SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

In re SCOTT LEE PETERSON On Habeas Corpus	Case No. SC055500A Related to Cal. Supreme Court No. S230782 **ORDER ON WRIT OF HABEAS CORPUS**

INTRODUCTION

Scott Lee Peterson ("Petitioner") was convicted of murdering his wife and unborn child after a jury trial. He claims in a Petition for Writ of Habeas Corpus that he was deprived of his constitutional right to a fair and impartial jury because of a trial juror's[1] alleged concealment of bias during voir dire. (Petition for Writ of Habeas Corpus ("Petition"), p. 96.)[2] Petitioner

[1] The juror was identified by name during the evidentiary hearing with her consent, but this Court will continue to use the identifier used by the California Supreme Court and will refer to the juror as "Juror No. 7."

[2] In an order dated February 15, 2022, this Court took judicial notice of the habeas pleadings filed in this case with the California Supreme Court, including the Petition for Writ of Habeas Corpus, Claim One, and the informal pleadings filed by the parties. (Order Re Respondent's Request that the Court Take Judicial Notice of Respondent's Pleadings, filed February 15, 2022.) The Petition included 9 exhibits as part of Claim One: Exhibits 8, 44-47, 49-52. To be comprehensive, the Court also takes judicial notice of the transcripts and court records in *People v. Peterson*, San Mateo County Superior Court, SC55500A; in the direct appeal, *People v. Peterson*, S132449; and in the habeas proceedings, *In re Scott Lee Peterson on Habeas Corpus*, S230782.

claims that his conviction should be vacated because the juror committed prejudicial misconduct by providing false answers in her jury questionnaire during the jury selection process.

Petitioner's Petition was originally filed in the California Supreme Court in conjunction with his direct appeal. In October 2020, the Supreme Court issued an Order to Show Cause, remanding the case to the San Mateo Superior Court and requiring Respondent "to show cause . . . why the relief prayed for should not be granted on the ground that Juror No. 7 committed prejudicial misconduct by not disclosing her prior involvement with other legal proceedings, including but not limited to being the victim of a crime, as alleged in Claim 1." (*In re Scott Peterson on Habeas Corpus*, S230782, Order filed on Oct. 14, 2020.)

On remand, this Court reviewed the full record, conducted a five-day evidentiary hearing, and considered the extensive briefing submitted by the parties.[3] For the reasons set forth in detail below, the Petition is DENIED.

PROCEDURAL HISTORY

In April 2003, Petitioner was charged with the December 2002 murders of his wife Laci Peterson and their unborn child, Conner, in violation of Penal Code section 187. The information added a multiple murder special circumstance in violation of Penal Code section 190.2, subdivision (a)(3). Petitioner pled not guilty and was tried by jury.

A five-month jury trial began on June 1, 2004. (Petition, p. 17.) The jury began deliberations on November 3, 2004. (*Ibid.*) The jury continued deliberating until noon on November 9, when the first of two jurors was dismissed.[4] (*Ibid.*) This juror was replaced by alternative juror No. 2—the juror who ultimately became Juror No. 7 and whose questionnaire and voir dire are the subject of Petitioner's habeas claim. Juror No. 7 ultimately deliberated in

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[3] Petitioner was represented by Clifford Gardner, Esq., Habeas Corpus Resource Center, by and through Shelley J. Sandusky, Esq., and Andras Farkas, Esq., and Pat Harris, Esq. of the Law Office of Pat Harris. Respondent was represented by the Stanislas District Attorney Birgit Fladager and Special Assistant District Attorney, David Harris.

[4] The reasons for dismissal of these two jurors are not relevant to the Petition.

both the guilt and penalty phases of the trial. (*See* Reporter's Transcript ("RT") 345:22-346:13.)

After another juror was dismissed and replaced, deliberations resumed and continued until November 12, 2004, when the jury found Petitioner guilty of first-degree murder and guilty of the lesser included offense of second-degree murder. (20 Trial Clerk's Transcript ("CT") 6133.) The jury found the multiple murder special circumstance true. (*Ibid.*) During the penalty phase, the jury returned a death verdict and Petitioner was sentenced to death. (*Ibid.*; 21 CT 6462-6469.)

Petitioner appealed the jury verdict and death sentence to the California Supreme Court. While his direct appeal was pending, Petitioner filed the instant Petition. On August 24, 2020, the California Supreme Court unanimously affirmed Petitioner's conviction but reversed his death sentence. (*People v. Peterson* (2020) 10 Cal.5th 409, cert. denied sub nom. *Peterson v. California* (2021) 141 S.Ct. 1440.) On October 14, 2020, the Supreme Court issued its Order to Show Cause on the Petition. (*In re Scott Lee Peterson on Habeas Corpus*, S230782.)

The case was remanded to the Superior Court for further proceedings related to both the death penalty and the Petition. On May 28, 2021, the District Attorney informed the Court that it would no longer seek the death penalty and on December 8, 2021, the Court resentenced Petitioner to life in prison without the possibility of parole, leaving the Petition pending for further proceedings.

On the Petition, Respondent filed a Return and Petitioner filed a Denial. Because Respondent's Return contained new documentation regarding Juror No. 7, of which Petitioner was previously unaware, the Denial included additional factual allegations related to the juror misconduct claim.[5] A Supplemental Return and Supplemental Denial followed.

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[5] In its Return, Respondent provided documentation showing that in November 2001, Juror No. 7's ex-boyfriend, Eddie Whiteside, was charged with domestic violence against Juror No. 7 and pled no contest to battery. (Return, pp. 51-53.) Because Juror No. 7 had not disclosed the incident in response to Question 74 in the jury questionnaire asking if she had ever been the victim of a crime, Petitioner made additional factual allegations in his Denial to the Return. (*See* Denial, pp. 11-13.)

After reviewing the Returns and Denials, the Court scheduled an evidentiary hearing for February 25, 28, and March 1, 2022. Testimony resumed on March 24 and concluded on March 25, 2022. (RT 370:4-375:20; 400:13-18.) The parties filed post-evidentiary briefs, and oral argument was held on August 11, 2022. The matter was taken under submission on September 16, 2022, following the submission of proposed memorandums of decision by both sides.[6]

FACTUAL BACKGROUND: CHALLENGED STATEMENTS

Petitioner's claims concern statements made by Juror No. 7, both in her answers to questions in the jury questionnaire and during in-person voir dire.

A. Juror No. 7's Answers to the Jury Questionnaire

The jury selection process began on March 4, 2004. (Petition, p. 17.) Prospective jurors were asked to complete a 116-question, 20-page, written questionnaire under penalty of perjury. (Exhibit ("Exh.") 4.)[7] On March 9, 2004, under penalty of perjury, Juror No. 7 filled out her jury questionnaire. (*Id.* at p. 20.) She did not seek a hardship discharge. (*Id.* at p. 21.) Relevant here are questions 54a, 54b, and 74.[8] Juror No. 7's answers were as follows:

> 54a. "Have you ever been involved in a lawsuit (other than divorce proceedings)?"
> Juror No. 7 checked "NO."
>
> 54b. "If yes, were you: ___The plaintiff ___The defendant __Both."
> Juror No. 7 left 54b blank.

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[6] The evidentiary hearing was briefly re-opened by order dated December 8, 2022, to correct an error in an exhibit that had been admitted at the request of Petitioner. Exhibit 1, now sealed, contained a full social security number of Marcella Kinsey. Ms. Kinsey's role in the habeas proceeding is explained later in this Order. Rule 1.201 of the California Rules of Court mandates, in pertinent part, that attorneys who file papers in the court's public file, redact all but the last four digits of a social security number and only file that portion of the social security number where required. (Cal. Rules of Court, rule 1.201(a)(1) & (b).) The rule very clearly states that the purpose of this requirement is "[t]o protect personal privacy and other legitimate interests." (*Id.* at (a).) Exhibit 1 was replaced by stipulation of the parties dated December 15, 2022, with Exhibit 1A. The correction delayed the Court in issuing this Order by December 16, 2022.

[7] Unless otherwise indicated, all references to exhibits are to habeas evidentiary hearing exhibits.

[8] In the Petition, Petitioner also claimed Juror No. 7 gave a false answer to question 72 on the questionnaire, which asked if she had ever "participated in a trial as a party, witness or interested observer?" (*See* Petition, pp. 97-100, 107.) Petitioner failed to address question 72 at the evidentiary hearing or in his post-hearing brief. The Court addresses this claim below.

74. "Have you, or any member of your family, or close friends, ever been the VICTIM or WITNESS to any crime?"
Juror No. 7 checked "NO."

(*Id.* at pp. 9-10, 14.)

In addition to these questions, Juror No. 7 gave answers to other questions that provided the trial attorneys additional information about her and her views of the case. For instance, Juror No. 7 was unable to state where her parents were born, putting "?" in the space for her answers. (Exh. 4, p. 3.) She listed high school as her educational background, (*id.* at p. 4), with "[s]ome [c]ollege or [t]ech [s]chool" as a "medical asst., CNA." (*Id.* at p. 6.) Despite answering that she received training as a medical assistant, she responded "NO" to the very next question which asked "[h]ave you ever studied or received training in medicine, psychology, psychiatry, social work, sociology, or counseling?" (*Ibid.*) Her questionnaire answers also contained misspellings.[9]

Juror No. 7 provided her view on the death penalty as well. Question 107 asked "[w]hat are your feelings regarding the death penalty?" Juror No. 7 responded, "if without a doubt someone did something that bad, all the evidence was there then if that is the sentence given then the person needs to have that sentence." (Exh. 4, p. 19.) Similarly, when asked "[w]hat are your feelings regarding life in prison without the possibility of parole?" in Question 108, she responded "same as above. 'if' without a doubt all evidence is there."[10]

B. In-Person Voir Dire of Juror No. 7

After filling out her questionnaire, Juror No. 7 returned in person on April 12, 2004, to be questioned by the trial court and counsel during the phase of the trial known as "voir dire."[11]

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[9] Juror No. 7 wrote out "Home Heath care" in response to Q. 32; "police acadamey class" (Q. 44); "no feeling's" (Q. 40); "cat & dog's" (Q. 63); "just the basic's." (Q. 91); "They help serv the people." (Q. 73).

[10] The standard applied in criminal proceedings is "proof beyond a reasonable doubt." (*See* CALCRIM Nos. 103, 220.) Based on her answers to the questionnaire, Juror No. 7 was, at the time, using a different standard of "without a doubt" yet neither side followed up with her regarding this response during in person voir dire.

[11] Voir dire is the examination, by oral and direct questioning, of the prospective jurors, following the completion of the trial judge's initial examination. (*See* Code Civ. Proc., section 223.)

(Exh. 5.)[12] Initially, the trial court asked Juror No. 7 how long her employer would pay her for jury service given that the expected length of the trial was set for five months. When Juror No. 7 responded that her employer would only pay for "two weeks" the trial judge excused her. (*Id.* at pp. 4598:22-4599:3.) Juror No. 7 did not protest or indicate on the record any hesitation with being excused. (*Id.* at p. 4599:4-7.)

Juror No. 7 testified at the evidentiary hearing that after she was excused, she "grabbed [her] things" and was starting to leave when Petitioner's counsel, Mark Geragos, requested that she remain. Juror No. 7 recalled that she had stepped across "about three chair lengths" before Mr. Geragos asked that she not be dismissed. (RT 247:21-248:6.)

> Q. And when you said the Judge dismissed you, the Judge basically did what?
>
> A. I don't remember exactly how it went, but he said your job is not paying and you're dismissed. And I grabbed my things and I stood up from the chair and I thanked him. And I started to walk out, and Mr. Geragos said I object or something along those lines of whatever his legal term was, and I sat back down.

(*Id.* at 133:6-13.) Juror No. 7 recalled that during voir dire she informed the trial judge that she did not fill out a hardship because she "lived with [her] mother and [her] kid's father, so financially [she] would be okay." (*Id.* at 133:19-23; *see also* Exh. 5, pp. 4600:10-19, 4610:2-18.)

The transcript of the April 12, 2004, voir dire is consistent with Juror No. 7's memory of her interaction with the trial judge. (Exh. 5, pp. 4598:22-4599:26.) After Mr. Geragos interceded, Juror No. 7, like some of the other prospective jurors, indicated her willingness to serve despite only limited jury service payment by her employer. (*Id.* at p. 4600:1-17.)

During voir dire, Mr. Geragos expressed to Juror No. 7 that what he was "really" concerned about were the answers to publicity questions that she listed on her questionnaire. (Exh. 5, p. 4623:12-24.) Mr. Geragos asked Juror No. 7 about publicity and out of court discussions she had about Petitioner's guilt or innocence, including discussions about cheating.

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[12] Juror No. 7's juror number for the jury selection phase of the trial was 6756. (Exh. 4, p. 20.)

Q. Yeah. Now when the people would express their opinions to you, kind of what I'm getting at, is did you, I mean did you express any kind of an opinion back? Did you say Yeah, that looks bad, or he was cheating on his wife, or anything along those lines?

A. Yeah, I mean, I –yeah, it does look bad. If anything I said it's not looking good.

Q. Okay. Now when you come in here, do you think that you – I know that we asked those questions, and who knows, I mean, you know you've never been through this.

A. Right.

Q. I've never been through this; the judge has never been through a case like this. But do you think that you can set that kind of – the fact that you have expressed an opinion aside?

A. I think I can.

(*Id.* at p. 4624:10-25.)

There was no follow-up regarding Juror No. 7's opinion about Petitioner's cheating after this limited colloquy. In addition, at no time during the voir dire did either side ask Juror No. 7 about issues pertaining to domestic violence, define the term "lawsuit," or make any additional inquiries to refine the questions in the questionnaire, despite the District Attorney acknowledging in open court that other jurors had informed the court that at least some of the questions were not clear. (*See* Exh. 5, pp. 4618:21-4619:8.)

PETITIONER'S CLAIMS

According to Petitioner, Juror No. 7 committed misconduct by intentionally providing false answers in her jury questionnaire. Petitioner's theory is that, because of the unmatched pre-trial publicity in the case, prospective jurors were aware of the People's theory that Petitioner assaulted his pregnant wife, killing her and their unborn child, while cheating on her. During jury selection, Petitioner contends, Juror No. 7 concealed that when she was five-months pregnant, she too had been threatened, and she sought (and received) a restraining order after hearing, stating in her restraining order petition that she feared for herself and the life of her unborn child. The restrained party was Marcella Kinsey, the ex-girlfriend of Juror No. 7's ex-boyfriend, Eddie Whiteside. She also failed to reveal an alleged domestic violence incident that occurred in 2001 involving Mr. Whiteside. Petitioner contends that Juror No. 7 concealed

this material and relevant information because she was actually biased against Petitioner and wanted to be on the jury to punish him for what she believed he had done to his unborn child.

