SUPREME COURT COPY

In the Supreme Court of the State of California

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

SUPREME COURT
FILED

MAY 14 2014

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Deputy

San Diego County Superior Court
Case No. CR133096
Honorable Richard Murphy, Judge

RETURN TO ORDER TO SHOW CAUSE

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DEATH PENALTY

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RETURN TO ORDER TO SHOW CAUSE

COMES NOW the Director of the Department of Corrections and Rehabilitation and states for a return to the Order to Show Cause issued on January 21, 2014, as follows:

I. On June 4, 1992, Bell killed eleven-year old Joey Anderson, the son of Bell's live-in-girlfriend Deborah Mitchell, while Mitchell was at work. Joey was in Mitchell's bedroom watching television, having come home early from school. That morning, Bell cashed an assistance check and used it to buy crack cocaine. Bell consumed all of the cocaine. He returned home to find items to steal so that he could purchase more crack cocaine. When Bell encountered Joey, he took a knife from the kitchen drawer and stabbed Joey to death. Bell stole the television set and a boom box, and left. (See *People v. Bell* (2007) 40 Cal.4th 582, 586-587.)

II. On November 22, 1993, a San Diego County Superior Court jury found Bell guilty of first degree murder and robbery. The jury also found true a robbery special circumstance allegation, and allegations of personal use of a deadly weapon and infliction of great bodily injury. On December 17, 1993, the jury returned a verdict of death. On March 7, 1994, the superior court imposed a judgment of death. (*People v. Bell, supra*, 40 Cal.4th at p. 594.)

III. On February 15, 2007, this Court affirmed the judgment and sentence in its entirety. (*People v. Bell, supra*, 40 Cal.4th at pp. 585, 622.) On October 1, 2007, the United States Supreme Court denied certiorari. (*Bell v. California* (2007) 552 U.S. 826.)

IV. On March 29, 2007, Bell filed a petition for writ of habeas corpus in this Court raising no claims, seeking to amend the petition by June 21, 2009.

V. On June 22, 2009, Bell filed an amended petition for writ of habeas corpus. On June 23, 2009, this Court requested an informal

response to the amended habeas petition from the People. Respondent filed its informal response on October 15, 2009. On October 28, 2010, Bell filed a reply.

VI. On January 21, 2014, this Court issued an order to show cause. This Court directed respondent "to show cause, when the matter is ordered on calendar, why petitioner should not be granted relief because of the alleged misconduct of Juror M.H., as alleged in claim six, subclaim 7, of the petition for a writ of habeas corpus filed March 29, 2007, and amended June 22, 2009."

VII. In claim six, subclaim 7, Bell alleges that Juror M.H. committed misconduct. Specifically, Bell alleges that Juror M.H. "talked to her husband the night before verdicts were returned." (Petition at pp. 196-197.) Bell further alleges that the misconduct "had a substantial and/or injurious effect and/or influence on the jury's determination of penalty." (Petition at p. 197.) Bell supports his allegations with a declaration from juror P.R., who states that M.H. told her that she [M.H.] spoke to her husband about the case, and he "advised her to change her vote." (9 Petition Exhibits at p. 2426.) Bell has also submitted a declaration from M.H., who states she "does not recall" speaking to her husband. (9 Petition Exhibits at p. 2430.)

VIII. Large portions of the declarations Bell has submitted concern the deliberative process and are therefore inadmissible, as more fully detailed in the accompanying memorandum of points and authorities. Those portions of the declarations should be stricken and not considered for any purpose. (Evid. Code, § 1150, subd. (a).)

IX. There was no juror misconduct.

A. Juror M.H. did not speak to her husband while the trial was ongoing. (Return Exhibit 1 at p. 1.)

X. If there was juror misconduct, the presumption of prejudice has been rebutted.

XI. Except as otherwise indicated, respondent denies each and every allegation of the petition, denies that Bell's confinement is in any way illegal, and denies that Bell's rights have been violated in any respect. Each and every legal characterization contained in the petition is erroneous as a matter of law, and none of the facts alleged in the petition demonstrate any entitlement to relief.

XII. If Bell disputes any fact asserted in this return and deemed by this Court to be material, a referee should be appointed and an evidentiary hearing held to resolve any conflict thus discerned.

WHEREFORE, respondent respectfully submits that the petition for writ of habeas corpus should be denied and the order to show cause discharged, unless Bell disputes any material assertion contained herein. If Bell does deny any material fact asserted herein, a referee should be appointed and an evidentiary hearing should be convened to resolve such disputed fact or facts, after which the petition for writ of habeas corpus should be denied and the order to show cause discharged.

Dated: May 12, 2014

Respectfully submitted,

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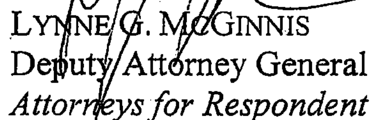

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL HISTORY

On November 22, 1993, a San Diego County jury convicted Bell of the first degree murder of Joey Anderson (Pen. Code, § 187, subd. (a)) and of first degree robbery (Pen. Code, §§ 211/212.5). The jury found true the allegations that Bell personally inflicted great bodily injury on the victim (Pen. Code, § 12022.7) and that he personally used a deadly and dangerous weapon, to wit: a knife (Pen. Code, § 12022.5). The jury further found true the special circumstance allegation that Bell committed the murder during the course of a robbery (Pen. Code, § 190.2, subd. (a)(17)). (42 RT 35-3502; 5 CT 1196-1199.)[1] On December 17, 1993, the jury returned a separate verdict finding that death was the appropriate punishment. (54 RT 4501-4502; 7 CT 1536.) On March 4, 1994, the trial court denied Bell's motion for a new trial and automatic motion to reduce the sentence to life without the possibility of parole. (Pen. Code, § 190.4, subd. (e).) (61 RT 4634, 4650.) That same day, the court sentenced Bell to death on the murder conviction and the robbery special circumstance. The court stayed sentence on the remaining charge and the enhancement allegations pursuant to Penal Code section 654. (61 RT 4655-4656; 8 CT 1710-1711.)

On February 15, 2007, this Court affirmed the judgment and sentence in its entirety. (*People v. Bell, supra*, 40 Cal.4th at pp. 585, 622.) On March 28, 2007, this Court denied Bell's petition for rehearing. On October 1, 2007, the United States Supreme Court denied certiorari. (*Bell v. California, supra*, 552 U.S. 826.) On March 29, 2007, Bell filed a petition for writ of habeas corpus in this Court raising no claims and

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[1] Record references are to the record in the direct appeal.

seeking to amend the petition by June 21, 2009. On June 22, 2009, Bell filed an amended petition for writ of habeas corpus.

On June 23, 2009, this Court requested an informal response to the amended habeas petition from the People. Respondent filed its informal response on October 15, 2009. On October 28, 2010, Bell filed a reply.

On January 21, 2014, this Court issued an Order to Show Cause. This Court directed Respondent "to show cause, when the matter is ordered on calendar, why petitioner should not be granted relief because of the alleged misconduct of Juror M.H., as alleged in claim six, subclaim 7, of the petition for a writ of habeas corpus filed March 29, 2007, and amended June 22, 2009."

