In the Supreme Court of the State of California

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

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

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

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RESPONSE TO EXCEPTIONS TO REFEREE'S REPORT

A. Substantial Credible Evidence Supports the Referee's Findings that Juror M.H. Did Not Discuss the Case with Her Husband until Her Jury Service was Complete

Responding to Questions 1 and 2[1] by this court, the referee found there was insufficient credible evidence that M.H. and her husband Steven H. discussed Bell's case while it was ongoing. Any discussion, the referee concluded, happened after the trial was over. (Rep., p. 19.) The referee further found there was no evidence Mr. H. gave M.H. any information or advice about the case. (Rep., p. 20.)

Bell takes exception to these findings. He argues that he proved, by a preponderance of the evidence, that M.H. and Mr. H. discussed the case before the last day of penalty phase deliberations, and that Mr. H. advised M.H. to change her vote to a death sentence. (OB[2] 11.) Bell asserts that M.H. and Mr. H. were not credible witnesses because their memories had diminished, their testimony was inconsistent with their declarations, their testimony was not consistent, and they had an interest in denying any wrongdoing. (OB 12.) By contrast, Bell asserts, P.R. was credible, thoughtful, cautious, consistent, and worthy of belief. (OB 12-13.) Credibility determinations, however, are exclusively within the province of the referee. (E.g., *In re Bolden* (2009) 46 Cal.4th 216, 228 [when former jurors gave conflicting testimony about alleged misconduct, and referee found two jurors "less credible" than two others, referee's finding there was no misconduct would be upheld].)

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[1] Question 1 asked, "Did M.H. discuss the jury's deliberations, or any other aspect of the case, with her husband during her service as a juror?" Question 2 asked, "If so, when did the conversation(s) occur?"

[2] "OB" refers to Bell's opening brief on the merits.

B. The Inability of M.H. to Remember Some Details About the Trial Does Not Invalidate Her Testimony

Bell asks this court to disregard M.H.'s testimony because, according to Bell, M.H. did not remember key details about the trial. Bell also asserts that M.H. merely "assumed" she did not talk to Steven H., and that she could not actually recall if they had talked. (OB 13-15.) The evidentiary hearing record does not support either of Bell's claims. While the trial took place 21 years before the evidentiary hearing, and it is not surprising that the memories of all the witnesses were somewhat faded, M.H. was able to give quite a bit of information about her jury service. M.H. testified that she sat in the front row of the jury box. (RT 9.) Fellow jurors included a woman in a wheelchair, the foreman who worked for the Department of Veteran's Affairs, another woman who was removed for talking to her husband, and two African-American men who rode the trolley with M.H. These men assisted M.H. when her car was stolen. (RT 10.) They offered to take her home. (RT 11-12.) There was a Mira Costa College professor on the jury whose car was also stolen. (RT 11.) M.H. recalled the underlying facts of the case, i.e., that Bell was in a boyfriend/girlfriend relationship with a woman who he ended up killing. (RT 9.) M.H. also testified that she was never "sitting on the fence" or "agonizing" over her decision about the appropriate penalty for Bell. (RT 66.) And, she recalled that after the verdict, there was a get-together at one of the juror's homes. (RT 19.)

Moreover, P.R.'s memory had also faded. P.R. did not recall how the victim was killed. She did not remember the name of the prosecutor. (RT 79.) She did not recall the division of votes during the guilt phase or any particular aspects of that phase. (RT 86-87.) The only thing she recalled about the special circumstance vote was that jurors had to agree. (RT 89-90.) She testified "I can't be sure" when first asked if she recalled a juror

being dismissed from jury service. (RT 91.) She testified the penalty discussions were heated, they went on for several days, and "[t]hat's as much as I can recall." (RT 96.) She did not remember defense investigator Tom Crompton interviewing her on June 27, 2005. (RT 177-178.)

Bell labels as an "assumption" and "dubious" M.H.'s testimony that she never talked to her husband about the case. Bell claims that M.H. had no specific recollection and was therefore unable to deny or confirm whether a conversation took place. (OB 14-15.) To the contrary, M.H. testified during direct examination by Bell's counsel, "[W]e did not talk during the deliberations." (RT 28.) "My husband did not ask me questions . . . And I did not tell him anything." (RT 31.) When read paragraph 16 of P.R.'s 2009 declaration, which purported to relate a conversation the two had before they entered the jury room, M.H. testified, "As far as I'm concerned, those didn't happen. I was not involved in that." (RT 50.) "Where [P.R.] says 'had broken down and spoken to her husband about her dilemma,' that's not me." (RT 52.) On cross-examination, M.H. testified she took the court's admonishments seriously and refrained from discussing the facts of the case while it was ongoing. (RT 55.) Later on, she testified, "I wouldn't have relied on my husband, yes, that is definitely true." (RT 66.) And she again testified she did not discuss the case with another juror outside of deliberations and did not talk to her husband about the case while deliberations were going on. (RT 68.)

C. The Referee Properly Credited Steven H.'s Testimony in Reaching Her Conclusions

The referee found that Steven H. corroborated M.H.'s testimony. (Rep., pp. 18-19.) Bell takes exception to this finding, arguing that the record does not support it. (OB 19-20.) Bell is wrong. Mr. H. testified that he had previously been on two juries. (RT 415-416.) The trials occurred before M.H. served on Bell's case. (RT 417-418.) Mr. H. was the foreman

on one of those juries. In both cases, the court made it very clear that jurors were not to discuss the case outside of deliberations. (RT 417.) Thus, he was "very much" aware he was not to do so. He was not interested in the case, knew M.H. was not allowed to talk, and "I just don't like to talk, and I don't like to ask questions, and I don't like to listen either." Steven H. added, "I know that I would not have discussed the case with her" during the deliberation process. (RT 419.) He also testified that while M.H. might have told him she was on a murder trial, she did not say anything more. (RT 420.) He would not have asked anything about the trial, because "I don't ask. I'm just not interested." (RT 426.)

M.H. gave substantially similar testimony. She testified that Mr. H. had been on several juries, so he knew not to talk. (RT 29.) She testified, "My husband did not ask me questions . . . And I did not tell him anything." (RT 31.) She also testified, "He could care less." (RT 34.) "He doesn't want to have my problems too." (RT 35.)

D. Any Potential "Bias" on Behalf of M.H. and Steven H. Were Matters Left to the Consideration of the Referee

Bell asks this court to disregard the testimony of M.H. and Steven H. as "suspect." Bell argues that M.H. had an interest in denying any wrongdoing, and Mr. H. had an interest in protecting his wife. (OB 20-22.) This court should reject Bell's attempt to relitigate the credibility of witnesses.

"The main reason for an evidentiary hearing is to have the referee determine the credibility of the testimony given at the hearing. [Citation.] Because the referee observes the demeanor of the witnesses as they testify, [this court] generally defer[s] to the referee's factual findings and give[s] great weight to them when supported by substantial evidence." (*In re Bacigalupo* (2012) 55 Cal.4th 312, 333; accord, e.g., *In re Hardy* (2007) 41 Cal.4th 977, 993.) "Deference to the referee is particularly appropriate on

issues requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. [Citations.]" (*In re Price* (2011) 51 Cal.4th 547, 559, internal quotation marks omitted; accord, e.g., *In re Boyette* (2013) 56 Cal.4th 866, 876-877 (*Boyette*).)

This court rejected a similar attempt to undermine credibility in *Boyette*. There the defendant claimed that the presiding juror was biased because he willfully gave false answers during jury selection concerning his prior felony conviction and other contacts with the criminal justice system. (*Boyette*, *supra*, 56 Cal.4th at p. 871.) At an evidentiary hearing on the defendant's petition for writ of habeas corpus, the juror testified that he misunderstood the question on the juror questionnaire, one of his convictions had been expunged, and did not consider the other – a DUI – to be a criminal matter. (*Id.* at pp. 873-874.) The referee concluded that there was an honest misunderstanding and although unreasonable, the misunderstanding was not indicative of juror bias. (*Id.* at p. 874.) The defendant raised several exceptions to this finding. As pertinent here, the defendant argued that the referee "failed to give any weight" to the juror's inconsistent statements, "some of which undermined his believability." The defendant further argued, "The hearing reflects [the juror's] complete lack of credibility." (*Id.* at p. 876.) This court rejected the defendant's attempt to relitigate witness credibility, stating, "[I]n light of all the evidence, including [the juror's] demeanor while testifying, the referee reasonably credited [his] explanation for his failure to disclose his own criminal history when answering question No. 25 on the jury questionnaire." (*Id.* at p. 877.)

