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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

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

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DEATH PENALTY

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ROBERT WESLEY COWAN,	)	Related to:
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Petitioner,	)	Automatic Appeal No. S055415
	)	
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PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT

I.

INTRODUCTION

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

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

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

II.

SUMMARY OF PROCEEDINGS

A. Trial Court Proceedings

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

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

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

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

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

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

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

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

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

The judgment was affirmed on appeal by the California Supreme

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

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

> 1) Is Juror 045882 the person who was cited for a misdemeanor violation of Penal Code section 415, subdivision (1) on January 14, 1995, was charged with a violation of that section on January 18, 1995, pled guilty to that offense on February 6, 1995, and received a sentence of three years' probation and a fine of $225, as reflected in the court file in Bakersfield Municipal Court No. 506741-B?
>
> 2) If so, what were Juror 045882's reasons for failing to disclose these facts on his juror questionnaire and during voir dire at petitioner's trial?
>
> 3) Was the nondisclosure intentional and deliberate?
>
> 4) Considering Juror 045882's reasons for failing to disclose these facts, was his nondisclosure of the above facts indicative of juror bias?
>
> 5) Was Juror 045882 actually biased against petitioner?

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

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

III.

SUMMARY OF THE EVIDENCE AT THE REFERENCE HEARING

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

A. Exhibits Admitted at the Reference Hearing

Exhibit A-1 was the court file in Bakersfield Municipal Court No. 506741-B. It showed that Juror 045882 was cited for a misdemeanor violation of Penal Code section 415, subdivision (1) on January 14, 1995; was charged with a violation of that section on January 18, 1995; pled guilty to that offense on February 6, 1995; and received a sentence of three years' probation and a fine of $225. The police report in the court file indicated that a uniformed security officer made a citizen's arrest of the juror for fighting at the Valley Plaza Mall. The officer placed the juror in handcuffs and took him to a walkway off the main plaza. The juror was held in custody by the security officer until Bakersfield Police Officer R. Wimbish arrived approximately 45 minutes later. Officer Wimbish advised the juror of his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 and then questioned him about the fight. Later, the officer issued the juror a citation, and the juror was released from custody after he signed the citation and received his copy.

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

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

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

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

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

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

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

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

B. Juror 045882's Testimony at the Reference Hearing

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

1. Question 34

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

When asked on direct examination why he had not mentioned the

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

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

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

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

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

2. Question 39

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

3. Question 53

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

4. Question 54

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

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

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

5. Other Relevant Testimony

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

STANDARD OF REVIEW FOLLOWING AN EVIDENTIARY HEARING

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

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

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

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

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

V.

EXCEPTIONS AND ARGUMENTS ON THE MERITS

A. Applicable Law

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

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

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

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

Juror misconduct involving the concealment of material information on voir dire raises a presumption of prejudice that requires reversal of the conviction unless rebutted. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 119.) The presumption will prevail unless there is "an affirmative evidentiary showing that prejudice does not exist" or "a reviewing court's examination of the entire record" determines there is no "reasonable probability of actual harm to the complaining party [resulting from the misconduct]." (*People v. Carpenter* (1995) 9 Cal.4th 634, 653, internal quotations and citations omitted.) A "reasonable probability" of prejudice exists when there is a "substantial likelihood that one or more jurors were actually biased against the defendant." (*In re Hamilton*, *supra*, 20 Cal.4th at p. 296.)

"[I]n most cases, the honesty or dishonesty of a juror's response [to a question on voir dire] is the best initial indicator of whether the juror in fact was impartial." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556, conc. of J. Blackmun.) When a juror conceals material information, such concealment "establish[es] substantial grounds for

inferring that [the juror] was biased . . . *despite . . . protestations to the contrary*." (*People v. Price* (1991) 1 Cal.4th 324, 400-401.) (Italics added.) "Concealment by a potential juror constitutes implied bias justifying disqualification." (*People v. Morris* (1991) 53 Cal.3d 152, 183-184; *People v. Farris* (1977) 66 Cal.App.3d 376, 387 ["the deliberate concealment by this juror of his past and present scrapes with the law, knowing that he would otherwise be subject to dismissal from the jury panel, is another factor evidencing his unfitness to serve as a juror"]; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 979 [juror's "lies give rise to an inference of implied bias on her part"].) A verdict must be overturned even if only one juror is biased. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112.)

