerning his belief that he was not an alcoholic or his admission that he was ordered by a court to attend AA meetings. Neither Juror Ary nor respondent dispute the relevant fact that Juror Ary was convicted of driving under the influence of alcohol and/or drugs.

Petitioner can not admit or deny the hearsay statements of Juror Ary that although he was aware of his son's arrest for possession and sales of drugs, he did not reveal that information during voir dire because he did not believe it applied to the question regarding "the use" of drugs.[21] Petitioner does admit that Juror Ary was aware of his son's arrest for sale and possession of drugs.

Petitioner denies that there is a dispute as to whether Juror Ary deliberately misrepresented his use of alcohol or his son's use of illegal drugs and further denies that this alleged dispute can only be resolved by having Juror Ary testify under oath at an evidentiary hearing.

Petitioner admits and agrees with respondent that Juror Ary

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[21] This statement by Juror Ary directly contradicts his prior statement that he did not reveal his son's criminal record because he was not aware of his older son's prior convictions. Return at 5. Respondent has offered these statements to support the contention that all of Juror Ary's failures to truthfully answer numerous voir dire questions could be explained by some innocent motive. The falsity of this proposition is underscored by Juror Ary's continuing failure to truthfully answer questions even when asked by state representatives.

introduced false and extrinsic information into the jury deliberations by stating that petitioner had committed a prior homicide. Petitioner denies that there is a relevant or material conflict concerning when the false information was introduced. Petitioner cannot deny or admit that Juror Ary does not now recall the incident, but admits that Juror Ary has signed a declaration under penalty of perjury that he made the statement during guilt phase deliberations. Respondent does not deny that Juror Ary did in fact make the false and extrinsic statements during the deliberations. Petitioner admits that Juror Lewis confirms that the statement was made by Juror Ary.

Petitioner denies that there is a material dispute as to whether additional jurors also heard the statement. Petitioner also denies that it is appropriate to question the jurors regarding their reliance of the false statement because such an inquiry would be in violation of Evidence Code Section 1150. Petitioner further denies that this issue is appropriately resolved in an evidentiary hearing.[22]

Petitioner admits respondent's admission that Juror Rennie watched the movie *American Me* at Juror Ary's suggestion. Petitioner denies that

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[22] It is ironic that respondent requests that this testimony be taken in light of respondent's previous request to strike the juror declarations submitted by petitioner arguing that they reflected "the feelings, beliefs and thought processes" of the jurors. Informal Response at 17.

there is any material or relevant dispute regarding who, or how many other holdout jurors there were. Given that respondent does not deny that Juror Rennie watched the movie, it is irrelevant whether others also watched it.

Petitioner admit's respondent's admission that Juror Ary continues to state that he told the "naive" jurors to watch the movie and that he recalls one juror thanking him for recommending the movie. Petitioner also agrees with respondent's further admission, through additional hearsay statements, that "most of the other jurors who spoke with the state's investigators recalled a discussion about a movie during deliberations, including four jurors who recalled Juror Ary recommending that several jurors watch the movie *American Me* during deliberations."

Petitioner denies that there is any material or relevant dispute as to which jurors actually watched the movie during deliberations, which jurors had already seen the movie before the trial commenced or whether any of them changed their mind as a result.

Petitioner denies that there is any material or relevant issue regarding Juror Ary's introduction of prejudicial and extrinsic evidence into the deliberation process that needs to be resolved by further inconveniencing, disturbing and disrupting the lives of the jurors by requiring them to testify at an evidentiary hearing.

## VI.

## 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 prejudiced 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. Respondent admits all the material facts supporting petitioner's allegations.

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. 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 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 Under Either Implied or Assumed Bias

#### 1. Implied Bias

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. Wheeler*, 22 Cal.3d 258, 265 (1978). The bias or prejudice of a single juror violates a defendant's right to a fair trial. *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.

Voir dire, or increasingly the sworn answers to juror questionnaires, serves the vital function of enabling the parties and the court to probe jurors for potential prejudices or biases thus ensuring an impartial jury. 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 to the process:

> 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.