Following the filing of Respondent's Return and Supplemental Return, and Petitioner's Denial and Supplemental Denial, the following core material factual allegations are in dispute:

Factual allegation No. 22: "Petitioner alleges that [Juror No. 7] wanted to sit in judgment of Mr. Peterson, in part to punish him for a crime of harming his unborn child – a crime that she personally experienced when Marcella Kinsey threatened [Juror 7]'s life and the life of [Juror 7]'s unborn child." (Petition, p. 102; Denial to the Return ("Denial"), p. 21.)

Factual allegation No. 23: "For this reason, [Juror No. 7] was actually biased against Petitioner." (Petition, pp. 102-103; Denial, p. 21.)

Factual allegation No. 24: "Juror [No. 7]'s bias, based on her own victimization as a woman whose unborn child was threatened by another, was confirmed during deliberations. Ten jurors voted to convict Mr. Peterson of second degree murder of the unborn child. Juror [No. 7] was a holdout juror, who strenuously argued that the killing of the unborn child was first degree murder. (Exh. 8 to the Petition at HCP-000238.) During deliberations, Juror [No. 7] passionately, and personally, argued to her fellow-jurors, 'How can you not kill the baby?, [Juror No. 7] said, pointing to her stomach.' (*Ibid.*) As the jurors recounted the deliberations, 'The issue of fetus versus a living child also came into play for some jurors, but not for [Juror No. 7.] "That was no fetus, that was a child," [Juror No. 7] said. "Everyone heard I referred to him as 'Little Man.' If he could have been born, he would have survived. It's unfair. He didn't give that baby a chance."' (*Ibid.*)" (Petition, p. 103; Denial, pp. 14, 16-17.)

Factual allegation No. 26: "In letters to petitioner, [Juror No. 7] disclosed an obsessive interest in the death of Petitioner's unborn child." (Petition, pp. 103-104; Denial, p. 22.)

Factual allegation No. 33: "Juror [No. 7] concealed on voir dire a subject that was extremely important and emotionally critical to her: that she had personally experienced the threat of losing a child through the intentional, harassing conduct of her ex-boyfriend's girlfriend." (Petition, p. 106; Denial, p. 22.)

Factual allegation No. 34: "Juror [No. 7]'s experience of a juror deeply concerned about losing an unborn child through intentional misconduct of another was material to the issues in petitioner's case, which similarly involved the death of an unborn child through misconduct of another." (Petition, p. 106; Denial, p. 22.)

TESTIMONY AND EVIDENCE AT THE HEARING

The Court determined that an evidentiary hearing was required to resolve the parties' disputes over the allegations. The following summarizes the evidence related to Petitioner's claims.

A. Evidence Adduced

1. Juror No. 7's December 10, 2020, Declaration

The first witness called by Petitioner was Juror No. 7. She was questioned for almost two days. Initially she appeared nervous. Her attorney, Geoffrey Carr, was present in court. After several preliminary questions, Mr. Carr invoked Juror No. 7's right to remain silent, (RT 21:2-7), and the Respondent, District Attorney, presented the Court with a grant of immunity, which was signed and entered into the record. (*Id.* at 21:10-25.)

Petitioner started his examination of Juror No. 7 by directing her attention to the declaration she signed on December 10, 2020, included in Respondent's Return. Juror No. 7 confirmed she understood what perjury meant. (RT 23:8-9.) Juror No. 7 was directed to specific statements made in the declaration asking if they were truthful and accurate. As to some statements, she responded that they were "absolutely" truthful and accurate; to others she responded "yes" or "yeah"; and to some she testified "more or less" and/or gave an explanation. Relevant to the Court's inquiry are some of the following questions and answers:

Q: We were on question 5. … Statement 5. If you look at paragraph 5, was paragraph 5 a truthful and accurate statement? [13]

A: Absolutely.

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[13] Paragraph 5 stated: "I responded to the juror questionnaire candidly, truthfully, and to the best of my ability." (Exh. 10, ¶ 5.)

Q: Okay. … Was paragraph 8 a truthful and accurate statement?[14]

A: Absolutely.

Q: I will take you to paragraph 10. Take a second and read it. Was paragraph 10 a truthful and accurate statement?[15]

A: Yes.

Q: Take you to paragraph 11. Was paragraph 11 a truthful and accurate statement?[16]

A: Yeah.

Q: I'll take you to paragraph 12, please. Was paragraph 12 a truthful and accurate statement?[17]

A: Yes.

Q: Thank you. I'll skip you down to paragraph 16. Is paragraph 16 is [sic] a truthful and accurate statement?[18]

A: Yes.

Q: I'll skip you to paragraph 18, please. Was paragraph 18 a truthful and accurate statement?[19]

A: Yes.

(RT 26:22-27:21.)

Juror No. 7 confirmed as truthful and accurate her statement that at the time of jury selection she did not recall that she had requested a restraining order against Marcella Kinsey in November of 2000. (RT 28:7-14; Exh. 10, ¶ 19.) She clarified, however, that her statement that Ms. Kinsey had come to her home to confront her about Juror No. 7's relationship with

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[14] Paragraph 8 stated: "I had never been a plaintiff or defendant to my memory, and therefore placed an 'X' in the response field to question '54a.'" (Exh. 10, ¶ 8.)

[15] Paragraph 10 stated: "At the time that I answered these questions—together and right in the middle of a twenty-page questionnaire—I understood the word 'lawsuit' to mean and refer to a suit for money or property. I did not think the question was a reference to any other appearance in court." (Exh. 10, ¶ 10.)

[16] Paragraph 11 stated: "I am not a lawyer and have no legal education, so my understanding of the word 'lawsuit' at the time that I filled out the form excluded other types of court proceedings. I also looked to the language of question '54b.,' which referred to 'plaintiff' and 'defendant' to confirm my understanding of the questionnaire." (Exh. 10, ¶ 11.)

[17] Paragraph 12 stated: "I was not asked to clarify this written response by the judge or either of the parties or their representatives. No one followed up with me to explain what the word 'lawsuit' meant to me. No one defined the word 'lawsuit' to include being in court for any reason." (Exh. 10, ¶ 12.)

[18] Paragraph 16 stated: "I answered all the questions that were asked of me by the judge, the prosecutors, and the defense attorneys. I clarified my oral responses when I was asked to do so, an opportunity I was not given when I filled out my written questionnaire." (Exh. 10, ¶ 16.)

[19] Paragraph 18 stated: "At no time during the jury selection process did any court case in which I was involved cross my mind." (Exh. 10, ¶ 18.)

Ms. Kinsey's ex-boyfriend, Eddie Whiteside, was "more or less" truthful and accurate because Ms. Kinsey had not come to confront *her,* but rather Mr. Whiteside. (RT 28:15-22; Exh. 10, ¶ 20.)

Juror No. 7 answered "yes" in response to paragraph 21's accuracy which stated in part that she "sought a restraining order based on that behavior [described in paragraph 20]."[20] Juror No. 7 also confirmed the statements in that same paragraph that she "did not hire an attorney" but rather "filed the petition myself." (RT 28:24-26; Exh. 10, ¶ 21.)

With respect to paragraph 22, Juror No. 7 explained that the whole paragraph was "somewhat true."[21] (RT 29:26-30:10.) She clarified that she did not consider herself a victim of Ms. Kinsey's behavior testifying that "[i]t's been a long time but, if I recall, there may have been a court date, and I do remember telling the Judge, 'I'll drop all charges against Marcella.'" (*Id.* at 30:15-21.) Juror No. 7 confirmed that paragraphs 23 and 24 were truthful and accurate statements.[22] Regarding paragraph 25, she testified that the paragraph was "somewhat" truthful and accurate explaining:

> "It's just different wording than I would – how I would word it. I've been in many fights, and I don't consider myself a victim. Might be different from you or somebody else. You may consider a fight – you may consider that you're a victim, but I don't."

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[20] Juror No. 7's statement and testimony that she sought a restraining order based on Ms. Kinsey's behavior on September 23, 2000, is inconsistent with her later testimony that "the restraining order wasn't as a result of when she came to my house," (RT 44:19-22), but rather because Ms. Kinsey had "continued to bother" her in the following months. (*Id.* at 47:21-48:8.)

[21] Paragraph 22 stated: "I did not and still do not personally know what resulted of Marcella Kinsey's behavior the night that she disturbed my peace. I did not testify against her in any criminal action and cannot state with any level of certainty whether her actions resulted in any conviction or otherwise. Based on the fact that I did not participate in any criminal proceedings, I did not consider myself a victim of a crime. I still do not. I never sought to prosecute Marcella Kinsey for her behavior for that very reason." (Exh. 10, ¶ 22.)

[22] Paragraph 23 stated: "I did not interpret the circumstances leading to the petition for a restraining order as a crime. I still do not." Paragraph 24 stated: "Minor indignities, shoving matches, raising of voices, and other undignified means of communicating frustration do not stick out to me, let alone cause me to feel 'victimized' the way the law might define that term." (Exh. 10, ¶¶ 23 and 24.)

(RT 31:21-32:2.)[23]

Paragraphs 26-30 of her December 10, 2020, declaration dealt with the November 2001 incident involving herself and Eddie Whiteside. When questioned about paragraph 30, Juror No. 7 testified that the first sentence ["No one has ever contacted me about this incident and it never crossed my mind during jury selection of the trial of Scott Peterson."] was true and that the next two sentences ["This incident did not stick out to me as anything out of the ordinary, nor did it ever cross my mind when I was responding to the juror questionnaire. Had it crossed my mind, or had I been asked about it, I would have immediately disclosed the incident."] were "[a]bsolutely" true. (RT 33:7-17; Exh. 10, ¶ 30.)

Juror No. 7 was asked about paragraph 31 which stated, "At no time before, during, or after the Scott Peterson trial did I ever for a moment harbor any personal animus toward Scott Peterson, nor was I biased against him or in favor of the prosecution." (Exh. 10, ¶ 31.) She testified as follows:

Q: Okay. Paragraph 31. Would you take a look a minute to read that?

A: This is partially true, yes.

Q: Okay. When you say partially true what do you mean by that?

A: Before the trial I didn't have any anger or any resentment towards Scott [Peterson] at all. After the trial it was a bit different because I sat through the entire trial and listened to the evidence.

Q: Okay. So what is partially true is the before the trial but not necessarily after the trial: did I get that right?

A: Right.

(RT 33:20-34:6.)

As to the three remaining paragraphs, Petitioner only asked Juror No. 7 about paragraphs 32 and 33, not 34.[24] Petitioner again questioned Juror No. 7 about each sentence.

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[23] Paragraph 25 stated: "I had been involved in many loud verbal disagreements. I have never considered myself a victim and I do not know whether lawyers and judges would agree or disagree with my opinion." (Exh. 10, ¶ 25.)

[24] Paragraph 32 stated: "I did not purposely withhold any information from the court during the jury selection process. I have had countless unpleasant experiences in my life. Those outlined above did not

Q: Okay. Thank you. Now if you go to paragraph 32.

A: First sentence is absolutely true.

Q: I'm sorry. You're absolutely right. I should have gone sentence by sentence, so the first sentence is true and accurate?

A: It is.

Q: Second sentence please.

A: Yeah. I've had unpleasant situations in my life.

Q: Okay. So that's true and accurate?

A: Sure.

Q: The third sentence?

A: Absolutely true.

Q: Okay and the last sentence?

A: Absolutely true.

Q: Now, let's go to the last one in paragraph 33 if you would read the first sentence there please and tell us if that's true and accurate?

A: That's absolutely true.

Q: Okay and the last sentence?

A: That's true.

(RT 34:7-35:2.)

2. Juror No. 7's Testimony About the Marcella Kinsey Incident

Juror No. 7 testified about the November 27, 2000, application for a restraining order involving Marcella Kinsey, the former girlfriend of Juror No. 7's then boyfriend, Eddie Whiteside.[25] Juror No. 7's memory surrounding her November 27, 2000, application against Ms. Kinsey and the December 13, 2000, restraining order hearing in San Mateo Superior Court

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cross my mind during any portion of the jury selection process or during the trial. They did not play any role in my evaluation of the evidence or my verdicts." Paragraph 33 stated: "I did not form any conclusions regarding the evidence in the case until I was called into the jury deliberation room. I recall discussing the evidence with the remaining jurors before a unanimous verdict was reached." Paragraph 34 stated: "I have an abiding conviction that the charges are true based on the evidence that was presented at trial. This abiding conviction is based solely on the strength of the evidence presented at trial." (Exh. 10, ¶¶ 32, 33, 34.)

[25] There is a slight ambiguity in the record. In her November 2000 petition for a restraining order, Juror No. 7 refers to Mr. Whiteside as her ex-boyfriend at the time of the September 23, 2000 incident. (*See* Exh. 45 to the Petition for Habeas Corpus, HCP-000905.) During her testimony, however, Juror No. 7 referred to Mr. Whiteside as her boyfriend at the time. (*See, e.g.*, RT 45:16-26.)

was imperfect given the passage of over two decades. Juror No. 7 was able to recall some things but not others. For example, Juror No. 7 was able to recall bringing the restraining order forms to court but not going and testifying about the incidents at a hearing. (RT 41:20-42:17; 187:3-189:1.)

Juror No. 7's testimony about the reason for seeking a restraining order against Ms. Kinsey was inconsistent at points. Juror No. 7 was shown the court filings for the application for a restraining order. (Exhibit 1A)[26] She acknowledged that the handwriting was hers but did not remember filling out the model forms. (RT 36:19-39:15.) "I mean, I remember the incident, but I don't remember filling the paperwork out. I know I did it." (*Id.* at 39:14-15.) Despite confirming the language in paragraphs 20 and 21 of her December 10, 2020, declaration that she sought a restraining order based on the behavior of Ms. Kinsey coming to the home where she lived and causing a disturbance on September 23, 2000, Juror No. 7 testified at the hearing that had Ms. Kinsey not continued with *other* conduct after that incident, she would not have filed for a restraining order. (*Id.* at 43:26-44:22; 47:21-48:13.) According to Juror No. 7, the September incident "show[ed] a history of being a little stalkerish," which is why Juror No. 7 included it in her restraining order application. (*Id.* at 48:3-4.) The "other" alleged conduct Juror No. 7 listed in the application included Ms. Kinsey: (1) telling Mr. Whiteside that she saw his car in Juror No. 7's driveway; (2) calling Juror No. 7's new home phone on November 11, 2000, and hanging up when Juror No. 7 answered; thereafter calling Juror No. 7's phone again and saying it was "Kim" when Juror No. 7 answered the second time; (3) allegedly checking the caller I.D. at Mr. Whiteside's mother's home to get Juror No. 7's new phone number; and (4) following Juror No. 7 on November 21, 2000, in her car and pointing her finger at Juror No. 7.[27] (Exh. 45 to the Petition for Habeas Corpus, HCP-000909.)