In his post-hearing brief, Bell made the identical argument he makes here. He asserted, "P.R. had no interest or bias in this case, unlike M.H., who understandably would not want to admit that she knowingly violated

the trial court's admonitions to not discuss the case with non-jurors or anyone outside of deliberations and then changed her position from life to death." (Petitioner's Post-Hearing Brief at p. 21.) Bell cited the same federal cases as support for this proposition. (*Id.* at pp. 21-22.) At oral argument following the evidentiary hearing, Bell's counsel told the court:

> Juror P.R. has no bias against Juror M.H. or bias against the People or any motive to falsely accuse Juror M.H. of misconduct in this case . . .
>
> . . . I contrast that with the potential for bias that exists for Juror M.H. who is being accused of misconduct, and I think there's a great reason why. She would not want to admit to misconduct all of these years later.

(1/29/16 RT 8.)[3] The referee considered these factors, and found M.H. and Steven H. to be credible. The referee stated that M.H. "was a very coherent and responsive witness." (Rep., p. 18.) Her testimony was fairly consistent that "she did not, and would not, have talked to her husband about the case or asked him to help her decide how to vote." (*Ibid.*) Her "testimony was supported by Steven H., who also testified he and M.H. did not talk about the case during deliberations." The referee pointed to testimony by M.H. and Steven H. that had both served on juries before, were aware of the court's admonition not to speak to anyone, and abided by that admonition. (*Ibid.*) Further, given Mr. H.'s avowed lack of interest in the case, it was unlikely he would have discussed it with M.H. (Rep., pp. 18-19.) Bell provides no persuasive reasons for usurping the referee's credibility determinations. His challenges to the testimony of M.H. and Steven H. should therefore fail.

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

E. The Referee's Determination Regarding P.R.'s Lack of Credibility is Entitled to Deference

Bell next asks this court to re-evaluate the credibility of P.R. (OB 22-23.) Bell argues that P.R. was detailed, accurate, and thoughtful when answering questions. According to Bell, P.R. had a clear memory of M.H., did not confuse M.H. with the A.G. (the juror who was actually dismissed), and had no bias or interest in the outcome of the case. Bell takes exception to the referee's finding that "any conversation between M.H. occurred after the trial was over," arguing that P.R.'s testimony was credible while M.H.'s testimony was "dubious." (OB 13.) The referee "had the opportunity to observe the demeanor of witnesses and their manner of testifying," and her credibility determination is therefore entitled to great deference. (*In re Williams* (1994) 7 Cal.4th 572, 595.)

In his post-hearing brief, Bell argued that P.R. should be believed because she had a better recollection of events and "she has no interest or bias in the matter[.]" (Petitioner's Post-Hearing Brief at p. 21.) He noted, "In contrast to M.H., P.R. has very specific memories of the trial and penalty deliberations." (*Id.* at p. 10.) He asserted, "All told, P.R. is more credible than M.H. regarding what occurred at Mr. Bell's trial, and M.H.'s assertions that she did not speak to P.R. outside of deliberations should not be accorded any significant weight." (*Id.* at p. 22.) At the post-hearing closing argument, Bell's counsel asserted, "[P.R.] in my opinion is an extremely credible witness. She is to be believed." (1/29/16 RT 23.) The referee disagreed. The referee found P.R.'s memory about what happened to be questionable. The referee noted that P.R. "had significant trouble following questions and there would be long pauses in her testimony." (Rep., p. 19.) When asked about her 2009 declaration, there were many events she did not recall. And, under all the circumstances, i.e., the failure of Investigator Lake to record the interview and her cryptic notes, the

declaration "cannot be said to be an accurate record of the events." (Rep., p. 19.) These credibility determinations, which the referee was in the best position to make after personally observing the witness, should not be disturbed.

F. The Referee Correctly Found a Lack of Substantial Credible Evidence that Steven H. Gave M.H. Information or Advice About the Case

Answering Question 3 posed by this court,[4] the referee found "no evidence that Stephen H. gave M.H. any information or advice about the case." (Rep., p. 20.) Bell takes exception to this finding. (OB 24-25.) Citing select portions of P.R.'s testimony, Bell argues that before deliberations were complete, M.H. told P.R. that Mr. H. "helped her make a decision on the death penalty." Bell claims that M.H. was a holdout juror in favor of life without the possibility of parole, and changed her mind after she spoke to Mr. H. (OB 25.)

The referee correctly determined that there was a lack of substantial evidence to support these claims. During the evidentiary hearing, Bell's counsel asked P.R., "Do you recall speaking to anyone as you arrived at the vicinity of the courtroom?" P.R. responded, "You know, as I sit here now, I don't recall that, but I have – like I say, I re-read the declaration and it states that I did speak with someone. At the moment I can't remember that or visualize it, but it is written that . . . ." Counsel interrupted P.R. and asked, "Do you recall speaking to M.H. about conversations she may have had with anybody about the case?" P.R. in turn asked, "Do you mean as I'm remembering right now?" When defense counsel told her "yes," P.R.'s response was, "No." (RT 98.)

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[4] Question 3 asked, "What information or advice, if any, did M.H.'s husband give to M.H.?"

After being handed her 2009 declaration and asked if it refreshed her recollection, P.R. testified she had a "fleeting kind of vague memory that [M.H.] kind of stage whispered or something to me as we were going in." (RT 99-100.) She claimed to have a "second memory of it [which] [wa]s more clear or vivid or whatever, you know." (RT 100.) Defense counsel asked P.R. for her current memory. P.R. continued to give vague testimony, stating, "It was just we knew we were both struggling, and she just kind of – I don't know – we went in together and she said 'my husband helped me decide,' and it was kind of a stage-whisper." (RT 100.) When asked the same question a short while later, P.R. admitted, "Well, my current one [memory] is the very dim, fleeting kind of statement as we were going in." (RT 102.)

The testimony by M.H. and Steven H., by contrast, was clear and unequivocal. M.H. testified that while she may have vacillated to some extent during the deliberations, she "was never sitting on the fence . . . totally agonizing over it." (RT 66.) She further testified that from the very beginning of the trial, she "knew . . . that we wouldn't discuss it, and we didn't discuss it." (RT 25-26.) She continued, "we did not talk during the deliberations." (RT 28.) "I was told that [not to talk] and I wasn't going to do it." (RT 31.) She took the court's admonishment seriously, and refrained from discussing the facts of the case while it was ongoing. (RT 55.) She also testified her husband "wouldn't have asked me and I wouldn't have told him." (RT 65-66.) At the end of her testimony, she again stated she did not discuss the case with another juror outside of deliberations, and did not talk to her husband about it. (RT 68.)

Steven H. echoed this testimony, stating he did not discuss the facts of Bell's case with M.H. during the trial. (RT 419.) Additionally, Steven H. made clear, in no uncertain terms, that he was not interested in this case or in anything else M.H. had to say. (RT 419, 426.) He testified, "I don't

listen to M. much . . . I'm not interested in what she has to say. . . She knows it . . . I'm not listening." (RT 426.)

The referee reasonably concluded, after observing and listening to the witnesses, that M.H. was simply not the type of person who would violate the court's admonitions or who would "stage whisper" to a fellow juror that she had received help deciding the case. The referee also reasonably concluded that Steven H., who admitted he tuned his wife out, would not discuss an ongoing trial with her and provide her with assistance in reaching a decision. And, the referee reasonably concluded that P.R.'s memory was questionable. The referee's finding on Question 3 should be upheld.

G. The Referee Properly Concluded that Juror M.H. Made No Statements to Juror P.R. About the Case

Responding to Question 4 posed by this court, the referee found that that the sole evidence of any conversation between M.H. and P.R. was that M.H. told P.R., "My husband helped me decide." The referee continued, "However, it is questionable whether this conversation even occurred. In addition, it is not clear what M.H. may have been referring to." (Rep., p. 20.) In response to Question 5, the referee found that the statement, if any, occurred on the last day of deliberations, before jurors entered the jury room. The referee added, "As stated previously, however, this court finds insufficient credible evidence that the conversation between M.H. and P.R. occurred at all." (*Ibid.*)[5]

Bell agrees with the referee's conclusion that the statement, if any, occurred before jurors entered the jury room. (OB 25.) Bell takes exception to the remainder of the referee's findings. (OB 25-43.) As

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[5] Question 4 asked, "Did M.H. tell P.R. about a conversation between M.H. and her husband?" Question 5 asked, "If so, when and what did M.H. tell P.R. about that conversation?"

demonstrated below, substantial evidence supported the findings. The exceptions should thus be rejected.

1. The Referee Was Entitled to Discount P.R.'s Testimony Because of P.R.'s Demeanor and Manner of Testifying

In assessing P.R.'s credibility, the referee noted:

> During her hearing testimony, [P.R.] had significant trouble following questions and there would be long pauses in her answers. In addition, when questioned about the contents of her 2009 declaration, there were many events described therein that P.R. did not recall.