Voir dire is designed to uncover individuals who have a connection to the case such that, consciously or not, that connection is simply too likely to be a barrier to a fair consideration of the evidence, argument and legal standards presented. Unless jurors truthfully reveal information relevant to that inquiry, not only the defendant but all parties are deprived of the ability to adequately make that determination.

To ensure the efficacy of the voir dire process, jurors are examined under oath obliging them to respond truthfully to the examination. It is not only the defense, but also the prosecution and the court, that rely on the voir dire process in making decisions. Thus, if potential jurors fail to respond truthfully and candidly, the jury selection process is rendered meaningless. Falsehoods, or deliberate concealment or nondisclosure of facts and attitudes, deprives all sides of the right to select an unbiased jury and erodes the basic integrity of the institution of trial by jury.

For voir dire to function effectively, jurors must answer questions truthfully. *Dyer v. Calderon*, 151 F.3d at 973. Petitioner accepts that jurors are human beings and can mistakenly and innocently occasionally give false answers. Indeed, it is rare that an "honest, yet mistaken," answer to a voir

dire question will result in a new trial unless the falsehood bespeaks a "lack of impartiality." *Dyer v. Calderon*, 151 F.3d at 973 citing *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 555-56 (1984).[23]

Juror Ary's falsehoods bespeak this lack of impartiality. Where, as is true here, the circumstances of one or more jurors and/or the nature of the jury deliberations are such that we lose confidence that the verdict was reached on the basis of the facts, argument and appropriate legal standards, we have reached an unacceptable departure from constitutionally mandated standards.

The presence of a biased juror cannot be harmless and must result in a new trial for petitioner regardless of whether actual prejudice is shown. See *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). The presence of a biased juror like the presence of a biased judge introduces a structural defect that is not subject to a harmless error analysis. See generally, *Arizona v. Fulminate*, 499 U.S. 279, 307-10 (1991).

Juror Ary's multiple false statements during voir dire, as detailed in

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[23] A logical prerequisite to a determination that a juror has committed misconduct is to establish that the voir dire questions were sufficiently specific to elicit the undisclosed information. *People v. Blackwell*, 191 Cal.App.3d 925, 929 (1987), citing *Moore v. Preventive Medicine Medical Group Inc.*, 178 Cal.App. 728, 742 (1986). As is discussed in detail above, the numerous questions at issue here used simple, basic English and were only one sentence in length.

Sections III, IV and V, above, reveal a prejudiced and biased person determined to become a member of petitioner's jury and influence its verdicts. Juror Ary not only concealed his felony conviction that made him statutorily incompetent to serve, but in a series of answers to questionnaire inquiries, he concealed:

- that he had an extensive criminal record;
- that he had been convicted of driving under the influence of drugs and/or alcohol;
- that he had been ordered to attend drug and alcohol counseling;
- that both of his sons had criminal records;
- that one of his sons had been sentenced to state prison on drug charges;
- that at least one of his sons had an extensive history of involvement with illegal drugs;
- that his cousin had been convicted of capital murder and sentenced to death;
- that he and both of his sons had extensive contacts with law enforcement and the court system;
- and that he had witnessed numerous criminal activities.

Juror Ary does not deny that he failed to reveal this information. Respondent therefore must resort to attempts to explain and justify Juror Ary's untruthful answers by claiming a lack or lapse of memory or by interposing Juror Ary's purported personal interpretation of the questions.[24]

The answers Juror Ary concealed from the court and trial counsel concerned the very issues that were central to the trial.[25] Petitioner was charged with killing two people outside of a drug house. The prosecution attempted to portray petitioner as a cold-blooded drug dealer. Juror Ary's background and his son's long history as a drug-dealer and addict gave Juror Ary an array of strongly held beliefs about the criminal justice system, the system's negative impact on his son and about young African Americans. In addition, because the other jurors were unaware of Juror Ary's true past, he was able to portray himself as just the person the prosecutor argued should have more influence than other jurors. After all,

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[24] As discussed in detail above, respondent has failed to supply declarations from any of the jurors or state investigators. Petitioner, therefore, can only rely on respondent's narrative discussion of their purported comments.

[25] Juror Ary used the very information he withheld during voir dire to actually bolster his own credibility during jury deliberations. By concealing material facts during voir dire, Juror Ary successfully avoided both a challenge for cause and a peremptory challenge. The prejudice resulting from this misconduct is demonstrated, *inter alia*, by Juror Ary's use of the very information he previously concealed – his "street smarts" – to bolster his credibility during jury deliberations.

