

No. **37806-0**

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

HOYT WILLIAM CRACE,

PETITIONER.

PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

Hoyt William Crace (hereinafter “Crace”) challenges his Pierce County convictions for Attempted Assault in the Second Degree (along with a “deadly weapon” allegation), Criminal Trespass, and Malicious Mischief in the Second Degree (03-1-03797-6). Crace is currently serving a life without parole sentence as a result of a subsequent persistent offender finding.

B. FACTS

Procedural History

In 2003, Crace was charged with Assault in the Second Degree, Criminal Trespass in the First Degree, and Malicious Mischief. On May 14, 2004, a jury returned guilty verdicts as to the later two counts and a guilty verdict of “attempted” second-degree assault. On May 28, 2004, after defense counsel “stipulated” to Crace’s criminal history, the trial court found that he was a “persistent offender” and sentenced Crace to “life without parole” on the attempted assault conviction. Crace’s *Judgment and Sentence* is attached as Appendix A.¹

Crace appealed. On June 28, 2005, this Court affirmed Crace’s conviction and sentence. *Opinion* attached as Appendix C. Crace’s motion

¹ Crace was sentenced a year earlier on a count of criminal trespass (King County Case No. 02-1-0084-4) to a term that was supposed to conclude with “(f)inal 3 months of sentence to be served in inpatient treatment.” Unfortunately, Crace was not transferred to treatment, but instead remained in custody. See Appendix B.

for discretionary review was denied by the Washington Supreme Court on June 5, 2007. *See* Appendix D. This Court then issued its mandate on June 19, 2007. Appendix E.

This is Crace's first collateral attack on this judgment. Crace has a separate on-going PRP attacking a separate judgment (Pierce County No. 91-1-01574-2). This Court has not assigned a number to that case as of this writing.

Facts at Trial

On direct appeal, this Court summarized the facts as follows:

On August 17, 2003, at 2:25 a.m., Pierce County Sheriff's Deputy Hardesty received a call from dispatch directing him to a possible burglary in progress at a residence in a mobile home park. As Hardesty got out of his car, a man approached him and stated that an unknown male burst into his neighbor's home and then fled. The man said that the subject ran about two blocks away to the north and that he was armed with a sword.

At that moment, Hardesty, who had a flashlight in his hand, saw a male approximately two blocks away jumping up and down in the middle of the street, yelling and screaming at the top of his lungs. The suspect was later identified as Crace.

Hardesty could see a long, chrome-like object in Crace's hand. When Crace made eye contact with Hardesty, he began running at full speed toward the officer. As Crace ran, he yelled, 'They are after me, someone help me.' 2 Report of Proceedings (RP) at 83.

As Crace drew closer, Hardesty saw a sword in his hand. Hardesty drew his weapon and directed Crace to drop the sword. Crace kept running at Hardesty, and Hardesty kept repeating his command to drop the sword. Finally, Crace dropped the sword when he was approximately 50 feet away from the officer but continued running at Hardesty. The officer repeatedly commanded him to get on the

ground, and Crace complied when he was approximately five to seven feet from the officer. Hardesty handcuffed Crace and placed him in the back of his patrol vehicle.

Once Hardesty secured Crace, he heard a female screaming from the residence identified by dispatch. There, he found an hysterical Rita Whitten. Whitten told Hardesty that as her baby slept in the bedroom and she watched television in the living room, Crace, whom she had never seen before, burst through the front door, screaming about being pursued. After rifling Whitten's kitchen cabinets and drawers, Crace ran out of her home.

As Hardesty spoke with Whitten, he heard screams from the parking lot. He ran out and saw Crace kicking wildly in the back of the patrol car; Crace broke out the left rear window. After securing Crace in four point restraints, Hardesty advised him of his constitutional rights.

Crace stated that earlier in the evening, he had been assaulted by four or five 'guys' and that he ran from them in fear. Based on his experience, Hardesty suspected that drugs affected Crace and he inquired about Crace's substance use. Crace told Hardesty that he had ingested a lot of cocaine earlier in the day.

