In the Supreme Court of the State of California

In re **STEVEN M. BELL,** **On Habeas Corpus**	**CAPITAL CASE** Case No. S151362

Trial: San Diego County Superior Court Case No. CR133096
The Honorable Richard Murphy, Judge
Reference Hearing: The Honorable Joan P. Weber, Judge

EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
MICHAEL T. MURPHY
Deputy Attorney General
LYNNE G. MCGINNIS
Deputy Attorney General
State Bar No. 101090
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2205
Fax: (619) 645-2012
Email: Lynne.McGinnis@doj.ca.gov
Attorneys for Respondent

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CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

On June 4, 1992, after smoking crack cocaine, petitioner Steven M. Bell went to the home of his girlfriend intending to steal items to sell in order to buy more crack. Upon encountering his girlfriend's 11-year old son, Joey, at the house, Bell stabbed Joey and, when Joey fell to the floor, stabbed him several more times and stomped on Joey's head with his foot, killing him. Bell stole a television and radio, sold them, and used the proceeds to buy more crack cocaine, which he smoked with a woman companion.[1] A San Diego County Superior Court jury convicted Bell of first degree murder with special circumstances. Bell was sentenced to death. This Court affirmed Bell's conviction and sentence on direct appeal. (*Bell, supra*, 40 Cal.4th 582.) The United States Supreme Court denied certiorari. (*Bell v. California* (2007) 552 U.S. 825.)

Bell filed the instant amended petition for writ of habeas corpus in this Court on June 22, 2009. On December 10, 2014, this Court issued a reference order directing the referee to take evidence on and answer the following questions:

> 1. Did juror M.H. discuss the jury's deliberations, or any other aspect of the case, with her husband during her service as a juror?
>
> 2. If so, when did the conversation(s) occur?
>
> 3. What information or advice, if any, did M.H.'s husband give M.H.?
>
> 4. Did M.H. tell juror P.R. about a conversation between M.H. and her husband?
>
> 5. If so, when and what did M.H. tell P.R. about that conversation?

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[1] A more detailed statement of the facts is set forth in this Court's opinion in *People v. Bell* (2007) 40 Cal.4th 582 (*Bell*).)

The referee held an evidentiary hearing on these questions on September 25 through September 30, 2015. At the end of the hearing, the referee ordered the parties to file objections to evidence, and proposed findings of fact on the reference questions. (RT[2] 580-591.) The parties filed their pleadings in December 2015. Argument was then held before the referee on January 29, 2016. (1/29/16 RT[3] 1-29.) The referee filed her Findings of Fact in this Court on March 21, 2016.

As discussed below, Respondent has no exceptions to the referee's findings of fact. And based on those findings, Bell has failed to meet his burden of proving his claim that Juror M.H. committed misconduct during his trial. Therefore, habeas corpus relief should be denied.

II. REFERENCE HEARING

A. Testimony

1. Petitioner's Witnesses

a. Juror M.H.

M.H. was 80 years old at the time of Bell's evidentiary hearing in 2015. She was in good health and was not taking any medications. (RT 76.) In 1993, M.H. served as a juror in Bell's capital case. (RT 5.) It was a serious matter and she took her duties seriously. (RT 8.) M.H. recalled that Bell was on trial for killing the son of his girlfriend. She did not remember the names of the attorneys who represented Bell. M.H. sat in the front row of the jury box. (RT 9.) One of the female jurors used a wheelchair. The foreman worked for the Department of Veteran's Affairs. Two African-American jurors rode the trolley with M.H. (RT 10.) They offered to take M.H. home after her car was stolen. (RT 10-12.) Another

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[2] "RT" refers to the Reporter's Transcript of the evidentiary hearing.

[3] "1/29/16 RT" refers to the Reporter's Transcript of the evidentiary hearing closing arguments.

juror was a professor at Costa Mesa College. His car was also stolen. (RT 11.)

During the trial, a woman on the jury was dismissed for talking to her husband about the case. (1 RT 11-12.) The juror or her husband was in the Navy. At some point, jurors came to court and were told she had been removed from the jury. M.H. did not remember if she learned the reason for the juror's removal before or after the trial was over. (RT 12-14.)

M.H. did not remember P.R. Hearing her name did not refresh M.H.'s recollection in any way. M.H. engaged in idle talk with jurors during the breaks. (RT 11.) M.H. probably mentioned the fact that she was married. (RT 12.)

M.H. had no specific recollection of the guilt or penalty phase deliberations. There were discussions, votes, and additional discussions. (RT 15.) She did not recall the division among jurors when the penalty phase deliberations began, how jurors were divided at any time during deliberations, or how many votes were taken. (RT 16-18.)

A penalty verdict was reached on December 17, 1993. Asked if she recalled speaking to any jurors before entering the jury room on that date, or speaking to defense attorneys after the case was over, she said she did not. (RT 18-19.) She saw the jurors once after the trial was over, at a get-together at one of the juror's homes. (RT 19.)

In 2009, M.H. met with Susan Lake, an investigator for the defense. (RT 19-20.) Lake came to M.H.'s house, sat down on the sofa, put her personal items on the coffee table, and asked questions. (RT 20.) M.H. tried to answer the questions truthfully. Lake later returned with a declaration for M.H. to review. (RT 21.) The declaration "is somebody else's words. I mean they are not all my words. I mean it's not verbatim. It's the gist of what we talked about." (RT 20.) M.H. had no specific

memory of reviewing the declaration. (RT 22.) She read it over, signed and initialed it, and a copy was mailed to her. (RT 22-23.)

In 2014, Special Agent John Wilde called M.H., explained he was working for the prosecution, said he was following up on her conversations with Lake which occurred in 2009, and told her that he wanted to hear her story about what happened. (RT 25-26.) M.H. assumed that all of the investigative contacts were part of Bell's appeals process. (RT 25.)

Bell's counsel asked M.H., "Okay, at the time you were speaking with Mr. Wilde, did you believe that speaking with your husband prior to reaching a decision was in violation of the court's instructions?" M.H. responded, "Yeah. I knew from the very beginning that we wouldn't discuss it, and we didn't discuss it." (RT 25-26.)

Agent Wilde later came to M.H.'s house to talk to her. (RT 26.) M.H. did not recall if her husband Stephen was home at the time. (RT 26.) Agent Wilde told M.H. that the defense had done their research, and now the prosecution was conducting research of its own. Early on, Wilde obtained M.H.'s permission to audio record the interview. (RT 27.) Agent Wilde asked M.H. whether she had any conversation with family members, her husband, or friends regarding the Bell trial. She responded, "Um-hmm," meaning she was unsure. She and Mr. H. had "talked about it after the trial was over, but we did not during the deliberations." (RT 28.) "He never asked me anything and he's served on juries before so he knew not to." (RT 29.)

Asked by Bell's counsel how Mr. H. knew he was not supposed to talk to M.H. during trial, M.H. responded, "We probably had a discussion when I first starting serving on it, you know, that I can't talk about it. And he had been on several juries, so he knew not to talk." Although M.H. did not specifically remember telling Mr. H. they could not talk, "It's just I was

told that and I wasn't going to do it." (RT 29.) "My husband did not ask me questions . . . And I did not tell him anything." (RT 31.)

After the trial was over, M.H. told Mr. H. about the case. However, she continued, he is not the kind of person who asks questions. "He could care less." (RT 35.) M.H. explained, "He doesn't want to have my problems too." (RT 35.)

