IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No. S151362
STEVEN M. BELL,	**CAPITAL CASE**
On Habeas Corpus.	Related to Automatic Appeal Case No. S038499 (Closed)
	San Diego County Superior Court Case No. CR133096

PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS

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I. INTRODUCTION

Steven Bell was condemned to death by a jury unable to reach a unanimous verdict during its first three days of deliberation. The jury arrived at its decision on the fourth day, but only after one member violated her oath and consulted with a nonjuror about her vote. Contrary to the factual findings of the referee, Mr. Bell proved by a preponderance of the evidence presented at the evidentiary hearing that Juror M.H. spoke to her husband about the case during the penalty phase deliberations, and that her husband helped and advised her to change her vote to death. Mr. Bell also proved that M.H. told Juror P.R. about that conversation on the last day of deliberations before a unanimous verdict was reached. This misconduct raises a presumption of prejudice that respondent has not rebutted, and requires this Court to vacate Mr. Bell's death sentence.

II. PROCEDURAL HISTORY

On August 12, 1992, the San Diego County District Attorney filed an Information charging Mr. Bell with the murder of Johnny Joseph Anderson, pursuant to Penal Code § 187(a) [count one], and first degree robbery, pursuant to Penal Code §§ 211 and 212.5 [count two]. 1 Clerk's Transcript on Appeal (CT) 15-17. The Information alleged the special circumstance that the murder was committed during the course of a robbery, pursuant to Penal Code § 190.2(a)(17). 1 CT 15-16.[1]

The guilt-innocence phase of Mr. Bell's trial began on October 25, 1993, 8 CT 1800, and ended on November 22, 1993, with a guilty verdict on all counts, and a finding that the special circumstance was true, 42 Reporter's Transcript on Appeal (RT) 3500:19-3507:27; 8 CT 1835-39. The penalty phase of Mr. Bell's trial began on November 30, 1993, 8 CT 1842, and ended on December 17, 1993, after about seventeen hours of deliberations over four days, 8 CT 1859-65.

This Court affirmed the judgment in its entirety on automatic appeal in *People v. Bell*, 40 Cal. 4th 582 (2007).

Mr. Bell filed a Petition for a Writ of Habeas Corpus in this Court on March 29, 2007, and an Amended Petition for Writ of Habeas Corpus on June 22, 2009. This Court issued an order to show cause on January 21, 2014, based on the misconduct of Juror M.H., as alleged in Claim Six, subclaim 7(b) of the Amended Petition. Respondent filed a Return on May 14, 2014. Mr. Bell filed a Traverse on September 25, 2014.

On November 12, 2014, this Court issued an order directing that a

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[1] The Information also alleged that Mr. Bell personally used a deadly and dangerous weapon – a knife – within the meaning of Penal Code § 12022(b), and as to count two, that Mr. Bell personally inflicted great bodily injury on the victim within the meaning of Penal Code § 12022.7. 1 CT 15-16.

Judge of the San Diego Superior Court be selected to sit as a referee to take evidence and make findings of fact on 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 or conversations 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?

On December 10, 2014, the Honorable Joan P. Weber was appointed as a referee to take evidence and make findings of fact. The evidentiary hearing was held on September 28 through September 30, 2015. After post-hearing briefs were filed by the parties in December 2015, and final arguments were delivered on January 29, 2016, the referee issued a Report of Proceedings, Evidence, and Findings of Fact after Hearing (hereafter "Referee's Report"), filed in this Court on March 21, 2016.

On March 28, 2016, this Court invited the parties to serve and file exceptions to the referee's findings of fact and simultaneous briefs on the merits, and responses, if any, thereafter.

III. SUMMARY OF EVIDENCE PRESENTED AT THE REFERENCE HEARING

For the first three days of deliberation, the jury could not reach a unanimous verdict. Evidentiary Hearing Reporter's Transcript (EH RT) 96:21-97:5. Jurors P.R. and M.H. were among the small group of jurors who had favored a life sentence for Mr. Bell. EH RT 97:2-26. On the fourth day, as P.R. and M.H. arrived at the jury room for what would be the final few hours of deliberation, "[they] went in together and [M.H.] said

[her] husband helped [her] decide." Evidentiary Hearing Reporter's Transcript (EH RT) 101:17-20.

P.R. was questioned repeatedly at the evidentiary hearing about her interaction with M.H. on that last day of deliberations, and she answered consistently – in accord with her then-current recollection – that M.H. said her husband helped her make the penalty phase determination. EH RT 263:25-264:2; *see also* EH RT 104:26, 169:8, 169:25, 170:5, 236:26-27 (M.H. told P.R. "my husband helped me decide"), 239:10-11 (M.H. told P.R. "my husband helped me to decide"); EH RT 127:13-20 ("M.H. whispered she had asked her husband to help her decide.").

During her testimony, P.R. was confronted with statements she made (or failed to make) when she discussed the case with Mr. Bell's trial counsel, Mr. Bell's habeas investigator, and the Attorney General's investigator in 1994, 2009, and 2014, respectively. P.R.'s first post-trial contact happened in January or February 1994, shortly after the end of Mr. Bell's trial, when trial counsel Peter Liss called P.R. and spoke with her on the telephone. EH RT 107:25-27, 195:25-197:1. P.R. testified that the conversation was not long, EH RT 226:9-10, and that she got the impression that Mr. Liss "want[ed] an opinion about the defense - - about their actions, how we felt that they had done for the case," EH RT 108:4-6. P.R. did not tell Mr. Liss about her interaction with M.H. on the last day of deliberations. EH RT 222:25-28. P.R. explained that she would not have told Mr. Liss unless he had asked her about it, EH RT 197:14-18; she did not realize the full import of the information at the time, EH RT 199:6-10; 201:4-7; and although she understood that she should have disclosed it, EH RT 198:1-3, she did not feel comfortable doing so with Mr. Liss, EH RT 261:1-5.

Habeas Corpus Resource Center investigator Susan Lake met with

P.R. on three occasions in 2009. EH RT 350:22-351:6. The first contact was on May 28, 2009, at P.R.'s residence. EH RT 351:10-18. P.R. testified that Ms. Lake identified herself clearly as someone working on behalf of Mr. Bell, EH RT 108:28-109:8, and that she did not feel any pressure when speaking with Ms. Lake, EH RT 109:27-28. The interview lasted approximately one and a half hours, EH RT 284:8-9, and P.R. recalled that it covered "everything" relating to Mr. Bell's trial, RT 109:16-19. In the context of discussing the penalty phase deliberations, P.R. brought up M.H., EH RT 284:17-21, and described her interaction with M.H. on the last day of deliberations, EH RT 394:24-395:18; Evidentiary Hearing Exhibit (EH Ex.) 2. Ms. Lake testified that P.R. told her that M.H. "confided in her that she had been having a really hard time, being one of the two jurors who was in favor of life, and she had broken down and . . . talked to her husband about it." EH RT 372:6-10. Soon after the interview, Ms. Lake drafted a declaration based on the information she received from P.R. EH RT 406: 14-25; *see also* EH RT 362:20-23 ("[I]t was my practice to draft the declarations immediately following or that evening following, as close as possible to the interview.").[2] Ms. Lake met with P.R. again on June 1, 2009, to conduct a follow-up interview. EH RT 363:27-364:11.

On June 12, 2009, Ms. Lake returned to P.R.'s home with a draft declaration. EH RT 286:26-287:15; EH Ex. 1. P.R. reviewed the declaration carefully and asked Ms. Lake to make changes to paragraphs 3, 4, and 16. Ms. Lake handwrote the requested changes into the declaration, and P.R. initialed the changes. EH RT 111:4-9, 112:6-16, 112:26-113:4,

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[2] Ms. Lake was unable recall exactly when she drafted the declaration, but she most likely wrote it on the same day of the interview. EH RT 406:16-18 ("I can't say if it was one hour later or if it was that evening.") It is possible, though unlikely, that she wrote it the day after the interview. EH RT 406:18-22.

287:28-289:26, 292:21-25; EH Ex. 1 at ¶¶ 3, 4, 16. P.R. also initialed every page of the declaration, and signed the last page under penalty of perjury. EH RT 112:26-113:4, 290:4-10, 292:21-25; EH Ex. 1. The change to paragraph 3 was limited to replacing "clamoring" with "arguing." EH RT 288:4-11; EH Ex. 1 ¶ 3. In paragraph 4, P.R. asked Ms. Lake to cross out a line relating to the jury foreman having made fun of trial counsel for how he dressed. EH Ex. 1 at ¶ 4. Ms. Lake testified that P.R. "acknowledged that she had said it, but she wasn't comfortable having it in the declaration." EH RT 288:26-289:6. Most significantly, P.R. asked for the following underlined language to be added to paragraph 16:

> On the last day of deliberations, [M.H.] approached me <u>in the hallway before we entered the jury room</u> and confessed that she had broken down and spoken to her husband about her dilemma the night before, <u>to see if he could help her out of her dilemma, and he advised her to change her vote</u>. 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 pressure from the other jurors to get things over with. She told me that she had decided to change her vote.

EH Ex. 1 at ¶ 16.

At the time P.R. signed her declaration in 2009, she believed it was the most accurate recollection of her memory. EH RT 113:5-8, 137:1-3, 172:17-25. P.R. testified that, despite the passage of time between the trial and her contact with Ms. Lake, she "was still remembering [the trial] pretty well" in 2009. EH RT 247:27-28.

P.R. was contacted by Special Agent John Wilde (S.A. Wilde), from the Attorney General's Office, on three occasions. S.A. Wilde conducted a tape-recorded interview during their first contact on March 13, 2014. EH RT 500:25-27; EH Exs. 3, 7. In that interview, P.R. brought up the name M.H. EH Ex. 3 at 5. P.R.'s memory was unclear in the beginning of the

interview, but as S.A. Wilde asked questions, her memory was refreshed. She testified that when she spoke to S.A. Wilde, she was certain that M.H. had spoken to her. EH RT 242:10-12, 244:7-8.

P.R. confirmed to S.A. Wilde that she provided every piece of the information contained in her 2009 declaration to Ms. Lake; S.A. Wilde read the declaration line-by-line to P.R. and she affirmed it was true. EH RT 113-120; EH 524:22-527:25 (S.A. Wilde testifying that P.R. confirmed every statement in her 2009 declaration as accurate); Ex. 3 at 16-39. Immediately after reading the sentence that M.H. told P.R. she sought her husband's advice on how to vote on the penalty, P.R. said that this refreshed her memory about her interaction with M.H. EH Ex. 3 at 36:6-12.

