S141210

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ABELINO MANRIQUEZ on Habeas Corpus.

(Filed Oct. 17, 2018)

With respect to the petition for writ of habeas corpus filed on February 17, 2006, and amended January 10, 2008, all claims are denied on the merits. (See also *In re Manriquez* (2018) 5 Cal.5th 785.)

Claims 4 and 14, except to the extent they allege ineffective assistance of counsel, are procedurally barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225, to the extent they were raised and rejected on appeal.

Claims 3, 5, 8, and 9, except to the extent they allege ineffective assistance of counsel, are procedurally barred under *In re Dixon* (1953)41 Cal.2d 756, 759, to the extent they could have been raised on appeal but were not.

Claims 10 and 11, except to the extent they allege ineffective assistance of counsel, are procedurally barred under *In re Seaton* (2004) 34 Cal.4th 193, 201, to the extent they could have been raised in the trial court but were not.

To the extent claim 14 alleges insufficiency of the evidence, it is not cognizable on habeas corpus. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

Corrigan, J., was absent and did not participate.

CANTIL-SAKAUYE
Chief Justice

Filed 7/26/18

IN THE SUPREME COURT OF CALIFORNIA

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Petitioner Abelino Manriquez filed an original habeas corpus petition in this court seeking relief from his multiple murder convictions and death sentence. We issued an order to show cause with respect to petitioner's claim that prejudicial juror misconduct occurred when a juror did not timely disclose a history of childhood abuse.

After an evidentiary hearing, the referee found the juror's nondisclosure was neither intentional nor deliberate, and that the juror was not biased against petitioner; as such, there was no prejudicial juror misconduct. We agree generally with the referee's findings, and therefore hold that petitioner is not entitled to relief.

I. PROCEDURAL BACKGROUND

Petitioner was sentenced to death in 1993 after a jury convicted him of four counts of first degree murder and found true, among other things, the special circumstance of multiple murder. (Pen. Code, §§ 187, 190.2, subd. (a)(3).) We unanimously affirmed petitioner's guilt verdict and death sentence. (*People v. Manriquez* (2005) 37 Cal.4th 547 (*Manriquez*).)

Petitioner filed this habeas corpus petition, his first, in 2006, and amended it in 2008. In claim 2 of the petition, he alleged the jury foreperson, C.B., had committed misconduct by concealing having been physically and sexually abused as a child. A pretrial juror questionnaire had asked prospective jurors whether they experienced any violent and criminal acts, and Juror C.B. generally responded in the negative. Petitioner produced C.B.'s posttrial juror questionnaire and a declaration, in both of which she had described being raped and beaten as a child—facts that were not disclosed on her pretrial questionnaire.

We issued to the Secretary of the Department of Corrections and Rehabilitation an order to show cause why we should not grant petitioner relief on the ground of juror misconduct. After considering the Attorney General's return and petitioner's traverse, we ordered a reference hearing. The order directed the referee to address four questions:

1. What were Juror C.B.'s reasons for failing to disclose her childhood abuse on her juror questionnaire and during voir dire at petitioner's trial?

2. Was the nondisclosure intentional and deliberate?

3. Considering Juror C.B.'s reasons for failing to disclose these facts, was her nondisclosure indicative of juror bias?

4. Was Juror C.B. actually biased against petitioner?

We appointed William C. Ryan, Judge of the Superior Court of Los Angeles County, as the referee. The referee conducted an evidentiary hearing in which Juror C.B. testified. The referee then filed a 14-page report with recommendations. Petitioner and the Attorney General filed postreport briefing, and petitioner presented his objections to the referee's report.

II. TRIAL EVIDENCE

A lengthy recitation of the facts of petitioner's crimes is unnecessary; they are contained in our prior decision. (*Manriquez*, *supra*, 37 Cal.4th at pp. 552-568.) It is sufficient for our purposes to note the jury convicted petitioner of murdering four people on separate occasions, which made him eligible for the death penalty.

More relevant to our analysis is the evidence presented during the penalty phase. During its case in aggravation, the prosecution presented evidence of petitioner's involvement in three additional killings, and that petitioner had raped a friend's babysitter at gunpoint. (*Manriquez*, *supra*, 37 Cal.4th at pp. 568-570.)

"The defense evidence in mitigation was introduced through the testimony of five of [petitioner's] relatives, each of whom described the deprivation and abuse [petitioner] suffered as a child in rural Mexico. The witnesses testified that [petitioner's] childhood was marred by extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education,

affection, or encouragement by the adults in [petitioner's] life.

"Cecilia Manriquez Solis, [petitioner's] first cousin, testified that she and [petitioner] resided as children on a ranch they shared with her grandmother and [petitioner's] father, in Mexico. The area in which the ranch was located lacked electricity, a school, church, store, or regular law enforcement, and none of the residences on the ranch had windows or doors. The children worked from 3:00 a.m. to approximately 5:00 p.m.—farming, planting, and collecting firewood and water, every day of the year except Good Friday. During the few years that Solis and [petitioner] resided together at the ranch, she observed him beaten several times, 'sometimes two to three times per day.' These beatings included one occasion when [petitioner] was seven years of age: he was tied to a tree and beaten with a whip, and Solis recalled that 'my grandmother got tired of hitting him, so my uncle, his father continued to hit him.' On other occasions [petitioner] was beaten with a whip or a belt. Such beatings occurred on a daily basis. Once [petitioner] was hog-tied and left all night in a storage bin for corn. Solis never saw [petitioner] receive any sign of love or affection from his grandmother or his father.

"Cresencia Tamayo, [petitioner's] aunt, also resided at the ranch when [petitioner] was a young child, and testified that [petitioner's] chores also involved retrieving the 'cattle, beasts, burros. . . .' [Petitioner] was sent on errands, and if he failed to perform he 'would be hit or beaten' by his father, uncles, or grandmother,

several times 'all over with the belt' or with a rod or stick. [Petitioner] and the other children worked each day of the year and never were allowed to play except 'for a little while' on Good Friday. 'There were no toys, [and] [t]here was no Christmas.' Rarely was any sort of affection shown to [petitioner].

"Joaquina Ward, who described herself as a half sister to [petitioner's] cousin Cecilia Manriquez Solis, testified that she also resided at the ranch for a few months when [petitioner] was a child. She recalled that the children 'were treated poorly' and that '[w]hen they didn't do what they were told to do, they were hit,' [petitioner] more often than the other children. On one occasion, Ward encountered [petitioner] 'tied by the legs and the hands,' because 'he had been sent up to the hills to retrieve some firewood; and because he did not bring the kind that his father had asked for, he was punished.' Ward untied [petitioner], after which 'he went down and turned into a little ball, and he stayed there crying.' She never saw anyone act affectionately toward [petitioner].

"Juan Manriquez, [petitioner's] cousin, testified that he resided with [petitioner] at the ranch and that the children were prohibited from playing; when they did, they were beaten with 'either a rod or a whip.' Manriquez recalled that [petitioner] was beaten 'for any reason,' two or three times per day, 'and we could hear his screaming when he was being beaten.' On one occasion, [petitioner] was caught bathing with his cousin, which led to another beating while [petitioner] was tied up. When the boys' grandmother caught them

eating fruit, she 'burned our feet so we couldn't run away and so we wouldn't do it again.' [Petitioner] attempted to run away numerous times, which in turn led to his being beaten. Ultimately, [petitioner] was able to run away and find his mother.

"Lorenza Sanchez, [petitioner's] half sister, testified that when [petitioner] was approximately 12 or 13 years of age, he came to live with her and their mother at the home where their mother was employed, at which time Sanchez first learned she had a half brother. They resided together for approximately four or five years, during which time they moved to a larger ranch—one that had a school—but [petitioner] did not attend the school, because he spent his time assisting other individuals in harvesting corn. During this period, [petitioner's] mother cohabitated with a man who beat Sanchez and her sister, actions that [petitioner's] mother witnessed, angering [petitioner] who once threw a brick at the man. Sanchez did not recall her mother showing any affection toward [petitioner]." (*Manriquez*, *supra*, 37 Cal.4th at pp. 570-571.)

III. HABEAS CORPUS PROCEEDINGS

In support of petitioner's claim of juror misconduct, the following evidence was presented.

A. At Petitioner's Trial

Before the start of petitioner's 1993 trial, prospective jurors received written questionnaires. The prospective jurors signed the completed questionnaires under penalty of perjury.

In pertinent part, Question 63 of the questionnaire asked, "Have you or anyone close to you been the victim of a crime, reported or unreported?" On Juror C.B.'s questionnaire, the "No" answer was checked but crossed out, and the "Yes" answer was checked. C.B. wrote, "Home was robbed" one time, and listed her "[r]oommate before we lived together" as the victim.

Question 64 asked, "Have you or any relative or friend ever experienced or been present during a violent act, not necessarily a crime?" Juror C.B. checked "No."

Question 65 asked, "Have you ever seen a crime being committed?" Juror C.B. checked "No."

Question 66 asked, "Have you ever been in a situation where you feared being hurt or being killed as a result of violence of any sort?" Juror C.B. checked "No."

Juror C.B. did not otherwise disclose any history of abuse, being a victim, or experiencing or seeing violence or a crime. During voir dire, neither party examined her about these topics. Because petitioner had peremptory challenges remaining when C.B. was in the jury box, he could have challenged her, but did not. C.B. served as the jury's foreperson.

B. After Petitioner's Trial

A voluntary posttrial questionnaire asked, among other things, for suggestions that could be used to improve trials in the future. Juror C.B. wrote, "The mitigating circumstances offered during the sentencing phase [were] actually a detriment in most of the [jurors'] minds, especially mine. I grew up on a farm where I was beat[en], raped, [and] used for slave labor from the age of [five through] 17. I am successful in my career and am a very responsible *Law abiding* citizen. It is a matter of choice!" (Underscoring in original.)

In a voluntarily given 2007 declaration, signed under penalty of perjury, Juror C.B. wrote, "Some of the questions on the [pretrial juror] questionnaire seemed to have no purpose. Superficial questions about where you were brought up, or your education, or income should be no one's business. I do not remember if questions were asked about whether we were victims of a crime." She added, "As to the mitigating evidence, I recall that [petitioner] grew up on a farm and was abused. I told the other jurors about what I had heard about farms in Mexico. But, I was regularly beaten from age three to age [17] while I lived with a foster mother on a farm in Pennsylvania. . . . At the farm there was also a home for aged people and one of the residents raped me when I was five. Having been through abuse myself, I do not view abuse as an excuse. I told the other jurors about my experience and my belief that childhood abuse was not an excuse. [¶] The abuse issue was discussed in the penalty deliberations. A couple of other jurors also had rough childhoods. I

remember that one of the jurors . . . said he had a stepfather who would beat him once in a while. [¶] I had heard that life on farms in Mexico was real tough, with long work hours and very little food. Again, I did not accept this as an excuse and said so."

In a voluntarily given 2012 declaration, signed under penalty of perjury, Juror C.B. wrote, "When I was filling out the [pretrial] juror questionnaire, I answered the questions as honestly as I could. I did not attempt to conceal any information from anybody. When I answered the questionnaire, I was not thinking about the abuse I suffered as a child, because those are not memories I keep at the forefront of my mind. It was only after [petitioner] presented evidence of his childhood abuse as mitigating circumstances that I thought about the abuse I suffered as a child. [¶] Specifically, when I was asked in questions 63 through 66 of the [pretrial] juror questionnaire . . . I did not think that those questions were about things that happened to me during my childhood. Instead I believed the questions were asking about things that happened to me as an adult. That is the reason I did not disclose the fact that I was raped when I was five years old, or abused as a child." She explained, "I did not try to conceal the fact that I had been raped and abused as a child, and freely shared that information with my fellow jurors during the penalty phase deliberations after [petitioner] offered evidence of his own abusive childhood as mitigating circumstances." She stated, "I was not biased against [petitioner], and based all of my decisions on the evidence that was presented during the trial."

C. Evidentiary Hearing

Juror C.B. testified at the evidentiary hearing, and her testimony was consistent generally with her posttrial questionnaire and declarations. C.B. was born in Pennsylvania, where as a child she lived on a farm. She testified that "in the [1950s] when I grew up, abuse was not a crime. Kids were abused all the time. And using kids for hard labor was very common."

Juror C.B. also testified about being physically abused by more than one person from the age five to approximately age 13 or 14. She had feared being hurt during her abusive upbringing. With respect to the sexual abuse, she testified to having been "molested." Before petitioner's trial, she had shared her childhood experiences with "only really close friends."

Juror C.B. had "several days" to complete the juror questionnaire. Before answering Questions 63 through 66, she thought about how to respond. During that process, her childhood experiences "did not come to mind." She understood, at the time of petitioner's trial, that the questions had no time parameters, that is, they were not confined to violent or criminal acts experienced only during adulthood.

With respect to Question 64, which asked about experiencing a violent act, Juror C.B. testified it was an important question that was not unduly invasive. She also understood that, under the "standards" at the time of petitioner's trial, molesting a five-year-old child was a criminal act and an act of violence, and that physically abusing a child was also an act of violence.

When answering Question 64, however, Juror C.B. did not disclose her childhood abuse because "the question indicated a violent act not necessarily a crime, and I did not consider my childhood a violent act." Similarly, she "did not consider anything in my life as criminal acts." She elaborated: "I did not consider myself a victim of a crime. I was a victim of circumstance. And that being said, I never thought of myself as having been a victim of any kind. So [at petitioner's trial], I did not even think about the fact that I had been criminally assaulted. . . . [¶] And as far as the molestation, it was a one-time thing, it never happened again. It went into the recesses of my mind. And it was not even thought of . . . until the very end of this whole trial." C.B. did not consider her childhood molestation to be an act of violence because "you had to be there. When you are growing up and that's your environment, you take it in stride."

Juror C.B. testified that, at the time of petitioner's trial, she completed the juror questionnaire honestly. She acknowledged, however, that in hindsight she should have answered both Question 64 and the inquiry regarding fear of being hurt in the affirmative.

Juror C.B. further testified that the penalty phase "triggered" her childhood memories. Specifically, she testified, "I know we're not supposed to say what other people were saying, but there was another [juror] who brought it up himself about having been beaten quite often by his father, and all of these things triggered in my mind my own abuse. [¶] . . . [¶] [W]e shared our life experiences for the jury's benefit to show we are

productive people, we don't commit murders." She told the other jurors: "I had been raised in an abusive environment and had been molested, raped when I was five, and that I did not feel that was an excuse to become an unproductive, violent person in my adulthood."

Prior to the trial, Juror C.B. knew nothing about petitioner. She learned about petitioner's childhood for the first time during the penalty phase.

IV. DISCUSSION

"Because a petition for a writ of habeas corpus is a collateral attack on a presumptively final criminal judgment, 'the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them.' [Citation.] To obtain relief, the petitioner must prove by a preponderance of the evidence the facts that establish entitlement to relief." (*In re Cowan* (2018) 5 Cal.5th 235, 243.)

The law concerning juror concealment is settled. As this court explained in *In re Hitchings* (1993) 6 Cal.4th 97 at page 110 (*Hitchings*), "[w]e begin with the general proposition that one accused of a crime has a constitutional right to a trial by impartial jurors. [Citations.] '"The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."'"

We have also explained the important role of the voir dire process: "The impartiality of prospective jurors is explored at the preliminary proceeding known as voir dire. '*Voir dire* plays a critical function in assuring the criminal defendant that [his or her] Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. [Citation.] Similarly, lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule. . . .' " (*Hitchings*, *supra*, 6 Cal.4th at p. 110.)

"A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*Hitchings*, *supra*, 6 Cal.4th at p. 111.) Such misconduct includes the unintentional concealment, that is, the inadvertent nondisclosure of facts that bear a " ' "substantial likelihood of uncovering a strong potential of juror bias." ' " (*In re Boyette* (2013) 56 Cal.4th 866, 889 (*Boyette*).)

"Once a court determines a juror has engaged in misconduct, a defendant is presumed to have suffered prejudice. [Citation.] 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.' " (*People v. Weatherton* (2014) 59 Cal.4th 589, 600; see *People v. Thomas* (2012) 53 Cal.4th 771, 819.) In other words, a concealment

creates a presumption of prejudice, but it can be rebutted by a showing that there is no substantial likelihood of actual bias. Whether the prosecutor has discharged his or her burden is for the court to decide.

An *unintentional* concealment caused by an honest mistake during voir dire, however, "cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias. Moreover, the juror's good faith when answering voir dire questions is the most significant indicator that there was no bias." (*In re Hamilton* (1999) 20 Cal.4th 273, 300 (*Hamilton*); see *Boyette*, *supra*, 56 Cal.4th at p. 890 [the unintentional nature of a juror's nondisclosure "supplies sufficient support" for the ultimate finding of no substantial likelihood of actual bias].) *Hamilton*'s holding acknowledges the possibility that, in a rare case, a court ultimately may determine that a juror's innocent concealment masked a substantial likelihood of actual bias.

"Although juror misconduct raises a presumption of prejudice [citations], we determine whether an individual verdict must be reversed for jury misconduct by applying a substantial likelihood test. That is, the 'presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.' [Citation.] In other words, the test asks not whether the juror would

have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias." (*Boyette*, *supra*, 56 Cal.4th at pp. 889-890; see *Hamilton*, *supra*, 20 Cal.4th at p. 295; *People v. Nesler* (1997) 16 Cal.4th 561, 578 (plur. opn.); *Hitchings*, *supra*, 6 Cal.4th at pp. 118-120.)

"The standard is a pragmatic one, mindful of the 'day-to-day realities of courtroom life' [citation] and of society's strong competing interest in the stability of criminal verdicts." (*Hamilton*, *supra*, 20 Cal.4th at p. 296; see *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 555 (plur. opn.) ["To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give"].)

Stated somewhat differently, with respect to a claim of concealment, a habeas corpus petitioner bears the initial burden of showing that a juror did not disclose requested material information. If such a nondisclosure is shown, a presumption of prejudice arises. An intentional concealment is strong proof of prejudice, while a showing that the nondisclosure was unintentional may rebut the presumption of prejudice. Whether any nondisclosure was intentional is not dispositive; an unintentional nondisclosure may mask actual bias, while an intentional nondisclosure may be for reasons unrelated to bias. The ultimate question remains whether petitioner was tried by a jury where a substantial likelihood exists that a juror was actually biased against petitioner.

A juror is actually biased if she or he has "a state of mind . . . in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).) As explained in the plurality opinion in *People v. Nesler*, *supra*, 16 Cal.4th 561 at pages 580 to 581, "[w]hat constitutes 'actual bias' of a juror varies according to the circumstances of the case. [Citation.] . . . ' "[L]ight impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but . . . those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him [or her]." ' "

With these principles in mind, we turn to the questions we posed to the referee and the responses he provided. The referee acts as " 'an impartial fact finder for this court.' " (*Boyette*, *supra*, 56 Cal.4th at p. 887.) " 'The referee's factual findings are not binding on us, and we can depart from them upon independent examination of the record even when the evidence is conflicting. [Citations.] However, such findings are entitled to great weight where supported by substantial evidence.' " (*Ibid.*) We generally defer to a referee's determination of witnesses' credibility " ' "because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying." ' " (*Id.* at p. 877.)

We "independently review the referee's resolution of legal issues and of mixed questions of law and fact." (*In re Crew* (2011) 52 Cal.4th 126, 149 (*Crew*).)

A. Evidentiary Objections

Preliminarily, petitioner challenges some of the referee's evidentiary rulings.

1. Evidence Code Section 1150

Petitioner's habeas corpus counsel, when inquiring how Juror C.B. reacted at the trial during the penalty phase, asked her, "[W]hen you heard evidence of [petitioner's] abuse from working on the farm, did you think, well, so was I?" Citing section 1150 of the Evidence Code, the referee struck C.B.'s response.

Although petitioner objects to the referee's ruling, it was correct: "Evidence of a juror's mental process—how the juror reached a particular verdict, the effect of evidence or argument on the juror's decisionmaking—is inadmissible." (*Boyette*, *supra*, 56 Cal.4th at p. 894 [citing Evid. Code, § 1150, subd. (a)].) Petitioner correctly notes that "the rule against proof of juror mental processes is subject to the well-established exception for claims that a juror's preexisting bias was concealed on voir dire." (*Hamilton*, *supra*, 20 Cal.4th at pp. 298-299, fn. 19.) The question actually posed to Juror C.B., however, inquired about her thoughts *as she was hearing petitioner's evidence*, and thus solicited quintessential evidence of her mental process. It plainly was not

directed at C.B.'s state of mind during voir dire. And it inquired about neither her purported *preexisting* beliefs nor her purported concealment; rather, it solicited evidence of how petitioner's presentation of his case in mitigation was affecting her decisionmaking process. Moreover, petitioner's contrary suggestion notwithstanding, the question did not attempt to solicit an admission from C.B. that, due to her own impressions and opinions, she was unable to render a verdict based on the evidence presented. We therefore overrule petitioner's objection to the referee's ruling on this question.

2. Evidence of Bias

Over petitioner's objection, respondent's counsel asked Juror C.B. if she was biased against petitioner "at any time while you were a sitting juror in this trial?," and she responded, "No, sir, I was not." She conceded, however, that she did not know the legal definition of "bias." The referee in turn found that C.B. was not biased against petitioner in part due to her testimony that she was not biased.

Petitioner challenges this testimony and finding, first noting Juror C.B. is not a lawyer, and that she conceded she did not know the legal definition of "bias." Petitioner also contends the referee prevented the parties from exploring her understanding of the meaning of "bias": When C.B. was asked if she was biased against petitioner, petitioner's counsel objected, arguing in relevant part that the question called for a legal

conclusion. The referee overruled the objection, determining that the question was "not asking as a matter of law [but] asking as a matter of fact."

We agree with petitioner that the referee's findings could not properly be based *solely* on Juror C.B.'s belief that she was not biased against petitioner. *People v. Allen and Johnson* (2011) 53 Cal.4th 60 (*Allen and Johnson*), in which the trial court dismissed a juror for refusing to deliberate, is instructive. In finding that the juror was not deliberating, the trial court relied in part on the other jurors' opinions that the juror in question was refusing to deliberate. In the course of concluding that the trial court had committed reversible error, we observed that a court "cannot substitute the opinions of jurors for its own findings of fact." (*Id.* at p. 75.)

And, as petitioner notes, jurors are sometimes unaware of their own biases, or are reluctant to admit to having biases. Accordingly, when assessing Juror C.B.'s possible bias, we will not consider the referee's finding that C.B. believed she was not biased to the extent the referee relied on C.B.'s *assessment of her own bias*. As we will explain, however, the record as a whole before us contains substantial evidence that supports the referee's findings, including his findings regarding C.B.'s credibility and his ultimate finding that she was not actually biased.

B. Questions Posed

We note at the outset that the referee found Juror C.B. to be a credible witness; specifically, that she

testified in a "direct, responsive, thoughtful and consistent manner" to the questions posed, and "was not evasive, uncooperative or defensive." The referee also found C.B's credibility was enhanced by her voluntarily completing the posttrial questionnaire and by voluntarily complying with the parties' pre-reference hearing requests for more information. In other words, the referee reasoned, if C.B. had a "hidden agenda," she simply could have remained silent.

Petitioner contends the referee's findings, including the findings concerning Juror C.B.'s credibility, are not supported by substantial evidence. We will address each question, the referee's findings, and petitioner's contentions in turn.

1. Question One: What Were the Reasons for Nondisclosure?

Our first question inquired about Juror C.B.'s reasons for not disclosing her childhood abuse. At the time of petitioner's trial, Juror C.B. understood that sexually abusing a child was a criminal and violent act; she also understood that physically abusing a child was a violent act. The referee found, however, that C.B. did not disclose the childhood abuse that *she* had personally suffered because she did not consider *her* childhood experiences to have been criminal or violent acts.

The referee further found that the experience of being a child in the 1950s supported Juror C.B.'s explanation why she did not initially disclose her childhood experiences. Juror C.B. testified her childhood

experiences did not come to mind when she was completing the pretrial juror questionnaire because she "did not consider [her]self a victim of a crime." The referee reasoned that her belief her childhood experiences were neither crimes nor acts of violence "is consistent with how society viewed and treated abuse of children 60 years ago, as distinct from how society now views and treats such abuse."

The referee accepted Juror C.B.'s explanation and found no conflict in her testimony. In doing so, the referee noted that C.B. acknowledged she had been present during a violent act, that is, her childhood sexual and physical abuse. She also acknowledged the questionnaire did not have any time parameters, and were not specifically limited to her adult experiences. Nonetheless, the referee concluded, because C.B. did not consider herself the victim of a crime or a violent act, her childhood experiences did not come to mind when she was completing the pretrial juror questionnaire.

In sum, the referee found that, in her mind, Juror C.B.'s childhood sexual and physical abuse were not criminal and violent acts, but rather were simply a part of life. As such, and despite their presumably traumatic nature, he determined, when completing the pretrial juror questionnaire, C.B. did not believe they constituted crimes or acts of violence.

Petitioner challenges the referee's findings regarding both Juror C.B.'s credibility and her reasons for not disclosing her childhood experiences. Because the two findings are inextricably linked, we will discuss them

together, and, as we will explain, we adopt these findings.