On April 29, 2014, Wilde returned to M.H.'s home with a written declaration, which M.H. signed. (RT 36.) M.H. noted that while paragraph 6 used the words, "presiding juror," she would have referred to this person as the foreman. (RT 37.) In paragraph 9, the words "specifically recalled" and "verdicts were entered" are not a verbatim transcription of what she said. (RT 38-40.) M.H. continued, "Just the same as the declaration of Lake's was not verbatim. She used words I would never have used. So I thought it was their presentation of our conversation, and it didn't change the thinking." (RT 40.)

Bell's counsel read paragraph 16 of P.R.'s 2009 declaration aloud to M.H. (RT 49-50.)[4] Counsel asked M.H., "Do those sentences reflect your recollection of the events of the penalty phase proceedings in Mr. Bell's case?" M.H responded, "As far as I'm concerned, those didn't happen. I was not involved in that." (RT 50.) Counsel asked, "Given the passage of time of 22 years, and the lack of recollection that you have about the events in 1993, as understandable, could P.R. be accurately recounting the

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[4] In this paragraph, P.R. stated: "The last day of deliberations, M.H. approached me in the hallway before we entered the jury room and confessed that she had broken down and spoken to her husband the night before to see if he could help her out of her dilemma, and he advised her to change her vote. She said that she did not want to change her vote to death, but at the same time she was tired of the trial lasting so long and tired of the pressures from other jurors to get things over with. She told me that she had decided to change her vote to death." (RT 49-50.)

conversation and you simply not remembering it?" M.H.'s response was, "Anything is possible, I guess, but I do not – absolutely do not – this sounds more like the dialogue that went on with the excused juror." (RT 51.) "Maybe P.R. has things mixed up. Where she says here, 'had broken down and spoken to her husband about her dilemma,' that's not me." (RT 52.)

On cross-examination by the prosecutor, M.H. testified that during trial, the court admonished jurors not to discuss the case with others while it was ongoing. (RT 54-55.) M.H. took the admonishment seriously and abided by it. (RT 55.) The following colloquy occurred:

> Q. Did you discuss this case during deliberations with a juror while not in deliberations?
>
> A. No.
>
> Q. How do you know that? What are you basing that on?
>
> A. My recollection, and who I am as a person. I don't think I would have done it.
>
> Q. And did you discuss this case with your husband Stephen H. during deliberations while this case was still ongoing?
>
> A. No, I did not.
>
> Q. What are you basing that statement on?
>
> A. On who I am, what I had been told not to do, and you know, knowing that he wouldn't have asked me and I wouldn't have told him.
>
> Q. So is it fair to say that it's not that you don't recall it happening, it's that it did not happen?
>
> A. If I don't recall it happening, it did not happen.
>
> Q. I know they are two confusing concepts, but it is important to be clear for the record.

A. Well, I feel that I don't recall it and I didn't do it based on my recall.

(RT 65-66.) M.H. explained that during trial, she would have followed any of the court's orders or admonishments. (RT 65.) She had no reason to believe she did otherwise in this case. While she certainly vacillated to a certain extent during deliberations, "I was never sitting on the fence, you know, totally, oh, agonizing over it. My thought process with the trial went from here to there and that was – the decision was the death penalty." (RT 66.) The following discussion ensued:

Q. And on direct, you talked a little bit about your husband and how – I believe you said something along the lines of how you can make up your own mind and wouldn't have relied on your husband. Is that true?

A. I wouldn't have relied on my husband, yes, that is definitely true.

(RT 66.)

b. Juror P.R.

P.R. was 88 years old at the time of Bell's evidentiary hearing. Her health was very good. She was taking two medications for high blood pressure. (RT 275.) P.R. remembered serving as a juror in 1993 in a capital case involving Bell. P.R. recalled that Bell was living with a girlfriend or female friend. She had a young son. The morning of the crime, Bell picked up a relief check. He joined some people down the street, cashed the check, and used the money to purchase drugs. Meanwhile, the boy had been sent home from school. Bell ran out of drugs and wanted money to buy more drugs. (RT 78.) He went home, intending to take the television set and sell it. Bell was surprised to find the boy home on the bed, watching television. There was a struggle. The boy was killed, and Bell took the television set. (RT 79.)

P.R. testified that Bell's trial attorneys were Ms. Leonard and Mr. List [sic: Liss]. She described the prosecutor as a "tall, professional-looking man." Judge Murphy was the trial judge. (RT 79.) During jury selection, P.R. filled out an extensive questionnaire. (RT 80.) At trial, she sat in the middle of the second row of the jury box. (RT 81-82.) M.D. was the jury foreman. Another man about the same age as M.D. was on the jury, as well as two African-American men, a woman named Nancy, and M.H. Nancy was the alternate. Someone was dismissed from the jury and Nancy was that person's replacement. (RT 84.)

P.R. described M.H. as "tall" and "brunette." Because the two women were about the same age, they gravitated towards one another. P.R. did not learn very much about M.H.'s family. M.H. did say her husband's mother was developing dementia, they were concerned about her, and at some point a family member had to pick her up. P.R. did not remember any other family talk. (RT 84.) She did not recall how the jury was divided, if at all, during the guilt phase or any particular aspects of the deliberations. (RT 86-87.)

P.R. spoke to Susan Lake. (RT 87.) P.R. signed a declaration after talking to Lake, which she reviewed for accuracy. (RT 87-88.) P.R. made some handwritten changes to the declaration. (RT 88.) She looked at the declaration recently, and it helped refresh her recollection of events which occurred in 1993. (RT 89.) However, she still did not recall the guilt phase deliberations, other than the fact that all jurors had to agree. (RT 89-90.) Asked if she recalled anyone being dismissed from jury service, P.R. responded, "I can't be sure." (RT 89-90.) A young female juror was in the Navy. (RT 91-92.) She did leave the jury, but P.R. did not remember why. P.R. then testified the juror was dismissed because she talked to someone else about the case, "[b]ut I may be getting it confused with this young

woman mentioned in [paragraph] number 9 [of my 2014 declaration]." (RT 92.)

P.R.'s jury service ended on December 17, 1993, when the jury reached its verdict in the penalty phase of the trial. (RT 96.) Penalty phase discussions were heated and went on for several days. (RT 96.) Near the end, P.R., M.H., and someone else were the only ones in favor of life without parole. (RT 97.) And, "[t]hat's as much as I can recall." (RT 96.)

P.R. did not recall speaking to anyone right before entering the deliberation room on the last day of the penalty phase deliberations. She re-read her 2009 declaration, in which she stated she did speak to someone. At present, she could not visualize or remember that conversation. (RT 98.) She had a "fleeting kind of vague memory that [M.H.] kind of stage-whispered to me as we were going in." (RT 99-100.) Asked, "What do you recall M.H. saying to you on the last day of trial," P.R. responded, "It was just we were both struggling, she just kind of – I don't know – we went in together and she said my husband helped me decide, and it was kind of a stage whisper." (RT 103.) P.R. added that her current memory of what happened was "very dim, fleeting kind of statement she made as we were going in." (RT 102.) M.H. made the statement before the jury reached its verdict. (RT 103.) It consisted of one sentence, "My husband helped me decide." (RT 104.)

P.R. saw her fellow jurors once after the trial was over. (RT 106.) A juror named Wendy hosted a party at her home. Most of the jurors were there. M.H. was not. Also, one of Bell's attorneys called her after the case was over. (RT 107.) In response to defense counsel's inquiry, "What do you recall of that conversation," P.R. testified, "Specifically, I have difficulty remembering." (RT 107-108.) He called her and wanted her opinion about the defense case, and how jurors felt the attorneys had done on behalf of Bell. (RT 108.)