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[26] Exhibit 1A (admitted for limited purposes during the 2022 evidentiary hearing) and Exhibit 45 (attached to the Petition) contain the same documents related to Juror No. 7's restraining order litigation against Ms. Kinsey.

[27] On December 13, 2000, San Mateo Superior Court Commissioner Rosemary Pfeiffer granted Juror No. 7's request for a restraining order and ordered Ms. Kinsey to "stay at least 100 yards away" from Juror No. 7 and her unborn child. (Exh. 1A, p. 4.)

Juror No. 7 also testified that she did not think that a petition for a civil harassment restraining order was a lawsuit and did not recall the Kinsey incident[28] or the petition for the restraining order when she was filling out the jury questionnaire. She testified several times that it "never crossed [her] mind, ever." (RT 84:12-20; 278:13-23.) Juror No. 7 further testified that, "I don't hold on to things. I didn't remember." "That was over. I didn't hold any grudges. It was past me." (*Id.* at 84:24-85:3.)

Juror No. 7 admitted that she filed a second lawsuit against Ms. Kinsey seeking damages as a result of Ms. Kinsey's conduct. The second lawsuit was filed in Santa Clara County and sought "lost wages and a number of other things." (RT 42:18-43:7.) No records of the suit were admitted into evidence. Juror No. 7 stated on the stand that she understood a lawsuit to mean "[w]hen you sue somebody for money," though she later clarified that in her mind she "didn't sue [Ms. Kinsey]" because she "dropped [the] charges" the first time she went before a judge about the civil lawsuit. (*Id.* at 290:23-291:11; *see also* 42:25-43:6; 94:7-11.) When asked why she dropped the suit, Juror No. 7 replied, "'[c]ause it was over with, and her and I came to the realization that we were both stupid, and this was over a stupid guy, and there was no need to continue." (*Id.* at 94:12-15.) Juror No. 7 stated that after she dropped the lawsuit, "Marcella and I stood outside and we talked and kind of made amends." (*Id.* at 94:22-95:25.) As to the timing, Juror No. 7 testified that she was still pregnant with her third child when she went to court and dropped the lawsuit against Ms. Kinsey.[29] (*Ibid.*)

Given the timeline in the record, it appears that Ms. Kinsey and Juror No. 7 had a truce for over a year. According to Juror No. 7, however, she believed that Ms. Kinsey "still held some animosity towards me because of the love she had for [Mr. Whiteside]." (RT 96:4-6.) Juror No. 7 denied that Ms. Kinsey continued to harass her. (*Id.* at 96:7-8.)

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[28] The September 23, 2000, incident where Ms. Kinsey came to Juror No. 7's home is, at times, in this Order referred to as the "Kinsey incident."

[29] At the time of the restraining order litigation, Juror No. 7 had two older children. The first child Juror No. 7 had with Mr. Whiteside was and is her third child. The third child was also the "unborn" child referred to in the restraining order application.

Juror No. 7 testified that she did not know if Ms. Kinsey was ever *charged* with violating the restraining order. The only evidence in the record regarding any alleged restraining order violations were two incidents, one reported on July 21, 2001 and the other reported on June 29, 2002. (RT 505:24-513:19.) Juror No. 7 only testified about the second violation.

According to Juror No. 7, she was in the hospital having her fourth child[30] when the alleged violation occurred. During her hospitalization, there was a video taken which showed Ms. Kinsey at Mr. Whiteside's mother's house holding her third child. "They were having a party, and she was on video holding my son." (RT 97:3-7; 192:18-193:20.)

Juror No. 7's testimony about what she did after she saw the video was unclear. She testified that she learned about Ms. Kinsey being near her son after she was out of the hospital. (RT 193:12-20.) After seeing the video, Juror No. 7 reached out to either an East Palo Alto police officer or a detective. She testified that she "want[ed] to say it was an East Palo Alto police officer," but she was not "a hundred percent sure." (*Id.* at 96:20-97:2.) She then testified that the person she contacted might have been a detective who was "kind of a family friend." (*Id.* at 194:24-195:5.) Juror No. 7 testified that she did not remember another incident where Ms. Kinsey violated the restraining order. (*Id.* at 97:25-98:2; 192:4-20.)

Juror No. 7 was asked if she believed that Ms. Kinsey's act in holding her son, who was also covered by the December 13, 2000, restraining order after hearing, was a crime.

> Q. Can you tell me, did you believe that Ms. Kinsey was committing a crime when she was with your child?
>
> A. Actually, no, I didn't. I talked to the police out of spite.
>
> Q. You called the police out of spite? [...]
>
> A. Yeah, I did. She was actually being nice to my child, so it wasn't a crime. I was just being spiteful.

(RT 195:6-7; 195:21-26.)

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[30] Mr. Whiteside is also the father of Juror No. 7's fourth child. (RT 68:26-69:2.)

3. Juror No. 7 and the Incident With Eddie Whiteside

Juror No. 7 was questioned about a November 2, 2001, purported domestic violence incident involving Eddie Whiteside that ended in his arrest. Juror No. 7 testified that she had an on-and-off relationship with Mr. Whiteside for about 6 years. (RT 69:8-10.) During their relationship,"[h]is stuff remained at [her] house all the time" even though he was not always there. (*Id.* at 70:14.) They had two sons together. (*Id.* at 66:4-6; 69:9-19.)

With respect to the domestic violence incident, Juror No. 7 testified to the following:

Q. Now at some point Mr. Whiteside and you, you discussed, had a disagreement where you went inside the bedroom; is that what I understand?

A. Yes.

Q. And he came in and followed you?

A. I followed him.

Q. Okay. And when you followed him what happened next?

A. I handed my mom my son, and my mom was in the kitchen and he was already in the bedroom, and I walked into our bedroom and I shut our door and I ran up to him and I took off on him.

Q. You say took off?

A. I'm sorry, I punched him.

Q. How many times?

A. I don't recall.

Q. Was it more than one?

A. Probably.

Q. Okay. Did he punch you back?

A. Never touched me.

(RT 70:16-71:9.)

Juror No. 7 testified that during this incident, she believed her lip got caught on her braces, "probably when I was screaming at him [Mr. Whiteside]," causing a small cut. Juror No. 7 testified adamantly that Mr. Whiteside was not responsible for the cut on her lip. In her words, "[h]e didn't do it," "he never touched me." (RT 71:10-23.)

Juror No. 7 testified that she was unsure if Mr. Whiteside had any injuries.

Q. Did he have any injuries?

A. Him? I don't know.

Q. Yeah. You don't recall when you hit him he was injured?

A. No. He was pretty dark skinned, so you can't really tell if he had bruises or not.

(RT 71:24-72:3.)

As a result of the altercation, Mr. Whiteside called the police.

Q. What happened when the police showed up?

A. What I recall is I opened the door when the police showed up, and I said – can I be candid?

Q. Yes, please.

A. I said, "I didn't fucking call you. I don't have shit to say to you. Go talk to him. He called you."

Q. Okay.

A. And how – I remember the police said, "What happened to your lip?" And I said, "I don't know what happened to my lip," because I didn't even know there was a little cut. And I said, "Get the fuck out of my house 'cause I didn't call you."

(RT 72:14-26.)

Juror No. 7 was aware that the police took Mr. Whiteside away that night and he went to jail. (RT 73:5.) Juror No. 7 testified that Mr. Whiteside returned to her house the next day and stayed with her for a few years thereafter. (*Id.* at 74:24-75:4.) When asked whether she was aware he was going to court as a result of the charges against him, she testified that although she "knew he had that case," she did not "discuss the case" with him "back then." (*Id.* at 75:5-25.) As she put it, their relationship was "complicated" at that time and "he didn't share all that with me." (*Id.* at 75:8-10.) Juror No. 7 testified that at the time she was unaware that he had pled guilty to any charge. (*Id.* at 76:23-25.)

Juror No. 7 recalled that a female police officer tried, "that night or after the fact," to get her to say that Mr. Whiteside hit her, but Juror No. 7 refused. "They wanted me to say that Eddie hit me, and Eddie never hit me, so I wasn't going to then, now, or any time. Eddie never hit me, so I was not a victim of domestic violence." (RT 78:5-80:6.)

Juror No. 7 recalled receiving a restraining order protecting her from Mr. Whiteside but testified that she ignored it. "He didn't touch me, so he didn't have to stay away from me." "I

wasn't scared." (RT 77:2-14) She also testified she threw the restraining order away. (*Id.* at 82:19-22.)

During her testimony, Juror No. 7 agreed that hitting Mr. Whiteside was a crime but she denied being a witness to a crime because she "didn't see [her]self do it." "I don't stand outside my body and watch, but I did punch him, yes." (RT 81:9-21.) Juror No. 7 denied hitting Mr. Whiteside other than that one incident. (*Id.* at 73:19-24.)

When asked about the Whiteside incident[31] as it related to jury selection in Petitioner's trial, Juror No. 7 said it never crossed her mind. Juror No. 7 testified that had this incident crossed her mind or had she been asked about it, Juror No. 7 would have immediately disclosed it. (RT 281:20-282:9.)

4. Juror No. 7 as a Victim or Witness to a Crime

Despite being questioned by Petitioner several times, Juror No. 7 was adamant throughout her two-day testimony that at the time of jury selection she did not believe she was the victim of or witness to a crime involving either Ms. Kinsey or Mr. Whiteside. "I wasn't and I'm still not a victim." (RT 281:1-282:1.) As it pertained to Ms. Kinsey, Juror No. 7 testified she did not see Ms. Kinsey slash Eddie Whiteside's tires, (*id.* at 64:19-22); she did not witness Ms. Kinsey kicking down the door, (*id.* at 65:1-3); and it was probably Mr. Whiteside who told her Ms. Kinsey sprayed him with mace. (*Id.* at 231:5-6.)

Juror No. 7 acknowledged that she considered Ms. Kinsey "stalking" and kicking in the front door of her home, crimes. (RT 57:12; 56:17-21.) Juror No. 7 explained, however, that she only sought a restraining order because "at the time [she] was pregnant, and [she] knew [Ms. Kinsey] and [Juror No. 7] would fight." Juror No. 7 did not want to fight Ms. Kinsey while she was pregnant. (*Id.* at 48:10-13.) Juror No. 7 was unwavering in her testimony that throughout her life "[she's] been in many fights," and therefore does not consider herself a victim. "Might be different from you or somebody else. You may consider a fight – you might

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[31] The November 2, 2001, incident is, at times, in this Order referred to as the "Whiteside incident."

consider yourself a victim, but I don't." (*Id.* at 31:25-32:2; *see also* 30:15; 59:9-22; 64:19-22; 65:1-3; 80:5-6; 81:9-18; 230:26-6; 281:1-7.)

B. Other Witnesses Called During the Evidentiary Hearing

1. Greg Beratlis

Greg Beratlis served as an original juror in Petitioner's case and participated in jury deliberations for both the guilt and penalty phase. (RT 344:26-345:20.) During the guilt phase of the deliberations, two jurors were removed and two alternates were substituted in, the first alternate being Juror No. 7. (*Id.* at 345:22-346:13.)

Mr. Beratlis explained that prior to the alternates being seated, the jurors "had a process" in the jury deliberation room. In addition to charting things out and putting things on the wall to assist in the deliberations, (RT 364:12-18), the jury "spent a little time respecting each other's thoughts," and "giv[ing] a little time to basically get out what [they] had kept inside for the whole trial." (*Id.* at 346:24-26.) According to Mr. Beratlis, when Juror No. 7 entered the jury deliberation room, she "blurted out" that Petitioner should pay for killing "Little Man." (*Id.* at 352:4-10.) Mr. Beratlis' understanding of "Little Man" was that she was talking about Laci's unborn child, Conner. (*Id.* at 352:24-353:5.) After making that comment, and since Juror No. 7 was the "new kid on the block," Mr. Beratlis immediately informed her "that we have a process in place before she just gave her opinion." (*Id.* at 365:19-366:2.) According to Mr. Beratlis, Juror No. 7 was not making any signs or gestures when she made the comment about "Little Man." Mr. Beratlis also testified that Juror No. 7 did "nothing aggressive in any way." (*Id.* at 352:20-23.)

2. Alfreda Bracksher

Alfreda Bracksher was called by Petitioner to authenticate records from the East Palo Alto Police Department ("EPAPD"). Ms. Bracksher is the current Custodian of Records and has been a records clerk for EPAPD for approximately 10 years. (RT 493:2-12; 515:1-3.) Ms. Bracksher was familiar with the Records Information Management System ("RIMS") that the EPAPD currently uses to maintain, among other things, police reports. RIMS was not in place

in 2001. In the old system, police officers would write a paper report and narrative. (*Id.* at 515:20-25; 520:7-521:2.) While the face sheets were later entered into RIMS, some of the original reports and narratives were purged. (*Id.* at 521:3-7.)

Petitioner issued a subpoena to EPAPD for records pertaining to the November 2001 incident between Juror No. 7 and Mr. Whiteside (incident EP01-306-17). (Exh. 9.) In response, Ms. Bracksher filled out a declaration as custodian and returned one record of incident EP01-306-17. (Exh. 8.) Ms. Bracksher testified that Petitioner's counsel sent her a declaration that she was to fill in and return. (RT 518:17-21.) On the stand, Ms. Bracksher admitted that she made a mistake in paragraph 5 of her November 30, 2021, declaration. Paragraph 5 incorrectly stated that Ms. Bracksher had prepared the "original records from which the accompanying copies were made." (*See* Exh. 8, ¶ 5.)

