8

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **CURTIS F. PRICE,** On Habeas Corpus.	**CAPITAL CASE** S069685

SUPREME COURT
FILED
SEP 29 2008
Frederick K. Ohlrich Clerk
DEPUTY

Humboldt County Superior Court No. CR9898
The Honorable W. Bruce Watson, Jr., Judge

BRIEF IN OPPOSITION TO PETITIONER CURTIS PRICE'S MOTION FOR PRE-HEARING DISCOVERY

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

GLENN R. PRUDEN
Supervising Deputy Attorney General

DAVID H. ROSE
Deputy Attorney General

PETER E. FLORES, JR.
Deputy Attorney General
State Bar No. 168294

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5874
Fax: (415) 703-1234
Email: Peter.Flores@doj.ca.gov

Attorneys for Respondent

DEATH PENALTY

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

Statutes

TABLE OF AUTHORITIES (continued)

Page

Other Authorities

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **CURTIS F. PRICE,** On Habeas Corpus.	**CAPITAL CASE** S069685

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

INTRODUCTION

Petitioner Curtis Price has filed a motion for discovery based on the Civil Discovery Act that was previously denied and clarified by the specially appointed referee in this matter.[1/] In his Motion For Pre-hearing Discovery, petitioner seeks this Court's review, and overruling, of the referee's discovery orders. The referee clearly understood that he had discretion to determine the discovery needed for a proper hearing in this matter and found that discovery of the type ordered in *In re Scott* was appropriate. Since the referee understood his right to determine the scope of discovery and there was no abuse of discretion, this Court should not overturn the referee's discovery orders. Even if this Court chooses to review the discovery orders *de novo*, petitioner's request for discovery based on the Civil Discovery Act should be denied because it has no basis in case law, statute, or public policy.[2/]

1. The Honorable W. Bruce Watson, Jr., Superior Court of California, County of Humboldt.

2. This Opposition To Petitioner's Motion For Prehearing Discovery is based on the legal arguments and authority contained herein, the pleadings filed

STATEMENT OF THE CASE

Petitioner was convicted of special circumstances murder, robbery, and other crimes and was sentenced to death on July 8, 1986. (*People v. Price* (1991) 1 Cal.4th 324, 376.) His conviction and sentence were affirmed by this Court in 1991. (*Id.* at p. 494.) Petitioner's first application for collateral relief in this Court was denied on January 29, 1992. (*In re Price*, S018328.) Petitioner's second application for collateral relief was denied on February 19, 1992. (*In re Price*, S023791.) This motion is related to petitioner's third application.[3]

On February 14, 2007, this Court ordered an evidentiary hearing to determine a series of questions related to whether or not prosecutor Ron Bass and Geri Johnson patronized the Waterfront Café while juror Zetta Southworth was working as a cook and Robert McConkey was tending bar. (Exhibit A.) The hearing is to determine whether or not Mr. Bass sent Ms. Southworth drinks and knew that she had a drinking problem. (*Ibid.*) The hearing is also to determine the truth or falsity of the allegation that Mr. Bass gave money to Mr. McConkey to give to Ms. Southworth along with a message to her to vote guilty. (*Ibid.*) Whether or not the alleged statement and money were ever conveyed and whether the statement was made in a joking manner are the final issues to be resolved at the hearing. (*Ibid.*)

STATEMENT OF FACTS

After informal discussions related to discovery in the reference hearing, both petitioner and respondent filed motions for discovery. Based on extensive

---

below in the reference court (attached to petitioner's motion), and the record and pleadings in this matter.

3. Petitioner has since filed a fourth application for collateral relief. (*In re Price*, S139574.)

briefing and argument, the reference court denied petitioner's request for discovery based on the Civil Discovery Act and ordered pre-hearing discovery of the type required under California Penal Code sections 1054.1 and 1054.3. (Exhibit B.) The discovery under the reciprocal criminal discovery code would of course relate to the alleged incident contained in this Court's order rather than to the underlying facts of the original conviction. Following petitioner's Motion to Clarify and additional briefing, the reference court again denied petitioner's request for depositions and document requests based on the Civil Discovery Act and restated its order that respondent produce all reports generated regarding the alleged incident as well as the names and addresses of all witnesses, the full statements of all witnesses to the alleged incident, all relevant real evidence seized as part of the investigation of the alleged incident, felony convictions of all witnesses, and any reports by experts intended to be called at the hearing. (Exhibit C.)

Petitioner seeks through his Motion For Pre-hearing Discovery to have this Court reverse the Reference Court's discovery orders. (Petitioner's Motion For Pre-hearing Discovery "Pet. Motion," p. 3.)