Returning to the subject of her discussions with defense investigator Lake, P.R. testified that Lake called her and made an appointment. When Lake came over, she asked P.R. a lot of questions about Bell's trial. (RT 109.) Lake came over again and asked her to review a draft declaration. (RT 110-111.) She reviewed it carefully. (RT 111.) She made some changes, which Lake wrote down and had her initial. (RT 111-112.) P.R. also put her initials at the bottom of each page, and signed the declaration at the end. (RT 112-113.) Her memory was better in 2009 than at present (2015). (RT 113, 136.)

Bell's counsel read the 2009 declaration to P.R. paragraph by paragraph, asking her after each paragraph if she remembered those events. In some instances she did, in others, she did not. (RT 137-173.) Bell's counsel asked P.R. about paragraph 9 of her 2014 declaration, in which she stated, "On the last day of penalty phase deliberations, as we entered the court room, [M.H.] whispered to me that she had asked her husband to help her decide." P.R. testified, "That's how I remembered it rather than the way it was written up from Susan Lake's – it differs quite a bit." (RT 127.) "We're looking at two different memories of it at two different time frames . . . And at the time I spoke with Mr. Wilde, this is what it had become . . . It diminished to where I didn't remember a big conversation in the hall." (RT 128-129.)

Asked specifically about paragraph 16 of her 2009 declaration, M.H. testified she would not use those words today. (RT 166.) Some of it was inaccurate, and "I remember it differently." She did not speak with M.H. in the hallway. (RT 167.) Rather, "[w]e were going into the jury room and she said it to me in many less words than this." (RT 167-168.) "It isn't that M.H. approached me and had a conversation in the hallway." "It was not that much of a conversation." (RT 168.) They did not have the long conversation reflected in the declaration. (RT 169.) There was a fairly

brief discussion and M.H. said, "My husband helped me decide." (RT 169-170.)

On cross-examination, P.R. testified she did not recall the fact that a defense investigator named Tom Crompton interviewed her on June 27, 2005. (RT 177-178.) She continued, "I guess I can't be sure, but it seems like something I would remember." (RT 178.) She has served on a total of five juries, with Bell being the third and most serious of the five cases. (RT 192-193.) P.R. took her duties seriously. At each trial, including Bell's, the court admonished jurors not to discuss the case outside of deliberations. (RT 193.) The court read the admonition several times throughout the trial and P.R. knew what it meant. (RT 194.) Other than "that reference to M.H. and I having words with each other . . . I never spoke to anyone." (RT 193.)

Within a month after the trial was over, P.R. learned, by reading an article in the paper, that a juror was dismissed for discussing the case with her husband. (RT 194-195.) In January or February 1994, after P.R. read the article, she spoke to defense attorney Liss. (RT 196.) Liss called her and wanted to talk about the case. (RT 196-197.) P.R. did not remember the details of the conversation. She never told Liss about M.H., explaining, "I don't think I discussed it with him. I wouldn't have unless he asked me." P.R. agreed that the call would have been a good opportunity to reveal the information to Liss. (RT 197.) She should have, but did not. (RT 197-198.) She did not tell anyone about M.H. until she spoke to Lake in 2009. When she and Liss spoke, the events occurring at trial were fresher in her mind. (RT 198.) The prosecutor asked P.R., "When did you realize it [the conversation with M.H.] was important? That it might be important?" P.R. responded, "Probably not until that first declaration. It didn't register as that important." (RT 199.) "I knew that's not right, but it didn't register as that important." The prosecutor asked P.R. if it was

possible that she was confusing M.H. with A.G., the juror who was excused for talking to her husband. P.R.'s response was, "No, no, no." (RT 201.)

When P.R. testified she did not recall much about her conversation with Liss (RT 202), the prosecutor had her review a five-page memo dated February 14, 1994. (RT 216-220.) P.R. then recalled that Liss asked her about the deliberation process, but did not remember him asking her what caused jurors to change their votes, her personal feelings, and whether everything, including the penalty phase, was aboveboard. (RT 221-222.) P.R. had no motive to lie to Liss. The events would have been fresher in her memory than they were in 2009 and in 2014. She never told Liss about her conversation with M.H. (RT 222.) At this point in her testimony, she admitted that it would have been important to tell him. (RT 223.)

P.R. testified that although M.H. was the only person she was friendly with on the jury, they were not that close. (RT 226-226.) They did not go to coffee on breaks or eat lunch together. (RT 227.) When P.R. spoke to Agent Wilde, she told him she was not even sure M.H. was a juror in Bell's case. (RT 230-231.) Wilde confirmed that M.H. was a juror and P.R. became more comfortable with the idea. P.R.'s memory in 2015 was better than it was when she talked to Wilde over a year earlier. (RT 231.)

P.R. told Agent Wilde another juror was dismissed because she did not want to be there. At the time, P.R. did not recall any type of misconduct. (RT 232.) P.R. had forgotten the juror was excused for speaking to her husband. (RT 234.) P.R. also thought that two jurors were excused, one because she did not want to be there and another because she talked to her husband. (RT 234-235.) P.R. was confused as to whether there were two different people. (RT 235.) At the time, she thought a juror asked to leave and was let go. She later learned the juror was dismissed. (RT 236.)

P.R. again testified that her conversation with M.H. was fleeting. They were getting ready to go into the jury room and M.H. whispered, "My husband helped me decide." (RT 236.) She did not say anything else. (RT 232-233.) M.H. spoke in a whisper and no one else would have heard her. (RT 237.) Her exact words, "as I remember it," were, "My husband helped me to decide." (RT 239.) P.R. acknowledged that when she spoke to Agent Wilde 18 months earlier, she was unable to provide him with any details about what M.H. said. (RT 242.)

On redirect examination, P.R. testified she had no clear memory of A.G., who was dismissed during the guilt phase deliberations. The two never talked during jury service. (RT 254.) Bell's counsel asked, "As you sit here today, do you know how many jurors were removed from jury service?" P.R. responded, "I guess it was only one." (RT 255.)

Bell's counsel asked P.R. about her failure to tell defense attorney Liss about her conversation with M.H.:

> Q. Why didn't you tell Mr. Liss about your conversation with M.H.?
>
> A. . . . I had not done the proper thing, and I didn't feel that he was a confidant of mine that I was going to share – if I was going to bring that up, it would not have been him and over the telephone.
>
> Q. And you remember having that feeling when you were speaking with him?
>
> A. Well, I don't remember. I probably wasn't – in all the conversation, I probably wasn't thinking about that particular thing.
>
> Q. But you didn't volunteer the information?
>
> A. No, I didn't.

(RT 260-261.)

On re-cross examination, the prosecutor reminded P.R. that earlier, she had testified that she did not tell Liss about her conversation with M.H. because she did not think it was important, while she was now testifying she did not tell him because he was not a confident. The prosecutor asked P.R. which of those reasons was true. (RT 265-266.) P.R.'s response was, "Well probably both of those things." (RT 266.) Asked, "Is it fair to say [Susan Lake] wasn't a confidant either," P.R. responded, "No, and I actually didn't realize the importance of what she wanted to talk about." (RT 267.) P.R. acknowledged that she never contacted the court, the district attorney, or defense counsel to inform them of her conversation with M.H. (RT 267-268.)