At trial, Crace acknowledged that he had a substance abuse problem. He stated that he was repairing a friend's trailer located in the same mobile home park as Whitten's trailer. On the day of the incident, another resident of the trailer park offered Crace approximately one gram of cocaine. Crace testified that, between 10:00 a.m. and 2:00 p.m., he voluntarily consumed eight to ten alcoholic coolers, a gram of cocaine, two prescription pain medications, Dilaudid, and a quarter piece of heroin.

Crace testified that he felt very relaxed and fell asleep while watching a video. When he awoke, it was dark. Crace heard and saw things, grew terrified, and became convinced that he was going to be murdered. He ran screaming from the trailer, trying to find the home of two elderly women who lived nearby. Instead, he entered Whitten's trailer by mistake. Crace testified that he told Whitten about his fears but when Whitten kept screaming, he quickly left. He went outside and found the elderly women's trailer but he did not

stay there because he still thought that someone was trying to murder him.

Crace returned to his trailer, took the sword off the wall, and ran down the street screaming for help. When he saw Hardesty's flashlight beam, he ran toward the light, sword in hand. When Crace realized that an officer held the flashlight, he remained too frightened to drop the sword or stop.

Eventually, he dropped the sword but he did not obey the direction to lie down on the ground because he was scared and still too far away. He did not resist being handcuffed and placed in the patrol car. When his fears of being murdered persisted, he kicked out the window in the hopes that someone would return to the vehicle to help him.

Hardesty testified that he received training regarding the '21 foot rule,' the distance at which someone armed with a knife can reach an officer to inflict injury before an officer can draw his gun. 2 RP at 77. Hardesty stated that he feared for his safety as Crace ran toward him and was prepared to shoot him even after he dropped the sword. The deputy indicated that he would have shot him if Crace had come a couple of steps closer. The deputy demonstrated for the jury how Crace held the sword and how he ran toward him. The jury also saw a demonstration of the distance at which Crace dropped the sword and got on the ground.

Dr. Vincent Gollogly, a psychologist, testified for the defense. He said that Crace's voluntary intoxication led to a delusional state. Gollogly also concluded that Crace could not realize the nature of his actions due to drug ingestion. Gollogly explained that, in his opinion, Crace could not accurately appraise the situation, although he could still engage in goal-directed behavior. Gollogly believed that Crace panicked and thought unclearly at the time of the offense.

Dr. Steven Marquez, a forensic psychologist at Western State Hospital who evaluated Crace for the State, diagnosed him with an antisocial personality disorder. He found Crace manipulative, offering exaggerated psychiatric symptoms inconsistent with any known pattern or syndrome. Crace told Marquez that five people

wanted to harm him on the night of the incident. Marquez saw considerable goal-directed activity in Crace's actions and opined that he could form intent.

The Court instructed the jury that, in addition to the original charged of second-degree assault, it could also consider the lesser offense of attempted second-degree assault. *See* Appendix F. Defense counsel did not seek a lesser included instruction of unlawful display of a weapon. *See* Appendix G. After deliberations, the jury left the second-degree assault verdict form blank, but convicted of the lesser “attempt.” Appendix G.

Crace has included the transcript of his trial and sentencing as Appendix H.

C. ARGUMENT

1. CRACE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BASED ON TRIAL COUNSEL’S FAILURE TO REQUEST A LESSER INCLUDED INSTRUCTION FOR UNLAWFUL DISPLAY OF A WEAPON

Introduction

Crace was charged by Information with intentionally assaulting another with a deadly weapon. At trial, Crace claimed that he was unable to form the requisite intent. The State offered and the trial court gave a lesser included instruction of “attempted” assault. Despite the fact that offering a lesser of unlawful display of a weapon would have been consistent with his defense and would have, if accepted by the jury, reduced Crace’s sentence from “life” to one year (unlike the “attempted” lesser

which resulted in *no* reduction in Crace’s sentence), defense counsel did not seek such an instruction. Caselaw provides that such a failure constitutes deficient performance. The fact that Crace’s jury convicted only of the lesser of attempted assault establishes the requisite prejudice. Thus, defense counsel’s failure to request an instruction on unlawful display of a weapon constitutes ineffective assistance of counsel.