ARGUMENT

I.

THE REFERENCE COURT UNDERSTOOD ITS DISCRETION TO ORDER DISCOVERY AND DID NOT ABUSE THAT DISCRETION

In *In re Scott* (2003) 29 Cal.4th 783, 813-814, this Court found that the nature and scope of discovery in habeas corpus reference hearings has generally been resolved on a case-by-case basis, and approved the use of the California criminal reciprocal discovery provisions to guide a referee's discovery order. The referee in this matter directly cited this Court's holdings in *In re Scott* when making his original discovery order. (Exhibit B, pp. 2-3.)

Additionally, in his order denying petitioner's motion to clarify, the referee made it clear that he understood he had the power to order discovery along the lines of that allowed in civil *or* criminal proceedings:

> The question is the boundaries of discovery. In some post conviction writ proceedings it may be appropriate that discovery be along the lines of civil proceedings. In other matters it may be that discovery proceed, as in the underlying criminal case, pursuant to the criminal discovery statutes, PC §§1054.1, 1054.3; 1054.9.

(Exh. C at p. 2.)

Understanding his discretion, the referee properly considered the factual issues raised in this Court's reference order and determined that the discovery needed for a fair hearing would be produced without resorting to document requests and depositions as set out in the Civil Discovery Act. There is no evidence that the referee did not understand his duty nor that he abused his discretion. Accordingly, this Court should deny petitioner's motion.

Additionally, petitioner asserts that in its reference order (Exh. A), this Court not only contemplated potential discovery beyond that already held by petitioner, but, in essence, made a finding that further discovery was mandated by the reference order. (Pet. Motion at p. 6.) However, no such conclusion can or should be drawn from this Court's reference order. The reference order merely states that "Any requests for discovery in this matter should be addressed to the referee." This is clearly a reference to the fact that under *In re Scott*, the referee is accorded the discretion to grant or deny any discovery requests. (*In re Scott, supra*, at pp. 813-814.) It can hardly be read as a finding that discovery based on the Civil Discovery Act is mandated or even appropriate in this matter.

II.

PETITIONER'S REQUEST FOR CIVIL DEPOSITIONS WAS PROPERLY DENIED AND THERE IS NO NEED FOR DEPOSITIONS

As in his briefing before the referee, petitioner asserts that he has a need to take depositions prior to the hearing in order to "flesh out the events at issue" and "perpetuate the testimony." (Pet. Motion at p. 8; Exh. C at p. 2.) However, the observation of each witness's demeanor, manner of testifying, and credibility is a central duty of a referee in a hearing and, as such, the referee's findings are given great weight and deference by this Court. (*In re Williams* (1994) 7 Cal.4th 572, 594; *In re Hitchings* (1993) 6 Cal.4th 97, 109.) Respondent believes that the referee's duties will be best served and most efficiently accomplished by hearing all sworn testimony directly and by making all relevance and privilege rulings at the hearing or through pre-hearing motions in limine. The referee agreed that depositions would not assist him in his duties, stating "This court is directed to sit as a referee and 'take evidence and make findings of fact.' This will require witnesses be examined before the court. Pre-hearing depositions appear both unnecessary and burdensome." (Exh. C at p. 2.)

Further, every criminal trial involves numerous Evidence Code section 352 relevance rulings and the trials are not delayed or harmed by the lack of civil depositions done in advance of the trial. As noted by this Court in *In re Fields* (1990) 51 Cal.3d 1063, 1070, a reference hearing such as the one here is subject to the same basic rules of evidence as those applicable to all trials.

Additionally, petitioner, as he did in his original briefing regarding discovery, asserts that Ron Bass and Worth Dikeman have not been "made available" to him. However, Mr. Bass has been retired for several years and Mr. Dikeman worked for the Humboldt County District Attorney's Office. The California Attorney General's Office represents the People of the State of California in this matter; not Mr. Bass or Mr. Dikeman. Petitioner has the same right as respondent to contact any witness and request his or her voluntary agreement to be interviewed. This is no different from the rights that prosecutors and criminal defendants have during original criminal proceedings. Petitioner's rights should not be expanded to include discovery based on the Civil Discovery Act simply because he has filed a habeas petition.

