SUPREME COURT COPY

No. S141210

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

RESPONSE TO RESPONDENT'S BRIEF ON MERITS AND EXCEPTIONS TO REFEREE'S REPORT

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DEATH PENALTY

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I. INTRODUCTION

Petitioner was sentenced to death by an unconstitutionally biased jury. Respondent recognizes that the United States and California Constitutions require an impartial jury, one in which "'every member is capable and willing to decide the case solely on the evidence before it.'" (Respondent's Brief on Merits and Exceptions to Referee's Report ("RB") at 7-8, quoting *In re Hamilton* (1999) 20 Cal.4th 273, 294; *see also Smith v. Phillips* (1982) 455 U.S. 209, 217.) Without dispute, the juror must "lay aside [her] impression or opinion and render a verdict based on the evidence presented in court" (*Irvin v. Dowd* (1961) 366 U.S. 717, 722-23, citations omitted; *People v. Nesler* (1997) 16 Cal.4th 561, 580-81, plurality opinion) and "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" make the juror biased. (*Reynolds v. United States* (1878) 98 U.S. 145, 155, quotations omitted; *Nesler*, *supra*, 16 Cal.4th at 581, quoting same.)

Respondent never addresses the questions these standards mandate. Did C.B. "*decide* the case solely on the evidence"? Was C.B. "*capable* . . . [of] decid[ing] the case solely on the evidence"? Did C.B. lay aside her opinions? Or did her abusive, enslaved childhood close her mind, combat Petitioner's evidence and resist its force?

The undisputed evidence unequivocally answers the questions Respondent should have addressed: No, C.B. did not decide the question of Petitioner's death based solely on the evidence. No, C.B. was not capable of doing so. No, she did not lay aside her opinions. And yes, her personal trauma closed her mind and resisted the force of Petitioner's evidence; she had concluded that childhood abuse was no excuse before she ever walked into the courtroom. (*See* Petitioner's Exceptions to the Referee's Findings of Fact and Merits Brief ("PB") at Section IV.B.)

Respondent completely ignores the facts and law compelling these conclusions. Respondent does not acknowledge, let alone come to grips with:

- C.B.'s admissions that she rejected Petitioner's mitigation evidence based on her uniquely similar and traumatic history of abuse;
- C.B.'s statements to her fellow jurors about the same; and
- C.B.'s admission that even before the trial, her own history of abuse had predisposed her to reject any mitigation defense based on abuse.

Instead of confronting these undisputed facts, Respondent distracts by relating facts of the murders for which Petitioner was convicted – facts that are utterly irrelevant to the juror misconduct and bias

issues before this Court.

Respondent argues that C.B. was not biased simply because she said so at the 2013 evidentiary hearing, 20 years after the trial. This testimony is beside the point because C.B. admitted she did not know the legal definition of "bias." Her contemporaneous and subsequent admissions show that she was biased under the legal definition, as a matter of law: She did not decide to vote for death based solely on the evidence; she did not lay aside her opinions; and her past closed her mind to Petitioner's childhood-abuse testimony and combatted its force.

Respondent also argues that C.B.'s failure to disclose her history of abuse on her juror questionnaire was neither intentional nor deliberate. However, Respondent ignores the contradictions in C.B.'s testimony. C.B. could not be completely "credible" because the reasons she gave for not disclosing her abuse during voir dire cannot all be true. Because substantial and credible evidence does not support the Referee's finding, this Court should go where the evidence takes it: C.B. understood the clear questions and – however understandably – deliberately chose not to disclose her painful past.

II. THE UNDISPUTED LEGAL FRAMEWORK APPLICABLE FOR THIS CASE

As Respondent concedes, "[a] juror who conceals relevant facts or gives false answers during the voir dire examination thus

undermines the jury selection process and commits misconduct." (RB at 8; *In re Boyette* (2013) 56 Cal.4th 866, 889.) The false answer is misconduct even if the juror did not intentionally conceal relevant facts. (*In re Boyette*, *supra*, 56 Cal.4th at 889-90 [juror's incorrect answers on voir dire were misconduct raising presumption of prejudice even though he answered in good faith].)

