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

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

John R. Reese, Bar No. 37653
john.reese@bingham.com
Robert A. Brundage, Bar No. 159890
robert.brundage@bingham.com
Nitin Jindal, Bar No. 257850
nitin.jindal@bingham.com
Monica A. Hernandez, Bar No. 280195
monica.hernandez@bingham.com
BINGHAM MCCUTCHEN LLP
Three Embarcadero Center
San Francisco, California 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2286

Attorneys for Petitioner
Abelino Manriquez

SERVICE ON CAL. ATT. GEN. REQUIRED BY CAL. R. CRT. 8.29(c)(1)

DEATH PENALTY

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Attorneys for Petitioner
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I. INTRODUCTION

Petitioner Abelino Manriquez has been sentenced to death. The evidentiary hearing confirmed that the process that produced this sentence was not fair. To avoid the death penalty, Petitioner focused his mitigation defense on having suffered through years of abuse and slave labor on a farm as a child. Unbeknownst to Petitioner or his counsel, Juror C.B. ("C.B.") – the foreperson of the jury – had a strikingly similar childhood. She too was physically abused and used for slave labor, even raped, on a farm as a child. At the evidentiary hearing ordered by this Court, she testified that even before she heard Petitioner's evidence (indeed before she was empaneled), she had already concluded that abuse was no excuse, based on having been abused and enslaved herself. When she heard Petitioner's evidence, she connected it to her own history and considered Petitioner's evidence a "detriment" to his cause. In deliberations she argued to other jurors that her own similar past demonstrated that a history of abuse and violence was no excuse to commit crimes as an adult. These facts are not in dispute.

C.B. did not disclose her history of abuse and rape on the jury's pre-trial questionnaire in response to questions that clearly called for such facts. As a result, during the penalty phase of Petitioner's trial, neither Petitioner, his counsel, nor the trial court knew that C.B.'s personal history of abuse had closed her mind to his evidence and caused her to prejudge and reject Petitioner's defense.

Even though C.B.'s strikingly similar past closed her mind to Petitioner's mitigation defense, the Referee found that C.B. was not "actually biased" because jurors are expected to bring "life experiences" with them into deliberations and use them as a "prism" through which to interpret the evidence. In doing so, the Referee ignored the

Constitutional requirement that jurors make their decisions "based solely upon the evidence received at trial." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1049; *Smith v. Phillips* (1982) 455 U.S. 209, 217.) A 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, superseded by statute on other grounds; *People v. Nesler* (1997) 16 Cal.4th 561, 580-81 (plur. op.)), 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, citations omitted; *Nesler, supra,* 16 Cal.4th at pp. 581, quoting same.)

It is one thing for a juror to interpret evidence through the lens of their common socioeconomic factors such as "race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation," as this Court has allowed. (*People v. Wilson* (2008) 44 Cal.4th 758, 823, quoting and adopting *People v. Bell* (1989) 49 Cal.3d 502, 564.) It is another to do what C.B. did: base a decision on a unique, traumatic, and specific personal experience that was uncannily similar to the material facts at issue, closed her mind to Petitioner's evidence, and resisted its force.

The Referee's failure to find that the undisputed facts place C.B.'s actions well over the constitutionally permissible line is subject to this Court's independent review. The issue this Court faces is one many courts have faced before, and every court that has addressed jurors who make decisions based on unique and traumatic personal

experiences that mirror the material facts has found the juror to be biased. In fact, both the California and U.S. Constitutions require an unbiased jury and compel this result. The Referee's open-ended "prims" of experience notion violates these constitutional requirements.