S.A. Wilde returned to see P.R. on April 30, 2014, and presented her a draft declaration. EH RT 120:6-23; EH Ex. 5. Paragraph 9 of the declaration included the language, "On the last day of penalty phase deliberations, [M.H.] told me she spoke to her husband about the case. At present I don't recall what she told me." EH RT 124:23-125:1; Ex. 5 at ¶ 9. P.R. asked S.A. Wilde to cross out "At present I don't recall what she told me," because that was inaccurate. EH RT 263:7-24. P.R. directed S.A. Wilde to replace the crossed out language with: "As we entered the courtroom on verdict day, M.H. whispered she had asked her husband to help her decide."[3] EH RT 126:11-128:20. S.A. Wilde did not prepare a

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[3] P.R. also requested that the following underlined language be added to paragraph 7 of the declaration:

> Another young female juror was dismissed during the trial. I learned after the trial had concluded that she was dismissed for talking to her husband about the case. Additionally, she did not want to be on the jury and was eager to be excused.

EH RT 121:28-124:22; EH Ex. 5 at ¶ 7.

report of his April 30 contact with P.R., at the direction of the Deputy Attorney General handling the case.[4] EH RT 517:9-15.

On May 1, 2014, S.A. Wilde returned to P.R.'s home and presented her a declaration that she signed. EH RT 518:24-519:11; EH Ex. 7. Paragraph 9 of the declaration omitted the following crossed out language and added the italicized language: "On the last day of the penalty phase deliberations, ~~[M.H.] told me she spoke to her husband about the case. At present I don't recall what she told me.~~ *as we entered the courtroom* ~~*for verdict day*~~*, [M.H.] whispered she had asked her husband to help her decide.*" *Compare* EH Ex. 6 at ¶ 9 *with* EH Ex. 5 at ¶ 9. The clauses "[M.H.] told me she spoke to her husband about the case" and "for verdict day" – which were in the modified draft declaration – were omitted from the revised final declaration without P.R.'s approval, and S.A. Wilde did not inform P.R. of these changes or explain why the changes were made. EH RT 131:9-23, 536:25-537:1.

P.R. testified that the passage of time and its effect on her memory explain why her recollection in 2014, and at the evidentiary hearing in

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[4] S.A. Wilde not only failed to produce an independent report of his contact with P.R. on April 30, 2014, he also omitted mention of the contact in his May 1, 2014 report of his interactions with P.R., and he wrote the report in a manner that creates the impression it documents every contact he had with P.R. EH Ex. 7; EH RT 518:14-519:3. The May 1, 2014 report refers to S.A. Wilde's contacts with P.R. using the singular form of the word interview, creating the false impression that there had been only one contact preceding the signing of her declaration on May 1. EH Ex. 7 ("On 05/01/14, I met with [P.R.] at her residence. I presented [P.R.] with *a declaration created from our previous interview*." (emphasis added)); EH RT 519:13-19. S.A. Wilde testified that he understood the Deputy Attorney General's instruction not to create a report of the April 30 contact to mean that he should omit any reference of that contact in his reports. EH RT 519:20-520:7; *see also* 9/25/16 EH RT 4:23-8:22 (re failure to disclose).

2015, of her interaction with M.H. on the last day of deliberations was not as detailed as it was in 2009. EH RT 252:12-23 ("[T]his happened, but years later I was remembering it differently. That's the only thing. I mean, the exchange happened. I'm not saying that this didn't happen."); EH RT 99:18-23 ("I was remembering it differently from a different time viewpoint."). P.R. did not doubt her recollection that M.H. told her that she spoke to her husband and that he helped her decide how to vote on the penalty phase. *See, e.g.*, EH RT 101:17-102:3, 263:25-264:2, 265:9-12.

During their testimony, M.H. and her husband, S.H., denied having spoken about the case before the verdict was reached. EH RT 30:7-32:13, 64:10-65:5, 419:5-420:2. M.H.'s denial was based in part on the assumption that she would not commit wrongdoing, rather than on a memory of what actually happened. EH RT 29:9-13, 32:10-35:7. M.H.'s memory of events at the time of the penalty phase and of the penalty phase deliberations was very limited. EH RT 15:18-23, 16:16-18:17. M.H. assumed she did not discuss the case with S.H., because she knew she was not supposed to and S.H., who had served in juries before, knew it was not allowed and would not have asked about the case. EH RT 64:23-27. S.H. admitted that he may have heard something about the case from M.H., but he could not remember the specifics. EH RT 422:20-423:24. He also explained that M.H. talks all the time, even though he does not ask questions, and that he is not interested in what she has to say. EH RT 426:1-10.

IV. STANDARD OF REVIEW

When a petitioner challenges his conviction by filing a habeas corpus petition he bears the initial burden to plead sufficient factual grounds for relief, and then later to prove them. *People v. Duvall*, 9 Cal. 4th 464, 474

(1995). When the petition "states 'a prima facie case for relief on one or more claims,' and this court issues an order to show cause, that order creates a 'new cause' that is 'limited to that specific claim or claims.'" *In re Bacigalupo*, 55 Cal. 4th 312, 332 (2012) (quoting *People v. Super. Ct. (Pearson)*, 48 Cal. 4th 564, 572 (2010)). If, as here, an evidentiary hearing is ordered on disputed factual issues after the filing of a return and traverse, it is the petitioner who bears the burden of proof. *Duvall*, 9 Cal. 4th at 483. That is, the petitioner must prove the facts that establish a basis for relief by a preponderance of the evidence. *In re Visciotti*, 14 Cal. 4th 325, 351 (1996); *Bacigalupo*, 55 Cal. 4th at 333. CALJIC defines preponderance of the evidence as follows:

> "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

CALJIC 2.50.2 (2016); *see also* CALCRIM 375 (2016) ("A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.").

"When issues of juror misconduct or taint arise in a petition for habeas corpus . . . and become the subject of an evidentiary hearing before [a] referee, [this Court's] review of the referee's report follows well-settled principles. The referee's factual findings are not binding on [this Court], and [the Court] can depart from them upon independent examination of the record even when the evidence is conflicting." *In re Hamilton*, 20 Cal. 4th 273, 296 (1999); *see also In re Thomas*, 37 Cal. 4th 1249, 1256-57 (2006) ("[I]t is for this court to make the findings on which the resolution of [petitioner's] habeas corpus claim will turn."). The referee's "findings are

entitled to great weight where supported by substantial evidence," and "[d]eference to the referee is particularly appropriate on issues requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying." *Hamilton*, 20 Cal. 4th at 296-97. "On the other hand, any conclusions of law or resolution of mixed questions of fact and law that the referee provides are subject to our independent review." *Id.* at 297.

V. EXCEPTIONS TO THE REFEREE'S FINDINGS

Upon requisite independent review of the evidentiary hearing record, this Court should not assent to the referee's findings on the reference questions, and instead should find that Mr. Bell satisfied his burden of proving by a preponderance of the evidence that M.H. spoke to her husband about the case and he helped and advised her to change her vote to death, and then M.H. told P.R. about the conversation before the deliberations concluded.

A. The evidence proves Juror M.H. discussed Mr. Bell's case with her husband before the end of deliberations and that he helped and advised her to vote for a death sentence.

This Court asked: "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 or conversations occur?"; and "3) What information or advice, if any, did M.H.'s husband give M.H.?"

As to Questions 1 and 2, the referee found that there was "not sufficient, credible evidence to find that M.H. and [S.]H. discussed

Petitioner'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. [Citations.]" Referee's Report at 19:24-26. As to Question 3, the referee found that "[t]here is no evidence that [S.]H. gave M.H. any information or advice about the case." Referee's Report at 20:2.

Mr. Bell takes exception to the referee's findings. Mr. Bell proved by a preponderance of the evidence that M.H. discussed the case and deliberations with her husband during her service as a juror, before the last day of penalty phase deliberations, and that S.H. helped and advised M.H. to vote for a death sentence.

1. Sufficient credible evidence supports a finding that M.H. discussed the case with her husband during her jury service; the referee's findings to the contrary merit no deference.

The referee's findings on Questions 1 and 2 are not supported by substantial evidence. Rather, the evidence presented at the evidentiary hearing supports a finding that M.H. and S.H. were not credible witnesses, and that P.R., on the contrary, provided a credible account of her encounter with M.H. on the last day of penalty phase deliberations. The testimony provided by M.H. and S.H. is dubious for several reasons. Their memories of the events at the time of the trial were much diminished; both provided prior inconsistent statements; S.H.'s testimony contradicted M.H.'s testimony; and they had an interest in denying any wrongdoing. P.R. testified credibly concerning her interaction with M.H. P.R. was thoughtful and cautious when she testified about what she could and could not remember; she was firm and testified without hesitation that her interaction with M.H. happened – despite the fact that her memory was less detailed in 2014, and at the hearing, than it was in 2009; she provided consistent

accounts of her interaction with M.H. in 2009, 2014, and 2015; and she had no interest in admitting that she violated the trial judge's instructions by discussing the case with another juror outside the jury room.

a. M.H.'s testimony is unreliable and insubstantial because of her poor memory.

M.H. had a very diminished memory of key details of the trial, and although she did not dispute that she shared her experience as a juror with her husband, she testified that any conversation she had with him about Mr. Bell's case (other than informing him that she was selected to be a juror) happened after the conclusion of the trial. Her testimony was not based on an actual memory, but on her assumption that she would not have committed misconduct.

At the hearing, M.H. affirmed the statement she made in her 2009 declaration that, due to the passage of time, she "[did] not recall large chunks of the trial and [her] experience as a juror." EH RT 45:13-46:2. She was unable to remember any of the names of her fellow jurors or of the trial attorneys. EH RT 9:17-11:8. Her sparse memories of only a handful of her fellow jurors were "attached to something personal that made [her] remember [those] people." EH RT 11:4-5. These memories were limited to:

- One of the jurors was in a wheelchair. EH RT 10:14-19.
- The jury foreman worked for Veterans Affairs. EH RT 10:23-24.
- Two African American jurors rode the trolley with M.H. and helped her when her car was stolen. EH RT 10:26-11:1.
- A juror who taught at Mira Costa College also had his car stolen while the trial was ongoing. EH RT 11:3-4.
- One of the jurors was dismissed for talking to her husband about the case. EH RT 10:24-25.

M.H. had no memory of P.R. even after being provided with P.R.'s full name and her photograph. EH RT 11:9-18, 44:6-17. M.H. also was unable to recall jurors N.M. and A.G. by their names, even when prompted. EH RT 49:7-11 ("I have no idea of names."), 56:19-21 ("I don't remember any of their names.").

M.H. did not remember anything specific about the penalty phase deliberations. She did not remember how many jurors, or who, favored life without the possibility of parole over a death sentence at any time during the deliberations, the votes that were taken, or when the death verdict was returned. EH RT 15:11-17:8, 41:27-44:5. M.H. had no specific or general memories of the events on the last day of penalty deliberations. She did not remember arriving at the courthouse, any conversations she had prior to entering the jury room, or the verdict being read in open court. EH RT 18:2-17.