"[J]uror misconduct raises a presumption of prejudice." (*In re Boyette*, *supra*, 56 Cal.4th at 890.) The prosecution bears the burden of rebutting the presumption. (*Id.* at 892.) "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 the Court finds a "substantial likelihood that a juror was 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, because a biased adjudicator is one of the few structural trial defenses that compel reversal without application of a harmless error standard." (*People v. Hensley* (2014) 59 Cal.4th 788, 824, quotations omitted.)

Here, C.B.'s failure to disclose her history of abuse, intentional or not, was misconduct because she "g[a]ve[] false answers during [] voir dire." (*In re Boyette*, *supra*, 56 Cal.4th at 889.) Respondent does not claim otherwise. C.B.'s undisputed 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, below.) Indeed, C.B. was actually biased. (*See* Section III, below.) That C.B. intentionally and deliberately concealed her history of physical abuse and rape (*see* Section V, below) only confirms this conclusion.

III. JUROR C.B. WAS ACTUALLY BIASED

Respondent claims that C.B. was not actually biased because she testified 20 years after-the-fact that she was not biased. That testimony cannot support a conclusion that she was not biased as the law defines it, however. C.B. admitted she does not know what bias means under the U.S. and California Constitutions. (EHT[1] at 60:21-23.) She directly testified to facts making clear that she did not lay her opinions aside and decide based solely on the evidence presented in court and that her undisclosed history of abuse created strong and deep impressions that closed her mind, combatted Petitioner's mitigation evidence and resisted its force – the tests for bias.

[1] The record of the evidentiary hearing includes a transcript of the June 30, 2013 hearing and exhibits admitted by both Petitioner and Respondent. The evidentiary hearing transcript is cited herein as "EHT."

(*See* Section I, above; PB at Section IV.B.2.) Respondent ignores these facts even while admitting that the "entire record" and the "totality of the circumstances" are relevant to the bias inquiry. (RB at 14, citing *People v. Thomas* (2012) 53 Cal.4th 771, 819, and *In re Carpenter* (1995) 9 Cal.4th 634, 654.)

Respondent agrees that conclusions of law and mixed questions of law and fact are subject to this Court's independent review. (RB at 2.) Because the question of whether C.B. was actually biased requires this Court to apply the constitutional standard of "bias" to undisputed facts, it should be determined by this Court de novo. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-01; *see also* PB at Section IV.B.1.)

The undisputed facts establish that C.B. had a history of abuse that was significant, traumatic, and that mirrored Petitioner's history of abuse. They further establish that she was predisposed to and did indeed reject Petitioner's defense because of that history. Under California and federal Constitutional law, that means she was actually biased.

A. Respondent's Reliance On C.B.'s Claim That She Was Not Biased Is Misplaced

Unable to dispute either C.B.'s admissions or that they satisfy the test for bias, Respondent falls back on her conclusory testimony that she was not biased, saying she "emphatically denied that she held any bias against Petitioner." (RB at 13.) To no avail. C.B.'s uninformed

conclusion cannot overcome her specific admissions of unconstitutional bias.

First, C.B. did not "emphatically" deny anything; she was simply asked "Were you biased against Mr. Manriquez at any time while you were a sitting juror in this trial?" and responded "No, sir, I was not." (EHT at 53:25-27.)

Second, and more importantly, C.B. is not a lawyer and admitted she did not know the legal definition of bias. (EHT at 60:21-23.) The Referee erroneously overruled Petitioner's objection to asking C.B. whether she was "biased" because it called for a legal conclusion (EHT at 52:17-53:27) and Respondent deliberately prevented Petitioner from then determining what her answer meant. Petitioner's counsel asked her "What does bias mean to you?" Respondent then objected on relevance grounds, and the Referee erroneously sustained the objection. (*Id.* at 60:12-19.) Thus we know that C.B. was *not* denying that she met the legal test for bias (since she did not know what that test was) and we do not know what she did mean (because the Referee sustained Respondent's relevance objection to that question, though it was very relevant). If C.B.'s claimed lack of bias were given any weight, the Referee's ruling preventing Petitioner from determining what she meant was erroneous, unfair and prejudicial.

A layperson such as C.B. would likely understand "bias" to mean personal prejudice or animus against the defendant. (*But see People*

v. Cissna (2010) 182 Cal.App.4th 1105, 1116 ["Juror bias does not require that a juror bear animosity towards the defendant."].) C.B. could not know that a fixed preconviction or inability to decide the case solely on the evidence was bias.