The Referee also found that C.B.'s failure to disclose her history of abuse on her juror questionnaire was neither intentional nor deliberate. He found all of her testimony credible and consistent, but he did not even acknowledge all of the conflicting reasons she gave for her failure to disclose her abuse, let alone reconcile them. It is not possible for C.B. to have been completely "credible." 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. THIS COURT'S REFERENCE QUESTIONS, THE EVIDENTIARY HEARING, AND THE REFEREE'S FINDINGS OF FACT

A. Petitioner's Writ Of Habeas Corpus & The Court's Reference Questions

Petitioner filed his First Amended Petition for Writ of Habeas Corpus in 2008. He alleged, among other things, that he was denied his right to a fair and impartial jury due to C.B.'s actual bias and her failure to disclose a childhood history of abuse and slave labor during voir dire. (*See* Jan. 10, 2008 Am. Pet., Claim 2.) In June 2012, this Court issued an Order to Show Cause why "relief prayed for should not be granted on the ground of juror misconduct, as alleged in [Petitioner's] Claim 2." (Jun. 20, 2012 Order to

Show Cause.) After Respondent filed his Return and Petitioner filed his Traverse, this Court ordered an evidentiary hearing for findings of fact on the following 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?

(Mar, 20, 2013 Order.) The Referee took evidence, including evidence from C.B., on July 30, 2013.

B. Facts Presented And Admitted At The Evidentiary Hearing

1. C.B.'s Failure To Disclose Her History Of Abuse During Voir Dire

At Petitioner's trial, voir dire began with a pre-trial questionnaire, which C.B. swore to answer truthfully. (Pet. Ex. 2[1] [Pre-Trial Questionnaire] at TF3915; EHT at 36:4-22.) The questionnaire asked:

> 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?
> (c) Who was the victim(s)?

[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." Exhibits admitted by Petitioner and Respondent are cited as "Pet. Ex." and "Resp. Ex.," respectively.

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?

(Pet. Ex. 2 [Pre-Trial Questionnaire] at TF3931-32, emphasis supplied.) C.B. answered "Yes" to Question 63 but only disclosed a robbery of her roommate's home. (*Ibid.*) She answered "No" to Questions 64-66. (*Ibid.*)

These answers were false. C.B. was asked questions 64 and 66 at the evidentiary hearing and admitted the true answers were yes. (EHT at 17:1-14, 17:18-21.)

Specifically, C.B. was abused on a farm for approximately ten years.[2] (*Id.* at 17:1-10.) The abuse was "physical abuse." (*Id.* at 17:11-12.) It was "by more than one person." (*Id.* at 17:13-14.) She was raped when she was 5 years old. (*Id.* at 18:16-18 ["Q. You were also raped when you were 5; is that correct? A. I was molested, yes."]; *id.* at 17:5-7 [abuse included "molestation"]; Pet. Ex. 3 [Post-trial Questionnaire] at TF014371 [stating she had been "raped" on the farm].) C.B. was also used as a slave on that farm. (EHT at 18:19-24.) Inescapably, rape and physical abuse are "violent act[s], not necessarily a crime" (Question 64) and she was "hurt . . . as a result of violence of any sort" (Question 66). Thus, as stated, C.B. now acknowledges that the true answers to Questions 64 and 66 are yes. (EHT at 17:1-14, 17:18-21.) Whether intentionally false or

[2] At the 2013 evidentiary hearing, C.B. testified that she was abused from the age of 5 to 13 or 14. (EHT at 17:8-10.) In her 1993 post-trial questionnaire, she stated that she had been abused from the age of 5 through 17. (Pet. Ex. 3 at TF14371.)

not, her incorrect answers were juror misconduct. (*See* Section IV.B.4., below.)

C.B. did not otherwise disclose her history of abuse and rape on her pre-trial questionnaire. (Pet. Ex. 2.) Thus, during voir dire, Petitioner's counsel had no way of knowing that she had been extensively abused and even raped on a farm or how it would affect her evaluation of Petitioner's central mitigation evidence -- his own extremely similar background. Counsel had no opportunity to ask about how her childhood abuse shaped her views, learn how she would react to evidence that Petitioner had suffered through a similar childhood of abuse on a farm, or draw out information that could either inform a decision whether to exercise a peremptory challenge or establish a challenge for cause. (Resp. Ex. A [Trial Tr. Vols. 1-3]; EHT at 80:1-9.) He still had unused peremptory challenges. (Resp. Ex. A [Trial Tr. Vols. 1-3] at 776:15-18 [Petitioner's counsel exercising a peremptory challenge after C.B. was seated on the panel].) Nor did the trial court know to ask C.B. if she could set aside her personal history of abuse and determine Petitioner's sentence based solely on the evidence. Thus, after C.B. was selected to serve on the jury and became the foreperson (EHT at 15:9-23), her prejudicial background was a secret known only to her.