Unlawful Display of a Weapon Is a Lesser Included Offense

Legally speaking, it is clear that unlawful display of a weapon is a lesser included offense of a second degree assault charged under the “assaults with a deadly weapon” prong. RCW 9A.02.020 provides that “(i)t shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.” To establish that an offense is a lesser included offense each element of the lesser offense must be a necessary element of the offense charged and the evidence in the case must support an inference that the lesser crime was committed. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). Thus, as a matter of law, unlawful display of a weapon is a lesser included offense of assault in the second degree. *Compare* RCW 9A.02.020(1); RCW 9A.36.021.

Next, this Court must determine whether unlawful display of a weapon qualifies as a lesser included offense under the *facts* of this case. When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court views the supporting evidence in the light most favorable to the party that requested (or, as here, *should have requested*) the instruction. See *State v. Cole*, 74 Wn.App. 571, 579, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997).

That test is also easily satisfied. There is no dispute that Crace displayed a weapon. Further, the evidence is clear that his display of the sword “warranted alarm for the safety of others.” Further, the evidence regarding Crace’s intent to assault was contested, as both the transcript and the jury’s rejection of the original assault charge both prove. Thus, the facts supported the giving of this lesser.

Trial Counsel’s Failure to Request the Instruction was Ineffective

Because this issue is raised in the context of an ineffectiveness claim, Crace must show both deficient performance and prejudice. The Court of Appeals’ decision in *State v. Ward*, 125 Wn.App. 243, 104 P.3d 670 (2004), which held that trial counsel was ineffective for failing to request a lesser instruction of unlawful display of a weapon in an second-degree assault case, is completely on point.

In that case, Ward was charged with two counts of second degree assault after allegedly pointing a gun at two men attempting to repossess his car. Ward testified he believed the men were trying to steal his car and that one of them came toward him with a crowbar. Both Ward and his girlfriend testified that Ward did not point his gun at the men, but rather told them he had a gun and opened his jacket to show it to them. Trial counsel did not request a lesser of unlawful imprisonment. On appeal, Ward argued his trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of unlawful display of a weapon.

In response, the State contended that counsel's failure to request the instruction was legitimate trial strategy, an "all or nothing" choice to force the jury to acquit on the greater charge and prevent conviction (by compromise or otherwise) on the lesser. This Court disagreed, reversing Ward's conviction without an evidentiary hearing based on several indisputable facts.

To begin, the *Ward* Court relied heavily on the United States Supreme Court's reasoning in *Keeble v. United States*, which bears repeating here:

It is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely

because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973).

Next, the *Ward* Court compared the penalty attached to a conviction as charged with the penalty resulting from a conviction on the lesser offense. The Court in *Ward* concluded that the significant gap between the two penalties was a salient factor in determining that counsel's failure was unreasonable. 125 Wn.App. at 249 ("First, the potential jeopardy for Ward was considerable. He faced 89 months in prison for the two assaults, including the mandatory firearm enhancements. Unlawful display of a weapon, by contrast, is a gross misdemeanor carrying a maximum penalty of one year in jail and revocation of a concealed weapons permit.").

Crace's case involves a much more significant difference between the respective penalties: life in prison *versus* a one year maximum. Further, the equation was not changed by the Court's decision to give the State's requested "attempted assault" instruction. The jury's conviction on that crime still resulted in a life sentence. Aside from a death penalty case, the "risk vs. benefit" equation here was as stark as it ever gets in the law. Thus, this factor strongly supports an ineffectiveness finding.

The second fact that this Court pointed to in *Ward* was that Ward's defenses were the same on both the greater and lesser offenses. In other

words, offering the lesser would not have compromised or undercut trial strategy. This Court noted in *Ward*:

His theory at trial was lawful defense of self and property. These are complete defenses to both second degree assault and unlawful display of a weapon. RCW 9A.01.020(3)(c). *An instruction on the lesser included offense was therefore at little or no cost to Ward.* If the jury had believed Ward acted lawfully, he would have been acquitted of both the greater and lesser offenses. If the jury did not believe Ward acted lawfully, but doubted whether he pointed his gun, he would have been convicted only of the misdemeanor.

