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 RESPONSE TO RESPONDENT'S EXCEPTIONS AND BRIEF ON THE MERITS

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I. INTRODUCTION

Steven Bell presented sufficient, credible evidence at the evidentiary hearing to prove juror misconduct occurred during the penalty phase deliberations. Contrary to respondent's suggestion, the referee's factual findings are not supported by substantial evidence and should not be accorded deference. An independent review of the record by this Court should lead it to conclude that Juror P.R.'s earnest recollections about the actions of Juror M.H. prove that juror misconduct tainted Mr. Bell's trial. The denials of M.H. and her husband, S.H., are suspect, and are outweighed by the credible evidence that they spoke about the case, and that S.H. helped and advised M.H. to change her vote to death.

II. ARGUMENT

A. Standard of review for the referee's factual findings

The standard used to review a referee's factual findings on habeas corpus is clear: after conducting an independent examination of the record adduced at the reference hearing, this Court determines whether the referee's factual findings are "supported by 'ample, credible evidence' . . . or 'substantial evidence,'" and if they are, it affords them "great weight." *In re Hitchings*, 6 Cal. 4th 97, 109 (1993) (citations omitted). The referee's findings are not binding on this Court, and it "'may reach a different conclusion on an independent examination of the evidence produced at the hearing . . . even where the evidence is conflicting.'" *People v. Ledesma*, 43 Cal. 3d 171, 219 (1987) (quoting *In re Branch*, 70 Cal. 2d 200, 203 n.1 (1969)).

In its brief, respondent asserts that a Court of Appeal decision, *People v. Hamlin*, 170 Cal. App. 4th 1412 (2009), "illustrates a reviewing court's proper deference to the trial court's (or referee's) credibility determinations and findings of facts." Respondent's Exceptions to Referee's Findings of Fact and Brief on the Merits (Respondent's Exceptions) at 30. Respondent also quotes a passage from *Hamlin* which cites civil appellate cases for the proposition that a trial court's resolution of conflicts in testimony and credibility assessments must be accepted as conclusive on appeal, unless they are arbitrary or irrational. Respondent's Exceptions at 31-32 (quoting *Hamlin*, 170 Cal. App. 4th at 1463-64). Respondent's claim that *Hamlin* illustrates the appropriate standard of review in the instant case is misguided. The well-settled standard applicable to this habeas proceeding is different than that articulated on appeal in *Hamlin*. Although "great weight" is given to the habeas referee's findings that are supported by substantial evidence, and "special deference" is afforded to the referee on factual questions

requiring resolution of testimonial conflicts and assessment of witnesses' credibility, ultimately "it is for this court to make the findings on which the resolution of [petitioner's] habeas corpus claim will turn." *In re Thomas*, 37 Cal. 4th 1249, 1256-57 (2006); *see also In re Malone*, 12 Cal. 4th 935, 946 (1996) ("The referee's findings are not binding on us . . . .").

B. Respondent's contention that the referee's findings were supported by substantial evidence should be rejected.

Respondent argues that substantial evidence supports the referee's finding that M.H. did not speak to her husband about Mr. Bell's case during jury deliberations, relying on M.H.'s testimony that she did not do so. Respondent's Exceptions at 32-33. Respondent, however, failed to address the evidence that calls into question the reliability and accuracy of M.H.'s testimony, and undermines the referee's finding. M.H.'s testimony about the conversations she had with her husband relating to Mr. Bell's case during and after the trial should not be credited, because M.H. remembered so little and speculated about what actually happened. For example:

- M.H. testified that she did not remember telling S.H. that they could not talk about the case when the trial started:

> Q: How did you know that he knew not to speak with you?
>
> A: Well, when I came -- we *probably* had a discussion when I first started serving on it of, you know, that I can't talk about it. And he had been on several juries so he knew not to talk. It was just . . .
>
> Q: Do you recall having a conversation with him - -
>
> A: No, *I can't specifically recall it.* I just say that's probably what happened. I don't know. I shouldn't even have said, because I don't know.