M.H. remembered "very little" about any conversations she had with her husband before or after the trial about her service as a juror. EH RT 34:17-20. She could not recall specific conversations, but she made assumptions when she testified about what she discussed with her husband and when those conversations happened. EH RT 29:9-13, 32:10-35:7. For example, she testified that she "probably" told her husband that she had been selected to serve as a juror on Mr. Bell's trial "when [she] came home and said [she] ha[d] to go back the next day," EH RT 33:7-11, and that she "probably" spoke to her husband about Mr. Bell's case for the first time when she "came home after the verdict was read," EH RT 32:10-13. M.H.'s testimony that she did not discuss the case with her husband before the end of the trial is dubious. She testified that she did not speak to her husband, because she does not remember it, EH RT 50:18-26, and because "of who [she] [is], what [she] had been told not to do, and the relationship

that [she] ha[s] with [her] husband and . . . knowing that he wouldn't have asked [her] and [she] wouldn't have told him." EH RT 64:23-26.

In 2009, M.H. told Ms. Lake that "she didn't remember talking to [S.H.] or not" about Mr. Bell's case prior to the conclusion of the penalty phase. EH RT 292:4-7. M.H. did not deny having a conversation with S.H., but rather conveyed she had no current memory and was unable to affirm or deny that it happened. EH RT 292:4-12; *see also* EH Ex. 8 at ¶ 9.

Mr. Bell takes exception to the referee's finding that M.H.'s 2009 statement is not admissible as a prior inconsistent statement, under Evidence Code § 1235 and Evidence Code § 770, because it is not materially inconsistent with M.H.'s testimony. Referee's Report 13:25-14:3. As the following interaction at the evidentiary hearing demonstrates, counsel for respondent and M.H recognized that M.H.'s statements were materially inconsistent:

> [Counsel for respondent]: I want to go into a little bit about petitioner's counsel's questions about your recall of events versus events that did not occur, because *there's a distinct difference* between those two statements; would you agree?
>
> [M.H.]: Yes.

EH RT 63:24-27 (emphasis added); *see also* EH RT 388:1-6 (respondent's counsel asking Ms. Lake about difference between lack of recall versus "I don't remember because it didn't happen"). At the evidentiary hearing, M.H. asserted that she did not speak to her husband about the case or the deliberations before a verdict was reached. EH RT 30:7-32:13, 64:10-65:5, 68:7-11. M.H.'s statement to Ms. Lake in 2009, however, left open the possibility that she had a conversation with her husband about Mr. Bell's case before it concluded. Because M.H.'s testimony foreclosed that possibility, it created an inconsistency in her statements. *See People v. Homick*, 55 Cal. 4th 816, 859 (2012) ("Inconsistency in effect, rather than

contradiction in express terms, is the test for admitting a witness's prior statement." (quotations marks and citation omitted)); *People v. Green*, 3 Cal. 3d 981, 988 (1971) (stating that "the same principle [of inconsistency in effect] governs the case of the forgetful witness."); Michael H. Graham, *Winning Evidence Arguments* § 613:2 (2016) ("A witness who testifies to a fact at trial may be impeached with a prior statement of the witness claiming a lack of recollection as to the fact; *current recollection and prior lack of recollection are inconsistent.*" (emphasis added)); *see also* Cal. Law Revision Comm'n Comment, Evid. Code § 1235 ("In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at trial because it is nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.").[5]

Even if this Court upholds the referee's ruling that M.H.'s prior

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[5] The referee did not cite any case law to support the determination that M.H.'s "prior statement is not materially inconsistent with M.H.'s hearing testimony." Referee's Report at 14:2-3. Two related cases cited subsequently in the Referee's Report when addressing the admissibility of S.H.'s prior statements, however, are distinguishable from Mr. Bell's case.

In *People v. Johnson*, 3 Cal. 4th 1183, 1220 (1992), a witness testified: "I might have, I don't remember. I remember saying this is him, and it wasn't by name, it was by his face," when asked if she remembered the defendant by his physical appearance or by his name. This Court found that a "momentary expression of uncertainty" did not make the prior statement "I remembered him as the one standing over me" admissible because there was no inconsistency, i.e. the witness remembered the defendant by his physical appearance. In the present case, there is no question that M.H. maintained her position throughout her testimony that she did not engage in a conversation with her husband before the end of the trial. In *People v. Arias*, 13 Cal. 4th 92, 153 (1996), small details were different from the prior statement of a witness who testified reluctantly about the statements made by the defendant about his participation in the crime. The statement at issue in this case is the core of, not ancillary to, the dispute.

statement is not admissible for its substance, the Court should consider M.H.'s prior lack of recollection when assessing the credibility of her in-court denials, under Evidence Code § 780, subdivisions (c) and (h), and Evidence Code § 785.[6] *See People v. Hawthorne*, 4 Cal. 4th 43, 55 n.4 (1992) ("prior inconsistent statements are admissible to prove their substance as well as to impeach the declarant") (citing *In re Johnny G.*, 25 Cal. 3d 543, 550-56 (1979) (Mosk, J., concurring); *Robertson v. Fleetwood Travel Trailers of Cal., Inc.*, 144 Cal. App. 4th 785, 793 n.2 (2006) (noting that the jury heard, for purposes of impeachment, a witness's prior testimony that "he could not recall" seeing a leak from a shower door, which in his subsequent trial testimony he claimed to have repaired).

b. The testimony of S.H. that M.H. did not speak with him about Mr. Bell's case is unreliable and insubstantial.

During his direct examination, S.H. denied having ever had a conversation with M.H. about Mr. Bell's trial before or after the end of deliberations. EH RT 419:5-420:2. But he wavered immediately when asked on cross-examination about his prior statements to S.A. Wilde in 2014. In response to the first cross-examination question, asking if he told the truth when he spoke to S.A. Wilde, S.H. said, "As far as I know, I just don't - - I just absolutely don't remember. I don't remember whether - - I just don't. It's just - - I looked at [the transcript of the interview with S.A. Wilde] and, you know, as far as the discussions, are concerned, I didn't have a discussion with her." EH RT 421:25-422:1. S.H. admitted that he

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[6] M.H. and Ms. Lake testified about M.H.'s 2009 statement without objection grounded on improper impeachment. *See* EH RT 44:24-45:11, 292:4-12. Respondent's counsel also elicited testimony from Ms. Lake about the 2009 statement. EH RT 387:12-388:11.

did not remember having a conversation with M.H. about the case, EH RT 425:19-24, but explained:

> I'll tell you what, 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 what she has to say. She knows it. She knows I have selective listening and I don't remember it. She'll ask me five minutes later, and I won't remember it and I'm not listening.

EH RT 426:1-10. S.H.'s testimony denying that a conversation between him and M.H. took place should receive no weight for the purpose of determining whether a conversation happened during Mr. Bell's trial.

S.H.'s testimony makes it clear that the likelihood M.H. shared information about the case and deliberations with him was not at all determined by whether S.H. asked her about it. When all of the evidence is considered, there is no substantial evidence supporting the referee's finding that "it is unlikely [S.H.] would discuss the case with [M.H.] or help her decide how to vote," because S.H. had served on other juries and knew jurors are not supposed to discuss the case during deliberations, and "he was not interested in talking to M.H. about the case or asking her any questions about it. [Citation.]" Referee's Report at 18:27-19:2.

Mr. Bell takes exception to the referee's finding that S.H.'s 2014 statement to S.A. Wilde about what he recalled hearing about the case, and when, is inadmissible because it is not clearly inconsistent with his denial that he spoke with M.H. about the case. The referee reasoned that the "statements are vague as to how and when [S.H.] learned about the case," and that S.H. "never [said] he learned about the case from discussing it with [M.H.], only that he *may* have learned something about it but he could not remember. He could just as easily have learned about the case from reading

a newspaper article after the trial was over." Referee's Report at 14:27-15:3. S.H.'s 2014 statements, however, when viewed in light of the questions he was answering, demonstrate he was referring to information provided by M.H.:

> [S.A. Wilde]: So she never spoke to you, uh, during the trial about, uh - - about the trial during it?
>
> [S.H.]: If she did I don't remember it. I just remember when it finally got over the small particulars about it.
>
> [S.A. Wilde]: Okay. But generally, uh, no conversation during the trial?
>
> [S.H.]: I may have heard something but - -
>
> [S.A. Wilde]: Okay.
>
> [S.H.]: - - boy, whatever it might be, I can't remember what it was.

EH Ex. 14 at 3:15-25; EH RT 422:22-423:9. S.A. Wilde's questions were narrow and direct; the reasonable interpretation of S.H.'s answers is that M.H. said something to S.H. about the case during the trial, and that by 2014, he could not recall the details of what M.H. told him. S.H.'s testimony on re-direct that M.H. "talks all the time," that he has "selective listening," and that "she'll ask [him] five minutes later, and [he] won't remember it and [he's] not listening," EH RT 426:1-10, evinces that M.H. spoke to S.H. even when S.H. was uninterested and did not ask, and S.H. did not remember the details of the conversation in 2014, when he was interviewed by S.A. Wilde, or in 2015, when he testified. It also is very unlikely that S.H. would have learned the details of the case from a source other than M.H. given his stated lack of interest in the case. EH RT 419:10, 420:1-2. As with M.H.'s prior statement, S.H.'s prior statement is admissible because it is inconsistent in effect with his testimony, *see*

Homick, 55 Cal. 4th at 859, and it should be considered on the issue of his credibility as well.

Mr. Bell additionally takes exception to the referee's finding that "M.H.'s testimony is supported by the testimony of her husband who also said the two did not talk about the case during deliberations." Referee's Report at 18:25-26. M.H. categorically denied having had a conversation with her husband about the case before the end of deliberations, EH RT 30:7-32:13, 64:10-65:5, but testified that after the end of the trial she "kind of took him through" her experience, EH RT 34:22-23. As described above, S.H. initially denied having a conversation with M.H. *before or after* the end of the trial. EH RT 419:5-420:2. S.H. then wavered about his recollection of whether M.H. spoke to him about the case. EH RT 421:5-422:3. He told S.A. Wilde in 2014 that he might have heard something from M.H. about the case before it ended, but he did not remember what it was. EH RT 422:26-423:24. He also testified that M.H. tends to share her experiences with him even though he is not interested, that he does not listen to M.H., and that he does not remember what she tells him five minutes later. EH RT 426:1-10. When viewed in light of the complete evidentiary record, the referee's finding is not supported by substantial evidence.

c. The testimony of M.H. and S.H. denying that they discussed the case is suspect, because M.H. has an interest in denying wrongdoing and S.H. has an interest in protecting his wife.

The denials of M.H. and S.H. should be rejected as suspect because of their interest in repudiating any wrongdoing, and because of S.H.'s interest in not testifying against his wife.