(Rep., p. 19.) Bell takes issue with the referee's credibility findings. Pointing to a few portions of P.R.'s testimony, he argues that the pauses indicated she was giving thoughtful and careful responses. He asserts that memory lapses after the passage of so many years should be expected and that P.R.'s demeanor reflected a person who "to the best of her ability," tried to correctly answer the questions that were asked. Based on his own interpretation of P.R.'s believability as a witness, he asks this court to "reject the stated basis for questioning P.R.'s memory of events." (OB 27-30.) As this court has repeatedly stated:

> The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations [citation]; consequently, we give special deference to the referee on factual questions 'requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. [Citations.]

(*In re Lawley* (2008) 42 Cal.4th 1231, 1241, internal quotation marks omitted.)

In re Scott (2003) 29 Cal.4th 283 (*Scott*), illustrates the point. In *Scott*, a habeas proceeding alleging ineffective assistance of counsel at the penalty phase, the defense called several family members and friends to

testify on the defendant's behalf. After a reference hearing, the referee issued a report in which he concluded, inter alia, that the family members and friends "were in large part unbelievable and [their testimony] inferentially recently fabricated after the sentence of death had been imposed." (*Id.* at p. 800.) The referee explained, "I looked at the witnesses carefully. Based on their demeanor, I just believed that the testimony of the family and friends was exaggerated, was histrionic, and was recently fabricated. That just permeated this courtroom." (*Id.* at p. 422.) The defendant took exception to these findings. This court rapidly disposed of the defendant's complaint:

> [Defendant] discusses the testimony of each witness in detail and asks us to overturn each of the referee's credibility determinations that are adverse to him. "Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, as the referee has the opportunity to observe the witnesses' demeanor and manner of testifying." [Citation.] Indeed, the reason we require habeas corpus petitioners to prove their disputed allegations at an evidentiary hearing, rather than merely decide the merits of the case on declarations, is to obtain credibility determinations. We have compared the referee's report to the transcript of the evidentiary hearing. The factual discussion and record citations are accurate and reliable. The report, including its credibility discussion, is thorough and convincing, and fully responsive to our questions. We see no reason to overturn the referee's credibility determinations. Accordingly, we adopt his factual findings.

(*Scott, supra*, 29 Cal.4th at p. 824.)

Here, too, the evidentiary hearing record supports the referee's credibility determination. At the hearing, Bell's counsel read a portion of paragraph 9 of P.R.'s 2009 declaration to her in which she stated, "The vote for the special circumstance came down to 11 to one with a female juror, who was later dismissed, voting that the special circumstance was not true." (RT 89.) Bell's counsel asked her whether that paragraph refreshed her

recollection of the guilt phase deliberations. (RT 89-90.) She responded that it did not. Counsel asked, "You still have no memory of the special circumstance vote?" P.R.'s response was, "I recall that was something we had to vote." Defense counsel asked P.R. to read the entirety of paragraph 9 to herself then asked her if it refreshed her memory of the vote on the special circumstance. P.R. said, "It doesn't help me." (RT 90.)

Bell's counsel asked P.R. what she recalled about the jury's deliberations following the penalty phase. P.R. responded, "It was penalty." She continued, "I don't know what specifically you are asking." (RT 96.) Counsel asked her if she recalled what the vote was (on penalty) during the last day of deliberations. P.R. responded, "Well I do remember the three to one." But when the court asked P.R. to repeat her answer, P.R., referring back to her 2009 declaration, said, "I don't – I said three to one. Now I don't quite know what I meant by that, though." (RT 105.) Counsel attempted to rephrase his question, asking, "You previously testified that you recall three people voting for life without the possibility of parole, yourself, M.H., and another juror?" P.R. responded, "Yes, that's what I'm getting confused about. Yes. Three. Yes." (RT 106.)

Bell's counsel asked P.R. whether she spoke to one of the attorneys after the case was over. P.R. said an attorney called her. (RT 107.) Asked what she recalled of the conversation, P.R. responded, "Specifically, I have difficulty remembering." (RT 107-108.)

Bell's counsel questioned P.R. about paragraph 9 of her 2014 declaration, in which she crossed out the words, "At present, I don't remember what [M.H.] told me." (RT 124-125.) Counsel asked, "What were you thinking after you read that paragraph?" P.R.'s response was, "Well, I don't understand, exactly." Counsel asked if the sentence was accurate when she reviewed the declaration in 2014. P.R. responded, "Yes." Counsel asked, "It was accurate that you did not recall what she

told you?" P.R. answered, "I'm confused." Counsel tried to clarify his question by asking P.R. why she crossed out the sentence and replaced it with something else. P.R. said, "I don't know." (RT 125.) Asked if the sentence was inaccurate, P.R. in turn asked, "Possibly – possibly inaccurate because why it was crossed out?" Counsel told P.R., "That's what I'm trying to figure out is why it was crossed out and why it was replaced with the handwritten version. Do you know?" (RT 126.) P.R. replied, "I don't know." (RT 127.)

Defense counsel handed P.R. the final version of her 2014 declaration, marked as Exhibit 6, and told her what it was. P.R. asked, "What am I looking at right now?" Counsel asked her why it no longer included the sentence in the draft declaration which stated, "M.H. told me she talked to her husband about the case." P.R. asked, "Why that much of a change had happened?" She then answered, "I don't remember whether – I don't remember." (RT 130.) And, defense counsel went through P.R.'s 2009 declaration with her paragraph by paragraph. She did not remember a lot of what was in it. (RT 136-172.)

On cross-examination, the prosecutor asked P.R. whether defense investigator Lake contacted her on two occasions – May 28, 2009 and June 1, 2009. P.R. asked, "Say the dates again?" When the prosecutor repeated the dates, P.R. asked, "And that's not the date of the – that she took the declaration, is it?" The prosecutor told her it was not, and asked her if Lake interviewed her on May 28 and June 1, 2009. P.R.'s response was, "Well, would it be – she had already done a declaration. No, you are saying it was before." (RT 179.)

The prosecutor asked P.R. about a meeting she testified she had with Bell's counsel shortly before the evidentiary hearing. When asked when the meeting occurred, P.R. responded, "I don't quite understand the question. Mr. Bell's counsel?" The prosecutor asked P.R. whether she had

met multiple times with investigators and attorneys about the case. P.R. in turn asked, "Multiple times, meaning you?" (RT 181.)

Later on, the prosecutor asked P.R. whether she ever wrote any notes about her alleged conversation with M.H. P.R. asked, "By writing notes, what do you mean?" (RT 199.) The prosecutor asked P.R. if it was possible she was confusing juror A.G., who was dismissed for talking to her husband, with M.H. P.R. responded, "I don't quite understand. Confused with?" The prosecutor asked P.R. whether, when she spoke to defense counsel Peter Liss after the trial, she said she was shocked to learn that A.G. was dismissed for speaking to her husband. P.R. asked, "That's the name of the person you've referring to?" The prosecutor continued, "If I told you it was juror A.G. got excused for speaking to her husband, does that sound correct to you? Do you remember that?" (RT 201.) P.R. asked, "Speaking to him about it?" The prosecutor told P.R. she had notes documenting her conversation with Liss and asked her if they would help refresh her recollection. P.R. asked, "Notes were taken of our phone conversation?" (RT 202.) A short while later she asked, "Did I know that they were taking – recording it or taking notes?" (RT 203.)

In questioning the next day, the prosecutor asked P.R. if she remembered telling attorney Liss that there were first three holdouts, then two holdouts (in favor of life without parole). P.R. responded, "Yes." The prosecutor reminded P.R. that she testified, on direct examination, that there were three holdouts. P.R. said, "I'm confused." (RT 224.) The prosecutor went through some of P.R.'s interview with prosecution investigator Wilde, asking her why she expressed doubt about M.H. P.R. responded, "I don't know why I was so doubtful . . . but perhaps that is why it is in there." (RT 229.) The prosecutor asked her if she told Agent Wilde she was not even sure M.H. was a juror on this case. (RT 230-231.) P.R. asked, "Could you restate that?" (RT 232.)

The prosecutor asked P.R. about a later portion in the interview, where she qualified her response about a conversation with M.H. by adding, "Maybe she did." The prosecutor asked her whether the response indicated uncertainty on her part. She answered, "Uncertainty?" The prosecutor explained what she meant. (RT 243.) P.R. said, "Well, I'm getting confused as to when you are saying she told me." (RT 243-244.) The prosecutor replied, "I'm referring to when you spoke with Special Agent Wilde," to which P.R. asked, "Wilde?" P.R. answered "I guess so" when asked if the question by Wilde about M.H. triggered a memory. (RT 244.)