II. Guilt Phase Evidence

A. Prosecution Case

In June 1992, Bell, Deborah Mitchell, and Joey Anderson resided at 428 North 28th Street in San Diego, California. (27 RT 1942, 1945, 1947.) On June 4, sometime before 8:00 a.m., Mitchell left the house for work and Joey left for school. (27 RT 1955-1956.) Meanwhile, Bell went to the General Services office to get his welfare check. (29 RT 2142, 2144, 2150-2155.)

The $111.00 check, which Bell obtained at around 12:45 p.m., was not used for food, groceries or other family needs. Instead, Bell promptly cashed the check at a liquor store right across the street from the General Services office. Bell used the cash to buy crack cocaine, which he shared with several friends. (29 RT 2142, 2144-2145, 2151-2152, 2154-2160.)

By around 3:00 p.m., the $111.00 was gone. Desperate for more crack, Bell returned to Mitchell's home, hoping to steal anything he could.

(29 RT 2139, 2160.)[2] Wearing a baseball cap belonging to Joey, Bell retrieved a shopping cart from Mitchell's shed, opened the front door with his key, and went inside the house. (27 RT 1861-1862, 1944; 28 RT 2055, 2061-2062; 29 RT 2143-2144, 2161.) Assuming that Joey was still in school, Bell entered the master bedroom, where Mitchell kept her television set. Much to Bell's chagrin, Joey, who had been sent home from school because of a discipline problem, was on the bed watching the TV. (27 RT 1852-1853, 1956-1957; 29 RT 2223, 2225.) Bell went to the kitchen, retrieved a knife from a drawer, came up behind Joey, and stabbed him in the back. (29 RT 2224.) Joey fell to the floor. (29 RT 2225, 2229.) Bell stabbed Joey several more times, then stomped on Joey's face with his foot. (29 RT 2230, 2232.)

As Joey lay lifeless on the floor, Bell unscrewed the television set from the cable box and placed it in the shopping cart. Bell proceeded to Joey's room, took Joey's boom box, and placed it in the cart with the television set. Bell retrieved a blue blanket from the master bedroom, covered the cart with the blanket and left the house, waving to one of his neighbors as he passed by. (27 RT 1861-1862, 1872-1873, 1878-1880, 1887-1889; 29 RT 2146-2147, 2161.) Bell wrapped the bloody knife in a plastic bag he had taken from Mitchell's kitchen and, after walking a couple of blocks, dropped the bag near a garbage can. (29 RT 2225-2226, 2230-2231.) Bell returned to his friends, sold the boom box then the television set, and used the proceeds to purchase several more rocks of crack cocaine. (29 RT 2166-2169.) Bell shared the rocks with a prostitute named "Chocolate" who provided him with oral sex. (29 RT 2163, 2170, 2175-2176.)

[2] This was not the first time Bell had stolen from Mitchell. In December 1990, Bell took Mitchell's VCR. (27 RT 1950-1952, 1967.)

When Mitchell returned home from work that evening, she looked into the master bedroom and noticed that her television was gone. (27 RT 1958-1959.) The phone in the living room was off the hook. (27 RT 1959.) As Mitchell approached the empty TV stand, she saw Joey lying on the floor. Mitchell screamed, then picked him up and laid him back down. Knowing that Joey was dead, Mitchell ran to the home of her good friends and neighbors, Frances and Winifred Booker. (27 RT 1960.) Mitchell banged on the Bookers' front door, screaming for help. Mrs. Booker dialed 9-1-1. (27 RT 1914, 1960.)

Several officers and detectives with the San Diego Police Department responded to the 9-1-1 call. (27 RT 1919-1920; 28 RT 1995-1996; 2000-2001, 2003; 2053-2054.) When they arrived at Mitchell's home, Joey was lying on the floor of the master bedroom, near the window by the television stand. He was dead. (27 RT 1916, 1290.) He had multiple stab wounds. (27 RT 1920.) Next to him was a half-eaten piece of bread. There was a bowl of beans on the bedroom floor. (27 RT 1917-1918; 28 RT 2001.) Police found a bloody towel near the top of the bed. (28 RT 2059.) The knife was never recovered. (28 RT 2001.)

At around 10:45 the following morning (June 5), Officer Michael Prutzman was working traffic on Sixth Avenue near Balboa Park. (28 RT 2068-2069.) As Prutzman was completing a traffic citation, Bell approached him from the west sidewalk. (28 RT 2069-2070.) Bell was carrying a newspaper which was folded open to an article captioned, "Boy 11 Stabbed To Death." (28 RT 2070-2071.) Bell handed Prutzman the paper and a California identification card. (28 RT 2071.) Bell told Prutzman he was the one the police were looking for but that he "didn't stab that boy." (28 RT 2072.) Prutzman asked Bell if he wanted to talk to someone about the case. Bell said that he did. Prutzman offered Bell a ride

to the police station in his patrol car. Bell accepted. (28 RT 2072.) Prutzman drove Bell to the downtown police station. (28 RT 2073.)

At the station, Bell was interviewed by homicide detectives Jesse Raymond Almos and John Michael Doucette.[3] (28 RT 2081-2083, 2118-2119.) Bell waived his *Miranda*[4] rights and agreed to talk. (28 RT 2083, 2120-2121.) Bell detailed his activities of the previous day, admitting that he took the TV and boom box so he could sell them and buy more drugs. (29 RT 2139-2172.) However, Bell denied stabbing Joey, claiming that Joey was not home at the time. (29 RT 2139, 2144, 2147, 2174.) Bell told the detectives he was in "shock" and "disbelief" when he read in the morning paper that Joey was dead. (29 RT 2143.)

After Bell was booked and processed, he agreed to speak again about the offense. Bell was interviewed by Paul Allen Redden.[5] (29 RT 2222-2223.) This time, Bell confessed to killing Joey and gave details about the stabbing. (29 RT 2223-2232.) Bell said he "just flipped," as he retrieved the knife from the kitchen door he "ask[ed] for the Lord's help" because "something's pushing me to do this," and that "at that particular moment I just felt so evil for some reason." (29 RT 2224, 2227-2228.) Bell also told Redden that he was wearing the same clothes he had on at the time he stabbed Joey and that he did not get upset about what he had done until the drugs wore off. (29 RT 2231-2232.)

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[3] The interview was recorded on audio tape. (28 RT 2084, 2121.) The detectives thought they were also videotaping the interview but later found out that the video equipment was broken and the intended video tape was blank. (21 RT 2107, 2121.)

[4] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

[5] Redden was a polygraph examiner. However, the Redden interview tape was edited to delete all references to a polygraph test; and the witnesses were instructed not to mention a polygraph at trial. (13 RT 379-381.)

Prutzman, Almos, Doucette, and Redden all testified that when they spoke with Bell, he was coherent, acted appropriately, and appeared neither mentally disturbed nor under the influence of alcohol or narcotics. (28 RT 2073, 2079-2080, 2084, 2093-2094, 2121-2122, 2214-2215.)

On June 5, 1992, San Diego County Chief Deputy Medical Examiner James Bonnell, M.D., performed an autopsy on Joey's body. (28 RT 2011-2013.) There were three stab wounds to the abdomen, four to the front of the chest and one to the back of the chest. (28 RT 2016-2017.) There were four cutting type wounds in the neck and head. (28 RT 2017.) Joey had defensive wounds on his hands. (28 RT 2027, 2029-2030.) According to Bonnell, the cause of death was multiple stab wounds to the chest and abdomen area, and bruising of the brain and a skull fracture caused by a blunt impact to the head. (28 RT 2015-2016, 2026.) Joey was still alive when he suffered the head injury. (28 RT 2026-2027.) The nature of the wounds, i.e., the fact that only one was severe, indicated that this was not a rage/overkill homicide caused by a loss of control. (28 RT 2024-2026.)

