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

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DEATH PENALTY

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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

evidence, this Court can "depart from [the referee's findings] upon independent examination of the record even when the evidence is conflicting." (*In re Hamilton*, *supra*, 20 Cal.4th at 296.)

"Though [this Court] defer[s] to the referee on factual and credibility matters, in other areas [this Court] gives no deference to the referee's findings." (*In re Hardy* (2007) 41 Cal.4th 977, 993, quoting *In re Ross* (1995) 10 Cal.4th 184, 201.) "[A]ny conclusions of law, or resolution of mixed questions of fact and law, which the referee provides are subject to [this Court's] independent review." (*In re Hamilton*, *supra*, 20 Cal.4th at 297.) In addition, this Court "independently review[s] prior testimony." (*In re Hardy*, *supra*, 41 Cal.4th at 993, quoting *In re Ross*, *supra*, 10 Cal.4th at 201.)

"Ultimately, the referee's findings are not binding on [this Court] [citations]; it is for this [C]ourt to make the findings on which the resolution of [Petitioner's] habeas corpus claim will turn." (*Id.* at 993-94.)

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.] [¶] 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 722-23.) 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] 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

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[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 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.

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.

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, 18:16-24; 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 With 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

[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.

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.)

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, 41:6-17.) 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.

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

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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.

[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 pre-trial 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

found that 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 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

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

(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 58:2-7.) 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 14:19-26 [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, 68:19-20.) 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.

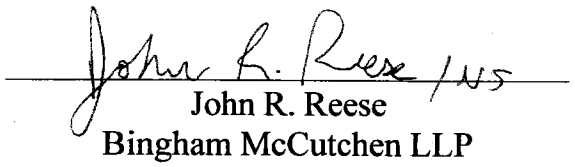
Alternatively, and at the very least, Petitioner's death sentence must be reduced to life without possibility of parole. This Court may command such a sentence without ordering a new penalty trial. California Penal Code section 1181, subdivision (7) states: "When the verdict or finding is contrary to 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 finding 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: 

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CERTIFICATE OF COMPLIANCE

I certify that the attached Exceptions to Referee's Findings of Fact and Merits Brief uses a 13-point Times New Roman font, and contains 14,923 words.

DATED: July 21, 2014

By: _____

John R. Reese
Bingham McCutchen LLP
Attorneys for Petitioner
Abelino Manriquez

PROOF OF SERVICE

I am over eighteen years of age, not a party in this action, and employed in San Francisco County, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mail and UPS overnight delivery, and they are deposited that same day in the ordinary course of business.

On July 21, 2014, I served the attached:

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

☒ (BY MAIL) by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California, in sealed envelope(s) with postage prepaid, addressed as set forth below. I am readily familiar with this law firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence is deposited with the United States Postal Service the same day it is left for collection and processing in the ordinary course of business.

Abelino Manriquez, CDC # J12400
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☒ (UPS/OVERNIGHT DELIVERY) by causing a true and correct copy of the document(s) listed above to be delivered by in sealed envelope(s) with all fees prepaid at the address(es) set forth below.

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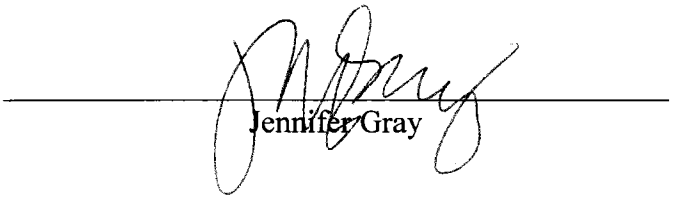
I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on July 21, 2014.



Jennifer Gray