On redirect, defense counsel re-read the crossed-out portion of paragraph 9 of P.R.'s 2014 declaration, "at present, I don't recall what she told me." Counsel continued, "I want to just clarify. What was your reaction when you read that sentence?" P.R. responded, "Um, I don't quite recall, but it was crossed out so I must have – I must have – that might – must have been the time I told him what I did remember." (RT 262.)

Given the above testimony, the referee could reasonably conclude that P.R.'s confusion, lack of memory, and long pauses before answering questions, undermined her credibility as a witness.

2. Substantial Evidence Supports the Referee's Conclusion that P.R.'s Testimony Should be Discounted Because Her Current Recollection of Her Alleged Interaction With M.H. Was Limited

The referee found that while P.R. was not lying about what she thought happened between herself and M.H., "her memory about what happened is questionable." (Rep., p. 19) The referee observed that given P.R.'s advanced age at the time Lake interviewed her, Lake should have recorded the interview so it was clear what P.R. said. Moreover, "given Ms. Lake's cryptic notes of the interview, it is very unclear what P.R. actually recalled independently in 2009." (*Ibid.*)

Bell takes issue with the referee's observations. (OB 31-34.) Bell argues that given the passage of time, P.R.'s lack of memory was reasonable. Bell asserts that according to P.R., her 2009 declaration accurately reflected her interaction with M.H. (OB 32-33.) Moreover, Bell continues, P.R. had "no motive to perpetuate a false story." (OB 33.) And, when Lake visited P.R. in 2009, P.R. was the one who volunteered the information about M.H. (OB 33-34.)

The evidentiary hearing record supports the referee's credibility determination. Paragraph 16 of P.R.'s 2009 declaration states, "On the last day of deliberations, M.H. approached me in the hallway before we entered the jury room and confessed that she had broken down and spoken to her husband about her dilemma the night before to see if he could help her out of her dilemma, and he advised her to change her vote." (RT 166.) Defense counsel read this paragraph to P.R. and asked, "Do you have a current recollection of that event in 1993?" Counsel asked P.R. whether she would give the same testimony "today" (at the hearing). (RT 166.) P.R. responded, "No." (RT 166-167.) Asked if some of it was "not accurate," P.R. responded, "Yes." Bell's counsel asked her the same question a slightly different way, querying her as to whether the sentence was inaccurate. P.R.'s response was, "I remember it differently. So the answer would be "'yes.'" Defense counsel asked her what "was inconsistent with this sentence." (RT 167.) P.R. answered, "That we didn't speak out in the hallway, that we were going into the jury room and she said it to me in many less words than this." (RT 167-168.) Shortly thereafter, answering another question, P.R. said, "What I'm saying is – it isn't that M.H. approached me in the hallway. 'M.H. approached me and confessed that she had asked her husband to help her out of the dilemma.' It was not that much conversation. (RT 168.) Defense counsel asked, "Is there any contrary information you would provide today?" P.R. responded,

"My husband helped me decide." Referring to paragraph 16 of her declaration, P.R. observed, "See that was a long conversation, to tell me those things." Asked if the conversation was actually fairly brief, P.R. responded, "Yes." (RT 169.) P.R. also did not remember M.H. saying, "she had decided to change her vote to death." (RT 170.)

As the referee told counsel at closing arguments:

> [I]t's extremely troubling to the Court that when we get to the crux of the important statement, [P.R.] feels very uncomfortable with that language today that is in the 2009 declaration. Even the part that's written in, and says, "I don't believe that's what I said. I'm not comfortable with that. That's not how I remember it," and that's troubling too, you know, when we get to the critical paragraph 15 on page – paragraph 16 on page 5 and she changes that significantly in court during this evidentiary hearing.

(1/29/16 RT 10.) The referee noted that the details in paragraph 16 were "very different from, 'My husband helped me decide.'" (1/29/16 RT 12.) The referee rhetorically asked defense counsel, "But you're not troubled by [P.R.'s] testimony in court during this evidentiary hearing? Again, referring to page 5, paragraph 16 where she talks about that critical language, and she says, 'I think this is incorrect. I don't think I said that.'" The referee added, "[P.R.] was very uncomfortable with that language." (1/29/16 RT 14.)

The referee also questioned Lake's tactics in obtaining any statements by P.R. and Lake's credibility as a witness. Lake claimed that P.R. dictated the contents of paragraph 16 of the 2009 declaration. (RT 289.) But P.R. testified the paragraph did not reflect what she said. (RT 167-168.) Lake took sparse notes of her interview and the notes are very difficult to read. (See Exh. 2.) The interview was 90 minutes but the notes were only four and a half pages long. (RT 362.) Lake had two additional interviews with P.R. but did not take notes. (RT 351.) Lake never drafted reports; she just

took notes. (RT 305-306.) But Lake did not want to take so many notes that she was not able to listen. (RT 307.) If the matter was truly important, she would not take notes because she felt confident she would remember what was said. (RT 374.) Lake relied upon the declaration process to ferret out any errors. (RT 307.) She testified that the declaration itself, "it's memorializing the conversation." (RT 308.) Lake refused to record any of her conversations. She testified, "I don't think its good practice." (RT 352, 385, 387.) Lake could not recall exactly what P.R. said during their three interviews. (RT 376-377, 385-386.)

At closing argument, the referee asked defense counsel, "So are you going to comment for me on the way Ms. Lake conducted this investigation, and the shoddy – and I'm going to out and use that word because you have a very professional office[.]" (1 29/16 RT 14.) The referee observed:

> But I really can't believe that when someone is going back in 2009 to interview an elderly woman about a trial that many years ago, that a recording would not be made so that we're absolutely clear as to what she said in 2009, whether they were leading questions asked to her by Ms. Lake, we have no idea. Whether the notes – these are cryptic notes that Ms. Lake took down which are Exhibit . . . 2 are correct. We have no idea. Whether when she goes back for the subsequent interview there were things said or leading issues – leading questions as to Juror P.R. We have no idea. There isn't even a recording to that . . . Every single word said to her by Ms. Lake was critically important to me, and I am very unclear, sir, based on the state of the evidence as to what Ms. Lake said to her. What she said back to Ms. Lake and whether she was totally comfortable with this 2009 declaration as signed when she signed it.

(1/29/16 RT 14-15.) The referee told defense counsel, "You've got the burden, and I've got to feel confident that this investigation conducted by Ms. Lake was conducted thoroughly and professionally, and that's where I am not seeing that you've met your burden." (1/29/16 RT 17.)

Further undermining P.R.'s credibility was her answers to questions about the interview she had with Agent Wilde in March 2014. In that interview, Wilde asked P.R. if she remembered a juror named M.H. P.R. responded, "Do you have a list of names . . . I mean I came up with that, and I'm wondering if I was correct?" (RT 230.) P.R. confirmed that at the time of the interview, she was not even sure M.H. was a juror in this case. P.R. also said her memory at that time was not as clear as it was a year later, in 2015. (RT 232.) She later testified she had difficulty remembering when she spoke to Agent Wilde. (RT 235.) She was not able to provide him with any details about a conversation with M.H., if one even occurred. (RT 241-242.) Then asked why she did not tell Agent Wilde she spoke with M.H. when Wilde brought it up, P.R. responded, "I don't know." (RT 243.)

In sum, the referee could reasonably conclude that, in light of Lake's failure to record the interviews, and P.R.'s different versions of events, those events did not occur at all.[6]

3. The Referee Could Reasonably Conclude That Juror P.R. Was Confused

The referee found that it could "not rule out the possibility that P.R. is confusing M.H. with the juror who was actually dismissed for speaking to her husband during trial." (Rep., p. 19.) Bell challenges the referee's conclusion. Bell notes that P.R. accurately described M.H. at the evidentiary hearing, identified M.H. in a photograph that habeas counsel

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[6] Bell argues, "the evidence before the referee does not substantiate a finding that P.R. was led and manipulated into believing and making statements under oath from 2009 to 2015, about an event she did not actually experience." (OB 34.) The referee made no such finding; nor was there ever a claim of "manipulation." Indeed, the referee stated, "the Court does not believe P.R. is lying about what she recalls." (Rep., p. 19.) The referee concluded, rather, that P.R. was confused or mistaken. (*Ibid.*)

showed her a few days before the hearing, and recognized her in the hallway right before the hearing. Bell discusses statements by P.R. in her 2009 declaration in which she was able to distinguish the guilt and penalty phases. (OB 35.) Bell also focuses on testimony by Susan Lake that she (Lake) did not think there was any confusion. (OB 35-36.)