Juror Ary had much valuable experience to share with the "naive" jurors. He should be trusted. Unfortunately, it was not only the court and the attorneys who did not know Juror Ary's real history, it was also the other jurors who had no reason to be skeptical of Juror Ary.

There is no disagreement between the parties that Juror Ary gave false responses regarding his eligibility to serve and his voir dire and questionnaire responses. Juror Ary was a convicted felon and ineligible to serve as a juror under the California Code of Civil Procedure, section 203(a)(5) (persons who have been convicted of a felony are ineligible to serve on juries; California Constitution, Article VII, section 8(b); *People v. Karis*, 46 Cal.3d 612, 633 (1988) (the legislature since 1851 has concluded that ex-felons are unfit for jury service.)[26] Even though the Jury Summons clearly stated that a prior felony conviction disqualified a person from jury service, Juror Ary falsely stated that he was qualified. Exh. 238.

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[26] The lack of fitness for jury service of a person who has been convicted of a felony is long-standing at common law as is the evidence code provision that a witness' credibility may be impeached by a prior felony conviction. Evidence Code Section 788. Evidence Code Section 788 is an exception to the general prohibition against using specific instances of conduct to attack credibility. *People v. Wheeler*, 4 Cal.4th 284 (1978). These code sections demonstrate the legislature's understanding that a witness' prior convictions are relevant for impeachment insofar as they prove criminal conduct from which a fact finder could infer a character inconsistent with honesty and veracity. *Id.*

Respondent does not dispute Juror Ary's lack of legal qualifications.

Even though Juror Ary was barred by statute as unqualified, he reported for jury service. 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.

The trial court employed a questionnaire for most of the voir dire questions, a common practice in capital trials. The court made clear that the answers to the questionnaire inquiries were made under penalty of perjury. CT 5167; RT 149-50. The trial court also instructed the jurors on the necessity of answering the questions completely and the reasons why the information requested soliciting personal beliefs or potentially embarrassing information was crucial to the process. The court explained to the jurors that 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 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 at 116.

It is extremely difficult to credit respondent's assertions 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.[27]

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[27] Petitioner has demonstrated, and respondent has conceded, that Juror Ary failed to truthfully answer questions about his own criminal record, the criminal records of his sons and their alcohol and drug problems. It has also been established that Juror Ary used his stories about crimes he had allegedly witnessed while driving a bus in Oakland, California, as a basis for convincing other jurors that he was more knowledgeable about "real life" and therefore more qualified to make determinations about guilt and penalty. Although this misconduct is not the subject of the Court's reference order, the truthfulness of the descriptions of Juror Ary's misconduct detailed in the Declaration of Juror McLaren, Exh. 70, is not denied by Respondent.

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.

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.*[28] Whatever the juror's motivation,

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[28] 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

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 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).

**2. Presumed Bias**

In reversing Dyer's conviction, the Ninth Circuit found that a demonstration of implied juror bias was sufficient to require reversal of the convictions and sentence. While the Ninth Circuit did not reach the issue of presumed bias in *Dyer*, this case presents evidence upon which the Court may conclude that actual bias existed.

Unlike the facts found in *Dyer* where there was no evidence that the juror committed additional misconduct during deliberations, Juror Ary was

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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.

not only a convicted felon who, on multiple occasions, concealed relevant information on voir dire, but also committed significant additional acts of misconduct throughout the trial. Analyzing the undisputed record here, we need not rely on implied bias. The evidence of juror misconduct, from beginning to end, compels a finding of presumed bias by Juror Ary. This record leaves no room for doubt of Juror Ary's bias against petitioner.

Courts may presume bias based on extraordinary circumstances. *Dyer*, 151 F.3d at 981; see *McDonough*, 464 U.S. at 556-57 (Blackmun, Stevens and O'Connor, JJ concurring) (accepting the doctrine of actual bias in exceptional circumstances); *id.* at 558 (Brennan and Marshall, JJ., concurring in the judgment) (same); *Zerka v. Green*, 49 F.3d 1181, 1186 n. 7 (6th Cir. 1995); *Amirault v. Fair*, 968 F.2d 1404, 1405-06 (1st Cir. 1992); *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir. 1990); *Cannon v. Lockhart*, 850 F.2d 437, 440 (8th Cir. 1988); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979); *United States v. Allsup*, 566 F.2d 68, 71-72 (9th Cir. 1977).