2. Petitioner's Mitigation Evidence Focused On A History Of Abuse

During the trial's penalty phase, Petitioner's mitigation defense relied mainly on his own history of abuse and slave labor. Petitioner's mitigation defense explained that he was abused during his childhood working and living on a farm in Mexico. At the farm, Petitioner suffered brutal beatings two to three times a day at the hands of his grandmother and father. (Resp. Ex. B [Trial Tr. Vols. 9-10] at 2169-74;

2191-93; 2203-05; 2223-29.) In addition to the beatings, Petitioner was forced to work on the farm from approximately three in the morning until five in the evening, 364 days a year.. (*Id.* at 2179, 2196-97.) To this day, the only mitigation defense that C.B. remembers is that "he was raised on a work farm and lived in a very abusive environment." (EHT at 27:22-24.) Also during the penalty phase, the State introduced evidence that Petitioner had committed rape. (Resp. Ex. B [Trial Tr. Vols. 9-10] at 2138-39.)

3. C.B. Prejudged Petitioner's Mitigation Evidence And Based Her Penalty Phase Decision On Her Undisclosed History Of Abuse

C.B. Prejudged Petitioner's Mitigation Evidence. C.B.'s similar history of abuse admittedly predisposed her to reject Petitioner's mitigation defense. Her history of abuse "shape[d] [her] outlook" on life. (EHT at 27:6-13.) Even before she heard Petitioner's evidence -- indeed before she was even impaneled -- she did not view *anyone's* history of abuse "as an excuse for committing crimes." (*Id.* at 27:15-18.) That she would reject Petitioner's case based on her own history of abuse was inevitable. Her mind was effectively closed.

C.B. Based Her Penalty Phase Decision On Her Undisclosed History Of Abuse. C.B. never wavered from her preconceived view. Petitioner's mitigation defense "triggered" Juror C.B. to think about her own similar history of abuse. (EHT at 69:7-15, 71:11-22.) Given her own success, she considered Petitioner's attempt to use his similar background in mitigation to be a "detriment" to his cause. (*Id.* at 34:23-35:13; Pet. Ex. 3 [Post-trial Questionnaire] at TF14371.) When she heard Petitioner's history of abuse, she

thought "well, so was I." (EHT at 33:9-11.) (The Referee granted a motion to strike the "so was I" testimony under Evidence Code section 1150 (*Id.* at 33:9-21); this ruling was error because the testimony showed bias. (*See* Section IV.B.5., below.))

During deliberations, C.B. told the other jurors that her own history demonstrated that abuse is no excuse. (EHT at 27:25-27.) She told them that she "had been raised in an abusive environment and had been molested, raped when I was five, 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; *see also id.* at 33:5-8 [told jurors about her "history of abuse" "in response to hearing evidence about Mr. Manriquez's abuse during the penalty phase"], 64:9-17 [told jurors she "didn't think Mr. Manriquez's abuse was an excuse for his committing these crimes"], 31:25-27 [she and another juror "shared our life experiences for the jury's benefit to show we are productive people, we don't commit murders."].)

Post-trial, C.B.'s only explanation for rejecting Petitioner's defense was a reference to her own life: "I grew up on a farm where I was beat, raped, and used for slave labor from the age of 5 thr[ough] 17. 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.)

In sum: Whatever C.B.'s reasons, her incorrect answers to Questions 64 and 66 were misconduct. That misconduct prevented Petitioner's counsel from learning about her history of childhood rape and abuse on a farm and resulting attitudes, and from seeking to excuse her from the jury. Additionally, her history of abuse admittedly caused

her to conclude even before she heard the evidence that abuse was no excuse, and predisposed her to reject Petitioner's mitigation defense.