The prosecutor asked P.R. when the conversation occurred. P.R. said, "That's a bit confusing because it's written one place that going into the jury room, and I think it's Mr. Wilde's writing that says as we entered the courtroom, so I'm confused. I thought it was as we went into the jury room. That seems more logical." (RT 268.) However, P.R. was not sure exactly when the conversation occurred. (RT 268.) P.R. again admitted that when she first met with Agent Wilde, she recalled there was some type of conversation, but not what it was about. (RT 272-273.) When Wilde returned with the declaration, she recalled M.H. whispering, "My husband helped me decide." (RT 273.)

c. Defense Investigator Susan Lake

From 2004 through 2009, Susan Lake was an investigator with the Habeas Corpus Resource Center [HCRC]. She interviewed M.H. and P.R. (RT 277.) Lake identified handwritten notes she took during the interviews. (RT 278.) She took the notes so she could relay information to the HCRC attorneys, in case there were follow up questions or a declaration needed to be prepared. (RT 283.)

Lake spoke to M.H. at M.H.'s home in May 2009. (RT 278.) She handed M.H. her business card, identified herself as an investigator with HCRC, and asked M.H. if she would be willing to talk about her service as a juror. M.H. agreed. (RT 279.) M.H. said she remembered very little about the penalty phase deliberations. (RT 283.) After talking to M.H., Lake spoke to P.R. at P.R.'s house. (RT 283-284.) She introduced herself in the same way as she did with M.H. They talked for about an hour and a half. (RT 284.) Lake did not know before that interview that P.R. and M.H. were supposedly friendly, or that there was possible misconduct by M.H. Lake took notes during the interview. (RT 285.)

Lake followed up with P.R. two more times. No notes were taken during the first follow-up interview. (RT 285-287.) At the second follow-up interview, Lake brought P.R. a declaration. She handed P.R. a copy, kept a copy, and read each paragraph aloud. She told P.R. to stop her if she had questions or concerns, or wanted anything changed. (RT 287-288.) When she got to the third paragraph, P.R. asked her to change the word "clamoring" to "arguing." Lake wrote in the change and P.R. initialed it. (RT 288.) P.R. had Lake cross out a portion of paragraph 4, saying she was not comfortable leaving this sentence in the declaration. (RT 288-289.) She also wanted paragraph 16 to be more specific. (RT 289.) Lake wrote the changes into paragraph 16, told P.R. she would consult with an attorney about the changes, and left. (RT 289-290.)

Lake returned to M.H.'s home to interview her again. Lake asked M.H. if she remembered P.R. M.H. said she did not, but might if she saw a photograph of her. (RT 290.) Lake showed a photo to M.H., but M.H. still did not remember P.R. (RT 291-292.) Lake asked M.H. if she remembered talking to her husband about the trial before the last day of deliberations. M.H. said she did not remember whether she talked to him or not. (RT

292.) Lake did not take notes of the contact because it was brief and "there was no reason to take notes." (RT 290.)

Lake went back to M.H. with a declaration. Lake gave M.H. a copy and read it aloud while M.H. read along. (RT 291.) There were no corrections. M.H. initialed each page and signed the last page. (RT 292.)

On cross-examination, Lake testified she was aware that in 2005, a defense investigator named Tom Crompton contacted P.R. (RT 302-303.)

Lake further testified she did not have any background as a sworn peace officer. (RT 304.) She did not receive formal training in drafting reports, conducting interviews, or documenting them. (RT 304-305.) She did not write reports of her interviews with P.R. and M.H. but rather, took notes and drafted declarations. (RT 306.) Taking notes distracts her from being able to listen. She was confident that errors could be corrected during the declaration process. (RT 307.) It was not her standard practice to write a report because the declaration, "in a way . . . it's memorializing the conversation." (RT 308.)

Lake met with P.R. three times. The first meeting was on May 28, 2009. (2 RT 351.) Lake took notes but did not draft a report. (RT 351-352.) The notes are four and a half pages with every other line crossed out. (RT 355, 362.) Lake did not have a clean copy of the notes. (RT 355-356.) The notes give the date of the interview – May 28, 2009 – but not the time of day. (RT 356.) Lake did not audio-record any of her juror interviews, because "I don't think it's good practice." (RT 352.) Lake felt that jurors did not speak freely if they were audio-recorded. (RT 352-353.) At the time of the interviews, Lake knew she was investigating potential claims of juror misconduct, and that (in 2009), P.R. was 82 years old. (RT 352.)

After interviewing P.R., Lake telephoned an attorney from HCRC. The attorney directed her to conduct a follow-up interview. (RT 353.) Lake interviewed P.R. again on June 1, 2009. She did not record the

interview, write a report, or take any notes. (RT 364.) Lake continued, "I just did not take notes. For whatever reason, I'm just confident that I didn't take notes, being confident that I would remember what – whatever was said, and that if I didn't, for some reason, remember, then I – I would have no qualms following up with her again." (RT 367.) Lake could not remember what P.R. said in her June 1 interview, or what she specifically said in her interview on May 28 about her conversation with M.H. (RT 368, 370, 375-376.) "All I can say is, I am confident that I got it right with her." (RT 375.) Lake added, "I cannot say it's [the declaration is] verbatim as if it were an audio recording, but I can tell you what she told me in my own words." (RT 371.) Lake also testified if she were told something very important, she would not take notes because she was certain she would remember what was said. (RT 374.)

Lake's first meeting with M.H. was on May 27, 2009. (RT 378.) Lake took two and a half pages of notes. (RT 379, 382.) In the copy of the notes, each line is crossed out. (RT 382.) The notes do not document the date, time, or circumstances of the interview, although the date is indicated in a program called "Case Map." (RT 379-381.) P.R. was not discussed during this contact and there was nothing unusual about it. (RT 382.)

On June 12, 2009, after meeting with P.R., Lake spoke to M.H. again. (RT 282, 284.) Lake did not take notes because she was not asked to. She did not audio record the meeting nor did she prepare a report about it. (RT 382.) Taking notes is distracting and audio-recording causes "people [to] get self-conscious and freeze up." (RT 385, 387.) Lake could not recall what she and M.H. discussed at their meetings on May 27 or on June 12. (RT 385-386, 388.) The June 12 meeting was much shorter. (RT 385.) While it was clear to Lake that M.H. said she did not remember whether or not she had spoken to her husband, "[t]he words are never verbatim in a declaration." (RT 389.) During the June 12 interview, Lake showed M.H.

a photograph of P.R. (RT 390-391.) She never showed P.R. a photograph of M.H. (RT 390.) She did not contact or interview Mr. H. (RT 392-393.)

The referee directed Lake to paragraph 16 of P.R.'s declaration stating M.H. had "broken down and confessed," and asked Lake, "Who came up with the word, 'confessed?'" The following colloquy ensued:

> A.: I'm not certain if that was the juror or that was me. I'm guessing it was her because in the handwritten part, she had me write 'dilemma' and that – those were her words in . . . paragraph [16].
>
> Q. Did you choose the word 'dilemma' or did Mrs. R.?
>
> A. In the typed declaration?
>
> Q. Yes.
>
> A. I don't recall.
>
> Q. Is the word 'dilemma' in your handwritten notes? . . .
>
> A.: No.

(RT 410-411.) Lake acknowledged that there was nothing in her notes reflecting the contents of any conversation between P.R. and M.H. (RT 211.) Lake did not recall when she drafted P.R.'s declaration but it was probably before June 1. Lake "would have" changed the declaration if anything new was said on June 1. The referee asked Lake, "Where are the changes on this declaration from the June 1 meeting?" Lake responded, "Um, they're – I guess they're lost." (RT 412.)

d. Prosecution Investigator John Wilde

In February 2014, the California Attorney General's Office, counsel for respondent, assigned Special Agent John Wilde to investigate allegations of juror misconduct in Bell's case. (RT 429-431.) The investigation focused on whether one juror had spoken to her husband

while the trial was ongoing. Agent Wilde's goal was to seek the truth. (RT 432.)