125 Wn. App. at 249-50 (emphasis added).

Like *Ward*, offering an unlawful display instruction in this case also would not have impeded Crace's "diminished capacity" or "intoxication" defenses. Crace could have defended in the same manner, admitting either expressly or implicitly that Crace's display of the sword caused alarm, even if Crace did not possess or could not form the intent to assault.

The third factor leading to reversal in *Ward* was the conclusion that complete acquittal was not assured. The *Ward* court noted: "Finally, self-defense as an all or nothing approach was *very risky* in these circumstances, because it relied for its success chiefly on the credibility of the accused." 125 Wn. App. at 250 (emphasis added).

It is well known that mental defenses are usually unsuccessful. See Fradella, Henry, *From Insanity to Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. Fla. J.L. Pub. Policy 7 (2007). However, this Court does not need to look to empirical research to

determine whether the strength of the defense in this case. Instead, this Court can look either compare closing arguments or the testimony of the experts to find proof that, while Crace's mental defense was viable, acquittal was far from assured. In fact, in the *defense case* is the most compelling proof that acquittal was not assured. Both Crace and his expert (Dr. Gollogly) testified that Crace picked up the sword and ran with it in an alarming manner in order to prevent a perceived attack, *i.e.*, as a means of protection. RP 155. In other words, the defense witnesses admitted to some level of intention, even if it was not intent to assault real people. In addition, Dr. Gollogly testified that, generally speaking, when Crace is intoxicated he is likely to act in a manner "physically intimidating to others," even if he did not have the intent to assault. RP 182. Interestingly, Dr. Marquez (the State's expert) seized on the defense testimony that Crace was overcome by delusions and testified that this testimony did not support a finding of diminished capacity, but was more akin to insanity. RP 227.

In sum, while Crace's defense was viable and both experts agreed that Crace was not responding to reality, it was hardly a clear case of diminished capacity. Just as importantly, all of the testimony at trial supported the conclusion that Crace's actions were alarming to others. In sum, Crace's actions most resemble the crime of unlawful display of a

weapon. Thus, presenting that crime as a lesser would have increased Crace's chance of acquittal or a hung jury on the assault charges.

This is precisely why the Court in *Ward* found ineffectiveness:

“Given the developments at trial, and the starkly different potential penalties, it was objectively unreasonable to rely on such a strategy.”

Ward, 125 Wn. App. at 250. That succinct statement applies with equal, if not more, force to this case.

There is an additional parallel between *Ward* and the instant case. In *Ward*, the Court of Appeals looked to the trial court's imposition of an exceptional sentence as proof that there was a reasonable probability of a different outcome if the lesser included instruction had been requested by counsel. Here, there is stronger proof of a reasonable probability that Crace's jury would have returned a verdict of unlawful display of a weapon, if offered that option: the jury rejected the original second-degree assault charge. Thus, his jury must have found that Crace did not intend to physically assault or create fear of bodily injury, *i.e.*, the relevant mental states for assault in the second degree. Instead, the jury's rejection of that charge provides the clearest proof of a reasonable probability of a different outcome (less than a 50% chance that one juror would have voted not to convict of attempted assault, but would have voted for unlawful display.)

This Court Should Reverse Outright or Remand to the Trial Court

It would be hard to find a case more on point than *Ward* is to this case. The final parallel between the two cases should be in the outcome. The Court of Appeals reversed *Ward*'s conviction. It should also reverse *Crace*'s conviction.

To the extent that any of the facts are contested, *Crace* respectfully seeks an evidentiary hearing.

