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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

In re Scott Lee Peterson On Habeas Corpus	Case No. SC055500A Related to: California Supreme Court No. S230782 (on habeas corpus) and No. S132449 (on direct appeal). **PETITIONER'S PROPOSED MEMORANDUM OF DECISION**

INTRODUCTION

Petitioner Scott Peterson has filed a Petition for Writ of Habeas Corpus (Petition) seeking relief from his convictions for murder. As relevant here, Petitioner alleges that a seated juror at his trial committed prejudicial misconduct by providing false information

during the jury selection process. For the reasons set forth below, the Court agrees and grants Mr. Peterson's Petition for Writ of Habeas Corpus.

PROCEDURAL BACKGROUND

In December of 2003, Petitioner was charged with murder in the death of his wife, Laci Peterson, and their unborn son, Conner. (9 CT 3284.) He was convicted and sentenced to death. (20 CT 6133; 21 CT 6462, 6468.) Petitioner appealed to the California Supreme Court. During the pendency of that appeal Petitioner also filed the instant Petition with the Supreme Court. In claim one of the Petition, Petitioner contended that his conviction should be vacated because one of the seated jurors (Juror 7) had committed misconduct by providing false answers in her jury questionnaire during the jury selection process.[1]

The essence of Petitioner's habeas claim was this: because of the unmatched pre-trial publicity in this case, prospective jurors were aware of the People's theory, that Petitioner assaulted his pregnant wife, killing her and their unborn child. During jury selection Ms. Nice did not reveal that when she was five months pregnant, she too had been assaulted, and she sought (and received) a restraining order because she feared for the life of her unborn child. Yet in her jury questionnaire in Petitioner's case, she denied ever having been either involved in a lawsuit or the victim of a crime. Petitioner alleged that in a case where the People's theory was that he assaulted and killed his pregnant wife, Ms. Nice's failure to reveal her history required relief.

On August 24, 2020, in connection with Petitioner's appeal, the California Supreme Court unanimously reversed his death sentence. (*People v. Peterson* (2020) 10 Cal.5th 409.) On October 20, 2020, the Supreme Court addressed the jury misconduct claim in the Petition, unanimously issuing an Order to Show Cause, remanding the case to the San Mateo Superior Court and requiring Respondent, the California Department of Corrections

[1] At the evidentiary hearing juror 7, Richelle Nice, stated she had no objection to being identified by name. Accordingly, the Court will refer to her by name throughout this order.

and Rehabilitation, "to show cause . . . when the matter is placed on calendar, 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 accord with the Supreme Court's order, the case was remanded to the Superior Court. Respondent filed a Return to the Petition and Petitioner filed a Denial to the Return (Denial). Because Respondent's Return contained documentation regarding Ms. Nice of which Petitioner was unaware, Petitioner's Denial included additional factual allegations related to the juror misconduct claim. Respondent filed a Supplemental Return responding to these additional factual allegations, and Petitioner filed a Supplemental Denial. This Court held an evidentiary hearing on the juror misconduct the issue on which the Supreme Court's October 20, 2020 Order to Show Cause was based on February 25, 2022, February 28, 2022, March 1, 2022, March 16, 2022, March 24, 2022 and March 25, 2022. After the evidentiary hearing, the parties provided simultaneous opening and reply briefs which the Court has reviewed. In addition, the Court heard argument from the parties on August 11, 2022, and gave both parties the option to submit a proposed Memorandum of Decision. The case was submitted for this Court's decision on September 16, 2022.

FACTUAL BACKGROUND

A. The Trial.

Because the claim remanded to this Court involves an allegation of juror misconduct, the facts of the underlying trial need not be discussed in detail. Petitioner was charged with murdering his wife Laci Peterson who was pregnant with their first child. The prosecution's theory was that he killed her either on the evening of December 23 or the morning of December 24, 2002. Under the state's theory, Petitioner attached cement anchors to Laci Peterson's body, transported her to the Berkeley Marina on December 24, and put her into the San Francisco Bay. For his part, Petitioner conceded that he went fishing in the San Francisco Bay on December 24, but always maintained that Laci Peterson was alive and well when he left the house that morning.

B. Ms. Nice's Answers About Her Financial Condition During Jury Selection And During Her Contemporaneous Child Support Applications.

As in many capital cases, all prospective jurors filled out a jury questionnaire prior to voir dire. The questionnaire had a separate page which permitted jurors to request a hardship discharge. Those jurors that did not request (or receive) a hardship discharge were ordered back for individualized jury voir dire.

Ms. Nice was called for jury duty. On March 9, 2004, under penalty of perjury, she filled out a jury questionnaire. (Evidentiary Hearing (EH) Exhibit 4 at p. 20.) She did not seek a hardship discharge. (*Id*. at p. 21.) She told the court and both parties she was living with her four children and her "significant other." (*Id*. at pp. 4-5.)

Roughly two weeks later, on March 26, 2004, and again under penalty of perjury, Ms. Nice filled out an Income and Expense Declaration for a child support action also in San Mateo Superior Court. (EH Exhibit 16 at pp. 1-3.) In that declaration, Ms. Nice told the court that the only people living with her were her four children. (*Id*. at p. 3.)

Roughly two weeks later, on April 12, 2004, Ms. Nice appeared for voir dire in the Peterson case. When the trial judge asked if her employer would pay her salary during the (estimated) five months of trial, she explained that although she would only be paid for two weeks, she was willing to sit for five months as a juror. (23 RT 4598-4599.) Under oath, Ms. Nice told the court and both parties that she had "talked about it" with her "family" – in particular her "significant other" who was living with her – and he had agreed to "carry the [financial] load." (23 RT 4600, 4610, 4627.)

Five days later, and again under penalty of perjury, Ms. Nice filled out another Income and Expense Declaration for a different child support action in San Mateo Superior Court. (EH Exhibit 16 at pp. 9-11.) In that declaration, Ms. Nice once again told the court that the only people living with her with her four children. (*Id.* at p. 11.)

C. Ms. Nice's Answers To Questions 54 And 74.

Question 54a of the jury questionnaire asked prospective jurors "[h]ave you ever been involved in a lawsuit (other than divorce proceedings)?" (EH Exhibit 4 at p. 9.)

Question 54b asked, if the answer to 54a was yes, whether the prospective juror was a plaintiff, the defendant or both. (*Id*. at p. 10.) Question 74 asked "[h]ave you, or any member of your family, or close friends, ever been the VICTIM or WITNESS to any crime?" (*Id.* at p. 14.) Ms. Nice answered no to question 54a, left 54b blank and answered no to question 74. (*Id*. at pp. 9-10, 14.)[2]

D. Lawsuits Involving Marcella Kinsey.

1. Ms. Nice's November 2000 lawsuit against Marcella Kinsey seeking a restraining order.

In November 2000, Ms. Nice filed a "Petition for Injunction Prohibiting Harassment" against Marcella Kinsey. (EH Exhibit 1 at p. 7.) At the time, Ms. Kinsey was the ex-girlfriend of Eddie Whiteside, a man Ms. Nice was dating. (*Ibid*.)[3]

Ms. Nice filled out a complaint seeking an injunction prohibiting harassment against Ms. Kinsey and filed it in San Mateo Superior Court. (*Id*. at p. 7.) She filled out the form herself, without aid of counsel. (EH Exhibit 10 at ¶ 21.) In the form, Ms. Nice identifies herself as the plaintiff at least 16 times. (See EH Exhibit 1 at pp. 2, 5, 6, 8, 12, 13.)

The particular form Ms. Nice used left no doubt that the action was a lawsuit. Indeed, the very first page of Ms. Nice's complaint specifically advised her that she was filing a lawsuit:

Read the Instructions for Lawsuits to Prohibit Harassment . . . *before*

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[2] In question 97a of the questionnaire, Ms. Nice checked a box saying she would be unable to resolve the case based solely on the evidence in court. (EH Exhibit 4 at p. 17.) Curiously, *neither* party specifically asked Ms. Nice about this answer during the voir dire. This may have been because in answering questions 79, 98, 99, and 102 Ms. Nice told the parties she would decide the case based on the evidence she heard in court, and counsel for both sides asked questions about Ms. Nice's ability to be fair and open minded, and she again said she would come into the case with an open mind and set aside any pre-existing views. (23 RT 4614-4615, 4621 [prosecution], 4624-4629 [defense counsel].)

[3] There is a slight ambiguity in the record. In her November 2000 lawsuit, Ms. Nice claimed that Mr. Whiteside was her ex-boyfriend at the time of the Marcella Kinsey incident. (EH Exhibit 1 at p. 7.) During her 2022 evidentiary hearing testimony, Ms. Nice referenced Mr. Whiteside as her boyfriend at the time. (Reporter's Transcript Evidentiary Hearing (RT EH) 60.)

completing this form. (EH Exhibit 1 at p. 7, original italics.)

Because Ms. Nice was "about five months pregnant" in November 2000, she sought protection for "Richelle J. Nice & unborn child." (*Id*. at pp. 7, 11.) In her written complaint, Ms. Nice made a number of factual allegations in support of her request for a restraining order. (*Id*. at pp. 7-11.) She "declare[d] under penalty of perjury under the laws of the State of California that the foregoing is true and correct." (*Id.* at p. 9.) In seeking a restraining order this is what Ms. Nice alleged:

- Ms. Kinsey "threatened to commit acts of violence against plaintiff[s]." (*Id*. at p. 7.)
- Ms. Kinsey "committed acts of violence against plaintiff[s]." (*Ibid*.)
- On September 23, 2000, Ms. Kinsey came to her (Ms. Nice's) home, screaming for Eddie Whiteside and Ms. Nice to come outside. (*Id*. at p. 11.)
- Mr. Whiteside's car was outside the home; Ms. Kinsey slashed the tires on the car. (*Id.* at p. 11.)
- Ms. Kinsey sprayed Mr. Whiteside with mace. (*Ibid*.)
- Moments later, Ms. Kinsey "kicked in the front door to Richelle's house." (*Ibid.*)
- Weeks later, after Ms. Nice moved to a different home, Ms. Kinsey "found out where Richelle lives," found out Ms. Nice's new telephone number, and followed Ms. Nice in her car. (*Ibid.*)
- In a subsequent telephone call, Ms. Kinsey said she "knew where she [Ms. Nice] lives and would not come there but she would handle it on the streets." (*Ibid*.)

Because of these incidents, Ms. Nice advised the court that she "feel's [sic] like [Ms. Kinsey] would try to hurt the baby, with all the hate and anger she has for Richelle." (*Ibid*.) Ms. Nice was "in fear for her unborn child." (*Ibid*.)

On December 13, 2000, Ms. Nice testified before Judge Rosemary Pfeiffer in support of her request for a restraining order. (*Id*. at p. 4; RT EH 42.) Her testimony was "sworn." (*Ibid*.) Although there is no longer any transcript of that hearing, at the time of

the hearing California Code of Civil Procedure section 527.6, subdivision (d) (now subsection (i)) provided that in order to grant a restraining order Judge Pfeiffer was required to find "by clear and convincing evidence that unlawful harassment exists."[4]

Judge Pfeiffer found clear and convincing evidence of unlawful harassment and issued a restraining order protecting "Richelle Nice & unborn child" for three years. (EH Exhibit 1 at p. 2.) She ordered Ms. Kinsey "to stay at least 100 yards away," from "Richelle Nice & unborn child" and "have no contact in person, by phone or mail." (*Id*. at pp. 2, 4.)[5]

2. Ms. Nice's second lawsuit against Ms. Kinsey seeking money for lost wages and other damages.

After the restraining order litigation, Ms. Nice filed a second lawsuit against Ms. Kinsey. In her 2022 evidentiary hearing testimony, Ms. Nice admitted that this lawsuit was filed in Santa Clara County. (RT EH 42.) Ms. Nice recalled filling out the paperwork, filing the complaint in the Superior Court and, later, going to court to dismiss the lawsuit. (RT EH 30, 42-43, 291.) Ms. Nice explained that this was a civil lawsuit for "lost wages and a number of other things." (RT EH 42-43.) Ms. Nice knew this was a lawsuit for money. (RT EH 291.)