Ms. Bracksher testified as follows:

Q. But you didn't prepare that report, did you?

A. No, I did not. And what – I guess I misinterpreted it because when I read it, I produced it, and that's what I thought. When I signed it [her declaration], that's what I meant. I didn't mean that I actually generated the report. I provided the report. I printed the report which in hindsight is not generating now that I think about it.

(RT: 519:14-21.)

Ms. Bracksher admitted to another error in the records she submitted. When asked by Petitioner's counsel to certify screen shots of other incidents appearing in RIMS, E01-202-19 and E02-182-18 involving Ms. Kinsey allegedly violating Penal Code section 166(a)(4)—contempt to disobey a court order—she admitted that she mistakenly also certified an email sent by someone unrelated to the EPAPD.

Q. Do you see the same red stamp?

A. Yes.

Q. So just to be clear, when you were asked for a certified copy, you put the red stamp on the email that the HRC [Habeas Corpus Resource Center] sent to you?

A. Yeah, I did. I don't know why, but yes.

Q. I'm sorry. I couldn't hear the last part of what you said.

A. I said yes, I did. I don't know why, but yes, I did.

Q. Can you certify somebody else's email?

A. Not at all. No.

(RT 538:10-21.)

With respect to the incident involving Eddie Whiteside, Ms. Bracksher testified that in the RIMS report, Juror No. 7 was identified as a "confidential victim" and Mr. Whiteside as the suspect. (RT 505:1-15; *see also* Exhs. 8, 23.) Regarding the alleged restraining order violations by Ms. Kinsey, Ms. Bracksher testified that one incident was reported on July 21, 2001 (E01-202-19) and the other was reported on June 29, 2002 (E02-182-18). With respect to the July 21, 2001, incident, the victim was reported to be Juror No. 7. (RT 508:22-509:5.) As to the June 29, 2002, incident, Juror No. 7 was again listed as the victim. (*Id.* at 511:3-14.) Neither incident listed Juror No. 7's son as the victim.

3. Shareen Anderson

Shareen Anderson was listed as a witness by Petitioner. Ms. Anderson had interviewed Juror No. 7 after the trial as part of an A&E documentary. Prior to her testimony at the evidentiary hearing, Ms. Anderson invoked the journalist privilege pursuant to Evidence Code section 1070. In lieu of calling her, the parties stipulated as follows:

> If called to testify, Shareen Anderson would testify that in 2017, she interviewed [Juror No. 7] at [Juror No. 7's] home. After the interview, as Ms. Anderson was leaving, she saw a photograph on a wall of a small child. The child was wearing clothing that had the words "Little Man" visible.

(RT 485:10-23.)

4. Mark Geragos

Mark Geragos was listed as a witness for Petitioner. In support of the original habeas petition, Mr. Geragos submitted a declaration. (*See* Exh. 49 to the Petition for Habeas Corpus.) The parties stipulated that Mr. Geragos would not be called as a witness, but that if called to testify, Mr. Geragos would testify to the following:

1. I was lead counsel for defendant Scott Peterson in *People v. Peterson*, SC055500A, and I conducted jury selection. As part of the process, I reviewed the jury questionnaires of prospective jurors.

2. Juror 7 was initially selected as an alternate juror. She later became a seated juror. I reviewed her jury questionnaire. I also questioned her during voir dire.

3. When Juror 7 was selected as an alternate, and later seated, I did not know any of the circumstances that have been alleged by Petitioner regarding Juror 7's background.

4. I had been a trial lawyer for almost 40 years. Had I known any of the circumstances that have been alleged by Petitioner regarding Juror 7's background I would have challenged Juror 7 for cause. There is no way I would have wanted such a juror on the jury which would decide Mr. Peterson's fate. If the trial court did not grant a for-cause challenge, I would certainly have exercised a peremptory challenge on this juror.

(Joint Stipulation to Testimony of Mark Geragos, pp. 1-2, filed February 28, 2022.)

5. Justin Falconer

Justin Falconer, one of the original jurors, was listed as a witness by Petitioner. At the time of the evidentiary hearing, Mr. Falconer was in Iraq training dogs with the United States Military. (RT 438:2-23; Petitioner's Witness List, filed December 27, 2021.) Petitioner made an offer of proof that if called, Mr. Falconer would testify to four points: (1) Juror No. 7 talked about Conner a lot and referred to him as "Little Man" during the trial; (2) Juror No. 7 said she was having money problems as the result of her job not paying her; (3) Juror No. 7 told him that she could have been excused for a financial hardship but she stayed because she wanted to be on the jury; and (4) Juror No. 7's statements about a book deal. (Petitioner's March 14, 2022, Status Conference Statement, pp. 10-15.)

Petitioner requested that Mr. Falconer be permitted to appear for the hearing through Zoom or other remote technology. Respondent opposed. According to Respondent, Mr. Falconer was in a "unique situation" because the trial judge dismissed him as a juror citing a lack of credibility. (RT 431:2-20.) Petitioner did not dispute that Mr. Falconer had been dismissed for the reasons stated by Respondent. Respondent argued, and the Court agreed, that in person testimony was required so that the Court, as fact finder, could observe Mr. Falconer

as it had all witnesses during the evidentiary hearing, and assess his credibility in the same manner as it would other live witnesses.[32] (*Id.* at 436:11-25.)

In addition to opposing a remote appearance, there was confusion as to whether the Habeas Corpus Resource Center ("HCRC") investigator had secured a second declaration from Mr. Falconer that it had not provided to Respondent despite court-ordered discovery. (RT 424:12-430:26.)

The Court granted Petitioner additional time to secure the attendance of Mr. Falconer in person. (RT 438:19-439:6.) Ultimately, Mr. Falconer was unable to appear for in-person testimony to conclude the evidentiary hearing. (*Id.* at 482:21-483:3.)

LEGAL STANDARDS

A. Applicable Legal Principles

A criminal defendant has the constitutional right to trial by an impartial and unbiased jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *People v. Merriman* (2014) 60 Cal.4th 1, 95.) "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." (*In re Boyette* (2013) 56 Cal.4th 866, 888, internal citations and quotation marks omitted.) "An impartial jury is one in which no member has been improperly influenced [citations] and every member is ""capable and willing to decide the case *solely* on the evidence before it"" [citation]." (*In re Hamilton* (1999) 20 Cal.4th 273, 294, italics added.) Thus, the constitutional right to an impartial jury is violated even if only a single juror is biased[33]. (*People v. Merriman*, *supra*, 60 Cal.4th at p. 95, citing *People v. Nesler* (1997) 16 Cal.4th 561, 578.)

"'[D]uring jury selection the parties have the right to challenge and excuse candidates who clearly or potentially cannot be fair. . . . Voir dire cannot serve this purpose if prospective

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[32] Being able to view the demeanor of the witnesses and evaluate their veracity is "of vital importance when, as here, the critical decision turns on the credibility of the witnesses. (*In re Hitchings* (1993) 6 Cal.4th 97, 114.)

[33] Although the evidence of Petitioner's guilt is overwhelming and not in reasonable doubt, the strength of the evidence is not relevant when considering the question of juror misconduct, and it has not been considered as part of this proceeding. (*In re Carpenter* (1995) 9 Cal.4th 634, 654.)

jurors do not answer questions truthfully.'" (*In re Cowan* (2018) 5 Cal.5th 235, 247, quoting *In re Hamilton*, *supra*, 20 Cal.4th at p. 295.) "A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct. Such misconduct includes the unintentional concealment, that is, the inadvertent nondisclosure of facts that bear a substantial likelihood of uncovering a strong potential of juror bias." (*In re Manriquez* (2018) 5 Cal.5th 785, 796, internal citations and quotation marks omitted.)

When a petitioner makes a claim of juror misconduct, the court conducts a two-step inquiry. The court must "first determine whether there was any juror misconduct. Only if we answer that question affirmatively do we consider whether the conduct was prejudicial." (*People v. Collins* (2010) 49 Cal.4th 175, 242.)

If the petitioner establishes juror misconduct by the preponderance of evidence, then the court proceeds to the second step of the inquiry: whether the misconduct requires reversal of the judgment. "'Once a court determines a juror has engaged in misconduct, a defendant is presumed to have suffered prejudice. [Citation.] It is for the *prosecutor* to rebut the presumption by establishing there is "no *substantial likelihood* that one or more jurors were actually biased against the defendant." [Citations.]'" (*In re Manriquez*, *supra*, 5 Cal.5th at p. 797.) "This presumption of prejudice may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." (*In re Hitchings, supra,* 6 Cal.4th at p. 119, internal citations and quotation marks omitted.)

B. Burden of Proof

"Because a petition for a writ of habeas corpus is a collateral attack on a presumptively final criminal judgment, 'the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' [Citation.] To obtain relief, the petitioner must prove by a preponderance of the evidence the facts that establish entitlement to relief."

(*In re Cowan*, *supra*, 5 Cal.5th at p. 243.) "'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.'" (*People v. Duvall* (1995) 9 Cal.4th 464, 474, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.)

Where, however, the court determines that a juror has committed misconduct by concealing "relevant facts or gives false answers" during jury selection, the court presumes prejudice and the burden shifts to the People to demonstrate the absence of prejudice. (*In re Manriquez*, *supra*, 5 Cal.5th at p. 797.) "Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton, supra*, 20 Cal.4th at p. 296.) "In other words, the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias." (*In re Boyette*, *supra*, 56 Cal.4th at p. 890.)

This objective standard is "a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts." (*In re Hamilton, supra*, 20 Cal.4th at p. 296.) Our Constitution demands that jurors be selected from a cross section of the community as a means of ensuring the defendant's right to an impartial jury. (*People v. Crittenden* (1994) 9 Cal.4th 83, 119.) This requires a process that allows for varied levels of education and diverse backgrounds and experiences, which "is both the strength and the weakness of the institution.... 'The criminal justice system must not be rendered impotent in quest of an ever-elusive perfection.... Jurors are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias.'" (*In re Hamilton, supra*, 20 Cal.4th at p. 296, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 654-655.)

The United States Supreme Court has also recognized that jurors are not held to a standard of perfection. "The varied responses to respondents' question on *voir dire* testify to the fact that jurors are not necessarily experts in the English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of the terms which are relatively easily understood by lawyers and judges. Moreover, the statutory qualifications for jurors require only a minimal competency in the English language." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 555.)

Actual bias is "a state of mind . . . in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (*In re Manriquez*, *supra*, 5 Cal.5th at p. 799, citing Code Civ. Proc., section 225, subd. (b)(1)(C).) Indeed, "[a] sitting juror's actual bias, which would have supported a challenge for cause, renders him 'unable to perform his duty' and thus subject to discharge and substitution." (*People v. Keenan* (1988) 46 Cal.3d 478, 532.)

Generally, "[t]he gravity of the misconduct correlates with the amount of proof necessary to rebut the presumption of prejudice." (*People v. Echavarria* (2017) 13 Cal.App.5th 1255, 1267.) "In addition to the nature and seriousness of the misconduct, courts have recognized the strength of the evidence of misconduct and the probability that actual prejudice may have ensued is relevant to a determination whether the presumption of prejudice has been rebutted." (*People v. Hill* (1992) 3 Cal.App.4th 16, 38.)

A juror's intentional concealment is strong proof of prejudice, but it is not dispositive of actual bias; "an unintentional nondisclosure may mask actual bias, while an intentional nondisclosure may be for reasons unrelated to bias." (*In re Manriquez*, *supra*, 5 Cal.5th at p. 798.) However, if an unintentional concealment is caused by an honest mistake on voir dire, it "cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias." (*Id.* at pp. 797-798, quoting *In re Hamilton, supra*, 20 Cal.4th at p. 300.)

Courts have relied on specific factors in determining whether a juror intentionally concealed relevant information. A juror volunteering undisclosed information after the trial is one of them. (*See, e.g.*, *In re Manriquez*, *supra*, 5 Cal.5th at p. 804 [juror disclosed childhood abuses in post-trial questionnaire]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 646 [two months after trial, juror informed defense counsel of having been stabbed 15 times when he was a teenager].) "[I]f the juror 'had formed improper opinions about the case and intended to act in ways prejudicial to the defense, common sense suggests that the juror would have simply remained silent.'" (*In re Manriquez*, *supra*, 5 Cal.5th at p. 804, quoting *People v. Ray* (1996) 13 Cal.4th 313, 344.)

Pretrial publicity, pretrial questionnaire, or voir dire may also alert a juror to the importance of their undisclosed personal experiences, and trigger relevant memories. If the court finds that a juror "had a reason to anticipate the importance of her own [...] experiences while completing the pretrial questionnaire or participating in voir dire, her nondisclosures may [indicate] an attempt to conceal [them], which could in turn indicate juror bias." (*In re Manriquez*, *supra*, 5 Cal.5th at p. 809.) Such a conclusion requires the line of questioning by counsel and the court to be sufficiently clear though. (*People v. Blackwell* (1987) 191 Cal.App.3d 925, 929; *In re Hitchings*, *supra*, 6 Cal.4th at p. 116.)

In addition to these specific factors, courts assessing whether a non-disclosure was intentional also look at the reasons given by the juror for failing to disclose the information. Courts may find a non-disclosure to have been inadvertent when a juror *credibly* provides a reason for the non-disclosure. (*In re Manriquez*, *supra*, 5 Cal.5th at p. 806; *In re Cowan*, *supra*, 5 Cal.5th at pp. 244-246.) Finally, a juror's partiality can be supported by the surrounding circumstances of the misconduct. (*See In re Hitchings*, *supra*, 6 Cal.4th at p. 120 [juror violated her oath as a juror by discussing the case before trial was over].)

C. Factors Regarding Credibility of Witnesses

The credibility of several witnesses is critical to resolving the factual allegations in dispute. The Judicial Council of California Criminal Jury Instruction ("CALCRIM") 226 and

California Civil Jury Instruction ("CACI") 5003 prescribe the factors to be considered by jurors in determining witness credibility in criminal and civil proceedings. The Court finds that these factors, and the other instructional guidance regarding credibility provided by the Judicial Council, are appropriate in guiding the Court's determination of credibility in this proceeding. Those factors include:

- How well was the witness able to remember and describe what happened?
- What was the witness's behavior while testifying?
- Did the witness understand the questions and answer them directly?
- Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?
- Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?
- How reasonable is the testimony when you consider all the other evidence in the case?
- Did the witness admit to being untruthful?
- Has the witness engaged in other conduct that reflects on his or her believability?
- Was the witness promised immunity ....in exchange for his or her testimony?

(*See* CACI No., 5003, CALCRIM No., 226; *see* also CALJIC No. 2.20.)