The record here demonstrates precisely the facts necessary to exemplify the "extraordinary circumstances" upon which a court may find actual bias.

### 3. Presumption of Prejudice Standard

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,k 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.

### C. Juror Ary's Actions Following Voir Dire Offer Proof of His Bias and Additional Independent Examples of Juror Misconduct Requiring Reversal of Petitioner's Conviction and Penalty Judgment.

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. Nesler*, 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.

To make this determination, the reviewing court examines all pertinent parts of the record. The presumption of prejudice must be upheld unless, upon reviewing the entire record, there is no substantial likelihood that the complaining party suffered actual bias. *People v. Danks*, 32 Cal.4th at 302. The facts set forth here meet this Court's standards of actual prejudice under any analysis or review of the record. They also meet the federal standard requiring reversal. *See Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995).

Prior to guilt phase deliberations, Juror Ary was one of, if not the most, active juror. Before the close of evidence in the guilt phase, he asked numerous, unusual questions of the court. Each question sought to elicit information that would undermine the defense. His first question, "[h]ow can a homeless person obtain such private lawyer[s] or are the [sic] court appointed," demonstrates hostility toward the defendant and a desire to go

outside the evidence to bring about the desired result.[29] *Id.* Juror Ary's second question sought additional information that he apparently believed was necessary for a conviction.[30] The third question concerned whether petitioner's co-defendant was also being tried. RT 1577. And the final, quite revealing question, requested that petitioner take a lie detector test, which the court acknowledged was "really none of their business as such." RT 1577. Juror Ary's questions were clearly designed to impugn the defense.

Further evidence of Juror Ary's bias was revealed as the trial progressed. After the presentation of the guilt phase evidence, the jury retired to deliberate. Juror Ary has sworn and respondent does not dispute, that the jury was divided on whether to return a verdict of first or second degree murder. Ary Dec., Exh. 53. The jury requested extensive read-backs of testimony and additional review of the evidence presented at trial. After two hours of deliberation, the jury sent a note requesting an enormous

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[29] The court's irritable response to counsel, "[t]hat's none of his business, so we're not going to comment on that," evidences the court's recognition of the inappropriate nature of Juror Ary's inquiry. RT 1576.

[30] The importance of the information sought by Juror Ary is evinced by the prosecutor's subsequent reopening of her case to provide such information. RT 1634-35.

amount of material. CT 849; RT 1829.[31] Additional notes and questions followed. RT 1831-32.

Faced with the jurors' reluctance to return a verdict of murder in the first degree, Juror Ary took matters into his own hands and falsely told the other jurors that petitioner had committed a prior murder. This false and prejudicial statement was inexcusable. Juror Ary admits that he injected extrinsic evidence into guilt phase deliberations with the purpose of convincing reluctant jurors to vote for first degree murder. Jury Ary unhesitatingly explains that "[the jury] discussed the fact that this may have been the first murder for which Mr. Boyette had been caught but that he may have committed previous murders. If we found second degree murder, when he got out in seven years he would feel like he'd gotten away with these killings and would kill again." Ary Dec., Exh. 53.

That Juror Ary inaccurately attributed at least one other murder to petitioner is confirmed by one of the other jurors:

> There was one juror, a black male bus driver

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[31] The declarations of the jurors confirm that the read-backs were a source of deep dissension within the jury room. "[T]here . . . was a protest anytime a juror wanted to ask the judge a question or look at a piece of evidence. On one occasion, after a female jury member asked for some piece of information from the record, another jury member retorted, 'maybe we should shoot her.' This kind of bullying was frequent from several strong-willed people." Karantzalis Dec., Exh. 83.