The evidentiary hearing record supports the referee's determination. Bell's counsel asked P.R. whether she recalled a juror being excused from jury service. (RT 90.) P.R. responded, "Yes, I do." Asked what she recalled about that event, P.R. said, "Well, I don't recall it very well. I believe – I'm not sure if it was the same person that is written about here in paragraph 9" [of the 2009 declaration]. P.R. answered, "um-hmm" and "yes" when asked if that juror was dismissed during the special circumstance vote. Counsel asked her, "At some point, do you have any recollection of a juror being excused from jury service?" P.R. in turn asked, "You mean other than this person?" When defense counsel said, "anybody," P.R. responded, "I can't be sure." (RT 91.) Defense counsel asked P.R. whether the name A.G. meant anything to her. P.R. said it sounded familiar. P.R. answered "yes" when then asked if there was a juror in the Navy. (RT 91.) That juror "was a young woman, and she's the one that was – did leave, I think." (RT 91-92.) P.R. first testified she did not recall why A.G. left. When asked again, P.R. said, "Well, I want to say because she had talked to someone else about the case, but I may be confused with this young woman mentioned in [paragraph] number 9." (RT 92.) Bell's counsel asked, "So paragraph 9 that you read to yourself describes the dismissal of a juror during the guilt phase deliberations, is that your understanding?" (RT 92-93.) P.R.'s response was, "I'm not sure." P.R. then said, "I'm getting that confused with the young woman who was in the Navy. It's not the same – one in [sic: and] the same person?" Bell's

counsel asked P.R. whether the excused juror was the woman in the Navy. P.R. responded, "I think it is, but I'm not positive." (RT 93.)

The prosecutor asked P.R., "Is it possible that you are confusing what occurred with the juror that was excused for talking to her husband with this conversation you testified about with M.H.? P.R. said, "I don't quite understand, confused with?" Asked again, P.R. denied it, testifying, "no, no, no." But she then expressed confusion once again. The prosecutor asked her if she recalled telling trial counsel, Peter Liss, she was shocked to read in the paper that A.G. was excused for talking to her husband. P.R. asked, "That's the name of the person you've been referring to?" The prosecutor responded, "Yes. If I told you it was Juror A.G. got excused for speaking to her husband, does that sound correct to you? Do you remember that?" (RT 90.) P.R. asked, "Speaking to him about it?" Asked if Juror A.G.'s name refreshed her memory, P.R. testified she was unsure. (RT 202.)

The prosecutor returned to the subject the following day. The prosecutor noted that during her interview with Agent Wilde, P.R. was asked why a juror was dismissed from jury service. At that time, P.R. told Wilde, "I think she didn't want to be there. I don't recall that she was dismissed for any misconduct or anything like that. She had very – uh, she didn't want to be there." (RT 232.) The following colloquy ensued:

> Q. So, in reviewing those statements, is it fair to say you told Special Agent Wilde that she got dismissed because she didn't want to be there?
>
> A. Yes.
>
> Q. And you didn't believe at the time you spoke with Special Agent Wilde that she had been excused for speaking about the case with her husband?
>
> A. Well that's – No, I didn't remember. I thought I heard about it later.

Q. What do you mean by that?

A. That she was dismissed.

Q. You found out about it shortly after the trial, right?

A. Yes.

Q. When you spoke with Special Agent Wilde in 2014, you would have been aware that that juror was excused for speaking about the case with her husband, right?

A. Yes.

Q. But you told him that you thought she was excused?

A. Well, I had forgotten the part about her speaking to her husband.

(RT 513-514.) The prosecutor read P.R. further portions of her interview with Agent Wilde, where P.R. had told him that it was possible this particular woman (A.G.) was the one who talked to her husband. (RT 234.) Asked about it, P.R. testified, "I remember being confused as to whether there were two different people . . . I do remember feeling whether it was two people that had left or I was hearing about the same person." (RT 235.) P.R. answered "yes" when the prosecutor asked her whether she was confused as to why the jurors left. (RT 236.)

On redirect examination defense counsel asked, "As you sit here today, do you know how many jurors were removed from jury service?" P.R. responded, "I guess it was only one." Asked who, P.R. replied, "Well, it must have been A.G." (RT 255.)

In sum, the referee could reasonably conclude that P.R. might have confused M.H. with A.G.

4. The Referee Appropriately Considered Juror P.R.'s Fifteen Year Delay in Disclosing the Alleged Misconduct by Juror M.H.

The referee found it noteworthy that while P.R. spoke to Liss shortly after trial, at which point when P.R. was aware that a juror had been dismissed for talking to her husband, P.R. did not mention her alleged conversation with M.H. (Rep., p. 19.) At closing arguments, the referee told the parties:

> And, of course, in the back of my head, I've got this lingering issue of why when [P.R.] interviews with the lawyer right after the trial, and they're clearly talking about misconduct, no mention whatsoever, no mention of this incident. And they talk about the other juror that got excused for talking to her husband, which is a very bizarre coincidence in this case.

(1/29/16 RT 17.) Bell challenges the court's credibility finding, arguing that P.R.'s conduct was "eminently reasonable" because she did not feel Liss was a confidant, and she did not want to jeopardize her "bond" with M.H. (OB 36-37.) The evidentiary hearing record supports the referee's observations.

Susan Lake was no more of a confidant than Peter Liss. P.R. met Lake only once while she had the opportunity to observe Liss throughout the trial. Moreover, the fact Liss was not a confidant was one of many varying explanations P.R. gave for her failure to disclose. Questioned by the prosecutor, P.R. testified that she spoke to Liss in January or February of 1994. "It would have to have been" after she learned that a juror was excused for talking about the case with her husband. (RT 196.) The matter was discussed further, as follows:

> Q. You never told Mr. Liss about this conversation you had with M.H. on the last day of deliberations. Is that fair to say?
>
> A. I think so. I don't think he discussed it with me. I wouldn't have unless he asked me.

Q. And would you agree that that would have been a good opportunity to tell him about this conversation?

A. Yes, it would have been.

(RT 197, emphasis added.) A short while later, P.R. gave a different reason:

Q. When did you become aware that this conversation you testified about with M.H. was important?

A. Well, I knew that it was not the right thing to do. I mean, that we weren't supposed to have exchanged any words, but what was – when did it?

Q. When did you become aware that this conversation you testified about with M.H. – When did you realize it was important? That it might be important?

A. Probably not until that first declaration. It didn't register as that important.

(RT 199, emphasis added.) Later the prosecutor asked, "And you agree that that would have been an important thing to tell [Liss] now?" P.R. answered, "Yes." (RT 223.)

On redirect, Bell's counsel asked P.R. why she did not talk to Liss about the conversation. (RT 260.) At that point she testified, "I had not done the proper thing, and I didn't feel that he was a confidant of mine that I was going to share – if I was going to bring that up, it would not have been him and over the telephone." (RT 261.) Defense counsel asked, "And you remember having that feeling when you were speaking with him?" P.R. responded, "Well, I don't remember. I probably wasn't – In all the conversation, I probably wasn't thinking about that particular thing." (RT 261, emphasis added.)

The prosecutor unsuccessfully sought to clarify P.R.'s testimony:

Q. You just testified on redirect that the reason you didn't tell Mr. Liss about this conversation with M.H. was because he wasn't a confidant, is that right?

A. Yes.

Q. Those were the words you used, is that correct?

A. Yes.

Q. And yesterday, didn't you testify the reason you didn't tell Mr. Liss was because you didn't think it was important?

A. Well, probably both those things.

(RT 265-266, emphasis added.)

Finally, not once did P.R. testify that she was reluctant to make a disclosure to Liss because she felt she had bonded with M.H. In sum, the referee could reasonably take into account P.R.'s 15 year delay making a report.

H. The Referee Correctly Determined that it Was Unclear Exactly What, if Anything, Juror M.H. Told Juror P.R.

The referee found that assuming, arguendo, M.H. said 'My husband helped me decide,' "there is no evidence showing *what* he helped her decide." (Rep., p. 19, emphasis in original.) The referee added that while P.R. "did affirm at the hearing that M.H. said that her husband helped her decide 'the penalty phase of the case' . . . this was in response to a leading question. P.R. did not add this phrase at any point in her testimony." (*Ibid.*)

Bell challenges the referee's conclusion. (OB 37-39.) Bell argues that because the statement was made during the penalty phase deliberations, shortly before the verdict was announced, the only reasonable interpretation is that M.H. said her husband helped her decide to vote for the death penalty. (OB 38-39.) Bell ignores the applicable standard of review. "As long as there is substantial evidence to support the referee's determinations, they will be upheld. [Citation.]" (*People v. Garcia* (1993) 17 Cal.App.4th 1169, 1182.)