Moreover, "[i]n determining whether the presumption of prejudice has been rebutted, 'it is clear that the usual "harmless error" tests for determining the prejudicial effect of an error [citations] are inapplicable. Convincing evidence of guilt does not deprive a defendant of the right to a fair trial [citation] since a fair trial includes among other things the right to an unbiased jury . . . .'" (*People v. Diaz, supra*, 152 Cal.App.3d at p. 935; *People v. Marshall* (1990) 50 Cal.3d 907, 951 ["if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict"]; *Dyer v. Calderon, supra*, 151 F.3d at p. 973 ["The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice"].)

B. Exceptions to the Referee's Factual Findings

1. Question 1

The referee found that Juror 045882 was the person who was the defendant in Bakersfield Municipal Court No. 506741-B. (Report at p. 2.) Petitioner does not take exception to this finding.

2. Question 2

The referee found that Juror 045882's failure to disclose his misdemeanor conviction and probation sentence was a result of his having "simply overlooked the misdemeanor conviction when he filled out the questionnaire." (Report at p.3). This finding is not supported by substantial evidence. The referee cites only to portions of the record that support his ultimate finding, while wholly ignoring contrary, more credible evidence indicating intentional nondisclosure.

According to his testimony at the evidentiary hearing, Juror 045882's reasons for his failure to disclose his prior misdemeanor conviction and probation status were several and inconsistent. At various times, he said various things; he had no reason or explanation for the omission (RT 143:23, 145:12, 146:16, 180:3-6); he forgot about his conviction and probation status (RT 143:26, 147:5-6); he thought he did not have to mention the conviction because he was cited rather than arrested (RT 167:12-18); the questions were a little vague and hard to understand (RT 165:10-18); his answer that he came to court for "tickets" may have been a reference to his prior conviction (RT 168:23-25); and he probably did not want to answer at least one of the questions (RT 178:13-19). The juror's testimony in fact covered all possible explanations for the nondisclosure – inadvertent forgetfulness, intentional omission, confusion, and actual, albeit ambiguous, disclosure. It is simply not possible that all of these

explanations were truthful. Juror 045882's failure to provide a single, consistent explanation for why he did not mention his prior misdemeanor conviction and probation status on the questionnaire is strong evidence he was not being truthful in his testimony. Moreover, none of the allegedly innocent explanations offered by the juror withstand careful scrutiny.

It is not plausible Juror 045882 forgot or overlooked his prior misdemeanor conviction and probation status, as the referee concluded, especially when he was able to recall a 1991 arrest that did not even result in charges being filed, more than three years earlier. The juror's conviction occurred only 14 months before his jury service, and he was still on probation for this incident during jury selection. Moreover, the conviction for fighting in public was both his first criminal conviction and his only criminal record as of 1996. (RT 136:23-137:1.) This was not a situation in which the juror had a long history of many criminal convictions and thus could have innocently forgotten about a less serious prior.

Additionally, at the hearing, the juror testified that he was upset about the misdemeanor case at the time it occurred. He was upset "probably 'cause I was convicted of something, you know, that I was standing up for something that I believed in." (RT 139: 21-27.) If indeed Juror 045882 truly felt he was standing up for something he believed in during the mall incident, it is highly unlikely he would have put it "behind" him and not still be "dwell[ing]" on it just 14 months later during jury selection, as he claimed in his testimony. (See RT 137:8-10; 171:9-15.)