Evidentiary Hearing Reporter's Transcript (EH RT) 29:3-13

(emphasis added).[1]

- When asked "When is the first time you spoke to your husband about the case?" M.H. answered, "*Probably* after the - - I came home after the verdict was read." EH RT 32:10-13 (emphasis added).
- When asked when S.H. learned that M.H. had been selected to serve on Mr. Bell's jury, M.H. answered, "*Probably* when I came home and said I have to go back the next day." EH RT 33:7-11 (emphasis added).
- When asked if S.H. knew when the jury was deliberating in the guilt phase of the trial, M.H. testified, "I have no - - I have no knowledge of that. *I can't remember back that far.* I have no idea." EH RT 34:7-10 (emphasis added).
- When asked "Do you remember any conversations you had with your husband at all about the case, whether it was before or after deliberations?" M.H. answered, "Very little." EH RT 34:17-20.

See also Petitioner's Exceptions to the Referee's Report and Brief on the Merits (Petitioner's Exceptions) at 13-15. Moreover, in 2009, M.H. told Habeas Corpus Resource Center investigator Susan Lake that she did not remember whether or not she spoke to her husband about Mr. Bell's case while the trial was still ongoing. EH RT 292:4-12; EH Ex. 8 at ¶ 9.[2]

Respondent unconvincingly asserts that the testimony of S.H. corroborates M.H.'s testimony, providing additional support to the referee's findings. Respondent's Exceptions at 34. S.H.'s testimony contradicted the account provided by M.H. S.H. testified that M.H. talks "all the time," irrespective of whether or not he asks her any questions, and despite the fact

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[1] Respondent mischaracterized this portion of M.H.'s testimony by failing to include the complete quote. Respondent's Exception at 32 ("When the trial started, she told Mr. H., 'I can't talk about it.' (RT 29.)").

[2] As discussed in Petitioner's Exceptions, Mr. Bell takes exception to the referee's finding that this statement is inadmissible as a prior inconsistent statement. Even if this Court finds that it is inadmissible for its substance, M.H.'s lack of recollection in 2009 about this central issue should be considered in assessing her credibility. Petitioner's Exceptions at 15-17.

that he is not interested in what she has to say. EH RT 426:1-3. S.H.'s testimony, furthermore, makes it clear that he is not competent to testify about whether or not M.H. made any particular statement to him:

> I do not listen. I don't listen to M. much, and I - - of course, I get scolded all the time about it, but I'm not interested in any of that stuff. . . . She knows I have selective listening and I don't remember it. *And she'll ask me five minutes later and I won't remember it and I'm not listening.*

EH RT 426:3-10 (emphasis added). The incomplete quotation from S.H.'s testimony provided by Respondent, i.e., "I'm just not interested in what she has to say . . . I don't ask. I'm just not interested," Respondent's Exceptions at 34 (citing EH RT 426), is misleading, and the actual testimony does not substantially support Respondent's argument that M.H. and her husband did not talk about Mr. Bell's case during deliberations because S.H. did not ask her any questions.

For these reasons, and those discussed in Petitioner's Exceptions, this Court should reject respondent's argument that the testimony of M.H. and S.H. provides substantial evidence supporting the referee's finding that M.H. did not speak to S.H. about Mr. Bell's case before the end of deliberations.

Respondent further asserts that P.R.'s testimony was "scattered and inconsistent," noting changes in P.R.'s statements about M.H., and confusion P.R. exhibited about the dismissal of Juror A.G. Respondent's Exceptions at 34-35; *see also id.* at 32-33. Although P.R. exhibited some uncertainty and lapses in her memory, the evidentiary hearing record does not provide substantial support for a finding that P.R. concocted an event that never happened, and conflated the excusal of A.G. during the guilt phase with M.H. and her misconduct at the penalty phase.

On cross-examination at the hearing, P.R. emphatically rejected the suggestion that she was confusing M.H. and A.G.:

Q. Is it possible that you are confusing what occurred with the juror that was excused for talking to her husband with this conversation you testified about with M.H.?

A. I don't quite understand. Confused with?

Q. The juror that was excused for speaking to her husband - -

A. Yes.

Q. - - that - - that she was excused for speaking to her husband, is it possible that you are confused and now attributing that to M.H.?

A. *No, no, no.*

EH RT 201:8-19 (emphasis added).

