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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

In re SCOTT LEE PETERSON, **On Habeas Corpus.**	**CAPITAL CASE** San Mateo Case No. SC055500A Case No.: S230782 Related Case No. S132449 **SUPPLEMENTAL RETURN TO THE PETITION FOR WRIT OF HABEAS CORPUS** Dept: TBD Judge: Hon. Anne-Christine Massullo

On July 7, 2021, this court ordered Respondent to file a supplemental return, on or before August 6, 2021, to admit or deny the additional allegations Petitioner made in his denial, filed on June 25, 2021.

I.

THE PEOPLE HAVE MADE NO GENERAL DENIALS.

The People begin by correcting Petitioner's assertion that the People answered Petitioner's factual allegations with general denials in their Return. We did not. A general denial is a conclusory statement of ultimate facts. (*In re Marquez* (2007) 153 Cal.App.4th 1, 12.) The People's denials were specific as to each allegation. Moreover, the denials were

repeated and expanded in other sections of the Return. In *People v. Duvall* (1995) 9 Cal.4th 464, the California Supreme Court explained that,

> We thus acknowledge the possibility that a habeas corpus petition could contain factual allegations that, under the circumstances of a particular case, would be difficult or impossible for the respondent to contradict with contrary factual allegations prior to an evidentiary hearing....Nevertheless, respondent may harbor an honest and reasonable belief that a particular factual allegation is untrue.

(*Id.* at p. 484.)

None of the responses in this Supplemental Return are general denials. Rather, as the *Duvall* court explained, Respondent harbors an honest and reasonable belief that some of the allegations are untrue and, in other instances, Respondent cannot know whether the allegation is true.

II.

THE EVIDENTIARY HEARING IS LIMITED IN SCOPE TO ONE ISSUE.

Petitioner has attempted to draw more issues before this court, but it is essential to recall the Supreme Court's directive:

> **"[Did] Juror 6756 commit[] prejudicial misconduct by not disclosing her prior involvement with other legal proceedings, including but not limited to being the victim of a crime."**

(Supreme Court's Order to Show Cause, 10/14/2020.)

This court has already noted that material facts are in dispute and will require an evidentiary hearing to resolve. (July 7, 2021 Order to File Supplemental Return.) The only issue to be decided at the evidentiary hearing is whether Juror 6756 truthfully answered the juror questionnaire to the best of her ability and understanding.

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III.

PETITIONER HAS FAILED TO INVESTIGATE THE "FACTUAL" ALLEGATIONS MADE IN THE DENIAL.

The People provided the "San Mateo" attachments in its Return so that Petitioner could conduct his own investigation[1]. He has not done so. Instead, he has attempted to assume as true anything and everything remotely referenced therein. When Petitioner sought an extension of time to file his Denial, the People believed that he needed time to conduct research and investigate these matters. However, it appears that all Petitioner did was acquire a copy of Juror 6756's child's birth certificate and then copiously cite the attachments provided by the People in their Return.

IV.

PEOPLE'S RESPONSES TO PETITIONER'S ADDITIONAL "FACTUAL" ALLEGATIONS.

The People will repeat each of the 19 additional allegations made in Petitioner's Denial and will then provide their response in bold directly thereafter:

1. "In November 2001, juror 7 was living with Eddie Whiteside."

The People can neither admit nor deny the truth of this allegation. The People do not know with whom Juror 6756 resided in November 2001[2].

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[1] The San Mateo attachments were previously provided as part of the People's Return to put the Petitioner on notice for him to conduct further investigation into the possibility of other events. Juror 6756 was not a People's witness, and the People had no "Brady" obligation to provide the information. The People did provide the unsubstantiated information to ensure fairness and to allow the defense to conduct their own, complete, investigation.

[2] As the People stated in their Return, Juror 6756 is not their witness but was a juror and is represented by counsel. Her prior attorney provided the People with the declaration the People previously filed with this court. It is the People's understanding that Juror 6756's attorney will make her available to the court to answer questions.

2. "In November 2001, juror 7 was dating Eddie Whiteside."

The People can neither admit nor deny the truth of this allegation. The People do not know who Juror 6756 was dating in November 2001.

3. "On November 2, 2001, Eddie Whiteside was arrested and charged in San Mateo Superior Court with (1) corporal injury on spouse/cohabitant, a violation of Penal Code section 273.5, subdivision (a); (2) battery against a spouse, cohabitant, girlfriend, or former spouse or girlfriend in violation of Penal Code section 243, subdivision (e); (3) false imprisonment in violation of Penal Code section 236[;] (4) cruelty to a child in violation of Penal Code section 273A, subdivision (b); and (5) battery in violation of Penal Code section 242. (See Return, Ex. 2 at pp. 2020_00023-00024.)"