E. The November 2001 Domestic Violence Incident.

On the evening of November 2, 2001, East Palo Alto Police Officer Alan Corpuz arrested Eddie Whiteside for a violation of Penal Code section 273.5, subdivision (a) – corporal injury to a spouse or cohabitant. (EH Exhibit 8 at p. 3; RT EH 501-502.) Officer

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[4] Section 527.6, subdivision (b) (now subdivision (b)(3)) defined harassment as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner."

[5] Although neither party has presented evidence showing Judge Pfeiffer had before her a previous criminal restraining order against Ms. Kinsey, the Court recognizes that if there had been a criminal restraining order there would have been no need for Ms. Nice to go through the considerable trouble of seeking a civil restraining order as well.

Corpuz prepared a police report that same night. (EH Exhibit 8 at p. 3.; RT EH 502.) According to Officer Corpuz, Richelle Nice was the victim, and her mother was a witness. (EH Exhibit 23; RT EH 505.)

Based on information Officer Corpuz obtained, Mr. Whiteside was criminally charged with several counts of domestic violence against Ms. Nice, including (1) corporal injury on a spouse/cohabitant in violation of Penal Code section 273.5, subdivision (a); (2) battery on a former girlfriend in violation of section 243, subdivision (e); and (3) simple battery in violation of section 242. (EH Exhibit 2 at p. 2.) Mr. Whiteside was also charged with (1) false imprisonment in violation of section 236 and (2) endangering the health of a child in violation of section 273A, subdivision (b). (*Ibid*.)

Ultimately, Mr. Whiteside pled no contest to the battery charge and the remaining charges were dismissed. (*Id*. at p. 11.) The court placed Mr. Whiteside on 18 months probation, ordered him to serve 10 days in county jail, and required completion of at least 104 hours of domestic violence counseling within a year. (*Id*. at pp. 9-10.) The court also precluded Mr. Whiteside from having any contact with, or coming within 100 yards of, "Richelle NIQ, Baby Doe." (*Id*. at pp. 7-8.)

F. The 2015 Petition For Writ Of Habeas Corpus And Ms. Nice's Explanations For Her Jury Questionnaire Answers.

After Petitioner filed the Petition alleging juror misconduct in 2015, Ms. Nice formally offered explanations for her juror questionnaire answers on two separate occasions. First, in December 2020, with the aid of counsel, Ms. Nice prepared a sworn declaration, which Respondent used in support of its Return to the Petition. Second, Ms. Nice testified at the 2022 evidentiary hearing.[6]

[6] In his original Petition, Petitioner also contended that Ms. Nice gave false answers to question 72 on the questionnaire, which asked if she had ever "participated in a trial as a party, witness or interested observer?" Because Petitioner does not separately pursue this claim in his post-hearing briefing, the Court does not address it.

1. Ms. Nice's explanations in her 2020 declaration.

Within weeks of the Supreme Court's October 2020 Order to Show Cause, Ms. Nice hired attorney Negad Zaky. (RT EH 218, 573.) Mr. Zaky prepared a declaration for Ms. Nice and provided it to the District Attorney. (RT EH 588.) As to question 54, Ms. Nice explained she did not disclose her involvement in the November 2000 lawsuit against Ms. Kinsey as a result of misunderstanding the question; the lawsuit did not "cross her mind" because she believed "the word 'lawsuit' to mean and refer to a suit for money or property." (EH Exhibit 10 at ¶¶ 10, 18.) Ms. Nice added that she read questions 54a and 54b "together because they were labeled as being part of the same question," and in answering question 54a, she considered whether she ever been a plaintiff. (EH Exhibit 10 at ¶¶ 7-8.) Believing she "had never been a plaintiff," she answered question 54a "no." (*Id*. at ¶ 8.)

As to question 74, Ms. Nice explained why she did not disclose having been a victim of any crime. As to the Marcella Kinsey incident in 2000, Ms. Nice explained (1) because she "did not participate in any criminal proceedings, [she] did not consider [herself] a victim of a crime," and (2) she "did not consider the circumstances leading to the [restraining order] as a crime;" instead, these were "[m]inor indignities . . . [which] do not . . . cause me to feel 'victimized' the way the law might define that term." (*Id*. at ¶¶ 22-24.) As for the November 2001 domestic violence incident with Mr. Whiteside, Ms. Nice said she "did not consider Mr. Whiteside's behavior a crime." (*Id*. at ¶ 27.)

Ms. Nice's 2020 declaration did not address why she did not reveal having been a witness to "any crime," or that her significant other (Mr. Whiteside) had been the victim of a crime (the tire slashing). (*Id*. at ¶¶ 1-34.)

2. Ms. Nice's explanations in her 2022 evidentiary hearing testimony.

Ms. Nice was the main witness at the 2022 evidentiary hearing. By the time of the hearing Ms. Nice had hired a second lawyer, and she refused to testify based on her privilege against self-incrimination. (RT EH 20.) Ultimately, she did testify, but only after being given immunity in exchange for her testimony. (RT EH 21.) In her testimony at the evidentiary hearing, Ms. Nice addressed her answers to questions 54 and 74.

a. Question 54a

Ms. Nice testified that she did not reveal the November 2000 restraining order lawsuit because she believed that a lawsuit had to involve a suit for money. (RT EH 278, 290.) She did not reveal the separate civil lawsuit for money damages because she had dismissed it. (RT EH 30, 94.)

b. Question 74.

As relevant here, question 74 had two components, each with two parts, asking if (1) Ms. Nice herself had been the victim of or a witness to any crime and (2) Ms. Nice had a close friend that had been the victim of witness to any crime. Ms. Nice offered no explanation for why she did not reveal that Ms. Kinsey had slashed Mr. Whiteside's tires, who, according to her jury questionnaire, was Ms. Nice's significant other at the time of jury selection. Similarly, she offered no explanation for why she did not reveal that she was a witness to Ms. Kinsey's acts in kicking in her front door or stalking her. (See RT EH 65 [Ms. Nice admits she saw the stalking].)

Ms. Nice did offer a number of different explanations for why she did not reveal that she herself had been the victim of crimes, either in connection with the Marcella Kinsey incident in 2000 or the Eddie Whiteside domestic violence incident in 2001:

1) The 2000 Marcella Kinsey incident.

As to the Marcella Kinsey incident, Ms. Nice offered three reasons why she did not reveal that she had ever been the victim of "any crime." First, she did not consider herself a victim of any crimes during this incident because she did not participate in a criminal proceeding against Ms. Kinsey. (RT EH 55, 281.) Second, any crimes that Ms. Kinsey committed were against the landlord and Mr. Whiteside, not her. (RT EH 56 [the tire slashing "wasn't a crime against me."]; 257-258 [the door that Kinsey kicked in was "the landlord's"], 258 [the tires that were slashed "weren't mine"].) Third, Ms. Nice simply did not consider herself a victim. (RT EH 59.) Contrary to what she said under oath in 2000 ("[I] feel[] like [Ms. Kinsey] would try to hurt the baby, with all the hate and anger she has for Richelle"), Ms. Nice now swore that she never had any fear for her baby's life. (RT

EH 52.) Instead, Ms. Kinsey's conduct fell under the category of "minor indignities," which she defined as situations involving "shoving matches, raising of voices, and other undignified means of communication." (RT EH 58-59.)

2) The 2001 Eddie Whiteside incident.

As to the Eddie Whiteside incident, Ms. Nice testified that she never was a victim of domestic violence. Ms. Nice testified that on the evening of November 2, 2001, she and Mr. Whiteside argued, "probably" about his cheating on her with other women. (RT EH 201.) She was holding her infant son at the time; she handed the baby to her mother, then went into the bedroom with Mr. Whiteside, closing the door. (RT EH 70, 72.) She punched him. (RT EH 71.) He did not hit her. (*Ibid*.) Mr. Whiteside called police. (RT EH 66.)

When police arrived, she refused to speak with them. (RT EH 73.) During her testimony, Ms. Nice recalled that in November of 2001 she was wearing braces and "I believe I had a small cut from my lip getting caught on my braces . . . ." (RT EH 71.) When police asked her what happened to her lip, she said she did not know. (RT EH 72.) Perhaps because of the blood on her lip, police then arrested Mr. Whiteside and charged him (as noted above) with various assaultive offenses against Ms. Nice. (EH Exhibit 2 at p. 2.) Police also charged him with endangering the health of a child and false imprisonment. (*Ibid*.)

Ms. Nice did not recall whether she told police officers that Mr. Whiteside was innocent. (RT EH 74.) She did not offer to come to court and tell a judge or Mr. Whiteside's counsel that Mr. Whiteside was innocent. (RT EH 75-76, 203.) Mr. Whiteside never asked Ms. Nice to tell the truth about what really happened. (RT EH 76.)

G. Ms. Nice's Nickname For The Petersons' Unborn Child

Ms. Nice admitted she gave Conner a nickname, calling him "Little Man," but said she could not recall if that nickname came during trial or afterwards. (RT EH 105-107.) Juror Greg Beratlis testified that during trial, when Ms. Nice was seated as a juror, her first words on entering the jury room were that jurors should make Petitioner "pay for killing the 'Little Man'." (RT EH 352.)

Within months of the end of trial, Ms. Nice began to write letters to Petitioner on death row. (RT EH 124.) The letters reveal a repeated focus on what happened to Conner. (EH Exhibit 6 at pp. 4-6, 17-18, 21, 22-24.) And Ms. Nice testified that in her home she had pictures of her children up on the wall. (RT EH 205-206.) In 2017 – 13 years after the jury verdict – documentarian Shareen Anderson interviewed Ms. Nice in her home and saw a black and white photograph on the wall of a small child wearing clothing with the name "Little Man" written on it. (RT EH 485.)

H. Other Evidence Presented.

The parties stipulated that if trial attorney Mark Geragos was called to testify at the hearing, he would testify that (1) when Ms. Nice was seated as a juror he did not know about the Kinsey incident, the restraining order litigation, the civil lawsuit, or the Eddie Whiteside incident of November 2001 and (2) had he known this information he would have moved to strike Ms. Nice for cause or, failing that, he would have used a peremptory challenge to discharge her from jury service. (Joint Stipulation to Testimony of Mark Geragos, filed February 28, 2022.) And Petitioner also presented the testimony of Alfreda Bracksher, custodian of records for the East Palo Alto Police Department, to authenticate a police report showing that Mr. Whiteside was arrested on the evening of November 2, 2001 and charged with inflicting corporal injury on a spouse. (RT EH 500-502.) Ms. Nice was listed as the victim in the report. (RT EH 505.)

POSITIONS OF THE PARTIES

Petitioner's claim for relief has two general components. First, Petitioner contends that he has proven Ms. Nice gave false answers to questions 54a and 74. (Petitioner's Opening Brief (POB) 27-29; Petitioner's Reply Brief (PRB) 10-14.) In Petitioner's view this establishes juror misconduct, resulting in a presumption of prejudice which the prosecution must rebut. Petitioner argues that Respondent was unable to rebut the presumption here because (1) Ms. Nice was not a credible witness generally, with a history of giving inconsistent statements under oath; (2) the factors articulated in *In re Manriquez*

(2018) 5 Cal.5th 785 show Respondent has not carried its burden; and (3) the surrounding circumstances show a substantial risk that Ms. Nice was not impartial. (POB 29-52; PRB 14-31.)

