SUPREME COURT COPY

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 Superior Court Case No. CR133096

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

By this verified Traverse, petitioner Steven M. Bell, through his counsel, the Habeas Corpus Resource Center (HCRC), responds to the Return to the Order to Show Cause ("Return").

I. INCORPORATION BY REFERENCE

By this reference, Mr. Bell expressly incorporates and realleges each fact alleged in the Petition for Writ of Habeas Corpus ("Petition"), filed on March 29, 2007, the Amended Petition for Writ of Habeas Corpus ("Amended Petition"), filed on June 22, 2009, the Reply to the Informal Response ("Reply"), filed on September 28, 2010, and Exhibits 1 through 139 filed in support of his claims for relief, as if each fact, allegation, exhibit, and legal argument were fully set forth in this Traverse. *People v. Romero*, 8 Cal. 4th 728, 739 (1994); *In re Sixto*, 48 Cal. 3d 1247, 1252

(1989), *In re Lewallen*, 23 Cal. 3d 274, 277 (1979). Mr. Bell specifically relies on every allegation, exhibit, and legal argument made in support of Claim Six of his Amended Petition. Additionally, Mr. Bell incorporates into this Traverse the accompanying Memorandum of Points and Authorities. *In re Gay*, 19 Cal. 4th 771, 781 n.7 (1998).

Mr. Bell also requests that this Court incorporate by reference into this habeas corpus proceeding the certified record on appeal, and all of the briefs, motions, orders, and other documents and material on file in *People v. Steven M. Bell*, Case No. S038499, and *People v. Steven M. Bell*, San Diego County Superior Court Criminal Case No. CR133096. *See In re Reno*, 55 Cal. 4th 428, 444, 484 (2012) (holding habeas petitioner need not request judicial notice of all documents from prior proceedings in capital cases because this Court routinely consults prior proceedings irrespective of formal request).

II. REPLY TO RESPONDENT'S ALLEGATIONS

1. Mr. Bell denies that he killed Joey Anderson as described and alleged in paragraph I of the Return. Mr. Bell admits that he was found guilty, that the jury returned a death verdict, and the superior court imposed a judgment of death, as alleged in paragraph II. Mr. Bell denies that he was lawfully convicted and sentenced. He affirmatively alleges that his conviction and sentence are unlawful and in violation of his state and federal constitutional rights, other mandatory state law, and international law, for the reasons stated in his briefs and other pleadings on automatic appeal in Case No. S038499, and in his Petition, Amended Petition, Reply, this Traverse, and the exhibits in support of these pleadings in Case No. S151362.

2. Mr. Bell admits that this Court affirmed the judgment in its

entirety in *People v. Bell*, 40 Cal. 4th 582 (2007), and that the United States Supreme Court denied certiorari in *Bell v. California*, 552 U.S. 826, 128 S. Ct. 202 (2007), as alleged in paragraph III of the Return. Mr. Bell affirmatively alleges that the affirmance of his conviction and sentence and the denial of certiorari are erroneous, predicated upon infirm trial and appellate proceedings, and violated his state and federal constitutional rights, other mandatory state law, and international law, for the reasons stated in his briefs and other pleadings in and related to his automatic appeal in Case No. S038499, and in his Petition, Amended Petition, Reply, this Traverse, and the exhibits in support of these pleadings in Case No. S151362.

3. Petitioner admits that he timely filed a Petition for Writ of Habeas Corpus in this Court on March 29, 2007, as alleged in paragraph IV of the Return, but denies that the Petition raised no claims. Mr. Bell admits the he timely filed an Amended Petition for Writ of Habeas Corpus on June 22, 2009, as alleged in paragraph V of the Return. Mr. Bell affirms that respondent filed an Informal Response on October 15, 2009. Mr. Bell admits that he filed a timely Reply to the Informal Response on September 28, 2010.

4. Mr. Bell affirms that, on January 21, 2014, this Court issued an Order to Show Cause, as alleged in paragraph VI of the Return. Mr. Bell affirmatively alleges that this Court determined that he had established a prima facie case that he should be granted relief because of alleged juror misconduct by Juror M.H. *See People v. Duvall*, 9 Cal. 4th 464, 475 (1995).