The People can neither admit nor deny the truth of this allegation. The allegation is from a printout that is built upon multiple levels of hearsay, including that of a law enforcement agency, the San Mateo District Attorney's Office, and the San Mateo Superior Court, who either located the printout and/or provided access to them. The printout is not an official record of any proceeding and appears to be from an internal records system. There has been no showing of accuracy or reliability. All that is known is that the printout was emailed to the People and we have no way to vouch for its contents or reliability. Moreover, the printout from which this allegation is made does not name Juror 6756.

4. "These offenses were alleged to have occurred on November 2, 2001. (*Ibid.*)"

The People cannot admit or deny the truth of this allegation because, as explained in No. 3, *supra*, it is based upon an email of a printout from a records system or website which consists of multiple levels of hearsay. As stated above, the printout was emailed to the People and we have no way to vouch for its contents or reliability.

5. "On December 11, 2001, defendant Whiteside was ordered not to 'annoy, harass, strike,

threaten, sexually assault, batter [or] stalk . . . the protected persons named below' and not to come 'within 100 yards of the protected persons named below." (*Id.* at pp. 2020_00029-00030.)"

The People cannot admit or deny the truth of this allegation. The allegation is not based upon a true restraining order, or official court record. Rather, it is based on a page printed from a database/website which does not name the protected persons. Further, as explained previously, the printout was emailed to the People and we have no way to vouch for its contents or reliability.

6. "Juror 7 and 'Baby Doe' were the protected persons. (*Id.* at p. 2020_00030; 2020_00054.)"

The People neither admit nor deny the truth of this allegation. The allegation is not made based upon a true restraining order. Rather, it is based on a printed page from a database/website and, most importantly, it does not name the protected persons.

7. "On January 2, 2002, defendant Whiteside pled no contest to battery (count 5). (*Id.* at p. 2020_00032.)"

The People cannot admit or deny the truth of this allegation. The allegation is based on a page printed from a database/website and constitutes hearsay. Further, the page referenced has neither a name nor a case number on it; the printout was emailed to the People and we have no way to vouch for its contents or reliability. It should also be noted that this allegation fails to note that the alleged plea was to a misdemeanor and occurred before a trial or preliminary hearing.

8. "On January 2, 2002, defendant Whiteside was ordered to 'complete at least 104 hours of domestic violence counseling within 12 months. (*Id.* at p. 2020_00034.)"

The People cannot admit or deny the truth of this allegation. The allegation is based on a page printed from a database/website. The printout was emailed to the People and we have no way to vouch for its contents or reliability. Moreover, the page referenced

is lacking a name and/or a case number.

9. "On January 2, 2002, defendant Whiteside was again ordered not to have contact with or come within 100 yards of the 'protected persons named below' (Juror 7 and "Baby Doe"). (*Id.* at p. 2020_00036-00037.)"

The People can neither admit nor deny the truth of this allegation. The allegation is based on a page printed from a database/website, and the protected person's name differs from that of Juror 6756. Further, the printout was emailed to the People and we have no way to vouch for its contents or reliability.

10. "On January 23, 2002, defendant Whiteside presented the Superior Court with 'proof of enrollment in domestic violence batterers' treatment program.' (*Id.* at p. 2020_00039.)"

The People can neither admit nor deny the truth of the allegation. The allegation is based on a notation made on a page printed from a database/website and constitutes hearsay. Moreover, the printout was emailed to the People, does not appear to be an official record and we have no way to vouch for its contents or reliability.

11. "On June 27, 2002, juror 7 gave birth to a child. (Den. Ex. 1 at p. 3.) This child was born 237 days after the November 2, 2001 incidents of domestic violence were perpetrated against juror 7 and "Baby Doe." Counsel for Mr. Peterson are informed and believe that Juror 7 was pregnant at the time of the assaults. (See National Institutes of Health, About Pregnancy, (https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo) (last updated June 18, 2021) [pregnancy usually lasts about forty weeks or 280 days].) Counsel for Mr. Peterson further are informed and believe that sometime between when juror 7 became pregnant in 2001 and the birth of that child in 2002, but before she filled out the questionnaire for Mr. Peterson's trial on March 9, 2004, juror 7 became aware that she had been pregnant at the time of the domestic violence assaults."