Respondent disagrees both on misconduct and prejudice. As to question 54a, and that portion of question 74 which asked if Ms. Nice had ever been the witness to "any crime," Respondent concedes Ms. Nice's answers to both questions were "erroneous in retrospect." (Respondent's Opening Brief (ROB) at p. 33; accord *In re Peterson*. S230782, Informal Response (IR) [conceding "that a 'lawsuit' generally describes a process in which a court resolves a disagreement between parties.") In Respondent's view, Ms. Nice's incorrect answers were based on her "erroneous understanding of the terms 'lawsuit' and 'witness' . . . . " (ROB at p. 53.) Although these answers were false, Respondent argues there is no juror misconduct in the first instance because Ms. Nice's false answers were not intentional. (ROB at pp. 27-43.)[7]

As to that portion of question 74 asking if Ms. Nice had ever been the victim of "any crime," Respondent contends that, in fact, she was not the victim of any crimes. As to the Marcella Kinsey incident, "the crimes committed by Ms. Kinsey were against Mr. Whiteside and the landlord, not against Ms. Nice." (ROB at p. 52; accord ROB at p. 30 ["The door belonged to the landlord and the tires to Mr. Whiteside."]; RRB at p. 16 ["the tire damage was to Mr. Whiteside's car, the door damage was to the landlord's door where her mother was residing . . . . "].) As to the November 2001 domestic violence incident, Mr. Whiteside never actually hit Ms. Nice. (ROB at p. 52.)

Assuming misconduct, Respondent alternatively argues that any presumption of prejudice has been rebutted. In Respondent's view, Ms. Nice was a credible witness, and both the *Manriquez* factors and the surrounding circumstances support a finding that the

[7] As to Ms. Nice's failure to reveal the civil lawsuit against Ms. Kinsey for damages, Respondent contends that because Petitioner has not produced documentation for that decades old civil lawsuit – but only Ms. Nice's testimony – he has not carried his burden of proving she ever actually brought that lawsuit for damages. (Respondent's Reply Brief (RRB) at pp. 7-8.)

presumption of prejudice has been rebutted. (ROB at pp. 52-53.)

LEGAL STANDARDS

A. Legal Standards Governing Proof Of Juror Misconduct.

As our Supreme Court has recognized, "[t]he law concerning juror concealment is settled." (*Manriquez*, *supra*, 5 Cal.5th at p. 797.) In that vein, the Court has repeatedly noted "the general proposition that one accused of a crime has a constitutional right to a trial by impartial jurors." (*In re Hitchings* (1993) 6 Cal.4th 97, 110; accord *Manriquez*, *supra*, 5 Cal.5th at p. 797.) The Court has also recognized the direct relationship between a fair jury-selection process and the goal of obtaining an impartial jury. Thus, the jury selection process "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored;" it enables "the trial judge . . . to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence;" and it protects "the defendant's right to exercise peremptory challenges . . . . " (*Hitchings*, *supra*, 6 Cal.4th at p. 110, citing *Rosales – Lopez v. United States* (1981) 451 U.S. 182, 188.)

But as both the United States and California Supreme Courts have observed, the ability of even the most well-intentioned jury-selection process to ensure an impartial jury depends "on prospective jurors answering truthfully when questioned." (*In re Boyette* (2013) 56 Cal.4th 866, 888; *Hitchings*, *supra*, 6 Cal.4th at p. 111; see *McDonough Power Equip. v. Greenwood* (1984) 464 U.S. 548, 554.) Both courts have agreed that a juror's false answers during jury selection directly undercut the ability of the parties to exercise both for-cause and peremptory challenges. (*Boyette*, *supra*, 56 Cal.4th at p. 889; *McDonough*, *supra*, 464 U.S. at p. 554.) And while the relationship between for-cause challenges – which remove jurors who cannot be impartial – and the mandate of ensuring an impartial jury is obvious, peremptory challenges are just as directly related to that essential mandate. "[T]he peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury." (*Boyette*, *supra*, 56 Cal.4th at p. 889.) As a result, "[t]he necessity of truthful answers by prospective jurors if [the jury selection process] is to serve

its purpose is obvious." (*McDonough*, *supra*, 464 U.S. at p. 554.) In accord with these authorities, "a juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*Hitchings*, *supra*, 6 Cal.4th at p. 111.)

Although recognizing that the jury selection process is undermined by false answers from jurors "regardless whether [the false answers are] intentional," for many years, the California Supreme Court left open the question of "whether juror concealment must be intentional before it constitutes misconduct." (*Hitchings*, *supra*, 6 Cal.4th at pp. 111, 115; see *Ballard v. Uribe* (1986) 41 Cal.3d 564, 590, fn. 14.) More recently, however, the Court has resolved the question, explicitly holding that even unintentionally false answers during jury selection can constitute misconduct. (*Manriquez*, *supra*, 5 Cal.5th at p. 797; *Boyette*, *supra*, 56 Cal.4th at p. 889.)

In the habeas context, it is the Petitioner's burden to prove the existence of juror misconduct. A habeas petitioner must carry this burden by a preponderance of the evidence. (*In re Gay* (2020) 8 Cal.5th 1059, 1072.) The petitioner carries this burden by proving that a prospective juror has "conceal[ed] relevant facts or give[n] false answers during the voir dire examination . . . . " (*Manriquez, supra,* 5 Cal.5th at p. 797.)

B. Legal Standards Governing Whether The Presumption Of Prejudice Has Been Rebutted.

Once a court determines a juror has engaged in misconduct by providing false answers during the jury selection process, be it intentionally or unintentionally, a defendant is presumed to have suffered prejudice and "[i]t 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.'" (*Manriquez*, *supra*, 5 Cal.5th at p. 797, quoting *People v. Weatherton* (2014) 59 Cal.4th 589, 600.) The Court has described the prosecutor's burden in this context as a "heavy" burden. (*In re Stankewitz* (1985) 40 Cal.3d 391, 402.)

As the Court summarized in *Manriquez*, the ultimate question for this Court is whether there is a substantial likelihood that the juror was actually biased:

> [A] habeas corpus petitioner bears the initial burden of showing that a juror did not disclose requested material information. If such a nondisclosure is shown, a presumption of prejudice arises. An intentional concealment is strong proof of prejudice, while a showing that the nondisclosure was unintentional may rebut the presumption of prejudice. Whether any nondisclosure was intentional is not dispositive; an unintentional nondisclosure may mask actual bias, while an intentional nondisclosure may be for reasons unrelated to bias. The ultimate question remains whether petitioner was tried by a jury where a substantial likelihood exists that a juror was actually biased against petitioner.

(*Manriquez*, *supra*, 5 Cal.5th at p. 798.)

"Actual bias" is "the existence of a state of mind on the part of the juror 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." (*People v. Nesler* (1997) 16 Cal.4th 561, 581 quoting Code Civ. Proc., § 225, subd. (b)(1)(C).)

In sum, once a petitioner establishes that false answers were given, and juror misconduct has occurred, there are two inquiries. First, were the false answers intentional? Second, if not, did the false answers nevertheless mask actual bias?

1. Legal standards for assessing whether false answers were intentional: the *Manriquez* factors.

There are a number of California decisions addressing the question of intentionality in connection with the same type of juror misconduct/concealment as is involved here – a juror's failure to disclose (1) prior involvement in other legal proceedings and (2) the fact that she has previously been both a victim of and witness to prior crimes. (See, e.g., *Manriquez*, *supra*, 5 Cal.5th 785 [addressing juror's failure to disclose that she was a victim of abuse as a child]; *In re Cowan* (2018) 5 Cal.5th 235 [juror fails to disclose prior involvement with the criminal justice system]; *People v. San Nicolas* (2004) 34 Cal.4th 614 [juror fails to disclose both that he was a victim of a stabbing and his prior involvement

with criminal justice system]; *People v. Blackwell* (1987) 191 Cal.App.3d 925 [juror fails to disclose that she had been a victim of domestic violence]; *People v. Diaz* (1984) 152 Cal.App.3d 926 [juror did not reveal that she had been the victim of an assault with a knife].) These decisions articulate a number of specific, common-sense factors courts look at in determining whether the state has carried its burden of showing that the false answers were not intentional and that the presumption of prejudice has therefore been rebutted.

Thus, although our Supreme Court has recognized that "an unintentional nondisclosure may mask actual bias," one factor courts look at is whether the juror's nondisclosure was intentional. (*Manriquez*, *supra*, 5 Cal.5th at p. 798.) "An intentional concealment is strong proof of prejudice, while a showing that the nondisclosure was unintentional may rebut the presumption of prejudice." (*Ibid*.) And in determining whether a juror intentionally concealed certain information, the juror's post-trial conduct is relevant. Where the juror voluntarily comes forward to reveal the previously undisclosed information and cooperates with the court and parties in addressing the issue, courts will generally find the non-disclosure unintentional. (See, e.g., *Manriquez*, *supra*, 5 Cal.5th at pp. 794, 801, 804; *San Nicolas*, *supra*, 34 Cal.4th at pp. 643, 646.) Courts also examine whether information the juror knew during the jury selection process should reasonably have alerted the juror to the importance of the non-disclosed information. (See *Manriquez*, *supra*, 5 Cal.5th at p. 809; *Blackwell*, *supra*, 191 Cal.App.3d at p. 929.) Finally, in *Boyette* the Supreme Court counseled that in assessing whether the presumption of prejudice had been rebutted, a reviewing court should consider not just the specific nature of the misconduct itself (discussed above in the context of the *Manriquez* factors) but "the surrounding circumstances." (*Boyette*, *supra*, 56 Cal.4th at p. 890.)

In addition to these specific factors, of course, 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. (*Manriquez*, *supra*, 5 Cal.5th at p. 806; *Cowan supra*, 5 Cal.5th at pp. 244-246.) In assessing the credibility of a juror's testimony

(as with any witness) the starting point is Evidence Code section 780. That section provides that in determining the credibility of a witness a factfinder should consider 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.

In addition to section 780, the factors listed in jury instructions related to assessing the credibility of witnesses, CALCRIM No. 226 and CALJIC No. 2.20, are also relevant. For example, CALJIC No. 2.20 provides that in assessing the credibility of a witness the factfinder should consider "a statement [previously] made by the witness that is [consistent] [or] [inconsistent] with [his][her] testimony," "[a]n admission by the witness of untruthfulness" and "[t]he character of the witness for honesty or truthfulness or their opposites." (See generally *People v. Ayala* (2000) 23 Cal.4th 225, 271 [evidence that a witness has lied under oath on another occasion is directly relevant to the witness's credibility].) In almost identical terms, CALCRIM No. 226 also requires consideration of the witness's "character for truthfulness," whether the witness has "[made] a statement in

the past that is . . . inconsistent with his or her testimony," and whether she has "admit[ted] to being untruthful." CALCRIM No. 226 conveys the common-sense principle of considering "[h]ow reasonable is the testimony when you consider all the other evidence in the case," while CALJIC No. 2.20 suggests the same idea in considering "the character and quality of [the] testimony."

2. Legal standard for assessing whether unintentional falsity masks actual bias.

As noted above, the California Supreme Court has held that a juror's unintentionally false answer on the juror questionnaire, that is an innocent mistake, can require relief if it masks a substantial likelihood of actual bias. (*Manriquez*, *supra*, 5 Cal.5th at p. 798 citing *In re Hamilton* (1999) 20 Cal.4th 273, 300.) This occurs when juror concealment, even if unintentional, "reflects a state of mind that 'would prevent a person from acting impartially.'" (*San Nicolas*, *supra*, 34 Cal.4th at p. 646 quoting *People v. Jackson* (1985) 168 Cal.App.3d 700.)

FINDINGS AND CONCLUSIONS

A. Petitioner Has Carried His Burden Of Proving Juror Misconduct

1. Question 54

In answering question 54a of the juror questionnaire, Ms. Nice indicated that she had never been "involved in a lawsuit (other than divorce proceedings)." (EH Exhibit 4 at p. 10.) Ms. Nice's testimony as well as the evidence adduced at the evidentiary hearing indicates that she had been involved in two lawsuits at the time she filled out the juror questionnaire. First, she sued Ms. Kinsey in San Mateo Superior Court to obtain a restraining order in November 2000, and testified against her in open court. (See EH Exhibit 1 at pp. 4, 7.) Respondent has repeatedly conceded that Ms. Nice erroneously failed to disclose the Petition for Injunction Prohibiting Harassment in response to question 54. (See ROB at pp. 31, 35, 53; IR at p. 27.) Ms. Nice herself has conceded that the restraining order falls within the definition of "lawsuit." (RT EH 290.) Moreover, the restraining order litigation falls squarely within the definition of lawsuit which respondent

itself proposes – "a process in which a court resolves a disagreement between parties." (IR at p. 27)

Respondent notes that Ms. Nice may not have understood at the time that she filled out the questionnaire that the restraining order litigation was a lawsuit. That misunderstanding will be discussed in connection with the Court's inquiry into whether Ms. Nice's false answer was intentional. But Ms. Nice's intent has no bearing on whether misconduct has occurred in the first instance. "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* . . . . " (*Manriquez*, *supra*, 5 Cal.5th at p. 797, emphasis added.)