Juror 045882 was also concerned about being on probation. As the juror explained, "Nobody likes being on probation," (RT 140:9-10), and he had to "watch" himself while on probation (RT 140:13.) The juror also did not like "being in trouble when [he] was young" (RT 141:11-12), and he

was concerned at the time that a violation could result in his going to jail (RT 141:14-20.) Although insisting his conviction was "not that big of a deal," Juror 045882 admitted "it was part of [his] life," (RT 83:2-5), and being put on probation "was important" to him, (RT 83:6-8). Even though Juror 045882 was not supervised by a probation officer, someone from the probation office contacted him at the beginning of his probation period. He was advised to stay out of trouble and pay his fine, asked if he had any questions, and given a telephone number to call if needed. (RT 172:7-16; 173:17-21.) Juror 045882 paid the fine as ordered. (RT 173:25-26.)

There were also other significant reasons why Juror 045882 was likely to have remembered his misdemeanor conviction and probation status at the time of jury selection. The other participant in the fight that resulted in the conviction was the ex-boyfriend of the juror's then-girlfriend. She was a very important person in the juror's life and he considered her child to be his step-daughter. (RT 152:5-9, 154:15-155:5.) Indeed, the juror acknowledged in his testimony that the significant relationship he had with his then-girlfriend would have been a reason why he would have remembered the mall incident. (RT 155:6-8.) He had one or two other fights at the mall, but neither resulted in a criminal charge being filed against him. (RT 166:9; 188:7-9.)

Additionally, as explained in the police report included in Exhibit A-1, on January 4, 1995, Valley Plaza Mall security personnel handcuffed Juror 045882 and placed him under citizen's arrest after breaking up the fight.[4] The juror was then taken to a walkway off the main plaza where he

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[4]The referee cited to Juror 045882's testimony that he was not arrested or handcuffed as evidence supporting his conclusion that the juror forgot about the conviction. In so doing, the referee wholly ignored Office

was detained for approximately 45 minutes until Bakersfield Police Officer Wimbish arrived. The officer advised the juror of his *Miranda* rights, interviewed him at the scene, and then released him with a citation. On February 6, 1995, Juror 045882 appeared in court, pled guilty, was put on probation for three years, and was fined. (See Exhibit A1.) These circumstances were unlikely to have been forgotten by Juror 045882 just 14 months later, when filling out a questionnaire that expressly asked for complete and truthful answers about his criminal history.

Finally, it is of little significance that Juror 045882 testified he was unable to recall his misdemeanor case when initially questioned by Judge Brehmer at the evidentiary hearing, prior to having his memory refreshed by reviewing Exhibit A-1. (RT 114:22-115:6.) The juror's failed memory in 2014, more than 19 years after the conviction, is little proof that he was also unaware of his conviction at time of his jury service in 1996, a mere 14 months after the incident.

The other reasons offered by Juror 045882 as possible explanations for his failure to mention the misdemeanor conviction and probation status are no more persuasive. The suggestion that the questions were vague and hard to understand is rebutted by the very language of the questions. Indeed, when questioned on redirect examination, Juror 045882 was unable to identify any part of Questions 34 or 54 he could not understand. (RT 175:13-16; 178:13-19.) The juror's initial claim on cross-examination that

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Wimbish's report that the juror was subjected to a citizen's arrest and placed in handcuffs by security officers. Certainly, the nearly-contemporaneous police report is more reliable than the juror's memory almost 20 years later regarding these factual issues. There was no evidence that either the police officer or the security officers had reason to lie about what had occurred.

the questions were incomprehensible is especially telling. This obviously false statement indicates the juror's extreme willingness to be untruthful at the evidentiary hearing. It significantly undermines the credibility of all of the juror's testimony.