B. **Defense Case**

The defense admitted that Bell killed Joey, and that Bell stole the television and boom box. The defense assertion was that the crime was a second degree murder, and the special circumstance was untrue, because the stabbing was the result of Bell's extreme intoxication, mental disorders, and/or traumatic childhood.

Steven West, director of forensic toxicology at Poison Lab, tested blood and urine samples taken from Bell the day after the offense. (31 RT 2375-2376, 2378-2380, 2384.) Both tested positive for benzoylecgonine, a cocaine metabolite. The urine sample contained more than 6000

nanograms[6] per milliliter and the blood sample contained 99 nanograms per milliliter. (31 RT 2383, 2389, 2392-2394, 2396.) Alex Sevanian, a professor of molecular pharmacology and toxicology at the University of Southern California, explained that over time, cocaine metabolites decrease in the blood and increase in the urine. (31 RT 2446-2447.) According to Sevanian, Bell's blood levels showed more than moderate cocaine use and his urine level demonstrated that he ingested an "enormous amount of cocaine." (31 RT 2452-2453.)

Doctor David E. Smith, M.D., a specialist in addictive and clinical toxicology, explained the effect of crack cocaine on the body. (32 RT 2511, 2514-2515.) Crack is very addictive because when ingested, it goes into the blood stream rapidly, causing a big surge followed by a rapid down. (32 RT 2515, 2521.) The brain then craves more. (32 RT 2517-2518.) External environmental cues, even neutral ones, can trigger drug hunger in a past abuser. (32 RT 2520.) Money is a very powerful stimulus. (32 RT 2522-2523.)

Smith stated that prolonged crack use can cause brief periods of psychosis where the user acts in a violent, irrational manner without conscious awareness of the episode, then quickly returns to normal. (32 RT 2518-2519, 2531-2553.) According to licensed clinical psychologist/marriage and family counselor Richard Levak, Ph.D., Bell had a temporary psychotic break when he stabbed Joey. (33 RT 2682-2683, 2685.) A similar transient psychotic episode occurred in 1981, when Bell, high on PCP and alcohol, stabbed 13-year old Christopher Cap in the back then sodomized him.[7] (32 RT 2557-2560; 33 RT 2683-2685.)

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[6] A nanogram is one thousand millionth of a gram. (31 RT 2435.)

[7] This crime will be referred to as the 1981 offense. Further details regarding this offense are set forth in the penalty phase evidence, below.

Doctor Levak interviewed Bell, administered the Minnesota Multiphasic Personality Inventory ["MMPI"],[8] and reviewed various documents connected with this case and with the 1981 offense. (33 RT 2956-2957.) Doctor Levak detailed factors he felt mitigated this crime. He diagnosed Bell as having borderline personality disorder. A person with this disorder can function effectively in structured situations but when faced with minor stressors, can have brief and transitory losses of contact with reality. (33 RT 2660-2661.) Bell developed the disorder at a very early age because his mother failed to show him love and affection; his father left home when Bell was six; Bell's step-father drank and alternated between tenderness and abuse; and Bell was teased as a child because he stuttered and because his mother dressed him in a "preppy" way. (33 RT 2664, 2666.) When Bell was nine, he started self-medicating with alcohol. When he was an adolescent, he turned to drugs. (33 RT 2666-2667.)

Levak and Smith both concluded that the murder of Joey was the result of Bell's cocaine intoxication, his borderline personality disorder, and his repressed childhood rage. (32 RT 2534-2536, 2563; 33 RT 2681-2683, 2686.) Smith opined that Bell's use of crack precipitated a psychotic decompensation in the form of a dissociative reaction, i.e., when Bell stabbed Joey, Bell felt like he was outside of his body. (32 RT 2536.) This was evidenced by Bell's statement to Redden that "evil forces" came into his head. Bell repressed the stabbing until the next day, when repeatedly confronted by the police. (32 RT 2536.)

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[8] The MMPI has 567 true-false questions and is designed to provide an objective measurement of an individual's personality makeup. (33 RT 2658.)

C. **Prosecution Rebuttal Case**

Experts called by the prosecution in rebuttal disputed assertions by defense experts that Bell was severely impaired by his cocaine use, that he had borderline personality disorder, and that he lost contact with reality during the stabbing.

Doctor Randall Clint Baselt, a forensic and clinical toxicologist who reviewed the toxicology results and read the transcript of Sevanian's testimony, stated that Sevanian used improper procedures to test Bell's urine sample. (35 RT 2860-2861.) Furthermore, Bell's blood and alcohol levels were not in the "abuse range," as opined by Smith. (35 RT 2876-2880.) A single "hit" of crack would produce a urine level measurement of 35,000 nanograms per milliliter. (35 RT 2862-2863.)

Doctor Reese Jones, M.D., a psychiatry professor at the University of California, San Francisco, who participated in a number of studies concerning the effect of cocaine on blood levels, urine levels and behavior, testified that proper quantitative urine level measurements of cocaine metabolite reveal astronomical amounts, up to 300,000 to 400,000 nanograms per milliliter. (36 RT 2930-2931.) Doctor Jones also explained that the effects of crack are very short-lived. (36 RT 2936-2937, 2940.) When the drug wears off, the user becomes fatigued, lethargic, and depressed. (36 RT 2940.) By the time Bell killed Joey, the peak high from his crack ingestion would have been over. (36 RT 2968-2969.) A person can take in a fair amount of crack and show minimal behavior disruption. (36 RT 2935-2936.)

According to Jones, who familiarized himself with the facts of this case, neither Bell's cocaine use, nor the circumstances surrounding its ingestion, caused a temporary psychotic break. (36 RT 2971-2972.) Such disorganization would have lasted hours, even days, not just a few minutes. (36 RT 2971-2972.) In addition, the affected individual would have a

history of these episodes. Bell did not. (36 RT 2972.) Jones noted that the only support for the "loss of contact with reality" claim was Bell's own statements to Levak describing what was in his mind at the time of the crime. (36 RT 2947.) A person would not remember a true loss of contact with reality. (36 RT 2947-2948.) The conclusions of Levak and Smith to the contrary were not supported by the facts, particularly Bell's interviews with Almos, Doucette, and Redden. (36 RT 2950-2951.) Jones found it implausible that Bell forgot the stabbing while remembering the rest of the day in detail. (36 RT 2951-2952.)

Doctor Mark J. Mills, a clinical and forensic psychologist, concurred. (37 RT 3047.) Mills reviewed various materials concerning this case.[9] Mills did not agree with the diagnosis of borderline personality disorder made by Smith and Levak. (37 RT 3058-3060.) Mills noted that Bell had no history of suicide attempts, suicide ideation, or self-mutilation, characteristics of a person with this disorder. (37 RT 3057-358.) If Bell had any personality disorder, it was a mixed personality disorder with predominately anti-social features. (37 RT 3059.)