P.R. forthrightly acknowledged during her testimony that she could not be sure A.G. – who served in the Navy – was, in fact, the juror dismissed at the guilt phase. EH RT 93:20-22 ("Q. Do you have a recollection that [the dismissed juror is] the same person who was in the Navy? A. I think it is, but I'm not positive."); *see also* EH RT 90:27-91:5, 254:8-18, 255:6-256:10. Nevertheless, P.R. continued to have a distinct memory of her interactions with M.H., *see* EH RT 226:14-16, 227:17-19 – a contemporary who served with P.R. for the entirety of the trial. P.R. also recalled A.G. as a much younger woman with whom she had no connection and did not converse. EH RT 92:12-19, 93:25-27. For P.R., A.G. and the dismissal for misconduct at the guilt phase deliberations clearly were divorced from and of no consequence to her interactions with M.H.[3]

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[3] Respondent also notes that Ms. Lake "did not show a photograph of M.H. (or A.G.) to P.R. to clear up any possible confusion" between P.R.'s recollection of the misconduct at the penalty phase and A.G.'s dismissal for talking to her husband about the case. Respondent's Exceptions at 33. The failure to show P.R. photographs in 2009 is of no moment. As mentioned in Mr. Bell's Exceptions, P.R. identified M.H. in a photograph shown to her a few days before the hearing in 2015, EH RT 190:23-28, and P.R. recognized

The difference in P.R.'s memory of and interactions with M.H., as compared to A.G., and the factual differences between the guilt phase deliberations and the penalty phase deliberations undermine the assertion that P.R. conflated the misconduct and falsely attributed to M.H. a second act of misconduct that never actually happened. For the reasons set forth here, and those detailed in Mr. Bell's Exceptions, the evidentiary hearing record does not substantially support the referee's finding that P.R.'s memory is questionable because she may have confused M.H. with A.G. and her misconduct at the guilt phase. *See* Petitioner's Exceptions at 34-36.

Respondent also argues that P.R. did not explain adequately why she failed to mention M.H.'s misconduct to trial counsel, "who she had seen throughout the trial," but then did so in 2009 to Ms. Lake, "who she had never met before." Respondent's Exceptions at 35. Though trial counsel was familiar to P.R. from the trial, he obviously was an attorney who – according to the trial court's instructions to the jurors – was not "supposed to . . . develop any kind of personal rapport with a member of the jury." 26 Reporter's Transcript on Appeal (RT) 1767:14-16. Furthermore, when discharging the jury after recording the verdict, the trial court told the jurors they were free to discuss, or not discuss the case, 54 RT 4503:25-28, but then admonished the jurors to "think about that," 54 RT 4503:28-4504:1, and "remind[ed]" them that they "should be careful what [they] say," 54 RT 4504:2-3. The trial court followed these remarks with a cautionary tale involving ostensible negative consequences that can flow from disclosing

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M.H. in the hallway of the courthouse on the first day of the hearing, EH RT 191:1-3. In all likelihood, P.R. would have done the same when her memory was fresher in 2009, and the photographs of M.H. and A.G. simply would have confirmed her discrete recollections of her interactions with M.H. during the trial. Ms. Lake also testified that, from her investigative perspective, she had no concern that P.R. was confusing M.H. and A.G. during the 2009 interviews. EH RT 391:5-8.

juror-related misconduct, i.e., "years of litigation." Specifically, the court invoked *People v. Hedgecock*, 51 Cal. 3d 395 (1990), a case in which a former San Diego mayor was found guilty of perjury and conspiracy, and after the verdict, two jurors reported improper contacts between the bailiffs and the jurors, and the consumption of alcoholic beverages during deliberations. The trial court warned:

> Those of you who followed the famous Roger Hedgecock case will remember that there were years of litigation because jurors said things to one person and then wouldn't say it under penalty to [sic] perjury to another. So be sure what you say is carefully thought out.

54 RT 4504:3-7.

As discussed in Mr. Bell's Exceptions, trial counsel's cold-call to P.R. soon after trial was significantly shorter and less comprehensive than the in-person discussion P.R. had with Ms. Lake after the intensity of the trial experience had diminished. Petitioner's Exceptions at 36-37. Given the stern warning the trial court gave the jurors about discussing any misconduct, and when viewed in the context of the differing circumstances of the post-trial contacts, P.R.'s failure to divulge M.H.'s misdeed when called by defense counsel some weeks after trial is understandable, and does not provide substantial evidence to support a finding that M.H. did not commit misconduct.