Also suggested on cross-examination was the possibility that Juror 045882 did not mention the misdemeanor conviction in the questionnaire because Question 34 only asked about prior "arrests" and the juror did not believe he had been arrested in the mall incident (despite the police report indicating he was placed under citizen's arrest). This explanation, however, is belied by the juror's failure to mention the conviction in response to Question 54, which asked about other contacts with law enforcement or the criminal justice system. Juror 045882 admitted that his misdemeanor case qualified as a contact with the criminal justice system and would have been responsive to Question 54. (RT 179:13-26.) Two explanations for not mentioning the misdemeanor conviction when answering Question 54 were offered by the juror - "I don't have an answer," (RT 146:16), and "probably just didn't want to answer it," (RT 178:13-19). Thus, if we credit the juror's explanation that he rationalized his way out of disclosing his conviction in response to Question 34, then his failure to disclose the information in response to Question 54 can only be viewed as knowing, deliberate deception.

Nor is it plausible that Juror 045882 failed to mention the misdemeanor conviction as an "other" contact in response to Question 54 because of his answer to Question 53. That question asked if the juror had ever been in a courtroom for any reason other than jury service. The juror answered, "tickets," suggesting the possibility he was referring to the citation for the mall incident. On direct examination, however, the juror

confirmed that his reference to "tickets" was limited to traffic tickets he had received for driving violations. (RT 127:4-24.)

Thus, when subjected to closer scrutiny, the several potentially innocent explanations offered by Juror 045582 for his failure to expressly mention the misdemeanor conviction are simply not plausible. The remaining explanations put forward by the juror were that he was unable to give a reason for the omission and that he probably did not want to answer the question, both indicative of the juror wanting to hide his conviction and probation status during jury selection.

The failure of Juror 045882 to consistently articulate a single, innocent explanation for his omission strongly indicates that no such innocent explanation exists. Rather, the rationale for his silence during voir dire, not admitted by the juror at the evidentiary hearing, was the promotion of the juror's own interests. Those interests would have been served by Juror 045882 winning a seat on the jury in order to lobby for a conviction and death sentence. In so doing, the juror would have a basis for seeking lenient treatment from the District Attorney's Office in the event he later violated his probation or sought early termination of his probation. He may also have feared that a vote for the defense would have caused the prosecutor to retaliate by scrutinizing him more carefully for possible violations of his probation. Even if the juror had other, not-yet disclosed interests in mind for wanting to be on the jury, the fact remains that he lied about his criminal background in order to put himself in a position to render verdicts regarding petitioner's guilt and sentence.

3. Question 3

The referee concluded that the Juror 045882's omission was not intentional and deliberate. (Report at p. 3.) This finding likewise is not

supported by substantial evidence.

Juror 045882 claimed that his nondisclosure was not intentional or deliberate. (RT 146:17-147:6; 165:2-4.) However, as demonstrated above, the juror's testimony was simply not credible. His explanations for why he did not mention his misdemeanor conviction and probation sentence were inconsistent and, to the extent they purported to be innocent, they were implausible. A fact finder may reject the entire testimony of a witness who is willfully false in one material part of his testimony. (*People v. Beardslee* (1991) 53 Cal.3d 68, 95.) Since it is not credible that Juror 045882 forgot about his prior misdemeanor conviction and probation status while completing the questionnaire or that he was unable to understand the questions, the only reasonable explanation is that the nondisclosure was intentional and deliberate.

This conclusion is not undermined by the fact Juror 045882 did disclose his prior 1991 arrest, later discharged, in his questionnaire and during voir dire. (Exhibit B-1 at p. 10; Exhibit C-1 at p. 1041.) Certainly, the information he revealed was far less likely to result in his being excused (and clearly it did not) than the fact he currently was serving a three-year term of probation. Moreover, by describing only his arrest in 1991, Juror 045882 gave a responsive, but incomplete, answer regarding his criminal background. This incomplete answer, unlike leaving the questions blank, created the misleading impression that the juror was complying with the court's order to answer the questionnaire truthfully. Petitioner's trial counsel was therefore less likely to suspect that the juror was lying about his criminal record, and constituted another form of deception.

4. Question 4

The referee concluded that the Juror 045882's failure to disclose his

misdemeanor conviction and probation sentence was not indicative of juror bias. (Report at p. 3.) This finding is also not supported by substantial evidence.