Given a hypothetical mirroring the facts surrounding the offense as Bell related them to Redden, Mills opined that Bell did not lose contact with reality during the short time in which the stabbing occurred. (37 RT 3060-3062.) Mills noted that Bell's other actions were rational and goal-oriented. Bell was highly conscious of his environment and had the presence of mind to go to Mitchell's house, unscrew the cable box from the television, get a plastic bag, hide the knife, and cover the stolen items with a blanket. (37 RT 3106-3107.) Additionally, psychotic decompensation is

[9] The court authorized Mills to interview Bell. (37 RT 3051.) However, when Mills went to see Bell at the jail, Bell declined to be interviewed. (37 RT 3052-3053.)

a slow process and a loss of contact with reality would occur within minutes of smoking the crack cocaine. (37 RT 3062-3063, 3107.) Furthermore, records concerning Bell contained no history of dissociative reactions. Moreover, if Bell had such a reaction, he would have mentioned it to Redden. (37 RT 3064-3067.) Bell did not say anything about hallucinations until more than a year after the fact, and then made statements that were self-serving. (37 RT 3067-3068.) Mills noted that when Bell was interviewed by law enforcement after the 1981 offense, Bell blamed it on the fact that he had just used PCP for the first time. However, Bell told Levak he started using it at age thirteen. (37 RT 3068-3069.)

Mills also disagreed with testimony from defense experts that Bell blocked out the killing after it happened. If he had, when he found out about it, he would have expressed sorrow, horror, or grief at the loss of Joey's life. (37 RT 3066-3067.) The interview tapes showed, however, that Bell remained emotionless and flat. (36 RT 2951-2952.)

III. PENALTY PHASE EVIDENCE

A. Prosecution Case

The prosecution penalty phase evidence focused on the circumstances surrounding the 1981 offense; the impact it had on the victim, Christopher Cap; and the impact Joey's death had on his family.

Cap described what he remembered about the 1981 offense. Cap testified that on March 17, 1981, when he was thirteen years old, he and some friends decided to skip school so they could attend the St. Patrick's Day parade. (44 RT 3625-3626.) They watched the parade, drinking beer and smoking marijuana. (44 RT 3626-3627.) Later that night, Cap, two of Cap's friends, Kim and Derrick, and Bell, whom Cap did not know very well, went to Cap's apartment. (44 RT 3627-3628, 3636.) Derrick, who was very drunk, got sick. (44 RT 3628-3629.) Cap, Kim, and Bell carried

Derrick to Lennox Hill hospital, which was a couple of blocks away. Bell kept kicking and hitting Derrick for no reason. (44 RT 3629.)

After they took Derrick to the hospital, Kim, Bell, and Cap returned to Cap's apartment. (44 RT 3629-3640.) By this time, it was late at night. The three played games for awhile, then Kim went home. Cap and Bell remained in Cap's bedroom. (44 RT 3630.) As the two were sitting on Cap's bed talking, Bell told Cap that he had dropped his keys behind the bed and could not reach them. (44 RT 3631-3632.) Bell asked Cap to look for the keys. Cap leaned across the bed, reaching down between the bed and the wall. (44 RT 3632.) Bell stuck a fifteen inch butcher knife in Cap's back. (44 RT 3632-3633.) Cap fell to the floor. (44 RT 3633-3634.) He drifted in and out of consciousness. (44 RT 3634.) He could hear the sounds of the knife as he was trying to breathe. (44 RT 3635.) The next thing Cap remembered was trying to get up and walk. He could not stand. He lay on the floor for a few more hours until he was found and taken to the hospital, where the knife was surgically removed. (44 RT 3635.) Bell was one of the people who visited Cap in the hospital and who signed get well cards. (44 RT 3639-3640.)

In a confession given to law enforcement on March 27, 1981, Bell supplied additional details surrounding the 1981 offense. Bell stated that he retrieved the knife from Cap's kitchen when he told Cap he was getting a drink of water. (37 RT 3092-3093.) When Cap turned away, Bell stabbed Cap in the back, angling the knife until it went all the way through Cap's body. (37 RT 3094-3095, 3102.) After Cap fell to the floor, he asked Bell to take him to the hospital. (37 RT 3095-3096.) Bell ignored Cap's request. Instead, Bell went into Cap's bathroom, retrieved a jar of Vaseline, pulled Cap's pants down to his knees, removed his own pants, put some Vaseline in Cap's rear end, and sodomized him. (37 RT 3096-3097.)

Bell then got dressed, left Cap's apartment, and went home. (37 RT 3096-3097.)

Cap told the jury that after the stabbing, he lost a lot of school time and was not able to catch up. He never graduated from high school. (44 RT 3640.) He was living with his mother in the same apartment they occupied in 1981. (44 RT 3635.) Other than his mother, his sole means of support was SSI. (44 RT 3639.) For several years, Cap was paralyzed from the waist down. (44 RT 3640.) He recently regained some movement in his legs. (44 RT 3635, 3540-3541.) He still depends on a wheelchair and still has scars on his chest and back. (44 RT 3633, 3640.)

Joey's mother, Deborah Mitchell, and Mitchell's father, Joseph N. Fuller, described Joey as a typical, happy eleven-year old boy who liked to talk, ride his bike, and play. (44 RT 3618-3619, 3661, 3664-3665.) Since Joey's death, Mitchell has distanced herself from the rest of the family. (44 RT 3621-3622.) Mitchell has been unable to return to her former home on 28th Street and has moved away from San Diego, where she grew up and where many of her relatives still live. (44 RT 3619-3620, 3665-3666.) Mitchell, who took Joey's murder very hard, lives alone in San Francisco and attends therapy twice a week. (44 RT 3620, 3667.)

As part of the prosecution's penalty phase evidence, the jury was shown two additional crime scene photos, and photographs of Joey and Mitchell during a recent trip to San Francisco. (44 RT 3616-3617, 3663-3664.)

B. **Defense Case**

Defense witnesses discussed Bell's ability to adjust well in an institutionalized setting, contributions he could make if incarcerated, his normally gentle nature, his problems with drug abuse, his psychological difficulties, and his dysfunctional family background.

Shirley and Jacqueline Bell, Bell's paternal aunts, Kenneth L. Bishop, Jr., Bell's first cousin, and Lisa Marie Graves, Bell's older sister, told of a family background of physical abuse, sexual abuse, and lack of either nurturing or love. When Bell was two years old, he was hospitalized for pneumonia. (46 RT 3757-3758.) His mother visited him on only one occasion. (46 RT 3758-3759.) When Bell was a little older, he began to stutter. (46 RT 3759; 49 RT 4108-4109.) The stuttering annoyed his mother, who told him to say what he had to say or shut up. (46 RT 3759-3760, 3787; 49 RT 4109.) Bell stopped communicating with his mother and had Lisa speak for him. (49 RT 4109-4110.) In all the years Bell was growing up, his mother never showed him any affection. (46 RT 3760; 48 RT 3990; 49 RT 4108.) He had no toys. (46 RT 3783-3784.) As a result, Bell was not a loving child, was quiet and unhappy, and did not interact with other children. (46 RT 3783-3785, 3791; 48 RT 3990-3991.)

Bell's natural father was a drug user who stole from the family. (46 RT 3764; 49 RT 4105-4106, 4110.) After Bell's parents divorced, Bell's mother did not allow him to have contact with his aunts, his cousin, his father, or his grandmother, the only nurturing adults in his life. (46 RT 3763-3764, 3780, 3791-3792; 48 RT 3992-3993; 49 RT 4106.)