M.H. has an inherent interest in denying that she knowingly violated

the court's admonitions not to discuss the case outside of deliberations and changed her vote based on this extraneous interaction, especially after she realized that her actions were being called into question. *See* EH RT 58:16-27 (acknowledging that she was unaware of importance of the 2009 interview and the investigation of potential misconduct). Courts have acknowledged that many jurors have a natural reluctance to admit misconduct. *See Stanley v. Wong*, No. CIV S-95-1500, 2006 WL 1523128, at *8 (E.D. Cal. May 31, 2006) ("Ordinary people would be 'on alert' in a defensive mode to avoid being accused of having engaged in misconduct as jurors or in relating facts to petitioner's counsel. Weaker individuals might well give into self-preservation instinct by retracting previous statements in order to protect themselves."); *Smith v. Phillips*, 455 U.S. 209, 236 (1982) (Marshall, J., dissenting) ("A juror will be less reluctant to admit that he was disturbed or upset by the misconduct of a third party, than to admit that he himself acted improperly."); *Rugiero v. United States*, Nos. 90-80941-01, 96-40376, 2004 U.S. Dist. LEXIS 16574, at *50 (E.D. Mich. Apr. 30, 2004) ("When suspected and questioned about breaking the rules, there is [for jurors] a natural human defensiveness and reluctance to admit it.") (decision available at https://casetext.com/case/rugiero-v-us-2) (last visited May 24, 2016).

S.H. similarly has an interest in denying he was party to juror misconduct, and his familial relationship with M.H. – who has an interest in not being found to have violated her oath as a juror – also substantiates S.H.'s personal bias and interest, and his motive to deny that any misconduct occurred. *See People v. Pierce*, 269 Cal. App. 2d 193, 200 (1969) (discussing witness bias based on family relations). Moreover, the negative effects on the spousal relationship itself when one spouse testifies against the other have long been recognized in the law. Under Evidence

Code § 970, a spouse is afforded the "privilege not to testify against his spouse in any proceeding," because such testimony is likely to disrupt "marital harmony." *People v. Sinohui*, 28 Cal. 4th 205, 213 (2002) (citing *Tentative Recommendation: Study Relating to the Uniform Rules of Evidence* (Feb. 1964), 6 Cal. Law Revision Comm'n Rep. at 242 (1965) ("The privilege not to testify . . . is recommended because compelling a married person to testify against his spouse would in many cases seriously disturb if not completely disrupt the marital relationship of the persons involved.")); *see also* Cal. Law Revision Comm'n Comment, Evid. Code § 970 ("The rationale of the privilege provided by Section 970 not to testify against one's spouse is that such testimony would seriously disturb or disrupt the marital relationship. Society stands to lose more from such disruption than it stands to gain from the testimony which would be available if the privilege did not exist.").

Accordingly, this Court should consider the bias and interests of M.H. and S.H. when conducting its independent examination of the record.

d. P.R.'s testimony is credible and demonstrates by a preponderance of the evidence that M.H. spoke with her husband about Mr. Bell's case before the last day of penalty phase deliberations.

P.R. testified consistently and credibly that M.H. told her on the last day of penalty phase deliberations that her husband helped her decide how to vote on Mr. Bell's sentence. EH RT 101:17-20, 104:26, 127:13-20, 169:8, 169:25, 170:5, 263:25-264:2, 239:10-11. The referee did not find that P.R. was lying about her recollections, but nonetheless dismissed her testimony as "questionable." Referee's Report at 19:3-4. As discussed fully below, the referee's finding is not supported by substantial evidence: P.R.'s memory was detailed and accurate; P.R. was thoughtful when

answering questions and admitted when she was unsure or unable to recall a specific event; P.R. had a clear memory of M.H. and did not confuse M.H.'s misconduct with that of Juror A.G.; P.R. provided an overall consistent account of her interaction with M.H. in 2009, 2014, and 2015; and unlike M.H. and S.H., P.R. had no bias or interest in this matter. *See* section V.B, *infra.*

The referee found that "[a]ny conversation about the case between M.H. and her husband occurred after [the] trial was over, as M.H. testified [citations]." Referee's Report at 19:25-26. Mr. Bell takes exception to this finding. For the reasons set forth above, the testimony of M.H. about when she had a conversation with S.H. is not entitled to any significant weight. P.R testified M.H. told her, before the jury reached its verdict, about the conversation she had with her husband. EH RT 101:17-103:4; *see also* EH RT 268:26-27 (P.R. testified that M.H. made the statement as the jurors went into the jury room). P.R.'s recollection of the timing of M.H.'s statement preponderates over M.H.'s dubious testimony that any conversation with her husband about the case occurred after it concluded. *See* Referee's Report at 20:10-11 (finding the "statement by M.H. to P.R. . . . occurred on the last day of deliberations, before entering the jury room."). The referee's finding is not supported by substantial evidence, and the credible evidence proves that M.H. spoke with S.H. prior to the last day of penalty phase deliberations.

2. The referee's finding that there is no evidence that S.H. gave M.H. any information or advice about the case is not entitled to deference, because the credible evidence supports a determination contrary to the referee's finding.

Regarding Question 3, the referee found that "[t]here is no evidence

that [S.] H. gave M.H. any information or advice about the case." Referee's Report at 20:2. Mr. Bell takes exception to this finding. As noted above and discussed more fully below, the statement made by M.H. to P.R. clearly indicates that S.H. abetted her decision and advised her to vote for the death penalty. Before the jury reached its verdict, M.H. told P.R. that her husband helped her make a decision on the penalty phase of Mr. Bell's case. EH RT 101:17-20, 104:26, 127:13-20, 169:8, 169:25, 170:5, 263:25-264:2, 239:10-11. M.H. was one of about three jurors who favored life without the possibility of parole over a death sentence. EH RT 97:16-17, 24-26. M.H. voted for the death penalty after making the statement to P.R. that her husband had helped her decide. *See* EH RT 101:25-102:1, 103:1-4 (M.H. told P.R. on December 17, 1993, before the jury reached a verdict, that S.H. helped her decide the sentence). The referee's finding is not supported by substantial evidence, and this Court should hold that the credible evidence proves S.H. abetted and advised M.H. to vote for the death penalty.

B. The evidence proves Juror M.H. told Juror P.R. about the conversation between M.H. and her husband before M.H. and P.R. entered the jury room to deliberate on last day of the trial.

This Court asked: "4) Did M.H. tell Juror P.R. about a conversation between M.H. and her husband?"; and "5) If so, when and what did M.H. tell P.R. about that conversation?"

As to Question 4, the referee found that the "sole evidence is that M.R. [*sic*] told P.R. 'my husband helped me decide.' [Citations.] However, it is questionable whether this conversation even occurred. In addition, it is not clear what M.H. may have been referring to." Referee's Report at 20:5-7; *see also id.* at 20:15-17 ("As stated previously, however, this court finds insufficient credible evidence that the conversation between M.H. and P.R.

occurred at all."). Regarding Question 5, the referee found that the "statement by M.H. to P.R. that 'my husband helped me decide,' if it occurred at all, occurred on the last day of deliberations, before entering the jury room." Referee's Report at 20:10-11.

The referee's finding as to when the interaction between P.R. and M.H. took place should be adopted by this Court, i.e., before P.R. and M.H. entered the jury room to begin the final day of the deliberations. Mr. Bell, however, takes exception to the referee's findings concerning the improbability and content of the conversation, and the related evidentiary rulings concerning P.R.'s statements about her interaction with M.H.

1. The referee's finding concerning the unlikelihood and content of the conversation is not entitled to deference, because the credible evidence supports a determination that M.H. told P.R. about the conversation on the final day of the deliberations.

Mr. Bell proved by a preponderance of the credible evidence that M.H. told P.R. about a conversation she (M.H.) had with her husband. P.R. repeatedly testified to her current recollection of the interaction she had with M.H., i.e., on December 17, before the jury reached its verdict, M.H. told her that M.H.'s husband helped her decide the case.[7] Specifically, P.R. testified:

- "It was just we knew we were both struggling, and 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." EH RT 101:17-20.[8]

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[7] Respondent conceded, and the referee agreed, "that P.R.'s testimony that M.H. said 'my husband helped me decide' is admissible as a prior inconsistent statement" under Evidence Code § 1235 and Evidence Code § 770. Referee's Report at 12:10-14.

[8] The referee found that "P.R.'s statement that she was 'struggling,' is a

- M.H. made her statement to P.R. before the jury reached its unanimous decision on December 17. EH RT 101:25-102:1; *see also* EH RT 103:1-4 (M.H. made her statement before the jury reached its verdict).
- M.H. said on the morning of December 17, "My husband helped me decide." EH RT 104:24-26.
- P.R.'s current recollection was that M.H. said, "My husband helped me to decide." EH RT 169:4-8; *see also* EH RT 169:22-

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reference to her mental processes during deliberations," and thus "inadmissible under Evidence Code section 1150." Referee's Report at 11:11-12. Mr. Bell takes exception to the referee's determination. Section 1150 "distinguishes 'between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . .'" *People v. Steele*, 27 Cal. 4th 1230, 1261 (2002) (quoting *People v. Hutchinson*, 71 Cal. 2d 342, 349 (1969)). P.R.'s testimony that she and M.H. "were both struggling" does not "relate solely to the mental processes and subjective reasoning of the declarant juror." *People v. Danks*, 32 Cal. 4th 269, 298 n.9 (2004).

P.R.'s articulation of their struggle is an objectively ascertainable fact grounded in the divided votes of the jurors – information which the referee correctly found independently admissible. *See* Referee's Report at 11:4-5 ("Pursuant to *Danks*, the statements about the split of jurors are admissible."). Just as the testimony concerning the division in the jury votes is admissible evidence of an overt act, so is P.R.'s description of her own and M.H.'s behavior related to the deliberations. This Court's analysis of juror declarations in *Danks* supports Mr. Bell's interpretation of P.R.'s testimony.

In *Danks*, the Court deemed admissible comparable evidence about the expressed struggles of jurors in deciding the penalty, including the statement: "'During deliberations, other jurors expressed feelings about the difficulty and responsibility of making a life or death decision.'" *Danks*, 32 Cal. 4th at 299; *see also id.* at 300 ("'During the deliberations, other jurors expressed the feeling that it was difficult having the responsibility for making a life and death decision.'"); *id.* at 301 (finding a statement about a juror's position on the verdict admissible; "'After the first day of deliberations, I spoke with my pastor about the difficulty of making the decision . . . I also told him that I had made up my mind about the verdict.'"). Thus, P.R.'s testimony about her own and M.H.'s struggle in the deliberations should have been admitted and considered by the referee.

170:7.

- P.R.'s current recollection was of a fleeting, passing moment in which "Um, just that we were ready to go in and she said to me 'My husband helped me decide.'" EH RT 236:24-237:10.
- The exact words P.R. remembered currently that M.H. whispered "was 'My husband helped me to decide.'" EH RT 239:7-11.