Juror 045882 claimed that his nondisclosure was not indicative of bias. (RT 164:22-165:1, 173:1-3, 182:7-13.) Again, however, he was not a credible witness and his testimony should not be believed. As previously explained, a juror's honesty or dishonesty during voir dire is usually "the best initial indicator of whether the juror in fact was impartial." (*McDonough Power Equipment, Inc. v. Greenwood*, *supra*, 464 U.S. at p. 556, conc. of J. Blackmun.) When a juror conceals material information, "that information establish[es] substantial grounds for inferring that [the juror] was biased . . . despite . . . protestations to the contrary." (*People v. Price*, *supra*, 1 Cal.4th at pp. 400-401; *see also People v. Morris*, *supra*, 53 Cal.3d at pp. 183-184; *People v. Farris*, *supra*, 66 Cal.App.3d at p. 387; *Dyer v. Calderon*, *supra*, 151 F.3d at p. 979.)

As further explained in *Dyer*, "[t]here is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances has too much at stake in the matter to be considered indifferent." (*Dyer*, *supra*, 151 F.3d at p. 982.)

In addition, the materiality of information withheld by a juror during jury selection must be considered. Certainly, Juror 045882's prior misdemeanor conviction and status as probationer were of great relevance to the voir dire examination and of critical importance to defense counsel's efforts to select an impartial jury. (*See In re Hitchings*, *supra*, 6 Cal.4th at p. 116.) Had he been truthful about his criminal record on voir dire,

defense counsel reasonably could have concluded the juror could not be fair and exercised a peremptory challenge to remove him. Alternatively, it may have been determined upon further questioning that Juror 045882 was excusable for cause due to implied or actual bias. (Code Civ. Proc. § 225, subd. ((b)(1)(B) and (C).) The information not disclosed was significant and cogent evidence of the juror's probable bias. Moreover, Juror 045882 likely knew he had to conceal the information about his criminal record in order to obtain a seat on the jury and avoid excusal.

5. Question 5

The referee found that Juror 045882 was not actually biased against petitioner. (Report at p. 3.) This finding is also not supported by substantial evidence.

Juror 045882 claimed that he was not biased against petitioner. (RT 164:22-65:1, 173:1-3, 182:7-13.) Again, however, he was not a credible witness and his testimony should not be believed. Rather, as already explained, the juror's undisclosed status as a probationer suggested he had a substantial motive to favor the prosecution. Only the District Attorney could help him if he violated the terms of his probation or sought an early termination. The juror's bias was corroborated by other questionnaire answers, revealing he was a strong supporter of the death penalty (Questions 56-59), and his view that being on the jury was a "great chance" for him (Question 30). (See Exhibit B-1.) Why did Juror 045882 believe jury service was a "great chance?" Despite his claim to the contrary, voting in favor of the prosecution could lead to future leniency in the resolution of any issues relating to his probation.

In any event, whatever the reason Juror 045882 wanted a seat on the jury, he lied about his criminal background to achieve that goal. His

deliberate lies are strong evidence that he was not indifferent and that his votes for conviction and a death sentence were motivated by his bias against petitioner.

That bias was evident in the juror's demeanor at the evidentiary hearing. Juror 045882 was eager to please the state by readily agreeing to answers suggested by the prosecutor's leading questions, even when those answers were clearly wrong (or at least inconsistent with his other testimony). As discussed above, the juror readily agreed that some of the questionnaire was vague and hard to understand, but then later could not identify anything in Questions 34 or 54 that was difficult to comprehend. (See RT 165:10-18; 174:19-175:16; 178:13-15.) Similarly, when the prosecutor suggested to Juror 045882 that he did not mention his misdemeanor conviction in response to Question 34 because he did not view the case as involving an arrest, the juror immediately agreed, even though he later claimed not to have even thought about the conviction when reviewing the questionnaire. (See RT 167:12-18; 177:19-78:7.)