Bell's mother remarried while he was still a child. (49 RT 4112-4113.) The step-father beat Bell with an electric cord, a belt and his hands. (49 RT 4113-4115, 4122-4123.) The step-father sexually molested Bell's sister Lisa for several years, until Lisa joined the army, leaving Bell alone and afraid. (49 RT 4123-4126.) Bell's mother kept marijuana in the house which Lisa and Bell stole and smoked. (49 RT 4117-4119.) Additionally, in the New York neighborhood where Bell grew up, crack cocaine was prevalent, cheap, and easy to obtain. (48 RT 4006-4007.)

Several individuals who worked at or with the Harlem Valley Youth Detention Center, where Bell was incarcerated for the 1981 offense, stated

that Bell was a model inmate, never participated in violent incidents while in custody, was shy and quiet, had an excellent work ethic, was intelligent, and showed a talent for poetry, acting, and mechanics. (47 RT 3822, 3829-3832, 3838-3839; 48 RT 3916-3917, 3957-3960, 3963, 3982, 4030-4031, 4051-4054, 4068-4072.) Bell was active in Theater Rehabilitation for Youth ["TRY"], a group that gave performances in the facility. (47 RT 3818-3819, 3822-3835.) While in custody, Bell obtained his G.E.D. and participated in the college program. (48 RT 3917-3918, 4065-4066.) He worked in the kitchen and in the recreation department setting up audio-visual equipment. (48 RT 3918-3919, 4030-4032, 4049, 4065, 4067.) He was given those jobs because he could be trusted. (48 RT 48 RT 3919-3920, 4030-4031.) Bell would continue to do well in a prison setting and would have a contribution to make to other inmates. (48 RT 3924-3925, 3964, 4033-4034.)

James Park, a long time correctional consultant, explained the severe restrictions placed on prisoners who have been sentenced to life without the possibility of parole. (50 RT 4187-4204.) Park also opined that Bell would be an excellent prisoner because he adapts well to incarceration, is willing to learn, and has not been involved in any incidents since he was jailed for this crime. (50 RT 4204.) The director of TRY noted that Bell found it very difficult to forgive himself for what he had done to Cap. (47 RT 3829-3831.)

After Bell was released from custody in 1987, he was hired by TRY in their audio-visual department. (48 RT 3968-3970.) He was bright, caring, funny, and shy. (47 RT 3840-3841; 48 RT 3968-3972.) He was never violent or argumentative. (49 RT 4157.) However, he often showed up at work "strung out" on drugs. (47 RT 3841.) He was fired after less than a year because he falsely reported his weekly salary check missing, so

he could receive a replacement check. (47 RT 3843-3844.) Before he left, he worked an extra week to pay back the money he stole. (47 RT 3844.)

Two years later, Bell received training in electronics with the San Diego Urban League and enrolled in Kelsey-Jenney College. (46 RT 3770-3774, 3797-3798.) He dropped out of Kelsey-Jenney during the second semester, was arrested for violating his parole by leaving New York without permission, and was returned to custody. (46 RT 3799; 49 RT 4130-4131.) In May 1992, shortly after he returned to San Diego, he re-enrolled in Kelsey-Jenney. (46 RT 3801-3802.)

Alexander Caldwell, Ph.D., licensed clinical psychologist, echoed the opinions of Smith and Levak that Bell had a borderline personality disorder. (47 RT 3874-3875.) Caldwell opined that the murder of Joey, and the 1981 offense, resulted from transient psychotic episodes characteristic of this disorder, which in Bell's case was exacerbated by his drug use. (47 RT 3881-3883.) Bell would not engage in similar behavior in prison because it is a highly-structured, authoritarian setting. (47 RT 3884-3885, 3898.)

C. **Prosecution Rebuttal Case**

Robert A. Ruiz, a San Diego County deputy sheriff assigned as a training officer in the downtown jail, explained that Bell did not currently have much opportunity to interact with other jail inmates because he was in protective custody. (50 RT 4246-4248.) Deputy Probation Officer Bonita Miller, who prepared a pre-sentence report in connection with a conviction Bell sustained in 1991 for forgery, told the jury that she and Bell discussed the 1981 offense. (50 RT 4239-4240.) Bell claimed that he and Cap were smoking PCP, Cap grabbed a butcher knife, but Bell stabbed Cap first. Bell minimized the incident, did not mention the sodomy, said that he and Cap were still friends, and did not express any remorse over what had happened. (50 RT 4240-4241.)

IV. ARGUMENT

A. All Presumptions Are in Favor of the Judgment

Habeas corpus is an extraordinary remedy. (*In re Clark* (1993) 5 Cal.4th 750, 764, fn. 3.) Because a petition for writ of habeas corpus collaterally attacks a presumptively final criminal judgment, "the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*People v. Duvall* (1995) 9 Cal.4th 464, 474, emphasis in original.) "[A]ll presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260, superseded by statute on other grounds as stated in *In re Steele* (2004) 32 Cal.4th 682, 691.) "Although habeas corpus thus acts as a 'safety valve' [citation] for cases in which a criminal trial has resulted in a miscarriage of justice despite the provision to the accused of legal representation, a jury trial, and an appeal, this 'safety valve' role should not obscure the fact that 'habeas corpus is an extraordinary, limited remedy against a presumptively fair and valid final judgment.' [Citation.]" (*In re Reno* (2012) 55 Cal.4th 428, 450.)

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

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

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

> Once the issues [are] joined ... the court must determine whether an evidentiary hearing is needed. If the written return admits allegations in the petition that, if true, justify the relief sought, the court may grant relief without an evidentiary hearing. Conversely, consideration of the written return and matters of record may persuade the court that the contentions advanced in the petition lack merit, in which event the court may deny the petition without an evidentiary hearing. Finally, if the return and traverse reveal that petitioner's entitlement to relief hinges on the resolution of factual disputes, then the court should order an evidentiary hearing. Because appellate courts are ill-suited to conduct evidentiary hearings, it is customary for appellate courts to appoint a referee to take evidence and make recommendations as to the resolution of disputed factual issues .... After the evidentiary hearing, the court ...will then either grant or deny relief based upon the law and the facts as so determined.

(*People v. Romero, supra*, 8 Cal.4th 728, 739-740, internal citations omitted.)

The order to show cause "does not . . . establish a prima facie determination that petitioner is entitled to the relief requested. Rather, it signifies a 'preliminary determination that the petitioner has made a prima facie statement of specific facts which, if established, entitle [petitioner] to habeas corpus relief under existing law.'" (*In re Serrano* (1995) 10 Cal.4th

447, 455, quoting *In re Hochberg, supra*, 2 Cal.3d at p. 875, fn. 4.) This Court has also stated:

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

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

The order to show cause directs the respondent to address the "claims raised in the petition and the factual bases for those claims alleged in the petition." (*People v. Duvall, supra*, 9 Cal.4th at p. 475.) "When an order to show cause does issue, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition. It directs the respondent to address only those issues." (*In re Clark* (1995) 9 Cal.4th 464, 781, fn 16; *People v. Miranda* (1987) 44 Cal.3d 57, 119, fn. 37 [limiting issues in order to show cause was an implicit determination that defendant failed to make a prima facie case as to the other issues presented by petition].)