Fundamentally, petitioner rejects Juror C.B.'s explanation that Questions 63 through 66 did not trigger any memories of her childhood experiences. Her explanations could not be credible, he contends, because they were inconsistent and therefore not all true.

Petitioner notes Juror C.B. acknowledged that the questionnaire did not contain any time parameters, that is, it was not limited to events that occurred during adulthood. Yet, in her 2012 declaration, which she reaffirmed during the evidentiary hearing, C.B. expressed the belief that the questionnaire applied only to events during her adulthood. Similarly, she acknowledged that sexually abusing a child is a criminal and violent act, and that physically abusing a child is a violent act. But her personal sexual and physical abuse was, in her eyes, neither a criminal nor a violent act.

Petitioner is correct that Juror C.B.'s responses cannot all be reconciled. For example, she could not have believed the questionnaire both had no time parameters and was limited to events that occurred during her adulthood. But the referee appears to have resolved her seemingly contradictory responses by acknowledging that societal beliefs about the treatment of children in the 1950s might have differed from contemporary attitudes.[1] That is, it would appear C.B.

[1] Petitioner contends Juror C.B's beliefs, as well as the referee's findings, regarding societal views in the 1950s about children are "unsupported." Her beliefs undoubtedly were formed and

reasonably could believe that what might once have been treated as a "private matter" would likely today

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supported by her own personal experiences, by those of the people around her, and by the changes she has experienced. And it would appear her beliefs are shared by others. (E.g., Lukens, *The Impact of Mandatory Reporting Requirements on the Child Welfare System* (2007) 5 Rutgers J.L. & Pub. Pol'y 177, 191 ["Until the mid-1960s, identification by [child protective services] agencies of children suffering from mistreatment by their families was a haphazard project"]; Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes* (2001) 53 Hastings L.J. 1, 42 ["By the second half of the twentieth century, child protection had become an important component of state and federal social agendas, ultimately resulting in the complex network of criminal and civil policies and agencies that now regulate various aspects of family relationships"], 51 ["[I]t was not until the mid-twentieth century that regulation of child labor became a fixture of American life, after many decades of bitter struggle"].)

Petitioner's concerns regarding *the referee's* finding about the changes in societal views are more well-founded. Other than Juror C.B.'s testimony, the record contains no evidence regarding the changes in societal views about child labor and child abuse. And, without additional evidence, such a generalized finding by the referee regarding the evolution of societal views is vague as to what is exactly being found, and also as to how such changes could be quantified or measured. (See Evid. Code, § 452, subd. (h) [a court may take judicial notice of "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy"].)

Regardless, because Juror C.B. reasonably could have formed an opinion on the matter, and her opinion helps explain the consistency in her responses and her testimony, we need not address any finding the referee may have made on the general topic of societal views, other than to note substantial evidence in the record as a whole supports his finding that C.B. was consistent and therefore credible.

involve the criminal justice system and child protective services. Under this view, because C.B. did not believe her childhood experiences were violent or criminal acts, they would not have come to mind, regardless of the questionnaire's time parameters. And her answers support this finding. For example, when she was asked to explain her belief that the questionnaire was limited to events during adulthood, she responded, "I did not consider anything in my life as criminal [or violent] acts."

Petitioner seizes upon Juror C.B.'s statement that she "did not consider" any events in her life to have been criminal or violent acts to infer that, when completing the questionnaire, she in fact did recall her childhood experiences but then intentionally chose not to disclose them. He argues that contradicts her testimony that her childhood experiences did not come to mind until her memories were triggered during the penalty phase. We decline petitioner's invitation to read her testimony so literally. The totality of the evidence indicates that C.B. did not recall her childhood experiences until the penalty phase, notwithstanding her use of the word "consider" in describing her thought processes while completing the juror questionnaire.

In light of the alleged inconsistencies in Juror C.B.'s declaration and testimony, petitioner urges that we not defer to the referee's finding that she was a credible witness, but we decline the request. *Boyette* is instructive on this point. In *Boyette*, we ordered a reference hearing on a claim that a juror had engaged in

misconduct by failing to disclose on a pretrial juror questionnaire his or his relatives' criminal histories and substance abuse problems. At the evidentiary hearing, the juror gave inconsistent reasons for his nondisclosure, but the referee ultimately found the juror had unreasonably albeit honestly misunderstood the questions. (See *Boyette*, *supra*, 56 Cal.4th at pp. 872-884.) We deferred to the referee's credibility findings because " 'we assume the referee considered those discrepancies, along with [the witness's] demeanor, while testifying, before concluding he was a credible witness.' " (*Id.* at p. 877.) We assume the referee did likewise when evaluating C.B.'s credibility.

Petitioner's contrary contentions notwithstanding, we also agree with the referee that Juror C.B.'s disclosure of her childhood experiences on the posttrial questionnaire suggested she did not have a "hidden agenda," which thus further enhanced her credibility. *People v. Ray* (1996) 13 Cal.4th 313 supports our conclusion. In *Ray*, a juror realized during the trial that he had a passing acquaintance with the victim's daughter, and he informed the trial court of this fact. We affirmed the trial court's decision not to further inquire into the juror's possible bias because, among other reasons, if the juror "had formed improper opinions about the case and intended to act in ways prejudicial to the defense, common sense suggests that [the juror] would have simply remained silent." (*Id.* at p. 344.) Petitioner is correct that, unlike the juror in *Ray*, C.B. did not disclose her childhood experiences until after the trial had ended. Petitioner is also correct that

the timing of her disclosure frustrated petitioner's opportunity to explore C.B.'s possible biases while his trial was still in progress. But neither of those points refutes the referee's finding that she was credible.

Petitioner nonetheless argues that if Juror C.B.'s reasons for her belated disclosure about her childhood were sincere, she could and should have made her disclosure during deliberations, if not sooner. Even were we to agree that C.B. would have been more credible had she made her disclosure earlier, that does not necessarily render unbelievable her reasons for not disclosing until she did. Moreover, C.B. had the opportunity to refrain altogether from disclosing her childhood experiences, or from disclosing after the penalty phase verdict that she had discussed her experiences during deliberations. As she herself noted, she was testifying at the evidentiary hearing as a consequence of her voluntary disclosures on the posttrial questionnaire.

Accordingly, we reject petitioner's assertion that the referee's findings regarding Juror C.B.'s credibility are unsupported by substantial evidence. Instead, we conclude that, in light of the evidence presented, including the referee's assessment of C.B.'s demeanor while testifying, the referee reasonably accepted her explanation that she did not consider her childhood experiences when answering Questions 63 through 66, notwithstanding any possible tension between certain portions of her testimony.

Juror C.B.'s testimony, taken as a whole, shows she believed society formerly viewed criminal or violent acts committed on children differently from how it does today. As she repeatedly explained, when she was growing up, "abuse was not a crime. Kids were abused all the time. And using kids for hard labor was very common." Her stated beliefs about childhood abuse appear not to have been limited to her own personal experiences, but also included similarly situated children, and thus supported her assertion that she did not consider her experiences so extraordinary as to have been within the contemplation of the pretrial juror questionnaire. We therefore accept the referee's findings with respect to the first question because they are supported by substantial evidence.

2. Question Two: Was the Nondisclosure Intentional and Deliberate?

The second question we posed to the referee inquired whether Juror C.B.'s nondisclosure was intentional and deliberate. Preliminarily, we note that an intentional nondisclosure is strong proof that can sustain the presumption of prejudice raised by juror concealment.

C.B. specifically testified that, while completing the questionnaire, she tried to recall if she had been a victim of a crime but "nothing came to mind." For the reasons set forth in answering our first question, the referee also found that Juror C.B.'s nondisclosure of her childhood experiences was neither intentional nor

deliberate. Specifically, the referee found that C.B.'s childhood experiences "did not come to mind" while she was completing the questionnaire, and that she therefore believed she had honestly and accurately answered Questions 63 through 66. Notwithstanding the "seeming clarity" of the questions posed, the referee found that she answered the questions "in good faith" and "with no intent to conceal or deceive."

Petitioner challenges these findings. He contends the questionnaire was clear, Juror C.B. had sufficient time to consider her answers, and her testimony regarding her nondisclosure was "inconsistent and incoherent." As we will explain, however, we disagree with petitioner because there is sufficient evidence that Juror C.B.'s nondisclosure was unintentional.

In support of his position, petitioner cites *People v. Blackwell* (1987) 191 Cal.App.3d 925 (*Blackwell*). In *Blackwell*, the defendant claimed she was a victim of alcohol-triggered domestic violence and had killed her husband in self-defense, but the jury rejected her defense and found her guilty of second degree murder. A juror who had indicated during voir dire that she had had no personal experience with domestic violence or alcoholism admitted after the verdict that her former husband had physically abused her when he was drunk. (*Id.* at p. 928.) The Court of Appeal concluded that, if voir dire questioning is specific enough to elicit the undisclosed information and a juror nevertheless fails to disclose, this constitutes a prima facie case of juror concealment or deception. (*Id.* at p. 929.) From this, petitioner contends Juror C.B.'s failure to answer

sufficiently specific questions also constitutes concealment.

Blackwell, however, is distinguishable and ultimately does not help petitioner. The Court of Appeal also observed in that case that nothing in the juror's declaration indicated that she misunderstood or was confused by the voir dire questioning, or that her failure to disclose the domestic abuse was due to an oversight or forgetfulness. (*Blackwell*, *supra*, 191 Cal.App.3d at p. 930.) In other words, the *Blackwell* court reasoned that the juror's nondisclosure was intentional because the questions were clear *and* no reason was given for not understanding the questions or not providing a responsive answer; the only *supported* inference was that the juror "was aware of the information sought and deliberately concealed it by giving false answers." (*Ibid.*) Regardless of the clarity of the juror questionnaire in petitioner's case, Juror C.B., unlike the *Blackwell* juror, provided the reasons for her nondisclosure. C.B. repeatedly and consistently explained that she believed her childhood experiences were not applicable to the questions posed and therefore they did not come to mind. The referee found her explanation to be credible, and we have adopted the referee's findings in this regard.

As the referee noted, "the *Blackwell* court found that the biased juror . . . had intentionally concealed information that should have been elicited on voir dire, and had committed misconduct. Such is not the case here as there was no intentional concealment." We have adopted the referee's finding that C.B. did not

intentionally conceal her abuse, and we therefore reject petitioner's suggestion that the mere failure to answer a seemingly clear question alone rendered C.B.'s testimony incredible or otherwise indicated intentional concealment. (See *Boyette*, *supra*, 56 Cal.4th at pp. 872-884, 889-890 [a juror's unreasonable but honest failure to answer clear questions was not prejudicial misconduct].)

Petitioner argues there is further support for his position in *People v. McPeters* (1992) 2 Cal.4th 1148. We observed that "[i]n view of the traumatic nature of the event and the specificity of the questions," it was highly unlikely that a juror's failure to disclose having been assaulted with a knife during an attempted rape and then pursued and stabbed by her assailant was inadvertent. (*Id.* at p. 1176 [discussing the facts of *People v. Diaz* (1984) 152 Cal.App.3d 926 (*Diaz*)].) Our brief discussion of the Court of Appeal's decision in *Diaz*, however, was aimed merely at contrasting the gravity of the undisclosed incident in that case with the relatively benign one that had occurred in *McPeters*, in which a juror belatedly realized he had failed to timely disclose a passing acquaintance with the victim's husband. Contrary to petitioner's suggestion, we have never established a rule that a juror's nondisclosure of a sufficiently traumatic event always is intentional and serves as indisputable evidence of concealment.

Petitioner further supports his position with citation to *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, in which we held the trial court did not abuse its discretion in granting the plaintiff's motion

for a new trial in a medical malpractice lawsuit on the ground of prejudicial juror misconduct. In *Weathers*, two jurors had told the other jurors that Kaiser was a " 'good hospital' " and that a verdict for the plaintiff would " 'endanger[ ] the whole hospital system.' " (*Id.* at p. 107.) We affirmed the trial court's order, noting that "[i]t is apparent . . . that the court concluded that the [jurors'] concealment [during voir dire] was intentional." (*Id.* at p. 110, fn. 5.) Here, the referee found the concealment was inadvertent, a finding that we have concluded is supported by substantial evidence. Moreover, there were other acts of juror misconduct in *Weathers* that were not present in petitioner's trial. For example, during deliberations one of the jurors in question had brought up the fact that the plaintiff was an African American woman and remarked that " 'where he came from, they don't "even let a black woman into the courtroom." ' " (*Id.* at p. 107.)

Similarly unhelpful to petitioner is *Young v. Gipson* (N.D.Cal. 2015) 163 F.Supp.3d 647, a federal district court case granting relief in a capital habeas matter. The petitioner in that case had been sentenced to death for three first degree murders, two of which involved robberies at gunpoint. (See *People v. Young* (2005) 34 Cal.4th 1149, 1165.)[2] The federal district court found merit to the petitioner's claim of prejudicial juror misconduct based on a juror's affirmative

[2] This court affirmed the judgment in the automatic appeal (*People v. Young*, *supra*, 34 Cal.4th at p. 1166), and later summarily denied the petitioner's habeas corpus claim of prejudicial juror misconduct.

misrepresentations on a juror questionnaire and during voir dire questioning. The questionnaire inquired about familiarity with the locations where the offenses occurred. In answering the questionnaire, the juror denied any knowledge of the locations, and stated during voir dire that he had heard of some of the street names but had never been to where the crimes occurred. In a postverdict declaration, however, the juror stated that he knew the neighborhood "well." (He also indicated that he had been a member of the National Rifle Association since he was a teenager, despite denying any such membership on his juror questionnaire.) The federal district court granted habeas corpus relief, finding that the juror had not answered honestly the questions posed during jury selection.[3] (*Young v. Gipson*, at pp. 729-732 & fn. 25.) The juror in that case was personally familiar with the locations where the offenses had occurred, and then concealed that familiarity from the court and the parties. In contrast, Juror C.B. had no personal familiarity with the circumstances of petitioner's childhood; although she had some general knowledge about Mexican farms, nothing either on the pretrial questionnaire nor during voir dire would have

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[3] The juror had disclosed on the questionnaire that he, like some of the victims, had been robbed at gunpoint. In the juror's later declaration, he specified that he was robbed at a location that was approximately one-half mile away from one of the crime scenes. Because the juror had disclosed being robbed *yet served on the jury*, the district court's findings about his honesty presumably referred only to the nondisclosure of his personal familiarity with the area.

alerted her to the possible relevance of such knowledge.

Petitioner also relies on *Sampson v. United States* (1st Cir. 2013) 724 F.3d 150 (*Sampson*). In *Sampson*, the defendant had pleaded guilty to capital crimes, but federal law required a jury to be empaneled to determine the penalty. The jury imposed the death penalty, but the defendant presented evidence during habeas corpus proceedings that one of the jurors willfully had concealed information during voir dire. The First Circuit, in affirming the district court's decision vacating the death penalty, ruled that the juror had failed to honestly answer material voir dire questions; indeed, the juror admitted to being deliberately dishonest during voir dire. (*Id.* at pp. 164-168.) *Sampson* therefore does not aid petitioner because the federal courts had found that the juror repeatedly and deliberately lied on her pretrial questionnaire and during voir dire, whereas Juror C.B.'s nondisclosure was much more limited and unintentional.

Petitioner finally contends Juror C.B.'s testimony that she carefully considered her pretrial questionnaire answers, and that she could not recall being a victim of any crime, is simply not credible due to the traumatic nature of her childhood. We reject this contention because, as we have explained, we have adopted our referee's finding that she was a credible witness. We therefore further reject petitioner's suggestion that the timing of C.B.'s disclosure necessarily indicates that she intentionally concealed her childhood experiences.

Petitioner posits that Juror C.B.'s testimony indicates other possible motives for her nondisclosure. For example, she testified that she thought some of the questions on the questionnaire were unduly invasive, and that until the trial she rarely had discussed her childhood experiences. Although we agree with petitioner that those sentiments could have been *possible* motives for intentional concealment, we also agree with the referee's finding, supported by substantial evidence, that C.B.'s nondisclosure with respect to these questions was unintentional.

We therefore conclude that, in light of the evidence presented, including the referee's ascertainment of C.B.'s demeanor while testifying, the referee reasonably found that her nondisclosure was neither intentional nor meant to conceal or otherwise deceive. Accordingly, we accept the referee's findings with respect to the second question because they are supported by substantial evidence.

3. Question Three: Did the Nondisclosure Indicate Bias?

The third question we posed to the referee inquired whether Juror C.B.'s nondisclosure indicated juror bias. She testified that, prior to the trial, she knew nothing about petitioner. She learned about petitioner's childhood for first time during the penalty phase.

Having found Juror C.B.'s explanation for her nondisclosure to be credible, the referee found that her

nondisclosure did not indicate juror bias. According to the referee, C.B.'s responses on the pretrial questionnaire and her testimony during the evidentiary hearing indicated "she was attempting to provide full and honest answers, and that her nondisclosure was inadvertent." Based on his review of the whole record, the referee concluded that no juror bias existed.

Petitioner challenges these findings. He contends it is "irrelevant" that Juror C.B. knew nothing about petitioner prior to his trial. We disagree. If pretrial publicity, the pretrial juror questionnaire, or voir dire had alerted her to the possibility that his harsh upbringing would be an issue at trial, conceivably her memories about her own experiences might have been triggered earlier. That is, if C.B. had a reason to anticipate the importance of her own childhood experiences while completing the pretrial questionnaire or participating in voir dire, her nondisclosure may have indicated an attempt to conceal her own experiences, which could in turn indicate juror bias. Although her lack of knowledge regarding petitioner's upbringing earlier in the case is not dispositive of the issue of bias, it does bolster her explanation that it was only during the penalty phase in which memories of her own experiences were first "triggered."

Petitioner notes that the pretrial questionnaire was not limited to prospective jurors' experiences as adults. But it is also true that the questionnaire did not inquire specifically about childhood experiences. Moreover, there is no evidence before us to suggest that Juror C.B. specifically discussed her childhood

experiences with anyone while she was completing her pretrial juror questionnaire, during voir dire, or during the guilt phase of petitioner's trial.

As petitioner acknowledges, this court has previously expressed doubts that a juror's honest mistake during the voir dire process can lead to the impeachment of a verdict for juror bias. (See *Hamilton*, *supra*, 20 Cal.4th at p. 300; see also *Boyette*, *supra*, 56 Cal.4th at p. 890.) Because we have accepted the referee's findings that Juror C.B. answered the pretrial juror questionnaire in good faith, we similarly accept the referee's finding that her nondisclosure was not indicative of bias.

Petitioner asserts that, unlike the jurors in *Boyette* and *Hamilton*, Juror C.B.'s nondisclosure hid her actual bias. These decisions ultimately do not help him, however. In *Boyette*, the juror failed to disclose his or his relatives' criminal histories and substance abuse problems and yet there was no evidence linking these personal experiences with how that juror judged the defendant's case. (*Boyette*, *supra*, 56 Cal.4th at pp. 889-890.) Similarly, the juror in *Hamilton* inadvertently failed to fully disclose her exposure to pretrial publicity, yet there was no indication that the undisclosed exposure influenced her ability to evaluate the evidence in the case. (*Hamilton*, *supra*, 20 Cal.4th at pp. 300-301.)

Again, in light of the evidence presented in this matter, and the referee's assessment of Juror C.B.'s demeanor while testifying, the referee reasonably found

that she had made an honest mistake while completing the pretrial juror questionnaire, which was not itself indicative of bias. A juror could, of course, intentionally conceal information for reasons other than bias, such as embarrassment or the desire to protect someone else. But nothing in the record before us suggests C.B. had any such motives while completing the questionnaire or during voir dire.

Our inquiry, however, does not end here. Although a finding of intentional nondisclosure would sustain the initial presumption of prejudice caused by juror concealment, substantial evidence supports the referee's findings that Juror C.B.'s unintentional nondisclosure indicates a lack of bias. We acknowledge, however, the possibility that C.B.'s honest mistake nonetheless hid a bias. We therefore must determine the ultimate issue—that is, whether petitioner has shown there is a substantial likelihood that C.B. was actually biased against petitioner.

4. Question Four: Was Juror C.B. Actually Biased?

In light of his findings regarding the first three questions, the referee also found that Juror C.B. was not actually biased against petitioner. Relying on *People v. Wilson* (2008) 44 Cal.4th 758 (*Wilson*), the referee found C.B. had properly evaluated "the penalty phase evidence through the prism of her life's experiences," and was not actually biased in doing so.

Petitioner contests the referee's finding that Juror C.B. was not actually biased against him. Citing the well-established rule that impartial jurors must set aside their personal impressions or opinions and render a verdict based solely on the evidence presented in court, he contends Juror C.B. was unable to do this. We have exercised our independent review (see *Crew*, *supra*, 52 Cal.4th at p. 149) and, for the reasons explained below, we conclude that petitioner has not shown a substantial likelihood that C.B. was actually biased.

Petitioner preliminarily challenges the referee's finding that his trial counsel invited the jurors to consider their own life experiences. During the penalty phase closing arguments, trial counsel asked, "And before you judge him, put yourself in his place. Would you be the person you are today? No question you wouldn't be. Would you do the things he did? Maybe, maybe not." The referee inferred that Juror C.B. "simply accepted the invitation made by petitioner's counsel," did put herself in petitioner's place, and judged him negatively. Although the reasonableness of this particular inference is debatable, it is also not determinative of the ultimate issue of whether C.B. was actually biased against petitioner, and we therefore place no weight on this particular finding.

Relying on *Diaz*, *supra*, 152 Cal.App.3d at page 936, petitioner next contends that the possibility of prejudice is greater if the misconduct is committed by the jury foreperson—as Juror C.B. was for petitioner's trial—due to the influence that role may wield during

jury deliberations. C.B. testified she and another juror shared their childhood experiences with the rest of the jury, but the record before us does not (and, indeed, under Evidence Code section 1150, cannot) reveal the influence, if any, these disclosures had on the jurors' deliberative processes. Nor is there any indication in the record that the other jurors voted as they did simply because C.B. was the foreperson, and not, for example, because of the persuasiveness or strength of her opinion, the severity of the evidence in aggravation, or for any of innumerable other reasons unrelated to C.B. We therefore decline petitioner's invitation to automatically ascribe any significance to C.B.'s status as the jury foreperson.

We also note petitioner supports much of his argument with decisions finding prejudicial juror misconduct based on jurors' exposure to, referencing, or disseminating information that was not presented during the trial. Those cases are unavailing, however: A juror's impermissible reliance on extrajudicial information (that is, new facts) is different from a juror's more permissible reliance on her or his life experiences when evaluating the evidence presented at trial. (See *Allen and Johnson*, *supra*, 53 Cal.4th at pp. 76-78; *Wilson*, *supra*, 44 Cal.4th at p. 831 ["Nor was [the juror's] statement that he 'knows' more abuse occurred than was presented to the jury an instance of relying on facts not in evidence. . . . He merely drew [a permissible] inference from the evidence presented, drawn from his own life experiences, that more abuse probably occurred than was shown"].)

Jurors are actually biased if they cannot act "with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C).) A juror may, for example, harbor a general bias against a class of witnesses. In *People v. Thomas* (1990) 218 Cal.App.3d 1477 at page 1482, for instance, the Court of Appeal upheld the mid-deliberations dismissal of a juror who believed, "based upon personal experience, that police officers in Los Angeles generally lie." And in *People v. Barnwell* (2007) 41 Cal.4th 1038 at pages 1048 to 1054, we similarly upheld the mid-deliberations removal of a juror who also had a general bias against law enforcement officers. In *Allen and Johnson*, *supra*, 53 Cal.4th at page 78, however, this court explained that although such categorical prejudgment of a *class* of witnesses is unacceptable, a juror may properly draw on her or his life experiences when determining whether a particular witness is credible. And here, there is no evidence that Juror C.B. found any class of witnesses to be incredible (or particularly credible). Indeed, there is no indication that she expressed doubt regarding the credibility of *any* witness, or otherwise questioned that petitioner had suffered childhood abuse. Rather, she came to a conclusion as to the weight to be given to the evidence that was presented.

Petitioner finds support for concluding that Juror C.B. was actually biased in the Hawaii Supreme Court's decision in *State v. Larue* (Hawaii 1986) 722 P.2d 1039 at pages 1042 to 1043. There, the court held that prejudicial juror misconduct occurred when a

juror's own experience of being molested as a child, which she inadvertently did not disclose during voir dire and revealed for the first time during deliberations, caused her to find the young sexual assault victims to be credible. We express no opinion on the correctness of *Larue*'s holding. Instead, we observe that Juror C.B. did not rely on her personal experiences to vouch for a witness's credibility, and she did not otherwise engraft her own childhood experiences onto those of the mitigation witnesses' experiences.

Petitioner nonetheless identifies two possible bases in which the information Juror C.B. did not disclose during voir dire may have shown she was actually biased against him. First, C.B. was sexually abused as a child and therefore victimized by conduct similar to conduct described by the penalty phase evidence that petitioner had raped a woman. Second, C.B. had childhood experiences similar to petitioner's, which led her to reject this aspect of his case in mitigation.