The People can neither admit nor deny the truth of this entire allegation. First,

Petitioner has lumped several alleged factual statements together with inferences and information they "believe." Petitioner relies on information from a website as to how long a pregnancy "usually lasts." This is far from "factual." Moreover, the allegation presupposes that Juror 6756's pregnancy was full-term. Juror 6756 may have become pregnant at a date later than that computed by Petitioner but delivered the child pre-term. Also, Petitioner re-alleges the same claims about domestic assaults that have previously been denied. ***Lastly, Petitioner is claiming that "Baby Doe" was born on June 27, 2002, but was the subject of the January 2, 2002 restraining order resulting from an incident alleged to have occurred on November 2, 2001.*** **The People can admit that on June 27, 2002, Juror 6756 gave birth to a child based on the provided birth certificate (that appears to be an official record). The rest of the allegation is not based on fact, but is denied by the People and has been previously refuted by Juror 6756's declaration.**

12. "At 1:39 in the afternoon of October 21, 2020, Modesto Detective Craig Grogan sent an email to San Mateo District Attorney Senior Inspector Bill Massey. Mr. Grogan asked Mr. Massey to "[p]lease see what you can find on the DV case involving Whiteside. I need to determine who the victim is." (Return, Ex. 2 at p. 2020_00015-00016 (emphasis added).)"

The People partially admit the truth of this allegation. Investigator Grogan is retired from the Modesto Police Department and is now employed with the Stanislaus County District Attorney's Office.

13. "Later that same day Senior Inspector Massey replied with an East Palo Alto Police Department 'case display record' confirming that juror 7 was 'the "confidential victim" in the arrest of Whiteside in 2001.'"

The People can neither admit nor deny the truth of this allegation as it is based upon what appears to be a printout of a screenshot of East Palo Alto Police Department's database and constitutes hearsay. The People have no way to vouch for its contents or reliability.

14. "Juror 7 was, in fact, the adult victim in the charges against Whiteside in *People v. Whiteside*, SM315961A."

The People can neither admit nor deny this allegation. In fact, as it is phrased, this is an argument and the breadth extends far beyond the statement. It is not a factual allegation. Additionally, the allegation is based upon information from at least two different computer database/website printouts and multiple levels of hearsay/opinion. The information emailed to the People cannot be vouched for as it relates to the contents or reliability. Further, the facts of this allegation have also been refuted by Juror 6756 in her declaration filed with the People's Return.

15. "Question 74 in the jury questionnaire asked '[h]ave you, or any member of your family, or close friends, even been the VICTIM or WITNESS to any crime."

The People admit the truth of this allegation.

16. "Juror 7 selected 'No.'"

This is not a new allegation. It is allegation number 10 of the Petitioner's petition for writ of habeas corpus. Accordingly, the People repeat the response provided to it in their Return:

> **The People admit that Juror 6756 checked "No" for Question 74, which asked if she ("you"), "or any member of your family, or close friends, [have] ever been the VICTIM or WITNESS to any crime?" The People contend that Juror 6756 did not consider herself to have been a victim or witness and she still does not, as she explains in her Declaration. (Juror 6756's Declaration, paragraph 22.) We further contend that Juror 6756's view in this regard was, and remains, objectively reasonable.**

17. "Counsel for Mr. Peterson believe that on July 21, 2001, juror 7 was the victim and/or the witness to a crime when Ms. Kinsey violated the temporary restraining order juror 7 had

obtained against Ms. Kinsey. (Return, Ex. 2 at p. 2020_00017.)"

The People deny the truth of this allegation. First, the allegation is based upon Petitioner's counsel's "belief"; therefore, it is not a fact and it is irrelevant. Second, Juror 6756 was neither a victim nor a witness as explained in number 16, *supra*. Further, 2020_00017 upon which Petitioner bases his allegation states, "it appears [redacted] was likely the listed victim out of the 7-21-2001 incident. Nothing shows up on [redacted]'s person record in the EPA PD RIMS system earlier than 2006, so I don't know if she was listed as a confidential victim in the 2001 incident or what happened." (Underline added.) The allegation is repeating an email that is the speculation of the authors and not firm, factual information.

18. "Juror 7 did not disclose that she was the victim or a witness to the July 21, 2001 violation of the TRO."

The People deny the truth of this allegation as Juror 6756 viewed herself as neither a victim nor a witness as she stated in her declaration. She also explained the reasons why she does not consider herself such. Further, no Temporary Restraining Order is provided to support the allegation.