5. Mr. Bell admits that he alleged in Claim Six, subclaim 7, that Juror M.H. committed misconduct, as alleged in paragraph VII of the Return. Mr. Bell denies that, as stated in paragraph VII, he alleged "that

Juror M.H. 'talked to her husband the night before the verdicts were returned.' (Petition at pp. 196-197.)" Return at 2. Respondent's quotation is inaccurate. Mr. Bell affirmatively alleges that in Claim Six, subclaim 7, he alleged Juror M.H. committed prejudicial misconduct by discussing the case with a person who was not a member of the jury during the penalty-phase deliberations, to wit, as reported by Juror P.R., Juror M.H. "talked to her husband about the case on the night before the verdict was returned. (Ex. 110 at 2426; *compare* Ex. 111 at 2430.)" Am. Pet. at 196-97. Mr. Bell denies that, as stated in paragraph VII, he alleged "the misconduct 'has a substantial and/or injurious effect and/or influence on the jury's determination of the penalty.' (Petition at p. 197.)" Return at 2. Respondent's quotation is again inaccurate. Mr. Bell affirmatively alleges that in Claim Six, subclaim 7, he alleged Juror M.H. (and another juror) committed "prejudicial misconduct," Am. Pet. at 196, and that:

> The prejudice to Mr. Bell resulting from two jurors discussing the case with non-jurors and being influenced by those interactions in their sentencing decision is patent. Moreover, the misconduct of the jurors had a substantial and injurious effect and/or influence on the jury's determination of the penalty.

Am. Pet. at 197. Mr. Bell admits that he supported his allegation of misconduct with a declaration of Juror P.R. Ex. 110 at 2426. Mr. Bell affirmatively alleges that, contrary to respondent's unsupported assertion in footnote 10 of its Return, Juror P.R. has a current recollection of Juror M.H.'s statement about discussing the case with her husband. Mr. Bell also admits that he submitted a declaration from Juror M.H., but denies that the declaration "states she 'does not recall' speaking to her husband. (9 Petition Exhibits at p. 2430.)" Return at 2. Respondent's quotation is again inaccurate. Mr. Bell affirmatively alleges that Juror M.H. stated in her

declaration:

> 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 [Juror 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 [Juror P.R.].

Ex. 111 at 2430.

6. Mr. Bell denies that, as alleged in paragraph VIII of the Return, "[l]arge portions of the declarations Bell has submitted concern the deliberative process and are therefore inadmissible." Return at 2. Mr. Bell further denies that "[t]hose portions of the declarations should be stricken and not considered for any purpose." Return at 2. Mr. Bell affirmatively alleges that the declarations of Juror P.R. and Juror M.H. contain admissible facts and should be considered, as more fully explained in the accompanying Memorandum of Points and Authorities.

7. Mr. Bell denies that there was no juror misconduct in his case, and denies that Juror M.H. "did not speak to her husband while the trial was ongoing," Return at 2, as alleged in paragraph IX of the Return. Mr. Bell affirmatively alleges that Juror M.H., in contravention of her duties and obligations as a juror, committed misconduct by discussing the case with her husband during the penalty-phase deliberations, deciding to vote for death after doing so, and telling Juror P.R. about the misconduct, and that both jurors were subjected to extraneous influence, in violation of Mr. Bell's state and federally protected rights as guaranteed by the United States Constitution and the California Constitution.

8. Mr. Bell denies that, as alleged in paragraph X of the Return, if there was juror misconduct, respondent rebutted the presumption of

prejudice. Mr. Bell affirmatively alleges that the presumption of prejudice has not been rebutted by respondent, and that the misconduct here is inherently and substantially likely to have influenced both jurors and substantially likely to have resulted in actual bias.