> named Pervies, who was very much in favor of giving Maurice the death penalty. At one point, when it was becoming quite clear to Pervies and the others that I didn't want to vote for death, Pervies said, 'But remember the other murder.' Pervies told me that during the trial, another alleged murder was mentioned but that the judge told us not to consider it. I didn't remember the judge telling us this, but it stuck in the back of my mind after Pervies told me.[32]

Lewis Dec., Exh. 86.

The Sixth Amendment prohibits jurors from introducing matters into deliberations not presented during the trial. *See Gibson v. Clanon*, 633 F.2d 851, 854 (9th Cir. 1980) (explaining that a jury's consideration fo extrinsic material is a constitutional violation). In most cases, a court reviewing allegations of injection of "extrinsic evidence" into jury deliberations is asked to determine whether the error alone was prejudicial. The error here was patently prejudicial – Juror Ary introduced extrinsic evidence of a murder that never occurred.[33] Here, the first instance of Juror Ary's

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[32] The juror's declaration is somewhat ambiguous as to when the juror believed she received this information for the first time. However, based on Juror Ary's statement, it is clear that he made these statements during the guilt phase. The fact that this false extrinsic evidence also influenced a juror in the penalty phase only adds to the prejudice of the misconduct.

[33] Respondent does not deny that Juror Ary improperly introduced extrinsic evidence of a fictitious homicide. Instead respondent appears to suggest that the Court must order further fact-finding to determine whether the misconduct occurred once or twice. In fact, there is no question of

misconduct, unrelated to voir dire, involves the introduction of facts that were never produced in evidence and were also false.

The second instance of juror misconduct by introducing extrinsic evidence occurred in the penalty phase. During the penalty phase, Juror Ary had the enhanced authority of having been selected as the foreman of the jury.[34] Other than the capital crimes, no evidence of violent acts by petitioner had been introduced by the prosecution.[35] In an effort to bolster a weak case for imposing the death penalty, the prosecutor, in both her improper cross-examination of petitioner's expert and in her opening and closing arguments, sought to convince the jurors that petitioner poised a risk of future dangerousness because he would inevitably be forced to join a

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when Juror Ary introduced the admittedly false and clearly prejudicial notion that petitioner had been committed a prior homicide – Juror Ary himself admits that the false information was initially introduced to persuade undecided jurors to reach a first degree murder finding.

Moreover, the timing of the misconduct is irrelevant to petitioner's claim. First, the misconduct is clear evidence of Juror Ary's bias regardless of when it occurred. Second, even if Juror Ary's misconduct is considered in isolation rather than in the context of the entire record, his misconduct, whenever it occurred, under the circumstances of this case, requires reversal of both the conviction and penalty determination.

[34] Juror Ary's selection as foreman underscores his important role on the jury and demonstrates the esteem in which he was held by his fellow jurors.

[35] The only evidence presented by the prosecution in aggravation was a stipulation to two prior nonviolent felony convictions for drug offenses and victim impact evidence.

violent prison gang. Unless the jury intervened and sentenced petitioner to death he would become a gang member and kill others in prison. By raising this false argument, the prosecutor hoped to improperly influence the jury to return a death sentence.

During the penalty phase testimony, the prosecutor asked a defense witness: "Would you say that the Black Guerilla Family would be the type of gang that might influence Maurice Boyette to commit other crimes?" RT 1898. In her closing argument, the prosecutor's principle theme was gang activity and future dangerousness. The prosecutor sought to convince the jurors that sentencing petitioner to life without the possibility of parole would result in more grieving families that the jurors would be personally responsible for creating. The prosecutor stressed this point in her closing argument telling the jurors, "Can you put another family through what [the victims' families] went through? That's what you have to decide." RT 2003. Paraphrasing the testimony of the penalty phase defense expert, she argued:

> Well, aren't there gangs in prison who would exert that type of control? Isn't that the personality of someone who is going to do anything for a gang? Ever hear of the Black Guerilla Family? And all of a sudden, he starts backing off. I asked him: In other words, if Mr. Boyette gets caught with a good group of people, he will do good things; if he gets caught up with a gand, he will do what they want him to do? A hit man?

RT 2001.

Continuing the prison-gang theme, the prosecutor argued petitioner's future dangerousness explicitly. "As soon as I start mentioning gangs, because you know what I'll getting at, his likelihood of killing again, his future dangerousness. The perfect personality who could kill again." RT 2002. The prosecutor went further, "[the defense] brought out all these things that he is a big follower. Think of prison life, can you imagine the stress of prison. *You have no idea.* And the gangs, and the pressures." RT 2018; Emphasis added.