Agent Wilde reviewed the case files, reports, and previous declarations submitted by M.H. and P.R. He contacted M.H., Stephen H., and P.R. (RT 432.) He called M.H. and P.R. beforehand, informing them that he was from the California Attorney General's Office, the Bell matter was currently on appeal, and he would like to speak with them. (RT 433, 501-502.) He talked to M.H. first, on February 25, 2014, in her home. (RT 432-433.) He presented her with his peace officer badge, explained who he was working for and why he was there, and obtained her permission to audio record the interview. (RT 434-435.) After it was over, he prepared an investigative report. (RT 437.) Since the interview was recorded, there is nothing of substance in the report. (RT 437-438.)

Agent Wilde asked M.H. what she currently remembered, then read each paragraph of her 2009 declaration to her. (RT 444.) Asked after each paragraph if it was accurate, M.H. responded, "Yes." (RT 444-447.) M.H. never indicated she left anything out or that there were any mistakes in the declaration. (RT 446, 448-449.)

Agent Wilde returned to M.H.'s home with a declaration which documented what she said during the interview process. (RT 449, 451.) She seemed to understand she was signing the document under penalty of perjury. The declaration was prepared by one of the legal professionals in the Attorney General's Office. (RT 454-455.) While M.H. used the word "foreman," the declaration changed it to "presiding juror." (RT 458.) Also, M.H. said, "He [my husband] never asked me anything," but did not use the phrase, "verdicts were entered." (RT 461.)

Agent Wilde did not record this second meeting with M.H. (RT 483-484.) It was not an official interview or a fact finding event. (RT 484, 487.) If she had said something different, he would have documented it

and provided her with an amended declaration. (RT 484-485.) He had his recorder with him and would have attempted to record any major changes. (RT 486.) On May 1, 2014, two days after M.H. signed her declaration, Wilde prepared an investigative report. (RT 487-488.)

On March 13, 2014, Wilde spoke to P.R. (RT 501.) The interview was audio recorded. (RT 503.) Agent Wilde did not recall if he also took notes. (RT 503-505.) After the interview, someone in the Attorney General's Office drafted a declaration. (RT 505-506.) On April 30, 3014, Agent Wilde brought the declaration to P.R. P.R. read it to herself. (RT 515-516.) Agent Wilde did not prepare a report of this contact because he did not feel one was necessary, and he discussed the matter with a deputy attorney general who confirmed that there was no need for a report. (RT 516, 537-538.) P.R. made handwritten changes on the draft declaration. An amended declaration reflecting those changes was prepared and signed. (RT 529-530, 533.)

On cross-examination, Wilde testified that he had been a special agent with the California Department of Justice for 13 years. (RT 541-543.) For the five years before that, he was an officer with the San Diego Police Department. (RT 543.)

Agent Wilde used a digital recorder to audio-record his March 13, 2014 conversation with P.R. (RT 544.) He wanted to record the interview because she was elderly and to capture her exact words. (RT 545.) When he asked her about her conversation with M.H., she was unable to recall any details. (RT 545-546.) She seemed to be speculating about whether M.H. was even on the jury. (RT 550.) When P.R. saw her 2009 declaration, she felt it confirmed that M.H. was in fact on the jury. However, it did not appear as though her memory was refreshed. (RT 551.)

P.R. did not provide specifics until the second interview on April 30. (RT 546.) Agent Wilde memorialized the information by making

appropriate changes to P.R.'s declaration. (RT 547.) At the time he went to see her, he expected that they would review the declaration and she would sign it. (RT 552.) Agent Wilde believed it accurately reflected his interview with P.R. (RT 552-553.) When P.R. gave additional details, he wrote them down on the draft declaration, which she did not sign. (RT 553.) Instead, he returned on May 1, 2014 with a modified declaration. P.R. signed it and did not say anything new. (RT 553-554.)

Agent Wilde further testified that he drafted eight reports documenting the results of his investigations and contacts. (RT 555.)

2. Respondent's Witnesses

a. Stephen H.

Stephen H., M.H.'s husband, was 79 years old at the time of the evidentiary hearing. (RT 415-416.) He had previously been on two juries. (RT 416-417.) In one of the trials, he was the jury foreman. (RT 417.) Both trials were before Bell's case. (RT 417-418.) In both instances, the court made it very clear from the outset that jurors were not to discuss the case outside of deliberations. (RT 417.)

Asked whether, at the time of the Bell trial, he was aware he was not to discuss that case with M.H., Mr. H. responded, "Yes, very much." (RT 418.) Mr. H. denied talking to M.H. while the trial was ongoing. He was not interested in the case and knew she was not supposed to talk to anyone. He added, "I just don't like to talk, and I don't like to ask questions, and I don't like to listen either." "I know that I would not have discussed the case with her." (RT 419.)

Mr. H. knew M.H. was serving on a murder trial, but knew nothing else about the case. (RT 419-420.) He would not have asked anything about the trial: "I don't ask. I'm just not interested." (RT 426.) Mr. H. explained:

> M. talks all the time, and I don't know who she's talking to. Sometimes she talks to the cat. I do not listen. I don't listen to M. much and I – of course, I get scolded all the time about it, but I'm not interested in any of that stuff. I mean, I'm interested, but I'm not interested in what she has to say. She knows it. She knows I have selective listening and I don't remember it. And she'll ask me five minutes later, and I won't remember it and I'm not listening.

(RT 426.)

B. Referee's Report

As noted, this Court's reference order asked the referee to hold an evidentiary hearing and make findings of fact on five questions. Each of these questions is discussed below.

1. Question No. 1

The first question asked whether, during her service as a juror, M.H. discussed the jury's deliberations, or any other aspect of the case, with her husband, Stephen H. The referee found that there was insufficient credible evidence to conclude that M.H. spoke to Mr. H. during her service as a juror. (Rep., p. 18.) The referee observed that M.H. "was a very coherent and responsive witness." (*Ibid.*) As a juror, she was aware of the admonition not to speak to anyone about the case. She took the admonition seriously. Her testimony was fairly consistent that she did not, and would not have, talked to Mr. H. about the case or asked him to help her decide how to vote. Her testimony was supported by that of Mr. H., who also testified they did not talk about the case during deliberations. He had served on juries before and knew that such discussions were prohibited. (*Ibid.*) Mr. H. also testified he was not interested in talking to M.H. about the case, or in asking her any questions about it. (Rep., pp. 18-19.) It is therefore unlikely, the referee stated, that Mr. H. would discuss the case with M.H. or help her decide how to vote. (Rep., p. 19.)

Additionally, the referee found that while P.R. was not lying when recounting her version of the conversation she thought she had with M.H., her memory was questionable. (Rep., p. 19.) When she testified at the evidentiary hearing, she had significant trouble following questions and there were long pauses in her answers. When she was asked about her 2009 declaration, she did not recall many of the events described in it. (*Ibid.*) Further, the 2009 declaration, particularly paragraph 16, did not appear to be an accurate record of what P.R. said. Given P.R.'s advanced age when Susan Lake interviewed her, Lake should have recorded the interview. And, Lake's notes of the interview were cryptic, making it unclear what P.R. actually recalled in 2009. (*Ibid.*)

The sole admissible evidence before it on the contents of the conversation, the referee stated, was P.R.'s testimony that M.H. said, "My husband helped me decide." Because P.R. did not mention this conversation to defense attorney Liss when she spoke to him shortly after trial, even though it appears she was aware another juror was dismissed for speaking to her husband, it was possible P.R. was confusing the two jurors. (Rep., p. 19.)