It is somewhat unclear what purpose is served by petitioner's stated need to "perpetuate"or investigate the pre-hearing statements of witnesses. Petitioner already has witness statements from Mr. Bass, Ms. Johnson, and Mr. McConkey. Additionally, if and when a statement from Mr. Dikeman is taken by respondent, it will be provided to petitioner. Of course, pre-hearing statements under oath are unnecessary when the actual testimony at the hearing will be under oath. Further, sworn declarations under penalty of perjury by Mr. Bass and Ms. Johnson regarding these allegations have already been provided to petitioner in the Return To Order To Show Cause in the underlying habeas briefing. (S069685.) These sworn declarations exceed the statements typically exchanged in a criminal trial. The statements taken by an Attorney General investigator of Mr. McConkey have also been provided in the briefing. Petitioner's claimed need to depose Mr. McConkey is particularly surprising given the fact that the basis for these allegations arises from petitioner's original interview of Mr. McConkey. Any discrepancies in his statements can, and should, be resolved under oath in front of the fact-finder.

Finally, respondent has never disputed that all four of these witnesses may possess knowledge that is material and relevant to this proceeding. If they did not, they would not be referenced in the questions of the reference order and would likely be excluded from testifying at all under the referee's discretion to exclude irrelevant evidence. Accordingly, the fact that the witnesses have relevant information supports the referee's decision to deny deposition testimony in favor of live, sworn testimony before the fact-finder. Petitioner's citation to *Stewart v. Colonial W. Agency* (2001) 87 Cal.App.4th 1006, 1013-1015, a civil case, in support of his position has no application to this special proceeding. (Pet. Motion at p. 8.)

III.

PETITIONER'S REQUEST FOR CIVIL DOCUMENT REQUESTS WAS PROPERLY DENIED AND THERE IS NO NEED FOR DOCUMENT REQUESTS

As with petitioner's request for depositions, his request for document requests should be denied. Petitioner's thirty-two category document request (Declaration of Steven P. Ragland In Support Of Petitioner Curtis Price's Motion For Pre-hearing Discovery "Ragland Dec.," exh. C) as well as his general request for the right to propound further document requests was clearly and appropriately denied by the referee. To allow petitioner the use of civil document requests would open the evidentiary hearing to wide ranging fishing expeditions of little or only tangential relation to the questions in the reference order. As noted by this Court in *In re Scott*, *supra*, 29 Cal.4th at p. 821, a referee is correct in limiting "himself to taking evidence relevant to, and issuing a report answering, the specific questions . . . asked, not other questions."

Petitioner's request for document requests related to Juror Southworth highlight the risk of expanding the hearing beyond the specific questions posed by this Court and should be denied. Petitioner claims that he has a need and right to document requests about Ms. Southworth, "to discern the importance of her role in this matter, and to determine why she was approached among all jurors in Price's trial." (Pet. Motion at p. 9.) The requests seek information about any contacts Ms. Southworth had with Mr. Bass, Mr. Dikeman or Ms. Johnson both before and after the alleged incident, as well as, any contacts she or any member of her family had with law enforcement before and after the alleged incident. (*Ibid.*) However, neither Ms. Southworth's state of mind nor her role in the alleged incident are raised in this Court's reference questions. (Exh. A.) All of the questions focus exclusively and expressly on whether the incident occurred and the exact conduct by Mr. Bass, Ms. Johnson, Mr. McConkey, and, collaterally, Mr. Dikeman. None relate to Ms. Southworth or the effect any of the alleged conduct may have had on her or petitioner's trial. (*Ibid.*)

Another risk raised by petitioner's document requests, and in particular those related to Ms. Southworth, is that such requests will be used to conduct general investigation for additional habeas claims. The requests related to Ms. Southworth, while not relevant to the reference questions, are directly relevant to the claims raised by petitioner in his fourth habeas petition. (*In re Price*, S139574.) Discovery in this hearing should not be used as an avenue to conduct forays into areas beyond the reference questions and beyond the pre-habeas discovery already provided for by Penal Code section 1054.9.

Further, petitioner has no need for document requests related to the prosecution's possible investigation of the alleged incident. Petitioner has received not only the written copies of all statements taken by the Attorney General's office, he has been afforded access to tapes of the interviews. The referee also ordered respondent to produce "all reports generated regarding the alleged incident." (Exh. C at p. 3.) Additionally, respondent will review all Attorney General, Humboldt County District Attorney's Office, and Special Prosecution Unit files and produce the names and addresses of all witnesses to the alleged incident, the full statements of all witnesses, all relevant real evidence seized as part of the investigation of the alleged incident, any felony convictions of all witnesses, and any reports by experts intended to be called at the hearing. As a result, petitioner's attempt to seek any additional document requests is unnecessary, will only result in delays and waste of the court's time, and will subject the hearing to potential abuse.

IV.