Here, P.R. testified only that M.H. said, "My husband helped me decide." (RT 103, 104.) She described her memory as "very dim, fleeting kind of statement she made as we were going in." (RT 102.) "[I]t was kind of a stage whisper." (RT 103.) The statement consisted of one sentence, "My husband helped me decide." (RT 104, 170, 273.) The phrase "penalty phase of the case" was added by Bell's counsel, who asked, "Is there any question in your mind that M.H. said to you that her husband had helped her decide the penalty phase of the case?" (RT 263-264.) In short, the referee could reasonably conclude that given P.R.'s admittedly limited recall and lack of detail, the statement, if one was made, was vague and did not establish juror misconduct.[7]

RESPONSE TO CHALLENGES TO REFEREE'S EVIDENTIARY RULINGS

A. P.R.'s Statement that "We Were Both Struggling" During Deliberations was Inadmissible Under Evidence Code Section 1150

At the evidentiary hearing, P.R. testified, "It was just we knew we were both struggling, and she just kind of – I don't know – we went in together and [M.H.] said my husband helped me decide, and it was kind of a stage whisper." (RT 101.) The prosecutor objected under Evidence Code section 1150. (RT 101.) The referee sustained the objection, finding that the statement was "a reference to [P.R.'s] mental processes during deliberations" and was thus inadmissible. (Rep., p. 11.) Respondent agrees.

Evidence Code section 1150 provides, in pertinent part:

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[7] Respondent addresses this contention in an abundance of caution. Respondent asks this court to adopt the referee's finding that M.H. did not talk to P.R. at all.

> (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 (*Danks*), the defendant filed a motion for a new trial. The defendant claimed that during the penalty 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. . . ." (*Id.* 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 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.]" (*Id.* at p. 302.)

Like the statements about "emotional turmoil" and "stress," P.R.'s comment about a "struggle" related to her mental state during deliberations. She was stating in the declaration that she had difficulty deciding between life without parole and the death penalty. P.R.'s statement about M.H.'s alleged struggle concerned the mental state of M.H. while M.H. was trying to make a decision on the case.

Bell argues that the statement was not protected because it was "an objectively ascertainable fact grounded in the divided votes of the jurors[.]" Bell continues, "Just as the testimony concerning the division of the jury votes is admissible evidence of an overt act, so to is P.R.'s description of her own and M.H.'s behavior related to the deliberations." (OB 26, fn. 8.) However, as explained above, a person's "struggle" clearly relates to his or her own thought process, not to the juror's behavior. Moreover, a divided vote says nothing about the mindset of any juror. Jurors can be firm and steadfast in their positions but still disagree. And, unlike a juror's internal struggle, the numerical division of a jury is "open to sight, hearing, and the other senses and thus subject to corroboration. [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 523.) Accordingly, Bell's argument fails.

B. Prior Statements by Juror M.H. and by Her Husband Did Not Qualify for Admission as Prior Inconsistent Statements

1. Paragraph 9 of Juror M.H.'s 2009 Declaration

Bell notes that in paragraph 9 her 2009 declaration, M.H. said "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 . . . I do not recall speaking to my husband or P.R." (OB 15, see Exh. 8 at par. 9.) The referee found that this was not a prior inconsistent statement because it was not materially inconsistent with

M.H.'s testimony at the evidentiary hearing. (Rep., pp. 13-14.) The referee explained:

> Although M.H. testified at the hearing that she did not speak with her husband about the case until it was over (RT 31-32), she also fully admitted that she did not remember speaking to her husband about the case (RT 33, 34-35, 64-65). She stated her conclusion that the conversation did not happen was based, in part, on the fact that she did not recall it happening.

(Rep., pp. 13-14.) Bell takes exception to this finding, arguing that the referee should have considered paragraph 9 for its substance or at minimum in assessing M.H.'s credibility in court. (OB 15-16.) Respondent disagrees.

Section 1235 of the Evidence Code provides, "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 precludes admission of such a statement unless the witness is: (1) confronted with the statement and afforded an opportunity to explain or deny it; and (2) has not been excused from giving further testimony at the proceeding.

Evidence Code section 1235 permits the introduction of a witness's prior statements when the witness testifies inconsistently with them or denies having made them. (*People v. Bryant* (2014) 60 Cal.4th 335, 414.) The statements are admissible "to prove their substance as well as impeach the declarant. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1144, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Admission is not justified, however, unless there is a true inconsistency. "The fundamental requirement of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony.

[Citation.] Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness's prior statement. [Citations.]" (*People v. Homick* (2012) 55 Cal.4th 816, 859, emphasis in original, internal quotation marks omitted.)

For instance, in *People v. Johnson* (1992) 3 Cal.4th 1183, the victim's daughter selected the defendant's photograph in a photo lineup and said she was positive it depicted the person who killed her mother. At trial, defense counsel asked the witness if she had identified the person in the photograph by name. The witness responded, "I might have, I don't remember. I remember saying this is him, and it wasn't by name, it was by his face." (*Id.* at p. 1218.) On redirect, asked who she was identifying, she responded, "Willie Johnson" (defendant). (*Id.* at pp. 1218-1219.) Over defense objection, the trial court allowed the prosecutor to read into evidence preliminary hearing testimony of the witness where, when asked if she felt the person was the proper one because he looked like someone in a prior lineup, she responded, "No. I remember him as the one standing over me with the 12 gauge shotgun, that's what I remember." (*Id.* at p. 1219.) This court held that allowing the prior testimony into evidence was error. This court noted that the witness's statement on cross-examination, despite her momentary uncertainty, was effectively the same as her prior testimony – she identified defendant based on her memory of his appearance as he was committing his crimes. The most that could be said about her redirect testimony, "is that it was somewhat ambiguous, not that it was necessarily inconsistent with her prior statement or was evasive in any way." (*Ibid.*)

The same is true here. In 2009, M.H. signed a declaration prepared by HCRC in which she stated that she had no recall of P.R. and did not remember speaking to P.R. the night before the jury reached its verdict. (Exh. 8 at par. 9.) At the evidentiary hearing, M.H. testified that the

declaration "Is somebody else's words. I mean they are not all my words. I mean it's not verbatim. It's the gist of what we talked about." (RT 20.) M.H. explained at the evidentiary hearing that to her, "I don't recall" and "it did not happen" meant the same thing, testifying, "If I don't recall it happening, then it didn't happen." "Well, I feel that I don't recall it and I didn't do it based on my recall." (RT 66.)

Citing *People v. Green* (1971) 3 Cal.3d 981 (*Green*), overruled on other grounds in *People v. Chavez* (1980) 26 Cal.3d 334, 357, Bell argues that prior statements are admissible in cases of a "forgetful witness." (OB 16.) *Green* is not on point. In *Green*, a witness at the defendant's preliminary hearing testified that the defendant came to his [the witness's] home and told the witness he had a kilo of marijuana he wanted the witness to sell. The marijuana was packaged in 29 baggies which were inside a large shopping bag. The defendant said the shopping bag was hidden at the defendant's father's house and directed the witness to that location. In a statement to a police officer, the witness said the defendant called him on the phone and told him he had a kilo of "stuff" or "grass" which he wanted to leave at the witness's house. The witness agreed. Later that day, the defendant brought over a bag containing 29 baggies of marijuana. At trial, the witness testified that defendant called him, asked the witness to sell marijuana for him, and he agreed. However, when the prosecutor asked the witness what happened next, the witness testified he was not absolutely sure the defendant came to his house. Asked if the defendant brought anything to his house, the witness responded, "I don't recall." The witness claimed he was on LSD the night of the crime. (*Green*, *supra*, 3 Cal.3d at p. 986.) The prosecutor showed the witness the preliminary hearing testimony but the witness nonetheless testified he did not recall how he obtained shopping bag full of marijuana. (*Id.* at pp. 986-987.) He testified "[he] suppose[d]" someone told him where to find it but he could not say

exactly who it was. Although he gave more detail when shown additional preliminary hearing testimony, on examination by defense counsel, he again backtracked, claiming he was "not positive" what happened after he spoke to the defendant on the phone. (*Id.* at p. 986.) This court held that the witness's prior statements were admissible under Evidence Code sections 770 and 1235. (*Green, supra*, 3 Cal.3d at p. 988.) This court noted that "[i]n normal circumstances, the testimony of a witness that he does not remember an event is not 'inconsistent' with a prior statement by him describing that event. [Citation.]" (*Ibid.*) But an exception to this rule applies in cases, such as the one before the court, where the witness is deliberately evasive. In those circumstances, the witness's alleged lack of recollection constitutes an "implied denial" that the prior statements were true. (*Id.* at p. 408.) The prior statements are therefore "materially inconsistent" with the trial testimony and are admissible in evidence. (*Id.* at pp 408-409.)

Here, by contrast, there was no finding by the referee, nor does the record support the inference, that at any point M.H. was deliberately evasive or non-responsive. And any ambiguity in her 2009 declaration was a function of the way Susan Lake drafted it, not because of a change in position by M.H. Since M.H. did not suffer from a "lack of memory [which] was []either total []or suspiciously selective" and her "testimony in general outline was consistent" with the declaration, it was properly excluded. (*People v. Price* (1991) 1 Cal.4th 324, 413-414.)