With respect to the first basis, that Juror C.B. was the victim of conduct substantially similar to that petitioner was accused of committing, the record before us indicates there was evidence during the penalty phase trial that petitioner had raped a friend's babysitter at gunpoint (see *Manriquez*, *supra*, 37 Cal.4th at pp. 569-570), and that C.B. had once been raped or sexually assaulted as a child. There are differences between the two incidents, however. For example, petitioner had used a weapon during the rape whereas there is no evidence that C.B.'s assailant did. In addition, C.B.'s assault occurred decades before petitioner's

trial, and there is no evidence in the record before us that the incident continued to traumatize her. Nonetheless, we accept petitioner's contention that the two incidents were sufficiently similar as to present a *possibility* of bias.

In support of his position, petitioner relies upon *Diaz*, *supra*, 152 Cal.App.3d 926, in which the defendant was charged with assault with a deadly weapon while armed with a knife. A juror in the case did not disclose during voir dire that she had previously been assaulted at knifepoint during an attempted rape. The juror revealed her prior attack to court personnel, who described the juror as being " 'prejudiced as to violent crimes.' " (*Id*. at p. 931.) After a midtrial hearing, the trial court denied the defendant's motion to dismiss the juror, and the defendant was later convicted. (*Id.* at pp. 930-931.) A divided panel of the Court of Appeal reversed, reasoning that "when a juror has been victimized by the same type of crime" as the defendant is accused of having committed, there is a "probability of bias." (*Id.* at p. 939.)

In *Diaz*, after the prosecution had rested its case, the juror related her experiences to a bailiff and a court clerk. When the court asked the bailiff his impression of the juror's impartiality, the bailiff stated, " 'My opinion, she is prejudiced as to violent crimes, especially [against] women. She is obsessed with rape, with victims, and the men who perpetrate this act. I cannot honestly say that she would be an impartial juror as to violent crime. . . . [S]he does have a very acute obsession with rape.' " (*Diaz*, *supra*, 152 Cal.App.3d at p.

931.) Setting aside the questionable propriety of a trial court soliciting its personnel's "impressions" of a juror (as opposed to limiting their testimony to what they had observed), the record before us does not show that Juror C.B. had any sort of similar "obsession." To the contrary. C.B. testified that, until the trial, she rarely had discussed her childhood experiences. And the referee found her not to be defensive. In sum, while a similarity between a juror's life experience and a crime alleged against a defendant certainly may create a possibility of bias, the impact the sexual assault had on C.B. does not create a *substantial likelihood* of actual bias.

Petitioner also refers to *Sampson*, the federal capital murder case in which a juror concealed, among other information, that her ex-husband had abused her and threatened her. Petitioner seizes upon the First Circuit's statement that "[w]hen a juror has life experiences that correspond with evidence presented during the trial, that congruence raises obvious concerns about the juror's possible bias. [Citations.] In such a situation, the juror may have enormous difficulty separating her own life experiences from evidence in the case." (*Sampson*, *supra*, 724 F.3d at p. 167.) Again, Juror C.B.'s inadvertent nondisclosure does not implicate the same possibility of bias as the circumstances presented in *Sampson*, in which the juror intentionally concealed information during voir dire and the posttrial proceedings regarding juror misconduct. Moreover, the juror in *Sampson* lied about life experiences that were so painful that she "'could not

discuss those matters candidly, unemotionally or, often, coherently'" at the evidentiary hearing conducted years after the events had occurred (and years after the defendant's trial). (*Ibid.*) The *Sampson* juror's difficulty in separating her own life experiences from the evidence in that case was manifest. C.B.'s testimony, in contrast, was "direct" and "responsive," and there is no indication in the record that she ever was overcome with emotion or was otherwise incoherent. Although there is evidence that C.B. *applied* her life experiences when interpreting petitioner's mitigation evidence, the record does not support the inference that she had any difficulty separating her own experiences from the evidence in petitioner's case. We therefore decline petitioner's invitation to follow *Sampson*.

With respect to the second basis for finding actual bias, that Juror C.B. had childhood experiences similar to petitioner's that led her to reject this aspect of his case in mitigation, we have some doubts regarding the purported similarities in their respective experiences. The evidence before us regarding the details of C.B.'s childhood is somewhat scant: she was raised by a foster mother and had a "rough childhood" because she worked as "slave labor" on a farm in Pennsylvania. She explained that as soon as she was old enough, she had to work on the farm. The farm also had a home for retired people, and she was required to cook, clean, and otherwise care for the residents. She worked sometimes before school, after school, and during the entire weekend. She was often physically abused, and a resident of the home for retirees once had sexually

assaulted her. In contrast, petitioner as a child worked on a farm in rural Mexico for 14 hours a day, 364 days a year. He did not attend school because there were none. And unlike C.B., petitioner also provided examples of some of the extreme cruelty he suffered at the hands of his relatives, such being tied to a tree and whipped, being hog-tied for an entire night in a storage bin, or having the soles of his feet burned so he could not run away. We have no doubt both suffered greatly. And certainly C.B. believed their childhood to be similar. But she also did not consider her experience to be unique. She explained that another juror also disclosed during deliberation that he had been beaten as a child. We do not view petitioner's and C.B.'s experiences as comparable as petitioner insists, which lessens somewhat the likelihood of bias on this basis.

Petitioner contends nonetheless that Juror C.B.'s personal experiences improperly affected how she viewed petitioner's evidence in mitigation. As he points out, after petitioner's trial C.B. plainly and repeatedly stated that she did not consider petitioner's childhood abuse to be an excuse or mitigating because, although she too had been abused, she had not committed crimes. But there is no evidence before us as to when C.B. determined that childhood abuse was not a sufficiently mitigating factor.

Petitioner observes that the juror in *Blackwell*, *supra*, 191 Cal.App.3d 925, the case involving the juror who had committed misconduct by concealing her personal experiences with an abusive ex-husband, had relied on those experiences to reject the defendant's

self-defense theory. The juror there, who had been able to escape her ex-husband without resorting to violence, stated in a declaration that she "'was personally able to get out of a *similar situation* without resorting to violence,'" and therefore believed that the defendant should have been able to do the same had she wanted to. (*Id.* at p. 928.) Petitioner asserts that, like the *Blackwell* juror, Juror C.B. was biased against him because she did not consider his life experiences to be an excuse or justification for his criminal behavior. *Blackwell* does not assist petitioner, however, because there, the Court of Appeal concluded the juror had intentionally given false answers during voir dire, which strengthened the presumption of prejudice. In addition, no evidence was presented in that case to rebut the presumption of prejudice. (*Id.* at pp. 930-931.) The same cannot be said here.

More fundamentally, as the referee noted, jurors generally are *expected* to interpret the evidence presented at trial through the prism of their life experiences. (*Wilson*, *supra*, 44 Cal.4th at p. 823.) In *Wilson*, also a death penalty case, both the defendant and one of the jurors were African American. During voir dire, the juror testified he would not be biased either for or against the defendant due to their being of the same race. (*Id.* at pp. 821-822.) During the penalty phase deliberations, the juror explained to the other jurors that he found the defendant's mitigating circumstances compelling because, being an African American, he believed he had some insight into the negative family dynamics and harsh circumstances of the defendant's

upbringing that non-African American jurors did not possess. (*Id.* at p. 814.) The trial court discharged the juror for misconduct, finding in relevant part that he had concealed his bias during voir dire and improperly considered race-based biases instead of the evidence presented. (*Id.* at p. 820.)

We held in *Wilson* that the trial court had abused its discretion in removing the juror, and vacated the penalty phase verdict. We noted that, unlike "the fact-finding function undertaken by the jury at the guilt phase, 'the sentencing function [at the penalty phase] is inherently moral and normative, not factual; the sentencer's power and discretion . . . is to decide the appropriate penalty for the particular offense and offender under all the relevant circumstances.' [Citations.] Given the jury's function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct." (*Wilson*, *supra*, 44 Cal.4th at p. 830.) Because the penalty phase is less amenable than the guilt phase to burden of proof calculations (e.g., *People v. Winbush* (2017) 2 Cal.5th 402, 489), "a penalty phase juror properly considers 'personal religious, philosophical, or secular normative values' in making a penalty determination." (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 60; accord, *People v. Bell* (1989) 49 Cal.3d 502, 564.) And such considerations plainly contemplate jurors drawing upon their varied backgrounds and experiences when making these moral and normative decisions.

This different kind of decisionmaking distinguishes petitioner's case from *Blackwell*, *supra*, 191 Cal.App.3d 925, in which there was a substantial likelihood that the challenged juror had decided the defendant was guilty of murder because she believed it would have been possible for the defendant to have escaped her abusive husband without resorting to violence. In other words, there was a substantial likelihood the *Blackwell* juror had refused to decide whether the defendant's subjective fears were reasonable *under the facts actually presented*, but rather had judged the defendant by the facts of her own personal circumstances. In contrast here, there is no evidence before us to indicate that Juror C.B. did not believe petitioner was actually abused as a child, or that she had determined whether he was abused by comparing their respective childhoods. Instead, C.B. decided that the abuse petitioner did suffer was not sufficiently mitigating so as to warrant sparing him the death penalty.

In addition, petitioner's contrary contentions notwithstanding, Juror C.B.'s life experiences of childhood labor conditions on farms did not constitute "specialized information," nor did we intend in *Wilson* to restrict the scope or type of life experiences upon which jurors may rely. And to the extent petitioner contends C.B. committed additional misconduct by sharing her experiences with her fellow jurors, *Wilson*, again, anticipates that, as part of the deliberative process during the penalty phase, jurors will share with each other their reasons for accepting or rejecting the evidence that was presented: "[R]elying on an understanding,

based on personal experience, of the effects of certain social environments and family dynamics on a young person growing up, when this understanding illuminates the significance or weight an individual juror would accord to related evidence in a particular case, is not misconduct." (*Wilson*, *supra*, 44 Cal.4th at p. 831.)

Although the juror in *Wilson* had some experiences similar to those of the defendant, notably, the juror was not a victim of any crime. As such, we are mindful that certain life experiences may create impermissible biases and others will not. And some jurors properly will use their life experiences to help shape their opinions, although other jurors may have been so affected by their life experiences that they have difficulty separating their own experiences from evidence of others' comparable experiences.

Gonzales v. Thomas (10th Cir. 1996) 99 F.3d 978 is instructive. In *Gonzales*, the defendant was convicted of, among other things, forcible rape. During voir dire, one of jurors denied having been involved in a " 'similar' " " 'incident,' " but during deliberations she revealed that, decades earlier, she had been " 'date raped' " when she was 19 years old and in school. (*Id*. at p. 982.) The federal district court ruled the juror had not been dishonest during voir dire because she genuinely perceived differences between her own experiences and the defendant's charged crimes. (*Id*. at pp. 984-985.) And, on appeal, the Tenth Circuit rejected the argument that a rape victim as a matter of law cannot be an impartial juror in the trial of an accused rapist. (*Id.*

at p. 989 ["To hold that no rape victim could ever be an impartial juror in a rape trial would, we think, insult not only all rape victims but also our entire jury system . . . "].) It then compared the juror's experiences with the charged crimes, noted the juror's relative lack of longstanding trauma and the passage of time, and rejected the defendant's contention that she was biased against him. (*Id*. at pp. 990-991.)

The same is true with Juror C.B.: Nothing in her background rendered her, as a matter of law, unable to sit as a juror in petitioner's case, and the record before us does not show that her childhood experiences made her predisposed to vote for the death penalty in petitioner's case. Rather, C.B.'s good-faith attempt to honestly answer the juror questionnaire rebuts the initial presumption of prejudice created by her nondisclosure because it shows her lack of intentional misconduct. And petitioner's contention of a substantial likelihood of actual bias is unavailing in light of the totality of circumstances: (1) posttrial, C.B. voluntarily disclosed her childhood experiences; (2) she cooperated during the habeas corpus investigation; (3) she was calm, "forthright and candid" during the evidentiary hearing, and she displayed no defensiveness, zealotry, or obsession; (4) her experiences were only somewhat similar to petitioner's; (5) there was a notable passage of time between her experiences and petitioner's trial; and (6) there is no evidence that her life experiences had compromised her ability to evaluate the evidence before her.

In addition, there is no evidence in the record before us that Juror C.B. could not or would not deliberate with her fellow jurors; rather, her undisputed testimony indicated that she participated in the jury's deliberations. Nor is there any evidence that she had prejudged the case or otherwise entered deliberations with an impermissibly closed mind: Because jurors may form preliminary assessments about the case, that these assessments are not later swayed by their fellow jurors' opinions is not necessarily a form of prejudgment indicative of bias. (See *Allen and Johnson*, *supra*, 53 Cal.4th at pp. 75-76.)

Although it was misconduct for Juror C.B. not to answer the pretrial juror questionnaire accurately, there is no substantial likelihood she was actually biased against petitioner. Rather, as permitted, C.B. applied her life experiences when she interpreted petitioner's mitigating evidence and weighed it against the evidence in aggravation, that is, his four convictions of first degree murder, as well as evidence of his involvement in three additional killings and raping a friend's babysitter at gunpoint. As such, we reject petitioner's suggestion that C.B. was predisposed to reject the defense mitigation evidence, or was otherwise unable to act impartially.

We therefore accept the referee's findings (except as otherwise indicated) with respect to the fourth question because they are supported by substantial evidence, and we independently conclude that petitioner has not shown a substantial likelihood that Juror C.B.

was actually biased against petitioner.[4] Accordingly, petitioner has not established that he is entitled to habeas corpus relief on his claim of prejudicial juror misconduct.

A similarity between a juror's life experiences and some aspect of the litigation may so call into question a juror's impartiality as to warrant exercising a peremptory challenge or otherwise discharging that juror. And because voir dire is intended in part to allow the parties to explore the prospective jurors' possible biases, we acknowledge that Juror C.B.'s nondisclosure deprived petitioner of the opportunity to do so. Regardless of her misconduct, however, 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."'" (*Boyette*, *supra*, 56 Cal.4th at p. 897.) Such is the case here.

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[4] Petitioner also argues that Juror C.B. was impliedly biased, if not actually biased. We recognize that there is nonprecedential federal case law concerning the constitutional guarantees of a fair trial and impartial jury that have implied bias even in situations when actual bias has not been shown. Indeed, a number of federal courts have implied bias "on the basis of similarities between the juror's experiences and the facts giving rise to the trial." (*Gonzales v. Thomas*, *supra*, 99 F.3d at 987; see *Hunley v. Godinez* (7th Cir. 1992) 975 F.2d 316, 319 [collecting cases in which courts have presumed bias because "the prospective juror has been the victim of a crime or has experienced a situation similar to the one at issue in the trial"].) But even were we to adopt this approach, it would not alter our conclusion in this case.

V. Conclusion

We discharge the order to show cause.[5] Because our order to show cause and our reference order were limited to this claim, we do not here address any other claims set forth in the habeas corpus petition, but instead resolve them by separate order. (See *Crew*, *supra*, 52 Cal.4th at pp. 153-154.)

CANTIL-Sakauye, C. J.

WE CONCUR:

CHIN, J.
CORRIGAN, J.
CUÉLLAR, J.
KRUGER, J.

DISSENTING OPINION BY LIU, J.

Petitioner Abelino Manriquez was sentenced to death by a jury that included a member who was decidedly unpersuaded by Manriquez's mitigation evidence based on the physical and emotional abuse and deprivation he suffered as a child growing up on a farm. Nothing about this raises any eyebrows—until one realizes that the skeptical juror herself, in her own words, "grew up on a farm where I was beat[en], raped, [and] used for slave labor from the age of [five through] 17." This juror, C.B., described herself as "successful in

[5] Petitioner's related request under Penal Code section 1181 to reduce his sentence to life imprisonment without possibility of parole is denied for the reasons stated in our opinion.

my career" and as "a very responsible *Law abiding* citizen." "Having been through abuse myself," she said, "I do not view abuse as an excuse."

How, one might wonder, did this juror escape notice by defense counsel during jury selection and end up serving on the jury (as the foreperson no less)—despite items on the juror questionnaire that asked prospective jurors whether they had ever been a victim of crime or had ever experienced or witnessed a violent act? The answer is that Juror C.B. did not give accurate answers to these questions and, as a result, did not give either party any reason to inquire into her abusive childhood. Juror C.B.'s nondisclosure, though unintentional, was misconduct giving rise to a presumption of prejudice. (Maj. opn., *ante*, at p. 11.)

Today's opinion says prejudice from juror misconduct occurs in these circumstances only when the record reveals a substantial likelihood of actual bias. That standard is readily satisfied here. As Justice Franson cogently explains, there is a substantial likelihood—in light of Juror C.B.'s own account of how she approached this case—that her predetermined mindset based on her childhood experiences prevented her from giving individualized consideration to the childhood abuse evidence actually presented in this case. This alone requires reversal of the penalty judgment.

But actual bias is not the only form of cognizable prejudice here. Juror misconduct during voir dire can also result in prejudice by distorting a defendant's consideration of which jurors to peremptorily strike and

what defense strategy to adopt. Indeed, that is what happened in this case.

There are stark similarities between Manriquez's early life experiences and Juror C.B.'s. Both grew up on farms for the majority of their childhood, where they were often subjected to vicious beatings and forced into manual labor for long hours. (Maj. opn., *ante*, at pp. 3, 6–7.) Both had traumatic experiences marring their childhood: At the age of seven, Manriquez was once tied to a tree and lashed with a whip by his grandmother and uncle. On another occasion, he was hog-tied and left in a corn storage bin overnight. (*Id.* at p. 3.) At the age of five, Juror C.B. was raped by a resident of the farm where she lived. (*Id.* at p. 7.)

Juror C.B. failed to disclose any of this, despite being asked questions designed to reveal this information during jury selection. (Maj. opn., *ante*, at pp. 5–7.) Because of Juror C.B.'s misconduct, Manriquez was denied important knowledge about Juror C.B.'s disposition toward one of his main theories at the penalty phase. Had Juror C.B. revealed her prior experiences and disposition toward those experiences, any competent counsel would have struck her from the jury with a peremptory challenge. Indeed, why would any competent defense attorney keep on this jury a person who had herself grown up on a farm, was " 'used for slave labor,' " " 'regularly beaten,' " and " 'raped' " on the farm, and yet believed adamantly, despite those experiences, that " 'childhood abuse was not an excuse' "? (*Id.* at pp. 6–7.) There is no question that Juror C.B.'s misconduct

impaired Manriquez's right to exercise peremptory strikes.

In addition, Juror C.B.'s misconduct likely had a prejudicial effect on Manriquez's arguments at trial. One of his principal mitigation arguments was that his childhood was " 'marred by extreme cruelty, vicious beatings, grinding poverty, forced labor, and a lack of care, education, affection, or encouragement by the adults in [his] life.' " (Maj. opn., *ante*, at p. 3.) Defense counsel said to the jury during penalty phase closing arguments: " 'And before you judge him, put yourself in his place. Would you be the person you are today? No question you wouldn't be. Would you do the things he did? Maybe. Maybe not.' " (*Id.* at p. 30.) It is inconceivable that competent counsel would have made this statement if counsel had known of Juror C.B.'s past experiences and attitude toward those experiences, as the statement played right into Juror C.B.'s firm belief that her similar childhood trauma did not prevent her from becoming a " 'successful' " and " 'very responsible *Law abiding* citizen.' " (*Id.* at p. 6.) In sum, because of Juror C.B.'s omissions at voir dire, Manriquez was not afforded a fair opportunity to exercise peremptory strikes or appropriately craft his trial strategy.

Today's opinion says we must uphold the verdict if, in light of the entire record and the nature and circumstances of the misconduct, there is " ' "no *substantial likelihood* that one or more jurors were actually biased against the defendant." [Citation.] In other words, the test asks not whether the juror would have been stricken by one of the parties, but whether the

juror's concealment (or nondisclosure) evidences bias.'" (Maj. opn., *ante*, at pp. 11–12, quoting *In re Boyette* (2013) 56 Cal.4th 866, 889–890.) But this limited inquiry does not adequately safeguard a defendant's right to a fair trial.

As the court recognizes: "'"*Voir dire* plays a critical function in assuring the criminal defendant that [his or her] Sixth Amendment right to an impartial jury will be honored. . . . [L]ack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule. . . ."'" (Maj. opn., *ante*, at p. 10, quoting *In re Hitchings* (1993) 6 Cal.4th 97, 110 [originally quoting *Rosales-Lopez v. U.S.* (1981) 451 U.S. 182, 188].) "A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct. [Citations.] [¶] Without truthful answers on voir dire, the unquestioned right to challenge a prospective juror for cause is rendered nugatory. Just as a trial court's improper *restriction* of voir dire can undermine a party's ability to determine whether a prospective juror falls within one of the statutory categories permitting a challenge for cause [citations], a prospective juror's *false answers* on voir dire can also prevent the parties from intelligently exercising their statutory right to challenge a prospective juror for cause. [¶] Such false answers or concealment on voir dire also eviscerate a party's statutory right to exercise a peremptory challenge and remove a prospective juror the party believes cannot be fair and impartial. We have recognized that 'the peremptory

challenge is a critical safeguard of the right to a fair trial before an impartial jury.' [Citation.] . . . '[J]uror concealment, regardless whether intentional, to questions bearing a substantial likelihood of uncovering a strong potential of juror bias, undermines the peremptory challenge process just as effectively as improper judicial restrictions upon the exercise of voir dire by trial counsel seeking knowledge to intelligently exercise peremptory challenges.' [Citations.] 'The denial of the right to reasonably exercise a peremptory challenge, be it by either the trial court *or a juror through concealing material facts*, is not a mere matter of procedure, but the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction.' [Citations.]" (*In re Hitchings*, at pp. 111–112; see *Ex parte Dobyne* (Ala. 2001) 805 So.2d 763, 772 ["The form of prejudice that would entitle a party to relief for a juror's nondisclosure or falsification in voir dire would be its effect, if any, to cause the party to forgo challenging the juror for cause or exercising a peremptory challenge to strike the juror."].)

People v. Diaz (1984) 152 Cal.App.3d 926 is instructive. The defendant was accused of committing an assault with a knife and causing great bodily injury. (*Id.* at p. 930.) During voir dire, a juror concealed the fact that she had been attacked at knife point during an attempted rape. (*Id.* at pp. 930–931.) On the last day of trial, the juror told court personnel of the knife attack. (*Id.* at p. 931.) Defense counsel asked the trial court to dismiss the juror, but because defense counsel

refused to proceed with 11 jurors, the trial court denied the motion, and the defendant was convicted. (*Ibid.*) The Court of Appeal reversed, concluding that the juror's concealment prevented defense counsel from fairly evaluating whether to use a peremptory challenge. (*Id.* at p. 936 ["there is a strong inference of potential prejudice to defendant in his selection of a jury"].)

To see even more clearly the inadequacy of today's prejudice inquiry, suppose multiple jurors, not just Juror C.B., had made similar misrepresentations during voir dire that were directly relevant to Manriquez's mitigation arguments. And suppose those jurors are found not actually biased under the same inquiry that leads the court to find Juror C.B. not actually biased. In such a case, the defendant's right to exercise peremptory challenges would be illusory, and his opportunity to craft his trial strategy and arguments to the jury would be rendered a farce. Under the reasoning of today's opinion, such a defendant would have no recourse—a result plainly at odds with basic notions of a fair trial.

Because Juror C.B.'s misconduct resulted in prejudice to Manriquez during jury selection and during the penalty phase of his trial, I would grant his petition for relief from the penalty verdict. I respectfully dissent.

LIU, J.

I CONCUR:

FRANSON, J.*

DISSENTING OPINION BY FRANSON, J.P.T.

I join in Justice Liu's dissenting opinion. I write separately to address an alternate ground, which assumes the majority opinion adopted the appropriate legal standard for balancing a criminal defendant's Sixth Amendment and state constitutional rights to a trial by an impartial jury against society's interest in the finality of criminal judgments.[1] Applying that standard, the majority concluded there was no substantial likelihood that Juror C.B. was actually biased against petitioner. I respectfully dissent from that conclusion.

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* Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] The question of the proper standard for analyzing a juror's failure to disclose material information during voir dire has produced a variety of approaches among the lower federal court and state courts. (See Lafave et al., 6 Criminal Procedure (4th ed. 2015) § 24.9(f), p. 681 [jury misconduct]; Loewy, *When Jurors Lie: Differing Standards for New Trials* (1995) 22 Am. J. Crim. L. 733 [survey and analysis of the various standards courts use in determining whether a juror's nondisclosure requires a new trial] (*Loewy*).) Part of the variety in approaches results from how lower courts apply *McDonough Power Equipment v. Greenwood* (1984) 464 U.S. 548, a civil case that did not involve the Sixth Amendment and produced a three-way split on the standard to be used. (See *Loewy*, *supra*, at pp. 739-741.)