PETITIONER HAS NO RIGHT TO USE CIVIL DISCOVERY TOOLS IN THIS REFERENCE HEARING

As noted above, in *In re Scott*, *supra*, 29 Cal.4th at pp. 813-814, this Court found that the nature and scope of discovery in habeas corpus reference hearings has generally been resolved on a case-by-case basis and is subject to the discretion of the referee. Habeas corpus proceedings are codified under "Special Proceedings of a Criminal Nature." (Pen. Code, § 1473, subd. (a).) The Legislature has distinguished between "Special Proceedings of a Civil Nature" and "Special Proceedings of a Criminal Nature." (Compare Pen. Code, §§ 1473 *et seq.*, with Code Civ. Pro., §§ 1063 *et seq.*) While the Legislature's decision to statutorily label habeas corpus as a "Special Proceeding of a Criminal Nature" is not dispositive, it is highly instructive. (*In re Scott*, *supra*, 29 Cal.4th at p. 815.) Had the Legislature intended to subject habeas corpus proceedings to the Civil Discovery Act, it would have categorized habeas corpus proceedings as "Special Proceedings of a Civil Nature." It did not, and the Civil Discovery Act does not apply to habeas corpus proceedings.

The Legislature's intent is further shown by the fact that the discovery tool intended to assist a convicted defendant in investigating and filing a habeas petition was not included in the Civil Discovery Act, but was placed in the reciprocal *criminal* discovery scheme. (Pen. Code, § 1054.9.) Importantly, in interpreting the meaning of Penal Code section 1054.9, this Court has looked to the rest of the criminal discovery scheme for guidance. For instance, in *In re Steele* (2004) 32 Cal.4th 682, 696, this Court determined that the prosecution need only provide materials possessed by law enforcement agencies involved in the investigation and prosecution of a case. The Court added:

> This conclusion becomes clear on reading the statute in context. Section 1054.9 is part of the general discovery provisions of Penal Code section 1054 et seq. Those provisions limit trial discovery to materials the prosecutor possesses or knows "to be in the possession of the *investigating* agencies . . ." (Pen.Code, § 1054.1, italics added.)

(*Ibid.*) Just as this Court looked to the rest of the criminal discovery scheme to interpret the scope of discovery in the filing of habeas corpus petitions, this Court should approve of the referee's decision to look to the criminal discovery scheme in fashioning the discovery orders in this hearing.

Petitioner's reliance on *People v. Superior Court (Cheek and Grant)* (2001) 94 Cal.App.4th 980, 988, is misplaced. In *Cheek and Grant*, the court found that the Civil Discovery Act applies to proceedings under the Sexually Violent Predator Act (SVPA). (*Ibid.*) However, the SVPA is a "civil commitment scheme covering persons who are to be viewed, 'not as criminals, but as sick persons.'" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1166.) Application of civil discovery procedures is appropriate in civil commitment proceedings, but has no application to the special habeas proceeding here.

Further, attempts to characterize habeas corpus proceedings as civil for other purposes have failed. In *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1012, the court held that a habeas corpus petition is not a civil action or proceeding withing the meaning of the vexatious litigant statute. It noted, "Although it may be said that habeas corpus proceedings are no longer purely 'criminal' in nature, the modern expansion of the writ has not resulted in its characterization as 'civil' rather than 'criminal' by our Supreme Court." (*Id.* at p. 1010.) This Court in *In re Scott* chose not to determine whether habeas petitions are civil or criminal in other contexts, but did approve of discovery based on the reciprocal criminal discovery scheme as "a logical place for the referee to look to fashion a fair discovery rule." (*In re Scott, supra*, 29 Cal.4th at p. 814.)

V.

NEITHER THE FACT THAT AN EVIDENTIARY HEARING HAS BEEN ORDERED NOR THE PROVISIONS OF 1054.9 EXPAND PETITIONER'S RIGHT TO DISCOVERY

Petitioner asserts that the fact that this Court has ordered an evidentiary hearing entitles him to discovery beyond any order based on the provisions on the criminal discovery scheme. (Pet. Motion at pp. 12-13.) Petitioner's assertion is not borne out by the fact that the petitioner in *In re Scott* was also granted an evidentiary hearing while facing the death penalty. (*In re Scott, supra*, 29 Cal.4th at pp. 791-792.) Nonetheless, this Court found that "Penal Code section 1054.3 was a logical place for the referee to look to fashion a fair discovery rule." (*Id.* at p. 814.)

The fact that Penal Code section 1054.9 was enacted in 2003 to expand a habeas petitioner's pre-filing discovery rights does not imply that such rights should not be limited for habeas evidentiary hearings. Petitioner cites no authority for such a proposition and, as such, it should be rejected. The discretion to fashion a discovery order, even if it limits petitioner to the type of discovery allowed under the penal code, is vested in the referee. (*In re Scott, supra*, 29 Cal.4th at pp. 813-814.)