In addition to the restraining order lawsuit, Ms. Nice separately sued Ms. Kinsey for damages in a civil action filed in Santa Clara Superior Court. (RT EH 42.) Respondent suggests that absent documentary proof of the civil lawsuit, Ms. Nice's testimony is open to the reasonable interpretation that it was not a separate suit for money but actually was part of the restraining order litigation. (Aug. 11 RT 86-93).[8] This Court finds that Ms. Nice's testimony was unequivocal on this matter and is open to only one reasonable interpretation – that she filed a lawsuit for money against Ms. Kinsey. Ms. Nice recalled filling out the paperwork, filing the complaint in the Superior Court and, later, going to court to dismiss the lawsuit. (RT EH 30, 42-43, 291.) Ms. Nice explained that this was a civil lawsuit for "lost wages and a number of other things." (RT EH 42-43.) Ms. Nice knew this was a lawsuit for money. (RT EH 291.) Ms. Nice differentiated the lawsuit for money from the restraining order litigation by noting that she appeared in Santa Clara County for the former and San Mateo County for the latter. (Compare RT EH 42, 275 [testifying that she dropped charges against Ms. Kinsey in Santa Clara County] with RT

[8] The parties presented closing arguments on August 11, 2022. The Court will cite this transcript as "Aug. 11 RT."

EH 84 [testifying that she filed the restraining order litigation in San Mateo County].) Her repeated, unequivocal, and unrebutted testimony is sufficient to establish by a preponderance of the evidence the existence of a lawsuit she filed against Ms. Kinsey, even in the absence of documentary proof. (See Evid. Code, § 411 ["the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."].)

2. Question 74

In answering question 74, Ms. Nice said neither she, nor any of her family or close friends, had ever been "the victim or witness to any crime." (EH Exhibit 4 at p. 15.) There is an obvious conflict between Ms. Nice's 2022 testimony regarding the November 2001 Whiteside incident – an account suggesting Mr. Whiteside was innocent – and the contemporaneous documentary evidence indicating that Ms. Nice was a victim of domestic violence, a conflict which the Court will address in more detail below. However, for purposes of the misconduct analysis, even setting aside the Whiteside incident, Ms. Nice admitted not only that Ms. Kinsey committed crimes against her and Mr. Whiteside during the September 23, 2000 incident and the following month leading up to the restraining order application, but that the reason she called the police was to report that crimes had been committed:

Q: [by Mr. Pat Harris] You called police that night; is that right?

A: [by Ms. Nice] Yes.

Q: Is that because you thought a crime was being committed?

A: Yeah.

. . .

Q: And in fact your boyfriend's tires were slashed. You were aware of that; is that right?

A: Yeah

. . .

Q: She kicked in the front door of your house; is that correct?

A: She did.

Q: Did you consider that to be a crime?

A: Yeah, sure.

Q: Did you consider slashing of the tires to be a crime?

A: It wasn't a crime against me.

Q: No, but do you consider it to be a crime?

A: Sure.

Q: Do you consider her stalking you to be a crime?

A: Sure.

(RT EH 55-57.)

As the above exchange demonstrates, Ms. Nice admits that she considered Ms. Kinsey's actions in kicking down her door to be a crime, yet she did not disclose it in response to question 74. That is misconduct. In addition, although Ms. Kinsey did not slash Ms. Nice's tires, she did slash Mr. Whiteside's tires and thus Ms. Nice should have disclosed the incident because question 74 also asked if any close friends of the juror had been a victim of a crime. The failure to do so was also misconduct. That Ms. Nice believed that Ms. Kinsey was committing crimes at her home is further evidenced by the fact that she called police to report Ms. Kinsey's behavior. (RT EH 47; 55-56.)

Turning to Ms. Nice's admission that she was the victim of stalking, Respondent contends that Petitioner's counsel's use of the present tense in his question to Ms. Nice – "[d]o you consider her stalking you to be a crime" – is significant as it indicates that Ms. Nice responded to whether she *presently* (in 2022) considered Ms. Kinsey's conduct to be a crime. Under this construction, Ms. Nice's answer does not indicate that she considered it to be a crime at the time she filled out the questionnaire in 2004. (Aug. 11 RT 20)

Respondent's broad point – that the present tense nature of a question – can be dispositive is correct. The Supreme Court decision in *Manriquez* illustrates why. In that case, a prospective juror was asked if she had been the victim of a crime. She answered no. In fact, 40 years earlier, the juror had been the victim of abuse as a child. The juror explained that in the 1950s, when the abuse occurred, society viewed the acts which she had been subject to very differently and it was not considered a crime at the time.

(*Manriquez*, *supra*, 5 Cal.5th at p. 805.) She answered the questionnaire the way she did because she did not view the matter as a crime at the time it had occurred. *Manriquez* illustrates that the tense of a question (and answer) can be significant because views as to whether certain conduct may constitute a crime can change over time.

But in contrast to the facts in *Manriquez*, there is nothing in the record to suggest that society's or Ms. Nice's view of what type of behavior constitutes stalking has changed since 2000. To the contrary, Ms. Nice must have considered Ms. Kinsey's stalking a crime in 2000, otherwise she would not have sought a restraining order to prevent Ms. Kinsey's unlawful harassment. Indeed, Ms. Nice herself testified that absent Ms. Kinsey's stalking behavior after the confrontation of September 23, she (Nice) would not even have sought a restraining order. (RT EH 47-48.) And a few moments earlier in the hearing – in describing how she felt about Kinsey's behavior at the time it occurred – Ms. Nice described that behavior as "stalkerish." (RT EH 48.) If anything, the passage of time has softened Ms. Nice's view on Ms. Kinsey's behavior. At the evidentiary hearing Ms. Nice testified that Ms. Kinsey's behavior in 2000 was nothing more than a minor indignity, testimony that is in sharp contrast with her description of that same conduct in the November 2000 restraining order application.[9] (Compare RT EH 58-59 with EH Exhibit 1 at p. 11.) In sum, all the evidence before the Court indicates that Ms. Nice viewed Ms. Kinsey's behavior as criminal when it occurred and there is no evidence suggesting that her view was different in 2004 when she filled out the juror questionnaire.

In aid of its argument Respondent points to *People v. Majors* (1998) 18 Cal.4th 385. (Aug. 11 RT 97-98.) In *Majors*, a jury questionnaire asked the juror whether he knew of

[9] Respondent contends that Ms. Nice's narrative in the restraining order litigation was not admitted for the truth of the matter asserted. (RRB at p. 6.) While Respondent is correct regarding this Court's pre-hearing evidentiary ruling on that point, once Ms. Nice testified under oath contrary to the restraining order narrative, any inconsistent statements in the narrative became admissible for the truth of the matter asserted as prior inconsistent statements. (See Evid. Code, §§ 1235 & 770; *People v. Williams* (1976) 16 Cal.3d 663, 666.)

anyone whom he believed to be a drug user or a drug seller. (*Majors*, *supra*, 18 Cal.4th at p. 418.) The juror answered "no" despite his wife's drug use when she was a teenager and before they knew each other, because he understood the question to be directed to present use or sales only. (*Id.* at pp. 419-420.) *Majors* is inapposite. In that case the juror rightfully believed that the question was asking him if he knew anyone who was *at that time* a drug user or a seller and not about his wife's activities when she was younger. Here, as discussed above, the evidence shows that Ms. Nice's attitude toward Ms. Kinsey's stalking has remained constant, and if anything, was stronger at the time she filled out the questionnaire.

In sum, even without deciding whether Ms. Nice was a victim of domestic violence in November 2001, Ms. Nice provided false answers in her questionnaire. That constituted misconduct. The only remaining question is whether respondent carried its burden of rebutting the presumption of prejudice that arose from this misconduct.

B. Respondent Has Not Rebutted The Presumption Of Prejudice

1. Ms. Nice's credibility.

As in prior juror misconduct cases, Ms. Nice's credibility is central to the inquiry of whether Respondent has rebutted the presumption of prejudice. (See, e.g., *Manriquez*, *supra*, 5 Cal.5th at p. 801 [noting referee's determination that juror was credible at the outset]; see also *Hitchings*, *supra*, 6 Cal.4th at p. 114 [whether juror misconduct occurred depends on credibility of two witnesses].) The question of whether Respondent carried its burden of rebutting the presumption of prejudice turns largely on whether Ms. Nice's reasons for failing to disclose the Kinsey incident, her restraining order lawsuit, the civil lawsuit, and the November 2001 domestic violence incident are credible.

At the outset, this Court finds that Ms. Nice has repeatedly lied under oath. This case is unusual in that here, the evidence that Ms. Nice lied under oath comes from Ms. Nice herself. Among the claims Ms. Nice made under oath in her 2000 restraining order litigation was that a restraining order against Ms. Kinsey was required because she had "committed acts of violence against" Ms. Nice and her unborn child and she would "try to hurt the baby, with all the hate and anger she has for Richelle." (EH Exhibit 1 at pp. 7, 11.)

Ms. Nice later testified under oath before Judge Pfeiffer and obtained a restraining order protecting "Richelle Nice & unborn child." (EH Exhibit 1 at pp. 2, 4.) But in her 2022 testimony, Ms. Nice testified – again under oath – that she never had any genuine fear for her unborn baby, and she sought the restraining order out of spite. (RT EH 52, 297.) Her fear, and her reason for obtaining the restraining order, was that if she and Ms. Kinsey fought, they "would roll[] around like some dummies on the ground" causing Ms. Nice to have a miscarriage. (RT EH 53.) While neither side has produced a transcript from the testimony before Judge Pfeiffer, this Court finds that Ms. Nice's 2022 account of her fear would not be sufficient cause to issue a three-year restraining order under California Code of Civil Procedure section 527.6. More importantly, this Court is dubious that any court would grant such an order where the testimony of the moving party departs so dramatically from her written application, submitted under penalty of perjury. (See EH Exhibit 1 at p. 11.) However, for purposes of assessing credibility, it does not matter which sworn version is true; either way, the different versions reflect Ms. Nice's cavalier relationship with the truth, even when making sworn statements.

In addition, Ms. Nice admitted that after she had obtained the restraining order against Ms. Kinsey, she saw a video of Ms. Kinsey holding Ms. Nice's baby at a party. (RT EH 95-97, 192-195.) Ms. Nice called police in June 2002 to report the violation. (*Ibid*; RT EH 509-513.) In 2022, however, Ms. Nice testified under oath that she did not have any fear for her baby, and that she instead called police out of spite. (RT EH 195.) Again, it does not matter if Ms. Nice was lying when she spoke with police in 2002 or lying when she testified in 2022; either way, the inconsistency calls her credibility as a witness into question.

In paragraph 20 of her December 2020 declaration, Ms. Nice stated that she requested a restraining order because Ms. Kinsey "came to the home where I lived and caused a disturbance." (EH Exhibit 10 at ¶ 20.) In that same paragraph, she stated that Ms. Kinsey was not happy with Ms. Nice and Mr. Whiteside's relationship, so she came to "[Ms. Nice's] apartment to confront [her] about it." (*Ibid*.) In paragraph 21, Ms. Nice

reiterates that she "sought a restraining order based on [Ms. Kinsey's] behavior" as described in the previous paragraph. (*Id.* at ¶ 21.) This version of events directly supported Petitioner's thesis that Ms. Kinsey was threatening Ms. Nice and, by extension, her unborn baby. The declaration was sworn under penalty of perjury. (*Id.* at p. 4.) During her testimony at the evidentiary hearing, however, Ms. Nice testified that the sworn allegations in paragraph 20 were false; in fact, Ms. Kinsey did not come to confront her. (RT EH 28.) In addition, the sworn allegations of paragraph 21 were false; "the restraining order wasn't a result of when [Ms. Kinsey] came to my house." (RT EH 44.)