In contrast, the juror's attitude during direct examination by petitioner's counsel was more argumentative and defensive. For example, when asked if he had been concerned that disclosing his conviction and probation status would have resulted in his excusal, Juror 045882 responded, "no," and then interjected an additional comment not responsive to the question. The juror deflected blame to the court for the omission, arguing "the Courts could have pulled that up and already told me, no, you can't be a juror because of your misdemeanor or your felony; right? They could have looked that up. Said, hey, you're excused because of that –." (RT 147:16-23.) The juror's differing attitudes on direct and cross-examination confirmed his continuing bias against petitioner.

C. Petitioner is Entitled to Relief

1. Juror 045882 Committed Misconduct

Contrary to the referee's findings, the evidence at the reference hearing established that Juror 045882 intentionally concealed his prior misdemeanor conviction and probation status during jury selection. That deliberate omission constituted misconduct. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 111.)

Even assuming arguendo that Juror 045882's failure to disclose his recent misdemeanor conviction was somehow inadvertent, it does not follow that misconduct was absent. Indeed, two decisions of the Court of Appeal have stated that a juror's concealment of relevant information during voir dire need not be intentional in order for a constitutional violation to occur. (*People v. Diaz*, *supra*, 152 Cal.App.3d at p. 934 ["A juror's concealment, regardless whether intentional, during voir dire examination of a state of mind which would prevent a person from acting impartially is misconduct constituting an irregularity for which new trial may be granted"]; *People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 929 ["Intentional concealment of relevant facts or the giving of false answers by a juror during the voir dire examination constitutes misconduct"]; *but see People v. Kelly* (1986) 185 Cal.App.3d 118, 125 and *People v. Jackson* (1985) 168 Cal.App.3d 700, 704-706.)

This Court has twice acknowledged that a split exists in the decisions of the Court of Appeal, but has not had occasion to resolve "whether juror concealment must be intentional before it constitutes misconduct." (*In re Hitchings*, *supra*, 6 Cal.4th 87, 114-116 and fn. 5; *People v. Carter* (2005) 36 Cal.4th 1114, 1208.) However, even those cases that have questioned whether honest voir dire mistakes can form the basis for impeachment of a

verdict have acknowledged that "juror misconduct may still be found where bias is clearly apparent from the record." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 646, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1175.) An "honest mistake on voir dire" can result in the reversal of a judgment if there is "proof that the juror's wrong or incomplete answer hid the juror's actual bias." (*In re Hamilton, supra,* 20 Cal.4th at p. 300.)

Juror 045882's status as a probationer in Kern County gave him a motive to curry favor with the Kern County District Attorney, who would be prosecuting him for any probation violations. He may well have believed that by helping to convict petitioner of a capital murder he would receive in return favorable treatment from the District Attorney if he had future problems complying with his probation conditions or if he sought early termination of his probation. He may also have feared that a vote for the defense would lead the prosecution to retaliate by scrutinizing him more carefully for possible violations of his probation. In a related context, it is well settled that a prosecution witness serving a probation sentence has a "potential bias or prejudice based on concern of jeopardy to his probation." (*People v. Espinoza* (1977) 73 Cal.App.3d 287, 291, citing *Davis v. Alaska* (1974) 415 U.S. 308, 311; *People v. Lent* (1975) 15 Cal.3d 481, 485.) The same "potential bias or prejudice" exists when a probationer serves as a juror in a criminal trial. Even if Juror 045882 had some other, unknown motive for seeking a seat on the jury, the fact remains he lied about his criminal background, a strong indication he was a biased juror.

It is also significant that the information concealed by Juror 045882 was highly relevant to the selection of a fair and impartial jury. A juror's disclosure of a criminal record and probation sentence is likely to result in an excusal either for cause or by peremptory challenge.

An excusal for cause of a prospective juror who did not disclose his misdemeanor criminal record during voir dire was upheld by this Court in *People v. Morris*, supra, 53 Cal.3d 152. In *Morris*, the prospective juror responded in the negative when the court asked whether he had ever been "arrested" or "in jail for anything." Later, the prosecutor produced a rap sheet showing misdemeanor convictions including two drunk driving offenses, and two arrests for obstructing and resisting an officer which did not result in convictions. The trial court granted the prosecutor's motion to excuse the juror for cause. (*Id.*, at p. 183.)