19. "By concealing these relevant facts during voir dire and giving false answers on her questionnaire, juror 7 undermined the jury selection process, impairing Mr. Peterson's ability to exercise for-cause and peremptory challenges. This constitutes juror misconduct."

The People deny the truth of this allegation. First, this is not a factual allegation but a legal argument and conclusion. However, Juror 6756 answered the questions as she understood them. Juror 6756 was a defense-oriented juror that Mr. Geragos wished to keep on the jury, and this is why he asked the court to question her further when she stated she would only be paid for two weeks and was excused to leave by the court. In convincing the court to do so, Mr. Geragos pointed out that other jurors "have said the same thing." (HCP-000925, lines 6-7.)

V.

EXTRANEOUS MATTERS ARE NOT AT ISSUE AND ARE IRRELEVANT.

Whether Juror 6756 borrowed $1000 during a nine-month trial is irrelevant to the matter at hand. Recall the Supreme Court's directive in this case:

> **"[Did] Juror 6756 commit[] prejudicial misconduct by not disclosing her prior involvement with other legal proceedings, including but not limited to being the victim of a crime[?]"**

(Supreme Court's Order to Show Cause, 10/14/2020.)

Petitioner has continually attempted to fabricate an issue where none exists. He complains that Juror 6756 borrowed $1000 during a nine-month trial. This is an average of $111.11 per month. A pittance that can hardly be said to demonstrate that Juror 6756 was destitute and living in abject poverty in order to serve upon Petitioner's jury. On the contrary, it shows that, as Juror 6756 had stated from the start, her significant other was carrying "the load."

The defense agreed to have Juror 6756 sit on the jury knowing that she would not be paid by her employer for more than two weeks. It is bad faith for them to raise this issue now. Juror 6756 was getting up to leave when Mr. Geragos pointed out that other jurors "have said the same thing" about not being paid by their employers for more than two weeks. (HCP-000925, lines 6-7.) The truth is that Juror 6756 was a pro-defense juror that Mr. Geragos wanted to serve on the jury: Her mother was a drug counselor (HCP-000885, HCP-000887), her brother was an inmate in San Quentin (HCP-000893, HCP-000941), she was sporting nine tattoos (HCP-000159) and crimson-colored hair that was so unusual it led to her being dubbed Strawberry Shortcake. (HCP-000263-HCP-000264.)

Petitioner has made many claims as to Juror 6756's life, opinions and experiences, but he has never interviewed her, despite having had 16 years to do so. Instead, he has used the time to collect declarations from the jurors around her, about her. Petitioner has now taken potshots at her and made insinuations about her in an attempt to malign her character. From the start, Juror 6756 has been unable to protect herself from their attacks and intrusive tactics. Justice Chin, in his concurrence in *In re Hamilton*, described the same sort of invasive machinations before pointing out the cost to the justice system and citizens called on to perform

their civic duty:

> Two new investigators questioned some of the jurors and induced several to sign declarations, including Juror Gholston, who was 76 years old at the time. Petitioner then filed this petition for writ of habeas corpus accusing Gholston of committing serious misconduct at the trial 12 years earlier. Due to these allegations, we issued an order to show cause and ordered an evidentiary hearing. At the age of 79, and 15 years after she believed her jury service had concluded, the accused juror was forced to defend herself at a new trial in which she was, in effect, the defendant. She had to testify and subject herself to cross-examination about events of long ago and about the declaration she signed at petitioner's behest. Several other jurors also had to testify to defend against the charges. At the hearing, the allegations were proven unfounded. Today, more than 16 years after trial, and after a lengthy and expensive hearing, this court exonerates the accused juror, now an octogenarian. But at what cost to the criminal justice system and to citizens called on to perform one of the most onerous of civic duties?

(*In re Hamilton, supra*, 20 Cal.4th 273 at pp. 307-308.)

VI.

THE SUBSTANTIAL LIKELIHOOD TEST.

Whether a verdict must be overturned for jury misconduct is resolved by reference to the substantial likelihood test, an objective standard. (*In re Hamilton, supra,* 20 Cal.4th 273, 296.) The substantial likelihood test is as follows: (1) Juror misconduct raises a presumption of prejudice, and (2) that prejudice is rebutted where the entire record, that is, the totality of the circumstances—including the nature of the misconduct and surrounding circumstances—indicates there is no reasonable probability (i.e., no substantial likelihood) that the juror was actually biased against the defendant.