C. The Order to Show Cause Concerns Asserted Misconduct by Juror M.H. in Allegedly Talking to Her Husband About the Case Before Penalty Verdicts Were Returned

In its Order to Show Cause, this Court directed respondent "to show cause, when the matter is ordered on calendar, why petitioner should not be granted relief because of the alleged misconduct of Juror M.H., as alleged

in claim six, subclaim 7, of the petition for a writ of habeas corpus filed March 29, 2007, and amended June 22, 2009." In claim 6, subclaim 7(b), the subclaim related to Juror M.H., Bell alleges, "[J]uror [P.R.] reported that Juror [M.H.] talked to her husband about the case on the night before the verdict was returned." (Petition at pp. 196-197.) In subclaim 7(c) of paragraph 6, Bell alleges, "The prejudice to Mr. Bell resulting from [M.H.] discussing the case with non-jurors and being influenced by those interactions in [her] sentencing decision[] is patent. Moreover, the misconduct ... had a substantial and injurious effect and/or influence on the jury's determination of the penalty." (Petition at p. 197.)

Bell has submitted two declarations, one from juror P.R. and the other from juror M.H. As relevant to the subclaims here, P.R. states in her declaration, dated June 12, 2009:

> 14. I became close to one of the jurors, [M.H.], ***and it eventually came down to just her and me not wanting to vote for death. I think that Nancy, the alternate who had replaced the dismissed juror, also voted for life early on, but she ended up changing her vote to death. I did not want to vote for death because anything bad that Mr. Bell had done was when he was high on drugs. From testimony I heard in the penalty phase, including testimony from people who testified that he had worked in the kitchen in the juvenile facility without any incidents and had been well liked, I felt that he could have been a good kid if his home life and environment had been different. I felt that his life had been unfortunately wasted, but that it could have been different because I did not view him as a bad person. I felt that he had had a lot of bad breaks, and I did not feel death was the appropriate punishment in his case.***
>
> 15. ***Being one of the only two jurors in favor of a life sentence was difficult since all the other jurors were for death and wanted to get the deliberations over with, but I felt I could hold out as long as I had [M.H.] with me. At some point, probably in response to those who were forcefully arguing for death as if it were no big thing, I protested that contemplating someone's death was not an easy thing for me, to which the foreman said, "It's not hard for me. I could pull the switch***

myself." I thought that was remarkably callous and insensitive.

16. On the last day of deliberations, in the hallway before we entered the jury room, [M.H.] approached me and confessed that she had ***broken down and*** spoken to her husband ***about her dilemma to see if he could help her out of her dilemma***, and he advised her to change her vote. ***She said that she did not want to change her vote to death, but she was tired of the pressure from the other jurors to get things over with. She told me that she had decided to change her vote to death. I did not feel that I was strong enough to go up against the foreman and that other forceful male juror alone, and I did not want to be the one responsible for causing a new trial, thus wasting everyone's time and taxpayer money, so I changed my vote, too. As I mentioned, the trial was a very emotional experience for me, and though I served on Mr. Bell's trial to the best of my ability, by the last day of our deliberations I was just consumed by all that I had been through. I would not want to go through anything like that ever again.***

(9 Petition Exhibits at pp. 2426-2427, emphasis added.)

M.H. states in her declaration, dated June 13, 2009:

9. I recall almost nothing about our deliberations after the penalty phase of the trial. ***The trial had been long, and by that time, we jurors were all getting antsy and wanted to push things along. I do not recall for sure how the deliberations went. I cannot remember anything about our votes or how many jurors were in favor of life or death, or what issues were discussed.*** I was recently asked by Susan Lake, a representative of the Habeas Corpus Resource Center, if I remembered a fellow juror named [P.R.], and I said that I did not recall a juror by that name, though it is possible I might remember her if I saw a photo of her. After being shown a photo of [P.R.], I still do not have any recall of her. ***I do not recall if I voted for death at the beginning of deliberations, or not until the end of deliberations, and*** I do not recall telling [P.R.] on the day we reached our penalty verdict that I had spoken to my husband the night before ***and then decided to change my vote from life to death.*** Susan Lake asked me about this specifically, and I told her that I do not recall speaking to my husband and [P.R.] The trial was so many years ago, and I simply do not recall large

> chunks of the trial and my experience as a juror. ***It was not an experience that I have wanted to remember.*** I also served on a criminal case jury a few years after Mr. Bell's case, and it is hard for me to keep the two cases straight in my mind.

(9 Petition Exhibits at p. 2430, emphasis added.)

Evidence Code section 1150 provides, in pertinent part:

> (a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

This section limits jurors' statements regarding their deliberations to "objective facts." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 351.) While jurors can testify to statements made during or outside deliberations, they cannot testify as to how those statements effected the reasoning process of any individual juror. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-398.) This rule:

> serves a number of important policy goals: It excludes unreliable proof of jurors' thought processes and thereby preserves the stability of verdicts. It deters the harassment of jurors by losing counsel eager to discover defects in the jurors' attentive and deliberative mental processes. It reduces the risk of postverdict jury tampering. Finally, it assures the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of jurors' thought processes.

(*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 414, footnote omitted.)

"Thus, where a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance, 'open to corroboration by sight, hearing, and the other senses [citation],' which suggests a *likelihood* that one or more members of the jury were influenced by improper bias."

(*In re Hamilton* (1999) 20 Cal.4th 273, 294 [footnote omitted, emphasis in original]; accord, e.g., *People v. Steele* (2002) 27 Cal.4th 1230, 1261.)

In *People v. Danks* (2004) 32 Cal.4th 269, the defendant filed a motion for a new trial. The defendant claimed that during the penalty phase deliberations, two jurors had committed misconduct by speaking with non-jurors and reading biblical passages in the jury room. (*Id.* at pp. 297-298.) In support of the motion, the defendant submitted three declarations. In the first, juror K.A. stated, in part, "At some point during the trial I felt stress from being in court all day and attempting to go home at night and do all the home responsibilities in four hours that I normally did in eight hours . . . . because of the feelings I had, I felt the necessity of talking to my husband. . . ." (*People v. Danks, supra,* 32 Cal.4th at p. 298.) Juror E.M. stated, in part, "I was leaning toward the death penalty but I felt discomfort about imposing the death penalty. If I was going to vote for the death penalty I wanted to feel good about it. I needed to talk to someone out of a need for comfort . . . . because of the feelings I had, I felt the necessity of talking to my husband." (*Ibid.*) Juror B.P. stated, in part, that she talked to her pastor, and "[b]y that time, I had already made my decision . . ." That statement was followed by a list of reasons for her vote. (*Id.* at p. 300.) The People, in turn filed supplemental declarations from Jurors K.A. and B.P. K.A. stated, in part that: after the first day of deliberations, "I felt a great deal of stress and was upset, both due to the stress of making a decision in the case, and due to the difficulty of completing my normal home responsibilities in the evening after a full day in court[;]" and, that a Bible passage "gave her comfort." (*Ibid.*) B.P. stated, in part, "At the end of the day, I had made up my mind as to what I personally thought was the appropriate penalty. However, I felt a great deal of emotional turmoil due to the seriousness of making a life or death decision." (*Id.* at p. 301.) This Court held that the above portions of the declarations related solely to the

jurors "mental processes and subjective reasoning," and were thus inadmissible. Thus, this Court stated, "we may not consider why Juror K.A. was experiencing stress, or what verdict she was leaning toward. Nor may we consider the reasons Juror B.P. voted for the death penalty. [Citation.]" (*People v. Danks, supra,* 32 Cal.4th at p. 302.)