VI.

USE OF THE CIVIL DISCOVERY ACT WILL NOT AID THE EFFICIENCY OR FAIRNESS OF THE HEARING

Contrary to petitioner's assertion, use of civil discovery tools will not make the hearing more efficient. Petitioner's claim that the Civil Discovery Act would be more efficient than use of criminal discovery guidelines turns reality on its head. Even while protecting the many rights afforded criminal defendants, criminal cases proceed to trial much more efficiently and quickly than civil cases. Petitioner's wide-ranging discovery requests prove that the use of civil discovery tools in this case will result in a great many discovery disputes and conflicts that will have to be resolved by the referee. (Ragland Dec., exh. C.) Further, the referee's management of the hearing itself will prevent the hearing from being used as a discovery tool. Finally, petitioner has no need for pre-hearing civil discovery to narrow the issues so that only those of real importance will be presented at the hearing because this Court through its reference questions has already narrowed the issues. (Exh. A.)

Petitioner's claim that he should be entitled to depositions because material witnesses will not agree to interviews is negated by the fact that not only does he already have written witness statements and taped recordings of the statements, he has declarations under penalty of perjury by Ron Bass, Geri Johnson, and Jeff Lierly (detailing his interviews of the bartender, Robert McConkey).

VII.

PETITIONER'S DUE PROCESS RIGHTS ARE NOT VIOLATED BY THE REFEREE'S ORDER

As raised expressly before the referee and implied here, petitioner's claim that his due process rights will be violated by a discovery order similar to that used in *In re Scott* has no merit. The petitioner in *In re Scott* had an equal burden to carry in his habeas claims, but this Court saw no due process violation when it approved use of the section 1054.3 based discovery order. This Court noted, "If, as Proposition 115 provided, discovery is reciprocal at the criminal trial itself - where the defendant is presumed innocent and has no burden of proof - it certainly should be so on habeas corpus, where guilt has been established and the petitioner bears the burden of proof." (*In re Scott*, *supra*, 29 Cal.4th at p. 813.)

Petitioner here would also suffer no federal due process violation. The United States Constitution does not compel California or any state to afford convicted criminals a habeas corpus remedy. (*In re Clark* (1993) 5 Cal.4th 750, 764, fn. 2, citing, *Pennsylvania v Finley* (1987) 481 U.S. 551, 557.) Thus, state habeas proceedings need not include the constitutional rights afforded a criminal defendant at trial. (*Ibid.*) For instance, federal law does not entitle a state habeas petitioner to the assistance of counsel or a right to be present at state habeas proceedings. (See *Coleman v. Thompson* (1991) 501 U.S. 722, 755-756; *Sanders v. United States* (1963) 373 U.S. 1, 20.)

The fact that this is a capital case has no bearing on petitioner's due process rights. The United States Supreme Court has made this clear:

> We think these cases require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in non-capital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to ensure the reliability of the process by which the death penalty is imposed.

(*Murray v. Girrantano* (1989) 492 U.S. 1, 10-11.) Thus, a discovery order based on the criminal discovery scheme would not violate any state or federal due process right.

Even in federal habeas proceedings where discovery is much more liberally granted, "A habeas petitioner does not enjoy the presumptive entitlement to discovery of a traditional civil litigant." (*Rich v. Calderon* (9th Cir. 1999) 187 F.3d 1064, 1068, citing, *Bracy v. Gramley* (1997) 520 U.S. 899, 903-905.) Additionally, "Habeas is an important safeguard whose goal is to correct real and obvious wrongs. It was never meant to be a fishing expedition for habeas petitioners to explore their case in search of its existence." (*Id.* at p. 1067.) Accordingly, petitioner has no due process right to discovery of the type allowed in the Civil Discovery Act.

CONCLUSION

Accordingly, respondent respectfully requests that petitioner's motion be denied.

Dated: September 22, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

GLENN R. PRUDEN
Supervising Deputy Attorney General

DAVID H. ROSE
Deputy Attorney General

PETER E. FLORES, JR.
Deputy Attorney General

Attorneys for Respondent

SF1997XH0008
20147799.wpd

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF IN OPPOSITION TO PETITIONER CURTIS PRICE'S MOTION FOR PRE-HEARING DISCOVERY uses a 13 point Times New Roman font and contains 3917 words.