The prosecutor's statement demonstrates that not only was she improperly arguing that petitioner would join and follow the instructions of a prison gang, but any jurors who did not concur did so because they did not possess the information or knowledge needed to understand the reality of prison life. These uninformed jurors could only rectify their shortcoming and meet their duties as jurors by asking for information from, and then following directions from the "street smart" juror. The prosecutor's improper argument most likely contributed to the second significant juror misconduct. The prosecutor told the jurors:

> And I think in this part of the proceeding , it is a very difference type of proceeding, it is a very different type of proceeding, it's emotional, you need street smarts, you can't be naive about these things. *I recommend you pick a very*

> *street smart foreman. A very street smart foreman who will lead you and guide you.*

RT 1994; Emphasis added.

To accomplish her goal of obtaining a death sentence, the prosecutor instructed some of the jurors to disregard the opinions of jurors whose backgrounds failed to render them "street smart." At the end of her argument, the prosecutor returning to her theme that some jurors were more qualified than others to understand why a death sentence was necessary in this case, and argued:

> What I want to do is just say a couple of things to you. First of all *for some of you, in your backgrounds, this is a very different world for you* . . . . We've taken you off the streets from different towns in the Bay Area and we've thrown you in here. And for some of you, you've seen some of the violence that goes on, you know. *You have street smarts. So those of you who aren't exposed to this, listen to your fellow jurors who know what's going on.* You listen and you be very patient. Don't have a set opinion right off the bat, you listen and you talk about it.

RT 2019; Emphasis added.

The prosecutor improperly suggested that the jurors forego their personal responsibility for individualized sentencing and rely, instead, on the "more qualified" "street-smart jurors." The prosecutor was clear – anyone who could not vote for death should leave the jury: "[n]ow, if you find that this is just too much for you and you cannot deliberate in a case

like this, you must let us know. We have alternates."[36]

As the prosecutor hoped, the jurors elected as their foreperson the "street smart" juror, Juror Ary. Juror Ary had previously regaled the jury with his encounters with criminal activity as a bus driver assigned to the streets of Oakland. RT 2089. It is evident, not simply by the election of Juror Ary as the penalty phase foreperson, but also from comments of other jurors, that Juror Ary was a leader in the eyes of his fellow jurors. Numerous jurors have expressed this sentiment, and respondent does not dispute this fact. To the other members of the jury, Juror Ary's opinion had heightened credibility, certainly more that the "naive" jurors.[37] Juror Salcedo remembers the significant impact Juror Ary had on the other jurors:

> Pervies remembered what was said during the trial and presented it very accurately. He had a way of presenting evidence to each person which was its correct or accurate interpretation. This was very helpful during deliberations because a couple of college kids on the jury would interpret the testimony way off the mark.

Salcedo Dec., Exh. 106.

Salcedo further explained that "everyone was participating in the

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[36] In response to the prosecutor's argument, Juror Karanzalis left the jury because he did not feel he could vote for the death penalty in this case. Karantzalis Dec., Exh. 84.

[37] Of course, Juror Ary's status within the jury was attained as a result of his failure to disclose his actual history.

penalty deliberations. Pervis [sic] again proved to be a natural leader in the group. He was the biggest person on the jury, and the fact that he was black helped as far as my being convinced he was not prejudiced against [petitioner] because of his race." *Id.*[38]

No one disputes that the jury was divided as to penalty. Return at 7-9. During deliberations, not only did the majority jurors exhibit their disdain for the holdouts, see e.g. Salcedo Dec., Exh. 106, but in light of the prosecutors argument, the holdout jurors became unsure of their own roles and the validity of their opinions. As one juror stated:

> I felt that the jury was deadlocked . . . and I didn't understand what the consequences would be if we didn't end up agreeing on one sentence. The three of us who were in favor of prison were all female and I didn't think we would have any luck in convincing the other nine jurors to change their vote.
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> Lewis Dec., Exh. 86.