9. Mr. Bell denies respondent's general denial of "each and every allegation of the petition," as set forth in paragraph XI of the Return. Return at 3. Mr. Bell also denies that he is legally or constitutionally confined under a sentence of death, that the "legal characterization[s] contained in the petition" are erroneous, and that his factual allegations do not demonstrate his entitlement to relief. Return at 3. Mr. Bell realleges that his confinement, restraint of liberty, conviction, and sentence of death are unlawful and violated his state and federal constitutional rights, other mandatory state law, and international law, for the reasons stated in his briefs and other pleadings on automatic appeal in Case No. S038499, and in his Petition, Amended Petition, Reply, this Traverse, and the exhibits in support of these pleadings in Case No. S151362.

10. Mr. Bell admits that, as alleged in paragraph XII of the Return, a referee should be appointed and an evidentiary hearing held to resolve disputes as to any fact asserted in the Return.

11. Mr. Bell denies all allegations in the Return that are in any way contrary to or inconsistent with the facts alleged in Mr. Bell's Petition, Amended Petition, Reply, this Traverse, and the exhibits in support of these pleadings.

WHEREFORE, petitioner Steven M. Bell respectfully requests that this Court:

1. Grant the petition for writ of habeas corpus and vacate the judgment imposed against petitioner;

2. Alternatively, if the Court determines that relief should not be

granted on the pleadings because facts are in dispute, refer the matter for an evidentiary hearing before a neutral referee, and thereafter grant the petition for writ of habeas corpus and vacate the judgment imposed against petitioner; or

3. Grant petitioner such further relief as the Court deems appropriate and just in the interest of justice.

Dated: September 25, 2014 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Miro F. Cizin

Attorneys for Petitioner
Steven M. Bell

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On the morning of Friday, December 17, 1993, the jurors sitting in judgment of Steven M. Bell were about to enter their fourth day of penalty-phase deliberations. It was on Tuesday morning, December 14, that they began deliberating Mr. Bell's fate. 8 Clerk's Transcript on Appeal (CT) 1859-60. After approximately three hours and ten minutes of deliberations on Tuesday, the jurors deliberated for approximately five hours and twenty minutes each day on Wednesday, December 15, and Thursday, December 16. 8 CT 1859-64. On Friday morning, as the jurors were entering the jury room, Juror M.H. told Juror P.R. that she (M.H.) had talked to her husband about the case. After a few more hours of deliberations, the death verdict was returned. 8 CT 1865. This case certainly was not one in which the jurors easily settled on a sentence of death for Mr. Bell. The juror misconduct here immediately preceded the final few hours of deliberations and affected the outcome of the case.

Respondent argues that Mr. Bell's habeas corpus petition should be denied without a hearing, because "the only competent evidence before this Court is the declaration by M.H. showing no juror misconduct occurred." Return at 33. This argument is plainly wrong. As set forth fully below, at this stage of the habeas corpus proceeding, Mr. Bell is only required to plead his allegations for relief with particularity and include reasonably available information in support thereof. Evidentiary rules of admissibility do not restrict this Court's consideration of the allegations and supplementary exhibits accompanying the pleadings. Both the declaration of Juror P.R. submitted with the Amended Petition and the declaration of Juror P.R. submitted with the Return provide ample declaratory support

demonstrating that Juror M.H. spoke to her husband about the case and told Juror P.R., necessitating an evidentiary hearing on the alleged, disputed acts of misconduct.

Nevertheless, if this Court accepts respondent's invitation to impose a threshold requirement of evidentiary admissibility on the information provided in the declarations supporting Mr. Bell's allegations of misconduct, Juror M.H.'s avowal to Juror P.R. that she spoke to her husband who advised her to change her vote is, among other things, a prior inconsistent statement that would be admissible at a hearing under Evidence Code section 1235, and an event which was likely to have influenced the verdict improperly under Evidence Code section 1150(a).

There is sufficient information before this Court to create a factual dispute about whether acts of juror misconduct occurred at Mr. Bell's trial. Accordingly, this Court may not deny the habeas petition and discharge the Order to Show Cause without referring the matter for an evidentiary hearing before a referee in the superior court.