Dated: September 22, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

PETER E. FLORES, JR.
Deputy Attorney General

Attorneys for Respondent

MARY JAMESON
AUTOMATIC APPEALS SUPERVISOR
JORGE NAVARRETE
SUPERVISING DEPUTY CLERK
SAN FRANCISCO
—
NATALIE ROBINSON
SUPERVISING DEPUTY CLERK
LOS ANGELES

Supreme Court of California

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

☑ SAN FRANCISCO 94102
EARL WARREN BUILDING
350 McALLISTER STREET
(415) 865-7000
—
☐ LOS ANGELES 90013
RONALD REAGAN BUILDING
300 SOUTH SPRING STREET
(213) 830-7570

February 14, 2007

Hon. John T. Feeney
Presiding Judge
Superior Court of California
County of Humboldt
825 Fifth St.
Eureka, CA 95501

Re: In re Curtis F. Price on Habeas Corpus – S069685

Dear Judge Feeney:

In connection with the above-referenced habeas corpus petition now pending in the Supreme Court, we enclose a copy of the order directing that a referee be selected.

As stated in the order, please let us know as soon as the selection has been made so that we may proceed with the appointment by this court.

Thank you for your assistance in this matter.

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

By: Marsha Smith
Senior Deputy Clerk
(415) 865-7167

Enc.
cc: Karen S. Sorensen
Robert L. McGlasson
David H. Rose, Deputy Attorney General ✓
California Appellate Project
Habeas Corpus Resource Center
Dane Gillette, Chief Assistant Attorney General
Rec.

COPY

Koe N

SUPREME COURT
FILED

FEB 14 2007

Frederick K. Ohlrich Clerk

DEPUTY

IN THE SUPREME COURT OF CALIFORNIA

In re CURTIS F. PRICE on Habeas Corpus.	S069685

THE COURT:

Based on the record in this matter and good cause appearing:

The Honorable John T. Feeney, Presiding Judge of the Superior Court of California, County of Humboldt, shall select a Judge of the Humboldt County Superior Court to sit as a referee in this proceeding and shall promptly notify this court of the referee selected. After appointment by this court, the referee shall take evidence and make findings of fact on the following questions regarding the case of *People v. Curtis F. Price* (Humboldt County Super. Ct. No. CR9898; Judge John E. Buffington):

1. During the Curtis Price trial, did then Deputy Attorney General Ronald Bass and Geri Anne Johnson together patronize the Waterfront Café in Eureka on an evening when Zetta Southworth was cooking at the restaurant and Robert McConkey was tending bar? If so, on approximately what date did this occur?

2. While at the Waterfront Café, did Bass see or directly speak to Southworth? What, if anything, did he say to her?

3. While at the Waterfront Café, did Bass ask McConkey to take any alcoholic drinks to Southworth? If so, did McConkey do so? If Bass did send drinks to Southworth, did he know she was an alcoholic or had an alcohol problem?

4. Did Bass give McConkey any money with the direction or request that it be conveyed to Southworth? If so, what amount of money?

5. If Bass gave McConkey money for Southworth, did McConkey give Southworth the money? Did Southworth accept it?

6. If Bass gave McConkey money for Southworth, did he ask McConkey to convey any message with the money? If so, what message?

7. Did Bass direct, request or suggest that McConkey convey money to Southworth and tell her to vote guilty in Price's trial? If so, in what tone of voice did he do so? Did his tone, gestures and other surrounding circumstances suggest that he was serious or joking?

8. If Bass directed, requested or suggested that McConkey convey money to Southworth and tell her to vote guilty, did he intend that McConkey follow that direction, request or suggestion?

9. If Bass directed, requested or suggested that McConkey convey money to Southworth and tell her to vote guilty, did McConkey think that Bass actually wanted him to do so?

10. If Bass directed, requested or suggested that McConkey convey money to Southworth and tell her to vote guilty, did McConkey do so?

11. Did Johnson tell her husband, Worth Dikeman, about encountering Southworth while at the Waterfront Café with Bass? If so, what did she tell Dikeman?

It is further ordered that the referee prepare and submit to this court a report of the proceedings conducted pursuant to this appointment, the evidence adduced, and the findings of fact made.

Any requests for discovery in this matter should be addressed to the referee.

COPY

Kou N

IN THE SUPREME COURT OF CALIFORNIA

In re CURTIS F. PRICE on Habeas Corpus.	)	S069685

THE COURT:

Based on the record in this matter and good cause appearing:

The Honorable John T. Feeney, Presiding Judge of the Superior Court of California, County of Humboldt, shall select a Judge of the Humboldt County Superior Court to sit as a referee in this proceeding and shall promptly notify this court of the referee selected. After appointment by this court, the referee shall take evidence and make findings of fact on the following questions regarding the case of *People v. Curtis F. Price* (Humboldt County Super. Ct. No. CR9898; Judge John E. Buffington):

1. During the Curtis Price trial, did then Deputy Attorney General Ronald Bass and Geri Anne Johnson together patronize the Waterfront Café in Eureka on an evening when Zetta Southworth was cooking at the restaurant and Robert McConkey was tending bar? If so, on approximately what date did this occur?