Juror Ary does not dispute that jurors were singled out and isolated by other jurors who felt that the holdouts simply needed to be "educated." Juror Ary readily admits his role in the process, explaining that "[t]here were three jurors who were hesitant at first to sentence Mr. Boyette to

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[38] Not all of the jurors were as impressed by Juror Ary. Juror Mann observed, "that if a juror agreed with Juror Ary he appeared simply as strong and authoritative but if you were in dissent . . . [t]he foreman was not very helpful during deliberations . . . [because] he was not a good mediator." Mann Dec., Exh. 87.

death." To Juror Ary "[t]hey were people who didn't understand what life was like on the streets. They had not experienced anything." Ary Dec., Exh. 53. While jurors' memories differed on the number of holdouts, no one disputes the material fact that prior to Juror Ary's improper suggestion that jurors unwilling to vote for the death penalty should watch a highly inflammatory prison movie, more than one juror was in favor of sentencing petitioner to life without the possibility of parole. See Graff Dec., Exh 70; Mann Dec., Exh. 87.

Thus, penalty deliberations divided not only numerically but by the artificial boundaries created by elevating the opinions of so-called "street smart" jurors over those of "naive" jurors. When it became clear that the jury was divided, Juror Ary, took matters into his own hands and employed his "street smarts" to "assist the undecided jurors," Ary Dec., Exh. 53, by instructing the "holdout" jurors to rent the movie *American Me*. *Id.* Juror Ary freely admits he "told the holdout jurors that if they wanted to understand what it was in prison, they should watch the movie *American Me*. That is based on a true story. Two of the jurors rented the movie and watched it over the weekend. After they watched the movie, they changed their vote to death." Respondent does not dispute any of these material facts. Return at 9. Indeed, when interviewed by state investigators, Juror

Ary not only again admitted that he recommended that several "naive" jurors watch the movie, but, apparently to demonstrate the vital service he had performed, offered that one jurors had thanked him for recommending the movie. Return at 9.

The prejudicial nature of the film *American Me* is not disputed. *American Me* was filmed at Folsom Prison in California. It is over two hours long and is rated "R" by the Motion Picture Association for violence, profanity, nudity and mature themes. The movie posits – in graphic and violent detail – that anyone who enters a California prison will inevitably be forced into gang membership requiring blind obedience to gang dictates that routinely include murder. The film is presented as "a true story," and identifies as a primary instigator of gang violence in prison – the Black Guerrilla Family – the very gang named by the prosecutor in the hypotheticals she posed during cross-examination of the defense expert and argument at the penalty phase.[39]

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[39] If there is any doubt about the incendiary nature of the film and the prejudicial effect it would have on a juror's ability to be impartial, one need only examine a review of the film: "The prison sequences are savage and sobering, starting with the rape of Santana [the central character] by an inmate whom he promptly kills. Such scenes go beyond Hollywood sensationalism, detailing the confrontation of prison subcultures, the Mexicans, blacks, the white Aryan Brotherhood. American Me shows the fearsome logic that makes ethnic gangs the *inevitable* social structure that arises . . . *American Me* is a fiercely impressive film; *it butts its way inside*

The content of the film undoubtedly reinforced and lent substantial credence to the prosecutor's improper remarks during closing argument. Although there was absolutely no evidence introduced to suggest that petitioner had ever been in a gang or that this issue was an appropriate consideration for the penalty jury, viewing this movie confirmed for the jurors the legitimacy of the prosecutor's argument predicting the inevitability of petitioner's future dangerousness and reinforced that Juror Ary's assessment that gang participation was inevitable was correct.

It is not surprising that after viewing the film, at Juror Ary's urging, the holdout jurors could no longer resist the pressure to sentence petitioner to death. Indeed, Juror Ary proudly admits the efficacy of his efforts. "Two of the jurors rented the movie and watched it over the weekend. They finally understood that Mr. Boyette could kill again in prison if he was not sentenced to death. After they watched the movie, they changed their votes to death." Ary Dec., Exh. 53.