2. Steven H.'s 2015 Interview with Agent Wilde

Bell also argues for admission of a portion of Mr. H.'s February 2015 interview with Agent Wilde. Bell quotes the following exchange, argues that it is an "inconsistent" statement, and cites it as proof that a pre-deliberation conversation between M.H. and Steven H. occurred. (OB 18-20.)

Q.: So she never spoke to you, ah, during the trial about, ah, about the trial during it?

A.: If she did, I don't remember it. I just remember when it finally got over the small particulars about it.

Q. Okay. But generally, uh, no conversation during the trial.

A. I may have heard something but - -

Q. Okay.

A. But whatever it might be, I can't remember what it was.

(RT 422-423, quoting Exh. 14 at 3-4.) The referee found that this exchange was not admissible as a prior inconsistent statement because it was not materially inconsistent with the testimony at the evidentiary hearing. (Rep., pp. 14-15.) Bell takes exception to this finding. (OB 18-20.) The exception is not well-founded.

Mr. H. testified that he knew M.H. was serving as a juror on a murder trial, but knew nothing else about the case. (RT 420.) Mr. H. also testified that he would not have asked M.H. anything about the trial, because he was not interested. (RT 426.) Likewise, before the portion quoted by Bell, Mr. H. told Agent Wilde he was aware that M.H. was on a jury. (Exh. 14 at 2.) Asked if he knew anything about her jury service, Mr. H. responded, "No I don't. I don't know anything about that." (Exh. 14 at 2-3.) When Agent Wilde asked him how and when he learned about the Steven Bell trial, he said, "It was after the trial was over." (Exh. 14 at 3.) This is entirely consistent with his evidentiary hearing testimony that he was not interested, he would not have asked anything, and does not listen to anything M.H. has to say. (RT 419, 426.) Further, as the referee noted, while Mr. H. said he "may have heard something," he did not recall what he heard or when. (Rep., p. 15.) It may well have been after the trial was over. Even if it was during the trial, the statement is consistent with his evidentiary hearing

testimony that he knew M.H. was serving on a murder trial. (RT 420.) Because the statements were "largely consistent," the referee properly ruled that the interview was not admissible under Evidence Code section 1235. (*People v. Arias* (1996) 13 Cal.4th 92, 153.)

C. The Referee Properly Excluded Juror P.R.'s 2009 Declaration, Because Bell Did Not Establish the Foundational Requirements for its Admission as Past Recollection Recorded

Bell asked the referee to admit P.R.'s 2009 declaration, and particularly paragraph 16, as past recollection recorded. (Petitioner's Post-Hearing Brief at pp. 5-6.) The prosecutor asked the court to exclude it, arguing that it did not meet the necessary foundational requirements. (People's Response at pp. 7-9.) The referee agreed with the prosecution. The referee found that the statements in the declaration were not close enough in time to the events, and the declaration was not adequately accurate or reliable. (Rep., pp. 16-18.) Bell challenges the referee's ruling. (OB 39-43.) The ruling should stand.

Section 1237 of the Evidence Code provides, in part:

> (a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which:
>
> (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory;
>
> (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made;
>
> (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and

(4) Is offered after the writing is authenticated as an accurate record of the statement.

Here, while P.R. had insufficient recollection at the time of the evidentiary hearing, the first, third, and fourth foundational requirements were not met. As to the first requirement, P.R. did not speak to Lake until 2009 - *sixteen years* after Bell's trial was over. P.R. testified that by the time she spoke to Lake, she had "done away" with her "jury notes and anything." The prosecutor asked her, "When you spoke with Susan Lake, is it fair to say you hadn't thought about the case recently prior to talking to her?" P.R. answered, "Yes." The prosecutor continued, "And you hadn't thought about the case in months?" P.R. responded, "Probably not." (RT 247.) The prosecutor asked, "Well, it's fair to say the events were not fresh in your mind?" P.R.'s response was, "That's true." (RT 248.)

As to the third and fourth requirements, P.R. testified that paragraph 16 "differ[ed] quite a bit" from what she remembered. (RT 127.) There was no "big conversation in the hall." (RT 129.) What she recalled was that M.H. whispered that her husband helped her decide, "rather than the way it was written up from Susan Lake's[.]" (RT 127.) When Bell's counsel read paragraph 16 to P.R., she stated it was "not accurate." She continued, "I remember it differently." (RT 167.) "We were going into the jury room and she said it to me in many less words than this." (RT 167-168.) "It was not that much of a conversation." (RT 168.) "It isn't that M.H. approached me and had a conversation in the hallway." (RT 168.)

Bell's reliance on *People v. Cowan* (2010) 50 Cal.4th 401 (*Cowan*) (OB 40); *United States v. Senak* (7th Cir. 1975) 527 F.2d 129 (*Senak*) (OB 40) and *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*) is misplaced.

In *Cowan*, a witness testified that he met the defendant at an auto parts store, because the defendant owed him money. The witness could not

recall the date and time they met. The witness went to the home of the defendant's brothers, where he looked at various items, including jewelry, coins, and paperwork belonging to the victim. The witness also testified he would not have remembered anything if he had not looked at a transcript of an interview he had with a police officer three months earlier. Over the defendant's objection, the trial court allowed the prosecutor to call the officer who interviewed the witness. The officer testified that the witness told him the meeting with defendant occurred during the first week in September 1984. (*Cowan, supra*, 50 Cal.4th at p. 464.) The witness also described various items of property he had seen at the defendant's brother's house. (*Id.* at pp. 464-465.)

On his automatic appeal from a judgment imposing the death penalty, the defendant claimed that the trial court should have excluded the officer's testimony because it was hearsay. This court disagreed, concluding that it was admissible under Evidence Code section 1237. (*Cowan, supra*, 50 Cal.4th p. 465.) This court rejected, as forfeited and lacking in merit, the defendant's assertion that three months was too long after the event for the prior statement to qualify as "fresh." (*Id.* at pp. 465-466.) Observing that courts "have the flexibility to consider all pertinent circumstances in determining whether the matter was fresh in the witness's memory when the statement was made [citation]," this court noted that the statement was very detailed, and the witness had sufficient recollection to lead the detective to the house where he had seen the items. This court concluded, "Accordingly, there was a sufficient basis for concluding the events were reasonably fresh in [the witness's] mind at the time he spoke to [the officer]." (*Id.* at p. 466.) This court also found that the witness had reliably vouched for the truthfulness of the statement – "He repeatedly testified that he told [the officer] the truth to the best of his ability." (*Ibid.*)

The witness in *Senak* testified to a conversation he had with the defendant. The witness remembered a portion of the conversation but not all of it. The prosecution refreshed her memory with a memorandum of a statement she gave to FBI agents three years earlier. (*Senak*, *supra*, 529 F.2d at p. 136.) The witness answered "yes" when asked, "[Was] this a true statement at the time you were interviewed by the FBI Agents[?]" (*Ibid.*) On appeal from his conviction for federal offenses, the defendant argued the memorandum was too old to qualify as past recollection recorded. (*Id.* at p. 139.) The Court of Appeals found the claim forfeited because it was not made at trial, and thus reviewable only for "error so plain and clear that [the defendant] was denied a fair trial." (*Id.* at pp. 139-140.) The court acknowledged it was "unaware of any cases where this amount of time has been involved," and that cases had held that "a much lesser period of time [was] fatal to admission." (*Ibid.*) The court observed, however, that in the case before it, the statement "displayed no lapses of memory . . . but was specific in detail and was not inconsistent with that which the witness was able to recall when on the witness stand during trial." (*Id.* at p. 142.) Moreover, the transactions involved were not routine and had a significant impact under the witness. (*Ibid.*) The court thus held, "Under all of the unusual circumstances of this case, we are not persuaded that the introduction of the statement requires a reversal." (*Ibid.*)

Cummings involved a challenge to the reliability of a statement. There, a detective interviewed a witness who related a conversation he had with the defendant. In that conversation, the defendant confessed to the charged murder and gave details surrounding the incident. (*Cummings*, *supra*, 4 Cal.4th at p. 1256.) The witness had contacted the detective while he was an inmate at a county jail. (*Id.* at p. 1292.) The witness testified that while he did not remember anything about the contact, what he told the detective "was the truth," he had reported it while it was fresh in his mind,

and his motive in relating the information "was to arrange a deal to get out of jail." (*Id.* at pp. 1292-1293.) The defendant challenged the trial court's ruling permitting the statement as past recollection recorded. This court recognized, "whether an adequate foundation for admission of the [the witness's] statement to [the detective] turned upon whether [the witness's] testimony that his statement was true was reliable. [Citations.]" (*Id.* at pp. 1293-1294.) This court found no merit to the defendant's claim that the witness "was delusional and did not know what the facts were[.]" (*Id.* at p. 1294.) This court stated:

> [The trial judge] heard the testimony and had the best opportunity to assess the credibility of the witness. Her conclusion that [the witness] testified truthfully and reliably when he said that his statement to [the detective] was true is supported by the record.