As outlined extensively in *People v. Manriquez* (2005) 37 Cal.4th 547, the details of petitioner's crimes are horrific, and overwhelming evidence was presented at trial to support his guilt. Petitioner presented a minimal defense of one law enforcement officer, who presented hearsay testimony from a witness to one of the killings, comprising six pages of reporter's transcript. (*Id.* at p. 567.) By this, he essentially conceded his guilt and focused his efforts to avoid a death sentence by presenting evidence of his traumatic childhood physical and mental abuse as mitigating circumstances. The role of petitioner's childhood abuse in his mitigation arguments is crucial to the ultimate issue of actual bias.

With this backdrop, I address the second basis mentioned by the majority for a finding of actual bias—C.B.'s rejection of petitioner's traumatic childhood experiences as mitigating circumstances. In my view, the record establishes a substantial likelihood that (1) C.B. had a predetermined state of mind in reference to the case—specifically, the material issue of whether the childhood abuse that petitioner suffered could be a mitigating circumstance—and (2) C.B. relied on her strongly held belief that petitioner's childhood abuse was not an excuse to reject the petitioner's case in mitigation without giving individualized consideration to the evidence actually presented. Therefore, I conclude the record demonstrates a substantial likelihood of actual bias.

I. JUROR MISCONDUCT, REBUTTABLE PRESUMPTION AND ACTUAL BIAS

I agree that C.B.'s unintentional failure to disclose material information about her childhood was juror misconduct that raises a rebuttable presumption of prejudice. (Maj. opn., *ante*, at pp. 10-11.) When determining whether the prosecution has rebutted the presumption of prejudice that arises from juror misconduct, the court must independently determine from the entire record, including the nature of C.B.'s misconduct and "all the surrounding circumstances," whether there was no substantial likelihood she was actually biased against petitioner. (*In re Carpenter* (1995) 9 Cal.4th 634, 657; Maj. opn., *ante*, at p. 11; *In re Boyette* (2013) 56 Cal.4th 866, 890 (*Boyette*).) "All the surrounding circumstances" refers to C.B.'s statements, demeanor, and childhood experiences, but does not include the facts of the crimes. (Maj. opn., *ante*, at p. 40.) The substantial likelihood test is an objective standard. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.)

In the context of juror misconduct in a criminal proceeding, "[a]ctual bias" is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(C); *People v. Wheeler* (1978) 22 Cal.3d 258, 273-274.) This definition of actual bias extends beyond hatred of or ill will toward a defendant personally or a class of which he or she is a member. As relevant here, actual bias exists

when a juror "ha[s] been so affected by [her] life experiences that [she] ha[s] difficulty separating [her] own experiences from evidence of others' comparable experiences." (Maj. opn., *ante*, at p. 39.) To be sure, "jurors generally are *expected* to interpret the evidence presented at trial through the prism of their life experiences." (*Id.* at p. 36.) But here it is evident from C.B.'s comments about the similarity between petitioner's abusive childhood and her own abusive upbringing on a farm that C.B. had "difficulty separating her own experiences from the evidence in petitioner's case." (*Id.* at p. 35.)

II. APPLICATION OF DEFINITIONS TO THE FACTS

The existence of a state of mind on the part of C.B. on the issue of whether the childhood physical and mental abuse suffered by petitioner could constitute mitigating circumstances is not contested. During oral argument, the Attorney General acknowledged that C.B. had a "predetermined opinion" that petitioner's abuse was not an excuse. The Attorney General equated this to a predetermined mindset. Similarly, the majority acknowledges that "C.B. plainly and repeatedly stated that she did not consider petitioner's childhood abuse to be an excuse or mitigating because, although she too had been abused, she had not committed crimes." (Maj. opn., *ante*, at p. 36.)

C.B.'s declarations clearly establish her state of mind on petitioner's childhood abuse. In her 2007

declaration, C.B. described the abuse she suffered, compared it to petitioner's childhood abuse, and stated that "[h]aving been through abuse myself, I do not view abuse as an excuse." Also, based on her own experience of childhood abuse, C.B. openly acknowledged her "belief that childhood abuse was not an excuse" and that she communicated this belief to the other jurors. Furthermore, C.B.'s 1993 response to a posttrial questionnaire explained the basis for her belief by describing her childhood circumstances and stating: "I am successful in my career and am a very responsible *Law abiding* citizen. It is a matter of choice!" These statements plainly identified C.B.'s belief—that is, her state of mind—that the kind of childhood abuse petitioner suffered, which she believed to be similar to her own experience, did not constitute an excuse or a mitigating circumstance.[2]

Further, C.B.'s predetermined state of mind about petitioner's childhood abuse prevented her from considering the evidence actually presented. Her attitude toward such abuse cannot be described as "' "light impressions, which may fairly be presumed to yield to the

[2] In contrast to the present case, courts often are required to draw inferences to determine a person's state of mind. Here, C.B.'s own statements provide direct evidence of her state of mind and the reasons that particular state of mind existed prior to the trial—that is, was predetermined. Accordingly, this is not a situation where we are required to apply an objective standard and draw inferences about whether extraneous evidence resulted in a predetermined state of mind. (Cf. *Boyette*, *supra*, 56 Cal.4th at p. 892 [information jurors acquired by watching a movie did not establish a substantial likelihood of bias during penalty phase].)

testimony that may be offered, which may leave the mind open to a fair consideration of the testimony." ' " (*Nesler*, *supra*, 16 Cal.4th at p. 581.) The categorical and emphatic manner in which C.B. repeatedly stated her belief, based on her own experience, that "childhood abuse was not an excuse" and her sharing these beliefs and experiences with her fellow jurors indicates that C.B. held " ' "strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force." ' " (*Ibid.*) Most notably, there is no indication in the record that C.B. was ever open to evidence that might run counter to her own experience or that C.B. actually considered the evidence presented at trial in evaluating the *particular* circumstances of petitioner's *individual* case, as opposed to making an unqualified judgment based on *her own* experiences.

Accordingly, an evaluation of C.B.'s own undisclosed experiences of childhood abuse and the opinion she formed based on that experience are sufficient to establish a substantial likelihood that she could not impartially consider the evidence presented by petitioner.

The majority evaluates the evidence in the record differently and describes C.B.'s thought process by stating "C.B. decided that the abuse petitioner did suffer was not sufficiently mitigating so as to warrant sparing him the death penalty." (Maj. opn., *ante*, at p. 38) In addition, "C.B. applied her life experiences when she interpreted petitioner's mitigating evidence

and weighed it against the evidence in aggravation." (Maj. opn., *ante*, at p. 40.) But these characterizations of C.B.'s decisionmaking are conspicuously bereft of any citation to C.B.'s own comments about how she actually responded to petitioner's evidence. Her comments do not reveal deliberative consideration of petitioner's individualized circumstances based on the evidence actually presented. They instead reveal a categorical application of a predetermined mindset based on C.B.'s own experiences.

The majority also concludes the evidence that C.B. was prevented from acting impartially was outweighed by her honesty, forthrightness, cooperation, the fact that her childhood experiences were "only somewhat similar," there was a notable passage of time between her experiences and the trial, and there was no evidence that her experiences had a traumatic or life-changing impact on her. (Maj. opn., *ante*, at p. 40.) As to the passage of time, C.B.'s undisclosed childhood events, however distant, obviously and strongly shaped her personal views, which led her to "plainly and repeatedly state[] that she did not consider petitioner's childhood abuse to be an excuse or mitigating [factor]." (Maj. opn., *ante*, at p. 36.) Thus, the passage of time does not reduce to insignificance the likelihood that C.B. applied her belief that abuse is not an excuse to categorically reject petitioner's childhood abuse as a mitigating circumstance. Moreover, although the majority characterizes C.B.'s and petitioner's childhood experiences as "only somewhat similar," the crucial

fact is that "certainly *C.B.* believed their childhood to be similar." (*Id.* at p. 35, italics added.)

The majority places great weight on the finding that C.B.'s nondisclosure was unintentional.[3] As evidenced by her honesty and candor in explaining her reasons for not disclosing her traumatic childhood, it is clear that C.B. did not appreciate that her mindset might disqualify her from sitting as a juror. Therefore, she was very open about her background and thoughts. Many people do not appreciate their personal bias or prejudices, and are therefore very open and honest about their thoughts and opinions. Such honesty does not lessen the likelihood that her vocalized state of mind prevented her from acting impartially—that is, weighing the evidence offered in mitigation instead of rejecting it based on a predetermined state of mind.

In evaluating the likelihood that C.B. actually weighed the evidence of petitioner's childhood abuse or, alternatively, categorically rejected it because abuse is not an excuse, I conclude there is a substantial likelihood C.B. applied her predetermined state of mind and categorically rejected that evidence in deciding to impose the death penalty. While C.B. *might* have undertaken an actual weighing of the evidence, there is a substantial likelihood she did not. The existence of this substantial likelihood is supported by (1) her own

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[3] But irrespective of whether the nondisclosure was intentional or not, the presumption of prejudice is justified because the harm caused by the nondisclosure was the same—it hid C.B.'s predetermined mindset.

statements describing her mental process; (2) the similarity she perceived between her own experiences and petitioner's; (3) the categorical and unequivocal nature of her belief that childhood abuse is not an excuse; and (4) the fact she openly communicated her childhood experiences and her resulting belief to the other jurors. This evidence reasonably supports the inference that she considered them relevant to the case in mitigation. In contrast to *People v. Wilson* (2008) 44 Cal.4th 758, the evidence in this case is not readily susceptible to the inference that the juror's life experience was used to interpret or weigh the evidence presented. Here, there is a substantial likelihood C.B.'s life experience produced a specific attitude or prejudgment that led her to assign no mitigating weight to petitioner's childhood abuse without giving individualized consideration to the evidence actually presented.

In sum, the presumption of prejudice is not rebutted by a showing that there was no substantial likelihood of actual bias against the case in mitigation presented by the petitioner. Although the facts of the underlying crimes and the evidence in aggravation are horrendous, these facts are not relevant in determining C.B.'s mindset. A penalty phase verdict tainted by a substantial likelihood a juror was actually biased against a defendant must be reversed, "no matter how convinced we might be that an unbiased jury would have reached the same verdict." (*Nesler*, *supra*, 16 Cal.4th at p. 579.) I would grant the petition, vacate

the judgment insofar as the penalty of death was imposed, and allow a retrial of the penalty phase.[4]

FRANSON, J.*

I CONCUR:

LIU, J.

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[4] Before adopting a particular interpretation and application of statutory language, courts test that interpretation by considering the consequences that flow from it. (See *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1291.) This court's interpretation and application of the definition of "actual bias" contained in Code of Civil Procedure section 225, subdivision (b)(1)(C) is subject to this test. One of the consequences of the majority's view of "actual bias" is that a juror with C.B.'s state of mind relating to childhood abuse and privation could not be challenged for cause based on actual bias. Thus, a defendant—even one whose case in mitigation is based primarily on evidence of childhood abuse and privation—would be compelled to exercise a peremptory challenge to avoid empaneling a juror who would categorically reject childhood abuse and privation as mitigating circumstances. In my view, such a result during the voir dire process could unduly impinge a defendant's constitutional right to an impartial jury.

* Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

IN THE SUPREME COURT OF CALIFORNIA

In re **ABELINO MANRIQUEZ** On Habeas Corpus	S141210 Los Angeles Sup. Ct. Case No. VA004848 **REFEREE'S FINDINGS OF FACT IN RESPONSE TO CALIFORNIA SUPREME COURT'S REFERENCE QUESTIONS** (Filed Apr. 21, 2014) (Habeas Corpus)

AFTER EVIDENTIARY HEARING

Questions To Be Answered

On March 20, 2013, the Court ordered the referee to hold an evidentiary hearing and to make findings of fact responsive to the following questions:

1 What were Juror C.B.'s reasons for failing to disclose her childhood abuse on her juror questionnaire and during voir dire at petitioner's trial?

2. Was the nondisclosure intentional and deliberate?

3. Considering Juror C.B.'s reasons for failing to disclose these facts, was her nondisclosure indicative of juror bias?

4. Was Juror C.B. actually biased against petitioner?

Summary of Findings

Juror C.B. failed to disclose her childhood abuse on her juror questionnaire and during voir dire at petitioner's trial because she did not consider her childhood to have been a criminal act or an act of violence, and she did not consider herself to have been a victim. Her nondisclosure was neither intentional nor deliberate. Her nondisclosure was not indicative of juror bias. Juror C.B. was not actually biased against petitioner.

The Evidentiary Hearing

The referee conducted an evidentiary hearing on July 30, 2013. Petitioner was represented by John R. Reese, Esq., and Nitin Jindal, Esq., of Bingham McCutchen, LLP. Respondent was represented by Deputy District Attorney Brian R. Kelberg. Timothy M. Weiner, Deputy Attorney General, was also present. Petitioner was not present. The only witness was "Juror C.B."

The referee admitted into evidence the following exhibits submitted by petitioner:[1]

[1] Petitioner's counsel also offered an August 28, 2007, Declaration of Juror C.B. into evidence as Exhibit 4. (Evidentiary Hearing Transcript of proceedings before the referee held on July 30, 2013 (hereafter "EHT"), p. 73, lines 3-4.) [1] Respondent's counsel objected to this document being received for the truth of the matter asserted but did not object to its receipt "for the non-hearsay purpose that we used it in examination of the juror to show that

P-1 3/20/2013 – Supreme Court Minute Order Assigning Referee
P-2 8/9/1993 – Juror C.B.'s Pre-Trial Juror Questionnaire
P-3 10/21/1993 – Juror C.B.'s Post-Trial Juror Questionnaire
P-4 8/28/2007 – 2007 Declaration of Juror C.B.
P-5 8/9/2012 – 2012 Declaration of Juror C.B.
P-6 8/6/2012 – Transcript of Interview of Juror C.B.
P-7 5/15/2013 – Emails produced by Los Angeles District Attorney: MAN0001-MAN0017
P-8 5/13/2013 – Email between Los Angeles D.A. and Mr. Reese
P-9 7/10/2013 – Email between Los Angeles D.A. and Juror C.B.
P-10 5/16/2013 – Email between Los Angeles D.A. and Mr. Reese

The referee admitted the following exhibits submitted by respondent:

R-A Reporter's Transcript Vols. I, 2, and 3, *People v Manqiquez*, Case No. VA004848.
R-B Reporter's Transcript Vols. 9 and 10, *People v Manqiquez*, Case No. VA004848.

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there was an absence in the document of any reference to an explanation for the discrepancy [between Juror C. B.'s answers to Questions 63-66 of the jury selection questionnaire and Juror C. B.'s abusive childhood history as recounted by Juror C. B. in the post-verdict questionnaire from petitioner's trial counsel]." (*Id.*, lines 9-13.)

REFEREE'S FINDINGS

I. Question 1: What were Juror C. B.'s reasons for failing to disclose her childhood abuse on her juror questionnaire and during voir dire at petitioner's trial?[2]

The referee finds that Juror C.B.'s reasons for failing disclose her childhood abuse on her juror questionnaire and during voir dire at petitioner's trial were that she did not consider her childhood experiences to have been criminal acts or acts of violence, and she did not consider herself to have been a victim of crime.

<u>Background</u>

Juror C.B's Juror Questionnaire.

The specific questions at issue here and Juror C. B.'s answers to those questions were:

Question 63 "Have you or anyone close to you been the victim of a crime, reported or unreported?";

Question 64 "Have you or any relative or friend ever experienced or been present during a violent act, not necessarily a crime?";

Question 65 "Have you ever seen a crime being committed?"; and

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[2] Three volumes of the Reporter's Transcript on Appeal (hereafter "RT"), reflecting the oral voir dire conducted at petitioner's trial, were collectively marked as Respondent's Exhibit A.

Question 66 "Have you ever been in a situation where you feared being hurt or being killed as a result of violence of any sort?"

(Pre-trial jury questionnaire completed by Juror C. B. which she signed under penalty of perjury on August 9, 1993, marked Exhibit 2 to the Evidentiary Hearing.)

Juror C. B. answered "No" to Questions 64-66. (*Id.*, page Bates-stamped TF003932.) With respect to Question 63, it appears Juror C. B. initially checked the answer "No" before crossing over her checkmark and checking the "Yes" line. (*Id.,* pages Bates-stamped TF003931-003932.) Juror C. B. then indicated her "Home Was Robbed" "1" time. The listed victim was Juror C. B.'s "roommate before we lived together." (*Id.,* page Bates-stamped TF003932.)

Juror C.B.'s Evidentiary Hearing Testimony.

At the evidentiary hearing ordered by the Court, Juror C.B. testified that, from her perspective several years after petitioner's trial, she realized she had in fact been the victim of a crime and a violent act, and that in 1993 she had provided mistaken answers to some questions on her pretrial juror questionnaire. (EHT, p. 17, line 1 – p. 20, line 25.)

Juror C.B. explained at the hearing how she came to give mistaken answers to Questions 63-66 on the pretrial juror questionnaire. She testified that in 1993

she considered molesting a five-year-old to be a criminal act, but that

> "I did not consider myself a victim of a crime. I was a victim of circumstance. And that being said, I never thought of myself as having been a victim of any kind. So in 1993, I did not even think about the fact that I had been criminally assaulted, as it were, because in the '50's when I grew up, abuse was not a crime. Kids were abused all the time. And using kids for hard labor was very common. [¶] And as far as the molestation, it was a one-time thing, it never happened again. It went into the recesses of my mind. And it was not even thought of in 1993 until the very end of this whole trial." (EHT, pp. 19, line 5 – p. 20, line 12.)

As a result, when asked by petitioner's counsel whether in 1993 she considered the molestation she had suffered as a child "to have been an act of violence, not necessarily a crime?", Juror C. B. testified: "No, I didn't." (EHT, p. 20, lines 18-22.) Similarly, Juror C. B. testified that she did not consider the physical abuse that happened to her to have been an act of violence. (*Id.*, lines 23-25.) When petitioner's counsel asked Juror C. B. why she didn't consider the physical abuse that happened to her to be an act of violence, not necessarily a crime, Juror C. B. testified: "I guess my answer is, you had to be there. When you are growing up and that's your environment, you take it in stride." (EHT, p. 20, line 26-p.21, line 3.)

In her testimony, Juror C. B. acknowledged that, during her childhood, she had in fact been present during a violent act, and that when she answered Question 64 in 1993, she did not interpret the question as imposing any timeframe limitation *per se.* (EHT, p. 38, lines 3-16.) Juror C. B. testified that she considered Question 64 "an important question[,]" one which was neither "invasive" nor "ask[ing] information that was no one's business[.]" (EHT, p.40, line 26-p.41, line 5.) When specifically asked by petitioner's counsel why she had not disclosed her childhood abuse in response to Question 64, Juror C. B. testified: "Because the question indicated a violent act not necessarily a crime, and I did not consider my childhood a violent act." (EHT, p. 38, lines 19-21.)

Juror C. B. testified that, before answering Questions 63 through 66 on the questionnaire, she did sit back and think about her answers before she checked the "No" boxes. (EHT, p. 68, lines 9-11.) She also stated: "I tried to recall if I had been a victim of any crime, and nothing came to mind." Juror C. B.'s "childhood incidents didn't even come to mind" "because as I – no, they did not come to mind. And as I stated previously, I truly did not think of myself as a victim of a crime." (EHT, p. 68, lines 19-21.) "[Those instances] never entered my mind [before answering Questions 63 through 66 on the questionnaire]. [¶] [Q.]. . . [¶] Until the penalty phase, that's what triggered it. Other than that, I had no – I had no way of knowing that was even going to be an issue and so nothing triggered the thought

process to bring that forward." (EHT, p. 68, line 28-p.69, line 6.)

Juror C. B. further testified that her present recollection of what triggered her thought process at petitioner's trial about her childhood abuse "was during the penalty phase where the gentleman [petitioner's counsel] was talking about Mr. Manriquez's background." (EHT, p. 69, lines 11-13.)

> "Well, believe it or not – and I know we're not supposed to say what the other people were saying, but there was another gentleman [on the jury] who actually brought it up himself about having been beaten quite often by his father, and all of these things triggered in my mind my own abuse. And that's why I shared it. [¶] [Q.]. . . [¶] [W]hen we're younger, when we're young, and especially [for those who were young] in the '50's there was no – and I must say, the gentleman that shared first was actually a little bit older than I was, so he experienced similar acts that I did. And he didn't think of it as – he didn't share it that way like he'd been, you know, violated and it was a criminal act. And we shared our life experiences for the jury's benefit to show we are productive people, we don't commit murders." (EHT, p. 31, lines 9-27.)

During the penalty phase of petitioner's trial, Juror C. B. told the other jurors about her childhood abuse. "The specifics [of what I told the other jurors] that I recall simply was that I had been raised in an abusive environment and had been molested, raped

when I was five, and that I did not feel that was an excuse to become an unproductive, violent person in my adulthood." (EHT, p. 28, lines 2-6.)

It appears to the referee that Juror C. B. and the other juror mentioned by Juror C. B. in her evidentiary hearing testimony simply accepted the invitation made by petitioner's counsel in his closing penalty phase argument: "And before you judge him, put yourself in his place. Would you be the person you are today? No question you wouldn't be. Would you do the things that he did? Maybe. Maybe not." (EHT 58, lines 2-7, quoting from Ex. B, 10 RT 2291.) Juror C. B. agreed with petitioner's counsel that in 1993, her "past personal experiences shape[d] the outlook that [she] had on [life.]" "Sure, I think all of our experiences shape the outlook of our lives." (EHT, p.27, lines 6-11.)

The referee finds Juror C.B.'s testimony credible.

Juror C. B.'s experiences of growing up as a child in the 1950's, which shaped her view of life, support her explanation of why she did not disclose the circumstances of her abusive childhood. Juror C. B.'s perspective that she did not view herself as a victim of either a crime or act of violence is consistent with how society viewed and treated abuse of children 60 years ago, as distinct from how society now views and treats such abuse.

Also supporting Juror C.B.'s credibility is the fact that Juror C. B. herself brought her abusive childhood

history to the attention of petitioner's trial counsel when she voluntarily responded to trial counsel's post-verdict juror questionnaire. (See Juror C.B.'s Post-Trial Juror Questionnaire dated October 21, 1993, marked Exhibit 3 to the Evidentiary Hearing, Bates-stamped p. 234.) Furthermore, not only did Juror C. B. inform petitioner's trial counsel about her abusive childhood history, she also of her own accord informed petitioner's habeas counsel that she had communicated this information to her fellow jurors during jury deliberations as part of the jury's assessment of petitioner's proffered mitigation evidence of his own abusive background as a child in Mexico. (Declaration of Juror C. B. dated August 28, 2007, marked as Petitioner's Exhibit 4, pp. 3-4 (Bates-stamped pp. 1142-1143), ¶¶ 9-11; see also EHT, p. 12, line 8 -p. 13, line 14.) This strongly suggests that she had no hidden agenda or bias when serving as a juror.

The referee finds the evidentiary hearing testimony of Juror C. B. credible. Therefore, the referee finds that reasons testified to by Juror C. B. for not disclosing in response to jury questionnaire Questions 63-66 the circumstances of her abusive childhood background were, in fact, the reasons Juror C. B. did not disclose her abusive childhood background in response to Questions 63-66 of the jury questionnaire. The referee's credibility finding with respect to Juror C. B.'s testimony is based upon Juror C. B.'s demeanor, manner and mode of testifying Juror C. B. testified in a direct, responsive, thoughtful and consistent manner to questions posed by the parties' attorneys and by the

referee, and was not evasive, uncooperative or defensive.

It is reasonable that oral voir dire might not have prompted Juror C.B.'s recollections of her childhood. Juror C. B. did not disclose her childhood experiences on oral voir dire because, given her above-discussed perspective on her childhood, she was never asked any question which should have elicited such information. (See, Ex. A, 2 RT p. 279, line 27-p. 282, line 6 [oral voir dire of Juror C. B. by petitioner's trial counsel]; 2 RT p. 321, line 28-p. 323, line 19 [oral voir dire of Juror C. B. by the prosecutor].) Similarly, a review of the entire oral voir dire of the prospective jurors (Ex. A, 1 RT, pp. 170-239; 2 RT, pp. 240-544; 3 RT, pp. 545782) does not disclose any question posed or any answer given which should have prompted Juror C. B. to seek to amend her written responses to Questions 63-66.

Juror C.B.'s reasons do not conflict with each other. The referee finds that Juror C.B.'s testimony explaining different aspects of her questionnaire experience are not in conflict. As noted above, in her testimony, Juror C. B. acknowledged that during her childhood, she had in fact been present during a violent act and that when she answered Question 64 in 1993, she did not interpret the question as imposing any timeframe limitation *per se*; but that because she did not view herself as having been the *victim* of a crime, her experiences did not come to mind in response to these questions; that she viewed the questions at issue as important and purposeful, and that she believed she

had answered them accurately and honestly. EHT, p. 40, line 15-p. 41, line 17.

II. Question 2. Was the nondisclosure intentional and deliberate?

For the reasons set forth in the referee's findings with respect to Question 1, above, the referee finds Juror C. B.'s nondisclosure to be neither intentional nor deliberate.

Juror C.B.'s childhood experiences did not come to mind. Given Juror C. B.'s credible testimony that she did not consider herself to be a victim of violence or a crime despite her childhood experiences, the referee has concluded that Juror C. B. believed she had honestly and accurately answered Questions 63-66.