Finally, the referee found, even if M.H. did say, "my husband helped me decide," there was no evidence as to "*what* he helped her decide." (Rep., p. 19, emphasis in original.) At one point P.R. affirmed M.H. said he helped her decide "the penalty phase of this case," but this was in response to a leading question and P.R. did not use the phrase at any other point during her testimony. (*Ibid.*)

2. Question No. 2

The second question asked when the conversation(s) between M.H. and Stephen H., if any, occurred. The referee concluded, "There is not sufficient, credible evidence to find that M.H. and Stephen H. discussed [Bell's] case at all while it was ongoing. Any conversation about the case

between M.H. and her husband occurred after trial was over, as M.H. testified[.]" (Rep., p. 19.)

3. Question No. 3

The third question asked what information or advice, if any, Stephen H. gave M.H. The referee found that there was no evidence Mr. H. gave M.H. any information or advice about the case. (Rep., p. 20.)

4. Question No. 4

The fourth question asked whether M.H. told P.R. about a conversation between M.H. and her husband. The referee found that the sole evidence was that M.H. told P.R., "My husband helped me decide." However, the referee continued, "it is questionable whether this conversation even occurred. In addition, it is not clear what M.H. may have been referring to." (Rep., p. 20.)

5. Question No. 5

The fifth question asked when and what M.H. told P.R. about her conversation with Stephen H., if anything. The referee found that the statement, "'My husband helped me decide,' if it occurred at all," was made on the last day of deliberations, before jurors entered the deliberation room. (Rep., p. 20.) The referee noted that while P.R. was not quite sure if it took place at that time or upon entering the courtroom before the verdicts were read, for the most part she testified it was before entering the jury room. She said the same thing in her 2009 declaration. The referee concluded, "[H]owever, this court finds insufficient credible evidence that the conversation between M.H. and P.R. occurred at all." (*Ibid.*)

III. EXCEPTIONS TO THE REFEREE'S FINDINGS OF FACT

Respondent has no exceptions to the referee's findings of fact.

IV. ARGUMENT ON THE MERITS

In claim six, subclaim 7(b) of his amended petition for writ of habeas corpus, Bell alleges, "[J]uror [P.R.] reported that Juror [M.H.] talked to her husband on the night before the verdict was returned." (Amended Pet. at pp. 196-197; see also Order to Show Cause.) In subclaim 7(c) of claim 6, Bell alleges, "The prejudice to Mr. Bell resulting from [M.H.] discussing the case with non-jurors and being influenced by those interactions in [her] sentencing decision[] is patent. Moreover, the misconduct . . . had a substantial and injurious effect and/or influence on the jury's determination of the penalty." (Amended Pet. at p. 197.)

After extensive investigation, discovery, and a two-day evidentiary hearing, it is apparent that Bell's claim is unfounded. Accordingly, Bell has not demonstrated his entitlement to habeas relief.

A. Relief on Habeas Corpus

1. All Presumptions are In Favor of the Judgment

Habeas corpus is an extraordinary remedy. (*In re Clark* (1993) 5 Cal.4th 750, 764, fn. 3.) Because a petition for writ of habeas corpus collaterally attacks a presumptively final criminal judgment, "the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*), emphasis in original .) "[A]ll presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, superseded by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) "Although habeas corpus thus acts as a 'safety valve' [citation] for cases in which a criminal trial has resulted in a

miscarriage of justice despite the provision to the accused of legal representation, a jury trial, and an appeal, this 'safety valve' role should not obscure the fact that 'habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.' [Citation.]" (*In re Reno* (2012) 55 Cal.4th 428, 450.)

Collateral attack by habeas corpus is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (*In re Clark*, *supra*, 5 Cal.4th at pp. 766-767.) A habeas corpus petitioner "bears the burden of establishing that the judgment under which he or she is restrained is invalid. To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus." (*In re Visciotti* (1996) 14 Cal.4th 325, 351, citations omitted.)

2. An Order to Show Cause Reflects a Preliminary Assessment That a Petitioner Has Stated Facts Which, if Proved, May Entitle Him to Relief

The function of the writ of habeas corpus or its alternate, the order to show cause, is to "institute a proceeding in which issues of fact are to be framed and decided." (*In re Hochberg* (1970) 2 Cal.3d 870, 875, fn. 4; *People v. Romero* (1994) 8 Cal.4th 728, 738 (*Romero*).) The writ or order is the means by which issues are joined (through the return and traverse) and the need for an evidentiary hearing determined. (*Romero*, *supra*, 8 Cal.4th at p. 739.)

> Once the issues [are] joined ... the court must determine whether an evidentiary hearing is needed. If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing. Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the petition without an evidentiary hearing. Finally, if the return and traverse reveal that petitioner's entitlement to relief

> hinges on the resolution of factual disputes, then the court should order an evidentiary hearing. Because appellate courts are ill-suited to conduct evidentiary hearings, it is customary for appellate courts to appoint a referee to take evidence and make recommendations as to the resolution of disputed factual issues .... After the evidentiary hearing, the court ...will then either grant or deny relief based upon the law and the facts as so determined.

(*Romero*, *supra*, 8 Cal.4th at pp. 739-740, internal citations omitted.)

The order to show cause "does not . . . establish a prima facie determination that petitioner is entitled to the relief requested. Rather, it signifies a 'preliminary determination that the petitioner has made a prima facie statement of specific facts which, if established, entitle [petitioner] to habeas corpus relief under existing law.'" (*In re Serrano* (1995) 10 Cal.4th 447, 455, quoting *In re Hochberg*, *supra*, 2 Cal.3d at p. 875, fn. 4.) This Court has also stated:

> In issuing an order to show cause . . . a court makes "an implicit preliminary determination" as to claims *within the order* that the petitioner has carried his burden of allegation, that is, that he "has made a sufficient prima facie statement of specific facts which, if established, entitle him to . . . relief . . . ." That determination, it must be emphasized, is truly "preliminary." [I]t is only initial and tentative, and not final and binding.
>
> In issuing the order to show cause, the court also makes "an implicit determination" as to claims *outside the order* that the petitioner has failed to carry his burden of allegation, that is, that he has "failed to make a prima facie case . . . ." That determination is not preliminary. It may, of course, be changed. But unless changed, it stands.

(*In re Sassounian* (1995) 9 Cal.4th 535, 547, emphasis in original.)

The order to show cause directs the respondent to address the "claims raised in the petition and the factual bases for those claims alleged in the petition." (*Duvall*, *supra*, 9 Cal.4th at p. 475.) "When an order to show cause does issue, it is limited to the claims raised in the petition and the

factual bases for those claims alleged in the petition. It directs the respondent to address only those issues." (*In re Clark*, *supra*, 5 Cal.4th at p. 781, fn. 16; *People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37 (*Miranda*) [limiting issues in order to show cause was an implicit determination that defendant failed to make a prima facie case as to the other issues presented by petition].)

3. When Supported by Substantial Evidence, the Referee's Factual Findings are Entitled to Great Weight

A referee's findings of fact are not binding on this Court, but are given great weight if they are supported by substantial evidence. (*In re Visciotti*, *supra*, 14 Cal.4th at p. 345.) "The deference accorded factual findings derives from the fact that the referee had the opportunity to observe the demeanor of witnesses and their manner of testifying. [Citations.]" (*In re Williams* (1994) 7 Cal.4th 572, 595, internal quotation marks omitted.) "Deference to the referee is particularly appropriate on issues requiring resolution of testimonial conflicts and assessment of witnesses' credibility[.] [Citation.]" (*In re Boyette* (2013) 56 Cal.4th 866, 877, internal quotation marks omitted.) This Court assume[s] the referee considered . . . discrepancies [in testimony], along with the witness's demeanor, before concluding he was a credible witness. [Citation.]" (*Ibid.*, internal quotation marks omitted.) This Court independently reviews the evidence to "determine whether it supports the referee's findings and conclusions." (*In re Cudjo* (1999) 20 Cal.4th 673, 688.) "Any conclusions of law, or of mixed questions of law and fact, are subject to independent review." (*In re Lucas* (2004) 33 Cal.4th 682, 694.)