Factfinders should not automatically reject testimony just because of inconsistencies or conflicts. As the Judicial Council has explained, it is appropriate to "[c]onsider whether the differences are important or not." (CALCRIM No., 226; *see* also CACI No., 5003.) The law acknowledges the fact that "[p]eople sometimes honestly forget things or make mistakes in what they remember." (CACI No., 5003.) "Also, two people may witness the same event yet see or hear it differently." (*Ibid.*)

Factfinders are instructed to use their "common sense and experience" when evaluating the testimony and to view the reasonableness of the testimony considering all other evidence presented in the case. Finally, if a witness was not truthful about something important, the factfinder "may chose not to believe anything that the witness said." (CACI No., 5003.) However, if a factfinder thinks "the witness did not tell the truth about some things but told the

truth about others, [the factfinder] may accept the part [the factfinder] thinks is true and ignore the rest." (*Ibid.*)[34] Evidence that a witness has lied under oath on another occasion is directly relevant to the witness's credibility. (*See generally People v. Ayala* (2000) 23 Cal.4th 225, 271.)

With these principles in mind, the Court now turns to Petitioner's claims against the backdrop of the record evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court finds that several of the answers provided by Juror No. 7 on her juror questionnaire were false in certain respects. This shifts the burden to Respondent to demonstrate that she was not biased against Petitioner. The Court finds that Respondent has sustained its burden. The Court concludes that Juror No. 7's responses were not motivated by pre-existing or improper bias against Petitioner, but instead were the result of a combination of good faith misunderstanding of the questions and sloppiness in answering. The Court's findings are based on the evidence in the record, including an assessment of the credibility of Juror No. 7 and the other witnesses pursuant to the factors recited above.

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[34] Evidence Code section 780 lists similar factors for consideration for determining the credibility of a witness. These factors include "any matter that has any tendency in reason to prove or disprove the truthfulness of [her] testimony, including but not limited to any of the following:

(a) [Her] demeanor while testifying and the manner in which [s]he testifies.
(b) The character of [her] testimony.
(c) The extent of [her] capacity to perceive, to recollect, or to communicate any matter about which [she] testifies.
(d) The extent of [her] opportunity to perceive any matter about which [she] testifies.
(e) [Her] character for honesty or veracity or their opposites.
(f) The existence or nonexistence of a bias, interest, or other motive.
(g) A statement previously made by [her] that is consistent with [her] testimony at the hearing.
(h) A statement made by [her] that is inconsistent with any part of [her] testimony at the hearing.
(i) The existence or nonexistence of any fact testified to by [her].
(j) [Her] attitude toward the action in which [she] testifies or toward the giving of testimony.
(k) [Her] admission of untruthfulness.

A. Juror No. 7's Answers to Questions 54a and 54b Were False

Read together, questions 54a and 54b were asking Juror No. 7 if she had ever been involved in a lawsuit, and if so, as the plaintiff, the defendant, or both. Respondent contends Petitioner did not demonstrate that Juror No. 7's failure to list her petition for a restraining order was misconduct because Juror No. 7 did not understand that the request and hearing for a restraining order was a lawsuit because it was not a "suit for money or property." (People's Post Evidentiary Hearing Brief, pp. 29-30.) The Court disagrees.

With respect to Question 54b, it is clear from her testimony that Juror No. 7 identified herself as a "Plaintiff" when she filled out the form for the restraining order. She testified that she understood what was meant by "Plaintiff" and "Defendant" in the petition and explained that she was the "Plaintiff" because she was "the person asking for the restraining order." (RT 197:2-198:20.) In the petition for her restraining order, the word "Plaintiff" appears at least 10 times. (*See* Exh. 1A.)

In addition, Juror No. 7 testified that she did, in fact, seek money damages from Ms. Kinsey in another proceeding after the restraining order. That proceeding was in Santa Clara Superior Court. While the records of that proceeding are not available and not part of this record, Juror No. 7's testimony was clear: it was a lawsuit for money. (RT 42:18-43:6.)

Therefore, the Court finds that Juror No. 7's answers to Questions 54a and 54b were incorrect. There is a meaningful argument that "incorrect," in the context of this case, does not mean "false" because the questions at issue require the interpretation of legal terminology and Juror No. 7 was an unsophisticated layperson. Although the Court credits this argument, it finds that it is better addressed in the context of whether Juror No. 7 was motivated by bias in giving her answer. Accordingly, the Court concludes that the legally incorrect answer provided by Juror No. 7 was "false" and the burden will shift to Respondent. (*In re Manriquez, supra,* 5 Cal.5th at p. 797 ["A juror who conceals relevant facts or gives false answers during voir dire … commits misconduct."].)

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B. Juror No. 7's Answer to Question 74 was False

The second issue presented[35] concerns Juror No. 7's response to Question 74: "Have you, or any member of your family, or close friends, ever been the victim or witness to any crime?" The Court finds that Juror No. 7's response to Question 74 was also false for several reasons.

First, Juror No. 7 testified that she heard Ms. Kinsey stand outside her home yelling for her and Mr. Whiteside to come outside "so [they] could fight," and then kicked in Juror No. 7's front door. (RT 46:15-47:15; 56:15-16.) Juror No. 7 also knew that Mr. Whiteside had been a victim of Ms. Kinsey's behavior that day when she slashed the tires of his car and tried to spray him with mace. (*Id.* at 230:26-231:6.) Juror No. 7 admitted on the stand that she considered kicking in the front door and the slashing of Mr. Whiteside's tires to be crimes. (*Id.* at 56:17-26.) When asked why she called the police that day, Juror No. 7 conceded that it was because she "thought a crime was being committed." (*Id.* at 55:24-56:3.)

Second, Juror No. 7 saw Ms. Kinsey following her in her car and testified that Ms. Kinsey was showing a history of being "stalkerish." (RT 47:26-48:8.) Again, when asked by Petitioner whether she considered Ms. Kinsey stalking her to be a crime, Juror No. 7 answered, "sure." (*Id.* at 57:1-2.) Third, while Juror No. 7 testified that Mr. Whiteside did not assault her

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[35] As noted above, Petitioner appears to have abandoned the issue regarding Question 72 on the Questionnaire which reads: "Have you ever participated in a trial as a party, witness, or interested observer?" Juror No. 7 checked the box "No." Petitioner failed to cover Question 72 during the 2022 hearing or in his post-hearing briefing, but he has not formally waived or abandoned it. Assuming it was not abandoned, there is no evidence in the record that Juror No. 7 was ever a party, witness or interested observer *in a trial*. The record evidence is that Juror No. 7 dismissed the lawsuit against Ms. Kinsey in Santa Clara County Superior Court before it went forward to trial and the restraining order hearing was not a trial as that term is commonly understood. A hearing is a court appearance on a specific matter in which a court session takes place to review evidence and arguments that are presented in an effort to resolve a disputed issue, generally resulting in an order issued by the court. A trial, on the other hand, is more appropriately described as the examination of facts and law put in issue in a cause resulting in a final judgment usually against an individual or entity. (*See, e.g.,* Code Civ. Proc. section 527.6 [Temporary Restraining Order and Order After Hearing]; sections 588-598 [Mode of Trial]; and sections 607-613 [Conduct of Jury Trial].) However, even assuming the answer to Question 72 was false, the same facts underlying the Kinsey incident apply to Question 72. Put another way, the findings of this Court would be the same.

during the incident in her home in November 2001, she admitted she hit him, consequently admitting that Mr. Whiteside had been a victim of her assault.

Similar to the previous questions, whether Juror No. 7 had been the "victim" or "witness" of a "crime" raises issues regarding the interpretation of terms that have particular legal meanings. However, the issue before the Court at this stage of the findings is not whether Juror No. 7 misunderstood the terms; it is whether she gave an incorrect answer. For purposes of Question 74, the Court finds that her incorrect response was "false."

C. Juror No. 7 Was Not Biased Against Petitioner[36]

Having found that Juror No. 7's failure to disclose (1) the incident involving Ms. Kinsey, (2) the civil lawsuit against Ms. Kinsey, and (3) the incident involving her hitting Mr. Whiteside, constitutes misconduct, the Court turns to the next issue: Has the presumption of prejudice based on the finding of misconduct been rebutted? In other words, in reviewing the record as a whole, is there no substantial likelihood that Juror No. 7 was actually biased against Petitioner? For all the reasons set forth below, the Court finds that Juror No. 7 did not engage in prejudicial misconduct by failing to disclose her prior involvement, or the involvement of her family and close friends, in legal proceedings.

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[36] Petitioner relies on the case of *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970 to support his contention that the evidence of the Kinsey incident demonstrates that Juror No. 7 was impliedly biased against him. As a first point, while actual bias is a factual question, implied bias is a legal determination that may exist "in those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." (*Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 766, citations omitted.) These extreme situations might be "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." (*Smith v. Phillips* (1982) 455 U.S. 209, 222 (O'Connor, J., concurring).) In *Dyer,* the federal court found implied bias after the juror, when questioned by the trial court, told the judge that she believed her brother's death was an accident. In fact, the brother had been pistol whipped and shot in the back of the head. Shortly after his shooting, the juror sued the defendant that shot him. In addition, the juror's mother, with whom she lived, testified at the preliminary hearing involving the brother's death. There was also evidence that the juror's husband was in jail and had been arrested on a rape charge a month before trial. (*Dyer v. Calderon, supra,* 151 F.3d at pp. 979-980.) Here, the facts are completely distinguishable from those in *Dyer* and do not support a finding of such an extreme situation.

1. Juror No. 7's Nondisclosures Were Honest Mistakes

i. Juror No. 7 was a Credible Witness

Applying the factors set out in Evidence Code section 780, CALCRIM No., 226 and CACI No., 5003, this Court finds Juror No. 7 to be credible. Juror No. 7's demeanor while testifying was appropriate, respectful, and forthcoming. (CALCRIM No., 226.) Although she appeared somewhat nervous when she initially took the stand, given the publicity in the case and the accusation of misconduct, that nervousness was, in the Court's view, appropriate and justified. During the two days of questioning that followed, Juror No. 7 never lost her temper, or behaved in any manner other than someone who was respectful of the process and understood the seriousness of the proceeding. Juror No. 7 answered the questions presented to her. Juror No. 7's answers were direct and not evasive, and she spoke in a clear manner. (CACI No., 5003; CALCRIM No., 226.) When she was unable to understand the question, she so stated. When she was unable to recall an event, she also so stated.

Despite the passage of time, Juror No. 7's memory of the underlying events giving rise to this proceeding were, for the most part, clear. (CACI No., 5003; CALCRIM No., 226.) The Kinsey incident occurred in 2000 and the Whiteside incident in 2001, yet as to each she was able to describe what happened to the best of her recollection. Juror No. 7 credibly and directly explained: why she requested a restraining order against Ms. Kinsey; the lifestyle she and Mr. Whiteside shared and the events that led to his arrest in 2001; her reasons for "dropping" the civil lawsuit against Ms. Kinsey; and her reason for reaching out to an acquaintance who was also a police officer when she claimed that Ms. Kinsey violated the restraining order.

Although Petitioner alleges that Juror No. 7 was biased against him when she filled out her questionnaire in 2004, there is no evidence that her testimony during this proceeding was influenced by bias or prejudice. (CACI No., 5003; CALCRIM No., 226.) Juror No. 7 requested and was granted immunity. (CALCRIM No., 226.) Nothing that she said could have been used against her by the District Attorney. Put another way, she had every reason to be

truthful during the evidentiary hearing. In addition, there is no evidence that Juror No. 7 harbored a personal interest in how this Petition is decided.

ii. Juror No. 7 was not "impacted by the trauma of having her own unborn child threatened."

After hearing and observing Juror No. 7 during two days of testimony, the Court finds that far from being a traumatic life experience as painted by Petitioner, the incident involving Juror No. 7, Ms. Kinsey, and Mr. Whiteside can be described, for lack of a better word, as a love triangle. In this context, it is noteworthy that at the time of the September 23, 2000, incident, Juror No. 7 was approximately 30 years old, and Mr. Whiteside was 22 years old. (Exhs. 4, 8.) Ms. Kinsey was Mr. Whiteside's ex-girlfriend. Juror No. 7 was approximately 3 months pregnant with his child. Juror No. 7 testified that while Mr. Whiteside had all of his belongings at her house, he did not always live there. She specifically described Mr. Whiteside as someone who fit the model for the song "Papa Was a Rolling Stone." (RT 98:14-16.) During oral arguments, Petitioner described the relationship between Mr. Whiteside and Juror No. 7 as "a complex relationship." (8/11/22 Final Arguments RT 166:18-19.) Underscoring the on-and-off again nature of the relationship, is Petitioner's allegation that by the time Juror No. 7 filed for a restraining order two months after the Kinsey incident, Juror No. 7 and Mr. Whiteside appeared to have already broken up. (Exh. 45 to the Petition for Habeas Corpus, HCP-000905 ["4. How is it that you know the defendant (i.e., landlord/tenant, neighbor, etc.)? (Specify): Marcella is my *ex-boyfriends* [sic] ex-girlfriend."], emphasis added.)

Moreover, before Juror No. 7 sought the restraining order, she *called* Ms. Kinsey to "try to put a stop" to Ms. Kinsey's behavior, as alleged by Petitioner's supporting document. (Exh. 45 to the Petition for Habeas Corpus, HCP-000909.) When that attempt failed, she proceeded with the restraining order to avoid "handl[ing] it on the streets." (*Ibid.*) Though by her own admission she has been in many fights in her life, Juror No. 7 testified that at that time she was 5 months pregnant and "rolling around like some dummies on the ground" could cause her to lose the baby. (RT 53:15-19; 57:9-11.)

Understanding Juror No. 7's testimony needs to be put in the context of "common sense and experience." (CACI No., 5009; *see also* CALCRIM Nos., 105, 226.) There are several considerations that the Court takes into account in evaluating her testimony. First, if an individual *actually* fears that another person would harm that individual or the individual's unborn child, it is not reasonable for that individual to actively reach out to the other party and ask them to stop the conduct. Second, Juror No. 7's background needs to be considered in the context of how she viewed Ms. Kinsey's conduct. Jurors should represent a cross section of the community.[37] Juror No. 7 was part of that cross section. She grew up in East Palo Alto, California.[38] She had only a high school education with limited training as a certified medial assistant. Her brother served time in state prison for a drug related offense and her mother was a methadone drug counselor. Juror No. 7 testified repeatedly about the fact that she had been in many fights in her life, but that she did not consider herself to be a victim. (Exh. 10, ¶ 25; RT 31:25-26.) Witnessing her very candid demeanor when she described her life and her life experiences, the Court finds her testimony vis-à-vis Ms. Kinsey, while unusual, to be true.