2. While at the Waterfront Café, did Bass see or directly speak to Southworth? What, if anything, did he say to her?

3. While at the Waterfront Café, did Bass ask McConkey to take any alcoholic drinks to Southworth? If so, did McConkey do so? If Bass did send drinks to Southworth, did he know she was an alcoholic or had an alcohol problem?

4. Did Bass give McConkey any money with the direction or request that it be conveyed to Southworth? If so, what amount of money?

5. If Bass gave McConkey money for Southworth, did McConkey give Southworth the money? Did Southworth accept it?

6. If Bass gave McConkey money for Southworth, did he ask McConkey to convey any message with the money? If so, what message?

7. Did Bass direct, request or suggest that McConkey convey money to Southworth and tell her to vote guilty in Price's trial? If so, in what tone of voice did he do so? Did his tone, gestures and other surrounding circumstances suggest that he was serious or joking?

FILED
BONNIE L
JUN 23 2008

SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

L. Little

SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

CURTIS F. PRICE,

Defendant.

_______________________________________/

CASE NO: CR009898

DECISION ON: PRE-HEARING DISCOVERY

In the Matter of the Application of:

CURTIS F. PRICE,

Petitioner,

For a Writ of Habeas Corpus.

_______________________________________/

Defendant/Appellant, Curtis Price, and Respondent, The People of The State of California, have each filed a motion on the question of pre-hearing discovery.

This court was appointed by the California Supreme Court as a referee to "take evidence and make findings of fact" as to eleven questions set forth by the Supreme Court in the matter of the *People vs. Curtis F. Price,* Humboldt County Superior Court Case CR9898.

The questions for this proceeding arise in the context of a habeas corpus petition pending in the Supreme Court. For this proceeding the Supreme Court directed, "Any request for discovery in this matter should be addressed to the referee."

Petitioner argues discovery should be pursuant to the Civil Discovery Act, CCP §2016, *et seq.*

Respondent argues discovery should be reciprocal as set forth in PC §1054.1, 1054.3.

A writ of habeas corpus is titled a "Special Proceeding(s) of a Criminal Nature." PC §1473, *et seq.*

In *In Re: Scott* (2003) 29 Cal.4th, 783, the Supreme Court discussed habeas corpus proceedings in the context of civil or criminal in nature, and the scope of discovery, stating:

> "We believe a habeas corpus proceeding like this one is civil in nature for these purposes.[6] The Legislature has labeled it a 'Special Proceeding [] of a Criminal Nature' (Pen. Code, pt. 2, tit. 12, ch. 1, before §§ 1473-1508), but the label is not dispositive. (In re Head, supra, 42 Cal.3d at p. 226; see Pen. Code, § 10004.) It is not itself a criminal case, and it cannot result in added punishment for the petitioner. Rather, it is an independent action the defendant in the earlier criminal case institutes to challenge the results of that case. (*France v. Superior Court* (1927) 201 Cal. 122, 126-127 [255 P.815].)
>
> [6] We need not, and do not, decide whether a habeas corpus proceeding is civil or criminal for other purposes. (See *In re Head* (1986) 42 Cal.3d 223, 226, fn. 4 [228 Cal.Rptr. 184, 721 P.2d 65].) It is a special proceeding and not entirely analogous to either category. (*People v. Duvall, supra,* 9 Cal.4th at pp. 477-478, fn. 4.))" (pp. 815-816.)

The court in discussing the scope of discovery in habeas proceedings stated:

> "The nature and scope of discovery in habeas corpus proceedings has generally been resolved on a case-by-case basis. (See Comparet-Cassani, *Evidentiary Hearings in California Capital Habeas Proceedings: What Are the Rules of Discovery?* (199) 39 Santa Clara L.Rev. 409, 425-426.) We have indicated that discovery is available once we have issued an order to show cause, but we have not discussed the question further. (People v. Gonzalez (1990) 51 Cal.3d 1179, 1258-1261. . . .)
>
> If, as Proposition 115 provided, discovery is reciprocal at the criminal trial itself - - where the defendant is presumed innocent and has no burden of proof - - it certainly should be

> so on habeas corpus, where guilt has been established and the petitioner bears the burden of proof. (See *People v. Duvall (1995) 9 Cal.4th 464, 474 . . .*) (Petitioner received discovery from the People relevant to the issues before the referee.) Penal Code section 1054.3 was a logical place for the referee to look to fashion a fair discovery rule. It requires the defendant to provide the names, addresses, and statements of witnesses, expert reports, and real evidence the defendant intends to offer. This requirement is not onerous and could greatly facilitate the reference hearing. . . . " (pp. 813-814.)