As this Court explained in another setting, jurors can be expected to determine facts (especially here, where the fact is the juror's own state of mind). But they cannot reasonably be expected to know whether those facts satisfy the law. (*See People v. Guiton* (1993) 4 Cal.4th 1116, 1128-29 [test for determining whether defendant was prejudiced by instructions on both valid and invalid theories: when defect in theory is "purely factual," jury is "fully equipped to detect" it and instruction is normally not prejudicial; but when defect "is legal, not merely factual, that is, when the facts do not state a crime under the applicable statute," jury has no way of detecting the problem and erroneous instruction is presumptively prejudicial]; *Griffin v. United States* (1991) 502 U.S. 46, 59 [similar]; *see also People v. Hughes* (2002) 27 Cal.4th 287, 349-50 [holding that trial court erred in failing to define rape, despite prosecution's contention that term was "commonly understood"; "The People cite no empirical evidence or authority for the proposition that reasonable lay jurors are aware of the correct legal definition of rape . . . ."].)

Thus, Respondent can take no solace from *Smith v. Phillips* (1982) 455 U.S. 209, which considered a juror's statement that he was not

biased. (RB at 14.) In *Smith,* the court relied on the juror's *factual* testimony about his state of mind, not his *conclusion* as to whether those constituted bias. In *Smith*, a juror applied for a job with the prosecuting District Attorney's office during trial. (455 U.S. at 212.) Defendant claimed the juror was incapable of being impartial, and that the court should imply bias, due to the pendency of his job application and his desire to impress a potential new employer. (*Id.* at 215.) Nothing in *Smith* suggests that the juror was asked a conclusory question about whether he was "biased." He was not, as the briefs in that case make clear. He testified about the facts of his state of mind, not whether that state of mind met the legal standard for bias:

> Question: Do you think that [being a juror] might have helped you, that might have been helpful in considering you as an applicant for the job?
>
> Answer: Mr. Rothblatt, I swore an oath to listen to the evidence and to render a verdict on that evidence. I did so.
>
> ***
>
> Question: I didn't ask you that.
>
> Answer: Well, I'm telling you that this wasn't in my mind. I didn't consider it favorable. [The District Attorney's office] had nothing to do with this case so far as I'm concerned.
>
> * * *
>
> Question: Did you think that you would be considered for this job as investigator for the

> District Attorney's Office if you voted to acquit Mr. Phillips? Yes, or No.
>
> Answer: I didn't think about whether or not to acquit or convict Phillips had anything to do with the job. I didn't think about it at all, one way or the other.
>
> * * *
>
> Question: You mean you never thought for a moment that an acquittal in this case, the people in the District Attorney's Office would look upon you unfavorably as an investigator working for their staff if you felt that Mr. Phillips was entitled to an acquittal; is that what you're telling us?
>
> Answer: Yes, that's what I'm telling you. Why would the DA's Office care about my actions as a juror? You're the one who's suggesting it, no one else-.

(Brief of Appellant, *Smith v. Phillips* (1982) 455 U.S. 209, available at 1981 WL 389698, at *12.) The trial court gave weight to this testimony and found that the juror was not biased, and *Smith* found it was permissible for the trial court to rely only on the juror's testimony for that finding. (*Smith*, *supra*, 455 U.S. at 215-17.)

This case is thus nothing like *Smith.* The juror there testified to the *facts* about his state of mind; C.B. here testified only to the *conclusion* that she was not biased, while admittedly not knowing what bias meant under the law. The facts the juror recounted in *Smith* did not constitute legal bias; the facts C.B. testified to here do constitute legal bias. (*See* Section III.B, below; PB at IV.B.2.)

Smith affirmed that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (455 U.S. at 217.) As described in the following section, C.B. was actually biased, because her factual admissions prove she could not and did not decide the case "solely on the evidence before" her.

B. Respondent, Like The Referee, Completely Ignores The Bias Inquiry

Respondent acknowledges that Petitioner was entitled to a jury in which every member was "capable and willing to decide the case solely on the evidence before it" (RB at 7-8), and this Court recently confirmed that this requirement applies equally to the penalty phase of a trial in which the State seeks to sentence the defendant to death. (*People v. Hensley* (2014) 59 Cal.4th 788, 824.) Yet, Respondent completely ignores the substantial case law applying this standard of bias and the facts relevant to it.