In short, Ms. Nice's own testimony in 2022 about her prior statements under oath reflect a consistent attempt to shift the focus of Ms. Kinsey's behavior away from Ms. Nice and her unborn child. More importantly for purposes of assessing credibility, there are only two possibilities from Ms. Nice's 2022 testimony. Either Ms. Nice provided false information under oath in 2000, in her 2020 declaration and lied to the police in 2002, or she provided false information under oath in her 2022 testimony.

There are still more instances of Ms. Nice giving inconsistent statements under oath. When seeking child support orders in March and April of 2004, Ms. Nice provided a declaration detailing her income and expenses, and swore under oath that the only people living at home with her were her four children, ages 1 to 15. (EH Exhibit 16 at pp. 3, 11.) She did not list any adults living with her who could have provided financial assistance. (*Ibid.*) In contrast, during jury selection in the instant case which also took place in March and April of 2004, Ms. Nice repeatedly swore under oath that she lived with her significant other, later identified as Eddie Whiteside (RT EH 119-120), and explained that the reason jury service in this five-month trial would not be a financial burden was that Mr. Whiteside had agreed to provide financial support. (EH Exhibit 4 at p. 4; EH Exhibit 5 at pp. 4610, 4627.) Here, too, for purposes of assessing credibility it does not matter which sworn version is true; either way, the different versions suggest that Ms. Nice is willing to lie

under oath.[10]

2. The reasonableness of Ms. Nice's explanations for failing to reveal the Kinsey and Whiteside incidents.

As discussed above, in *Manriquez* the Supreme Court identified a number of specific factors to consider in assessing whether a Respondent has rebutted the presumption of prejudice. Among the most important of these factors is the reasonableness of any explanations offered by the juror to explain the false answers provided.

a. Ms. Nice's explanation for failing to reveal the restraining order lawsuit and the civil lawsuit for damages.

Respondent relies on Ms. Nice's explanations for her failure to answer question 54a of the juror questionnaire accurately. First, Ms. Nice explained that the 2000 restraining order litigation against Ms. Kinsey did not cross her mind because she had an "erroneous understanding" that the term "lawsuit" covered only actions for money or property. (ROB at pp. 52-53.) Respondent contends that this explanation is plausible because Ms. Nice is not a lawyer and might not understand the full meaning of the word "lawsuit." (ROB at pp. 8, 11, 42.)

The Court recognizes that the term "lawsuit" in question 54a is a term of art that may be open to interpretation by non-lawyers. (See *McDonough*, *supra*, 464 U.S. at p. 555 [jurors may be uncertain as to the meaning of terms that are relatively easily understood by judges].) Nevertheless, there are two problems with Ms. Nice's explanation when considered in the context of "[h]ow reasonable is [her] testimony when you consider all the other evidence in the case[.]" as CALCRIM No. 226 counsels. First, the restraining

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[10] Standard instructions CALJIC No. 2.20 and CALCRIM No. 226 also urge, respectively, consideration of whether the witness was "testifying under a grant of immunity" or was "promised immunity . . . in exchange for his or her testimony[.]" This factor applies here as well. (RT EH 21-22.) Although the circumstances here differ in some respects from the usual situation where the immunized witness is suspected to have been involved in the same crime as the defendant, there is no reason Ms. Nice would seek immunity in order to testify unless she believed she needed protection from a potential perjury charge.

order paperwork itself uses the term "lawsuit" and directs the person filling out the form to "*Read the* Instructions for Lawsuits to Prohibit Harassment *(form CH-150) before completing this form*." (*Ibid.* at p. 7.) So it is unlikely that a layperson, having just read the directions for filling out the form, would not be aware that she was filing a lawsuit. Second, Ms. Nice's own explanation of how she read question 54 is inconsistent with her testimony that she did not understand the restraining order litigation was a lawsuit. Question 54b asked prospective jurors whether, if they were involved in a lawsuit, they were the plaintiff, defendant, or both. (EH Exhibit 4 at p. 10.) In her sworn declaration, Ms. Nice explained that (1) she read questions 54a and 54b "together because they were labeled as being part of the same question," and (2) in answering question 54a, she considered whether she had ever been a plaintiff. (EH Exhibit 10 at ¶¶ 7-8.) Significantly, however, Ms. Nice also admitted that she personally prepared the lawsuit for a restraining order herself in which she identifies herself as the plaintiff at least 16 times. (See EH Exhibit 1 at pp. 2, 5, 6, 8, 12, 13; EH Exhibit 10 at ¶ 21.) And, as discussed below, Ms. Nice was the plaintiff in her civil lawsuit for lost wages against Ms. Kinsey. So reading questions 54a and 54b "together because they were labeled as being part of the same question," should have alerted her to the fact that she had been involved in two lawsuits.

Second, the explanation Ms. Nice gave for failing to disclose the restraining order litigation conflicts with the explanation she gave for failing to disclose her civil lawsuit against Ms. Kinsey for lost wages. Ms. Nice admitted that the civil lawsuit involved money since she was suing for lost wages. (RT EH 42-43, 291.) Nevertheless, Ms. Nice failed to disclose this lawsuit as well. (EH Exhibit 4 at p. 9.) She gave the same reason for her non-disclosure that she gave in connection with the restraining order litigation – this lawsuit did not cross her mind – but for a very different reason: because after filing it, there were no further proceedings and eventually she went to court and told the judge she wanted to drop it. (RT EH 29-30, 94; ROB at p. 53.)

There is tension between the two explanations. If Ms. Nice's explanation for failing to disclose the restraining order litigation was genuine – her belief that question 54a's

reference to lawsuits only covered lawsuits involving money – she certainly should have disclosed the civil lawsuit for lost wages. And if Ms. Nice's explanation for failing to disclose the civil lawsuit was genuine – that there were no further proceedings because she dismissed the lawsuit – she certainly should have disclosed the restraining order litigation which was *not* dismissed and not only involved subsequent proceedings, but the granting of a three-year restraining order against Ms. Kinsey, and Ms. Nice's later report of at least one violation of the restraining order. (EH Exhibit 1 at p. 4; RT EH 42, 96-97, 192-195, 507-513.) The Court finds that Ms. Nice's explanation for not disclosing the restraining order lawsuit is inconsistent with her explanation for not disclosing the lost wages lawsuit and therefore at least one of her explanations is not credible.[11]

b. Ms. Nice's explanation for failing to reveal the Kinsey incident.

The Court also finds that Ms. Nice's explanation for failing to answer "yes" to question 74 is not credible. (EH Exhibit 4 at p. 14.) As relevant here, question 74 poses inquiries in two areas. First, it asks if Ms. Nice herself had ever been either a victim of or witness to any crime. Second, it asks whether she had a close friend who had been the victim of or witness to any crime. Ms. Nice answered "no." (*Ibid.*) Respondent relies on Ms. Nice's explanation that the crimes Ms. Kinsey committed when she came to her house "were against Mr. Whiteside and the landlord, not against Ms. Nice." (ROB at p. 52; see RT EH 56 [when asked if Ms. Kinsey's act in slashing tires was a crime, Ms. Nice explains "it wasn't a crime against me"]; 257-258 [when asked if Ms. Kinsey's act in smashing through her front door was a crime, Ms. Nice notes the door belonged to "the landlord[]"].) But those explanations do not credibly explain Ms. Nice's answers to this question.

Ms. Nice's reason for not revealing that she was a victim of Ms. Kinsey's act in

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[11] Ms. Nice was not entirely forthcoming about the civil lawsuit. Thus, although she explained in her 2020 declaration that she did not disclose the restraining order litigation because she thought a lawsuit involved money or property, Ms. Nice did not disclose the civil lawsuit which involved money. (EH Exhibit 10.) Ms. Nice said nothing at all about the civil lawsuit until she had been provided immunity for her testimony at the evidentiary hearing.

slashing Mr. Whiteside's tires – "it wasn't a crime against me" (RT EH 56) – is accurate but it addresses only part of the question. Question 74 asked if Ms. Nice "*or any member of [her] family, or close friends*, [have] ever been the VICTIM or WITNESS to any crime." (EH Exhibit 4 at p. 14, italics added.) Even setting aside the question of whether Ms. Nice was a witness to the tire slashing, she recognized that Mr. Whiteside – her significant other who she maintained was living with her and her four children at the time – was the victim of this crime. (EH Exhibit 4 at p. 4 ["living with significant other"]; EH Exhibit 5 at pp. 4610, 4627 [living with significant other].) Nevertheless, although Ms. Nice conceded that slashing tires was a crime (RT EH 56), she did not disclose the incident prior to trial, precluding trial counsel from exploring the nature of the incident during jury selection.

There is also an important inconsistency in Ms. Nice's explanation for the damage Ms. Kinsey inflicted on her front door which renders her response to this question unreasonable "when you consider all the other evidence in the case." (CALCRIM No. 226 (2021 ed.).) Ms. Nice had lived in her home for nine years before the Kinsey vandalism incident (RT EH 181), but when Respondent's counsel asked whether the door Ms. Kinsey kicked in was her door or the landlord's door, she indicated it was the landlord's door. (RT EH 257-258.) Respondent posits that Ms. Nice answered question 74 with an understanding of this distinction, and she did not disclose the door smashing incident because it was only a crime against the landlord's ownership interest, not against her possessory interest as a nine-year tenant. (ROB at pp. 30, 52.)

First, this explanation is inconsistent with other parts of the hearing where Ms. Nice acknowledged that Ms. Kinsey smashed in her door and that she considered that act to be a crime. (RT EH 46 ["She knocked on my door"]; 49["When she came to my house and kicked in my door"]; 55-56 [Ms. Nice called police because she "thought a crime was being committed."].) Further, Respondent's argument is inconsistent with its position that Ms. Nice did not understand the term "lawsuit" because she is not an attorney. (ROB at pp. 8, 11, 42.) Much as the Court finds that a layperson might not have a precise understanding of the term "lawsuit," it also finds that it would be unreasonable for a layperson to

distinguish between a landlord's ownership interest and a tenant's possessory interest when someone comes over and kicks in their door. Instead, as with the varying explanations for failing to reveal the lawsuits, when considered in light of "all the other evidence in this case," this explanation looks more like a post hoc rationalization than a genuine and credible explanation. Moreover, even accepting the premise that Ms. Nice believed she was not a victim when Ms. Kinsey destroyed the front door of her home (because the landlord owned the door), she was a witness to that crime, as well as to the subsequent stalking. Yet in answering the witness component of question 74, she disclosed none of this, again precluding any exploration by counsel during voir dire.

c. Ms. Nice's explanation for failing to reveal the Eddie Whiteside incident.

Turning to the November 2001 Eddie Whiteside incident, Ms. Nice explained that she did not disclose that she was a victim of domestic violence because Mr. Whiteside was innocent and never hit her. (ROB at p. 52.) In her 2022 testimony, Ms. Nice explained that she and Mr. Whiteside had an argument, she handed her baby to her mother, she and Mr. Whiteside entered their bedroom, she closed the door, and then she hit him. (RT EH 69-72.) After police arrived, she refused to speak with them. (RT EH 72-74.) Looked at in isolation, of course, Ms. Nice's 2022 explanation for not disclosing that she was a domestic violence victim is both internally consistent and reasonable.