4. Petitioner Has Failed to Carry His Burden of Showing There Was Juror Misconduct

A criminal defendant has a federal and state constitutional right to a fair and impartial jury. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722; *In re Hitchings* (1993) 6 Cal.4th 97, 110; U.S. Const., Amend. VI; Cal. Const., art. I, § 16.) An impartial jury is one where no member has been subject to improper influence (*People v. Nesler* (1997) 16 Cal.4th 561, 568), and every juror is "'capable and willing to decide the case solely on the evidence before it.' [Citation.]" (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 468 U.S. 548, 554.)

When a juror directly violates "the oaths, duties and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors," the juror's action is referred to as "juror misconduct." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) Such misconduct creates a "rebuttable presumption of prejudice." (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) This presumption may be rebutted "by a showing that no prejudice actually occurred" (see *People v. Williams* (1988) 44 Cal.3d 883, 1156), or "by [the trial] court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party" (*Miranda, supra*, 44 Cal.3d at p. 117). The strength of the prosecution's case can be considered in determining if any juror misconduct was prejudicial. (*People v. Cochran* (1998) 62 Cal.App.4th 826, 831.)

This standard is a pragmatic one which must take into consideration the day-to-day realities of courtroom life (*Rushen v. Spain* (1983) 464 U.S. 114, 119), as well as the strong competing interest of society in the stability of verdicts in criminal trials (*In re Carpenter* (1995) 9 Cal.4th 634, 655). It is "virtually impossible to shield jurors from every contact or influence that

might theoretically affect their vote." (*Smith v. Phillips* (1982) 455 U.S. 209, 215.) Furthermore, a jury is a "fundamentally human" institution. (*People v. Marshall* (1990) 50 Cal.3d 907, 950 (*Marshall*).) It is therefore unavoidable the jurors will bring diverse backgrounds, personalities, and experiences into the jury room. (*In re Hamilton*, *supra*, 20 Cal.4th at p. 296.) Such diversity is both the strength and weakness of the jury system. (*Marshall*, *supra*, 50 Cal.4th at p. 950.)

> The criminal justice system must not be rendered impotent in quest of an ever-elusive perfection .... Jurors are imbued with human frailties as well as virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. [Citation.]

(*In re Hamilton*, *supra*, 20 Cal.4th at p. 296, omission in original.)

This Court "first determine[s] whether there was any juror misconduct. Only if [it] answers that question affirmatively does it consider whether the misconduct was prejudicial. [Citation.] " (*People v. Collins* (2010) 49 Cal.4th 175, 242, internal quotation marks omitted.) This Court "accept[s] the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citation.]" (*Ibid.*) This Court then determines whether those facts constitute misconduct, a legal question which is reviewed independently. (*Ibid.*)

The case of *People v. Hamlin* (2009) 170 Cal.App.4th 1412 (*Hamlin*) illustrates a reviewing court's proper deference to the trial court's (or referee's) credibility determinations and findings of facts. In that case, the defendant moved for a new trial, alleging juror misconduct. He submitted a declaration from Juror No. 151. According to Juror No. 151, Juror No. 63 stated, during the first week of trial, that he thought "a guilty verdict would be a slam dunk . . . a no brainer." (*Id.* at pp. 1461-1462.) The prosecutor, in response, provided declarations from two jurors who did not recall

hearing any statement about the defendant's guilt or innocence before deliberations. The prosecutor also noted that the alleged statement by the juror was inconsistent with the jury's verdict, since the jury had acquitted the defendant of several charges. (*Id.* at p. 1462.)

At the hearing on the new trial motion, the court noted that there was no context given for the remarks. It was unknown, for example, whether Juror No. 151 was joking, was speculating out loud, or if he qualified his statement. The court continued, "It is just a dangling remark by Juror No. 63 that is inadequate to show misconduct." The court also found that since the jury had returned seven not guilty verdicts and had found some of the great bodily injury allegations untrue, "it is pure speculation to conclude that these pre-deliberation remarks indicate he had a pre-existing bias that continued throughout the trial and prejudiced the case." (*Hamlin*, *supra*, 170 Cal.App.4th at p. 1462.)

The court further opined that Juror No. 63 had a bias or interest in seeing the new trial motion granted, and that her declaration raised "serious credibility problems." (*Hamlin*, *supra*, 170 Cal.App.4th at p. 1462.) The court noted that in a supplemental declaration, Juror No. 63 claimed Juror No. 32 "said he made up his mind about guilt prior to the completion of trial" while Juror No. 32, in his own declaration, stated he listened to the evidence and discussed it with other jurors before reaching a decision. Additionally, while Juror No. 151 said she was pressured to vote guilty, she did not say anything when she affirmed her verdict in court. (*Id.* at pp. 1462-1463.) The court thus concluded there was neither misconduct nor prejudice, and denied the motion for a new trial. (*Id.* at p. 1463.)

On appeal, the defendant argued there was no substantial evidence to support the trial court's conclusion that Juror No. 63 lacked credibility. The Court of Appeal disagreed. The court stated, in part:

> [A] trier of fact may accept such witnesses as he wishes and reject others . . . So long as the trier of fact does not act arbitrarily and has a rational ground for doing so, it may reject the testimony of a witness even when the witness is uncontradicted. [Citation.] Consequently, the testimony of a witness which has been rejected by the trier of fact cannot be credited on appeal unless, in view of the whole record, it is clear, positive and of such a nature that in cannot be rationally disbelieved. [Citation.]

(*Hamlin*, *supra*, 170 Cal.App.4th at pp. 1463-1464, internal quotation marks omitted.) In the case before it, the Court of Appeal continued, the trial court was entitled to conclude that there was a conflict in the declarations and that Juror No. 151 should not be believed. (*Id.* at pp. 1464-1465.)

Here, too, substantial evidence supports the referee's findings that M.H. did not talk to her husband Stephen H. during deliberations, and did not tell P.R. that she had. M.H. testified that Bell's case was a serious one and she took her duties as a juror seriously. (RT 9, 54.) She was aware, from the outset of the trial, that she was not to discuss the case with Mr. H., "and we didn't discuss it." (RT 25-26.) When the trial started, she told Mr. H., "I can't talk about it." (RT 29.) She added that Mr. H. had served on juries before and knew not to ask. (RT 29.) M.H. was emphatic, "My husband did not ask me questions . . . And I did not tell him anything." (RT 31.)

Shown paragraph 16 of P.R.'s declaration, M.H. denied ever saying she "broke down and spoke to [her] husband about he dilemma." M.H. testified, "That's not me." (RT 52.) M.H. surmised that P.R. was confusing her with A.G., a juror who had broken down, talked to her husband about the case, and was excused for that reason. (RT 51.) Although P.R. denied mixing the two up (RT 201), the referee reasonably concluded that given the striking similarity between paragraph 16 and the

circumstances surrounding A.G.'s dismissal, P.R.'s age, and the passage of time, P.R. might, in fact, have been so confused. (See Rep., p. 19.) Notably, while Susan Lake, the HCRC investigator, showed M.H. a photo of P.R. to see if it would refresh her recollection, Lake did not show a photograph of M.H. (or A.G.) to P.R. to clear up any possible confusion. (RT 390-391.)