Here, the nature of the alleged misconduct is the inability to answer questions as a lawyer would, such as interpreting a restraining order as a lawsuit. Assuming, arguendo, that a presumption of prejudice arose, the surrounding circumstances—for example, questions from the very same questionnaire about which Petitioner complains—demonstrates that Juror 6756 was not afraid to show that she knew about the case. Had she wished so desperately, as Petitioner claims, to be selected for jury service that she was willing to conceal information, she could easily have written that she knew very little, or nothing, about the case. Instead, when the questionnaire asked if she knew or recognized Scott Peterson, she responded, "Well who doesn't?" Her response shows an absence of cunning on her part and the unabashed candor of

her replies when she understood the question.

Where a juror intentionally lies, it is misconduct. (*People v. Castaldia* (1959) 51 Cal.2d 569.) But the California Supreme Court has explained that,

> [T]o find misconduct where "concealment" is unintentional and the result of *misunderstanding* or forgetfulness is clearly excessive. It is with good reason that the law places severe limitations on the ability to impeach a jury's verdict. To hold otherwise would be to declare 'open season' on jury verdicts not to a party's liking. A green light would be given for every unsuccessful litigant to root out after-the-fact evidence of any "subconscious bias."

(*People v. Jackson* (1985) 168 Cal.App.3d 700; italics added.) Here, Juror 6756's declaration demonstrates that she did not intentionally conceal information, she merely interpreted the terms based upon her own personal understanding of them. Subjectively, she did not consider herself to be a victim. Many persons eschew a victim mentality. Perhaps those from rough neighborhoods more than others. (HCP-000992.) The questionnaire did not ask, "Objectively speaking, have you ever been a victim, as that term is defined by the law?" Had it, Juror 6756 might have answered differently or asked for clarification. Jurors bring their diverse backgrounds and philosophies into the jury room, and the California Supreme Court has declared that is "both a strength and a weakness of the institution." (*In re Hamilton, supra*, at p. 296.)

The California Supreme Court has found no prejudice in numerous cases where a juror did not disclose information during voir dire due to a different interpretation of the terms used in the questionnaire. For example, in *People v. San Nicolas* (2004) 34 Cal.4th 614, a case in which the defendant had stabbed the victims, a juror did not disclose that he had been the victim of a crime in which he had been stabbed 15 times: "It just never came to me," he testified at the evidentiary hearing. The juror was found to be "a fair and impartial juror."

Likewise, in *In re Cowan* (2018) 5 Cal.5th 235, a juror failed to disclose his misdemeanor conviction because he had been given a citation and, to him, being arrested meant being handcuffed, taken away in patrol vehicle, fingerprinted, photographed and booked, but those things had not happened. His failure to disclose was found to be neither intentional nor deliberate.

Similarly, in *Manriquez*, the referee during an evidentiary hearing on habeas for a claim of juror misconduct, struck the juror's response when the petitioner's habeas counsel asked, "When you heard evidence of petitioner's abuse from working on the farm, did you think, well so was I?" (*In re Manriquez* (2018) 5 Cal.5th 795, 799.) Petitioner argued the question did not violate Evidence Code 1150(a), however the California Supreme Court disagreed finding that the question as posed "inquired about the juror's thoughts as she was hearing petitioner's evidence and thus solicited quintessential evidence of her mental processes." (*Id.* at p. 800.) The Court further held that "the question did not attempt to solicit an admission from the juror that, due to her own impressions and opinions, she was unable to render a verdict based on the evidence presented." *Ibid.*

Manriquez is instructive in other ways in the instant matter as previously argued. While the juror in *Manriquez* had days to answer her juror questionnaire, she denied a) seeing a crime committed, b) being present during a violent act, and c) being in a situation where she feared being hurt or killed. (*Id.* at p. 794.) In the *Manriquez* case, petitioner was charged with murdering four people on separate occasions. (*Id.* at p. 791.) The juror served as the foreperson and the jury found petitioner guilty and sentenced him to death. (*Id.* at pp. 793, 791.) On a voluntary post-trial questionnaire, the juror responded to whether there was a way to improve trials with the following statement,

> The mitigating circumstances offered during the sentence phase were actually a detriment in most of the jurors' minds, especially mine. I grew up on a farm where I was beaten, raped, and used for slave labor form the age of five through 17. I am successful in my career and am a very responsible Law abiding citizen. It is a matter of choice!

(*Manriquez, supra*, at p. 794.)