Here too, however, the question is whether the explanation is reasonable "when you consider all the other evidence in the case." (CALCRIM No. 226 (2021 ed.).) Looking at the record as a whole, there are reasons to doubt Ms. Nice's 2022 version of events. According to Ms. Nice's 2022 testimony, although she knew Mr. Whiteside was innocent, she did not tell that to police when they arrested him that night, and she never offered to come to court to tell the judge that he was innocent. (RT EH 74-76, 203.) And although Mr. Whiteside knew he was innocent, he never asked Ms. Nice to come to court to tell the

truth about what happened.[12] (RT EH 76.) Moreover, although Ms. Nice says she never provided any information to police, Mr. Whiteside was charged not only with battering Ms. Nice – which might be plausibly explained by Ms. Nice's 2022 recollection that she had a cut lip from braces she was wearing – but also, for unexplained reasons, with false imprisonment and endangering the health of a child, neither of which are supported by Ms. Nice's 2022 version of what happened. (EH Exhibit 2 at p. 2.) In short, the version of events Ms. Nice provided in her 2022 testimony as to the November 2001 Eddie Whiteside incident is inconsistent with the contemporaneous actions of all parties – Ms. Nice, Mr. Whiteside, and the police.

d. Ms. Nice's explanation that the Kinsey and Whiteside incidents did not cross her mind.

In addition to Ms. Nice's specific explanation for her non-disclosures, there is an overarching problem with Ms. Nice's more general testimony that this constellation of events involving her, Mr. Whiteside, and Ms. Kinsey did not cross her mind when she filled out her jury questionnaire. (RT EH 84 [restraining order litigation]; RT EH 302 [civil lawsuit].) In order to find credible Ms. Nice's testimony that when she answered questions 54 and 74 she forgot Ms. Kinsey's criminal conduct, along with her own attempts to halt and be remedied for this conduct through legal action, this Court would have to find that she:

- Forgot Ms. Kinsey's violent conduct at Ms. Nice's home while Ms. Nice was present and pregnant, which included slashing Mr. Whiteside's tires, screaming for him and Ms. Nice to come out of the house, trying to spray him with mace, and ultimately kicking in the door to Ms. Nice's home. (RT

[12] Respondent faults Petitioner for failing to call Ms. Kinsey or Mr. Whiteside as witnesses to either rebut or corroborate Ms. Nice's testimony. (ROB at p. 61; RRB at p. 9; Aug. 11 RT 87, 91.) However, Petitioner had the burden to prove misconduct and, once he did so, it is Respondent's burden to rebut the presumption of prejudice that arises from that misconduct. Either party could have called additional witnesses to carry their respective burdens. This Court also notes that Petitioner sought to depose Mr. Whiteside prior to the hearing and Respondent opposed that request, which this Court ultimately denied. (Order on Petitioner's Motion for Discovery, filed 11/20/2021.)

EH 45-47; 231.)

- Forgot that she called the police during Ms. Kinsey's attack. (*Id.* at p. 47.)

- Forgot that Ms. Kinsey's attack on the home where Ms. Nice and her family had lived for nine years led to their eviction from that home and forced them to move from Mountain View to East Palo Alto. (*Id.* at p. 181.)

- Forgot that Ms. Kinsey continued to harass and stalk Ms. Nice after she and her family moved to a new home – which included Ms. Kinsey discovering Ms. Nice's new address and phone number, repeatedly showing up outside her home, following her to work, and threatening to settle her dispute with Ms. Nice "on the streets." (*Id.* at pp. 50, 57.)

- Forgot that Ms. Kinsey's conduct caused sufficient stress to cause premature contractions and caused her to fear, at a minimum, that her unborn child would be born prematurely and/or harmed if she fought with Ms. Kinsey. (*Id.* at pp. 51-52.)

- Forgot that she sought a temporary restraining order and injunction against Ms. Kinsey, that the restraining order was granted, that she testified in court -- at the same courthouse where she would later report for jury duty in the instant case--in support of the injunction, and that the injunction was granted. (*Id.* at p. 84.)

- Forgot filing a civil lawsuit against Ms. Kinsey for damages she sustained as a result of Ms. Kinsey's conduct. (*Id.* at pp. 42-43.)

- Forgot that she called the police in June of 2002 to report a violation of the restraining order against Ms. Kinsey. (*Id.* at pp. 192-193.)

But the fact of the matter is that these at times violent and life-altering interrelated events spanned (at minimum, as far as court and law enforcement records show) nearly two years of Ms. Nice's life. And the June 2002 violation of the restraining order was less than two years before jury selection began in Mr. Peterson's case

But even that nearly two-year time period is misleading. According to Ms. Nice's 2022 testimony, at the time of jury selection she was still living with Mr. Whiteside. And it was Mr. Whiteside who was the source of all these events through his overlapping

relationships with Ms. Nice and Ms. Kinsey. The September 23, 2000 confrontation – which gave rise to Ms. Nice's restraining order and the lost wages lawsuits – occurred because Ms. Kinsey was jealous of Ms. Nice and Mr. Whiteside. (EH Exhibit 10 at ¶ 20; RT EH 28.) Ms. Nice told police about the June 2002 restraining order violation after seeing a video that showed Mr. Whiteside and Ms. Kinsey together at a party and Ms. Kinsey holding the first child Ms. Nice and Mr. Whiteside had together; a party that had occurred while Ms. Nice was in the hospital giving birth to her and Mr. Whiteside's second child. (RT EH 97.) Indeed, it was Mr. Whiteside's cheating on Ms. Nice with other women that made her life a "living hell." (RT EH 67, 229.) The timeline of Ms. Nice's involvement in her years-long series of lawsuits and police and judicial system contacts arising from Ms. Kinsey's harassment, and the fact that she was still living with Mr. Whiteside – the cause of this legal and judicial fallout – makes it unlikely that she would have forgotten these events when answering the jury questionnaire.

The nature of Ms. Kinsey's acts – and the subsequent restraining order and civil litigation – distinguish this case from the Supreme Court's decision in *In re Cowan*. In *Cowan*, a juror failed to reveal a misdemeanor arrest for public fighting, explaining that he did not think of it. (*Cowan*, *supra*, 5 Cal.5th at p. 244.) That arrest involved a one-day incident in which the juror was cited and released without being taken into custody. (*Ibid*.) He paid a fine and the matter was concluded. (*Ibid*.) He was never placed on probation, and never had to meet with a probation officer. (*Ibid*.) The Court found credible the juror's testimony that he simply overlooked the incident. (*Ibid*.) Here, Ms. Kinsey's crimes against Ms. Nice precipitated a series of related actions by Ms. Nice – the calling of police, a restraining order lawsuit, a civil lawsuit, and the subsequent restraining order violations – which occurred over a span of 22 months and concluded just two years before Petitioner's trial. This included two separate court appearances – one in connection with the restraining order in which Ms. Nice was sworn and testified and the second in connection with the civil lawsuit where she dismissed charges. (EH Exhibit 1 at p. 4; RT EH 30.) And this incident resulted in the eviction of Ms. Nice, her mother, and her four young children from

their home of nine years. (RT EH 90-91,181.) Given these facts, in contrast to the single-day incident forgotten by the juror in *Cowan*, it is highly unlikely that Ms. Nice simply forgot about this incident entirely. Viewing all the evidence in the case as required when assessing the credibility factors identified in Evidence Code section 780, CALCRIM No. 226 and CALJIC No. 2.20, Ms. Nice's proffered reasons for failing to answer questions 54 and 74 accurately are not credible.

3. The remaining *Manriquez* factors

In addition to the reasonableness of a juror's explanations for concealing relevant facts (discussed above), the Supreme Court in *Manriquez* identified several other factors useful in assessing whether a juror's false answers during jury selection were intentional. Because *Manriquez* is the Court's most recent habeas corpus juror misconduct opinion dealing with juror concealment, an in-depth review of that case is appropriate. Such review demonstrates that, in contrast to the facts in *Manriquez,* the facts in this case, when considered in connection with the factors identified in *Manriquez*, support this Court's conclusion that Ms. Nice intentionally failed to disclose her involvement in previous lawsuits.

In *Manriquez*, the defendant was charged with capital murder. The defense theory at the penalty phase revolved around the presentation of evidence showing that defendant's childhood was marred by "extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education, affection, or encouragement by the adults in [his] life." (*Manriquez*, *supra*, 5 Cal.5th at p. 792.)

Prior to trial, potential jurors were asked if they had ever been the victim of or seen a crime. (*Id*. at pp. 793-794.) Juror C.B. did not disclose having been the victim of abuse as a child. (*Id.* at p. 794.) But in a post-trial questionnaire which she voluntarily filled out immediately after the 1993 verdict, C.B. forthrightly informed the court that 40 years earlier, when she was a child, she had been abused. (*Ibid*.) In 2007, C.B. voluntarily signed a declaration about her process in answering the jury questionnaire. (*Ibid*.) She voluntarily signed another declaration in 2012. (*Id*. at p. 795.) In her subsequent testimony at the

defendant's evidentiary hearing, C.B. made clear that nothing she knew about the case prior to filling out the questionnaire alerted her to the significance of childhood abuse; "prior to the trial, she knew nothing about petitioner. She learned about petitioner's childhood for [the] first time during the penalty phase." (*Id*. at p. 809.) C.B. also explained that her childhood abuse "did not come to mind," because the abuse had occurred in the 1950s – four decades earlier – and she did not consider herself a victim. (*Id*. at pp. 795, 801.) C.B. did not perceive herself as a victim because "in the [1950s] when I grew up, abuse was not a crime. Kids were abused all the time. And using kids for hard labor was very common." (*Id*. at p. 795.) The Superior Court judge sitting as a habeas referee in the case credited C.B.'s explanation, "reason[ing] that [C.B.'s] belief her childhood experiences were neither crimes nor acts of violence 'is consistent with how society viewed and treated abuse of children 60 years ago, as distinct from how society now views and treats such abuse.'" (*Id*. at p. 801.)

On these facts, the Supreme Court found that the state had rebutted the presumption of prejudice. In reaching this conclusion, the Supreme Court repeatedly noted that C.B's voluntary disclosure of the abuse, and her post-trial cooperation with the court process, strongly supported a conclusion that the nondisclosure was unintentional. Thus, "juror C.B.'s disclosure of her childhood experiences on the posttrial questionnaire suggested she did not have a 'hidden agenda,'" (*Manriquez*, *supra*, 5 Cal.5th at p. 804.) C.B. "voluntarily complet[ed] the posttrial questionnaire and . . . voluntarily compl[ied] with the parties' pre-reference hearing requests for more information." (*Id.* at p. 801.) The Court noted that a different conclusion might be warranted if C.B. "had refrain[ed] altogether from disclosing" the abuse. (*Id.* at p. 804; accord *San Nicolas*, *supra*, 34 Cal.4th at pp. 643, 646 [finding juror's non-disclosure of a 22-year-old stabbing incident unintentional where juror voluntarily disclosed the incident to defense counsel months after trial and "cooperated fully with defense investigators"].) Moreover, the Court noted that nothing in the "pretrial publicity, the pretrial juror questionnaire, or voir dire" would have alerted C.B. to the importance or relevance of her own experiences. (*Id*. at p. 809.) Again the court noted the

possibility of a different conclusion if there had been pretrial publicity alerting C.B. to the relevance of her prior experiences. In that situation the failure to disclose those experiences could indicate bias:

> If pretrial publicity, the pretrial juror questionnaire, or voir dire had alerted her to the possibility that his harsh upbringing would be an issue at trial, conceivably her memories about her own experiences might have been triggered earlier. That is, if C.B. had a reason to anticipate the importance of her own childhood experiences while completing the pretrial questionnaire or participating in voir dire, her nondisclosure may have indicated an attempt to conceal her own experiences, which could in turn indicate juror bias.