4. C.B.'s Multiple Conflicting Explanations For Failing To Disclose Her Childhood Abuse And Rape On Her Juror Questionnaire

C.B. provided at least three conflicting, often internally inconsistent reasons why she failed to disclose her childhood abuse and rape during voir dire. First, she testified 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.) Questions 64-66, however, asked if she had "ever" been a victim of violence, "ever" seen a crime committed or "ever" feared being hurt by violence. (Pet. Ex. 2 [Pre-Trial Questionnaire] at TF3931-32.) She admitted that nothing in the questions indicated any time limitation to her. (EHT at 38:13-16.)

Second, C.B. stated that she did not disclose her childhood abuse because she somehow did not consider her abuse to have been a violent or criminal act. (EHT at 19:26-20:8; 20:23-25.) She admitted, however, that in 1993 when she filled out her questionnaire, she considered physically abusing a child to be violence. (*Id.* at 22:2-4.) Similarly, she stated that she did not disclose *her* own childhood molestation because she did not consider it to be a violent or criminal act. (*Id.* at 20:19-22.) When she filled out her questionnaire in 1993, however, she considered molesting a child to be violence. (*Id.* at 19:9-13, 19:26-27.) She did not explain how, even as she admittedly understood that molestation or abuse of anyone else was violence, she supposedly thought molestation or abuse of her was not.

Third, C.B. testified that she had "several days" to carefully think about and answer the questions, she was given the questionnaire to take home, she thought about her answers before checking the "no" boxes, and she may have even discussed some of the questions with her partner. (EHT at 67:9-68:11.) She believed the questions were important, and she consciously thought about them. (*Id.* at 41:4-5, 68:9-11.) Yet, C.B. testified that she did not disclose her childhood molestation and abuse because "they did not come to mind" and she simply did not think of them "until the very end of this whole trial." (*Id.* at 20:10-12, 68:19-20.)

C.B.'s various explanations cannot all be true. It cannot be true that she interpreted the questions to apply only to her adulthood, and that she did not read any time limitation into any of the questions. It also cannot be true that she did not remember any of her abuse until the penalty phase of the trial, and that she did not disclose her abuse because she did not view it to be "violence" or "crime." Either she remembered it and chose not to disclose it because she thought it was non-responsive, or she did not remember it. It also defies credibility that she did not remember a decade-long period of abuse when carefully approaching "important" questions, but that when she head Petitioner's mitigation evidence, her past freely came to mind. Finally, there is no credible explanation for how C.B. could know abuse and rape are "violence" in 1993, but conclude that her own abuse and rape need not be disclosed in answering the unambiguous juror questionnaire. C.B.'s different answers cannot be reconciled; at least some of them must be false.

C.B.'s other answers suggested another reason why she did not disclose her

past. C.B. stated that she generally viewed some of the questions on the juror questionnaire as "intense," having "no purpose," and as having asked about issues that should be "no one's business." (EHT at 36:23-37:7.) She testified that she keeps the details her childhood private and only shares them with "really close friends." (*Id.* at 50:14-20, 22:11-14.)

C. Referee's Findings of Fact

In April 2014, after briefing and argument, the Referee filed his Findings of Fact in Response to this Court's Reference Questions ("RFF").

First, the Referee found that C.B.'s "reasons for failing disclose [*sic*] 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." (RFF at 3:5-9.) He noted that she "did sit back and think about her answers" before responding to the juror questionnaire. (*Id.* at 5:12-13.) He also noted that that she "tried to recall if [she] had been a victim of any crime, and nothing came to mind." (*Id.* at 5:15-16, quoting EHT at 68:19-21.)

Although the Referee did not address all of the explanations C.B. provided for her failure to disclose her history of abuse, he nevertheless concluded her explanations "do not conflict with each other." (RFF at 8:17.)