On appeal, Morris claimed error because the prospective juror was not specifically asked whether he had been charged with a crime. According to *Morris*, the prospective juror's answer could have been correct if he was not arrested, but surrendered himself, and if he did not spend time in jail. This Court readily rejected Morris's argument, explaining that whether the prospective juror was taken into custody or surrendered himself, he was nevertheless arrested. "'An arrest is made by an actual restraint of the person, *or by submission to the custody of an officer.*'" (*Ibid*, quoting Pen. Code § 835 (italics in original).) Excusal of the prospective juror was proper because "[c]oncealment by a potential juror constitutes implied bias justifying disqualification." (*Id.*, at pp. 183-184; *see also People v. Bradford* (1997) 15 Cal.4th 1229, 1334 [juror properly excused for cause when trial court learned of juror's failure to disclose convictions for battery and disorderly conduct that occurred three years before].)

2. The Presumption of Bias Resulting from Juror 045582's Misconduct Was Not Rebutted

Here, Juror 045882's misconduct, along with the surrounding

circumstances, indicate a substantial, unrebutted likelihood the juror was actually biased against petitioner. As this and other courts have recognized, a juror's concealment of his misdemeanor record "established substantial grounds for inferring that [he] was biased." (*People v. Price*, *supra*, 1 Cal.4th at pp. 400-401; *People v. Morris*, *supra*, 53 Cal.3d at pp. 184-184; *People v. Farris*, *supra*, 66 Cal.App.3d at p. 387; *People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 929; *Dyer v. Calderon*, *supra*, 151 F.3d at p. 979.) In addition, the juror's lack of candor was coupled with both a determination to serve on the jury and strong support for the death penalty. The juror's determination to be seated on the jury was evidenced by his answer to Question 30 of the questionnaire, which asked about his attitude toward jury service. The juror felt being on the jury was "a great chance for" him. (Exhibit B-1, at p. 9.) The questionnaire also revealed the juror's strong support for the death penalty. When asked to describe his feelings about capital punishment, the juror wrote, "If guilty why not." (*Id.*, at p. 15.) He further explained that he never had a different view of the death penalty, that the death penalty was imposed too seldom, that the death penalty was not wrong for any reasons, and that he would have no trouble voting for the death penalty in the appropriate case. (Id., at p. 16.)

All of these circumstances make it substantially likely that Juror 045882 concealed information about his criminal record in order "to finagle a seat on the jury so [he] could lobby for a conviction and death sentence." (*Dyer v. Calderon*, *supra*, 151 F.3d 970, 981.) Moreover, even in the absence of any vindictive bias against petitioner, Juror 045882 was unfit to serve on petitioner's jury.

> Whether the desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs, by the

> hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.

(*Id.*, at p. 982.)

In addition,

> [i]f 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 obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

(*Id.*, at p. 983; see also *Green v. White* (9th Cir. 2000) 232 F.3d 671, 677.)

As a result of Juror 045882's misconduct, there is a reasonable probability that petitioner was convicted and sentenced to death by a jury that included at least one biased juror.

VI.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of habeas corpus should be granted.

DATED: August 4, 2015

Respectfully submitted,

MARK GOLDROSEN
Attorney for Petitioner
Robert Wesley Cowan

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT uses 13 point Times New Roman font and contains 9,153 words.

DATED: August 4, 2015

Respectfully submitted,

MARK GOLDROSEN

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 255 Kansas Street, Suite 340, San Francisco, California 94103; and that on August 4, 2015, I served a true copy of PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT on the parties below by depositing a true copy of the original thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at San Francisco, California addressed as follow:

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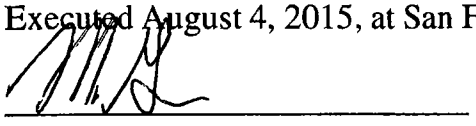

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