C.B. did not meet the constitutional requirement of impartiality. Instead of basing her decision solely on the evidence, C.B. 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. (*See* PB at Section II.B.3

[describing undisputed facts of C.B.'s rejection of Petitioner's mitigation evidence based on her similar history].) Indeed, her uniquely similar history made her predisposed to reject Petitioner's defense, and her rejection was immediate. (*Ibid.* [describing undisputed facts of C.B.'s predisposition to reject mitigation evidence].) Thus, C.B. was biased because she could not and did not base her decision solely on the evidence. (*See id.* at Section IV.B.2.)

Cases from California and other state and federal courts uniformly confirm that when a juror endures a significant, traumatic, and unique experience that mirrors the facts at issue in the case, and when that experience is likely to or actually enters deliberations, as here, the juror is actually biased. (PB at 23-30 [discussing *People v. Blackwell* (1987) 191 Cal.App.3d 925; *Nesler*, supra, 16 Cal.4th 561; *State v. LaRue* (Hawaii 1986) 722 P.2d 1039; *United States v. Sampson* (D. Mass. 2011) 820 F.Supp.2d 151; *People v. Thomas* (1990) 218 Cal.App.3d 1477; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513; *Burton v. Johnson* (10th Cir. 1991) 948 F.2d 1150; *United States v. Martin* (11th Cir. 1985) 749 F.2d 1514; *People v. Oliver* (Ill. App. 1977) 50 Ill.App.3d 665; *Bayramoglu v. Estelle* (9th Cir. 1986) 806 F.2d 880; and *Norris v. State* (1998) 230 Ga.App. 492].) Respondent has no answer to this substantial body of law establishing C.B.'s bias under the undisputed facts, even

though Petitioner cited these in his Traverse before this Court and the briefing before the Referee.

* * *

C.B.'s actual bias confirms that Petitioner's sentence violated California and federal constitutional law, and compels a new penalty trial.

IV. RESPONDENT CANNOT PROVE THERE WAS NO SUBSTANTIAL LIKELIHOOD THAT C.B. WAS BIASED

Petitioner is entitled to a new penalty trial even if C.B. was not "actually biased" (though she was). C.B.'s nondisclosure during voir dire constituted misconduct creating a presumption of prejudice, and the State cannot rebut that presumption because it 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.) "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.)

The presumption that Petitioner suffered prejudice as a result of Juror C.B.'s misconduct must be the starting point for the Court's inquiry. "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 [requiring a new trial and finding that trial court did not properly apply the presumption of prejudice], (emphasis in original.)

Nonetheless, Respondent makes no attempt to meet the burden of showing no substantial likelihood of bias. Indeed, he cannot because the evidence overwhelmingly establishes that C.B. was actually biased. (*See* PB at Section IV.B; Section III, above.) At the very least, Respondent cannot rebut the presumption of prejudice because C.B.'s history of abuse was inherently likely to have influenced her and the evidence undermines any confidence that neither C.B. nor any of the other jurors was impermissibly influenced by C.B.'s pre-existing views.

C.B.'s history of abuse was inherently likely to have influenced her deliberations; in fact, she admitted they did. As Respondent acknowledges, the question of prejudice is "whether the misconduct is inherently likely to have influenced the juror." (RB at 9, citing *People v. Harris* (2008) 43 Cal.4th 1269, 1303, *In re Hitchings* (1993) 6 Cal.4th 97, 118; *People v. Marshall* (1990) 50 Cal.3d 907, 950-951.) C.B.'s traumatic history of abuse was inherently likely to have influenced her during deliberations because jurors cannot help but connect their own unique and traumatic experiences to similar experiences that are presented to them. (*United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 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* (9th Cir. 1990) 895 F.2d 520, 527.]; *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 court did not accept that juror "could not be influenced, albeit unintentionally, by such a painful and tragic experience"].) Here, evidence of Petitioner's abuse immediately caused C.B. to think of her own abuse. She then decided Petitioner's fate based on her own uniquely similar history, and she told the other jurors of her past in an attempt to influence them. There can be no question that C.B.'s history of abuse actually influenced her, confirming a substantial likelihood of bias.