II. THE INFORMATION BEFORE THIS COURT IS SUFFICIENT TO CREATE A FACTUAL DISPUTE AS TO WHETHER JUROR MISCONDUCT OCCURRED AT MR. BELL'S TRIAL AND WHETHER THE STATE CAN REBUT THE PRESUMPTION OF PREJUDICE THAT ARISES FROM THE MISCONDUCT

A. A Juror Commits Serious Misconduct When She Discusses The Case Or Deliberations With A Nonjuror.

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." (internal 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) (citing *Smith v. Phillips*, 455 U.S. 209, 217 (1982)); *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"); *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").

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.

"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) (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. 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).[1]

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. [Citations.]"); *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. [Citations.]"); *People v. Davis*, 46 Cal. 4th 539, 624 (2009) (same, citing *Hamilton*); *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.")). "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

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[1] In Mr. Bell's automatic appeal, when addressing the trial court's dismissal of Juror L.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.

Hamilton, 20 Cal. 4th at 295).[2]

The presumption can be rebutted by the respondent 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); *Weatherton*, 59 Cal. 4th at 600 ("It is for the prosecutor to rebut the presumption by establishing there is 'no substantial likelihood that one or more jurors were actually biased against the defendant.'") (quoting *Hamilton*, 20 Cal. 4th at 296). 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

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[2] Respondent asserts broadly that in habeas corpus, "all presumptions favor the truth, accuracy, and fairness of the conviction and sentence..." Return at 21 (citing *People v. Gonzalez*, 51 Cal. 3d 1179, 1260 (1990)). This principle, however, may not be applied to Mr. Bell's constitutional claim of juror misconduct, because the misconduct itself creates a presumption of prejudice and undermines the integrity of the trial process. *See People v. Marshall*, 50 Cal. 3d 907, 949-51 (1990); *Weatherton*, 59 Cal. 4th at 600; *cf. Strickland v. Washington*, 466 U.S. 668, 697-98 (1984) (rejecting usual presumption of finality and ruling that "no special standards ought to apply to ineffectiveness claims made in habeas proceedings").

> 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. 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." *Id.* Under the second standard, when the Court finds a substantial likelihood that a juror was actually biased, 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).[3] "Juror bias does not require a

[3] "In an extraneous-information case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature of the juror's conduct, the circumstances under which the information was obtained, the instructions the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against the defendant."

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. [Citations.]" *Cissna*, 182 Cal. App. 4th at 1116; *see also In re Boyette*, 56 Cal. 4th 866, 899 (2013) (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.").

B. Mr. Bell Has Presented Ample Support For His Allegations Of Juror Misconduct, And An Evidentiary Hearing Must Be Held To Resolve The Factual Disputes.

In the context of habeas corpus proceedings, it has long been the law that "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." *People v. Romero*, 8 Cal. 4th 728, 739-40 (1994); *see also Tanner v. United States*, 483 U.S. 107, 120 (1987) (recognizing that "[t]he Court's holdings requir[e] an evidentiary hearing where extrinsic influence or relationships have tainted the deliberations"). In the context of a motion for new trial raising an issue of juror misconduct, this Court similarly has held that an evidentiary hearing to determine the truth of the allegations of misconduct "should be held only when the trial court, in its discretion, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact." *People v. Hedgecock*, 51 Cal. 3d 395, 415 (1990).

Though, as to new-trial motions, this Court has stated that "ordinarily a trial court does not abuse its discretion in declining to conduct an

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Carpenter, 9 Cal. 4th at 654.

evidentiary hearing on the issue of juror misconduct when the evidence proffered in support constitutes hearsay," *Dykes*, 46 Cal. 4th at 810 (citing *People v. Hayes*, 21 Cal. 4th 1211, 1256 (1999)), this general principle of typical appellate review does not equate with the procedures governing review of habeas corpus petitions.

> To satisfy the initial burden of pleading adequate grounds for relief, an application for habeas corpus must be made by petition, and "[i]f the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists." The petition should both (i) state fully and with particularity the facts on which relief is sought, as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations.

People v. Duvall, 9 Cal. 4th 464, 474 (1995) (citations omitted).