At the evidentiary hearing, the juror stated she grew up in the 1950's and abuse was not a crime then and, while she had been abused many times, she shared those experiences with only very close friends. (*Id.* at p. 796.) She also stated she did not believe her childhood abuse was a violent act nor did she consider anything in her life as criminal acts nor did she consider herself a victim of crime. (*Id.*) Instead, the juror stated, "I was a victim of circumstance." (*Id.*)

The referee found the juror to be a credible witness and stated she testified in a "direct,

responsive, thoughtful and consistent manner" and "was not evasive, uncooperative or defensive." (*Id.* at. p. 801.) The referee also found the juror's nondisclosure was not intentional, nor was the juror actually biased. (*Id.* at pp. 805-818.)

While the mistakes of Juror 6756 in this instance do not rise to the level of *Manriquez*'s juror during voir dire, they are similar in one aspect, neither juror saw herself as a victim nor did she believe what occurred to her was a criminal act.

The additional cases cited by Petitioner in his denial are not remotely similar to the instant case. First, Petitioner cites to the case of *Williams v. Taylor* (2000) 529 U.S. 420, noting that a juror's reticence to respond to questions at voir dire may require an evidentiary hearing to determine whether the juror was impartial. (Petitioner's Denial, p. 42, lines 23-26.) In this case out of the state of Virginia, the United States Supreme Court found that an evidentiary hearing was supported by 1) the juror's failure to identify a prosecution witness, an investigating officer, was her former husband approximately 15 years before the trial and 2) the prosecutor handled the divorce of the juror and the prosecution witness 15 years before the trial. (*Williams*, *supra*, 529 U.S. at 442.) The first question posed by the court to the jury was, "Are any of you related to the following people who may be called as witnesses?" (*Id.* at p. 440.) The juror did not respond and later testified she did not believe she was related to the witness any longer given their divorce 15 years prior. (*Id.* at p. 441.) The second question at issue that was posed to jurors was, "Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?" (*Id.* at pp. 440-441.) The juror did not respond to the Court's question and later testified she didn't believe the prosecutor represented her as the prosecutor had merely drawn up the divorce papers for both the juror and the prosecution witness in their uncontested divorce. (*Id.* at p. 441)

Petitioner attempts to liken the New York case of *U.S. v. Parse* (2015, 2nd Cir.) 789 F.3d 83, to the case before this court, but he has failed to fully brief this court as to the facts of *Parse* which involved a juror who *intentionally* lied during voir dire. The juror who admitted to intentionally lying to the court was an attorney who had had her license suspended, and she testified that she made up a *persona* to be more likely to remain on the jury. It was not the

juror's letter to the prosecutor following the conviction that showed evidence of actual bias, as Petitioner would have this court believe; rather, it was the fact that when asked about her occupation, the juror stated she was a stay-at-home mom and when asked about experience with the Courts, the juror only mentioned that she was engaged in a personal injury lawsuit. (*Id.* at p. 87.) The juror failed to mention that, the day before voir dire, she had sought reinstatement to the New York State Bar. The juror also told the Court that her husband had a bus business when he was, in fact, a career criminal. The juror also failed to mention multiple convictions in Arizona and New York where the juror used her married last name. In fact, it was not the letter that put defense counsel for Parse on notice as to concerns about the juror but, instead, it was a note from the juror to the Court during evidence wherein the juror asked if the jury would be instructed on the theories of respondeat superior and vicarious liability. (*Id.* at p.115.) At that point defendant Parse's counsel did begin an investigation that uncovered the possibility the juror was a suspended attorney.

Petitioner also relies on *Hochberg* to state that "The language of the Supreme Court's October 14, 2020, order requires an evidentiary hearing." (Petitioner Denial, p. 38, lines 15-16.) However, the Court further explains in the same footnote referenced by Petitioner, "When we order the respondent to show cause before the superior court why the relief prayed for in a petition for habeas corpus should not be granted, we do more than simply transfer the petition to that court and more than simply afford the petitioner an opportunity to present evidence in support of the allegations of the petition; we institute a proceeding in which issues of fact are to be framed and decided." Petitioner has had an opportunity to present such "facts" after receiving additional information obtained by the Respondent, but instead submits the very same documents to the Court a second time.

Petitioner cites to *People v. Hord* (1993) 15 Cal.App.4th 711, stating petitioners may "use juror affidavits to prove that jurors have concealed bias or prejudice on voir dire." There the Court noted an evidentiary hearing may be held to determine the truth of juror misconduct allegations, but that "[a]n evidentiary hearing need not be conducted in every instance of alleged juror misconduct." (*Id.* at p. 722-723 citing *People v. Hedgecock* (1990) 51 Cal.3d 395, 415 and

419.)