In addition, Juror No. 7 had four children with three different fathers and never married. When she appeared for jury duty, she had visible tattoos, and her hair was dyed a "bright pinkish-red color." (RT 235:18-24.) As Respondent argued, she appeared to be a juror Petitioner wanted to keep on his jury. (8/11/22 Final Arguments RT 145:22-26.) Consistent with that argument is the fact that the trial court excused her for cause based on a financial hardship *but it was Petitioner's attorney, Mark Geragos, that insisted she remain.*[39]

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[37] (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *Duren v. Missouri* (1979) 439 U.S. 357, 358–367; *People v. Burgener* (2003) 29 Cal.4th 833, 856.)

[38] Between the years of 1983 and 2000, East Palo Alto struggled with high rates of violent crime and gang violence. The crack epidemic had decimated the city and by 1992, the city had gained a reputation of being the U.S. "murder capital" and was the nation's leader in per capita murders that year. (https://www.smcgov.org/district-4-warren-slocum/history-east-palo-alto.) In short, it was a challenging place to grow-up.

[39] There is no indication in the record that Juror No. 7 did anything to resist the trial court's dismissal. (Exh. 10, ¶ 14; Exh. 5, p. 4599:2-12; RT 133:8-13.) She testified that when she was excused, she picked up her belonging and had walked three chair lengths to leave the courtroom when Mr. Geragos insisted she remain. Had Juror No. 7 wanted to be on the jury to punish Petitioner for what he did to Conner, it

Petitioner correctly argues that Juror No. 7's application for a restraining order, which stated that she was seeking the order because she was "in fear for her unborn child" is a past statement that on its face, is inconsistent with Juror No. 7's current testimony that she was not in fear of Ms. Kinsey hurting her or her unborn child. Evidence that a witness has lied under oath on another occasion is directly relevant to the witness's credibility. (*See generally People v. Ayala*, *supra*, 23 Cal.4th at p. 271.) However, in this context, the Court also credits Juror No. 7's "admission ... of untruthfulness." (CALJIC No., 2.20.) Juror No. 7 admitted at the evidentiary hearing that she had been untruthful, and she candidly explained why she requested a restraining order against Ms. Kinsey. In her own words, Juror No. 7 said she did not want to physically fight Ms. Kinsey and risk losing the baby. "[S]he wasn't going to deliberately hurt my child, but if we fought and rolled around like some dummies on the ground then, yes I would be fearful that I would lose my child doing something stupid like that." (RT 53:15-19.)[40]

Juror No. 7 also admitted she was "being spiteful" when she requested the restraining order be both for herself and her unborn child. (RT 52:15-19.) She credibly testified that she had absolutely no "genuine fear" that Ms. Kinsey was going to hurt her child. (*Id.* at 52:20-24.) Juror No. 7's testimony on this point is supported by her alleged behavior immediately prior to and after seeking the restraining order. Juror No. 7 twice initiated contact with Ms. Kinsey: once allegedly by telephone just days before requesting the restraining order, and once *after* the restraining order was issued outside the courthouse after dismissing the civil lawsuit. In both instances she was still pregnant with the unborn child covered by the restraining order.

Juror No. 7 conceded at the evidentiary hearing that she called law enforcement about Ms. Kinsey violating the restraining order approximately two years after it was issued. However, on the stand, Juror No. 7 stated that, again, she was "just being spiteful." (RT

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would be reasonable to conclude that she would have done more to resist dismissal in the beginning. Instead, she accepted the dismissal and started to leave.

[40] Unlike the juror in *Dyer* who *repeatedly* lied to the trial judge about the incident involving the killing of her brother four years earlier, Juror No. 7's testimony about the Kinsey incident was believable with respect to the reason Juror No. 7 requested the order. (*Dyer v. Calderon*, *supra*, 151 F.3d at pp. 979-980.)

195:21-26.) The incident that precipitated Juror No. 7 calling the police was a video of Ms. Kinsey at a birthday party at Mr. Whiteside's mother's house holding Juror No. 7's son—the "unborn" child that was the subject of the restraining order. At the time the video was taken, Juror No. 7 was in the hospital recovering from just having given birth. Juror No. 7 testified that she did not believe Ms. Kinsey was committing a crime when she was with her son. "She was actually being nice to my child, so it wasn't a crime." (*Id.* at 195:6-7, 25-26.) "I talked to the police out of spite." (*Id.* at 195:21-22.)

The Court finds Juror No. 7's testimony about her reason for contacting law enforcement regarding a restraining order violation to be credible given *both* the history between the parties and where Juror No. 7 was when the video was taken: In the hospital, having just given birth to Mr. Whiteside's second child.

The Court also finds Juror No. 7's non-disclosure of the lawsuit against Ms. Kinsey to be an honest mistake. Juror No. 7 forthrightly acknowledged she did, in fact, file a lawsuit seeking money damages against Ms. Kinsey. Her testimony that, in her mind, she "didn't sue her [Ms. Kinsey]" because instead of pursuing the civil lawsuit, Juror No. 7 asked the judge to "drop" the action, is credible. Juror No. 7's testimony is bolstered by the fact that after she asked the judge to "drop" the action, she and Ms. Kinsey made amends outside the courthouse. (RT 42:25-43:6; 94:7-95:25.)

Based on all of the record evidence, the Court is not persuaded that Juror No. 7 was "impacted by the trauma of having her own unborn child threatened," such that she was prejudiced against Petitioner. The Court accepts and credits Juror No. 7's explanations and finds the non-disclosures to be inadvertent.[41] The Court further finds that Juror No. 7 did not

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[41] The Court notes that there are examples of inadvertence and mistakes made by trained professionals in this proceeding. Ms. Bracksher signed a declaration as a custodian of records representing that the original records from which the accompanying copies were made were prepared by her. That statement was incorrect: it was a police officer who prepared the records. In a second instance, Mr. Bracksher certified copies of screenshots of records rather than the records themselves. She admitted this was an error. Another example involves the HCRC. Petitioner's counsel represented to the Court that it is HCRC's "policy" not to keep interview notes of investigators. Rather, after an interview, a declaration

intentionally conceal information on the jury questionnaire to punish Petitioner for what she had herself experienced when she was pregnant. The Court finds credible that for Juror No. 7, these incidents simply did not cross her mind, in the context of these questions as asked during the jury selection process. In Juror No. 7's words, "I don't hold on to things. I didn't remember. It didn't cross my mind." (RT 84:24-25.)

2. Juror No. 7 Was Not a Victim of Domestic Violence

As explained above, Eddie Whiteside is the ex-boyfriend of Juror No. 7 and the father to her two youngest children. Mr. Whiteside lived with Juror No. 7 at the time of jury selection, was present during the Kinsey incident and later named as a witness to an alleged restraining order violation. He was also the named suspect in the purported domestic violence incident involving Juror No. 7. Neither Petitioner nor Respondent listed Mr. Whiteside as a witness. Rather, it was Petitioner's intent to call Mr. Whiteside as a rebuttal witness to impeach Juror No. 7's testimony if necessary. (RT 144:8-10.)

According to Petitioner, Mr. Whiteside had spoken with an investigator from the HCRC, Hannah Gilson, on May 27, 2021, for approximately 15-20 minutes. (Petitioner's Response to Court Inquiry Re: Contact with Eddie Whiteside, p. 3.) Petitioner alleged that during the brief interview, Mr. Whiteside stated that he was not on board with Juror No. 7 staying on the jury for financial reasons, contrary to Juror No. 7's representations to the trial judge and testimony at the evidentiary hearing. (RT 138:4-17.) Pursuant to standard HCRC practice, after interviewing a potential witness, investigators add the statements obtained from the witness to a draft declaration. (Petitioner's Response to Court Inquiry Re: Contact with Eddie Whiteside, Exh. 3 [Declaration of Shelley Sandusky] ¶ 2.) Original notes are not kept once the statements are memorialized in the draft declaration. (*Ibid.*) Once interviews are

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is prepared for the witness and notes are destroyed. This turned out to be incorrect as it pertained to Shareen Anderson, whose interview notes were found after a subsequent search. Finally, Juror No. 7's Questionnaire, (Exh. 4), which has been the centerpiece of the habeas proceedings since 2015, was missing page 22. Upon inquiry by the Court, Petitioner secured page 22, admitted as Exhibit 4A, to complete the form. Exh. 4A did not contain critical information, but it demonstrates that oversights and honest mistakes are made by even the most professional individuals.

completed, the witness is then asked to review the draft declaration and correct any errors. (*Ibid.*) Though Mr. Whiteside initially agreed to meet with the HCRC investigator again, subsequent attempts to speak with him were unsuccessful. (RT 145:21-26.) Consequently, HCRC's draft declaration was never reviewed or signed by Mr. Whiteside.

Petitioner complained during the 2022 evidentiary hearing that he was having problems serving Mr. Whiteside with a trial subpoena. (RT 377:9-20.) Petitioner was given additional time to secure service on Mr. Whiteside. (*Id.* at 383:11-12.) Eventually, service was complete on the evening of March 3, 2022. (*Id.* at 451:1-10.) Petitioner informed the Court that unless Mr. Whiteside voluntarily spoke with counsel before the evidentiary hearing resumed on March 24, 2022, he would not call Mr. Whiteside to testify. (*Id.* at 451:11-452:19.) Ultimately, Petitioner did not call Mr. Whiteside as a witness and neither did Respondent.

Mr. Whiteside's testimony is directly relevant to three points. First, it is relevant to his alleged agreement to carry the financial load brought by Juror 7's service if selected. Second, it is relevant to the September 23, 2000, incident with Ms. Kinsey and the aftermath that followed and third, it is relevant to the purported domestic violence incident in 2001 and Mr. Whiteside's reason for entering his plea. In the Court's view, Mr. Whiteside was a logical witness to call where Petitioner sought to introduce doubt regarding Juror No. 7's motives for wanting to be on the jury and undermine her credibility regarding her account of certain events that transpired.[42] The same, however, could be said for Respondent, whose burden it is to rebut the presumption of prejudice. (*See People v. Ford* (1988) 45 Cal.3d 431, 446-449.)[43] In either

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[42] In Petitioner's Post-Hearing Opening Brief, Petitioner challenges and attempts to undermine Juror No. 7's explanation for failing to disclose the Whiteside incident—that it was *she* who hit Mr. Whiteside—by arguing that her explanation was inconsistent with: (1) Juror No. 7's conduct in 2001 in refusing to exculpate him, (2) Mr. Whiteside's conduct in failing to ask her to testify on his behalf, (3) the false imprisonment and endangering the health of a child charges brought against him, and (4) all of the contemporaneous police and court records regarding the incident. (*Id.* at pp. 22-24, 37, fn.10.)

[43] The Court declines Respondent's invitation to draw an adverse inference under Evidence Code section 412 for Petitioner's failure to call Mr. Whiteside as a witness. (*See* People's Reply to Petitioner's Post-Evidentiary Hearing Brief, p. 9, fn. 5.) Petitioner's decision to not list or call Mr. Whiteside was a judgment call. Moreover, as stated above, Respondent could have just as easily called Mr. Whiteside as a corroborating witness given that it was Respondent's burden to rebut the presumption of prejudice. (*See id.* at p. 10, fn. 5.)

case, Mr. Whiteside's testimony would have either confirmed Juror No. 7's testimony on these subjects, or not.

Consequently, the record evidence as to what happened the night of the alleged domestic violence incident is limited to Juror No. 7's testimony, which the Court finds credible. Juror No. 7 described the incident in a very matter of fact manner, accepted responsibility for hitting Mr. Whiteside, and with the Court's permission, was graphic in the language that she used when the police came to her house after Mr. Whiteside called them. (RT 70:16-72:26.) Moreover, looking at the record as a whole, the Court cannot help but note the semblance between the motives underlying the Kinsey incident and the Whiteside incident. While the Court does not condone violence for any reason, the record is clear that due to his ongoing infidelity, Mr. Whiteside was physically attacked by two women with whom he was romantically linked—Juror No. 7 and Ms. Kinsey—in the span of a little over a year.

Petitioner also contends that Juror No. 7 is not to be believed because it was Mr. Whiteside who was arrested; charged with crimes of domestic violence and child endangerment; who pled to a misdemeanor charge; and who was required to attend domestic violence classes. On its face, Petitioner's argument has merit. Juror No. 7 testified that she knew Mr. Whiteside was the one who was arrested that night. But she also testified that she was not aware of the charges or the fact that Mr. Whiteside entered a plea. Moreover, the arrest and subsequent plea of Mr. Whiteside, should be put in context of the time. In 2001, Mr. Whiteside was a Black man in his early twenties living in East Palo Alto with a woman who appeared to be White. When the police arrived, Juror No. 7 answered the door and told them to "get the fuck out of my house cause I didn't call you." When Juror No. 7 was asked about a cut on her lip, she did not offer an explanation and told the police officers that she did not know what happened to it. (RT 72:14-26.)

Today it is a well-known and well-studied fact that there has been a historical bias in policing. (*See* Marnie Lowe, *Fruit of the Racist Tree: A Super-Exclusionary Rule for Racist Policing Under California's Racial Justice Act* (2022) 131 Yale L.J. 1035, 1037; Elayne E.

Greenberg, *Unshackling Plea Bargaining from Racial Bias* (2020) 111 J. Crim. L. & Criminology 93, 98.) Training is ongoing to address racial bias in law enforcement. (Lowe, *supra*, 131 Yale L.J. at p. 1056, fn 98.) It is, therefore, not unreasonable to conclude that because of his age, race, and the fact that Juror No. 7 had blood on her lip, Mr. Whiteside was the one who was arrested. It is also not unreasonable that Mr. Whiteside simply accepted a plea rather than fight the charges given both his "complicated" relationship with Juror No. 7 and the existing racial bias in the justice system.

For all these reasons, the Court finds credible Juror No. 7's testimony that she was the one who hit Mr. Whiteside and that he never touched her.