The reviewing court "evaluates [the petition] by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief," i.e., whether a prima facie case for relief has been stated. *Id.* at 474-75. Evidentiary admissibility of information supporting the allegations is not a prerequisite at this stage of review:

> The petitioner in a habeas corpus proceeding bears the ultimate burden of proving the factual allegations that serve as the basis for his or her request for habeas corpus relief. Once the issues of fact have been joined by the respondent's filing of the return to the petition and the petitioner's filing of the traverse, the court may deny relief if it concludes that the petitioner has not alleged facts sufficient to warrant relief. If relief depends upon the resolution of disputed issues of fact, the court may order an evidentiary hearing and make findings of fact with regard to such issues. The various exhibits that may accompany the petition, return, and traverse do not constitute evidence, but rather supplement the allegations to

> the extent they are incorporated by reference. At the evidentiary hearing, such exhibits are subject to admission into evidence in accordance with generally applicable rules of evidence.

In re Rosenkrantz, 29 Cal. 4th 616, 675 (2002) (citations omitted); *see also In re Fields*, 51 Cal. 3d 1063, 1070 n.2 (1990) ("Declarations attached to the petition and traverse may be incorporated into the allegations, or simply serve to persuade the court of the bona fides of the allegations."); *In re Scott*, 29 Cal. 4th 783, 822-23 (2003) (describing declarations submitted by petitioner in support of habeas petition as hearsay and holding that after the issuance of an order to show cause and evidentiary hearing, it then becomes proper for the fact-finder to consider the testimony and credibility of live witnesses rather than hearsay declarations). Issues of evidentiary admissibility are properly reserved for the evidentiary hearing on disputed issues of fact. Mr. Bell's allegations and accompanying declarations in this case demonstrate a "strong possibility that prejudicial misconduct has occurred," *Hedgecock*, 51 Cal. 3d at 419, and together with respondent's Return, create a factual dispute concerning the acts of misconduct and the resulting prejudice.

Even if it were appropriate at this stage of the proceedings to parse the declarations of Jurors P.R. and M.H., contrary to respondent's assertion, there is "competent evidence" before this Court showing that Juror M.H. committed misconduct and was subject to extraneous influence, which she also imparted to Juror P.R. Respondent argues that, because of the hearsay rule, the "most P.R. can testify to is that she spoke to M.H. and that M.H. made a statement to her," citing *Hayes*, 21 Cal. 4th at 1258-59. Return at 32-33. Respondent's argument is incorrect.[4]

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[4] Respondent further asserts in a footnote that Juror P.R. "has no

The circumstances in *Hayes* are different than those in Mr. Bell's case. In *Hayes*, the defendant "did not attempt to call [as a witness the juror who allegedly committed misconduct], did not ask for a separate evidentiary hearing, and never sought to present evidence other than, possibly, testimony by defense counsel and his investigator about the content of [the juror's] out-of-court statements to them." *Hayes*, 21 Cal. 4th at 1253; *see also id.* at 1259 (reiterating the lack of effort on the part of the defense). "No statement, sworn or unsworn, of [the juror] herself was offered." *Id.* at 1256. By contrast, Mr. Bell submitted a declaration of M.H. setting forth her lack of recall on the acts in issue. Ex. 111 at 2430. And respondent has submitted an additional declaration in which Juror M.H. states specifically that she and her husband did not discuss Mr. Bell's case until it was over. Return Ex. 1 at 1. By further contrast to *Hayes*, Juror P.R.'s declarations (both the one submitted by Mr. Bell with his Amended Petition, Ex. 110 at 2426, and the second submitted by respondent, Return Ex. 2 at 1) proffer M.H.'s out-of-court statement to P.R. that she (M.H.) spoke to her husband about the case, which is evidence that is admissible at a hearing under an exception to the hearsay rule, namely the prior inconsistent statement exception of Evidence Code section 1235.[5]

A prior inconsistent statement, offered in compliance with Evidence Code section 770, is admissible as substantive evidence under the hearsay

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current memory of the substance of the conversation" with Juror M.H. Return at 33 n.10. Respondent cites the 2014 declaration of Juror P.R. as support for this assertion. *Id.* Curiously, Juror P.R.'s declaration does not include a statement supporting respondent's assertion about Juror P.R.'s lack of current memory of her interaction with Juror M.H.