Finally, respondent mentions that P.R. was contacted by prior habeas counsel's investigator, Tom Crompton, in June 2005 (a contact P.R. did not recall, EH RT 177:22-178:15), and that there is nothing in the record to indicate what P.R. told Mr. Compton during that contact. Respondent's Exceptions at 36. Respondent also states that "P.R. admitted that she did not mention [M.H.'s misconduct] to anyone until her meeting in 2009 with Lake." Respondent's Exceptions at 36. While it is correct that the record is

silent about the content of the conversation between Mr. Crompton and P.R., it was documented in pre-hearing discovery litigation that Mr. Bell's current habeas counsel was not able to locate any written or recorded statements or reports of statements from Mr. Crompton's contact with P.R. *See* Petitioner's Motion to Compel Disclosure, Ex. D at 2 and Ex. F at 4 (filed September 14, 2015). The information P.R. provided Mr. Crompton about Mr. Bell's case simply is not known. Nevertheless, contrary to respondent's assertions, P.R. did not testify unequivocally that she never mentioned M.H.'s misconduct to anyone until she talked to Ms. Lake. Rather, P.R. said she "can't honestly say" when she first told someone about her interaction with M.H. on the last day of the deliberations, EH RT 198:11-14, and Ms. Lake "probably" was the first person she told, EH RT 198:15-18. Thus, the record does not support respondent's inference that the first time P.R. mentioned her interaction with M.H. to anyone was in 2009, when she discussed the case with Ms. Lake – it "probably" was, but P.R. does not recall for certain.

In sum, as argued here and in Mr. Bell's Exceptions, there is sufficient evidence in the record for this Court to reject the referee's findings and conclude that M.H. committed misconduct. Moreover, respondent has not rebutted the presumption of prejudice by showing there is no substantial likelihood that the misconduct influenced M.H. and P.R. or that M.H. was actually biased. Accordingly, Mr. Bell's death sentence must be vacated and he should be given an opportunity for a fair penalty determination. *See* Petitioner's Exceptions at 47-52; *see also People v. Hensley*, 59 Cal. 4th 788, 828 (2014) (finding the "totality of the circumstances demonstrates a substantial likelihood that [a juror] was influenced or actually biased against defendant by his improper conversation with [a reverend], and that his vote to impose the death penalty was not based solely on the evidence and the instructions."); *id.* at 824 ("Regardless of how weighty the evidence may be, a defendant is entitled to 12, not 11, impartial jurors.") (citing *In re*

Carpenter, 9 Cal. 4th 634, 652, 654 (1995)).

III. CONCLUSION

For the reasons set forth in Petitioner's Exceptions to the Referee's Report and Brief on the Merits and above, Mr. Bell respectfully asks this Court to find that juror misconduct occurred during the penalty phase of his trial, grant the Amended Petition for Writ of Habeas Corpus, vacate his death sentence, and remand this case to the San Diego County Superior Court for a new penalty determination.

Dated: June 27, 2016

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____
Miro F. Cizin

By: _____
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Attorneys for Petitioner
STEVEN M. BELL

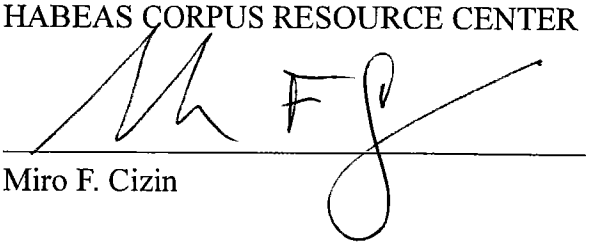
CERTIFICATE AS TO LENGTH

I certify that this Reply to the Informal Response contains 2,783 words, verified through the use of the word processing program used to prepare this document.

Dated: June 27, 2016

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

Miro F. Cizin

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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.
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- **Petitioner's Response to Respondent's Exceptions and Brief on the Merits**

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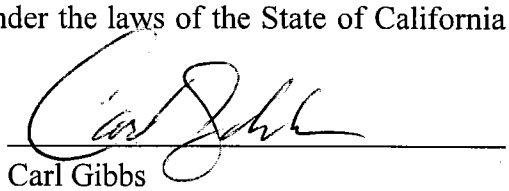
Petitioner

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

Date: June 27, 2016



Carl Gibbs