2. REQUIRING CRACE TO DRESS IN ORANGE JAIL SANDALS VIOLATED HIS FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY REVERSING THE PRESUMPTION OF INNOCENCE WHERE AT LEAST ONE JUROR ADMITTED SHE SAW HIM WEARING THE SANDALS, WHERE SHE KNEW THOSE SANDALS WERE JAIL ISSUED, AND WHERE THERE WAS NO COMPELLING STATE INTEREST IN REQUIRING CRACE TO WEAR THE JAIL SANDALS, RATHER THAN CIVILIAN SHOES .
3. CRACE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY WHERE A DELIBERATING JUROR SAW CRACE SHACKLED ON HIS WAY TO COURT, BUT DID NOT DISCLOSE THIS FACT DURING VOIR DIRE, WHERE THERE IS A REASONABLE PROBABILITY THAT IT CONTRIBUTED TO HER VERDICT.

Introduction

Although different legal claims, both of the two above-listed claims arise out of the same set of facts. Hence, they are grouped together.

One of *Crace*'s jurors (identified here as "Juror 6") saw *Crace* in shackles prior to jury selection, a fact she first revealed after trial in an November 2005 article she wrote for the *Puyallup Herald*. See *Declaration*

of Juror and attachments included as Appendix I. The juror recognized Crace in the courtroom as the prisoner she had seen earlier in shackles being escorted by jail officers because she noticed in court that he was wearing the same orange, jail-issued sandals. In her article, she notes that Crace was “(o)bviously, an accused prisoner in street clothes, sans real shoes...” She later described Crace as “Mr. Sandal Foot.” Although Crace was not shackled in the courtroom, he was shackled on his way to court and was required to wear the orange sandals provided by the jail in court. *See Declaration of Crace* attached as Appendix J.

However, Juror 6 did not reveal this prior encounter when asked if she knew Crace or had heard “anything about this particular case.” Voir Dire RP 6. She also did not reveal it during a short *voir dire* exchange regarding the presumption of innocence. Voir Dire RP 53. In her declaration attached to this petition, Juror 6 called it a “personal decision,” not to reveal this information. Later, as recounted in her newspaper article, Juror 6 noted her “instincts” led her to believe during deliberations that Crace was a possible third strike candidate. Juror 6 states that she did not discuss this possibility with anyone else on the jury.

Jail Clothes

It is clear that a court cannot, without violating the Due Process Clause, compel an accused to wear identifiable prison clothing during his trial. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126

(1976). This is because the practice furthers no essential state interest, and “the constant reminder of the accused’s condition implicit in such *distinctive, identifiable* attire may affect a juror's judgment” and impair the presumption of innocence, which is “a basic component of a fair trial under our system of criminal justice.” *Id.* at 503, 504-05 (emphasis added).

Like the cases where jurors observe a defendant in shackles in the courtroom, the Due Process clause is violated when a defendant is forced to wear jail clothes because it injects irrelevant and prejudicial facts into consideration. *See Deck v. Missouri*, 544 U.S. 622, 630, 125 S.Ct. 2007 (2005); *Illinois v. Allen*, 397 U.S. at 344 (“Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.”); *Rhoden v. Rowland*, 172 F.3d 633, 636 (9th Cir.1999) (“[S]hackling, like prison clothes, is an indication of the need to separate a defendant from the community at large, creating an inherent danger that the jury may form the impression that the defendant is dangerous or untrustworthy.”).

Here, Crace was not completely dressed in jail garb. He was permitted to wear civilian clothes in court, except for his sandals. Further, at least one juror clearly recognized these sandals not as Crace’s choice of footwear, but as issued by the jail.

Thus, the question is whether Crace was prejudiced by the juror's view of the sandals. However, before examining the prejudice on that issue, Crace discusses the issue of juror bias since the prejudice analysis for both issues dovetails.

Juror's Lack of Complete Candor

The Sixth Amendment guarantees a criminal defendant a fair trial by a panel of impartial, indifferent jurors. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Where a juror deliberately conceals information during *voir dire*, a new trial is mandated where the juror failed to honestly answer a material question and where a correct response would have provided a valid basis for a challenge for cause. *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 555-56, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). "A fair trial in a fair tribunal is a basic requirement of due process." *Id.* The jury must be "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). If even a single juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir. 1990).