The italicized portions of the declarations of P.R. and M.H. are likewise inadmissible. Several of their statements directly concern the deliberations in Bell's case. For instance, P.R. states that she, M.H., and Nancy "voted for life early on," but Nancy "changed her vote to death." (9 Petition Exhibits at p. 2426.) P.R. continues by asserting that the presiding juror, and several other jurors, forcefully argued for death and wanted to "get the deliberations over with." (*Ibid.*) P.R. adds that it was difficult being only one of two jurors in favor of a life sentence. P.R. also states that M.H. told her that she, M.H., "was changing her vote to death." (*Ibid.*) She talks about a discussion between her and the presiding juror about whether Bell should be sentenced to death. (*Ibid.*) M.H. states that she cannot remember the voting process, and that she changed her vote on the last day of deliberations. (9 Petition Exhibits at p. 2430.)

Some statements in the declarations are improper because they concern the jurors' reasons for their votes. For example, P.R. states that at first, she felt life without parole was the more appropriate penalty because Bell had a difficult childhood, was not a bad person, and committed the crimes only because he was high on drugs. (9 Petition Exhibits at p. 2426.) P.R. adds that the presiding juror was in favor of a death sentence and said the decision was easy for him. (*Ibid.*) She explains that she voted for death because she was uncomfortable being the lone holdout juror, because of pressure from other jurors, and because she did not want to be responsible for a costly new trial. (*Ibid.*) M.R. states that she does not remember

telling M.H. she decided to change her vote on the last day of deliberations, after talking to her husband. (9 Petition Exhibits at p. 2430.)

Other statements in the declarations concern the jurors' feelings about the case and about their verdicts. For instance, P.R. complains that during deliberations, she felt that the presiding juror made remarks which were "callous and insensitive." (9 Petition Exhibits at p. 2426.) She says the trial consumed all of her energy. (9 Petition Exhibits at pp. 2426-2427.) She states M.H. broke down during deliberations, was tired of the pressure, and felt she [M.H.] was in a "dilemma." (*Ibid.*) Both jurors describe the trial as an emotional experience. (9 Petition Exhibits at pp. 2426, 2430.)

Additionally, P.R.'s statement that she would not want to go through another trial like Bell's (9 Petition Exhibits at p. 2427), and M.H.'s statement that the trial was an experience she would prefer to forget (9 Petition Exhibits at p. 2430), are irrelevant and should be disregarded.

Finally, P.R.'s statement that M.H. told her that she [M.H.] talked to her husband and he told her to change her vote, contains multiple levels of hearsay and is therefore inadmissible for its truth. (Evid. Code, § 1200, subd. (a); see *People v. Beaudrie* (1983) 147 Cal.App.3d 686, 893 [affidavits in habeas corpus proceedings must be based on personal knowledge and cannot contain hearsay].)

D. There Was No Juror Misconduct

A criminal defendant has a federal and state constitutional right to a fair and impartial jury. (*Irvin v. Dowd* (1961) 366 U.S. 717, 722 [81 S.Ct. 1639, 6 L.Ed.2d 751]; *In re Hitchings* (1993) 6 Cal.4th 97, 110; U.S. Const., Amend. VI; Cal. Const., art. I, § 16.) An impartial jury is one where no member has been subject to improper influence (*People v. Nesler* (1997) 16 Cal.4th 561, 568), and every juror is "'capable and willing to decide the case solely on the evidence before it.' [Citation.]" (*McDonough*

Power Equipment, Inc. v. Greenwood (1984) 468 U.S. 548, 554 [104 S.Ct. 845, 78 L.Ed.2d 663].)

When a juror directly violates "the oaths, duties and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors," the juror's action is referred to as "juror misconduct." (*In re Hamilton, supra*, 21 Cal.4th at p. 294.) Such misconduct creates a "rebuttable presumption of prejudice." (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) This presumption may be rebutted "by a showing that no prejudice actually occurred" (see *People v. Williams* (1988) 44 Cal.3d 883, 1156), or "by [the trial] court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party." (*People v. Miranda, supra,* 44 Cal.3d at p. 117). The strength of the prosecution's case can be considered in determining if any juror misconduct was prejudicial. (*People v. Cochran* (1998) 62 Cal.App.4th 826, 831.)

This standard is a pragmatic one which must take into consideration the day-to-day realities of courtroom life (*Rushen v. Spain* (1983) 464 U.S. 114, 119 [104 S.Ct. 456, 78 L.Ed.2d 267], as well as the strong competing interest of society in the stability of verdicts in criminal trials (*In re Carpenter* (1995) 9 Cal.4th 634, 655). It is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." (*Smith v. Phillips* (1982) 455 U.S. 209, 215.) Furthermore, a jury is a "fundamentally human" institution. (*People v. Marshall* (1990) 50 Cal.3d 907, 950.) It is therefore unavoidable the jurors will bring diverse backgrounds, personalities, and experiences into the jury room. (*In re Hamilton, supra*, 20 Cal.4th at p. 296.) Such diversity is both the strength and weakness of the jury system. (*People v. Marshall, supra*, 50 Cal.4th at p. 950.)

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

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

Normally, hearsay evidence is insufficient to trigger further duties of courts to inquire as to juror misconduct. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1256.) In *Hayes*, after the jury was unable to reach a verdict on penalty, the defendant moved for a new trial. The defendant alleged that a juror, Nancy W., had admitted to the defense investigator and to the prosecutor handling the guilt phase that she read a newspaper article which included prejudicial information the trial court had excluded from evidence. This information consisted of news articles regarding the defendant's prior criminal history. In support of the motion, the defendant submitted written statements from the defense investigator and defense counsel. Neither was executed under penalty of perjury. In their statements, the investigator and counsel said they interviewed Nancy, who confirmed the alleged misconduct. However, the statements continued, Nancy was asked for a declaration but refused to provide one. (*People v. Hayes, supra,* 21 Cal.4th at pp. 1253-1255.) In opposition to the motion, the prosecution submitted a declaration from juror Ida C. Ida C. stated she avoided all publicity about the trial, no publicity about the case was mentioned during deliberations, and jurors did not learn about the defendant's previous difficulties with the law until after the trial was over. (*People v. Hayes, supra,* 21 Cal.4th at p. 1254.) A similar declaration was submitted by juror Bonnie B., who added that jurors felt "out of touch" because they were precluded from reading newspapers or watching the news on television. And, the prosecutor submitted a declaration stating that he was present during an interview with Nancy, where Nancy stated she had not read any news articles about the

case. The trial court denied the motion for new trial, finding that the evidence offered in support of it was inadmissible hearsay. (*People v. Hayes, supra,* 21 Cal.4th at p. 1255.)

In his automatic appeal to this Court, the defendant argued, inter alia, that the trial court abused its discretion in failing to conduct an evidentiary hearing on his motion. This Court disagreed. This Court noted the only admissible evidence the defense investigator and defense counsel could offer is that they interviewed Nancy and she made statements. That testimony would not establish misconduct. (*Id.* at p. 1256.) The contents of Nancy's statements, as related by counsel and the investigator, were inadmissible hearsay which did not fall into an exception to the hearsay rule. (*Id.* at pp. 1256-1258.) Because the only competent evidence before the trial court was the declaration of Nancy submitted by the prosecution, in which she denied the alleged misconduct, "there was no reason for the judge to consider the possibility of holding an evidentiary hearing and there could by no abuse of discretion in failing to do so." (*Id.* at p. 1260, footnote omitted.)