Here, Petitioner has provided no such evidence of a concealment of bias on behalf of Juror 6756. In *Hord*, the Court had before it two declarations from defense. In one declaration, a juror recalled two jurors remarking on defendant Hord not testifying and one juror wondering aloud how much time defendant would serve should he be found guilty. (*Id.* at p. 721.) In another declaration, a juror recalled "several jurors discuss[ing] why the defendant did not take the stand and testify…[and] what the defendant's possible sentence would be." In response, the People obtained declarations from all twelve jurors, where one juror who had initially signed one of the declarations from defense stated that the jury had already "reached a verdict on at least one charge or count prior to what was said about if he would have … said anything maybe things would have been different." The foreperson of the jury declared he admonished those discussing defendant's failure to testify and advised this failure to testify had no bearing on defendant's guilt. (*Id.* at p. 722.)

In reviewing whether defendant Hord was prejudiced by the jurors' comments, the Court relied heavily on the cases of *People v. Perez* (1992) 4 Cal.App.4th 893 and *People v. Hedgecock* (1990) 51 Cal.3d 395. In the case of *Perez*, the trial court denied the new trial motion despite defense counsel's statements that one of the jurors found defendant guilty because defendant Perez failed to testify. The trial court opined it was likely all 12 jurors could have remarked on defendant's failure to testify. Defense counsel submitted no declarations with his motion. The Appellate Court reversed the trial court finding defense had presumptively established juror misconduct and remanded the matter to the trial court with instructions for defense to obtain declarations from all 12 jurors. Significantly, the *Hord* Court distinguished *Perez*, finding the *Hord* case did not reflect any discussion between jurors to disregard the Court's instructions to not discuss defendant testifying. (*Hord, supra,* 15 Cal.App.4th at p. 727.)

The *Hord* Court also relied on *People v. Hill* (1992) 3 Cal.App.4th 16, 38, when it found, "Where the misconduct is not 'inherently likely' to have affected the vote of any of the jurors, prejudice is not shown." (*Hord, supra*, 15 Cal.App.4th at 727.) In reviewing the jury's declarations, the Court found the declarations did not suggest any new material was interjected

into deliberations not already known to the jury from trial and stated, "Transitory comments of wonderment and curiosity, although misconduct, are normally innocuous, particularly when comment stands alone without further discussion. The fact that only some of the jurors recalled the comments tends to indicate that this was not a discussion of any length or significance." (*Id.* at pp. 727-728.)

The *Hord* finding is helpful in the instant matter as Petitioner makes much of the statements of Juror 6756 regarding "Little Man". However, there is nothing in their pleadings to suggest that Juror 6756 "interjected" anything inappropriate into deliberations.

In *Hedgecock, supra,* 51 Cal.3d at 411-414, which was relied on by *Hord*, the jurors' declarations submitted by defense in support of a new trial motion discussed incidents where the bailiff assigned to the jurors during sequestration allegedly tried to find out the progress of deliberations and where the bailiff was alleged to have provided jurors with alcoholic drinks, causing one juror to not fully participate on the final day of deliberations. In rendering its decision, the California Supreme Court found,

> We emphasize that, when considering evidence regarding the jurors' deliberations, a trial court must take great care not to overstep the boundaries set forth in Evidence Code section 1150. The statute may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations. In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible. (*In re Stankewitz, supra*, 40 Cal.3d at p. 398.) But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.

(*Hedgecock, supra,* 51 Cal.3d at 418-419.)

Petitioner argues that in *People v. Cleveland* (2001) 25 Cal.4th 466, 484, the Court stated, "[S]ection 1150, subdivision (a), "expressly permits, in the context of an inquiry into the validity of the verdict, the introduction of evidence of 'statements made . . . within . . . the jury room." However, Petitioner neglects to mention that the Court in *Cleveland* issued a warning in the very next sentence stating, "[S]uch evidence must be admitted with caution, because statements have a greater tendency than nonverbal acts to implicate the reasoning process of

jurors." (*Ibid.*)

Following the decision in *Hedgecock*, the California Supreme Court in *People v. Lewis* (2001) 26 Cal.4th 334, 387-389, denied defendant's motions to find misconduct on behalf of the jury despite declarations stating jurors prayed prior to deliberations and a juror referenced to another his religious beliefs which helped him decide during the penalty phase. The Court found the juror's conversation about his religious beliefs with another juror was inadmissible under Evidence Code section 1150(a) citing to *Hedgecock, supra*.