(*Cummings*, *supra*, 4 Cal.4th at p. 1294.)

Unlike the witnesses in *Cowan*, *Senak*, and *Cummings*, P.R. expressly disavowed the statements contained in paragraph 16 of her declaration. As previously explained, she testified this paragraph did not accurately reflect her conversation with M.H. (RT 127, 129, 167-168.) As the referee also observed, Lake did not record the interview and her notes are cryptic. (Rep. p. 19.) This made it impossible to determine (1) whether P.R. had memory lapses at the time she spoke to Lake and (2) what exactly was said. Finally, while the *Senak* court upheld a time lapse of three years because of the "unusual circumstances" of that case (*Senak*, *supra*, 529 F.2d at p. 140), respondent submits that under any circumstances, sixteen years is simply too long. Accordingly, the 2009 declaration did not qualify for admission under Evidence Code section 1237.

REPLY BRIEF ON THE MERITS

THERE WAS NO PREJUDICIAL JUROR MISCONDUCT

In the merits portion of his brief, Bell asserts that "the misconduct ... [by M.H.] raises a presumption of prejudice that respondent cannot rebut." (OB 43-52.) The referee found that Juror M.H. never talked to her husband during the trial and therefore did not consider whether the purported misconduct was prejudicial. Respondent asks this court to adopt this finding, rendering the issue of prejudice moot. Even if P.R. had been the only witness testifying, Bell would not be entitled to relief, because the alleged misconduct was non-prejudicial.

A. Legal Principles

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

When a juror directly violates "the oaths, duties and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors," the juror's action is referred to as "juror misconduct." (*In re Hamilton, supra*, 20 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 (1987) 44 Cal.3d 57, 117). The strength of the prosecution's case can be considered in determining if any juror misconduct was prejudicial. (*People v. Cochran* (1998) 62 Cal.App.4th 826, 831.)

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

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

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

This court "first determine[s] whether there was any juror misconduct. Only if [it] answers that question affirmatively does it consider whether the misconduct was prejudicial. [Citation.] " (*People v. Collins* (2010) 49 Cal.4th 175, 242, internal quotation marks omitted.)

B. The Presumption of Prejudice Has Been Rebutted

Penal Code section 1122 requires the trial court to instruct the jury, after it is sworn and before opening statement, regarding "its basic

functions, duties and conduct," including an instruction that jurors "shall not converse among themselves, or with anyone else, . . . on any subject connected with the trial." (Pen. Code, § 1122, subd. (a).) "The jury shall also, at each adjournment of the court before the submission of the cause to the jury, . . . be admonished by the court that it is their duty not to. . . converse among themselves, or with anyone else, on any subject connected with the trial, or to form or express any opinion about the case until the cause is finally submitted to them." (Pen. Code, § 1122, subd. (b).)

"It is misconduct for a juror during the course of trial to discuss the case with a non-juror. [Citation.]" (*Danks*, *supra*, 32 Cal.4th at p. 304.) "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . The presumption is not conclusive, but the burden rests heavily upon the Government to establish . . . that such contact with the juror was harmless to the defendant. [Citations.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1309 (*Lewis*), omissions in original, internal quotation marks omitted.)

This court's decision in *Lewis* shows that not every juror communication with an outsider will require reversal. There, after the first day of deliberations, the jurors selected a foreman, who then conducted a secret poll on the jurors' views of the defendant's guilt. When Juror No. 9 went home that night, she told her husband she was frustrated that the foreman would not reveal the results of the secret poll. Her husband asked her why he would not disclose this information. She explained that the foreman said he was not allowed to share the results. Nothing else was discussed. The husband, a senior investigator with the Riverside County District Attorney's Office, reported the incident to the prosecution, who in turn advised the court. (*Lewis*, *supra*, 46 Cal.4th at p. 1306.)

At a hearing on the matter, Juror No. 9 was called into court. Asked what she discussed with her husband, she responded, "And I was very frustrated, so I went home and I burst in the door and I said, 'I'm so frustrated.'" (*Lewis*, *supra*, 46 Cal.4th at p. 1307.) She explained that she told her husband how the foreman had been picked. After he agreed to serve, he promised the jurors would help each other, but "he [wouldn't] even tell us where we stand." Her husband asked her why, and she said it was upon court order. However, she had read through the jury instructions "to see if there was anything in there, and there wasn't." (*Ibid.*) She then realized it would not change the outcome. Asked if she talked to her husband about anything else, she responded, "No, I was just so frustrated and venting." (*Ibid.*) Asked if the conversation would in any way affect her deliberations or her ability to be fair and impartial, Juror No. 9 replied, "No." (*Id.* at p. 1308.)

This court concluded that while the juror committed misconduct by talking to her husband, the presumption of prejudice had been rebutted. This court noted that the juror had revealed only procedure underlying the deliberations, "nothing substantive." Moreover, the juror confirmed that she could still be fair. (*Lewis*, *supra*, 46 Cal.4th at p. 1309.) Thus:

> The trial court's questions and Juror No. 9's responses established that the juror's conversation with her husband is not, judged objectively, inherently and substantially likely to have influenced the juror. [Citation.] Nor does it objectively demonstrate a substantial likelihood, or even a reasonable possibility, of actual bias. [Citations.]

(*Lewis*, *supra*, 46 Cal.4th at p. 1309, internal quotation marks omitted.)

Likewise, in *People v. Linton* (2013) 56 Cal.4th 1146 (*Linton*), during deliberations, the jury foreman reported that when the jurors were discussing a witness's reaction to seeing the defendant, Juror No. 1 said, "I'm the first to admit that I discussed this with my husband and we were

talking about the case." The juror's husband did not give her any feedback or make any comments in return. Asked about the incident, Juror No. 1 told the court that she did not discuss the facts of the case. (*Id.* at p. 1192.) She just told him she was confused and did not understand. Her husband stood there and did not respond. After counsel indicated they had no questions, the court reminded Juror No. 1 of the court's admonishments and made sure she understood. Defense counsel asked the trial court to excuse her. The court denied the request. (*Id.* at p. 1193.)

The defendant claimed on appeal that the trial court's ruling was in error. This court disagreed. This court found that, although Juror No. 1 made one comment to her husband, the comment was unrelated to the facts of the case. (*Linton, supra*, 56 Cal.4th at p. 1194.) The comment was general, and the husband did not respond. (*Id.* at pp. 1194-1195.) Accordingly, there was no "discussion or conversation" within the meaning of Penal Code section 1122 and no basis for the juror's removal. (*Id.* at p. 1195.)

Here, accepting P.R.'s testimony as true and disregarding contrary testimony by M.H. and Steven H., the most that can be gleaned is that M.H. whispered, "My husband helped me decide." As the referee found, "it is not clear what M.H. may have been referring to." (Rep., p. 20.) There was "no evidence showing *what* he helped her decide." (Rep., p. 19, emphasis added.) The statement is simply too vague to permit any meaningful conclusions.

Furthermore, Mr. H. testified, "I don't like to talk, and I don't like to ask questions, and I don't like to listen either." (RT 419.) He testified that M.H. talks all the time, "sometimes she talks to the cat, and "I do not listen." "I'm not interested in what she has to say." (RT 426.) Given this testimony, a reasonable conclusion is that M.H., if she said anything at all,

was just "venting." (*Danks*, *supra*, 32 Cal.4th at p. 304.) Thus, there was no prejudicial juror misconduct which would warrant habeas relief.

CONCLUSION

Based on the foregoing, as well as for the reasons set forth in respondent's opening brief on the merits, respondent respectfully requests that this court find there was no juror misconduct, deny habeas relief to Bell, and discharge the Order to Show Cause.

Dated: June 15, 2016

Respectfully submitted,

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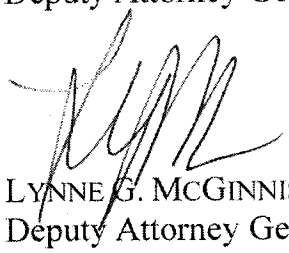

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONSE TO EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 15,421 words.

Dated: June 15, 2016

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

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

I declare:

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

On June 27, 2016, I served the attached **RESPONSE TO EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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

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

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on June 27, 2016 by 5:00 p.m., on the close of business day to the following.

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San Diego District Attorney's Office

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 27, 2016, at San Diego, California.

M. I. Salvador-Jett
Declarant

Signature

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