> "[T]he unfortunate part about the whole thing is that I did not consider myself a victim of a crime. I was a victim of circumstance. And that being said, I never thought of myself as having been a victim of any kind. So in 1993, I did not even think about the fact that I had been criminally assaulted, as it were, because in the '50's when I grew up, abuse was not a crime. Kids were abused all the time. And using kids for hard labor was very common. [¶] And as far as the molestation, it was a one-time thing, it never happened again. It went into the recesses of my mind. And it was not even thought of in 1993 until the very end of this whole trial." (EHT, p. 19, line 27-p.-20, line12.)

In discussing her thought processes when she was completing the answers to Questions 63-66 on the Questionnaire, Juror C. B. testified that she "tried to recall if [she] had been a victim of any crime, and nothing came to mind. [¶] [¶] No, [her "childhood incidents didn't even come to mind . . . "] because as I – no, they did not come to mind. And as I stated previously, I truly did not think of myself as a victim of a crime." (EHT, p. 68, lines 14-21.) In response to the referee's question – "Would it be accurate to say when you got to those [questions, Questions 63-66], those instances [from Juror C. B.'s childhood] never came to mind before you answered?" – Juror C. B. testified: "They never entered my mind." (*Id.*, lines 23- 28.) Finally, Juror C. B. explicitly and credibly testified that when she completed the juror questionnaire, Exhibit 2, in 1993, she believed that she had honestly answered every question on the questionnaire, including Questions 63 through 66. "I felt I was being honest, yes, uh-huh." (EHT, p. 52, line 16].)

Nondisclosure can be inadvertent despite "clear and unambiguous" questioning.

Petitioner argued at oral argument that the nondisclosure must have been intentional and reflective of bias because the questions of the pretrial questionnaire were clear and unambiguous. Despite the seeming clarity of the questions, however, the fact of nondisclosure does not necessarily indicate that nondisclosure was deliberate. Even when the questions are clear, it is not misconduct for a juror to innocently

fail to answer such questions correctly. See, e.g., *In re Boyette* (2013) 56 Cal.4th 866, 890; *In re Hamilton* (1999) 20 Cal.4th 274, 298-301.

No evidence has been adduced to indicate that Juror C.B. intentionally *concealed* her childhood experiences. After observing Juror CB testify, the referee concludes that all voir dire questions were answered in good faith by her with no intent to conceal or deceive.

III. Question 3. Considering Juror C. B.'s reasons for failing to disclose these facts, was her nondisclosure indicative of juror bias?

For the reasons set forth by the referee in response to Questions 1 and 2, above, the referee finds that Juror C. B.'s nondisclosure was not indicative of juror bias.

In light of Juror C. B.'s credible and honest belief that she had accurately answered Questions 63-66, her nondisclosure of the circumstances of her abusive childhood history is not indicative of actual juror bias. The referee also notes that Juror C. B. testified that, prior to being called as a prospective juror for petitioner's trial, she knew nothing about petitioner Abelino Manriquez or the crimes with which he was charged; nothing to the contrary was adduced at the evidentiary hearing. (EHT, p. 48, lines 1046.)

Inadvertent disclosure does not give rise to a presumption of bias. A juror who honestly but incorrectly answers voir dire questions does not

intentionally and deliberately fail to disclose, and such failure is "not indicative of juror bias." *In re Boyette*, supra, 56 Cal.4th at 873.

The referee was not expressly charged with determining whether Juror C.B.'s unintentional nondisclosure constituted juror misconduct, but even if the nondisclosure does constitute misconduct, and therefore gives rise to a presumption of prejudice, such a presumption of prejudice may be rebutted. The whole record must be examined to determine whether there is any evidence of bias. *In re Hamilton*, supra, 20 Cal.4th at 296. "What is clear is that an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias." *Id.* at 300. Here, Juror C.B.'s voir dire answers and her credible testimony that she gave time and thought to the responses she gave in her pretrial questionnaire are an indication that she was attempting to provide full and honest answers, and that her nondisclosure was inadvertent. From a review of the whole record, the referee concludes no such bias existed.

IV. Question 4. Was Juror C. B. actually biased against Petitioner?

The referee finds that Juror C.B. was not actually biased against Petitioner.

Juror C.B.'s testimony is direct evidence she was not biased.

For the reasons set forth by the referee above in response to Questions 1, 2 and 3, the referee finds that Juror C. B. was not actually biased against petitioner. In addition to the reasons set forth above, the referee finds credible Juror C. B.'s testimony in response to Respondent's question – "Were you biased against Mr. Manriquez at any time while you were a sitting juror in this trial?" "No, sir, I was not." (EHT, p. 53, lines 25-27.)

Circumstantial evidence supports a finding that Juror C.B. was not actually biased against Petitioner.

Juror C. B. herself brought her history of childhood abuse to the attention of petitioner's trial counsel when she voluntarily responded to trial counsel's post-verdict questionnaire (Ex. 3). Juror C. B. has discussed this history with both petitioner's habeas counsel (see, Ex. 4 [Aug. 28, 2007 Decl. of Juror C. B.]) and respondent's counsel, Dep. Atty. Gen. Weiner (see, EHT Exs. 5 [Aug. 9, 2012 Decl. of Juror C. B.] & 6 [transcript of Aug. 6, 2012 interview of Juror C. B. by Dep. Atty. Gen. Weiner and Special Agent Beach]). Like the juror in *Hamilton*, supra, when specifically asked during the July 30, 2013, evidentiary hearing about her childhood experiences, Juror C. B. was forthright and candid.

Juror C.B. did not use extrajudicial information in deciding Petitioner's case.

Petitioner's counsel argued at oral argument that Juror C. B. was actually biased because she prejudged Petitioner's mitigation defense and was unable to put aside her own history of abuse to determine his sentence. This argument, however, fails to differentiate between "extrajudicial information" a juror has received outside of the courtroom, which cannot be used by the juror in deciding a case, and a juror's life experiences, which act as a prism through which jurors at the penalty phase of a capital case may properly assess the weight to be given to proffered mitigation evidence. "Given the jury's function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct." *People v. Wilson* (2008) 44 Cal.4th 758, 830. That is all that Juror C.B. did. The reference to her childhood experience during deliberation was merely her way of analyzing the penalty phase evidence through the prism of her life's experiences and not misconduct of any sort.

Juror C.B.'s testimony that she rejected Petitioner's defense does not necessarily constitute an admission of bias. Petitioner also argued that a juror's admission that she rejected a defense based on a similar and traumatic personal experience is an admission of bias. For this proposition, he cites to *People v. Blackwell* (1987) 191 Cal. App. 3d 925, 931. *Blackwell* does not support that proposition, and is also factually distinguishable. Although the *Blackwell*

court did conclude that a *concealing* juror in that case had committed misconduct, this conclusion was not based solely on the similarity of past experience the juror shared with the defendant in that case. In fact, the *Blackwell* court found that the biased juror in that case had intentionally concealed information that should have been elicited on voir dire, and had committed misconduct. Such is not the case here as there was no intentional concealment.

Petitioner at oral argument suggested that Juror C.B.'s testimony should be rejected as self-serving to avoid a perjury charge. The referee declines to do so. This suggestion is nothing more than rank speculation on the part of the petitioner. Given the four-year statute of limitations to prosecute perjury (see, Pen. Code, §§118, 801.5, 803(c)), even had Juror C. B. committed perjury in responding to the juror questionnaire in 1993, no criminal prosecution for that offense was viable in 2013. On the other hand, if Juror C. B. committed perjury during her 2013 evidentiary hearing testimony, no such statute of limitations bar would protect her from a possible perjury prosecution. Petitioner's testimony at the evidentiary hearing, if truthful, would not provide grounds for a perjury prosecution. Juror C.B.'s testimony before the referee was not plausibly motivated by a self-serving desire to avoid perjury charges.

The referee respectfully recommends that the Court find that Juror C.B. failed to disclose her childhood abuse on her juror questionnaire and during voir dire at petitioner's trial because she did not consider

her childhood experiences to have been criminal acts or an acts of violence, and because she did not consider herself to have been a victim; that her nondisclosure was neither intentional nor deliberate, that her nondisclosure was not indicative of juror bias; and that Juror C.B. was not actually biased against petitioner.

Respectfully submitted,

Dated: April 14, 2014 /s/ Ryan
Los Angeles
California

WILLIAM C. RYAN
Court-Appointed Referee
and
Judge of the Superior Court
County of Los Angeles

No. S141210

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ABELINO MANRIQUEZ, On Habeas Corpus.	(Related to *People v. Manriquez*, Supreme Court No. S038073) (Los Angeles County Superior Court No. VA004848) Hon. Robert Armstrong, Presiding

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PETITIONER MANRIQUEZ'S EXCEPTIONS TO REFEREE'S FINDINGS OF FACT AND MERITS BRIEF

(Filed Jul. 21, 2014)

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DEATH PENALTY

* * *

IV. EXCEPTIONS AND BRIEF ON THE MERITS

A. Petitioner's Constitutional Right To An Unbiased Jury

A defendant has the Constitutional right to a trial by an impartial jury. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Irvin*, *supra*, 366 U.S. at 721-22; *In re Hamilton*, *supra*, 20 Cal.4th at 293-94.) Under both federal and California law, that right to impartiality extends to every juror: a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." (*People v. Pierce* (1979) 24 Cal.3d 199, 208; *Nesler*, *supra*, 16 Cal.4th at 578, citations and quotations omitted; *Tinsley v. Borg* (9th Cir. 1990) 895 F.2d 520, 523-24 ["Even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury," citations and quotations omitted].) "The right to an impartial jury is nowhere as precious as when a defendant is on trial for his life." (*Sampson v. U.S.* (1st. Cir. 2013) 724 F.3d 150, 163.)

Voir dire is the mechanism to ferret out such bias. "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*In re Hitchings*, *supra*, 6 Cal.4th at 110, citation and quotations omitted; *see also McDonough Power Equip., Inc. v. Greenwood* (1984) 464 U.S. 548, 554 ["*Voir dire* examination serves to protect that right [to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors"].)

Truthful responses are essential to a fair trial. As this Court has repeatedly explained, a prospective juror's false answers on voir dire undermine both challenges for cause and peremptory challenges. (*In re Boyette* (2013) 56 Cal.4th 866, 888; *In re Hitchings*, *supra*, 6 Cal.4th at 110-12) "Demonstrated bias in the responses to questions on voir dire may result in a juror's [*sic*] being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." (*In re Boyette*, *supra*, 56 Cal.4th at 888-89, quoting *In re Hitchings*, *supra*, 6 Cal.4th at 111). "[J]uror concealment, regardless whether intentional, to questions bearing a substantial likelihood of uncovering a strong potential of juror bias, undermines the peremptory challenge process just as effectively as improper judicial restrictions upon the exercise of voir dire by trial counsel seeking knowledge to intelligently exercise peremptory challenges."

(*In re Boyette*, *supra*, 56 Cal.4th at 889, quoting *In re Hitchings*, *supra*, 6 Cal.4th at 110-112.)

"A juror who conceals relevant facts or gives false answers during the voir dire examination thus undermines the jury selection process and commits misconduct." (*In re Boyette*, *supra*, 56 Cal.4th at 889.) The incorrect answer is misconduct even if the juror did not intend to give a false answer. (*Id.* at 889-90 [juror's incorrect answers on voir dire were misconduct raising presumption of prejudice even though he answered in good faith; presumption of prejudice was rebutted on facts]; Section IV.C., below.) Jury misconduct is especially problematic in capital cases, as the Eighth and Fourteenth Amendments require heightened reliability in the determination that death is the appropriate penalty. (*Beck v. Alabama (1980)* 447 U.S. 625, 638 n.13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

"[J]uror misconduct raises a presumption of prejudice." (*In re Boyette, supra*, 56 Cal.4th at 889-90.) The prosecution bears the burden of rebutting the presumption. (*People v. Marshall* (1990) 50 Cal.3d 907, 949-51.) "Any presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant." (*In re Hamilton*, *supra*, 20 Cal.4th at 296, emphasis in original and citations omitted.)

Irrespective of the prejudice inquiry, "if it appears substantially likely that a juror is actually biased, [the court] must set aside the verdict, no matter how convinced [it] might be that an unbiased jury would have reached the same verdict." (*In re Carpenter* (1995) 9 Cal.4th 634, 654; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 n.2 ["The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice."].)

Here, C.B.'s failure to disclose her history of abuse was misconduct. Regardless of whether her nondisclosure was intentional, she "g[a]ve[ ] false answers during [ ] voir dire." (*In re Boyette*, *supra*, 56 Cal.4th at 889.) This misconduct presumptively prejudiced Petitioner, a presumption that the government cannot rebut because it was substantially likely that C.B. was actually biased. (*See* Section IV.C., below.) Indeed, C.B. was actually biased. (*See* Section IV.B., below.) C.B. intentionally and deliberately concealed her history of physical abuse and rape, (*see* Section IV.D.2., below), only lends additional support to this conclusion.

B. Exception: The Referee Erroneously Found That C.B. Was Not Actually Biased

The undisputed facts prove C.B. was actually biased. Instead of basing her decision solely on the evidence, she rejected Petitioner's mitigation defense based on a unique, similar and traumatic personal experience that mirrored the material facts at issue during Petitioner's penalty phase trial. C.B.'s statements

after the trial, and her testimony at the reference hearing confirm her own childhood abuse formed the basis of her decision.

The Referee acknowledged that C.B.'s personal history of abuse played a role in Petitioner's penalty phase deliberations, but he applied the wrong legal standard to the operative facts and found that C.B. was not actually biased because jurors can base their decisions on any "life experience." That finding was wrong as a matter of law. The Referee also supported his finding with facts that are irrelevant to the core issue in this case: whether a juror can reject a defense based on a unique, similar, and traumatic personal experience. Case after case applying California and U.S. Constitutional principles establish that a juror cannot.

1. The Referee's Finding That C.B. Was Not Actually Biased Is Subject To Independent Review

The Referee's finding that C.B. was not actually biased is subject to this Court's independent review because the Referee applied the wrong legal standard to facts that are not in dispute. When "appl[ying] [ ] law to the facts," where the relevant "question requires [this Court] to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo." (*Ghirardo v. Antonioli* (1994) 8 Cal.

4th 791, 800-01; *see also People v. Cromer* (2001) 24 Cal.4th 889, 894 ["Mixed questions are those in which 'the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated,'" citation omitted]; *cf. Redevelopment Agency of City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68, 74 ["The proper interpretation of statutory or . . . constitutional language is a question of law which this court reviews de novo, independent of the trial court's ruling or reasoning," citation and quotations omitted].)

Here, Petitioner, Respondent, and the Referee all agree that C.B.'s own personal history of abuse played a role in the jury's penalty phase deliberations. Moreover, there is no dispute that history of abuse was traumatic, mirrored Petitioner's own childhood, and that Petitioner's history of abuse was the focus of his mitigation evidence.

The only dispute is a question of law and the application of that law to the undisputed facts: whether under prevailing California and U.S. Constitutional principles, C.B.'s rejection of Petitioner's defense based on her own history of abuse, instead of solely on the evidence, was actual bias. That question, which requires this Court to "exercise judgment about the values that animate [the] legal principle[ ]" of what constitutes actual bias, "should be classified as one of

law and reviewed de novo." (*Ghirardo*, *supra*, 8 Cal. 4th at 800-01.)

2. C.B. Was Actually Biased Because She Could Not Keep An Open Mind And Decide Solely On The Evidence

Under California law, actual bias is " 'the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.' " (*Nesler*, *supra*, 16 Cal.4th at 581 (adopting and quoting Cal. Code Civ. Proc. § 225 sub. (b)(1)).) Actual bias can arise at any time during trial: " 'If at any time during the trial the juror loses the ability to render a fair and unbiased verdict, he can, under [former] section 1123 of the Penal Code, be dismissed from the case.' " (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1484-85, quoting *People v. Farris* (1977) 66 Cal.App.3d 376, 386, brackets in original; Stats. 1988, ch. 1245 (repealing former Penal Code section 1123 and codifying it in Cal. Code Civ. Proc. § 233).)

A juror is actually biased if, among other things, she is "unable to put aside [her] impressions or opinions based upon the extrajudicial information [she] received and render a verdict based solely upon the evidence received at trial." (*Jenkins*, *supra*, 22 Cal.4th at 1049, quoting *Nesler*, *supra*, 16 Cal.4th at 583; *People v. Cissna* (2010) 182 Cal.App.4th 1105, 1118,

quoting same.) Actual bias need ***not*** be personal animus. (*Cissna*, *supra*, 182 Cal.App.4th at 1116.)

The U.S. Constitution similarly entitles a defendant to jurors who put aside their impressions and decide based solely on the evidence. "The theory of the law is that a juror who has formed an opinion cannot be impartial. [Citation.] [J] It is not required, however, that the jurors be totally ignorant of the facts and issues involved. . . . *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.*" (*Irvin*, *supra*, 366 U.S. at 722-23, citations omitted; *Nesler*, *supra*, 16 Cal.4th at 580-81, quoting same.) But "those *strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection* to him." (*Reynolds*, *supra*, 98 U.S. at 155, citations omitted, emphasis supplied; *Nesler*, *supra*, 16 Cal.4th at 581, quoting same.)

That is this case. Juror C.B. admits that before she heard a word of evidence, she already had a preconceived opinion based on her own history that abuse was no excuse; her own testimony demonstrates that she did *not* put this opinion aside and decide based solely on the evidence, but that her impression was strong and deep and fought the force of Petitioner's mitigation evidence at every turn. Before she was ever empaneled, she had already concluded based on her own experience that a history of abuse was no "excuse for committing crimes." (EHT at 27:15-18.) As soon as she heard about Petitioner's abusive past, she thought

of her own similar history (*Id.* at 69:7-15, 71:11-22) and thought "well, so was I." (*Id.* at 33:9-11.) (*See* Section IV.B.5., below [detailing why Referee erred in excluding "so was I" testimony].) In deliberations she told the other jurors of her abuse and that she "did not feel that was an excuse to become an unproductive, violent person in [her] adulthood" (*id.* at 27:28-28:6), "to show we are productive people, we don't commit murders." (*Id.* at 64:9-17.) Post-trial she wrote that she had grown up on a farm and been abused, but "I am successful in my career and a very responsible, law-abiding citizen. It's a matter of choice!" (Pet. Ex. 3 at TF14371; EHT at 34:23-35:13.)

These statements fit the California and U.S. Constitution tests for actual bias to a T. C.B. did *not* "put aside [that] impression[ ] or opinion[ ]" based upon her own extrajudicial information and "render a verdict based solely upon the evidence received at trial" (*Jenkins*, *supra*, 22 Cal.4th at 1049) or "lay aside [her] impression or opinion and render a verdict based on the evidence presented in court." (*Irvin*, *supra*, 366 U.S. at 72223.) To the contrary, her belief that abuse is not an excuse remained "strong and deep," "combat[ted]" the testimony about Petitioner's abusive childhood, "resist[ed] its force," and closed her mind so his plea for mitigation based on this evidence never had a chance. (*Reynolds*, *supra*, 98 U.S. at 155.) Her disclosure to fellow jurors of her history of abuse like Petitioner's, and of her conclusions based on that experience, confirms that she herself relied on the same history and preconceived opinions she urged other jurors to follow. "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." (*Nesler*, *supra*, 16 Cal.4th at 587; *see also Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [juror's comments that defendant was a good hospital was extraneous information that was evidence of bias]; *In re Carpenter*, *supra*, 9 Cal.4th at 657 ["a biased juror would likely have told other jurors what she had learned"]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 589 ["[B]ias at the time of voir dire may be inferred from the utterances made in the jury room. . . ."]; *Smith v. Covell* (1980) 100 Cal.App.3d 947, 955 ["improper communications [during deliberations] evidence a concealment of bias on voir dire"].)

Cases from California and other state and federal courts confirm that a juror is actually biased when she rejects a defense based on her own unusually similar experiences. For example, in *People v. Blackwell*, a victim of alcohol-triggered domestic violence claimed that she killed her husband in self-defense. (191 Cal.App.3d at 927-28.) A juror who disclosed no personal experience with these issues during voir dire later admitted "she was the victim of an abusive former husband who became physically violent when drinking." (*Id.* at 928.). She explicitly declared that: "'*Based upon my personal experiences, it is my opinion that* [followed by a description of Juror R.'s personal views on battered wives].'" (*Ibid.*, italics and brackets in original.) She further explained, "'[s]ince I was personally able to get out of a

similar situation without resorting to violence, I feel that if she had wanted to, [appellant] could have gotten out, as well." (*Ibid.*, italics and brackets in original.) *Blackwell* held that the juror's admissions that she rejected the defendant's case based on her own history of abuse "reveal[ed] her bias." (*Id.* at 931.) The court then held that her misconduct was prejudicial since the record contained no affirmative evidentiary showing that prejudice did not exist. (*Ibid.*)

Like the juror in *Blackwell*, C.B. *rejected* Petitioner's mitigation evidence *explicitly because of her* opinions based on her *similar* history of abuse. She admitted this immediately after the trial and at the evidentiary hearing. (EHT at 34:23-35:13; Pet. Ex. 3 [Post-trial Questionnaire] at TF1437 [immediately after trial, C.B. viewed Petitioner's mitigation evidence to be a "detriment"]; EHT at 27:15-18 [prior to trial, did not view anyone's abuse "as an excuse for committing crimes" based on her own history of abuse]; EHT at 69:7-15, 71:11-22 [Petitioner's mitigation evidence "triggered" C.B. to think of her own history of abuse].) Because C.B., like Petitioner, "grew up on a farm where [she] was beat, raped, and used for slave labor" for a decade, but was "successful in [her] career and a very responsible, law abiding citizen," she – like the juror in *Blackwell* – held Petitioner to the standard of her uniquely similar personal experience. (EHT at 34:23-35:13; Pet. Ex. 3 [Post-trial Questionnaire] at TF1437.) As in *Blackwell*, these admissions conclusively "reveal[ ] her bias." (*Blackwell*, *supra*, 191 Cal.App.3d at 931.)

The Referee refused to apply *Blackwell*, stating "*Blackwell* does not support [the] position [that 'a juror's admission that she rejected a defense based on a similar and traumatic personal experience is an admission of bias'], and is also factually distinguishable." (RFF at 13:6-10.) The Referee distinguished *Blackwell* because the juror in *Blackwell* was found to have intentionally concealed her history of abuse, whereas the Referee found that C.B. unintentionally failed to disclose her abuse during voir dire. (*Id.* at 13:14-16.) This misrepresents the case. The *Blackwell* court's determination that the juror's admissions revealed her bias did not turn at all on why the juror did not disclose her own history of abuse during voir dire or whether it was intentional. To the contrary, *Blackwell* noted that had the juror disclosed her viewpoint during voir dire, "it might have led to a challenge for cause, since Juror R.'s declaration reveals that she had a particular viewpoint regarding the issue of battered wives which she failed to disclose in response to a direct voir dire inquiry." (*Blackwell*, *supra*, 191 Cal.App.3d at 931.) Moreover, the court noted that the juror's "***affidavit*** reveal[ed] her bias," not her motivations during voir dire. (*Ibid.*, emphasis supplied.)

Many other cases are in accord with *Blackwell*'s holding, and the Referee ignored all of them. In *People v. Nesler*, *supra*, 16 Cal.4th 561, a plurality of this Court held that the juror's reference to extraneous information constituted misconduct because such disclosures "were made during deliberations, at a time when she disagreed with other jurors, in an apparent

attempt to persuade them to change their views." (*Id.* at 579, 587-89.) The plurality found that the juror's use of the information during deliberations demonstrated that "she was unable to put aside the impressions and opinions formed from her consideration of the extraneous information, and to decide the matter based solely upon the evidence presented at trial." (*Id.* at 589.) Accordingly, the plurality found that there was "a substantial likelihood that [the juror] was actually biased." (*Ibid.*) A fourth Justice, concurring in the judgment and forming a majority, agreed that the juror was "actually biased" if she "was herself influenced" by the extraneous information – as C.B. concededly was here. (*Id.* at 592-93 (Mosk, J., concurring in judgment).)

Similarly, in *State v. LaRue* (Hawaii 1986) 722 P.2d 1039, the Hawaii Supreme Court applied U.S. Constitutional principles and overturned a conviction for sexual abuse of a minor because a juror *inadvertently* failed to disclose being the victim of child abuse during voir dire, but *based* her decision in the case on her own experience. A new trial was required because, as in this case with C.B.:

> the crucial issue was being decided, at least by the foreperson, on the basis of a singular, and undoubtedly traumatic, personal experience closely paralleling the alleged crimes.
>
> . . . We do not doubt that foreperson Chung's failure to reveal that experience and recollection during voir dire was innocent, and inadvertent. The fact, however, that she brought it out to the other jurors during deliberation

> makes clear that her judgment on the issue was based on the particular incident in her own past, and her recollection thereof, and that she therefor was not, in this case, impartial. Moreover, it is impossible to say that beyond a reasonable doubt, the seven jurors who heard the remark were not influenced thereby in reaching the verdict.