Juror Ary's misconduct during the trial is the tragically predictable result of his successful efforts to conceal any information that might thwart his participation in this capital case. Juror Ary used other concealed

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*you and stays there long after you've seen it.*" Jack Kroll and Lynda Write, Eddie Olmos' East L.A. Story, Newsweek, March 30, 1992 at 66; Exh. 251, Emphasis added.

information to bolster his "street smart" credentials. He admitted in his declaration, and reiterated in his interview with state representatives, that he had numerous conversations with his son about his son's experiences while incarcerated in a California prison. Return at 5; Ary Dec., Exh. 53. He used this and other concealed information to bolster his credibility with his fellow jurors and to control the outcome of the deliberations.

Contrary to respondent's suggestion, there are no relevant or material facts in issue regarding this instance of Juror Ary's misconduct. It is irrelevant whether more than one juror watched the movie or changed her or his vote as a result. *Dyer v. Calderon*, 151 F.3d at 973 (The bias of prejudice of *a single juror* violates a defendant's right to a fair trial.) Emphasis added. Juror Ary proudly takes responsibility for his suggestion that "naive" jurors watch the movie in order to understand why they must vote for death, and he has declared repeatedly that he achieved his goal because after watching the movie the jurors changed their vote to a death verdict. Return at 9; Ary Dec., Exh. 53.

Juror Ary introduced extraneous and false facts into juror deliberations in a concerted and unabashed effort to obtain convictions and a death verdict. Juror Ary lacked the indifference which, along with impartiality, is the hallmark of an unbiased juror. *See Dyer v. Calderon*,

151 F.3d at 982.

The extraneous, false evidence of "other murders," the prison experiences of Juror Ary and his son, and the movie *American Me*, taken separately or together, raise a substantial likelihood of actual bias by not only Juror Ary, but other jurors. This is true not only because of the inherently biased nature of the extrinsic materials but also because of the nature of the circumstances surrounding the misconduct, including the undisputed fact that jurors actually changed their votes after considering the extrinsic evidence.

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).

Respondent does not deny that the juror misconduct occurred and fails to rebut any presumption of prejudice.

### 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.

## VII.

## PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

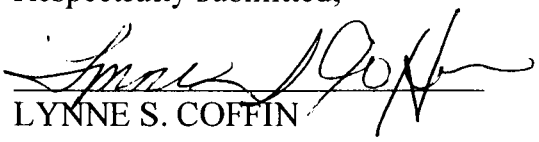
1. Take judicial notice of the record on appeal in *People v. Boyette* (No. S032736) and all pleadings filed therein, all pleadings, files and exhibits in *In re Boyette* (No. S092356) pursuant to Evid. Code §§ 452(d)(1) & 459.

2. Issue a writ of habeas corpus to vacate the judgment imposed against petitioner; or alternatively refer the matter for an evidentiary hearing before a neutral finder of fact.

3. Grant petitioner such further relief as the Court deems appropriate.

Dated: June 19, 2008

Respectfully submitted,



LYNNE S. COFFIN
LAW OFFICE OF LYNNE S. COFFIN

ATTORNEY FOR PETITIONER
MAURICE BOYETTE

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITIONER EXCEPTS AND REPLIES TO RESPONDENT'S RETURN uses 13 point Times New Roman font and contains 18,347 words.

Dated: June 19, 2008

Respectfully submitted,

LYNNE S. COFFIN
LAW OFFICE OF LYNNE S. COFFIN

Attorney for Petitioner
MAURICE BOYETTE

DECLARATION OF SERVICE BY UNITED STATES MAIL

Re: In re Maurice Boyette, S092356

I, Lynne S. Coffin, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 38 Miller Avenue, #328, Mill Valley, CA., 94941

.

I served the attached **PETITIONER EXCEPTS AND REPLIES TO RESPONDENT'S RETURN** on the following individuals/entities by placing true and correct copies of the documents in a sealed envelope with postage thereon fully prepaid, in the United States mail at Mill Valley, California, addressed as follows:

Christina Vom Saal
Office of the Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-3664

California Appellate Project
101 Second St.
San Francisco, CA 94105

Maurice Boyette
P.O. Box H76600
San Quentin State Prison
San Quentin, CA 94974

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

All parties that are required to be served have been served.

I declare under penalty of perjury that service was effected on June 23, 2008 at Mill Valley, California and that this declaration was executed on June 23, 2008 at Mill Valley, California.

Lynne S. Coffin