M.H. never wavered from her assertion that she and Mr. H. did not talk. On cross examination, she testified that during trial, the court gave jurors an admonishment not to discuss the case with others while it was going on. (RT 54-55.) M.H. followed all of the court's admonishments, including this one. (RT 55, 65.) She did not talk to another juror about the case outside of deliberations nor did she talk to Mr. H. (RT 68.) Based on who she is as a person, the admonishment, and the personalities of both herself and Mr. H., "he wouldn't have asked me and I wouldn't have told him." (RT 65.) Furthermore, she would not have relied on Mr. H. to decide the case because "we are both very independent thinkers, and sure, maybe you share ideas and stuff, but you make your own decisions." (RT 66.)

M.H.'s willingness to make decisions for herself is apparent from other portions of her testimony. For instance, during redirect examination, Bell's counsel asked her, "Have you ever consulted with your husband when you are making important decisions in your life?" M.H. responded, "Well, a personal decision that affects him and me, yes." (RT 72.) Counsel then asked, "So when you decided to retire, did you have a conversation with your husband prior to making the decision to retire?" In response, M.H. told counsel, "Got back from a trip. There was a letter saying there's an early retirement, I said, 'I'm out of here' . . . I didn't say, 'Is that okay?' I just said, 'I'm out of here.'" (RT 72.)

M.H.'s recollection is also supported by the testimony of Mr. H. Mr. H. testified he had served on two juries before M.H. was called to sit on Bell's case and was "very much" aware that they could not discuss it. (RT 417-418.) He and M.H. did not talk about the facts of the case during deliberations. He was not interested and knew M.H. was not supposed to talk about it. Mr. H. volunteered, "I just don't like to talk, and I don't like to ask questions, and I don't like to listen, either." (RT 419.) He explained, "I'm just not interested in what she has to say . . . I don't ask. I'm just not interested." (RT 426.) Given Mr. H.'s demeanor and responses, it was reasonable for the referee to conclude that he would not have given M.H. advise on how to vote during the penalty phase of Bell's trial.

P.R.'s testimony, by contrast, was scattered and inconsistent. In 2009 she signed a declaration purporting to recount a detailed conversation she had with M.H. on the last day of the penalty phase deliberations. (RT 127, 137.) When P.R. was first interviewed by Agent Wilde, she was not even sure M.H. was a juror on the case. (RT 234, 242.) A year later and at the evidentiary hearing, she testified M.H. said, in a stage-whisper, "My husband helped me decide." (RT 103-104, 232-233, 237-238.) But P.R. acknowledged that she and M.H. were not that close – they never ate lunch together or got together for coffee during the breaks. (RT 226-227.) P.R. also claimed her memory of P.R. was better at the evidentiary hearing than it was a year earlier, when she spoke to Agent Wilde. (RT 231.)

P.R. was also unsure about the circumstances surrounding the dismissal of A.G. When P.R. talked to Agent Wilde, P.R. said a juror (A.G.) was let go because she did not want to be on the jury. P.R. did not mention that the juror had committed misconduct. (RT 232.) She forgot that A.G. was dismissed for talking to her husband and also thought two jurors had been dismissed, one because she did not want to be on the jury and one for talking to her husband. (RT 234-235.) P.R. acknowledged she

was "confused" as to whether two different jurors were dismissed. Asked later, "[D]o you know how many jurors were removed from jury service?" P.R. responded, "I guess it was only one." (RT 255.) At another point in her testimony, P.R. stated she could "not be sure" that anyone was excused from jury service. (RT 91.) A young woman who was in the Navy did leave for unknown reasons, or for talking to someone about the case, "[b]ut I may be getting it confused with this young woman mentioned in [paragraph] number 9 [of my 2014 declaration]." (RT 92.) Just a short while earlier, P.R. had testified that someone was dismissed from the jury and was replaced by an alternate with the first name "Nancy." (RT 84.)

It is also telling that although Bell's trial counsel, Peter Liss, conducted an in-depth interview of P.R. just two months after the trial was over, P.R. never mentioned the purported remark by M.H. (RT 296-297.) At this point, P.R. already knew a juror had been dismissed for talking to her husband. (RT 196.) P.R. acknowledged that she had the opportunity to tell Liss about M.H. and should have done so. (RT 197-198, 222-223.) She gave varying explanations for her failure to mention the incident to him. She first testified, "I don't think I discussed it with him. I wouldn't have unless he asked me." (RT 197.) She then said, "It didn't register as that important." (RT 199, 201.) Asked later, she asserted that she kept the matter to herself because she "didn't feel that he was a confidant of mine that I was going to share – if I was going to bring that up, it would not have been him and over the telephone." (RT 260-261.) But asked if she had that feeling when she talked to Liss, she testified, "Well, I don't remember . . . I probably wasn't thinking about that particular thing." (RT 261.) P.R. did not explain why she would not relay the information to attorney Liss, who she had seen throughout the trial, but would convey it to Lake, who she had never met before.

Finally, P.R. did not recall being interviewed by defense investigator Tom Crompton on June 27, 2005, even though "it seems like something I would remember." (RT 177-178.) And there is nothing in the record to indicate that P.R. told Crompton about her alleged conversation with M.H. To the contrary, P.R. admitted that she did not mention it to anyone until her meeting in 2009 with Lake. (RT 198.)

In short, the referee properly concluded that there was insufficient credible evidence to support Bell's allegations that M.H.: (1) talked to her husband about Bell's case while the trial was ongoing; and/or (2) told P.R. she had talked to her husband about this case. This Court should conclude that there was no juror misconduct, and should deny habeas relief.

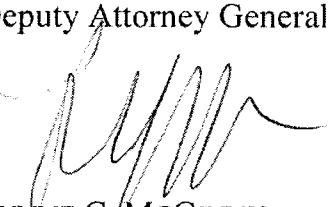
V. CONCLUSION

Based on the foregoing, respondent respectfully requests that this court find there was no juror misconduct, deny habeas relief to Bell, and discharge the Order to Show Cause.

Dated: May 12, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
MICHAEL T. MURPHY
Deputy Attorney General



LYNNE G. MCGINNIS
Deputy Attorney General
Attorneys for Respondent

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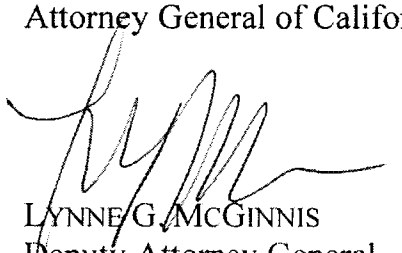
CERTIFICATE OF COMPLIANCE

I certify that the attached EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 12,001 words.

Dated: May 12, 2016

KAMALA D. HARRIS
Attorney General of California



LYNNE G. MCGINNIS
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **In re Steven M. Bell on Habeas Corpus** No.: **S151362**
I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. The Office of the Attorney General's eService address is AGSD.DAService@doj.ca.gov.

On May 26, 2016, I served the attached **EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Michael J. I-Iersek
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107
Attorneys for Steven M. Bell [2copies]

Court of Appeal of the State of California
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

California Supreme Court
Automatic Appeals Monitor
350 McAllister Street
San Francisco, CA 94102

San Diego County Superior Court
For delivery to:
The Honorable Joan P. Weber, Judge
220 W. Broadway
San Diego, CA 92101

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on May 26, 2016 by 5:00 p.m., on the close of business day to the following.

eservice-criminal@adi-sandiego.com
Appellate Defenders, Inc.'s

da.appellate@sdcda.org
San Diego District Attorney's Office

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 26, 2016, at San Diego, California.

M. I. Salvador-Jett
Declarant

Signature

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