There was no question in P.R.'s mind that M.H. said that her husband helped her to decide the penalty phase of the case. EH RT 263:25-264:2. Notwithstanding P.R.'s multiple, consistent statements about her recollections, as mentioned above, the referee opined that "while the court does not believe P.R. is lying about what she recalls [about her interaction with M.H.], her memory about what happened is questionable." Referee's Report at 19:3-4; *see also id.* at 20:6-7 ("it is questionable whether this conversation even occurred."). The referee offered four reasons as the bases for questioning P.R.'s testimony, namely: 1) P.R. "had significant trouble following questions and there would be long pauses in her answers," Referee's Report at 19:4-5; 2) P.R. did not recall many events described in her 2009 declaration, and "it is very unclear what P.R. actually recalled independently in 2009," Referee's Report at 19:5-11; 3) P.R. did not disclose the interaction with M.H. to trial counsel Peter Liss when P.R. spoke to him shortly after trial, Referee's Report at 19:14-16; and 4) P.R. may be conflating the excusal of Juror A.G. during the guilt phase with the misconduct of juror M.H. at the penalty phase, Referee's Report at 19:14-17. These rationales lack sufficient support in the record and are contrary to the evidence presented at the hearing.

a. P.R.'s cautious demeanor and pauses while testifying do not undermine her credibility as a witness, rather they enhance it.

Mr. Bell's trial occurred in 1993. His current habeas counsel was not

appointed to represent him until 2006, and ultimately interviewed P.R. in 2009, prior to filing a timely habeas corpus petition. At the time of the evidentiary hearing in 2015, P.R. was eighty-eight years old. It is completely reasonable, regardless of her age, that P.R. would express some uncertainty and have faded memories when answering some of the many questions asked at the evidentiary hearing.[9] P.R.'s demeanor while testifying was that of a thoughtful, careful person who was trying to provide accurate and authentic answers to questions based on her recollections, and who readily admitted when she had difficulty remembering. *See, e.g.*, EH RT 79:15-19 (acknowledging that she could picture the prosecutor (Robert Sickels) as a "tall, professional looking man," but could not recall his name or "anything very unusual about him"); EH RT 79:20-22 (pausing for a moment when asked if she recalled who the presiding judge was, and ultimately responding, "We had Judge Murphy, right?"); EH RT 113:11-19 (recalling that she was contacted by S.A. Wilde in March 2014, and admitting that she did not remember if he first contacted her by telephone); EH RT 117:22-118:3 (acknowledging that her memory was not refreshed by reading the 2014 interview transcript and she had "no picture of [S.A. Wilde] reading [the 2009 declaration] to [her]" during the interview).

At the hearing, P.R. was frequently called upon to answer questions about what she recalled currently (as compared to her previously stated recollections), and whether certain documents refreshed her present

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[9] When discussing the memory lapses of defense trial counsel Peter Liss and Sharyn Leonard (both of whom are several years younger than P.R.) about post-trial juror contacts, the referee commented that faded recollections are understandable and illustrate why it is "crazy" to "be holding habeas hearings on a verdict that occurred in 1993." EH RT 210:27-211:7.

recollection of events she had discussed at an earlier time – a distinction that is not so simple for laypeople who have never testified before.[10] In the face of such questions, P.R. was candid and straightforward in her responses. She sometimes said "yes," her memory was refreshed and she had a current recollection; she sometimes said "no;" and she sometimes said "I think so." *See, e.g.*, EH RT 148:4-9 (responding "I don't know on that one" when asked if she had a current recollection of the information stated in a particular sentence in paragraph 5 of her 2009 declaration); EH RT 148:21-25 (saying "I think so" and explaining the basis for her current recollection when asked about a sentence in paragraph 6 of her 2009 declaration); EH RT 159:22-23 (stating, about her current recollection of a sentence in paragraph 13, "I don't think it's independent. I think it's from reading they did the turnaround."); EH RT 165:9-166:7 (confirming a current recollection of all sentences in paragraph 15 of her 2009 declaration); *see also, generally*, EH RT 145:25-173:5 (reviewing the 2009 declaration line-by-line and stating whether she did or did not have a current recollection of the events recounted therein).

P.R. tried to testify to the best of her ability about what she remembered and what she did not all these years after Mr. Bell's trial. P.R.'s demeanor and the way she answered questions on the witness stand was consistent with how she carefully responded to the draft declaration presented to her by S.A. Wilde on April 30, 2014. EH Ex. 5. As detailed above, when reviewing the draft declaration, which read, "At present, I don't recall what [M.H.] told me," EH Ex. 5 at ¶ 9, P.R. asked S.A. Wilde

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[10] M.H. expressed confusion about this concept as well when asked whether a passage from her 2014 interview refreshed her current recollection. EH RT 42:22-43:3. In response to this line of inquiry, M.H. said she was "getting confused" by the questions and pointed out that she is "not an attorney." EH RT 43:2-3.

to strike that line as inaccurate, and replace it with the sentence, "As we entered the courtroom on verdict day, [M.H.] whispered she had asked her husband to help her decide," EH Ex. 5 at ¶ 9; *see also* EH RT 522:18-524:8. It simply was not true in 2014 that P.R. did not have a recollection about what M.H. said to her in 1993, and P.R. would not sign the Attorney General-drafted declaration which said as much, because it was not in accord with her then-current memory of her interaction with M.H.

P.R. similarly asked that additions and deletions be made to her 2009 declaration when she reviewed it with Ms. Lake. As described above, one of the requested changes added some details about P.R.'s recollections of the interaction she had with M.H. on the last day of the penalty phase deliberations. *See* EH Ex. 1 at ¶¶ 3, 4, 16; *see also* EH RT 287:16-290:10.

P.R. clearly was very careful in her review of the draft declarations presented to her, and she wanted them to accurately capture her then-current memories. On the witness stand, P.R. was equally careful to fulfill her oath and testify to the best of her current recollection in response to the hundreds of questions asked during her hours-long testimony over two days. Though she may have paused at times to search her memory before answering questions, her consistently careful and thoughtful way of providing information on the stand (as well as when reviewing declarations) does not undermine her credibility, rather it validates it. While deference is usually accorded to a referee's assessment of a witness' credibility, *Hamilton*, 20 Cal. 4th at 296-97, it is not appropriate in this instance, and this Court should reject the referee's stated basis for questioning P.R.'s memory of events.

b. P.R.'s more limited, current recollection of her interaction with M.H. does not support a finding that the occurrence is questionable, and does not outweigh the consistency and steadfastness of P.R.'s recollection that M.H. said she spoke to her husband about the case.

The referee's doubt regarding P.R.'s 2009 statements and emphasis on their contrast to P.R.'s more limited, current recollections of the trial events is unfounded when considered in the context of the entire evidentiary record. The referee noted that, during P.R.'s testimony, she did not recall many events described in her 2009 declaration (including the details of her interaction with M.H. on the last day of trial, set forth in paragraph 16, EH Ex. 1 at 5), and the referee opined that "it is very unclear what P.R. actually recalled independently in 2009." Referee's Report at 19:5-11. The referee declared that the 2009 interview "should have [been] tape-recorded," and described the investigator's notes as "cryptic." *Id.* at 19:9-10; *see also id.* at 18:8-10 (noting lack of audio-recording and "very cryptic notes," and speculating about possible use of "leading questions" or P.R. having trouble remembering).

P.R.'s memory at the time of the evidentiary hearing of her interaction with M.H. on the last day of the penalty phase deliberations (and other trial events) was less clear and detailed than it was at the time she provided the information in her 2009 declaration. The differences in her memory between 2009 and 2015, and the lack of tape-recording in 2009, however, do not support a finding that P.R.'s testimony is incredible, and that she has an honestly held but, nonetheless, false memory about her interaction with M.H.

P.R. testified that her memory in 2009, when she was interviewed by Ms. Lake and signed her declaration (EH Ex. 1), was better than it was in

2014, when she was interviewed by S.A. Wilde, or at the time of her testimony in 2015. EH RT 88:23-89:2, 113:5-10, 136:26-28, 235:14-24. Given her age and the passage of time, P.R.'s assessment of her changing memory is eminently reasonable.[11] P.R. also testified that she remembered reviewing her 2009 declaration carefully for accuracy before signing it. EH RT 87:27-88:3, 111:4-5. P.R. recalled that Ms. Lake made handwritten changes to the declaration at P.R.'s direction, and P.R. initialed the changes demonstrating her approval. EH RT 88:4-6, 111:28-113:1. Moreover, P.R. testified that when she signed the 2009 declaration she believed it to be completely accurate. EH RT 113:5-8, 137:1-3, 172:17-25. P.R. said that she was not in any way pressured during her interaction with Ms. Lake, EH RT 109:27-28, 181:4-10, and she had no reason to doubt the accuracy of the information she provided Ms. Lake or the 2009 declaration she signed, EH RT 173:16-20, 251:26-28.[12] Specifically as to her interaction with M.H.

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[11] Despite her faded memory, during her testimony, P.R. was able to recall several details about the trial. *See, e.g.*, EH RT 78-79, 81-86, 94-95.

Among the details P.R. remembered was the fact that, during Mr. Bell's trial, M.H. was reading a book that she recommended to her fellow jurors called "'Women are from Saturn, Men are from Mars' or something like that." EH RT 85:7-15; *see also* EH RT 423:27-424:1 (S.H. testified that he bought the book "Men are from Mars, Women are from Venus" for M.H.).

The book's full title is "Men Are From Mars, Women Are from Venus: A Practical Guide for Improving Communication & Getting What You Want in Your Relationships." *See* https://www.harpercollins.com/9780060168483/men-are-from-mars-women-are-from-venus (last visited May 20, 2016). It was on the New York Times list of bestsellers at the time of Mr. Bell's trial. *See* http://www.nytimes.com/1993/10/03/books/best-sellers-october-3-1993.html?pagewanted=all (last visited May 20, 2016).

[12] Juror M.H. similarly testified that she would have made corrections to her 2009 declaration before signing it if anything in it was inaccurate, EH RT 23:21-27, and Ms. Lake identified herself as an investigator for Mr. Bell's habeas counsel, EH RT 57:20-23. Both M.H. and P.R. also were provided copies of their 2009 declarations by mail shortly after they were

described in paragraph 16 of her 2009 declaration, P.R. testified that she believes Ms. Lake accurately documented her statements in the declaration, EH RT 251:26-252:3; *but cf.* EH RT 99-100, 166-70 (describing a different current recollection), and that, by the time she spoke to S.A. Wilde in 2014, and testified in 2015, though she still recalled the interaction, the details of the interaction had left her and she recalled it differently, EH RT 252:12-23.

P.R. also affirmed the accuracy and authenticity of her 2009 declaration when she was interviewed by S.A. Wilde in 2014. EH Ex. 3 at 16-39; *see also* EH 524:22-527:25 (P.R. confirmed to S.A. Wilde that every statement in her 2009 declaration was accurate). The referee did not mention this fact in her Report to this Court.