3. Juror No. 7 Volunteered Undisclosed Information to Petitioner's Investigator

Petitioner argues that Juror No. 7's lack of cooperation in voluntarily coming forward after trial to reveal the previously undisclosed information in her questionnaire supports a finding that the non-disclosure was intentional. (Petitioner's Post-Hearing Opening Brief, p. 31, citing *In Re Manriquez*, *supra*, 5 Cal.5th at 801-804 [an intentional concealment is strong proof of prejudice].) Petitioner contends that additional post-trial conduct of Juror No. 7 supports their argument. That conduct includes: (1) Juror No. 7 refusing to speak with the defense or Respondent; (2) Juror No. 7 hiring a lawyer; and (3) her refusal to testify at the 2022 evidentiary hearing absent a grant of immunity. (*Id.* at pp. 33-34 [distinguishing *In Re Manriquez* where C.B. admitted her non-disclosure in a post-trial questionnaire and "voluntarily compl[ied] with the parties' … requests for more information."].)

Setting aside that *In Re Manriquez* and the instant case both involve similar explanations for the non-disclosures, the circumstances post-trial here are distinguishable. First, there was no post-trial questionnaire in this case like there was in *Manriquez*. Ten years passed between Petitioner's guilty verdict and death sentence and the first time Petitioner's investigator from HCRC sought out Juror No. 7. Most importantly, and contrary to Petitioner's assertions, Juror No. 7 *did* speak with his HCRC investigator when invited, and Juror No. 7 was

candid with her responses. (*See* RT 223:4-14.) Juror No. 7 spoke with Petitioner's investigator on November 2, 2015. (*Id.* at 220:14-19; 250:1-9.) Though Juror No. 7 could not really recall the specifics of the discussion, (*id.* at 223:16-20; 225:18-226:4; 250:15-23), she did recall telling the investigator that "[r]estraining orders don't do any good" and that she "dropped all charges" against Ms. Kinsey. (*Id.* at 268:3-13; 274:3-275:13.) Petitioner does not argue, nor did he put forward any evidence that Juror No. 7 refrained from discussing the Kinsey incident and the civil lawsuit when asked, or otherwise failed to answer any of the investigator's other questions.

Based on this record, the Court does not draw an inference of bias from the fact that Juror No. 7 refused to speak a *second* time with the defense investigator *after* the misconduct claim was made. (*See* Petitioner's Post-Hearing Opening Brief, pp. 15-16, 34.) Petitioner filed his Habeas Petition on November 23, 2015—three weeks after HCRC's *first* interview with Juror No. 7. Juror No. 7 testified that at the time she spoke with the investigator she was unaware whether Petitioner had filed any paperwork accusing her of anything. (RT 272:22-26.) Once public, however, the amount of publicity that follows this case and the negative connotation that an accusation of jury misconduct carries, all adds to the Court's understanding of why Juror No. 7 hired an attorney. In other words, it was reasonable that when Juror No. 7 found out she was being accused of misconduct, she refused to speak with Petitioner's investigator a second time and instead sought the services of a lawyer.

The Court also rejects Petitioner's argument regarding Juror No. 7's request for immunity. First, the facts underlying Juror No. 7's decision to seek immunity are not part of this record. Second, there is no basis for the Court to draw any adverse inference simply because the request was made by Juror No. 7 or that immunity was granted by the District Attorney.

For all these reasons, the Court does not find Juror No. 7's behavior after the juror misconduct claim became public supports a finding that the original non-disclosure on the questionnaire was intentional.

4. Juror No. 7's December 10, 2020, Declaration Corroborates Her Testimony

Juror No. 7 hired an attorney, Negad Zacky, to assist her in preparing a declaration for submission with the Return filed on December 11, 2020. (*See* Exh. 10.) Mr. Zacky, a criminal defense attorney, was retained by Juror No. 7 approximately three months prior to October 26, 2020. (RT 573:1-11.) He had contact with the Stanislaus County District Attorney's Office on that same date, October 26, 2020. (*Id.* at 573:12-24.)

The District Attorney's Office provided Mr. Zacky with copies of the pleadings in the habeas petition. (RT 575:8-576:6.) At the time of the initial contact, Mr. Zacky informed the District Attorney that he was not sure whether or not Juror No. 7 would be providing a declaration for the Return. (*Id.* at 576:20-577:16.)

On November 9, 2020, Mr. Zacky provided the District Attorney's Office an unsigned draft declaration of Juror No. 7. (RT 582:15-25; 583:14-15.) Mr. Zacky made clear that the words of the draft declaration were not those of Juror No. 7. (*Id.* at 583:16-21.) After receiving a copy of a draft of the Return, changes were made to the draft declaration. (*Id.* at 587:9-23.) At the hearing, Mr. Zacky explained that changes to the declaration were not based on his review of the Return, but rather on responses regarding the scope of the Return and information that had been provided from the District Attorney's Office that was not previously provided. (*Id.* at 587:21-588:3.) Juror No. 7's signed declaration was given to the District Attorney shortly thereafter. (*Id.* at 588:11-18.) Mr. Zacky testified that at no point did the District Attorney tell him what to put into Juror No. 7's declaration. (*Id.* at 589:5-9.)

In Petitioner's Post-Hearing Opening Brief, he suggests Juror No. 7's answers in her declaration "bore remarkable similarities to the explanations proposed by the Attorney General in the 2017 Informal Response filed in opposition to the Petition for Writ of Habeas Corpus (the "Informal Response"), which Mr. Zacky had obtained." (Petitioner's Post-Hearing Opening Brief, p. 18.) For example, in addressing why she did not disclose her involvement in the November 2000 restraining order litigation against Ms. Kinsey, the declaration repeated the

"money or property" rationale in the Informal Response filed three years earlier. (*Compare* Exh. 10, ¶ 10 ["I understood the word "lawsuit" to mean and refer to a suit for money or property."] *with* Informal Response, pp. 27-28 [speculating that Juror No. 7 might not have understood her lawsuit against Ms. Kinsey was a lawsuit; "[L]awsuit could reasonably be understood as an action in which one person sues another for money [or] property."].) As to why she did not disclose having been the victim of any crimes, the declaration repeated the Informal Response's 2017 speculation that Juror No. 7 did not view Ms. Kinsey's conduct as a crime. (*Compare*, Exh. 10, ¶ 23 ["I did not interpret the circumstances leading to the petition for a restraining order as a crime. I still do not."] *with* Informal Response, p. 29 [speculating that Juror No. 7 may not have "understood Ms. Kinsey's harassment to be a crime."].)

At first glance, Petitioner's argument regarding the similarities between the two documents is well taken. However, at the evidentiary hearing, Juror No. 7 repeated and expanded on the explanations she gave in her declaration about her answers to questions 54a, 54b, and 74. During the evidentiary hearing, Petitioner was provided ample opportunity (and did) to go through each and every statement attested to by Juror No. 7 in her declaration. Juror No. 7's responses to questioning during the hearing was candid and direct. She thoughtfully responded to each question about the truthfulness of the statements in her December 10, 2020, declaration. When asked whether paragraphs 10 and 23 in her declaration were truthful and accurate statements, Juror No. 7 responded unequivocally, "Yes." (RT 27:5-8; 31:7-12.) Later in her testimony, Juror No. 7 affirmed her statement.

Q. "I understood the lawsuit to mean and refer to a suit for money or property." Was that a phrase you used?

A. Yeah.

Q. Specifically with the – to put into the declaration?

A. Yeah.

(*Id.* at 301:4-10.)

Juror No. 7 noted minor discrepancies in her declaration and stated that she should have met with counsel in person in drafting the declaration, but due to COVID, everything was done

over the phone, on Zoom, or through email. (RT 299:13-300:24.) The declaration, however, corroborates her testimony and overarching position that, due to "countless unpleasant experiences in [her] life" Juror No. 7 did not consider herself a victim of Ms. Kinsey's behavior, and neither the Kinsey incident nor the Whiteside incident ever crossed her mind during jury selection. (*See, e.g.*, Exh. 10, ¶¶ 18, 19, 24, 25, 27, 30, 32; RT 189:26-190:1 ["When I filled out that questionnaire, honestly and truly, nothing of this ever crossed my mind, ever."].)[44] Juror No. 7 further testified that she has never spoken to anyone from the District Attorney's Office or Attorney General's Office. (RT 217:21-24.)[45] Mr. Zacky's testimony was also clear that he crafted the original draft declaration without any influence by the District Attorney.

5. Financial Hardship and the Child Support Forms Are Inconclusive

Petitioner requested that other exhibits be admitted during the evidentiary hearing. Included were two cases filed by the Department of Child Support Services (DCSS) on May 10, 2004, and September 8, 2004, regarding child support. The May 10, 2004, filing, Case Number 72904, involved William Robinson as the Respondent/Defendant and The County of San Mateo at Petitioner/Plaintiff. The September 8, 2004, filing, Case Number F07931, involved Juror No. 7 as Petitioner/Plaintiff and James D. Smith as Respondent/Defendant.[46] As part of the child support applications, Juror No. 7 filled out an Income and Expense Declaration in each case. Both forms were signed under penalty of perjury. Question 12 on the Income and

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[44] To the extent there were some corrections or clarifications made to her December 10, 2020, declaration during the evidentiary hearing, the Court does not find that these impact the Court's determination regarding Juror No. 7's credibility given the entire record.

[45] Furthermore, it is not extraordinary that the Attorney General was able to surmise a possible explanation for why Juror No. 7 did not disclose that she was the victim or witness to a crime or that she had been involved in a prior lawsuit. A definition of the word "lawsuit" was not provided in the jury questionnaire, (Exh. 4; RT 278:1-3), and the word "lawsuit" is, generally, commonly understood to involve "money or property."

[46] The Court granted Respondent's request that it take judicial notice of Family Code sections 17404 and 17406. (RT 266:12-24; 487:16-488:9; 599:19-25.) Family Code section 17404 relates to the procedures and actions, including pleadings involving child support services. Family Code section 17406 relates to the attorney-client relationship between a local agency and any person resolving a complaint for paternity or support in a child support services case.

Expense Declaration asks the declarant to list the members of the household: "The following people live we me[]." In both cases, Juror No. 7 listed only her 4 minor children. (Exh. 16, SLP400508.)

The Income and Expense declarations were completed around the same time Juror No. 7 was going through the jury selection process.[47] As Petitioner points out, the information Juror No. 7 provided on her Income and Expense Declarations is inconsistent with her answers on the questionnaire and her representation during voir dire where she stated that she was living not just with her four children, but with her "significant other" as well as her mother. (*See* Exh. 4, Q.17, 18, 25; Exh. 5, pp. 4610, 4627.) Petitioner contends that these inconsistencies are important because they undermine Juror No. 7's credibility and also evidence her intent in misrepresenting the financial hardship her jury service presented.

During voir dire, when asked by the trial judge if her employer would pay her salary during the estimated five-month trial, Juror No. 7 explained that although she would only be paid for two weeks, she was willing to sit as a juror. (Exh. 5, pp. 4598-4599.) Juror No. 7 then twice indicated—once to the prosecution and once to defense counsel—that her significant other, whom she was living with, agreed to "carry the [financial] load." (*Id.* at pp. 4610, 4627.)

Petitioner argues Juror No. 7 purposefully provided false information to the trial court about her financial status to make it appear as if jury service would pose no financial burden. (Petitioner's Post-Hearing Opening Brief, p. 39.) According to Petitioner, Juror No. 7 was "allaying" the trial judge's concerns by claiming to live with Mr. Whiteside, instead of availing herself to a financial hardship. (*Id.* at p. 40.) Petitioner claims Juror No. 7's willingness to forego a hardship excusal with four children at home shows, at a minimum, that she was "eager to serve." (*Id.* at p. 41, citing *Dyer v. Calderon*, *supra*, 151 F.3d at p. 982.)

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[47] Juror No. 7 completed her jury questionnaire on March 9, 2004 and returned for voir dire on April 12, 2004. The Income and Expense declarations have a signature date of March 26, 2004 and April 17, 2004, although the actual support actions were filed later.

The Court is not persuaded that Juror No. 7 lied or was otherwise less than candid with the trial court about her financial condition in order to get on the jury. Further, the Court is not persuaded that this evidence supports a finding that Juror No. 7 was "eager to serve." Juror No. 7 did not hide the fact from the trial court or trial counsel that her employer would not pay her salary for the entire length of trial. She did not protest when she was initially dismissed by the trial judge: she picked up her belongings and started moving three chair lengths from her seat to leave the courtroom. Juror No. 7 also testified credibly at the evidentiary hearing that Mr. Whiteside was living with her when she reported to jury service. When questioned by Petitioner whether she told the trial court that Mr. Whiteside was going to help take care of the financial burden during the trial, she responded in the affirmative:

A. Yeah. I was living with him and my mom, so I said it wasn't a financial burden, and it wasn't.

Q. It was not a financial burden?

A. It was not.

(RT 120:14-21.) She testified that at that time, Mr. Whiteside was working as a mail courier at Stanford Hospital and helping support her financially. (*Id.* at 119:11-21.) Given that neither side called Juror No. 7's mother, Ms. Cosio, or Mr. Whiteside to contradict her statements, the uncontroverted evidence in the record on this point is Juror No. 7's testimony.

The fact that Juror No. 7 did not list Mr. Whiteside or Ms. Cosio as living with her on her Income and Expense Declaration adds little to support Petitioner's claim of bias and if anything, supports Respondent's claim that Juror No. 7 is not good at filling out legal forms. As a first point, uniform guideline for child support in California is generally determined by the parents' actual income and the level of responsibility for the children—it does not depend on who is living in the home. (Cal. Fam. Code, sections 4053, 4055.) Second, Juror No. 7's lack of attention to detail on legal forms is well documented in this proceeding. For example, Juror No. 7 testified she made a separate mistake on page 2, paragraph 5E on the very same Income and Expense Declaration filed May 10, 2004, when she listed spousal support. "I don't know

why I put spousal support. I wasn't married. I was probably thinking child support, but go ahead." (RT 117:2-4.) In the subsequent Income and Expense Declaration filed on September 8, 2004, Juror No. 7 listed "-0-" in response to the same question. Similarly, when Juror No. 7 filled out the form for the restraining order, she listed Marcella Kinsey as her attorney even though Juror No. 7 did not have an attorney for that proceeding. (*Id.* at 259:13-21.)