In *Lewis*, the juror who had spoken of his religious beliefs had also sent a letter to defense counsel a few days after trial asking to meet and speak with defendant. (*Lewis, supra*, 26 Cal.4th at 387.) "Less than two months later, [the juror] sent a second letter and the book Born Again. [The juror] wrote that [defense counsel] will have "real inner peace" and "purpose" by having a personal relationship with God and by accepting Jesus Christ, and urged that both [defense counsel] and defendant read Born Again, which is "not about religion but relationship." (*Id.* at pp. 387–388.) In reviewing the arguments about the juror's letters and book, the Court found these to be irrelevant as they were sent to defense counsel and defendant *after* the trial. (*Id.* at p. 388.) Much like the instant case, a contact with defendant post trial does not presume prejudice as Petitioner has attempted to argue. "[B]ias may be presumed only in "extreme" or "extraordinary cases." (*Fields v. Brown* (2007, 9th Cir.) 503 F.3d 755, 772.)

VII.

WITCH-HUNTS ARE DISFAVORED.

The justice system cannot be permitted to upend jurors' lives simply because a misunderstanding of terms by a layperson is twisted into the fiction of a malicious avengement of a personal vendetta. A Supreme Court Justice has pointed a finger directly at the almost "routine practice" of "trying to create" misconduct claims. More specifically, Justice Chin explained in his concurrence in *In re Hamilton* (1999) 20 Cal.4th 273:

> This court's experience with other capital habeas corpus petitions suggests that this case is but an extreme example of what is almost a routine practice of trying to create misconduct claims. At least, it appears that, even absent any basis to suspect that misconduct, investigators routinely question jurors in the hope that one will say something to support a claim of misconduct by that or some other juror. Obviously, there must be a mechanism for redress on those rare

> occasions when the jury system has indeed gone awry, and actual misconduct taints the verdict. But fishing expeditions by litigants who lost at trial must not transform the quest for misconduct claims into the witch-hunts of the next millennium. Somehow a balance must be found. The majority makes some useful suggestions, and existing law, including recent legislation, provides jurors some protection. [Citation.] But perhaps the time has come for the Legislature to enact a comprehensive "Juror Bill of Rights" designed to protect jurors from intrusive tactics while at the same time permitting reasonable means to expose the occasional genuine case of jury misconduct.

(*Id.* at pp. 308-309.)

The instant case represents a perfect example of what began as a fishing expedition by a litigant who lost at trial and it has now become the witch-hunt of which Justice Chin speaks. As the People previously explained, Juror 6756 is not the People's witness. Petitioner has had 16 years to meet his burden to show his allegations are true, and he has failed to do so. He has failed to overcome the declaration of Juror 6756. The People's attachments to their Return were never intended to be adoptive admissions and do not establish facts for the Petitioner.

A Juror Bill of Rights is a step in the right direction, but since none is currently in existence, Juror 6756 is without any protection from Petitioner's intrusion into her life and attempts to besmirch her character. Juror 6756 is entitled to closure 17 years after her jury service.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus should be denied.

Dated: August 5th, 2021

Respectfully Submitted,

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District Attorney
County of Stanislaus

DAVID P. HARRIS
Assistant District Attorney

Attorneys for Respondent

DECLARATION OF SERVICE

I, the undersigned, say:

I was at the time of service of the attached Supplemental Return to the Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities; and Exhibits over the age of eighteen years and not a party to the above-entitled action. I served a copy of the above-entitled document on August 5, 2021, to the following via electronic mail pursuant to CCP 1010.6(a)(6):

Cliff Gardner
Attorney at Law
1448 San Pablo Avenue
Berkeley, CA 94702
Email: casetris@aol.com

Habeas Corpus Resource Center
Attn: Andras Farkas, Staff Attorney
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Habeas Corpus Resource Center
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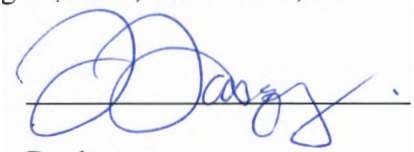
Pat Harris
Law Offices of Pat Harris, APC.
232 N. Canon Drive
Beverly Hills, CA 90210
Email: pat@patharrislaw.com

A courtesy copy was also sent via Federal Express (Tracking No. 816626702650) to the following:

Honorable Anne-Christine Massullo
San Francisco County Superior Court
Civic Center Courthouse
Department 304
400 McAllister St.
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of August, 2021, in Modesto, California.



Declarant

San Mateo Case No. SC055500A
Case No.: S230782
Related Case No. S132449
People v. Peterson