In spite of the evidence, the referee engaged in unfounded speculation, dismissing P.R.'s sworn statements and imagining that the 2009 interview somehow resulted in a false memory being implanted into P.R.'s recollections. Neither Ms. Lake's notes nor P.R.'s 2009 declaration is a verbatim accounting of all that was said by P.R. during her discussion of the case with Ms. Lake, of course. But there is no substantial evidence to support the referee's conjecture that P.R. was led into believing that she had an interaction with M.H. on the last day of the penalty deliberations which, in fact, never happened. P.R. has no motive to perpetuate a false story. Not only did P.R. affirm during her testimony that she would not have signed a declaration she did not believe to be accurate, she demonstrated by her actions – both on the witness stand and while reviewing her declarations – that she could not be steered into saying something she did not believe to be true at that moment. As detailed above, P.R. directed that additions and deletions be made to both declarations she reviewed in 2009 and 2014, and

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signed. EH RT 23:28-24:7 (regarding M.H. receiving her copy); EH RT 179:3-4 (regarding P.R. receiving her copy).

her statement about her interaction with M.H. in the 2014 declaration was less detailed than that in her 2009 declaration, even though S.A. Wilde had read the 2009 declaration to P.R. word for word.

Moreover, when Ms. Lake visited P.R. on May 28, 2009, Ms. Lake had no hint of any potential misconduct involving M.H. (to whom she had already spoken the previous day). EH RT 285:7-10. Ms. Lake also knew nothing about a connection between P.R. and M.H. EH RT 285:3-6. Further, during the interview, P.R. raised, without any suggestion when discussing the penalty phase deliberations, the fact that M.H. told P.R. that she talked to her husband. EH RT 284:10-285-2. As for P.R.'s additions to paragraph 16 upon review of the June 12, 2009 declaration, Ms. Lake testified that she was "surprised" when P.R. "stopped [her while they were reading the declaration] and [P.R.] wanted it to be more specific." EH RT 289:7-15. P.R.'s recollection of further details when reviewing the 2009 declaration with Ms. Lake is similar to her behavior when reviewing the draft declaration presented to her in 2014 by S.A. Wilde. *See* EH RT 546:22-27 (describing how P.R. "all of a sudden" had a recollection she did not indicate in the prior interview).

Simply, the evidence before the referee does not substantiate a finding that P.R. was led and manipulated into believing and making statements under oath, from 2009 to 2015, about an event she did not actually experience. *Cf. Hamilton*, 20 Cal. 4th at 285-88, 297 (describing how a juror contradicted and even denied the authenticity of her defense-obtained declaration).

c. P.R. was not confused about her recollections of which jurors committed misconduct.

In the same vein, the record demonstrates that P.R. clearly knew who M.H. is, and P.R. had (and has had in the past) distinct memories of her

interactions with M.H. and Juror A.G. At the hearing P.R. accurately described M.H. as a tall, brunette woman, EH RT 109:13-15; and P.R. identified M.H. in a photograph that was shown to her a few days before the hearing by habeas counsel, EH RT 190:23-28, and recognized M.H. in the hallway of the courthouse on the first day of the hearing, EH RT 191:1-3. P.R. also categorically rejected that she was confusing her two fellow jurors and falsely attributing A.G.'s misconduct during the guilt phase deliberations to M.H. during the penalty phase deliberations. EH RT 92:12-19, 201:8-19, 226:11-16, 254:8-26, 255:6-256:10.

The interview notes and declaration signed by P.R. in 2009 also clearly show that P.R. was not mixing up A.G. and M.H. when she spoke to Ms. Lake. M.H. is identified by her name in the 2009 declaration and investigator's notes. *See* EH Ex. 1 at ¶¶ 14, 15, 16; EH Ex. 2 at 3. By contrast, A.G. is identified not by her name, but as "the female juror." *See* EH Ex. 1 at ¶¶ 5, 9; EH Ex. 2 at 2. P.R. recounted in 2009 specific and distinct recollections of the guilt phase deliberations and the penalty phase deliberations. She described how during the guilt phase deliberations, the female juror and the foreman sat "at opposite ends of the table, arguing back and forth, rather heatedly." EH Ex. 1 at ¶ 9; *see also* EH Ex. 2 at 2. She also discussed how finding Mr. Bell guilty of murder with special circumstances was not difficult for her, and how the female juror was a lone holdout. *See* EH Ex. 1 at ¶¶ 6-7, 9; *see also* EH Ex. 2 at 2. As for the penalty phase, P.R. described a very different situation in which a few jurors, including herself and M.H., were in favor of a life without parole verdict during the deliberations. *See* EH Ex. 1 at ¶¶ 13-16; *see also* EH Ex. 2 at 3-4. The deliberations at both phases and the differences between the dismissed juror and M.H. were recalled by P.R. in separate and distinctive ways. Moreover, Ms. Lake further supported the lack of confusion with her

testimony that P.R.'s memory was very sharp, and Ms. Lake had no concern that P.R. was confusing these jurors during the 2009 interviews. EH RT 391:5-8.

P.R. also independently recalled M.H. near the start of her interview with S.A. Wilde in March 2014, and her memory of M.H. became more refreshed as the interview proceeded. *See* EH Ex. 3 at 5:24-25 ("I remember, uh, one lady, and I think she was [M.H.] perhaps."); *see also* EH RT 562:23-569:7 (S.A. Wilde testifying about his interview of P.R. and her recollections related to M.H.); EH Ex. 3 at 14:9-10 ("You know, now that you mention it, maybe [M.H.] did [say that she spoke to her husband about the case] and it was toward the end of the trial.").

The evidentiary hearing record does not substantially support the referee's speculation and alleged inability to "rule out the possibility that P.R. is confusing M.H. with the juror who was actually dismissed for speaking to her husband during trial." Referee's Report at 19:16-17.

d. P.R.'s failure to disclose the misconduct earlier does not undermine her credibility.

When discussing the possibility of confusion, the referee noted P.R.'s failure to disclose M.H.'s misconduct earlier. Referee's Report at 19:14-16. It is understandable, however, that P.R. would not tell defense counsel Peter Liss over the telephone shortly after trial that M.H. – a fellow juror with whom P.R. became closest during their extended jury service, EH RT 226:11-16 – told her that she (M.H.) spoke with her husband about the case during deliberations. P.R. was forthright when confronted at the hearing about her failure to disclose M.H.'s conduct to Mr. Liss. *See* EH RT 197:14-198:5, 222:25-223:5; *see also* EH RT 265:25-266:22. She explained that although she knew the interaction with M.H. was improper, she did not feel Mr. Liss was a confidant to whom she would volunteer the

information, EH RT 260:27-261:12, and she did not recall Mr. Liss asking her directly if she knew about any other juror speaking to someone outside of the jury room about the deliberations, EH RT 261:20-27.

By contrast, when P.R. spoke to Ms. Lake it was years after trial and in person, and the interview was more comprehensive and lengthier than the telephone conversation P.R. had with Mr. Liss. EH RT 108:28-109:21, 362:7-9 (May 28, 2009 interview was 1.5 hours long). The emotional experience of the trial was still raw when P.R. spoke to trial counsel, and P.R. had developed a bond with her fellow juror, which makes it eminently reasonable and believable that P.R. would not disclose M.H.'s misconduct until the opportunity presented itself upon a visit from Mr. Bell's habeas investigator years later.

Thus, P.R.'s failure to disclose M.H.'s misconduct to Mr. Liss should be viewed as an understandable omission based on reluctance to reveal the improper behavior of a colleague on the jury. In light of the complete evidentiary record, the lack of earlier disclosure does not undermine the evidence demonstrating that P.R. has not conflated M.H. and her misconduct with A.G. and her transgression.

e. There is no ambiguity in the evidence proving that M.H.'s husband provided assistance to her on the penalty decision.

As noted above, the referee opined that, even if M.H. said to P.R. that her husband helped her decide, "there is no evidence showing *what* [S.H.] helped her decide." Referee's Report at 19:18-19; *see also id.* at 20:7 (stating "it is not clear what M.H. may have been referring to."). The referee acknowledged that P.R. affirmed that M.H. was referring to the penalty determination as the choice her husband helped her make, but the referee noted that P.R.'s affirmation was in response to a leading question,

and she "did not add [the] phrase [the penalty phase of this case] at any other point in her testimony." Referee's Report at 19:19-21.

The referee's finding about the lack of clarity regarding the meaning of M.H.'s statement to P.R. should be rejected, because it is contrary to the evidence presented. The referee's opinion, also, is at odds with the finding on Question 5 that M.H. made her statement to P.R. before they entered the jury room on the final day of deliberations. Referee's Report at 20:10-15. The referee parsed the words, but ignored the context of the interaction when making the determination that the meaning of the statement P.R. currently recalls M.H. uttering is unclear.[13]

Surely, neither M.H., in making the statement about S.H. rendering aid on a decision, nor P.R., in hearing the statement, was referring to or thinking of anything other than Mr. Bell's fate. P.R. testified that she and M.H. were among the "maybe three people that were for prison without the possibility of parole." EH RT 97:12-26; *see also* Referee's Report at 10:16-11:5 (finding "P.R.'s testimony about the split of jurors" admissible). M.H. and P.R. were together in the midst of extended jury deliberations about whether Mr. Bell should die for his crime. Their deliberations were the culmination of a trial that began almost two months earlier, and ended on the same day M.H. made her statement to P.R., with a verdict returned less than an hour before one of the jurors was scheduled to be excused from jury service because of a prepaid vacation, *see* 48 RT 4083:11-4084:20; 7 CT 1528; 8 CT 1852, 1865 – a fact that was known to the jurors. *See* 24

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[13] As detailed above, in 2014, P.R. also confirmed that M.H. "told [P.R.] she spoke to her husband *about the case*," EH Ex. 5 at ¶ 9 (emphasis added); *see also* EH RT 528:11-529:9, 534:3-19, 535:19-537:1 (S.A. Wilde testifying about the removal of this language from the draft declaration after it was reviewed and accepted as accurate by P.R. on April 30, 2014), and "[M.H.] whispered to me she had asked her husband to help her to decide," EH Ex. 6 at ¶ 9; *see also* EH RT 522:18-524:8.

RT 1553:27-1554:26; 44 RT 3669:24-3671:6. The interaction between M.H. and P.R., and M.H.'s statement about her husband helping her decide, can only reasonably be interpreted, in the context of the evidence and circumstances in this case, as referring to the decision about Mr. Bell's sentence.

2. The referee's refusal to consider P.R.'s 2009 statements, as documented in her declaration, as a past recollection recorded was error.

The referee ruled that the statements P.R. made in 2009 to Ms. Lake, and documented in the 2009 declaration, about her interaction with M.H. were hearsay and not admissible as a past recollection recorded. Referee's Report at 16:25-18:15. Mr. Bell takes exception to the referee's evidentiary ruling.