As the Supreme Court recognized in *McDonough*, "[v]oir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." *Id.* at 554. Actual

bias against a defendant on a juror's part is sufficient to taint an entire trial. See *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir. 1977). Indeed, “[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.” *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000).

There are two types of bias: actual and implied. Actual bias arises from the juror’s prior experiences. Implied bias arises from a juror’s failure to answer questions truthfully during the *voir dire* process. Whether a juror is dishonest is a question of fact. *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (*en banc*). Either type of bias may support a challenge for cause. *Gonzalez*, 214 F.3d at 1111. Crace asserts that both types of bias are present.

Focusing for the moment on implied bias, courts may presume bias based on the circumstances. *Dyer*, 151 F.3d at 982 (“[t]he individual who lies in order to improve his chances of serving has too much of a stake in the matter to be considered indifferent.”). See also *McDonough*, 464 U.S. at 556-57 (Blackmun, Stevens, and O'Connor, JJ., concurring) (accepting that “in exceptional circumstances, that the facts are such that bias is to be inferred”); *id.* at 558 (Brennan and Marshall, JJ., concurring in the judgment) (agreeing that “[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as [a]

matter of law”) (alterations in original, quotations omitted); *United States v. Burr*, 25 F.Cas. 49, 50 (D.Va. 1807) (“He may declare that notwithstanding these prejudices he is determined to listen to the evidence, and be governed by it; but the law will not trust him.”). Nevertheless, it is an open question whether dishonesty is required before implied bias may be found. *Fields v. Woodford*, 309 F.3d 1095, 1105 (9th Cir. 2002).

To illustrate with caselaw: In *Dyer*, the juror on *voir dire* in a murder prosecution answered “no” to queries about whether she or any of her relatives had ever been the victim of any type of crime, and whether she or any of her relatives had ever been accused of any offense other than traffic cases. 151 F.3d at 972. The truth was that the juror's brother had been shot and killed six years earlier, and her husband was in jail. *Id.* at 972-73. The 9th Circuit concluded that the juror plainly lied, and that her lies gave rise to an inference that she chose to conceal important facts in order to serve as a juror and pass judgment on Dyer's sentence. *Id.* at 982; *see also Green v. White*, 232 F.3d 671, 676 (9th Cir. 2000) (presuming bias when the jury foreperson in a murder trial lied about his own prior felony conviction on a written jury questionnaire and in *voir dire* because the “pattern of lies, inappropriate behavior, and attempts to cover up his behavior introduced ‘destructive uncertainties’ into the fact-finding process.” (quoting *Dyer*, 151 F.3d at 983)).

The *Dyer* court further explained:

A juror ... who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process.... [A] perjured juror is unfit to serve even in the absence of ... vindictive bias. If a juror treats with contempt the court's admonition to answer *voir dire* questions truthfully, she can be expected to treat her responsibilities as a juror—to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions—with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

Id. at 983.

In sum, courts have implied bias in those situations where the relationship between a prospective juror and some aspect of the litigation makes it unlikely that the average person could remain impartial in his deliberations under the circumstances, or where repeated lies in *voir dire* imply that the juror concealed material facts in order to secure a spot on the particular jury. *Dyer*, 151 F.3d at 982. The standard is “essentially an objective one,” under which a juror may be presumed biased even though the juror himself believes or states that he can be impartial. *Dyer*, 151 F.3d at 982.

Most importantly for purposes of this case, reviewing courts have focused on whether prospective jurors are fully forthcoming, not whether an answer to a question (or a failure to answer a proposed question) is

technically correct. According to *Williams v. Taylor*, 529 U.S. 420 (2000), an evidentiary hearing to determine partiality is required where even a single response to a *voir dire* query was not forthcoming or was factually misleading. In *Williams*, a habeas petitioner claimed he was entitled to an evidentiary hearing regarding juror bias because a juror failed to respond to the following question posed during *voir dire*: “Are any of you related to the following people who may be called as witnesses?” The juror's ex-husband was among the witnesses named. The government insisted that the juror was honest because the questions were phrased in the present tense. But a unanimous Supreme Court rejected this argument, stating that “[e]ven if the juror had been correct in her technical or literal interpretation of the question relating to [her ex-husband], her silence ... could suggest to the finder of fact an unwillingness to be forthcoming ...” *Id.* The Court held that the petitioner was entitled to an evidentiary hearing on whether the juror was biased. *Id.* at 442.