Finally, even in the questionnaire which trial counsel had available to them before and during voir dire, there were other obvious mistakes. (*See* Exh. 4.) For example, Question 97a of the jury questionnaire stated that "[t]he jurors that sit in this case will be instructed that they must base their decision entirely on the evidence produced in court, not from any outside source or pre-existing opinion or attitudes. Can you do that, despite what you had read, heard, or seen about this case?" Juror No. 7 checked the box "NO" and provided no explanation. (*Id.* at p. 17.)[48] Yet, in Questions 94 and 95 on the very same page, Juror No. 7 indicted that despite her exposure to pre-trial publicity, she had not formed any preliminary opinions about the case and that she did "[n]ot have enough information" to "form[] or express[] any opinions about the guilt or innocence of the defendant, Scott Peterson." (*Ibid.*)

Juror No. 7's testimony during voir dire was consistent with the later responses and not with her response to Question 97a. Petitioner's counsel even conceded during oral argument that her response to 97a must have been a "mistake." (8/11/22 Final Arguments RT 52:2-13.) The Court finds that this is a "mistake" that someone who was purportedly giving false answers with the intent to be on the jury would not have made; if Juror No. 7 intended to be deceptive in order to conceal existing bias, she assuredly would not have answered "NO" to Question 97a. Instead, this "mistake" provides further compelling evidence of Juror No. 7's sloppiness and lack of sophistication in understanding and answering the questions put to her.

In the Court's view, the child support forms from May 10 and September 8, 2004 filings, do not advance Petitioner's argument that Juror No. 7 intentionally misrepresented her

[48] Neither Petitioner's counsel nor the People followed-up on this response during in person voir dire of Juror No. 7.

financial situation to avoid being struck from the jury. (Cf. *Dyer v. Calderon*, *supra*, 151 F.3d at p. 982.) At best, the child support documents are inconclusive about prior inconsistent statements regarding her finances and who lived with her during the jury voir dire. To the extent they are consistent, Juror No. 7 listed only her children as living with her on both forms.

6. Juror No. 7's Reference to "Little Man" Is Not Evidence that She Prejudged the Case

Petitioner also contends Juror No. 7 made considerable effort at the evidentiary hearing to distance herself from the phrase "Little Man." (Petitioner's Post-Hearing Opening Brief, pp. 37-38, 44-45.) Juror No. 7 testified that she gave Conner the nickname "Little Man" not during trial but "after trial was over and the first interview I did." (RT 105:9-14.) She did not recall going into the jury room and calling Conner "Little Man." (*Id.* at 106:12-14; 107:2-7.) Mr. Beratlis, however, credibly testified that when she first walked into the jury deliberation room, Juror No. 7 suggested the jurors convict Petitioner because of what he did to "Little Man."

Petitioner argues Juror No. 7's reference to "Little Man" when entering the jury room is evidence Juror No. 7 prejudged the case and entered deliberations with an impermissibly closed mind. (Petitioner's Post-Hearing Opening Brief, pp. 37-38, citing *In re Manriquez*, *supra*, 5 Cal.5th at p. 818 and *People v. Weatherton* (2014) 59 Cal.4th 589, 599.) The Court is not persuaded by this argument for two reasons. First, the case on which Petitioner relies, *People v. Weatherton*, is factually distinguishable from the record here. In *Weatherton,* the juror repeatedly talked about the case outside deliberations and did so in defiance of the trial court's repeated admonitions. (*People v. Weatherton*, *supra*, 59 Cal.5th at p. 599.) The juror discussed the case during his daily commute, at lunch, during cigarette breaks, in court hallways, and in elevators. (*Ibid.*) He telephoned non-deliberating jurors during deliberations, reporting what was occurring in the jury room. Multiple jurors testified that, long before the prosecution rested its case, the juror conveyed a belief in defendant's guilt. (*Ibid.*) Jurors testified that, *on the first day of trial,* the juror stated that [a called witness'] testimony was dispositive on guilt. (*Ibid.*) In other words, he "expressed these opinions long before the prosecution finished its

case and before the defense was able to present any evidence in rebuttal." (*Ibid.*) On these grounds, the California Supreme Court found that given the nature, scope, and frequency of the juror's misconduct, along with his repeated and admitted untruthfulness on a variety of topics, the People had not rebutted the presumption of bias. (*Id.* at p. 600.)

Here, there is no evidence that Juror No. 7 "prejudged the case long before deliberations began and while a great deal more evidence had yet to be admitted." (*See People v. Weatherton*, *supra*, 59 Cal.5th at p. 599, quoting *Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 794.) Juror No. 7 testified that she only formed an opinion *after* she heard all the evidence in the case. (RT 282:10-19; *see also* 33:20-34:6.) When she made her comments in the jury room, Juror No. 7 had just replaced a seated juror and had not yet participated in jury deliberations with the other jurors. (*Id.* at 364:19-365:8.) After making her statement, Juror No. 7 was immediately corrected by Mr. Beratlis and told that the jury had a process in place before she just gave her opinion. (*Id.* at 365:22-25.) Mr. Beratlis testified that he had never heard Juror No. 7 make statements of Petitioner's guilt or reference "Little Man" aside from when she first entered the jury room. (*Id.* at 353:6-7.) The record evidence is also clear that Juror No. 7 continued to deliberate with the other jurors, and that after those deliberations, the 12 jurors unanimously decided that Petitioner was guilty of Laci's murder in the first degree and Conner's murder in the second degree.

Second, Petitioner concedes that Juror No. 7 was not required by the jury instructions given at trial to refrain from expressing her opinion before deliberating with the other jurors. Juror No. 7 (along with the other jurors) was instructed by the trial judge that it was "rarely helpful for a juror at the beginning of the deliberations to express an emphatic opinion on the case." (Exh. 18, 111 RT 20565.) Juror No. 7's disregard of that instruction does not, in and of itself, constitute misconduct since the instruction is not considered mandatory. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1352.)

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7. Letters Juror No. 7 Sent to Petitioner Post-Conviction Do Not Show a Hidden Agenda

During the evidentiary hearing, Juror No. 7 was asked about letters she wrote Petitioner after the trial concluded. (*See* Exh. 6.)[49] Petitioner contends the letters are material because they demonstrate that Juror No. 7 was obsessed with Conner and referenced men cheating. (RT 308:23-311:10; Petitioner's Post-Hearing Opening Brief, pp. 42-43.)

Assuming the letters do appropriately reflect Juror No. 7's state of mind during the jury selection process, the letters do not support Petitioner's theory that Juror No. 7 wanted to be on the jury to punish him or that Juror No. 7 was fixated with Conner. At best, the letters demonstrate that Juror No. 7 was emotionally impacted by her participation in the trial. In her letter dated December 3, 2005, Juror No. 7 writes: "The jury is going to get together on the 16 of Dec. just for support." "Scott, I just want you to know that its not at all a happy day for us. Each one of us felt like we were just struck by a Mac truck." (Exh. 6, HCP-000962-HCP-000963.) She described the trial as an "emotional roller coaster." (*Ibid.*) In another letter dated December 17, 2005, Juror No. 7 admits she "had a break down." (*Id.* at HCP-000966.) She writes, "I never knew how much this trial had an impact on me, plus I have never had a great life. All the pressure just hit me. I think it has been the time of year. Our verdict, Laci & Conner." (*Ibid.*)[50]

An emotional reaction to evidence presented during a criminal trial is very different from a predetermined bias at the outset. If Juror No. 7 did have a "hidden agenda" and mindset to punish Petitioner, the letters do not reveal one. On August 8, 2005, Juror No. 7 tells Petitioner, "I want you to know, whether it means anything to you or not, that I do not hate you. I hate what you did. I know that you & a lot of others say we were full of hate, but you are all

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[49] Eight (8) letters, dating from August 2002 to May 30, 2006, were admitted not for the truth, but for Juror No. 7's then existing state of mind under the state of mind exception to the hearsay rule. (Cal. Evid. Code section 1250.)

[50] During her testimony, Juror No. 7 explained that the letters she wrote to Petitioner were done at the suggestion of her therapist. (RT 253:8-19.) Petitioner claims Juror No. 7's answer regarding her writing the letters at the suggestion of her therapist was stricken. Not so. The last question by Respondent asked Juror No. 7 what she hoped to accomplish by writing the letters. (*Id.* at 253:20-21.) That question was withdrawn after the break and the question and answer regarding her therapist was never stricken. (*Id.* at 254:13-19.)

so wrong. The verdict was not based on hate or emotions." (Exh. 6, HCP-000957.) On December 3, 2005, Juror No. 7 writes, "[b]elieve it or not I look forward in [sic] hearing from you also." (*Id.* at HCP-000965.) At one point, Juror No. 7 talks to Petitioner about enrolling in school, and "pass[ing] her final." (Exh. 6-A, SLP402254.) She tells Petitioner that she has thought about writing "[her] own book" about the trial, but promised she would "do nothing without [his] concent [sic]. I am not out to get you or make shit any worse for you as it all [sic] ready is. Please believe me when I say that." (*Id.* at HCP-000968-HCP-000969.) Juror No. 7 also added her concern about Petitioner's reaction when she publicly spoke out about the trial writing, "I hope your [sic] not mad at me...." (*Id.* at HCP-000977.) All told, the letters do not support the finding of someone with a vengeful state of mind.

Petitioner also asserts the letters show an obsession with Conner and suggests that Juror No. 7's continued post-trial focus on Laci's unborn child is consistent with a juror who has been impacted by the trauma of having her own unborn baby threatened. (Petitioner's Post-Hearing Opening Brief, p. 43; *see also* RT 309:7-15.) It is true Juror No. 7 references Conner and uses the phrase "Little Man" in her letters. Equally true, however, is that in those same letters, Juror No. 7 expressed sadness for Laci, Laci's mother and family, *and for Petitioner*. Furthermore, in none of the letters does Juror No. 7 reveal that at one time or another, the life of her own unborn child had been threatened. At best, the letters demonstrate that Juror No. 7 was sad about what had happened to Laci, Conner and their families and was someone who was seeking to have Petitioner come to peace with his actions. (Exh. 6, HCP-000960-HCP-000961 ["I will continue to pray for Laci, Conner & the rest of the family ... as well as you. I hope one day before you pass, you will finally set their souls free."]; HCP-000967 ["I think of you & how you are doing. Scott I just can't help but constantly think why? Why was that your only option?"]; HCP-000976 ["I keep praying for them & you Scott."].)

Finally, Petitioner suggests the letters are evidence of Juror No. 7's state of mind about cheating. In her February 15, 2006, letter, Juror No. 7 asked Petitioner: "One other reason I really wanted to write you is this is for my sake. *Nothing really to do with the trial really.* Your [sic] a man & I want to know. Why do you me [sic] cheat? Take of course, you & Laci. She

was cute, beautiful, full of life, love, love for you, spunky, happy just to be who she was & who she fell in love with. So why cheat? *I'm asking because the man I was with for 5 years had the same problem....So from a man's point of view Why?* Or why do you think? I'm sure there are some that don't I believe that. I do believe you can cheat & still love the one your [sic] with. So will you help me?" (Exh. 6-A, SLP402255 [emphasis added].) "I really do pray for you at these times Scott." (*Id.* at SLP402256.)

Juror No. 7 testified that her question about cheating was about men in general and why they cheat as opposed to asking Petitioner why *he* cheated. (RT 255:6-20.) Again, these statements in her letter demonstrate that her state of mind was not one of vindictiveness against Petitioner but more of a general inquiry based on the experience she had, and went through, with Mr. Whiteside. In any event, at the time of jury selection Juror No. 7 and Mr. Whiteside were together despite his ongoing infidelity. The issue of cheating was raised only briefly during voir dire but there was no follow-up or further questioning on the issue by Petitioner's counsel. (Exh. 5, p. 4624:10-16.) Moreover, the Court notes the questionnaire did not ask Juror No. 7 if anyone had cheated on *her* before: rather it was a generic question "[d]o you have any opinions about people involved in extramarital affairs." (Exh. 4, p. 5, Q. 26.)

Taken as a whole, the letters demonstrate a person who suffered long term adverse effects from the graphic evidence presented at trial[51] which was summarized in detail by the California Supreme Court. (*People v. Peterson*, *supra*, 10 Cal.5th at pp. 422-423.) The evidence included the intact body of Conner that had washed up on the shore and the later discovered body of Laci Peterson which, due to decomposition, had no head, no arms and one leg. (*Ibid.*) On the day the jury was sent into deliberations, Petitioner's own defense counsel described Conner's autopsy picture as "one of the most disturbing pictures … [they] will see."[52] (111 RT 20505:8-9.)

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[51] The Court had to take a break during the evidentiary hearing after Juror No. 7 broke down in tears when questioned about the letters. She also displayed appropriate but tearful emotions during other parts of her questioning. Observing Juror No. 7's emotional reactions years later during the 2022 hearing, it is evident that her experience as a juror in the *People v. Scott Lee Peterson* trial has been long lasting.

[52] Mr. Geragos's full statement during his final argument was:

The letters also evidence a juror who, despite all she heard and saw, was trying to get Petitioner to come to peace with what he did and the impact it had on his life and the life of Laci's family. The letters do not demonstrate a state of mind of contrivance or hatred to support a conclusion that at the time Juror No. 7 filled out the questionnaire, her goal was to lie to sit on the jury and punish Petitioner.

For all these reasons, the Court finds that Juror No. 7's letters either by themselves or viewed against the entire record evidence, fail to demonstrate prejudice or actual bias on the part of Juror No. 7.

CONCLUSION AND DISPOSITION

For all the foregoing reasons, the Petition for Writ of Habeas Corpus is DENIED.

The Clerk is ordered to serve a copy of this Order upon Petitioner, Scott Lee Peterson; upon Shelley J. Sandusky, Esq. and Andras Farkas, Esq., Habeas Corpus Resource Center, Cliff Gardner, Esq. and Pat Harris, Esq., as counsel for Petitioner, and upon District Attorney Birgit Fladager and Special Assistant District Attorney David P. Harris, as counsel for Respondent. The Clerk is also ordered to serve a courtesy copy upon Supervising Deputy Attorney General Donna Provenzano, as counsel for the Secretary of the California Department of Corrections and Rehabilitation.

Dated: December 20, 2022

Anne-Christine Massullo

ANNE-CHRISTINE MASSULLO
San Francisco County Superior Court Judge,
sitting as San Mateo County Superior Court Judge

The last kind of section of evidence that I haven't talked about would be the twine around the baby. And I'm not going put that picture up on the screen. I don't know about you, but I remember the first time I saw it on -- in the discovery. It's still kind of seared into my brain. It's one of the most disturbing pictures, I think, that you will see.

(111 RT 20505:3-9.)