(*Id.* at p. 809; see *Blackwell*, *supra*, 191 Cal.App.3d at p. 929 [finding juror non-disclosure prejudicial where juror did not reveal that she had been the victim of domestic violence even though she knew the charged case involved domestic violence].) Turning to C.B.'s explanation for the non-disclosure – that she did not view herself as a victim because childhood abuse was viewed differently in the 1950s – the Supreme Court credited the habeas referee's finding that C.B.'s testimony was "consistent with how society viewed and treated abuse of children 60 years ago, as distinct from how society now views and treats such abuse." (*Id*. at p. 801; accord *Cowan*, *supra*, 5 Cal.5th at p. 244 [crediting juror's testimony that he did not report a misdemeanor conviction for public fighting where the entire incident occurred on one day, and juror was not arrested, handcuffed, or booked but was instead cited and released by law enforcement].) Finally, in finding that the presumption of prejudice had been rebutted, the Court in *Manriquez* noted there was no "evidence that she had prejudged the case or otherwise entered deliberations with an impermissibly closed mind." (*Id*. at p. 818.)

The facts in this case stand in sharp contrast to those in *Manriquez* in virtually every respect. Unlike *Manriquez*, where C.B. admitted her non-disclosure in a post-trial questionnaire and then "voluntarily compl[ied] with the parties' pre-reference hearing requests for more information," Ms. Nice spoke with a defense investigator *before* the misconduct claim had been brought, but after the claim was made she (1) refused to speak

with the defense, (2) refused to speak with respondent, (3) hired a lawyer, and (4) refused to testify absent a grant of immunity.[13] This Court recognizes that every juror has the rights to retain counsel, exercise their Fifth Amendment privilege against self-incrimination, and refuse to testify absent a grant of immunity. However, the jurors in *Manriquez*, *San Nicolas*, *Boyette*, *Cowan* (and every other jury misconduct case) also had the rights to retain counsel, exercise their Fifth Amendment privilege against self-incrimination and insist on a grant of immunity before testifying. *But none of them did.* Although Ms. Nice was free to assert these rights, *Manriquez* permits an inference that in doing so, she demonstrated a desire to conceal her bias.

The Court also recognizes that there is a standard jury instruction given at the end of a case (and given here) which tells jurors they need not speak with anyone about the case. (See CALCRIM No. 3590; Code Civ. Proc., § 206, subds. (a)-(d); 120 RT 21760-21761.) Of course, presumably the jurors in *Manriquez* and *San Nicolas* also received this standard instruction and nevertheless voluntarily chose to explain the omissions on their respective juror questionnaires. (See *Manriquez*, *supra*, 5 Cal.5th at p. 818 [noting that juror voluntarily cooperated with defense counsel and disclosed her childhood abuse]; *San Nicolas*, *supra*, 24 Cal.4th at p. 646 [deferring to trial court's credibility determination which was based largely on juror's cooperation with defense investigators].) Indeed, it is precisely because of this standard instruction that a juror's voluntary decision to affirmatively cooperate with the parties in a search for truth – despite having been told she did not have to cooperate – is such a powerful sign of the juror's credibility. Clearly, Ms. Nice's post-trial behavior here distinguishes her from the jurors in every one of these cases

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[13] Respondent analogizes to Ms. Bracksher's testimony to show that witnesses can be confused by terms and submit incorrect information in declarations under penalty of perjury. (ROB at p. 43; RRB at p. 19; Aug. 11 RT 115-116.) However, the behavior of Ms. Bracksher stands in stark contrast to Ms. Nice's behavior. When learning of her error in her first declaration, Ms. Bracksher did not retain an attorney, she did not request immunity from the District Attorney, and she did not attempt to justify her errors with contradictory explanations. Instead, she testified and explained her errors in a forthright manner, even conceding that she did not know why she made certain errors. (RT EH 538.)

and is a factor that this Court may consider in assessing whether her failure to disclose material information on her juror questionnaire was intentional.

Further, unlike *Manriquez* where there was no pretrial publicity alerting C.B. to the importance of her own history of abuse, the pretrial publicity here was massive and made explicit the prosecution's theory that Mr. Peterson assaulted his pregnant wife, killing her and their unborn child. (See *Peterson*, *supra*, 10 Cal.5th at p. 439 [noting that Petitioner's case was the subject of massive worldwide media attention].) Because Ms. Nice (like virtually every other juror) acknowledged during voir dire that she had been exposed to pre-trial publicity, she was certainly on notice that her experience of being threatened and stalked while pregnant, fearing for the safety of her unborn child, and being involved in a domestic violence incident related to her partner's unfaithfulness would be central themes in the prosecution's case against Petitioner. (EH Exhibit 4 at pp. 17; EH Exhibit 5 at p. 4623.)

At first blush, there are two facets of *Manriquez* that look very much like the instant case, both involving the explanations given for the non-disclosures in the two cases. Juror C.B. explained that the childhood abuse did not cross her mind – it had occurred 40 years earlier and she did not view herself as a victim because at the time the abuse occurred, she (and society) did not view this type of abuse as a crime. (*Manriquez*, *supra*, 5 Cal.5th at pp. 801, 805.) Both the habeas referee and the Supreme Court credited this explanation because, in fact, it was "consistent with how society viewed and treated abuse of children 60 years ago, as distinct from how society now views and treats such abuse." (*Id*. at p. 801.) Here, Ms. Nice similarly said the restraining order litigation did not cross her mind, and she explained that she did not consider herself a victim of Ms. Kinsey's actions nor did she consider those actions criminal. (RT EH 278, 290; EH Exhibit 10 at ¶¶ 22-23.) On its face, these two explanations are similar, but a closer analysis reveals that this analogy to *Manriquez* fails for three reasons.

First, and most obviously, unlike the juror's abuse in *Manriquez*, the series of events involving Ms. Kinsey did not occur four decades before Petitioner's trial – they spanned a

two-year period that concluded only two years before Ms. Nice filled out her questionnaire. Second, Ms. Nice explained that the reason the restraining order incident did not cross her mind was because she thought lawsuits had to involve "money or property." (RT EH 278, 290.) Of course, this explanation is starkly inconsistent with the fact that Ms. Nice did not disclose her separate lawsuit against Ms. Kinsey, which she admitted was for money. (RT EH 42-43, 290-291.) And as to the nature of the acts committed during the restraining order incident, and again in contrast to juror C.B., there is no question here as to whether Ms. Nice considered herself a victim of criminal behavior at the time the crimes occurred. In her 2022 testimony, Ms. Nice admitted that the acts which Ms. Kinsey committed – including the slashing of tires and the smashing of Ms. Nice's front door – were crimes, directly contradicting her sworn declaration. (Compare RT EH 56-57 with EH Exhibit 10 at ¶ 23.) Equally important, and again in contrast to juror C.B., Ms. Nice also admitted that she herself had called police on the day of the crimes to report these crimes. (RT EH 55-57.) Unlike juror C.B., the evidence shows that Ms. Nice at all times up to her December 2020 declaration (and subsequent testimony) viewed herself as the victim of criminal conduct.

It is true that in her 2022 testimony Ms. Nice sought to re-affirm that portion of her December 2020 declaration that characterized her interactions with Ms. Kinsey as "minor indignities" for which she did not "need the police." (RT EH 58-59.) But, as noted above, Ms. Nice's bland characterization of Ms. Kinsey's actions in her 2020 declaration and her 2022 testimony as "minor indignities" and "undignified means of communicating" are impossible to reconcile with Ms. Nice's immediate actions in calling police to report Ms. Kinsey's crimes. It is akin to juror C.B. in *Manriquez* reporting her abuse as criminal when it occurred in the 1950s, and seeking a restraining order to stop the abuse, but later testifying that she did not consider her abuse to be criminal in the first place. And although this Court will not reproduce the entire narrative Ms. Nice included with her restraining order application, the urgent language she used to depict Ms. Kinsey's behavior and its traumatic effects on her and her unborn child is in sharp contrast to her characterization of

Ms. Kinsey's behavior in 2022 as a "minor indignity." (See EH Exhibit 1 at p. 11.) As the Supreme Court has said, "it is highly unlikely . . . nondisclosure was inadvertent" when voir dire questions are specific, and concealment is of a "traumatic" event. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1176, superseded by statute on other grounds.)

Based on all of the evidence before it, the *Manriquez* court was able to say there was not "any evidence that [C.B.] had prejudged the case or otherwise entered deliberations with an impermissibly closed mind." (*Manriquez*, *supra*, 5 Cal.5th at p. 818.) But this Court cannot make a similar finding. Although Ms. Nice (along with the other jurors) was specifically instructed not to reach a decision until "after discussing the evidence and instructions with the other jurors" and not to express, "at the beginning of deliberations . . . an emphatic opinion on the case, or to announce a determination to stand for a certain verdict," Ms. Nice did just that. (111 RT 20564-20565.) When seated to replace juror 7 who had been discharged, Ms. Nice's first words were to urge her fellow jurors to make Petitioner "pay for killing the 'Little Man'." (RT EH 352.)

As Petitioner recognizes, Ms. Nice's decision to ignore the trial court's instructions on the proper approach to jury deliberations does not in and of itself constitute misconduct, since this instruction is not considered mandatory. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1352.) But her decision certainly undercuts any argument that Respondent has carried its "heavy burden" of proving there was no substantial likelihood that she was biased. (See *Irvin v. Dowd* (1960) 366 U.S. 717, 722 ["a juror who has formed an opinion cannot be impartial."]; see also *Kenneally v. Lungren* (9th Cir. 1992) 967 F.2d 329, 333 ["Bias exists where [a factfinder] has prejudged, or reasonably appears to have prejudged, an issue"]; see also *Weatherton, supra,* 59 Cal.4th at p. 598 ["Prejudgment constitute[s] serious misconduct."].) The fact that before even beginning deliberations a juror's mindset is to make the defendant pay for what he allegedly did to the victim does not bespeak of a juror who has no bias. A statement seeking to punish a defendant before his guilt is even decided "require[s] neither interpretation nor the drawing inferences;" it is unabashed proof of prejudice. (*Weatherton*, *supra*, 59 Cal.4th at p. 599 [statement by juror before and during

deliberations that defendant deserved the death penalty was evidence of pre-judgment of guilt].) In short, the factors identified in *Manriquez* establish that in contrast to that case, Respondent has not carried its burden of rebutting prejudice.

4. The surrounding circumstances indicate that Respondent has not rebutted the presumption of prejudice.

The Supreme Court has counseled that in assessing whether the presumption of prejudice had been rebutted, a reviewing court should consider not just the specific nature of the misconduct itself but "the surrounding circumstances." (*Boyette*, *supra*, 56 Cal.4th at p. 890.) Here, there are four additional "surrounding circumstances" which also show that Respondent did not carry its heavy burden.

First the record shows that Ms. Nice provided false information to the trial court about her financial status to make it appear as if jury service would pose no financial burden. In this respect, on March 26, 2004, Ms. Nice signed an "Income and Expense Declaration" in conjunction with a child support action against William Robinson who was the father of one of her children. Mr. Nice declared under oath that (1) her monthly expenses were $3,820, (2) she received $400 in child support from a different partner,[14] (3) she had $160 in savings, and (4) she had a monthly salary of $1,885.20 after taxes. (EH Exhibit 16 at pp. 1-6.) In that sworn declaration, signed to get an order compelling Mr. Robinson to pay child support, Ms. Nice answered a question asking what people lived with her, and she swore there were only four people living with her – her four children. (*Id.* at p. 3.)

Three weeks later, on April 17, 2004, Ms. Nice filled out a separate "Income and Expense Declaration" in conjunction with a child support action against James Smith, who was the father of another child. Mr. Nice declared her expenses, the $400 child support and her salary, all of which were similar to her prior declaration. (*Id*. at pp. 9-12.) In this sworn declaration, signed to get an order for Mr. Smith to pay child support, Ms. Nice was

[14] Ms. Nice identified this partner as Eddie Whiteside. (EH RT 116-117.)

again asked how many people lived with her and she again named only her four children. (*Id*. at p. 11.)