In support of his finding, the Referee found "Juror C.B.'s testimony credible." (RFF at 7:1.) He found that "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 abused of children 60 years ago . . . ." (*Id.* at 7:5-8.) He also found that her credibility was supported by the fact she brought her childhood history to the attention of petitioner's trial counsel voluntarily on the post-verdict juror questionnaire, and that she voluntarily told habeas counsel that she informed the other jurors about her abuse. (*Id.* at 7:9-23.) The Referee further found that her disclosure shows "she had no hidden agenda or bias when serving as a juror." (*Id.* at 7:22.) The Referee also based his credibility finding on "Juror C.B.'s demeanor, manner and mode of testifying," and that she "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." (*Id.* at 8:1-3.)

Second, the Referee found that Juror C.B.'s nondisclosure was "neither intentional nor deliberate." (RFF at 9:3-4.) Based on her "credible testimony that she did not consider herself to be a victim of violence or a crime despite her childhood experience, the referee has concluded that Juror C.B. believed she had honestly and accurately answered Questions 63-66." (*Id.* at 9:6-10.) The Referee also credited C.B.'s statement that "'I felt I was being honest . . . .'" (*Id.* at 9:27-10:2, quoting EHT at 52:16.)

Third, citing to the same reasons he provided for his first two findings, the Referee found that C.B.'s nondisclosure was not indicative of bias. (RFF at 10:20-25.) In addition, the Referee further noted that prior to being called as a juror, C.B. "knew nothing about petitioner . . . or the crimes with which he was charged." (*Id.* at 10:25-11:2.)

Fourth, the Referee found that C.B. was not actually biased. (RFF at

11:23.) The Referee acknowledged that C.B. shared her history of abuse with other jurors during deliberations, but he found that her "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." (*Id.* at 13:1-3.) The Referee stated that this was permissible under *People v. Wilson* (2008) 44 Cal.4th 758, which states that "'for a juror to interpret evidence based on his or her own life experiences is not misconduct.'" (RFF at 12:26-28, quoting *Wilson*, *supra*, 44 Cal.4th at 830.)

The Referee rejected Petitioner's argument that C.B.'s admission that she rejected Petitioner's defense "based on a similar and traumatic personal experience is an admission of bias" under *People v. Blackwell* (1987) 191 Cal.App.3d 925. (RFF at 13:5-10.) The Referee found that *Blackwell* did not apply to the instant case because the juror in *Blackwell* was found to have intentionally concealed a traumatic personal experience that mirrored the facts at issue in that case. (*Id.* at 13:5-16.)

The Referee also supported his finding that C.B. was not actually biased with C.B.'s testimony that she believed she was not biased against Petitioner (RFF at 11:25-12:3), and the fact that she voluntarily brought her history of abuse to the attention of Petitioner's trial counsel. (RFF at 12:5-16.)

Although not cited in the portion of his report that directly addresses whether Juror C.B. was actually biased, the Referee noted that what triggered C.B.'s "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.'" (RFF at 5:25-6:2, quoting EHT at 69:11-13, alteration in original.) The Referee stated 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 the person you are today? No question you wouldn't be. Would you do the things that he did? Maybe. Maybe not.'" (RFF at 6:19-23, quoting EHT at 58:2-7.)

Finally, the Referee found that "even if ['Juror C.B.'s unintentional nondisclosure'] does constitute misconduct, and therefore gives rise to a presumption of prejudice, such a presumption may be rebutted." (RFF at 11:7-11.) Quoting *In re Hamilton* (1999) 20 Cal.4th 273, 296 for the proposition that "'[w]hat 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 answers hid the juror's actual bias,'" and pointing to his finding that she provided "credible testimony that she gave time and thought" to her pretrial questionnaire and that "her nondisclosure was inadvertent," he found that "[f]rom a review of the whole record, the referee concludes no [] bias exists." (RFF at 11:11-20.)

III. STANDARD OF REVIEW

On a writ for habeas corpus, the petitioner bears the burden of proving, "by a preponderance of the evidence, facts that establish a basis for relief." (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *see also In re Bacigalupo* (2012) 55 Cal.4th 312, 333.) When relevant facts are found by a referee at an evidentiary hearing, this Court will give those findings deference "only if substantial and credible evidence supports" them. (*In re Hitchings* (1993) 6 Cal.4th 97, 109.) Unless supported by substantial *and* credible