(*Id.* at 1042.) Of course, those same federal constitutional requirements apply to this Court.

Yet again, *United States v. Sampson*, (D. Mass. 2011) 820 F.Supp.2d 151 overturned a death sentence because a juror's personal experience, not disclosed in voir dire, mirrored the facts at issue and caused the juror to be biased. The court held that "[e]ach juror must be able to make th[e] decision [of whether to find the penalty of death] based solely on the evidence, uninfluenced by personal experiences he or she may have had." (*Id.* at 157.) The court noted that before trial, "potential jurors were excused for cause because they had emotional life experiences that were comparable to matters that would be presented in [defendant's] case and created a serious risk that they would not be able to decide whether the death penalty should be imposed based solely on the evidence." (*Ibid.*) Confronting a juror who failed to reveal similarities between her and defendant, the court stated that "[i]f these matters had been revealed, the court would have found that there was ***a high risk that after being exposed to the evidence at trial [the juror's] decision on whether [defendant] should be executed would be***

influenced by her own life experiences and, therefore, a high risk that she would be substantially impaired in her ability to decide whether [defendant] should be executed based solely on the evidence. Like other potential jurors, [the juror] would have been excused for cause solely for that reason." (*Id.* at 159, emphasis supplied.)

The First Circuit agreed, noting that the operative question under the Sixth Amendment of the U.S. Constitution is whether a "juror lacked the capacity and the will to decide the case based on the evidence," and providing that "[w]hen a juror has life experiences that correspond with evidence presented during the trial, that congruence raises obvious concerns about the juror's possible bias. [citations] In such a situation, the juror may have enormous difficulty separating her own life experiences from evidence in the case." (*Sampson v. U.S.*, *supra*, 724 F.3d at 167.)

Unlike *Sampson,* this Court does not have to guess about whether C.B. and Petitioner's shared histories of abuse would create a "high risk that [C.B.] would be substantially impaired in her ability to decide whether [Petitioner] should be executed based solely on the evidence." (*Sampson*, *supra*, 820 F.Supp.2d at 159)[3]

[3] The high risk that a juror will not be able to decide a case solely based on the evidence when the juror has a personal experience that mirrors the facts at issue is widely recognized. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 938-39 ["In light of the surrounding circumstances here, highlighted by the inevitable subliminal ramifications upon a juror's ability to fairly and objectively judge a person accused of committing the same type of violent physical assault to which the juror has been subjected, we conclude the

Petitioner already lost that gamble. C.B. admitted she did not "separat[e] her own life experiences from evidence in the case" and that she did not decide Petitioner's fate "based solely on the evidence." (*Sampson v. U.S.*, *supra*, 724 F.3d at 167; *Sampson*, *supra*, 820 F.Supp.2d at 157, 159.)

And again in *People v. Thomas* (1990) 218 Cal.App.3d 1477, during deliberations one juror announced that she could not accept the testimony of police officers, because of a "*firm belief based upon personal experience,* that police officers in Los Angeles generally lie." (*Id.* at 1482, emphasis supplied.) She then rejected the jury's attempt to consider the issue. (*Ibid.*) The trial court discharged the juror. (*Ibid.*) The Court of Appeal upheld the trial court's determination, finding that the juror "obviously had prejudged the credibility of the police officers who testified at trial and was unable to cast aside her personal bias in weighing the evidence." (*Id.* at 1485.) The plurality opinion cited *Thomas* with approval on this very point in *People v. Nesler* (1997) 16 Cal.4th 561, 588.

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trial court abused its discretion in not discharging [the juror]. The probability of bias is substantial when a juror has been victimized by the same type of crime."]; *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d at 1109, 1114 ["[T]he relationship between a prospective juror and some aspect of the litigation [can be] such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances," quoting *Tinsley v. Borg*, *supra*, 895 F.2d at 527.].) That risk is usually explored during voir dire, something that did not and could not happen in this case due to C.B.'s failure to disclose her history of abuse during voir dire.

As in *Blackwell*, *LaRue*, *Sampson*, and *Thomas*, the undisputed facts show that C.B. had specific personal experience that mirrored the facts at issue, and that personal history infected the jury's deliberations. C.B. admittedly did not put aside her own history of abuse – and decide "based solely upon the evidence received at trial." (*Jenkins*, *supra*, 22 Cal.4th at 1049.) To the contrary, C.B. *used* her impressions and opinions based on her traumatic and similar history of abuse to *rebut* and reject the evidence received at trial. That is actual bias. (*See also United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517 [juror who had two sons who were serving long prison terms for murder and robbery committed in an attempt to obtain heroin should have been excused from serving in case in which the defendant was charged with conspiracy to possess and distribute heroin]; *Burton v. Johnson* (10th Cir. 1991) 948 F.2d 1150, 1159 [a juror in abusive family situation could not be unbiased in a murder trial where the defendant's defense was battered wife syndrome because of the "similarities of the[ir] experiences"]; *United States v. Martin* (11th Cir. 1985) 749 F.2d 1514, 1517 [where defendant was on trial for aiding and abetting bank robbery, juror should have been excused where she admitted that her prior job as bank teller would have a "big impact" on her decision and she could not guarantee she would "stick to what goes on in the courtroom"; juror's admissions were "inconsistent with the capability to reach a decision based upon the evidence," "wholly inconsistent with deciding on the evidence presented in the courtroom," and instead "a candid acknowledgement that she would be affected by

matters not in evidence"]; *People v. Oliver* (Ill. App. 1977) 50 Ill.App.3d 665, 673-74 [juror failed to disclose in voir dire that he had been assaulted; based on his experience, the juror believed a victim of a crime never forgets the face of the offender; the credibility of identification testimony was "one of the main issues in controversy;" because the juror entered deliberations with a "preconceived opinion on one of the main issues" of the case, the defendant was deprived of his fundamental rights to due process of law and trial by a fair and impartial jury]; *Bayramoglu v. Estelle* (9th Cir. 1986) 806 F.2d 880, 882, 885 [where defendant had pointed gun at his own head, pulled the trigger, but the gun did not shoot, juror's reference during deliberations of personal experience with pointing a gun at her son was evidence of bias]; *cf. Norris v. State* (1998) 230 Ga.App. 492, 495 [applying Georgia law, "bias was already evident" without further inquiry where juror stated during voir dire he had not been involved in an abusive relationship, but during deliberations told other jurors he had been assaulted by women on prior occasions].)

3. The Referee Ignored The Substantial Case Law, Applied The Wrong Legal Standard, And Relied On Irrelevant Evidence

The Referee recognized that C.B.'s history of abuse affected the penalty phase deliberations. (RFF at 13:1-3.) He nevertheless concluded that she was not actually biased. The Referee's reasons are legally incorrect and do not withstand scrutiny.

a. The Referee Erroneously Found That C.B. Merely Interpreted Petitioner's Mitigation Evidence Through The "Prism" Of Her General "Life Experience"

Ignoring cases holding that a juror cannot base her decision on a similar and traumatic personal experience, the Referee erroneously concluded that "all that Juror C.B. did" was "use her life experiences" "as a prism" through which she "assess[ed] the weight to be given proffered mitigation evidence." (RFF at 12:23-28, citing *People v. Wilson* (2008) 44 Cal.4th 758; *id.* at 13:1-3 ["The reference to her childhood experience during deliberation was merely her way of analyzing the penalty phase evidence through the prism of her life's experiences and not misconduct of any sort."].)

But *Wilson* did not create a general "life experience" exception to the requirement that jurors base their decisions solely on the evidence. In *Wilson*, this Court stated, as a matter of California law only, that "the sentencing function [at the penalty phase] is inherently moral and normative, not factual," and that "[g]iven the jury's function at the penalty phase under our capital sentencing scheme, for a juror to interpret evidence based on his or her own life experiences is not misconduct. Jurors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work." (44 Cal.4th at 830, citations omitted.) *Wilson* involved an African-American defendant who sought to use his broken, abusive, and disadvantaged background in mitigation,

and a juror of the same race who believed he had insight into African-American family dynamics. (*Id.* at 830-31.) *Wilson* merely held that such socioeconomic factors – being of a certain race and having a family – were so common and unavoidable that they could not constitute bias: " '[I]n our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; . . . it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their ***life experiences in such groups***.' " (*Id.* at 823, quoting and adopting *Bell*, *supra*, 49 Cal.3d at 564; *see also People v. Yeoman* (2003) 31 Cal.4th 93, 162 [stating that "[j]urors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room" and permitting jurors to relate evidence of defendant's drug to their experiences with drug use because the "effect of drugs, while certainly a proper subject of expert testimony, has become ***a subject of common knowledge among laypersons***," emphasis supplied].)

Wilson did not permit jurors to base their decisions on specific and traumatic personal experiences that mirrored the material facts at issue in the case. Besides being of a certain race and having a family – factors shared by millions of Californians – there was no claim of any specific shared experience between the juror and defendant in *Wilson.* By contrast, Petitioner and C.B. both were physically abused for an extensive

amount of time, both were used for slave labor on a farm during this time, and C.B. was raped while Petitioner was accused of rape. (EHT at 17:1-14, 18:1624; Resp. Ex. B [Trial Tr. Vols. 9-10] at 2138-39, 2169-79; 2191-97; 2203-05; 2223-29.) The histories are so similar that C.B. made a point to list them in her post-trial questionnaire in an effort to show that she came from the same unique circumstances as him. (Pet. Ex. 3 [Post-trial Questionnaire] at TF014371.) Their common histories are exactly the kind of shared traumatic experiences that cause jurors to be biased. (*See* Section IV.B.2., above; *cf. United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71 ["The potential for substantial emotional involvement" may "adversely affect[] impartiality."]; *Smith v. State* (Fla. 2009) 28 So.3d 838, 860 [in a capital murder case, trial court erroneously denied challenge for cause against juror who was witness in a capital case where his daughter was murdered, even though he "sincerely" "stated that he could follow the instructions given by the trial court as well as be fair" because, despite the juror's "good intentions," court could not "accept" that juror "could not be influenced, albeit unintentionally, by such a painful and tragic experience"].)

The Referee's finding that *Wilson* blesses the use of "life experiences" during deliberations also proves too much. It would render investigating a juror's failure to disclose life experiences during voir dire useless because a juror would always be found to be unbiased, ***regardless of what the undisclosed experiences*** **are,** ***regardless of how similar they are to the***

material facts at issue, and ***regardless of whether that nondisclosure was intentional***. Respondent's argument would thus immunize the use of ***all personal experiences*** during a jury's deliberations. California and federal law unequivocally require the contrary. (*See* Section IV.B.2., above.)

b. The Referee Supported His Findings Within Legally Irrelevant Facts

The remaining facts the Referee uses to support his finding that C.B. was not actually biased are irrelevant to her failure to base her decision solely on the evidence.

C.B.'s Belief That She Was Not Biased. The Referee found that C.B.'s belief that she was not biased was "direct evidence she was not biased" (RFF at 11:25), but her uninformed statement should be not be given any weight. C.B. is not a lawyer and admitted that she does not know the legal definition of bias. (EHT at 60:21-23.) Thus, she could not know that her mental state and her inability to put aside her history of abuse constitute "actual bias." Indeed, jurors are often unaware of their own bias or reluctant to admit it. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 938; *Thomas*, *supra*, 218 Cal.App.3d at 1482-85 [juror's denial that she was biased against police officers insufficient to show lack of bias where other jurors corroborated that juror was making biased remarks during deliberations]; *Farris*, *supra*, 66 Cal.App.3d at 386 n.5 ["[E]ven though a juror may claim he can be impartial,

he can still be properly excluded from the case if there are so many factors weighing against this possibility, that neither he, nor any other person similarly situated, could render a fair and unbiased decision."]; *Allsup*, *supra*, 566 F.2d at 71 ["Bias can be revealed by a juror's express admission of that fact, but, more frequently, jurors are reluctant to admit actual bias, and the reality of their biased attitudes must be revealed by circumstantial evidence."]; *Gonzalez*, *supra*, 214 F.3d at 1111-12, quoting *Allsup*.)

C.B.'s testimony should also be disregarded because the Referee erroneously prevented the parties from determining what she meant when she testified that she was not biased. While the Referee permitted C.B. to testify as to whether she was "actually biased" "as a matter of fact," over Petitioner's objection that the question called for a conclusion of law, (EHT at 52:17-53:27), he ruled that Petitioner could not explore what she meant. (*Id.* at 60:12-19.) If C.B.'s claimed lack of bias were given any weight, then this ruling was erroneous, unfair and prejudicial.

Petitioner's Trial Counsel's Statement. The Referee also excused C.B.'s use of her specific history of abuse during deliberations by noting that C.B. "simply accepted the invitation made by petitioner's counsel in his closing penalty phase argument: 'And before you judge him, put yourself in his place. Would you be in the person you are today? No question you wouldn't be. Would you do the things that he did? Maybe. Maybe not.' " (RFF at 6:18-23, quoting EHT at

58:2-7.) Not only is the Referee's statement irrelevant, but it is speculation.

First, there is no legal basis for a juror's bias being "cured" by trial counsel's statement. Moreover, the point of trial counsel's question was to capitalize on *differences* between Petitioner's history of abuse and the jurors' own upbringings, as disclosed during voir dire. Without a disclosed history of abuse during voir dire, trial counsel was justified in thinking those *differences* existed. That this issue was the subject of trial counsel's arguments only underscores its importance, and the importance of the voir dire questions that were not asked due to C.B.'s false juror questionnaire answers.

Second, the Referee offers no evidentiary basis for his statement. The only evidence is to the contrary. When C.B. was specifically asked if Petitioner's trial counsel "triggered the events of [her] childhood," she responded "[t]he attorney presenting it didn't really – it might have started me to remember it, but the main thing was remembering the witness." (EHT at 71:11-19.) The Referee's finding is unsupported.

C.B.'s Pre-Trial Knowledge Of Petitioner And Her Voluntary Disclosure Of Her Abuse After The Trial Are Irrelevant. The Referee also supported his finding by noting that Juror CB. "knew nothing about petitioner . . . or the crimes with which he as charged" prior to being called as a prospective juror, and that Juror C.B. brought her history of abuse "to the attention of petitioner's trial counsel when she

voluntarily responded to trial counsels' post-verdict questionnaire." (RFF at 10:25-11:2, 12:7-8.) Again, these statements are irrelevant to the bias question and reflect the Referee's persistent failure to apply the correct legal standard.

"Juror bias does not require that a juror bear animosity towards the defendant. Rather, juror bias exists if there is a substantial likelihood that a juror's verdict was based on an improper outside influence, rather than on the evidence and instructions presented at trial, and the nature of the influence was detrimental to the defendant." (*Cissna*, *supra*, 182 Cal.App.4th at 1116.) Here, Petitioner does not claim that C.B.'s bias – basing her decision on a similar and traumatic personal experience – was based on any pre-trial motivation to punish Petitioner. Regardless of her pre-trial knowledge of Petitioner, going into Petitioner's trial, she had been shaped by a striking similar childhood history of abuse that made her incapable of deciding Petitioner's case solely on the evidence.

None of the facts used by the Referee to support his finding that C.B. was not actually biased affect the key issue in this case: that C.B. rejected Petitioner's mitigation evidence based on a unique, similar, and traumatic personal experience that mirrored the material facts at issue. As described above, that is actual bias.

4. C.B. Was Actually Biased Whether Or Not She Intentionally Concealed Information On Voir Dire

Whether C.B. is actually biased is not governed by the Referee's findings of fact in response to this Court's first three questions, which focus on her reasons for non-disclosure on the jury questionnaire during voir dire. As Respondent admitted in the Return it filed with this Court, even where there is "an honest mistake on voir dire," reversal is required where there is "proof that the juror's wrong . . . answer ***hid the juror's actual bias***." (Sept. 10, 2012 Return To Order To Show Cause at 7, quoting *In re Hamilton*, *supra*, 20 Cal.4th at 300, emphasis supplied.) Moreover, as this Court has explained:

> "[J]uror concealment, ***regardless whether intentional***, to questions bearing a substantial likelihood of uncovering a strong potential of juror bias, undermines the peremptory challenge process . . . [which is the] deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction."

(*In re Boyette*, *supra*, 301 P.3d at 547-48, citations and quotations omitted; *accord, People v. San Nicolas* (2004) 34 Cal.4th 614, 646 ["Notwithstanding [whether a juror's nondisclosure was intentional], juror misconduct may still be found where bias is clearly apparent from the record."].) Indeed, the evidence relevant to whether a juror is actually biased is not limited to why she may have failed to disclose material information

during voir dire. Instead, "the entire record," including the "surrounding circumstances" of any misconduct, is relevant to the bias inquiry. (*In re Boyette*, *supra*, 56 Cal.4th at 889-90)[4]

Deciding the bias issue with reference only to why the juror provided false answers on voir dire, and whether the juror's concealment was intentional, would also lead to absurd results. For example, a juror who knew and despised a key witness, but who honestly and in good faith mistakenly failed to disclose that knowledge during voir dire because she rushed through the juror questionnaire, or because it "did not come to mind," would never be found to be actually biased.

Here, regardless of the answers to this Court's first three questions, the overwhelming evidence of C.B.'s inability to base her decision solely on the evidence far outweighs her motivations for not disclosing her history of abuse during voir dire and conclusively proves her bias. (*See* Section IV.B.2., above.)

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[4] This Court, citing the United States Supreme Court, stated that "[t]here is serious question whether *honest* voir dire mistakes can ever form the basis for impeachment of a verdict." (*In re Hamilton* (1999) 20 Cal.4th 273, 300, citing *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556, emphasis in original.) However, *Hamilton* and *McDonough* both addressed cases where a claim of bias was based solely on a juror's failure to disclose information during voir dire. There was no claim that the undisclosed information became the basis for the juror's decision.

5. The Court Should Consider C.B.'s Testimony "Well, So Was I"

The Court should consider C.B.'s testimony that when she heard about Petitioner's history of abuse, she thought "well, so was I." Her testimony is direct evidence of C.B.'s actual bias. The Referee struck this testimony from the record, finding it was prohibited by California Evidence Code Section 1150. (EHT at 33:9-21.) That ruling was erroneous.

The Referee's ruling is subject to this Court' independent review. An evidentiary hearing "is subject to the rules of evidence as codified in the Evidence Code." (*In re Fields* (1990) 51 Cal.3d 1063, 1070.) Where a ruling depends on the "[t]he proper interpretation of statutory or . . . constitutional language," this Court reviews those rulings *de novo.* (*Redevelopment Agency of City of Long Beach*, *supra*, 75 Cal.App.4th at 74.) Because the Referee's ruling was based on an erroneous interpretation of Section 1150. it should be reviewed *de novo.*

First, C.B.'s testimony is admissible under this Court's "well-established" exception from Section 1150. Section 1150 provides that "[n]o evidence is admissible to show the effect of ["statements made, or conduct, conditions, or events occurring, either within or without the jury room"] 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." But Section 1150's "rule against proof of juror mental processes is subject to the well-established exception

for claims that a juror's preexisting bias was concealed on voir dire." (*In re Hamilton, supra,* 20 Cal.4th at 294, 298 n.19.) This exception makes sense because bias is a "state of mind." (*Nesler*, *supra*, 16 Cal.4th at 580.) Here, C.B.'s testimony is direct proof that her personal experiences and biases overrode her ability to judge the mitigation evidence fairly and impartially. The testimony about her biased state of mind falls directly within the exception to Section 1150 and should be considered.

Second, it would also be unconstitutional under the Sixth and Fourteenth Amendments of the U.S. Constitution to interpret California Section 1150 to prohibit consideration of C.B.'s testimony. Statutes should be interpreted to protect constitutional rights. (*Zadvydas v. Davis* (2001) 533 U.S. 678, 689 [courts should "first ascertain whether a construction of the statute is fairly possible by which [constitutional questions] may be avoided"]; *United States v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 78 ["It is [] incumbent . . . to read [a] statute to eliminate [constitutional] doubts. . . ."]; *United States ex. rel. Attorney General v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 408 ["[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter."]; *United States v. Buckland* (9th Cir. 2002) 289 F.3d 558, 564 ["[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality," citations omitted], en banc.)

Petitioner had a constitutional right to 12 jurors who could "lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court." (*Irvin*, *supra*, 366 U.S. at 722-723, citations omitted.) Here, Juror C.B.'s testimony is an explicit admission that she was unable to put aside her own impressions and opinions and is directly relevant to Petitioner's constitutional right. Thus, this Court should interpret Section 1150(a) to avoid the constitutional concerns that would arise if Petitioner was deprived of the ability to vindicate his constitutional right to an unbiased jury through direct evidence of C.B.'s bias.

C. Exception: The Referee Erroneously Found That The Presumption Of Prejudice Resulting From C.B.'s Misconduct Is Rebutted

Petitioner is entitled to a new penalty trial even if C.B. was not "actually biased," though she was. Because C.B.'s nondisclosure during voir dire constituted misconduct creating a presumption of prejudice, Petitioner is also entitled to a new penalty trial if the State cannot meet its burden to prove that there is no substantial *likelihood* that she was actually biased. (*In re Boyette*, *supra*, 56 Cal.4th at 889-90 [juror who gives "gives false answers during [ ] voir dire" commits misconduct raising "a presumption of prejudice" that Respondent must rebut by showing that "the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding

circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant."]; *Marshall*, *supra*, 50 Cal.3d at 949-51 [The prosecution bears the burden of rebutting the presumption.].) "Whether prejudice arose from juror misconduct . . . is a mixed question of law and fact subject to an appellate court's independent determination." (*Nesler*, *supra*, 16 Cal.4th at 582.)

This Court equates a "reasonable probability of prejudice" with a "substantial likelihood" that a juror was actually biased. A "reasonable probability" does not mean "more likely than not," but merely a "probability sufficient to undermine confidence in the outcome." (*C.f. People v. Ledesma* (1987) 43 Cal.3d 171, 217-18 [applying the standard when determining whether an ineffective assistance of counsel affected the trial outcome], superseded by statute on other grounds; *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682 [When deciding whether instructional error was prejudicial, "[a] 'reasonable probability' . . . does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility," citations and quotations omitted].) Thus, the relevant test in this case is whether there is a "probability sufficient to undermine confidence" in the belief that C.B. or one of the other jurors were not actually biased.

The Referee did not mention the operative legal standard. Rather, the Referee merely concluded without analysis that "[f]rom a review of the whole record, the referee concludes no [] bias exists," citing only his

finding that C.B. did not intentionally conceal her history of abuse during voir dire. (RFF at 11:7-20.) That is a non sequitur. Even if C.B. had honestly misunderstood the questions and answered sincerely though erroneously, that would not negate bias. Again, a juror is biased if she is not willing and able to put aside preconceived opinions based on extrajudicial information and decide based solely on the evidence. (*See* Section IV.B.2., above.) There is no logical connection between the sincerity of the juror's mistaken answer to a voir dire question, on the one hand, and whether she holds preconceived knowledge or opinions that she cannot put aside, on the other. Here, suppose that Juror C.B. really misinterpreted the questions as covering only her adulthood, as she testified. (EHT at 39:24-40:14, 41:617.) That innocent reason for not providing information about her childhood abuse does not make it more or less probable that her childhood abuse resembled Petitioner's, or that the abuse caused unshakable beliefs that prevented a fair decision.

To the contrary, C.B. was actually biased. (*See* Sections IV.B.2. & 4., above.) At the least, her admission that she held her "abuse is no excuse" opinion based on her own childhood and before she was empaneled, her unwavering adherence to that conclusion, her instant comparison between herself and Petitioner as soon as she heard his evidence of abuse, and the firmness with which she expressed her opinion in deliberations and the post-trial questionnaire all strongly suggest that her mind was made up before she entered the courtroom that abuse was no excuse. She harbored a strong

and deep opinion that resisted the force of Petitioner's evidence – the definition of actual bias. (*See* Section IV.B.2., above; *cf. Blackwell*, *supra*, 191 Ca.App.3d at 931 [presumption of prejudice unrebutted due to evidence of bias]; *Nesler*, *supra*, 16 Cal.4th at 589 [substantial likelihood of bias].)

Finally, given C.B.'s role as the juror foreperson and her view that it is "important for the foreperson to guide the jury to a decision" (EHT at 35:18-20), there was a "reasonable probability the remaining jurors" were also influenced by her views. (*Diaz*, *supra*, 152 Cal.App.3d at 936 [presumption of prejudice unrebutted because of juror's bias and because disclosure to other jurors created "reasonable probability the remaining jurors" were influenced by her views]; *LaRue*, *supra*, 722 P.2d at 1042 ("it is impossible to say that beyond a reasonable doubt, the seven jurors who heard [the foreperson's reference to her own personal history of being sexually molested in a trial regarding an allegation of sexual molestation] were not influenced thereby in reaching their verdict").)

The evidence undermines any confidence that neither C.B. nor any of the other jurors was impermissibly influenced by her views. This Court should find that Respondent cannot rebut the presumption of prejudice that arises from C.B.'s misconduct.