Evidence Code § 1237 makes admissible a witness's past, out-of-court statement:

> if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement.

Cal. Evid. Code § 1237(a).

The referee found that, although P.R. had insufficient present

recollection of her interaction with M.H. to be able to testify fully and accurately about it, the "statements in the 2009 declaration were not made at or near the time the events . . . occurred . . . [and] the statements [were not] made when the events were fresh in P.R.'s memory." Referee's Report at 17:11-14; *see also id.* at 18:4-7 (noting "a big difference between a lapse of three years [in *United States v. Senak*, 527 F.2d 129 (7th Cir. 1975)] and a lapse of 16 years" in this case).

When applying the hearsay exception set forth in § 1237, courts "have the flexibility to consider all pertinent circumstances in determining whether the matter was fresh in the witness's memory when the statement was made." *People v. Cowan*, 50 Cal. 4th 401, 466 (2010) (adopting an approach in accord with the federal courts' application of the federal counterpart to § 1237, Federal Rule of Evidence 803(5)). In *Cowan*, this Court cited *Senak*, 527 F.2d at 139-42, which permitted the admission of a past recollection recorded three years after the fact. *Cowan*, 50 Cal. 4th at 466. The Court in *Cowan* affirmed the admission of a witness's past recollection recorded over three months after the fact as "reasonably fresh," because the witness's statement to a police detective "was fairly detailed" and the witness had sufficient recollection to lead the detective to a house in which he had seen stolen items. *Id.* 50 Cal. 4th at 466. Under this Court's precedent, there is no specific timeframe within which the recorded statement must have been made for it to be deemed "fresh in the witness' memory." Cal. Evid. Code § 1237(a)(1).

As noted above, P.R.'s assessment of her memory was that it was better in 2009, than it was in 2014-2015. EH RT 88:23-89:2, 113:5-10, 136:26-28, 235:14-24. Moreover, as demonstrated by her declaration, P.R.'s recollection of the case was very detailed in 2009. P.R. provided accurate information about, among other things, the backgrounds of some

of her fellow jurors, the facts of the case, the replacement of Juror A.G., and the impending vacation of Juror W.R., in addition to information about the course of the guilt phase and penalty phase deliberations. *See* EH Ex. 1; Ex. 2; *cf. Cowan*, 50 Cal. 4th at 464-65 (noting that the witness's prior statement described when he met with the defendant and various items of stolen property he saw at defendant's brother's house). As discussed, P.R. affirmed the accuracy and authenticity of her 2009 declaration when she was interviewed by S.A. Wilde in 2014. EH Ex. 3 at 16-39. At the evidentiary hearing, P.R. testified that when she signed the 2009 declaration she believed it to be accurate, EH RT 113:5-8, 137:1-3, 172:17-25. Ms. Lake also provided testimony authenticating the 2009 declaration. EH RT 287:13-290:10.

The referee speculated that P.R. might have had difficulty remembering and might have been lead into providing the information she did in her 2009 declaration. As set forth above, the referee's speculation is unfounded for multiple reasons, and it ignores P.R. affirmations that she would not have signed a declaration if the contents were not true and in accord with her then-current memory. The referee's finding that P.R. "testified that the conversation with M.H. was not accurately recorded in the 2009 declaration (see RT 99-100, 166-169)," Referee's Report at 18:11-12, is an unfair characterization of P.R.'s testimony about the declaration. Although P.R. said that, based on her memory at the time of the hearing, the interaction as described in the declaration was inaccurate, she also testified that she had no reason to doubt the accuracy of the declaration (she simply had a different current recollection in 2015). EH RT 172:17-20. When specifically asked if she would have signed a declaration if she believed it to be inaccurate, P.R. testified, "No. I apparently didn't think it inaccurate in any way." EH RT 172:21-25; *see also* EH RT 113:5-8 ("Q. When you

signed this declaration, did you sign it believing it was the most accurate recollection of your memory? A. At that time, yes."), 137:1-3 ("Q. And when you signed the declaration in 2009, you believed it to be accurate? A. Yes.").

The circumstances here are analogous to those in *People v. Cummings*, 4 Cal. 4th 1233 (1993), where this Court upheld the admission of a prior statement, under § 1237, made by a witness (Kanan) to a detective (Holder) about statements made by the defendant. *Id.* at 1292-94. The prior statement of Kanan was not tape-recorded by Holder; it was only written down. *Id.* at 1265 ("Holder had made a written record of his conversation with Kanan."). Kanan testified that he spoke to Holder and told him the truth, and on cross-examination Kanan provided some information about where his encounter with the defendant took place. *Id.* at 1293. Kanan, however, also testified that he had no recall of the conversations with either the defendant or Holder, had been undergoing detoxification, was sometimes delusional, was still having drug-related problems at the time of trial, and was motivated to talk to Holder to arrange a deal to get out of jail. *Id.* at 1293. Rejecting defendant-appellant's claim that the trial court erred by admitting Kanan's prior statement as written by Holder, this Court held the lower court had sufficient basis to conclude that the statement was admissible and Kanan testified truthfully and reliably when he said he told the truth to Holder. *Id.* at 1293-94; *see also United States v. Edwards*, 539 F.2d 689, 691-92 (9th Cir. 1976) (upholding admission of a signed prior statement made while the witness was inebriated, and the witness had no present recollection of the underlying facts).

As in *Cummings*, this Court should find that the foundational requirements for admission of the first three sentences of paragraph 16 of

P.R.'s 2009 declaration (EH Ex. 1 at ¶ 16) as a past recollection recorded were satisfied at the evidentiary hearing. This Court should reject the referee's evidentiary ruling, and consider this evidence when undertaking its independent examination of the record and "mak[ing] the findings on which the resolution of [petitioner's] habeas corpus claim will turn." *Thomas*, 37 Cal. 4th at 1256-57.

C. Conclusion

The evidentiary record establishes by a preponderance of the evidence that M.H. spoke to her husband about the case, and he abetted and advised her decision to change her vote to death; and then M.H. told P.R. about the conversation before the deliberations concluded. The referee's findings to the contrary are not supported by substantial, credible evidence and should not be adopted by this Court. *See generally In re Hitchings*, 6 Cal. 4th 97, 119-22 (1993) (rejecting, as not supported by substantial and credible evidence, the referee's factual finding that a juror did not prejudge the case).

VI. MERITS OF MR. BELL'S CLAIM FOR RELIEF

The misconduct proved by Mr. Bell raises a presumption of prejudice that respondent cannot rebut. Juror M.H.'s communication with her husband about Mr. Bell's case was an improper contact with a nonjuror. This communication, along with the subsequent interaction with Juror P.R., amounts to improper deliberations outside of the trial proceedings. The misconduct committed in this case was inherently likely to have influenced the jurors, and substantially likely to have resulted in actual bias.

A. Juror M.H. committed serious misconduct by discussing the case with a nonjuror and telling another juror about the discussion.

Mr. Bell's constitutional right to a jury trial guarantees him a fair trial by a panel of impartial, indifferent jurors. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (the Sixth Amendment guarantees the right to trial by impartial jury and to confrontation of witnesses); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (quotation marks omitted)); *In re Hamilton*, 20 Cal. 4th 273, 293-94 (1999); *In re Hitchings*, 6 Cal. 4th 97, 110 (1993); *In re Stankewitz*, 40 Cal. 3d 391, 397 (1985); *see also* U.S. Const., Amend. VI; U.S. Const., Amend. XIV; Cal. Const., art. I, § 15; Cal. Const., art. I, § 16.

An "impartial trier of fact" is "'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *see also Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). The evidence against a defendant must come solely from the witness stand, *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965), and a jury's decision must be based upon the evidence presented at trial and the legal instructions given by the court. *See Hamilton*, 20 Cal. 4th at 294 (illustrating forms of "juror misconduct," and citing *People v. Nesler*, 16 Cal. 4th 561, 578-79 (1997), *In re Carpenter*, 9 Cal. 4th 634, 647 (1995), and *Hitchings*, 6 Cal. 4th at 118); *see also Lockhart v. McCree*, 476 U.S. 162, 178 (1986) (explaining that an impartial jury consists of "'*jurors* who will conscientiously apply the law and find the facts'" (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)); *Taylor v. Kentucky*, 436 U.S. 478, 485

(1978) (holding a defendant is entitled to a jury verdict based solely on trial evidence, not on "other circumstances not adduced as proof at trial").

"A defendant is entitled to be tried by 12, not 11, impartial and unprejudiced jurors. Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors, it is settled that a conviction cannot stand if even a single juror has been improperly influenced." *Nesler*, 16 Cal. 4th at 578 (citations and quotations omitted); *see also Barnes v. Joyner*, 751 F.3d 229, 240 (4th Cir. 2014) ("It is clearly established under Supreme Court precedent that an external influence affecting a jury's deliberations violates a criminal defendant's right to an impartial jury." (citing *Parker*, 385 U.S. at 364-66; *Turner*, 379 U.S. at 472-73, and *Remmer v. United States*, 347 U.S. 227, 229 (1954)); *People v. Cissna*, 182 Cal. App. 4th 1105, 1120 (2010) (explaining that improper communications between a juror and a nonjuror can deprive a defendant of his constitutional right to be tried by twelve impartial jurors, in effect interposing "a thirteenth juror").[14]

"It is misconduct for a juror during the course of trial to discuss the case with a nonjuror." *People v. Danks*, 32 Cal. 4th 269, 304 (2004)

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[14] In capital cases, the existence of a biased juror also violates the Eighth Amendment requirement of heightened reliability and the right to a conviction and sentence based on the evidence in the record. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) ("From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."); *Woodson v. North Carolina*, 428 U.S. 280, 300-05 (1976); *Turner*, 379 U.S. at 472-73; U.S. Const., Amend. VIII; Cal. Const., art. I, § 17; *see also Sampson v. United States*, 724 F.3d 150, 163 (1st Cir. 2013) ("The right to an impartial jury is nowhere as precious as when a defendant is on trial for his life." (citing *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988)).

(holding, however, that no misconduct occurred where juror did not discuss the case or deliberations with her husband, only the stress she was feeling in making a decision); *see also People v. Wilson*, 44 Cal. 4th 758, 838 (2008) ("Violation of [the] duty [not to discuss the case], in the form of discussing the case with a *nonjuror*, is serious misconduct."); *People v. Hensley*, 59 Cal. 4th 788, 825 (2014) (holding that that a juror committed misconduct by talking to his pastor about mercy and sympathy during penalty deliberations); *People v. Pierce*, 24 Cal. 3d 199, 207 (1979) (describing a juror's discussion of the trial with a nonjuror as "serious misconduct," and a violation of the juror's oath and duties set forth in Cal. Penal Code section 1122); *Remmer*, 347 U.S. at 229 (holding that denial of a new trial motion was erroneous where someone made a comment to a juror attempting to influence the verdict). It also is misconduct when a juror violates the trial court's instruction not to discuss the case with other jurors outside of jury deliberations. *See People v. Halsey*, 12 Cal. App. 4th 885, 892 (1993) (finding that a juror's violation of the court's order not to discuss the case justified discharge from the jury).