[5] In *Hayes*, this Court held that the defendant did not demonstrate the admissibility of the juror's hearsay statements under the exception for statements against penal interest or as adoptive or judicial admissions. *Hayes*, 21 Cal. 4th at 1257-58.

exception, Cal. Evid. Code § 1235 (West 1995), and generally to attack a witness's credibility, Cal. Evid. Code § 780 (West 1995). *See also 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"). Section 770 states the requirement that a witness be permitted the opportunity to explain or deny the inconsistent statement. Cal. Evid. Code § 770 (West 1995). The Evidence Code permits either the party calling the witness or any adverse party to offer in evidence an inconsistent statement of the witness, because it is admissible as substantive proof of the facts stated. *See, e.g., People v. Brown*, 35 Cal. App. 4th 1585, 1596-97 (1995); Cal. Law Revision Comm'n Comment, Evid. Code § 1235 ("Because Section 1235 permits a witness' inconsistent statements to be considered as evidence of the matters stated and not merely as evidence casting discredit on the witness, it follows that a party may introduce evidence of inconsistent statements of his own witness whether or not the witness gave damaging testimony and whether or not the party was surprised by the testimony, for such evidence is no longer irrelevant (and, hence, inadmissible)."). At an evidentiary hearing in this case, Mr. Bell intends to present the testimony of both jurors, M.H. and P.R.

The statements of Juror M.H. that she did not talk to her husband about the case until it was over, and that her husband did not ask her anything about the case while it was underway, Return Ex. 1 at 1; *see also* Ex. 111 at 2430, are inconsistent with the statements M.H. made to Juror P.R. about having talked to her husband during the deliberations and being advised by him to change her vote. Return Ex. 2 at 1; Ex. 110 at 2426.[6]

[6] The counsel M.H.'s husband provided M.H. about her vote, moreover, is not hearsay of itself, but "verbal conduct consisting of a directive that was neither inherently true or false," corroborating the improper substantive contact with a nonjuror and likely influencing both

"The fundamental requirement of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement." *People v. Homick*, 55 Cal. 4th 816, 859 (2012) (internal quotations, citation, and footnote omitted). The Law Revision Commission emphasized: "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." Cal. Law Revision Comm'n Comment, Evid. Code § 1235 (emphasis added). The Law Revision Commission noted further that the trier of fact will be able observe the demeanor of the declarant as he/she is examined and cross-examined regarding his/her statements and their subject matter, putting the trier of fact in a good position to determine the truth or falsity of the competing statements. *Id.*

The testimony of Juror P.R. concerning Juror M.H.'s prior inconsistent statements is admissible at an evidentiary hearing in this case. *See In re Hardy*, 41 Cal. 4th 977, 1001 (2007) (holding that, in light of a witness's denials of involvement in the crime, his statements otherwise were admissible at the reference hearing under Evidence Code section 1235). Because of the material, disputed issue of fact concerning the allegation of misconduct, an evidentiary hearing should be ordered in this

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jurors. *See People v. Curl*, 46 Cal. 4th 339, 362 (2009) (holding that an out-of-court statement to a witness telling the witness "to convey a message to a member of his family to 'get rid' of a pair of boots" was not hearsay); *see also People v. Cowan*, 50 Cal. 4th 401, 472 (2010) (holding that a defendant's offer to a detective to "come down right now" and speak to him about a case was not hearsay, but "'simply verbal conduct' consisting of a proposal to perform an act," citing *Curl*, 46 Cal. 4th at 362).

case. *See Romero*, 8 Cal. 4th at 739-40.[7]

Respondent also argues that certain portions of the declarations of Juror P.R. and Juror M.H. are inadmissible under Evidence Code section 1150(a). Return at 24-29. Section 1150(a) provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made,