D. Exception: No Substantial And Credible Evidence Supports The Referee's Finding That C.B.'s Failure To Disclose Her Abuse During Voir Dire Was Unintentional

The Referee's finding that C.B. unintentionally did not disclose her history of abuse during voir dire is only entitled to deference if supported by "substantial and credible evidence." (*In re Hitchings*, *supra*, 6 Cal.4th at 109.) It is not.

C.B. provided several conflicting explanations for her failure to disclose her childhood abuse and rape on her juror questionnaire. But the Referee selectively discusses only some of them and ignores the rest. In fact, there is no way to reconcile her various explanations. Contrary to the Referee's findings, C.B.'s explanations could not all be "credible" because they cannot all be true.[5] Thus, the Referee's ultimate conclusion that C.B. unintentionally did not disclose her history of abuse on her juror questionnaire is not supported by substantial and credible evidence.

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[5] In addition to making credibility findings, the Referee found the "Juror C.B. did not disclose her childhood experiences on oral voir dire because . . . she was never asked any question which should have elicited such information." (RFF at 8:5-9.) This statement about voir dire is beside the point given that she was asked *in writing* and under oath questions that sought such information. And of course it was her false answers to those written questions that concealed from trial counsel the need to explore the matter on oral voir dire.

An independent review of the evidence leads to one conclusion: because she was clearly asked about her history of violence, she understood the questions, she spent time on them, and the history of abuse constituted a decade of her life, C.B. consciously and deliberately chose not to disclose her painful past during voir dire.

1. The Referee's Findings That C.B. Was "Credible" And That The Various Reasons For Not Disclosing Her History Of Abuse And Rape Did Not Conflict With Each Other Are Insupportable

The Referee found "that Juror C.B.'s testimony explaining different aspects of her questionnaire experience are not in conflict" (RFF at 8:17-18), and that she "explicitly and credibly testified that when she completed the juror questionnaire [ ], in 1993, she believed that she had honestly answered every question on the questionnaire." (RFF at 9:26-10:1.) As a result, the Referee found her to be generally credible.[6] He found that

[6] The Referee placed great weight on the fact that C.B. brought her abusive childhood history to the attention of Petitioner's trial counsel in the post-verdict juror questionnaire and that she informed Petitioner's habeas counsel that she communicated this information to the other jurors during jury deliberations. (RFF at 7:9-21.) However, C.B.'s statements post-trial do not bear on whether the reasons for her nondisclosure in the pretrial questionnaire are credible. In fact, her decision to not notify the trial judge of her childhood history of abuse during deliberations, when she claims to have remembered her abuse, is more

because C.B. was "credible," the "reasons testified to by Juror C.B. for not disclosing . . . her abusive childhood background *were, in fact, the reasons*" for her nondisclosure. (RFF at 23:7-28, emphasis supplied.)

However, the Referee's findings are not supported by "substantial and credible evidence" as he failed to acknowledge and reconcile C.B.'s conflicting statements. Because C.B.'s different explanations cannot all be true, the Referee's finding that everything she said was credible is wrong, and this Court should depart from the Referee's findings and conduct an "independent examination of the record." (*In re Hamilton*, *supra*, 20 Cal.4th at 296.)

a. C.B. Admitted The Questions Were Not Limited To Any Time Period, But Claimed They Related Only To Adulthood

The Referee found that "[i]n her testimony, Juror C.B. acknowledged that, during her childhood, she had in fact been present during a violent act, and that when she answered Question 64 in 1993, she did not interpret the question as imposing any timeframe limitation *per se*" (RFF at 5:2-3, citing EHT at 38:3-16), but that she did not disclose her childhood abuse because she "did not consider [her] childhood a violent

consistent with an intentional choice not to disclose the abuse during voir dire, than with any unintentional nondisclosure.

act" (RFF at 5:7-11, citing EHT at 38:19-21). This explanation for her nondisclosure is not credible.

The Referee failed to acknowledge that C.B. also testified that she interpreted questions 63-66 of the juror questionnaire to only relate to her adulthood (EHT at 39:24-40:14, 41:6-17.) This testimony cannot be reconciled with her admission that nothing in the questions indicated to her they were limited to any time period. (*Id.* at 38:13-16.) It cannot be true that she interpreted the questions to relate only to her adulthood and also that she did not interpret them to have any time limitation. Thus, at least some of C.B.'s testimony is not credible.

b. C.B. Admitted That Abusing And Raping A Child Are Crimes And Acts Of Violence But Claimed Her Own Abuse And Rape Are Not

Although C.B. considered physically abusing a child to be violence in 1993 (EHT at 22:2-4), and although her juror questionnaire asked if she had "ever experienced or been present during a violent act," she stated that she did not disclose her own childhood physical abuse because she did not consider *her* abuse to have been a violent or criminal act committed against her. (*Id.* at 19:26-20:8; 20:23-25.) Similarly, although she considered the act of molesting a child to be violence (*Id.* at 19:9-13) and criminal (*Id.* at 19:14-27), she stated that she did not disclose *her* own childhood

molestation in response to the same question because she did not consider it to be a violent or criminal act committed against her. (*Id.* at 19:28-20:1, 20:19-22.) C.B.'s statements are inconsistent and not credible, yet, the Referee failed to reconcile them.

The Referee's finding appears to be based on C.B.'s unsupported view of "how society viewed and treated abuse of children 60 years ago." (RFF at 7:5-6.) He gave great weight to C.B.'s statement that "in 1993, I did not even think about the fact that I had been criminally assaulted, as it were, because in the '50's when I grew up, abuse was not a crime. Kids were abused all the time. And using kids for hard labor was very common." (RFF at 4:10-28, quoting EHT at 20:3-8.) But saying that she did not regard what happened to her as a crime is not a plausible reason for her answer. Question 64 asked whether C.B. had ever experienced "a violent act, *not necessarily a crime*." (Pet. Ex. 2 [Pre-Trial Questionnaire] at TF393132, emphasis supplied.) C.B. had been raped, and by any standard rape is a violent act. The question plainly covers violent acts even if they are not crimes. And, it was not the 1950's when she answered the questionnaire. She filled out the questionnaire in 1993, when she admittedly knew and believed that physical abuse and rape were "violence" and "crimes." (EHT at 19:9-27, 22:2-4.) Thus, her false answers on the questionnaire were inconsistent with her own understanding of the questions.

The Referee does not explain how C.B. could reasonably have given answers contrary to her admitted understanding. Instead, he simply quotes her conclusory

testimony that she did not consider her molestation to have been an act of violence. (*See* RFF at 4:19-21, citing EHT at 20:19-22 ["Q. In 1993 did you consider the molestation that happened to you to have been an act of violence, not necessarily a crime? A. No, I didn't."].) This will not do. C.B.'s inconsistent and unreasonable statements are not credible.

c. C.B. Failed To Recall Her Childhood Abuse And Rape Though She Carefully Thought About Her Answers To The Questionnaire

Without reconciling the conflicting evidence, the Referee simply states that C.B.'s childhood abuse did not come to mind when she carefully thought of her answers to the questionnaire (EHT at 5:12-6:2), but that they came to mind when she put herself in petitioner's shoes: "[i]t appears to the referee that Juror C.B. and the other juror mentioned by Juror C.B. in her evidentiary hearing testimony simply accepted the invitation made by petitioner's counsel in his closing penalty phase argument: 'And before you judge him, put yourself in his place.'" (*Id.* at 6:18-20, quoting EHT at 58:27.) This is not credible.

First, the relevant questions clearly called for this information. They were not ambiguous and C.B. was readily able to understand what they meant. (EHT at 14:1926 [C.B. has a Bachelor's and Master's degree in Business Administration].) Second, as explained in Section IV.D.2., below, C.B. had plenty of time to

deliberate over the questions, she considered them important, and she thought about them. Yet she claimed that her decade of abuse and her rape "did not come to mind." (*Id.* at 20:10-12, 68:1920.) How can ten years of "physical abuse" and "slave" labor, in addition to being raped, not come to mind in response to an unambiguous question that asked about any "violent acts," even though she had "several days" to think about the questions and believed they were "important"? How can that be credible? The Referee doesn't say.

2. C.B. Intentionally Failed To Disclose Her History Of Abuse On Her Juror Questionnaire

Contrary to the Referee's findings, C.B.'s explanations for her failure to reveal material, relevant information on her juror questionnaire cannot be believed. Taken together, they are inconsistent and incoherent. Some of them are not credible on their face. An independent review of the conflicting evidence leads to one conclusion: that C.B. intentionally and deliberately did not disclose her history of abuse during voir dire.

C.B.'s long and painful history must have come to her mind given the direct questions that were asked of her. *People v. Blackwell* (1987) 191 Cal.App.3d 925, is on point. In *Blackwell*, the defendant claimed she was a victim of domestic violence, triggered by her husband's alcoholism, and that she killed her husband in self-defense. (*Id.* at 927-28.) One juror who had indicated no personal experience with such violence or

alcoholism on voir dire admitted after the verdict that she was the victim of an abusive former husband who became violent when drunk. (*Id.* at 928.) Like Respondent here, the state in *Blackwell* argued that the concealment was unintentional and that no prejudicial misconduct occurred. The court rightly disagreed, explaining that "[i]f the voir dire questioning is sufficiently specific to elicit the information which is not disclosed, or as to which a false answer is later shown to have been given, the defendant has established a prima facie case of concealment or deception." (*Id.* at 929; *see also id.* at 930 [if "the question propounded to the juror was (1) relevant to the voir dire examination; (2) [ ] unambiguous; and (3) [ ] the juror had substantial knowledge of the information sought to be elicited . . . the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond" (citations omitted)].) The Court found that the "voir dire questions . . . were sufficiently specific and free from ambiguity so that the only inference or finding which [could] be supported [was] that Juror R. was aware of the information sought and deliberately concealed it by giving false answers." (*Id.* at 930.)

As in *Blackwell*, the questions in the juror questionnaire here were unambiguous and they were directly relevant to exploring any potential juror bias. Moreover, questions asking whether she had ever been a victim of or witness to violence or crime were in writing, and she had "several days" to carefully think about and answer them. (EHT at 67:18.) C.B. took the

questionnaire home, believed the questions were important, thought about her answers before checking the "no" boxes, and she may have even discussed some of the questions with her partner. (*Id.* at 67:9-68:11, 41:4-5.) Accordingly, C.B.'s claim that her decade of abuse didn't come to mind when answering the relevant questions cannot be credited. (*See* Section IV.D.1., above.) As this Court has said, "it is highly unlikely . . . nondisclosure [i]s inadvertent" when questions are specific and concealment is of a "traumatic" event. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1176, superseded by statute on other grounds.) Thus, as in *Blackwell*, "the only inference or finding which can be supported is that Juror [C.B.] was aware of the information sought and deliberately concealed it by giving false answers." (191 Cal.App.3d at 930.)

The Referee cites *In re Boyette* (2013) 56 Cal.4th 866, 890, and *In re Hamilton* (1999) 20 Cal.4th 273, 298-301, for the proposition that "[e]ven when the questions are clear, it is not misconduct for a juror to innocently fail to answer such questions correctly." (RFF at 10:9-11.) However, C.B.'s conflicting reasons for her nondisclosure, which the Referee failed to reconcile, show that C.B. did not "innocently" fail to answer the questions correctly, but that she intentionally concealed her childhood abuse and rape. And, of course, the referees' credibility determinations in *Boyette* and *In re Hamilton* are not relevant here. A referee's credibility determinations are fact driven. *Boyette* repeatedly states that it accepts the referee's findings under "the circumstances." The circumstances here are

different. Unlike the referees' findings in *Boyette* and *In re Hamilton*, the findings of the Referee in this case are not supported by substantial and credible evidence and should be rejected. (*See* Section IV.D.1., above.)

C.B.'s testimony demonstrates that she thought about her answers, remembered her childhood abuse, and chose to deliberately withhold her abuse and rape. Thus, this Court should not accept the Referee's findings that C.B. did not intentionally and deliberately conceal her history of abuse.

V. PETITIONER IS ENTITLED TO A NEW GUILT AND/OR PENALTY TRIAL – OR A REDUCTION IN PENALTY FROM DEATH TO LIFE WITHOUT POSSIBILITY OF PAROLE IN LIEU OF ORDERING A NEW PENALTY TRIAL

The evidence overwhelmingly shows that C.B. was actually biased. Where juror bias is "not known to the accused until after the trial and verdict" the appropriate remedy is for the court "to grant to the accused a new trial." (*Williams v. Bridges* (1934) 140 Cal. App. 537, 543 (1934); *see also Nesler*, *supra*, 16 Cal.4th at 579 [a "biased adjudicator is one of the few structural trial defects"].) Accordingly, this Court should grant Petitioner's petition for writ of habeas corpus.

Alternatively, and at the very least, Petitioner's death sentence must be reduced to life without possibility of parole. This Court may command such a

sentence without ordering a new penalty trial. California Penal Code section 1181, subdivision (7) states: "When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or fording the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed." This makes "clear that the court may reduce the punishment in lieu of ordering a new trial, when there is error relating to the punishment imposed." (*People v. Odle* (1951) 37 Cal.2d 52, 58-59.)

The Court should exercise its discretion under section 1181, subdivision (7) in this case. It has been more than twenty years since the first trial in this case and it would be difficult, if not impossible, for both parties to gather relevant witnesses for a new trial. Reducing the sentence would also serve the interests of judicial economy by avoiding the expense and delay of a new trial. The Court should order that Petitioner's death sentence be reduced to life in prison without possibility of parole; it need not order a new trial. Finally, in the event the Court does not reduce Petitioner's sentence,

Petitioner is entitled at the very least to a new penalty phase trial.

DATED: July 21, 2014

BINGHAM MCCUTCHEN LLP

By /s/ John R. Reese / NS

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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ABELINO MANRIQUEZ,

On Habeas Corpus.

(Related to *People v. Manriquez*, Supreme Court No. S038073)

(Los Angeles County Superior Court No. VA004848)

Hon. Robert Armstrong, Presiding

FIRST AMENDED
PETITION FOR WRIT OF HABEAS CORPUS

(Filed Jan. 10, 2006)

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DEATH PENALTY

TABLE OF CONTENTS

	Page
I. PROCEDURAL HISTORY AND BACKGROUND	1
II. STATEMENT OF FACTS	6
A. Guilt Phase Evidence	6
1. The Prosecution's Case-in-Chief	6
a. The Las Playas Shooting	6
b. The Fort Knots Shooting	10
c. The Rita Motel Shooting	15
d. The Mazatlan Bar Shooting	19
2. The Defense Case	21
B. Penalty Phase Evidence	22
1. Evidence in Aggravation	22
a. The Paramount Killings	22
b. The Rape of Patricia Mann	25
C. Evidence in Mitigation	26
D. Other Evidence	26
III. BASIS FOR JURISDICTION AND TIMELINESS	27
IV. JUDICIAL NOTICE AND INCORPORATION	28
V. SCOPE OF CLAIMS AND EVIDENTIARY BASES	28
VI. CLAIMS FOR RELIEF	29

CLAIM 1: Petitioner Was Deprived of His Right to the Effective Assistance of Counsel and to a Fair and Reliable Determination of Guilt and Penalty by Trial Counsel's Incompetence 29

A. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel During the Jury Selection Process 35

1. Trial Counsel Was Prejudicially Ineffective in Failing to Challenge the Prosecutor's Race-Based Use of Peremptory Challenges to Exclude Hispanic and Other Minority Venire Members 35

2. Trial Counsel Was Prejudicially Ineffective in Failing to Conduct Adequate Voir Dire During Jury Selection......... 44

a. Attitudes Regarding Mexican Immigrants and Non-English Speakers 44

b. Attitudes About Defendants Exercising a Fifth Amendment Right Not to Testify 46

3. Trial Counsel Was Prejudicially Ineffective in Failing to Seek to Remove Jurors Who Strongly Favored the Death Penalty 47

4. Trial Counsel Was Prejudicially Ineffective in Suggesting to the Venire Panel that a Sentence of Life Imprisonment Without the Possibility of Parole Could Be Reduced 50

B. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel by Failing to Investigate, Present Evidence, and Defend Against the State's Case in the Guilt Phase 53

1. Count I (Las Playas)......................... 54

a. Trial Counsel Unreasonably Stipulated to the Admissibility of Witness Angelica Contreras' Prior Testimony 54

b. Trial Counsel Failed to Investigate, Develop, and Present Evidence of an Alternate Suspect.... 58

c. Trial Counsel Failed to Investigate, Develop, and Present Evidence Demonstrating That the Shooter Was Threatened or Provoked 62

d. Trial Counsel Failed to Reasonably Investigate and Present Evidence of Petitioner's Mental Impairments and Illness.................................. 65

e. Trial Counsel Failed to Reasonably Investigate, Develop, and Present Evidence of Petitioner's Drug and Alcohol Dependence.................... 67

f. Trial Counsel Failed to Object to the Admission of Unreliable and Prejudicial Hearsay Statements During Detective Laurie's Testimony 68

g. Trial Counsel Failed to Challenge the Testimony of Firearms Expert Dwight Van Horn 70

h. Trial Counsel Failed to Object to and Move to Strike Irrelevant and Prejudicial Evidence Regarding the Circumstances of Petitioner's Arrest at the La Ruleta Bar 73

2. Count II (Fort Knots) 74

a. Trial Counsel Failed to Investigate, Develop, and Present Evidence to Challenge the Reliability of the Witness Identifications 74

b. Trial Counsel Failed to Investigate, Develop, and Present Evidence Concerning Witnesses Who Were Unable to Make Identifications 79

c. Trial Counsel Failed to Impeach Witness Barbara Quijada with Her Prior Felony Convictions 81

d. Trial Counsel Failed to Impeach Witness Deneen Baker with Her Conviction for Theft 84

e. Trial Counsel Failed to Object to and Move to Strike Inflammatory and Prejudicial Testimony of Barbara Quijada 86

f. Trial Counsel Failed to Object to and Move to Strike Improper and Prejudicial Testimony regarding Similar Modus Operandi in Counts I and II 88

g. Trial Counsel Unreasonably and Prejudicially Elicited Hearsay Testimony from Deneen Baker......... 89

h. Trial Counsel Unreasonably and Prejudicially Failed To Object to Testimony of Detective Verdugo .. 90

3. Count III (Rita Motel) 94

a. Trial Counsel Failed to Investigate, Develop, and Present Evidence that Petitioner Acted in Self Defense and/or Under Provocation 94

b. Trial Counsel Failed to Reasonably Investigate and Present Evidence of Petitioner's Mental Impairments and Illness.................................. 95

c. Trial Counsel Failed to Reasonably Investigate, Develop, and Present Evidence of Petitioner's Drug and Alcohol Dependence.................... 96

d. Trial Counsel Failed to Object to Prejudicial Testimony Characterizing Petitioner as a Cocaine Dealer.. 98

4. Count IV (Mazatlan)........................ 99

a. Trial Counsel Failed to Investigate, Develop, and Present Evidence that Petitioner Acted in Self Defense and/or Under Provocation 99

b. Trial Counsel Failed to Reasonably Investigate and Present Evidence of Petitioner's Mental Impairments and Illness.................................. 101

c. Trial Counsel Failed to Reasonably Investigate, Develop, and Present Evidence of Petitioner's Drug and Alcohol Dependence................... 102

d. Trial Counsel Unreasonably Failed to Impeach the Testimony of Detective Arellanes Concerning His History of Violent Threats.......... 103

5. Trial Counsel's Errors Prejudiced Petitioner.. 107

C. Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in Defending Against the State's Case in Aggravation in the Penalty Phase........ 107

1. Paramount Killings......................... 107

a. Trial Counsel Prejudicially Failed to Rebut the Testimony of the Prosecution's Expert, Dwight Van Horn 109

b. Trial Counsel Prejudicially Failed to Investigate, Obtain, and Present Evidence Showing That Petitioner Did Not Commit Robbery Under Force and Fear 112

2. Rape Aggravator 114

D. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in the Penalty Phase by Failing to Investigate, Obtain and Present Evidence in Mitigation for the Penalty Phase 116

1. Overview 116

2. Trial Counsel Unreasonably Failed to Discover, Interview, and Present the Compelling Testimony of Witnesses Who Knew Petitioner 119

3. Trial Counsel Unreasonably and Prejudicially Abandoned Investigative Leads in Sinaloa, Mexico 123

a. Esperanza Manriquez Banuelos, with Whom Trial Counsel Never Followed Up, Could Have Presented Compelling Mitigation Evidence at Trial 124

b. Like Esperanza Manriquez Banuelos, the Other Witnesses Whom Trial Counsel Failed to Pursue Could Have Presented Compelling Mitigation Evidence at Trial 133

c. Trial Counsel Had No Valid Tactical Reason to Forego Investigating, Developing and Presenting Mitigating Evidence from Multiple Witnesses in Mexico 144

4. The Witnesses Trial Counsel Presented Were Few in Number, Unprepared, and Their Testimony Was Unreasonably Limited in Scope 145

a. The Mitigating Evidence Presented by Trial Counsel Was Unreasonably Limited 147

b. The Witnesses That Trial Counsel Presented Were Unprepared 148

c. The Witnesses' Testimony Was Unreasonably Limited in Scope 150

5. A Reasonable Investigation and Preparation of Witnesses Who Knew Petitioner Would Have Made a Difference 154

a. Trial Counsel Unreasonably Failed to Investigate, Develop, and Present a Compelling Mitigation Case.... 154

b. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Petitioner's Upbringing Was "No Different Than a Lot of Our Lives, But in a Different Place at a Different Time" 160

c. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Defense Witnesses Were "Exaggerating" 161

d. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That the Witnesses Were Unreliable Because They Were All Family Members 161

e. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Crecencia Tamayo's Testimony Proved Petitioner's Upbringing Was Not So Bad 162

f. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Petitioner "Chose" to Kill as Evidenced by Other Family Members Who Had Not Been "in Trouble with the Law" 164

g. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That "There Was an Effort [by Petitioner] to Bring You Everything They Could, and There Is a Lack of Evidence Because They Didn't Have Any"... 167

h. Reasonably Competent Counsel Would Have Followed Through on Efforts to Use an Expert to Explain Petitioner's Culture and Upbringing.................................. 168

i. A Reasonable Investigation and Presentation of Mitigating Evidence Would Have Defeated the Prosecutor's Claim That Petitioner "Carried Guns Because He Liked To Kill".............................. 169

6. Trial Counsel Unreasonably Failed to Perform an Adequate Investigation of Mitigation Evidence from Expert Witnesses.................................. 172

a. Petitioner's Mental Illness and Neurocognitive Impairment....... 173

b. Evidence of Mental Illness and Neurocognitive Impairment Was Available to Trial Counsel, Who Unreasonably and Prejudicially Failed to Investigate, Develop, or Present Such Evidence............... 179

7. A Reasonable Investigation and Presentation of Expert Issues Would Have Made a Difference.................. 180

a. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That Petitioner "Liked to Kill" 180

b. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That "There Simply Is No Evidence Offered" to Show "the Offenses Were Committed While the Defendant Was Under the Influence of Extreme Emotional or Mental Disturbance"... 182

c. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That Petitioner Has No Evidence That the Offenses Were Committed While Petitioner Suffered from a Mental Disease or Defect................... 183

d. A Reasonable Investigation and Presentation of Mitigation Evidence Would Have Defeated the Prosecutor's Claim That "There Is Insufficient Evidence" to Show "That the Effects of The Intoxication Caused These Acts"............. 184

8. Conclusion 185

E. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in Failing to Request Several Jury Instructions 185

1. Trial Counsel Prejudicially Failed to Request an Instruction to the Jurors on the Meaning of Life Without the Possibility of Parole 186

2. Trial Counsel Prejudicially Failed to Request a Jury Instruction That Required the Jurors to Disregard Petitioner's Race, Nationality, and Immigrant Status 187

3. Trial Counsel Unreasonably and Prejudicially Failed to Secure an Instruction Regarding the Coroner's Testimony 189

F. Petitioner's Trial Counsel Rendered Constitutionally Ineffective Assistance of Counsel in Failing to Move to Exclude Evidence.. 192

1. Trial Counsel Failed to Bring a Motion to Exclude Petitioner's Statements That Were Obtained in Violation of His Constitutional Rights 192

2. Trial Counsel Prejudicially Failed to Exclude Evidence That Was More Prejudicial Than Probative Under Evidence Code Section 352 199

a. Prejudicial and Inflammatory Statements Regarding Witnesses' Fear of Petitioner 199

b. Prejudicial and Inflammatory Trial Exhibits 205

G. Trial Counsel Failed to Seek Judicial Relief When He Discovered That the Jury Foreperson Was Biased and Had Failed to Provide Truthful Responses During Voir Dire 208

H. It Was Unreasonable for Trial Counsel, Who Had Never Tried a Capital Case to Verdict, to Defend This Complex Case Without Requesting Additional Attorney Staffing 209

a. The ABA Guidelines Called for a Capital Defense Team of at Least Two Attorneys 210

I. Cumulative Prejudice and Heightened Prejudice Standard 214

CLAIM 2: Petitioner Was Denied His Right to a Fair and Impartial Jury 215

A. Jury Foreperson Constance Bennett Provided Untruthful Responses on Her Pre-Trial Jury Questionnaire Concerning Critical Matters That Revealed Her Bias Against Petitioner 216