Respondent also is unable to meet its burden because C.B.'s admissions about the role her history of abuse played during deliberations undermine any confidence that she was not biased. (*See* PB at 40-42 [discussing "substantial likelihood" standard].) Given C.B.'s role as the jury foreperson, there was also a "'reasonable probability the remaining jurors' were also influenced by her views." (*See* PB at 42-43 [citing *People v. Diaz* (1984) 152 Cal.App.3d 926, 936; *LaRue*, *supra*, 722 P.2d at 1042];

compare People v. Merriman (2014) 60 Cal.4th 1, *99-100 [where juror discussed case with acquaintance who was in law enforcement, and that discussion was misconduct, finding presumption of prejudice rebutted because "Juror No. 1 did not share with her fellow jurors the fact or substance of her conversation" and juror testified that she "maintained an open mind regarding defendant's guilt"].)

V. RESPONDENT FAILS TO CURE THE DEFECTS IN THE REFEREE'S FINDING THAT C.B.'S FAILURE TO DISCLOSE HER ABUSE DURING VOIR DIRE WAS UNINTENTIONAL

C.B. provided several conflicting explanations for her failure to disclose her childhood abuse and rape on her juror questionnaire. The conflicts cannot be reconciled and neither Respondent nor the Referee attempt to do so. In fact, both Respondent and the Referee selectively discuss only some of C.B.'s testimony and ignore the rest.

As described below, some of C.B.'s explanations are inescapably false; therefore, the Referee's finding that she was generally credible is clearly wrong. (*See also* PB at Section IV.D.1 [describing C.B.'s conflicting explanations and the Referee's failure to reconcile them].) The Referee's ultimate conclusion that C.B. unintentionally did not disclose her history of abuse on her juror questionnaire is not entitled to deference because it is not supported by "substantial and credible evidence." (*In re Hitchings*, *supra*, 6 Cal.4th at 109; *see also* PB at 43-51.)

Because Respondent fails to provide support for the Referee's finding, the finding must be rejected.

A. The Referee's Finding That C.B. Provided Credible Reasons For Failing To Disclose Her History Of Abuse And Rape Is Unsupported

Respondent recites the Referee's finding that Juror C.B. provided credible reasons for failing to disclose her childhood abuse in her pre-trial juror questionnaire, and that her "testimony explaining the different aspects of her testimony was internally consistent." (RB at 10, citing Referee's Findings of Fact ("RFF") at 8.) To the contrary, they are inconsistent.

1. C.B.'s Admissions That The Questions Were Not Limited To Any Time Period, But That She Nonetheless Interpreted Them To Relate Only To Adulthood, Are Irreconcilable

Respondent notes that "[a]t the [evidentiary] hearing, Juror C.B. acknowledged that she had been present during a violent act, and that when she answered Question 64 in 1993 ('Have you or any relative or friend ever experienced or been present during a violent act, not necessarily a crime?'), she 'did not interpret the question as imposing any timeframe limitation *per se*.'" (RB at 4, quoting RFF at 5; EHT at 38.) Respondent claims that C.B. did not disclose her childhood abuse in response to the

question because she "'did not consider [her] childhood a violent act.'" (RB at 4, quoting RFF at 5; EHT at 38.)

Respondent's argument for C.B.'s nondisclosure cannot be squared with her testimony that she interpreted questions 63-66 of the juror questionnaire to relate only to her adulthood (EHT at 39:24-40:14, 41:6-17), and her admission that nothing in the questions indicated 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, C.B.'s testimony is not credible and both Respondent and the Referee fail to reconcile her contradictory statements.

2. C.B.'s Statements That Abusing And Raping A Child Are Crimes And Acts Of Violence, But That Her Own Abuse And Rape Are Not, Are Irreconcilable

Respondent states that "C.B. consistently testified the sole reason for not disclosing her childhood abuse was that she did not consider any incident during her childhood to be a violent act (EHT at p. 38), and that she did not consider the abuse she suffered to have been a crime (EHT at pp. 19-20)." (RB at 10; *see also* RB at 4.) However, Respondent's argument is wrong because C.B. also testified that in 1993 she considered physically abusing a child to be violence (EHT at 22:2-4) and molesting a child to be violence (*Id.* at 19:9-13) and criminal (*Id.* at 19:14-27). Saying