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[7] *See also Bell v. Uribe*, 748 F.3d 857, 867 (9th Cir. 2014) ("Under Supreme Court precedent, the remedy for allegations of juror misconduct is a prompt hearing in which the trial court determines the circumstances of what transpired, the impact on the jurors, and whether or not the misconduct was prejudicial.") (citing *Smith v. Phillips*, 455 U.S. 209, 216-17 (1982)); *Barnes*, 751 F.3d at 244 ("it is clearly established federal law for purposes of our review under AEDPA that a defendant is entitled to a hearing when he or she presents a credible allegation of communications or contact between a third party and a juror concerning the matter pending before the jury." (footnote omitted); holding that petitioner's allegations of juror misconduct based on investigation summaries and an affidavit of petitioner's investigator raised a genuine concern of juror impartiality, and due process therefore required the state court to remedy this allegation by ordering a hearing in which petitioner would have enjoyed a presumption of prejudice; the state court's denial of the claim was an objectively unreasonable application of clearly established federal law to the facts of petitioner's juror misconduct claim, and its failure to investigate the juror misconduct claim was thus an abuse of discretion); *Franklin v. Virga*, No. CIV-S-05-0304 (KJM), 2013 WL 5597110 (E.D. Cal. Oct. 11, 2013), *denying reconsideration of Franklin v. Virga*, 2013 WL 1326484, at *16-17 (E.D. Cal. Mar 30, 2013) (No. CIV-S-05-0304 KJM P) (granting an evidentiary hearing in federal court on juror misconduct claim, rejected in the state court without a hearing, based on conflicting declarations submitted in state court about whether a juror made statements evidencing prejudgment); *Fullwood v. Lee*, 290 F.3d 663, 676-71 (4th Cir. 2002) (remanding for an evidentiary hearing on potential juror misconduct, and holding that an affidavit from a juror declaring that another juror was influenced by her husband who was strongly pro-death penalty and told the affiant juror and other jurors that her husband "was constantly telling [her] during the trial and during deliberations that she should convict [defendant] and sentence him to death" was admissible at the hearing and not a juror's mental process).

> 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 or to dissent from the verdict or concerning the mental processes by which it was determined.

Cal. Evid. Code § 1150 (West 2009).

"This statute 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)). "'The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration.' [Citations.]" *Id.* Moreover, when the "very making of the statement sought to be admitted would itself constitute misconduct," its admission is not barred by section 1150. *In re Stankewitz*, 40 Cal. 3d 391, 398 (1985).

Respondent concedes that certain statements of Juror M.H. and her husband as recounted by Juror P.R. are not barred from consideration by Evidence Code section 1150(a). Return at 25 (statements in Juror P.R.'s declaration about Juror M.H. saying that she spoke to her husband and he advised her to change her vote not italicized/challenged by respondent); *see also Danks*, 32 Cal. 4th at 297-302, 298 n.9, 310 n.14 (distinguishing proof of observable overt acts from jurors' subjective reasoning processes, and considering multiple objective acts and statements of jurors and of their pastors and husband).

Respondent, however, does challenge the related statement that Juror

M.H. told P.R. that she (M.H.) "had broken down" and spoke to her husband "about her dilemma to see if he could help her out of her dilemma." Return at 25. These statements, however, are admissible under precedent interpreting section 1150. In *Danks*, this Court held that comparable statements did not "relate solely to the mental processes and subjective reasoning of the juror," *Danks*, 32 Cal. 4th at 298 n.9, 302, and thus could be considered, including the following:

- "I told the pastor that I read the scripture and it gave me comfort," *id.* at 299;
- Statement that one juror told another she talked to her pastor "for guidance on the case" and that the juror "wanted to know what the Bible said about the death penalty," *id.* at 299-300;
- "I did not discuss the case or our deliberations with him, but simply the stress I felt in making the decision," *id.* at 300;
- "I told the jurors about [a Bible passage] and how that passage had given me comfort," *id.*;
- "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," *id.* at 301.