B. Jury Foreperson Constance Bennett Committed Misconduct When She Discussed Extraneous Facts Regarding Life on Mexican Farms During Penalty Phase Deliberations 223

C. Juror Bennett Was Biased in Favor of Imposing the Death Penalty Because She Was Concerned That Petitioner Would Be Released from Prison Before His Natural Death................................ 224

D. Several Jurors Were Biased Against Hispanic Immigrants 226

E. Conclusion 228

CLAIM 3: Petitioner Was Denied Due Process and Equal Protection by the Prosecution's Discriminatory Use of Peremptory Challenges 229

CLAIM 4: Joinder of Counts I Through IV Rendered the Trial Fundamentally Unfair in Violation of Petitioner's Due Process Rights and Violated His Rights to Due Process and a Fair and Reliable Determination of Guilt and Penalty 231

CLAIM 5: Petitioner Was Denied His Right to a Fair Trial Because of Pervasive Misconduct by the Prosecutor During Opening and Closing Statements and by Trial Counsel's Failure to Object to That Misconduct...................................... 238

CLAIM 6: Petitioner Was Denied Due Process of Law When the State Failed to Disclose Material Exculpatory Evidence 252

A. Suppression of Police Report Regarding Alternate Suspect in Count I (Las Playas) 254

B. Suppression of Field Show Up Regarding Count II (Fort Knots) 258

C. Suppression of Rejected Identifications in Count II (Fort Knots) 260

D. Suppression of Impeachment Evidence 261

1. Barbara Quijada 261

2. Deneen Baker 263

3. Detective David Arellanes 264

E. Suppression of Videotaped Interview of Petitioner 266

F. Suppression of Charter Suburban Hospital Records 267

G. Suppression of Forensic Documentation 268

H. Conclusion 270

CLAIM 7: Petitioner's Appellate Counsel Rendered Constitutionally Ineffective Assistance by Failing to Raise on Appeal the Trial Court's Prejudicial Error in Admitting a Video of the Paramount Crime Scene 271

CLAIM 8: Petitioner's Due Process Rights Were Violated by the Admission of Statements Obtained in Violation of His Fifth Amendment Protection Against Self Incrimination 273

CLAIM 9: Petitioner Was Denied His Right to a Fair Trial Because of State Misconduct 275

1. The Introduction of Prior Testimony of Witness Angelica Contreras 275
2. Inflammatory and Prejudicial Testimony and Evidence 278
   a. Inflammatory and Prejudicial Testimony regarding Witnesses' Fear of Petitioner 278
   b. Introduction into Evidence of Inflammatory and Prejudicial Photographs 280
3. State Authorities Engaged in a Pattern of Misconduct That Created Prejudicially Misleading Evidence 282
4. Conclusion 283

CLAIM 10: Petitioner's Constitutional and Statutory Rights Were Violated by the Process Used to Select and Impanel the Jury 284

CLAIM 11: Petitioner's Death Sentences Are Unconstitutional Because They Were Selected and Imposed in a Discriminatory, Arbitrary, and Capricious Fashion and Were Based on Impermissible Race and Gender Considerations 287

CLAIM 12: The Death Selection Process Used to Condemn Petitioner to Death Violated Petitioner's Constitutional Rights 294

A. California's Death Penalty Statute Fails to Narrow the Class of Death-Eligible Defendants as Required by the Eighth and Fourteenth Amendments 295

B. The California Statute on Aggravating and Mitigating Factors is Unconstitutionally Vague and Ambiguous 309

C. The Jury Instructions on Aggravation and Mitigation Were Unconstitutionally Inaccurate, Misleading and Biased Toward a Death Verdict........................ 314

CLAIM 13: Petitioner's Right to Consular Notification Under the Vienna Convention Was Violated 318

CLAIM 14: Execution of Petitioner Would Violate His Right to be Free From Cruel and Unusual Punishment Because His Sentences Were Based on Incomplete and Unreliable Evidence and Are a Disproportionate Punishment 333

CLAIM 15: Petitioner's Prolonged Confinement Under Sentence of Death and Execution Following Such Confinement Constitutes Cruel and Unusual Punishment 338

A. Prolonged Confinement is Cruel and Unusual in Itself.................................... 339

B. Execution After Long Delay Is Cruel and Unusual Because It Does Not Serve the Purposes of Capital Punishment 348

CLAIM 16: Petitioner Cannot Be Executed Lawfully Because His Death Sentences Violate International Law 351

A. Petitioner's Death Sentences Violate His Right to Life 361

B. International Law Requires Effective Assistance of Counsel 365

C. Petitioner Was Denied His International Law Right of Access to Court 369

D. Petitioner Was Denied His International Law Right to Protection Against Prosecutorial Misconduct 372

E. Petitioner's Prolonged Confinement and Delay in Execution Violate International Law 373

F. Petitioner Was Denied His International Laws Right to a Fair Hearing 376

CLAIM 17: Petitioner Is Ineligible for a Death Sentence Due to His Mental Illness and Impairments 379

A. Petitioner Suffers from Serious Mental Illness and Impairments 379

B. Petitioner's Mental Illness and Impairments Render His Execution Unconstitutional 381

CLAIM 18: Petitioner's Trial and/or Appellate Counsel Rendered Constitutionally Ineffective Assistance by Failing to Raise and Assert the Arguments Described in Claims 2, 3, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16, and 17 385

CLAIM 19: Petitioner's Convictions and Death Sentences Must Be Vacated Because of the Cumulative Effect of All the Errors and Constitutional Violations Shown in This Petition and the Automatic Appeal 386

VII. PRAYER FOR RELIEF 390

VIII. VERIFICATION.. 392

* * *

[215] **CLAIM 2: PETITIONER WAS DENIED HIS RIGHT TO A FAIR AND IMPARTIAL JURY.**

534. Petitioner's convictions and sentences of death were unlawfully and unconstitutionally imposed in violation of Petitioner's rights to due process, to a fair and impartial jury, to a fair trial, to confront witnesses, to compulsory process, to present a defense, to the effective assistance of counsel, and to accurate and reliable guilt and penalty determinations, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution, and Article I, Sections 1, 7, 13, 14, 15, 16, 17, 24, and 28 of the California Constitution, because of juror misconduct.

[216] A. Jury Foreperson Constance Bennett Provided Untruthful Responses on Her Pre-Trial Jury Questionnaire Concerning Critical Matters That Revealed Her Bias Against Petitioner.

535. Jury Foreperson Constance Bennett provided untruthful answers during jury selection on material questions that went to the core of issues presented during Petitioner's trial. Furthermore, Juror Bennett's responses to the pre-trial jury questionnaire demonstrated her bias against Petitioner and her inability to be fair and impartial.

536. The court provided each prospective juror with a questionnaire and emphasized the requirement and importance of answering truthfully: "Because the questionnaire is part of the jury selection process, the questions are to be answered under your oath as a prospective juror to tell the truth." CT Supp. I 2478. The court further instructed the prospective jurors to "accurately and truthfully answer, under penalty of perjury, all questions propounded to [them] concerning [their] qualifications and competency to serve as a trial juror. . . ." RT 170.

537. In relevant part, the pre-trial questionnaire required all prospective jurors to respond truthfully to the following:

63. Have you or anyone close to you been the victim of a crime, reported or unreported?

If "yes":

(a) What kind of crime(s)?

(b) How many times?

[217] (c) Who was the victim(s)?

64. Have you or any relative or friend ever experienced or been present during a violent act, not necessarily a crime?

65. Have you ever seen a crime being committed?

66. Have you ever been in a situation where you feared being hurt or being killed as a result of violence of any sort?

CT Supp. I 2494-95.

538. Juror Bennett answered "No" to questions 64 through 66. CT Supp. I 2495. She answered "Yes" in response to Question 63, but referred only to a single instance of home robbery in which the victim was her "roommate before [they] lived together." CT Supp. I 2495. Juror Bennett executed the juror questionnaire, certified "under penalty of perjury, that [her responses] are true and correct," CT Supp. I 2512, and asserted that she knew of no "reason why [she] would not be a completely fair and impartial juror in this case," CT Supp. I 2498. At no time during voir dire did Juror Bennett offer a different account of what she stated in her pre-trial questionnaire on these questions. Ultimately, Juror Bennett was selected as a juror and became the foreperson of the jury. *See* RT 2329.

539. The jury found Petitioner guilty of four counts of first degree murder in the guilt phase of trial, and delivered a verdict of death in the penalty phase. After Petitioner's trial, Trial Counsel sent Juror Bennett and [218] other jurors a post-verdict questionnaire, which Juror Bennett completed and returned. In this post-verdict questionnaire, Juror Bennett revealed to Trial Counsel – *for the first time* – crucial facts regarding her background that directly contradicted her earlier pre-trial questionnaire responses. Juror Bennett admitted that she had been the victim of several unreported crimes of a significant and highly prejudicial nature:

> The mitigating circumstances offered during the sentencing phase was *[sic]* actually a detriment in most of the jurors *[sic]* minds, especially mine. I grew up on a farm where I was beat *[sic]*, raped, and used for slave labor from the age of 5 thru *[sic]* 17. I am successful in my career and am a very responsible law abiding citizen. It is a matter of choice!

Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0234.

540. Juror Bennett later confirmed under penalty of perjury that she suffered abuse and rape as a child:

> As to the mitigating evidence, I recall that Manriquez grew up on a farm and was abused. I told the other jurors about what I had heard about farms in Mexico. But, I was regularly beaten from age three to age seventeen while I lived with a foster mother on a

> farm in Pennsylvania. The farm was 160 acres and we worked hard on the farm. At the farm there was also a home for aged people and one of the residents raped me when I was five. Having been through abuse myself, I do not view abuse as an excuse. I told the other jurors about my experience and my belief that childhood abuse was not an excuse.

Exh. 123, C. Bennett Decl., PE 1142 ¶ 9. Additionally, Juror Bennett had [219] recalled the pre-trial questionnaire, calling some of the questions "intense" and opining that "[s]ome of the questions on the questionnaire seemed to have no purpose" and that "[s]uperficial questions about where you were brought up, or your education, or income should be no one's business." *Id.* at PE 1191 ¶ 4.

541. Juror Bennett's post-trial revelations regarding her violent upbringing directly contradicted the responses she provided during jury selection.

542. Juror Bennett's post-trial admissions exposed a childhood with features significantly similar to that of the Petitioner, whose abuse during childhood was presented as mitigating evidence during the penalty phase of trial. Petitioner's childhood was marred by extreme cruelty, vicious beatings, grinding poverty, forced farm labor, and an absolute lack of care, education, affection or encouragement by the adults in his life. *See generally* RT 2163-2232.

543. In addition, the prosecution introduced evidence regarding an unadjudicated, alleged rape as an

aggravator in the penalty phase of trial. RT 2133-41. The post-trial questionnaire asked "How significant was the evidence of the rape on your decision to vote death?" With possible choices of "Very," "Not Very," and "Not At All," Juror Bennett marked "*Very*" in response to that question. *Id.* at PE 0231 (emphasis in original). Moreover, it is reasonably likely that Juror Bennett weighed her own [220] experiences with rape in reaching her verdict.

544. The U.S. Constitution's intolerance for jury bias is absolute. "Even if 'only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury." *Tinsley v. Borg*, 895 F.2d 520, 523-24 (9th Cir. 1990) (quoting *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979)). Even so, it is likely that Juror Bennett's bias affected other jurors as well because Bennett discussed her abuse during deliberations in the penalty phase:

> This abuse issue was discussed in the penalty deliberations. A couple of the other jurors also had rough childhoods. I remember that one of the jurors, an older white man, said he had a stepfather who would beat him once in a while.

Exh. 123, C. Bennett Decl., PE 1142-43 ¶ 11. Moreover, as the jury foreperson, she played an instrumental role in getting the jurors to reach a verdict. *Id* at PE 1140 ¶ 2.

545. Juror Bennett's untruthful responses to the pre-trial questionnaire resulted in a violation of

Petitioner's rights to a fair and impartial jury. The Sixth Amendment guarantees criminal defendants a fair trial, and the "touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). Therefore, any taint in the impartiality of the jury, during either the guilt phase or the [221] penalty phase, denies the defendant's constitutional right to a fair trial. Moreover, a biased juror "introduces a structural defect not subject to harmless error analysis," and the defect can only be remedied by vacating the verdict. *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998).

546. The jury selection process is designed to protect the jury's integrity at the outset by *preventing* the seating of biased jurors, either through excusal for cause or through the exercise of peremptory challenges. *See McDonough*, 464 U.S. at 554 ("*Voir dire* examination serves to protect that right [to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors."). "Demonstrated bias" may prompt a prospective juror to be excused for cause, while "hints of bias" may trigger peremptory challenges. *McDonough*, 464 U.S. at 554. However, such cleansing of the jury pool during voir dire is corrupted when jurors give false responses, thereby masking the potential or actual bias that their truthful answers might reveal. When a potential juror conceals material facts on voir dire, she denies "the right to reasonably

exercise a peremptory challenge," causing "the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction." *People v. Diaz*, 152 Cal. App. 3d 926, 933 (1984). Moreover, concealing bias on voir dire is a "direct violation of the oaths, duties and admonitions imposed on actual or prospective jurors," and it constitutes "juror misconduct." *In re Hamilton,* [222] 20 Cal. 4th 273, 294 (1999).

547. A potential juror may be challenged for cause if her responses reveal any actual or implied bias. Cal. Code Civ. Proc. § 225(b)(1). Juror Bennett's post-trial revelations demonstrate her actual bias against Petitioner, and her inability to consider fairly and impartially the mitigating evidence. She called such evidence "actually a detriment in most of the juror's *[sic]* minds, especially mine." Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0234. Juror Bennett additionally remarked that though she had an upbringing quite similar to Petitioner's, she was unmoved by the mitigating evidence because she, unlike Petitioner, was "successful in [her] career and [ ] a very responsible law abiding citizen." *Id.* (emphasis in original).

548. At the very least, Juror Bennett's untruthful responses revealed a presumptive, implied bias against Petitioner. It is well-established that courts may imply bias based on a juror's personal experiences where those experiences create "the potential for substantial emotional involvement, adversely affecting impartiality." *United States v. Allsup*, 566 F.2d 68, 71

(9th Cir. 1977) (presuming bias of jurors against the defendant because they worked for the bank, albeit a different branch, that the defendant was accused of robbing). Courts have presumed bias "where a juror or his close relatives have been personally involved in a situation involving a similar fact pattern" or have personally experienced a fact pattern similar to the [223] crime. *Tinsley v. Borg*, 895 F.2d at 528; *see also United States v. Eubanks*, 591 F.2d 513, 516-17 (9th Cir. 1979) (ordering new trial because one juror in heroin case failed to disclose that he had two sons serving heroin-related prison terms, which "bar[red] the inference that [he] served as an impartial juror"). In light of the similarities of Juror Bennett's history – which she concealed during jury selection – with evidence presented in the penalty phase, such as the beatings and forced labor Petitioner suffered as a child as well as the evidence regarding the unadjudicated, alleged rape, a court would find Juror Bennett impliedly biased against Petitioner at the very least.

549. Juror Bennett committed serious misconduct in providing untruthful responses during jury selection, and in concealing her bias. The concealment of this information violated Petitioner's unquestioned right to challenge Juror Bennett for cause and also violated Petitioner's right to exercise a peremptory challenge. As a result, Petitioner was denied his Sixth Amendment right to a fair trial and impartial jury.

B. Jury Foreperson Constance Bennett Committed Misconduct When She Discussed Extraneous Facts Regarding Life on Mexican Farms During Penalty Phase Deliberations.

550. Juror Bennett committed misconduct by improperly injecting her own, untested and specialized knowledge into the penalty phase deliberations when she informed jurors of facts she claimed to know [224] regarding life on Mexican farms:

> As to the mitigating evidence, I recall that Manriquez grew up on a farm and was abused. I told the other jurors about what I had heard about farms in Mexico.
>
> . . .
>
> I had heard that life on farms in Mexico was real tough, with long work hours and very little food. Again, I did not accept this was an excuse and said so.

Exh. 123, C. Bennett Decl., PE 1142-43 11 9, 11.

551. Juror Bennett failed to follow the Court's instructions in discussing these extraneous facts with the jurors during deliberations. *See* CT 795. Moreover, the jurors were likely influenced by Juror Bennett's discussion of improper facts, and her conclusions regarding them, particularly since she served as the foreperson of the jury.

552. This consideration of extraneous facts constitutes juror misconduct because a "death sentence [is] imposed, at least in part, on the basis of information

which [a defendant] had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). This misconduct denied Petitioner his Sixth Amendment right to a fair trial and impartial jury.

C. Juror Bennett Was Biased in Favor of Imposing the Death Penalty Because She Was Concerned That Petitioner Would Be Released from Prison Before His Natural Death.

553. Juror Bennett refused to vote for life without possibility of [225] parole as a sentence because she was concerned that Petitioner would have a chance at parole at a later stage. Her concerns overrode her ability to fairly and impartially consider the penalty phase evidence and to follow instructions.

554. In the post-verdict questionnaire, Juror Bennett responded to the question, "Why did you vote for death?" as follows: "I cannot allow a man like that the remotest possibility of ever being on the street again." Exh. 24, Post-Verdict Juror Questionnaire of Constance Bennett, PE 0232. Juror Bennett later declared under penalty of perjury that "I understood that life without parole meant he would never be paroled, but I also felt that there was always an outside chance that a prisoner would somehow be released or go free." Exh. 123, C. Bennett Decl., PE 1141 6.

555. Juror Bennett's post-trial statements indicate that she was actually biased against a sentence of life without the possibility of parole. At the very least, Juror Bennett's statements reveal an implied bias that

prevented her from fairly and impartially considering a verdict of life without the possibility of parole in penalty phase deliberations.

556. In addition, Juror Bennett never disclosed her bias during jury selection. In her pre-trial questionnaire, she indicated that she only "agreed somewhat" that a person convicted of "intentionally kill[ing] four people without legal justification [ ] and not in self defense [ ] should receive the death penalty." CT Supp. I 2504. Nor did Juror Bennett reveal her bias [226] during voir dire. RT 281-82. As a result, Petitioner was denied his right to a fair and impartial jury. *See People v. Diaz*, 152 Cal. App. 3d 926, 933 (1984) (When a potential juror conceals material facts on voir dire, she denies "the right to reasonably exercise a peremptory challenge," causing "the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction."); *see also In re Hamilton*, 20 Cal. 4th at 294 (concealing bias on voir dire is a "direct violation of the oaths, duties and admonitions imposed on actual or prospective jurors," and constitutes "juror misconduct.")

557. To the extent that the trial court adequately instructed the jurors on the meaning of life without the possibility of parole, which it did not, Juror Bennett's post-trial statements demonstrate misconduct in having refused to follow such instruction by allowing her predispositions to factor in the penalty verdict. Her post-trial statements also demonstrate that she concealed an intention not to follow instructions, contrary

to her statement in voir dire that she would follow the law. RT 282. This misconduct deprived Petitioner of his Sixth Amendment right to a fair trial and impartial jury.

D. Several Jurors Were Biased Against Hispanic Immigrants.

558. Several of the jurors were biased against Hispanic immigrants. [227] The prejudices of the jury members affected the impartiality of the jury and negatively affected Petitioner's ability to obtain a more favorable result at trial.

559. Jury Foreperson Constance Bennett acknowledged following the trial that Petitioner's status as a Mexican immigrant came up during juror deliberations and discussions. Juror Bennett declared:

> As to the fact that Manriquez was Mexican, there was an occasional comment like, "He's not even a citizen and he comes over here and kills people." I do not think it was an issue, but it came up in the discussions.

Exh. 123, C. Bennett Decl., PE 1141 ¶ 4.

560. As discussed in Claim 1.E.2, Petitioner's trial took place in an environment that created an unacceptable risk that impermissible and emotional factors would come into play in the jury's deliberative process. At the time of Petitioner's trial, a racially charged campaign for the passage of Proposition 187, a far-reaching initiative designed to deny undocumented

immigrants social services, was in full force. Anti-immigrant sentiment in California, which was particularly directed against Hispanic immigrants, was prevalent at the time of Petitioner's trial. On November 8, 1993, Proposition 187 passed by voter initiative.

561. Moreover, as discussed in Claim 5, the Prosecutor improperly made racist and inflammatory statements regarding Petitioner's Mexican nationality and immigrant status. In making these statements, the [228] Prosecutor also improperly argued that Petitioner committed the crimes because of his "personality" and "background." *See* RT 792. These arguments contributed to the bias against Petitioner.

562. The fact that Petitioner's race and illegal immigrant status was mentioned in juror discussions indicates that it improperly played a role in their deliberations, particularly when viewed against the backdrop of the Proposition 187 campaign. One or more jurors were actually or impliedly biased against Mexican immigrants.

563. Moreover, these biases were concealed during jury selection. *See People v. Diaz*, 152 Cal. App. 3d 933 (1984) (When a potential juror conceals material facts on voir dire, she denies "the right to reasonably exercise a peremptory challenge," causing "the deprivation of an absolute and substantial right historically designed as one of the chief safeguards of a defendant against an unlawful conviction."); *see also In re Hamilton*, 20 Cal. 4th at 294 (concealing bias on voir dire is a "direct violation of the oaths, duties and admonitions

imposed on actual or prospective jurors," and it constitutes "juror misconduct.") This concealed bias deprived Petitioner of his Sixth Amendment right to fair trial and impartial jury.

E. Conclusion

564. Each of these facts alone creates a structural defect in the proceedings that is not subject to harmless error analysis. *Dyer v. Calderon*, 151 F.3d 970, 973 n.2 (9th Cir. 1998). Even if the constitutional [229] violations are not per se prejudicial, they so infected the integrity of the proceedings that the error cannot be harmless. Taken together, the violations eviscerated Petitioner's fundamental right to a fair trial, and raise an unrebuttable presumption of prejudice, requiring a grant of relief.

*　　　*　　　*

[390] VII. PRAYER FOR RELIEF

WHEREFORE, Petitioner Abelino Manriquez respectfully requests that this Court:

1. Take judicial notice of the record, documents, pleadings and exhibits filed in this Court in *People v. Abelino Manriquez*, No. SO38073, and of the record, documents, pleadings and exhibits filed in the Los Angeles County Superior Court in *People v. Abelino Manriquez*, Los Angeles County Superior Court, No. VA004848;

2. Request that the original appendices referred to in this Petition be transmitted to the Court by the

Clerk of the Superior Court (Cal. Rules of Court, rule 8.224);

3. Allow Petitioner a reasonable opportunity to supplement the evidentiary showing of the claims presented here to include legal and factual grounds for claims which become apparent from further investigation, or from allegations made in the return or informal opposition to the Petition, and to supplement or amend the Petition to include claims which may become known as a result of further investigation and information which may hereafter come to light;

4. Issue a writ of habeas corpus or order respondent to show cause why Petitioner is not entitled to the relief sought;

5. Grant Petitioner sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the facts [391] alleged in this Petition;

6. Grant Petitioner the authority to obtain subpoenas for witnesses and documents which are not obtainable by other means;

7. Grant Petitioner the right to conduct discovery including the rights to take depositions, request admissions, and propound interrogatories and the means to preserve the testimony of witnesses;

8. Grant Petitioner relief on the merits of his claims after determining that there are no material facts in dispute or order an evidentiary hearing at

which Petitioner will offer the herein stated, and further proof of, the factual allegations stated above;

9. Order that Petitioner has not waived any applicable privileges by the filing of this Petition and the exhibits; that he has not waived either the attorney-client privilege or the work-product privilege; that any waiver of a privilege may occur only after a hearing with sufficient notice and the right to be heard on whether a waiver has occurred and the scope of any such waiver; that Petitioner is granted "use immunity" for each and every disclosure he has made and may make in support of this Petition; and issue any necessary protective orders;

10. Order a hearing and, if necessary, the taking of evidence, upon all allegations by respondent of waiver and/or forfeiture by Petitioner;

11. After full consideration of the issues raised in this [392] Petition, considered cumulatively and in light of the errors alleged on direct appeal, order that Petitioner's convictions, special circumstance findings, and death sentences be vacated;

12. Issue any stays of execution or proceedings necessary to protect this Court's jurisdiction; and

13. Grant Petitioner such further relief as is appropriate and just in the interest of justice.

VIII. VERIFICATION

909. I am an attorney admitted to practice law in the State of California. I represent Petitioner herein, who is confined and restrained of his liberty at San Quentin Prison, Tamal, California.

910. I am authorized to file this First Amended Petition for Writ of Habeas Corpus 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 as or more than Petitioner's.

[393] 911. I have read this Petition and know the contents of this Petition to be true.

912. Executed under penalty of perjury under the laws of the State of California and the United States on this 10th day of January, 2008 at San Francisco, California.

DATED: January 10, 2008

Respectfully submitted,

BINGHAM McCUTCHEN LLP

By: /s/ John R. Reese

John R. Reese
Attorneys for Petitioner
Abelino Manriquez