In this case, the juror failed to reveal that she had observed Crace, in shackles and escorted by jail officers only minutes earlier, when she was asked questions designed to elicit whether prospective jurors had any prior knowledge about this case which might affect their impartiality. This Court can alternately view that failure either as indicative of an interest in securing a spot on the jury or as concealing a fact (observing Crace in shackles) that the law recognizes is highly prejudicial.

Crace now turns to his joint prejudice analysis.

Prejudice

First impressions are prone to remain, and here the juror's first impression of Crace—a prisoner in shackles—was extremely prejudicial. *See United States v. Reed*, 376 F.2d 226, 229 (7th Cir. 1967) (“Mug shot” improperly introduced at start of trial made “the difference between the trial of a man presumptively innocent of any criminal wrongdoing and the trial of a known convict,” and colored the remainder of the trial.). However, because she did not reveal the fact that she saw Crace shackled, wearing jail sandals, and escorted to court by jail officers, Crace was unable to either challenge her for cause or seek a curative instruction, in an attempt to reduce the prejudice. Instead, because neither the Court nor the parties knew what the juror had seen, there was no perceived need for either further questioning or a curative instruction.

The lack of notice of the need to further inquire or to issue a curative instruction was exceptionally prejudicial to Crace given the issues in his trial. First, Crace was charged with a violent crime, increasing the risk that “the shackles essentially branded him as having a violent nature.” *Rhoden*, 172 F.3d at 637. Conversely, the sight of Crace in shackles served to undermine his defense. Moreover, the evidence against Crace was not overwhelming, a fact reflected in the jury's verdict on the “attempt” lesser. Because the case was close, an otherwise marginal bias

created by the shackles may have played a significant role in the jury's decision. *Id.*

Moreover, the Supreme Court has recognized that “little stock need be placed in jurors' claims” that they will not be prejudiced. *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). Where, as with visible shackling, a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings.... [T]herefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play. *Id.* (quotation marks omitted). The analysis thus must focus on whether the risk was there, not whether the jurors could recognize the risk.

In this case, the risk was present and was apparently realized. To illustrate, the juror noted that she had an instinct that Crace was facing a third strike. That instinct clearly could have been the result of her earlier observation of Crace in shackles—an image that she was reminded of when she saw Crace’s jail issued shoes each day in court.

In sum, these two issues, considered in concert, demonstrate that Crace’s right to a fair jury, a fair trial, or both was injured by the juror’s

observations of Crace, both in and out of court, as well as her failure to disclose this information to Crace's judge.

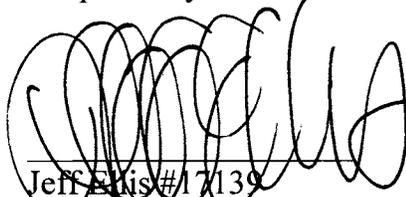
Once again, if these facts are disputed, this Court should order an evidentiary hearing. Otherwise, Crace has made showings of constitutional error.

D. CONCLUSION

Based on the above, this Court should call for a response from the State. If the State disputes any of the extra-record facts contained in this petition with competent evidence, then this Court should either remand this case to the trial court for a determination on the merits or for a reference hearing. If the State does not dispute any of the new facts, then this Court should grant Crace's petition and remand for a new trial.

DATED this 23rd day of May, 2008.

Respectfully Submitted:

A handwritten signature in black ink, appearing to be "Jeff Ellis", written over a horizontal line.

Jeff Ellis #17139
Attorney for Mr. Crace

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VERIFICATION BY PETITIONER

I, Hoyt Crace, declare that I have received a copy of the petition prepared by my attorney and that I consent to the petition being filed on my behalf.

May 1908 WSR
Date and Place

Hoyt Crace
Hoyt Crace