In *Danks* this Court also held that a juror's votes, and statements about her votes and when she had made up her mind were "objective acts subject to corroboration" that could be considered and used to determine prejudice. *Danks*, 32 Cal. 4th at 310 n.14; *see also People v. Steele*, 27 Cal. 4th 1230, 1265 (2002) (holding that portions of juror declarations involving "statements made or conduct occurring within the jury room" were properly considered as evidence of "objectively ascertainable overt facts"); *Stankewitz*, 40 Cal. 3d at 397 ("It is settled that jurors are competent to prove 'objective facts' under [section 1150(a)]. [Citation.]"). Thus, respondent's argument that "statements directly concern[ing] the deliberations in Bell's case" are inadmissible, Return at 28, is overly broad and mistaken. If the information proffered is an objective fact, it is not

barred by section 1150(a). Thus, for example, Juror P.R.'s statements that "it eventually came down to just [M.H.] and me wanting to vote for death...[and another juror] also voted for life early on, but she ended up changing her vote to death," Return at 24; Ex. 110 at 2426, recount objective facts that are appropriate to consider. Juror M.H.'s statement to P.R. about changing her vote to death, and her declared lack of recall also are not barred simply because they "directly concern the deliberations." Return at 28.

In sum, Mr. Bell has presented sufficient support for his allegation of misconduct by Juror M.H., which is inherently and substantially likely to have influenced both jurors and substantially likely to have resulted in actual bias. *See Hensley*, 59 Cal. 4th at 828 (holding that the totality of the circumstances demonstrated a substantial likelihood that a juror was influenced or actually biased against defendant where the juror "actively solicited his pastor's comments about the role of mercy and sympathy while still wrestling with his decision, spoke to him about this subject for 15–20 minutes, and was given directions inconsistent with the jury instructions"); *cf. Danks*, at 307 (holding one pastor's "gratuitous personal view of the appropriate penalty" and another's "unsolicited" opinion about the appropriate penalty not prejudicial); *see also id.* at 319 (Kennard, J., concurring and dissenting) ("Normally a spouse ... would have a great influence on a juror having to decide a matter of life and death."); *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.").

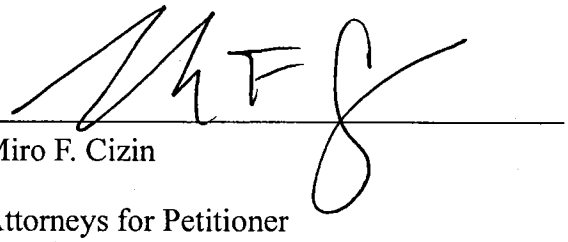
III. CONCLUSION

Based on the foregoing, petitioner respectfully requests that this Court, as is appropriate, refer the matter for an evidentiary hearing before a neutral referee, and grant the petition for writ of habeas corpus and vacate the judgment imposed against Mr. Bell.

Dated: September 25, 2014

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: 

Miro F. Cizin

Attorneys for Petitioner
Steven M. Bell

VERIFICATION

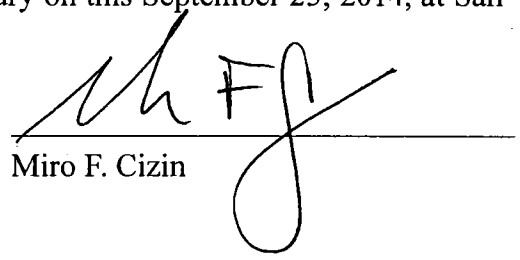
Miro F. Cizin declares as follows:

I am an attorney admitted to practice in the State of California. I represent petitioner Steven M. Bell herein, who is confined and restrained of his liberty at San Quentin State Prison.

I am authorized to file this Traverse to Return to Order to Show Cause on petitioner's behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much or more than petitioner's.

I have read the Traverse and accompanying Memorandum of Points and Authorities and know the contents to be true.

Executed under penalty of perjury on this September 25, 2014, at San Francisco, California.



Miro F. Cizin

CERTIFICATE AS TO LENGTH

I certify that this Traverse to Return to Order to Show Cause contains 7,461 words, verified through the use of the word processing program used to prepare this document.

Dated: September 25, 2014 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: _____

Miro F. Cizin

Attorneys for Petitioner
Steven M. Bell

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:

- **Traverse to Return to Order to Show Cause**

4. I served the document by enclosing it in packages or envelopes, which I then deposited with the United States Postal Service, postage fully prepaid.
5. The packages or 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: September 25, 2014

Carl Gibbs