Notwithstanding her financial situation, and despite at least three invitations from the trial court to declare a financial hardship, Ms. Nice chose not to avail herself of that very simple option to end her jury service and continue to support her family. (EH Exhibit 17 at p. 2468 ["A lot of people aren't going to be paid to sit here for five or six months. Some of you will. So we're going to take some time today to entertain some hardship excuses if you're unable to serve on this jury because you don't get paid or whatever."]; 2469 ["we know that some of you won't get paid for five or six months . . . . If you're not going to get paid . . . you will be excused."]; 2473 ["There are a lot of reasons for hardship excuses. Number one, you're not going to get paid for six months. That's the obvious one."].) Instead, she elected to fill out the jury questionnaire and return for an additional day of *Hovey* voir dire.

Ms. Nice filled out her jury questionnaire on March 9, 2004 – only two weeks before her March 26 "Income and Expense Declaration" described above. But in answering the questionnaire Ms. Nice provided different information about who lived with her, this time declaring under oath that she was living not just with her four children, but with a "significant other" as well as her mother. (EH Exhibit 4 at pp. 4, 5.) When Ms. Nice appeared for her April 12 voir dire, she 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." (EH Exhibit 5 at pp. 4610, 4627 [reaffirming that significant other will shoulder financial burden].) Ms. Nice made clear that Eddie Whiteside was this significant other. (RT EH 132-133.) As a consequence, Ms. Nice waived off financial hardship at the time she filled out the questionnaire and during voir dire and, in the words of the trial court, "practically volunteer[ed] to serve" on Petitioner's jury for five months without pay while supporting four young children. (EH Exhibit 5 at p. 4631.)

In short, at the very same time she was allaying the trial judge's concerns about her financial condition by claiming to live with Mr. Whiteside who would "carry the load," she

was telling the same court that (1) the only people who lived with her were her four boys and (2) Mr. Whiteside was paying her $400 child support. In portraying her financial need when seeking child support payments Ms. Nice swore under oath she lived alone with her four boys. But in portraying her financial need when seeking a seat on the jury, Ms. Nice swore under oath she had financial support from her live-in significant other. It is, of course, difficult to determine which of these two versions is true.[15] However, if Mr. Whiteside was living with her and providing financial support, then Ms. Nice's Income and Expense Declarations, sworn under penalty of perjury in March and April of 2004, contained false statements. And if, on the other hand, the Income and Expense Declarations were correct, then Ms. Nice's jury questionnaire and her voir dire, also given under oath, contained false statements.

Regardless of what impact this series of events has on Ms. Nice's general credibility, the fact that she was willing to forego a hardship excusal with four children at home, $3,800 in monthly expenses, $400 in monthly child support, $160 in savings and no salary to cover a five-month trial shows, at a minimum, that she was eager to serve. As the Ninth Circuit has noted in granting relief to a California defendant precisely because of juror concealment, "there is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck." (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 982.) Here, in connection with her financial condition, Ms. Nice either lied under oath in her Income and Expense Declarations, or in her jury questionnaire and voir dire.[16]

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[15] There is circumstantial evidence suggesting that Mr. Whiteside was not "carrying the load;" Ms. Nice admitted that – in fact – she had to get a part-time night job during trial. (RT EH 160-161.)

[16] Respondent notes that when the trial judge determined Ms. Nice would be paid for only two weeks, and started to discharge her, defense counsel Geragos objected and noted

Second, a major concern with Ms. Nice's failure to disclose the Kinsey incident in light of the specific facts of this case was the fact that it involved a threat of harm to Ms. Nice and her unborn child. Ms. Nice's post-trial conduct certainly raises cause for concern in this area as well. During the trial itself, as juror Greg Beratlis's testimony shows, Ms. Nice gave Conner a nickname, calling him "Little Man." Within months after trial ended, Ms. Nice began to write letters to Petitioner on death row. (RT EH 124.) Standing alone, this unusual conduct suggests a substantial emotional involvement in the case, the strength of which is only reinforced by the content of those letters, which reveals a repeated focus on what happened to Conner. (EH Exhibit 6 at pp. 4-6, 17-18, 21, 22, 23-24.)

It is, of course, true that Ms. Nice's decision to write Petitioner numerous post-trial letters focusing, in part, on Conner does not itself establish that Ms. Nice came into jury deliberations with a hidden bias because she had also been threatened while pregnant. Yet, her continued post-trial focus on Conner – and the act of writing Petitioner repeatedly on the subject – is certainly consistent with a juror who has been impacted by the trauma of having her own unborn baby threatened. That Ms. Nice admittedly gave Conner a nickname – "Little Man" – further illuminates her emotional involvement in the case, and the strength of her personal connection to that particular nickname is only reinforced by the photograph in her home of a baby wearing a 'Little Man' shirt. (RT EH 485.)

Third, Ms. Nice was not entirely candid in answering another important part of the

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that she had not said she was unable to serve. (ROB at pp. 49, 54, 56.) Respondent's position is that this shows Mr. Geragos wanted her to serve.

This is entirely true. But Mr. Geragos' actions were taken in light of the false answers he had been provided on the jury questionnaire. His stipulated testimony from the evidentiary hearing was that if he had known about the restraining order litigation and the Marcella Kinsey incident he would have discharged Ms. Nice. (Joint Stipulation to Testimony of Mark Geragos at ¶ 4.) And the contemporaneous record of voir dire supports this position – during voir dire Mr. Geragos discovered that another prospective juror had refused to reveal restraining order litigation in answering question 54a and the trial judge removed the juror for cause. (25 RT 4979-4984.)

questionnaire. Because of the extensive publicity prior to trial, Ms. Nice was aware of the state's theory that Petitioner was cheating on Laci Peterson with other women. (RT EH 227-228; 23 RT 4624.) Thus, she would have known that her opinion of men who cheat on their wives (as asked in question 26 of the questionnaire) might be relevant. In response, to question 26, she claimed to have "no" opinions about people involved in extramarital affairs. (EH Exhibit 4 at p. 5.) Yet at the hearing, Ms. Nice admitted that in her own life (1) Mr. Whiteside cheated on her with other women, (2) he made her life a "living hell," and (3) the fight with Mr. Whiteside on the night of November 2, 2001, was "probably" about his cheating. (RT EH 67, 124, 201, 229.) Indeed, the subject of Mr. Whiteside's cheating so preoccupied her that, after convicting Petitioner and sending him to death row, she wrote him a letter explaining that Mr. Whiteside had the same cheating problem as Petitioner and asking him to explain why men cheat. (RT EH 229; EH Exhibit 6A.) These facts further support the conclusion that Respondent has not met its burden of demonstrating there is no substantial likelihood that Ms. Nice was biased against Petitioner.

Finally, Ms. Nice's testimony as a whole supports the conclusion that Respondent has not met its burden of proof. In finding that the state had rebutted the presumption of prejudice in *Manriquez*, the Court noted that juror C.B. testified in a "direct, responsive, thoughtful and consistent manner" and "was not evasive, uncooperative or defensive." (*Manriquez*, *supra*, 5 Cal.5th at p. 801.) Taking Ms. Nice's testimony as a whole, the same cannot be said here. A few examples will suffice.

As detailed in the factual background above, Ms. Nice's testimony not only substantially departed from the documentary evidence, but these departures appear to have been surgically directed to areas on which Petitioner relied in making his juror misconduct claim.

For instance, in his Petition, Petitioner relied on Ms. Nice's own sworn allegations from November 2000 that she feared for the life of her unborn baby. (Petition at pp. 99-100.) The non-disclosure of the Kinsey incident was important precisely because, like Laci Peterson (in the state's theory), Ms. Nice herself had experienced a threat to her unborn

baby. (*Id*. at p. 102) But in her 2022 testimony Ms. Nice for the first time claimed that her specific sworn allegations on which Petitioner had relied were false and that she never had a genuine fear for her unborn baby's life. (RT EH 52.)

In light of their dramatic inconsistency, at least one of these statements made under penalty of perjury was false. The fact that Ms. Nice was willing to testify falsely under oath – either in 2000 in connection with the restraining order litigation or in 2022 at the evidentiary hearing itself – compromises her credibility as a witness. More importantly for purposes of Petitioner's juror misconduct claim, Ms. Nice did not change her sworn version of events in connection with Ms. Kinsey's tire slashing, the destruction of the door, or the stalking. Instead, Ms. Nice's significant change in her sworn version of events from the 2000 restraining order litigation was specifically directed to precisely that aspect of the Kinsey incident on which Petitioner relied in his Petition – the threat to her unborn child.

In addition, Petitioner separately relied on the documentary evidence showing that Ms. Nice was a victim of Mr. Whiteside's domestic violence. (Denial at pp. 32-33.) The non-disclosure of the Whiteside incident was important because, like Laci Peterson (under the state's theory), Ms. Nice was a victim of domestic violence. In her 2022 testimony Ms. Nice claimed for the first time that she was not a victim of domestic violence – it was she who punched Mr. Whiteside, who was then arrested by the East Palo Alto Police Department and charged with, among other crimes, false imprisonment and child endangerment, because Ms. Nice had a cut on her lip from her braces. (RT EH 71; EH Exhibit 2 at p. 2.) Neither of these departures – from either Ms. Nice's November 2000 sworn allegations, or the detailed judicial paperwork covering the Whiteside incident – had been advanced in Ms. Nice's December 2020 declaration. (See EH Exhibit 10.) And both departures undermine the bases for Petitioner's allegations of bias.

Ms. Nice's testimony also showed a considerable effort to distance herself from the phrase "Little Man," the nickname she gave Conner. Thus, Ms. Nice initially claimed that she gave Conner the nickname "Little Man" not during trial but "after trial was over and the first interview I did." (RT EH 105.) She claimed not to recall if – after she was selected

as a seated juror – she went into the jury deliberation room and suggested the jurors should convict Petitioner because of what he did to "Little Man," but claimed that this did not sound like something she would say. (RT EH 106, 177-178.) In fact, however, juror Beratlis recalled that when she first arrived in the jury room, Ms. Nice urged jurors that Petitioner should "pay for killing the 'Little Man'." (RT EH 352.)

And finally, in assessing Ms. Nice's testimony it is important to consider that when subpoenaed as a witness to the evidentiary hearing, Ms. Nice asserted her privilege against self-incrimination and refused to testify absent an agreement from the district attorney not to prosecute her for perjury. The concern raised by this extraordinary demand could not be clearer: in contrast to the honesty, candor, and cooperation of the juror in *Manriquez,* Ms. Nice was doing all in her power to avoid testifying at all.

Once misconduct is shown, it is at all points Respondent's burden to rebut the presumption of prejudice. Here the surrounding circumstances – Ms. Nice's apparent desire to get on the jury, her potential submission of false financial information to minimize the odds of discharge, her continued focus on the unborn baby (who, during the trial, she had nicknamed "Little Man"), her striking post-trial correspondence with Petitioner, her acknowledgement that her own significant other made her life "a living hell" by cheating on her and her awareness when she filled out the questionnaire that Petitioner was alleged to have cheated on his wife, the particular way in which she sought to change the basic facts established by the documentary evidence, her claim that she lied under oath in prior court proceedings, and her efforts to avoid testifying entirely – all support the same conclusion reached by application of the *Manriquez* factors, discussed above. Respondent has not carried its burden to show that there was no substantial likelihood of actual bias.

C. Conclusion

For the foregoing reasons, the petition for writ of habeas corpus is granted.[17]

[17] Because the Court finds that Ms. Nice is not a credible witness, and that her explanations for her false answers cannot be credited, there is no need to address whether relief is also required because – even if unintentional – the false answers mask a substantial

Dated: September 15, 2022

Respectfully submitted,

CLIFF GARDNER

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likelihood of actual bias and "reflect[] a state of mind that 'would prevent a person from acting impartially.'" (*San Nicolas*, *supra*, 34 Cal.4th at p. 646; *Manriquez*, *supra*, 5 Cal.5th at p. 798.)

PROOF OF SERVICE

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Case No.: SC055500A

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4. The document was served on:

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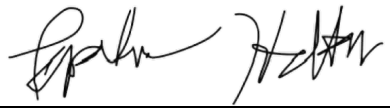
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: September 15, 2022



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