In Mr. Bell's automatic appeal, when addressing the trial court's dismissal of Juror A.G. for discussing the case with her husband during the guilt phase deliberations, respondent conceded: "It is axiomatic that a juror's refusal to follow instructions given by the court constitutes misconduct, and is good cause for discharging of that juror. [Citations.]" Respondent's Brief at 80-81.

At various points throughout Mr. Bell's trial, the court specifically instructed the jurors about their obligation and duty not to discuss the case with anyone apart from the other jurors during deliberations; to base their decisions only upon the evidence presented in the case; and to otherwise follow and decide the case in accordance with the court's instructions. *See,*

e.g., 21 RT 1112:1-10; 24 RT 1549:23-51:22; 26 RT 1768:10-70:22; 39 RT 3238:19-39:2; 42 RT 3509:6-10:2; 44 RT 3671:12-16; 46 RT 3810:10-14; 49 RT 4168:24-25; 52 RT 4434:20-24; 53 RT 4496:15-18.

Based on the evidentiary records, and for the reasons set forth in the above exceptions to the referee's findings, this Court should find that M.H. spoke to her husband about the case, and he helped her to decide and advised her to change her vote to death; and that M.H. told P.R. about the conversation before the deliberations concluded. Assuredly, that finding on M.H.'s behavior manifests and epitomizes serious juror misconduct. *See Hensley*, 59 Cal. 4th at 825 (soliciting guidance on an issue the juror was deciding is misconduct); *Pierce*, 24 Cal. 3d at 207 ("There is no question that juror [S.] committed serious misconduct" when he consulted with a police-officer witness during trial.); *Hitchings*, 6 Cal. 4th at 118 ("Violation of [the] duty [not to discuss the case with nonjurors] is serious misconduct.").

B. The prejudice of Juror M.H.'s misconduct has not been rebutted.

"Once a court determines a juror has engaged in misconduct, a defendant is presumed to have suffered prejudice." *People v. Weatherton*, 59 Cal. 4th 589, 600 (2014) (citing *Hamilton*, 20 Cal. 4th at 295). Juror misconduct raises a presumption of prejudice that respondent bears a heavy burden to rebut. *See Nesler*, 16 Cal. 4th at 578 ("Juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that the defendant was prejudiced thereby and may establish juror bias."); *Hamilton*, 20 Cal. 4th at 295 ("Misconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable

'presumption' of prejudice."); *People v. Davis*, 46 Cal. 4th 539, 624 (2009) (same); *People v. Dykes*, 46 Cal. 4th 731, 809 (2009) (noting that juror misconduct raises "a rebuttal presumption of prejudice"); *see also Remmer*, 347 U.S. at 229. The presumption of prejudice is particularly strong in capital cases. *Stankewitz*, 40 Cal. 3d at 397 (quoting *Mattox v. United States*, 146 U.S. 140, 149 (1892) ("It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment.")).

The presumption can be rebutted only by demonstrating that there is no substantial likelihood that the misconduct influenced the vote of one or more jurors. *People v. Marshall*, 50 Cal. 3d 907, 950-51 (1990); *Hensley*, 59 Cal. 4th at 825 ("A juror's misconduct raises a presumption of prejudice which the prosecution must rebut by demonstrating there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment." (punctuation marks omitted) (quoting *In re Boyette*, 56 Cal. 4th 866, 892 (2013)). The substantial likelihood test applies an objective standard by which the Court examines the misconduct and determines whether it is inherently likely to have influenced any juror. *Marshall*, 50 Cal. 3d at 951. This Court explained that this "'prejudice analysis' is different from, and indeed less tolerant than, 'harmless error analysis' for ordinary error at trial," *id.*, and opined on the reasons for the difference:

> Any deficiency that undermines the integrity of a trial which requires a proceeding at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury introduces the taint of fundamental unfairness and calls for reversal without consideration of actual prejudice. [Citation.] Such a deficiency is threatened by jury misconduct. When the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the

> defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial. By contrast, when the misconduct does not support such a finding, we must hold it nonprejudicial.

Id. at 951.

In *Carpenter*, this Court stated that bias exists "if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror;" or if, looking to the nature of the misconduct and the surrounding circumstances, it is substantially likely the juror was actually biased against the defendant. *Carpenter*, 9 Cal. 4th at 653; *see also In re Welch*, 61 Cal. 4th 489, 499-500 (2015) (citing *Carpenter* and describing the "two tests for prejudice"). Under the first standard,

> a finding of "inherently" likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this "inherent prejudice" test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information.

Carpenter, 9 Cal. 4th at 653.

If no inherent prejudice is found, under the second standard, the Court applies a "circumstantial test" for prejudice, recognizing that "the totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose." *Welch*, 61 Cal. 4th at 500 (quoting *Carpenter*, 9 Cal. 4th at 654) (quotation marks omitted).

When the Court finds a substantial likelihood that a juror was improperly influenced or biased (i.e., respondent has failed to rebut the presumption of prejudice), it "must set aside the verdict, no matter how

convinced [the Court] might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." *Nesler*, 16 Cal. 4th at 579 (citing *Carpenter*, 9 Cal. 4th at 653-54); *see also Hensley*, 59 Cal. 4th at 825; *Weatherton*, 59 Cal. 4th at 600. "Juror bias does not require a juror bear animosity towards that defendant. Rather, juror bias exists if there is a substantial likelihood that a juror's verdict was based on improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant." *Cissna*, 182 Cal. App. 4th at 1116; *see also Boyette*, 56 Cal. 4th at 899 (Corrigan, J., concurring and dissenting) ("'Actual bias' in this context does not mean that a juror must dislike the defendant or harbor a desire to treat him unfairly.").

Respondent cannot rebut the presumption of prejudice in this case. "When a person violates his oath as a juror, doubt is cast on that person's ability to otherwise perform his duties." *People v. Cooper*, 53 Cal. 3d 771, 835-36 (1991); *see also Nesler*, 16 Cal. 4th at 587 ("A juror's disclosure of extraneous information to other jurors tends to demonstrate that the juror intended the forbidden information to influence the verdict and strengthens the likelihood of bias."). "An impartial juror is someone capable and willing to decide the case solely on the evidence presented at trial." *Nesler*, 16 Cal. 4th at 581 (quotation marks omitted).

The evidence here is: M.H. spoke to her husband about the case during the penalty phase deliberations; he helped her to decide Mr. Bell's sentence and advised her to change her vote to death; and M.H. then told P.R. (who, like M.H., had favored a life verdict) about it as they entered the jury room for the final few hours of deliberations. These facts present a circumstance that was inherently likely to have influenced M.H. and P.R.,

and was substantially likely to have rendered M.H actually biased.[15] Like the juror in *Hensley* who was found to have been influenced or actually biased, M.H. spoke with a third-party about the case "while still wrestling with [her] decision," *Hensley*, 59 Cal. 4th at 828, and M.H. was abetted and advised in making her decision to switch from life to death. *Id.* at 826 (noting that the juror sought advice from his pastor on the very issue he was deciding and was advised in a manner inconsistent with the court's instructions); *cf. Danks*, 32 Cal. 4th at 307 (holding one pastor's "gratuitous personal view of the appropriate penalty" and another's "unsolicited" opinion about the appropriate penalty did not amount to a substantial likelihood of influence or bias on jurors).

A finding of a substantial likelihood of influence and actual bias, moreover, is appropriate even if this Court does not admit P.R.'s past recollection recorded in paragraph 16 of her 2009 declaration. The evidence demonstrating that S.H. helped M.H. decide Mr. Bell's fate (and then told P.R. about it), and that M.H. changed her vote from life to death, is sufficient to show that M.H.'s vote for a death sentence was not based solely on the trial evidence and court's instructions. In the context of the extended deliberations and division in the jury, M.H.'s statement that her husband helped her decide indicates substantive discussion of the case and M.H.'s decision occurred, and resulted in M.H. electing to join the jurors who favored a death verdict. As Justice Kennard pointed out in *Danks*,

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[15] "[A]ctual bias supporting an attack on the verdict is similar to actual bias warranting a juror's disqualification." *Nesler*, 16 Cal. 4th at 581. Just as this Court concluded the trial court properly refused further inquiry and dismissed Juror A.G. for talking to her husband about this case during the guilt phase deliberations, *Bell*, 40 Cal. 4th at 618-19, it should find that M.H.'s violation of the admonition against discussing the case with outsiders during the penalty deliberations would have warranted her disqualification.

"Normally a spouse . . . would have a great influence on a juror having to decide a matter of life and death." *Danks*, 32 Cal. 4th at 319 (Kennard, J., concurring and dissenting).

Mr. Bell's jurors had deliberated for almost fourteen hours without reaching a verdict when they retired for the evening on the penultimate day of deliberations. *See* 8 CT 1859-64. The verdict rendered the next day – after the misconduct, and with the looming possibility of having to restart the deliberations because of a juror's imminent holiday vacation – was tainted and should not be sustained. Under the totality of the circumstances in this case, respondent cannot demonstrate that there is no substantial likelihood that any juror was improperly influenced to Mr. Bell's detriment when deciding his penalty.

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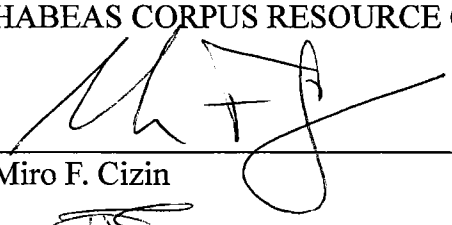
VII. CONCLUSION

For reasons set forth here and in the other pleadings filed in this case, Mr. Bell respectfully requests that this Court find that there was error at the penalty phase of his trial, grant the Amended Petition for Writ of Habeas Corpus, vacate Mr. Bell's death sentence, and remand this case to the San Diego Superior Court for a new penalty determination.

Dated: May 27, 2016

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

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CERTIFICATE AS TO LENGTH

I certify that this Reply to the Informal Response contains 16,428 words, verified through the use of the word processing program used to prepare this document.

Dated: May 27, 2016

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Miro F. Cizin

PROOF OF SERVICE

1. I am over 18 years of age and not a party to this action. I am a resident of or employed in the county where the mailing took place.
2. My business address is: Habeas Corpus Resource Center, 303 Second Street, Suite 400 South, San Francisco, California 94107.
3. Today, I mailed from San Francisco, California the following document:

- **Petitioner's Exceptions to the Referee's Report and Brief on the Merits**

4. I served the document by enclosing it in envelopes, which I then deposited with the United States Postal Service, postage fully prepaid.
5. The envelopes were addressed and mailed as follows:

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

Date: May 27, 2016

Carl Gibbs