Here, likewise, Bell has provided no competent evidence showing that M.H. committed misconduct. Instead, Bell has submitted a declaration from another juror, P.R. Therein, P.R. states that she spoke to M.H. in the hallway before the last day of deliberations. P.R. further states that M.H. told her she spoke to her husband the previous evening, and her husband told her to change her vote. (9 Petition Exhibits at p. 2426.) Like the statements from counsel and the investigator in *Hayes*, this declaration contains multiple levels of hearsay. Specifically, Bell offers it as proof that: (1) M.H. in fact spoke to her husband; and (2) in turn, M.H.'s husband told M.H. to change her vote. However, P.R. has no personal knowledge of the conversation, if any, between M.H. and her husband. The most P.R.

can testify to is that she spoke to M.H. and that M.H. made a statement to her. (*People v. Hayes, supra*, 21 Cal.4th at pp. 1258-1259.)[10]

Bell purports to supplement his allegations with a vague declaration from M.H. M.H. states, "I do not recall telling [P.R.] on the day we reached our penalty verdict that I had spoken to my husband the night before[.] Susan Lake [the defense investigator] asked me about this specifically, and I told her I do not recall speaking to my husband and [P.R.]." (9 Petition Exhibits at p. 2430.) M.H.'s statements are vague and can be interpreted in one of two ways, either: (1) she has no memory regarding whether she spoke to her husband and/or P.R.; or (2) she had no such conversation(s). Respondent has submitted a clarifying declaration from M.H. dated April 29, 2014, in which she states unequivocally that she never talked to her husband about the case until after the verdicts were returned. (Return Exhibit 1 at p. 1.) As in *Hayes*, the only competent evidence before this Court is a declaration by M.H. showing no juror misconduct occurred. Accordingly, habeas corpus relief should be denied.

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[10] In a supplemental declaration dated May 1, 2014, P.R. states that while she talked to M.H. on the last day of penalty phase deliberations and M.H. mentioned speaking to her husband about the case, she has no current memory of the substance of the conversation. P.R. also states that at the time, she did not feel the matter was important enough to report to the court. (Return Exhibit 2 at p. 1.)

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny habeas relief and discharge the Order to Show Cause.

Dated: May 12, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
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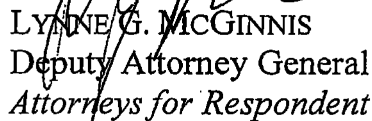

LYNNE G. MCGINNIS
Deputy Attorney General
Attorneys for Respondent

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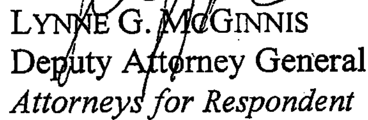
CERTIFICATE OF COMPLIANCE

I certify that the attached RETURN TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 10,009 words.

Dated: May 12, 2014

KAMALA D. HARRIS
Attorney General of California



LYNNE G. MCGINNIS
Deputy Attorney General
Attorneys for Respondent

Exhibit 1

DECLARATION OF MARIANNE HALL

I, MARIANNE HALL, declare:

1. I am competent to testify as a witness. If called to testify in court, I would testify to the following facts.

2. In 1993, I was a juror in the San Diego County Superior Court case *People v. Steven M. Bell.*

3. To the best of my recollection, Mr. Bell was on trial for killing the son of his former girlfriend. Mr. Bell had gone to his girlfriend's house to steal a television and did not know her son was there. When Mr. Bell discovered the son was at home, Mr. Bell killed him.

4. I do not recall any of the names of my fellow jurors. One of the male jurors worked for the San Diego Water Department or another utility company. We both rode the trolley to court.

5. Another female juror was in a wheelchair.

6. The presiding juror worked for the Department of Veterans' Affairs.

7. I do not recall a juror by the name of Phylis Roberts.

8. A female juror was dismissed during the trial for talking to her husband about the case.

9. I specifically recall that my husband and I did not discuss Mr. Bell's case until after the trial had concluded and verdicts were entered.

10. My husband had been on jury duty before, knew he was not supposed to ask me anything about my jury service while the trial was ongoing, and he did not do so.

11. On February 25, 2014, I conveyed the above information to Special Agent John Wilde. I understand that Mr. Wilde is an investigator working for the California Attorney General's Office, which represents the Department of Corrections in opposing the habeas corpus petition filed by Mr. Bell in the California Supreme Court challenging his conviction and death sentence. The information contained in this declaration is given willingly, and is true and correct to the best of my knowledge. I have read this

declaration carefully to ensure its accuracy. A copy of this declaration has been provided to me.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct, and that this declaration was executed in San Diego, California on April 29, 2014.

MARIANNE HALL

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Exhibit 2

DECLARATION OF PHYLIS ROBERTS

I, PHYLIS ROBERTS, declare:

1. I am competent to testify as a witness. If called to testify in court, I would testify to the following facts.

2. I am 86 years old.

3. In 1993, I was a juror in the San Diego County Superior Court case *People v. Steven M. Bell.*

4. To the best of my recollection, in this case, Mr. Bell had moved to California from New York. At the time of the crime, he was living with a girlfriend or female friend. The friend had a young son. The morning of the crime, Mr. Bell cashed a welfare check, met some friends, and bought drugs. At some point, Mr. Bell needed more money. He went home. The female friend's son was there, having been sent home early from school. The son was watching television. Mr. Bell wanted to steal the television set, sell it, and use the money to buy more drugs. He fought with the son and killed him.

5. When the defense investigator, Susan Lake, interviewed me in 2009, I remembered my fellow jurors quite well. However, my memory of those jurors has faded significantly over the past five years.

6. I do recall the presiding juror, two young African-American jurors, jurors named Marianne Hall and Nancy, and a young woman in a wheelchair.

7. 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.

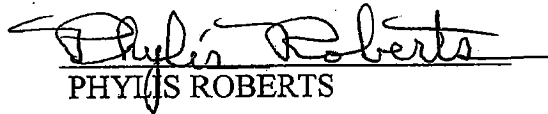
8. Marianne Hall and I had some discussions about our personal lives. For instance, she told me that someone in her family was suffering from Alzheimer's disease.

9. On the last day of the penalty phase deliberations, as we entered the court room, Marianne Hall whispered to me she had asked her husband to help her decide.

10. At the time, I did not consider my conversation with Marianne Hall important so I did not report it to the court.

11. On March 13, 2014, I conveyed the above information to Special Agent John Wilde. I understand that Mr. Wilde is an investigator working for the California Attorney General's Office, which represents the Department of Corrections in opposing the habeas corpus petition filed by Mr. Bell in the California Supreme Court challenging his conviction and death sentence. The information contained in this declaration is given willingly, and is true and correct to the best of my knowledge. I have read this declaration carefully to ensure its accuracy. A copy of this declaration has been provided to me.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct, and that this declaration was executed in Chula Vista, California on May 1, 2014.



PHYLLIS ROBERTS

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re STEVEN M. BELL On Habeas Corpus** No.: **S151362**

I declare:

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

On **May 13, 2014**, I served the attached **RETURN TO ORDER TO SHOW CAUSE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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For delivery to:
Honorable Richard M. Murphy, Judge

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San Diego, CA 92101

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 13, 2014**, at San Diego, California.

Jena Ray
Declarant

Signature

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