Attached to Respondents' Motion (dated March 28, 2008, Exh. B) is a letter from Petitioners' counsel to Respondent requesting discovery pursuant to the Civil Discovery Act. In the letter Petitioner lists thirty-two specific requests for discovery, and persons proposed to be deposed.

The court will deny discovery pursuant to the Civil Discovery Act. Petitioners' requests for discovery go well beyond the scope of this hearing. Petitioner is entitled to discovery relevant and material to these proceedings; reciprocal discovery as set forth in PC §1054.1 and §1054.3 is ordered.

Dated: June 30, 2008

W. BRUCE WATSON

W. Bruce Watson, Judge of the Superior Court

I:\DECISION\CR009898\.wgf

FILED
BONNIE J.
AUG 1 9 2008
SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT

Little

SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

CURTIS F. PRICE,

Defendant.
_______________________________________/

In the Matter of the Application of:

CURTIS F. PRICE,

Petitioner,

For a Writ of Habeas Corpus.
_______________________________________/

CASE NO: ~~CR009898~~ CR9898 bi

ORDER ON: MOTION TO CLARIFY DECISION ON: PRE-HEARING DISCOVERY

On June 23, 2008 the Court issued its Decision on Pre-Hearing Discovery. In the Decision the Court denied petitioner's request for discovery pursuant to the Civil Discovery Act, ordering reciprocal discovery pursuant to criminal discovery statutes, PC §§1054.1 and 1054.3.

Petitioner in this motion renews his request for civil discovery, specifically the

I:\ORDER\CR009898\.wgf

taking of depositions and propounding of requests for production of documents.

In the June 23, 2008 Decision the Court stated: "Petitioner is entitled to discovery relevant and material to these proceedings, ..." That remains true and comports with due process. The question is the boundaries of discovery. In some postconviction writ proceedings it may be appropriate that discovery be along the lines of civil proceedings. In other matters it may be that discovery proceed, as in the underlying criminal case, pursuant to the criminal discovery statutes, PC §§1054.1, 1054.3; 1054.9. The determination of the scope of discovery is most properly, as stated in *In Re Scott* (2003) 29 Cal.4th 783, "resolved on a case-by-case basis."

Petitioner requests civil discovery proceedings in two particular areas, the taking of depositions and propounding requests for the production of documents. Petitioner argues a need "to perpetuate testimony prior to a hearing" through depositions, and to receive documents by propounding requests for production.

The request to take depositions will be denied. This court is directed to sit as a referee and "take evidence and make findings of fact." This will require witnesses be examined before the court. Pre-hearing depositions to perpetuate testimony appear both unnecessary and burdensome.

The request to propound requests for production of documents will be denied. The order for reciprocal discovery, pursuant to PC $§1054.1, 1054.3 and discovery under PC §1054.9, is intended to encompass all materials in the possession of Respondent. Respondent acknowledges their duty to provide discovery, stating:

> "Pursuant to this Court's Decision regarding discovery and Penal Code section 1054.1, respondent will review all Attorney General, Humboldt County District Attorney's Office, and Special Prosecution Unit files and produce the names and addresses of all witnesses

> to the alleged incident, the full statements of all witnesses, all relevant real evidence seized as part of the investigation of the alleged incident, any felony convictions of all witnesses, and any reports by experts intended to be called at the hearing."

The Court will specifically order discovery of all reports generated regarding the alleged incident.

Pre-hearing discovery will continue as stated in the June 23, 2008 Decision on Pre-Hearing Discovery.

Dated: August 18 , 2008

W. BRUCE WATSON

W. Bruce Watson, Judge of the Superior Court

I:\ORDER\CR009898\.wgf

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Curtis F. Price, On Habeas Corpus**

No.: **S069685**

I declare:

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

On September 30, 2008, I served the attached **BRIEF IN OPPOSITION TO PETITIONER CURTIS PRICE'S MOTION FOR PRE-HEARING DISCOVERY** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Robert L. McGlasson
1024 Clairemont Ave.
Decatur, GA 30030

Jan Little
Attorney at Law
Keker and Van Nest
710 Sansome Street
San Francisco, CA 94111

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Hon. Paul Gallegos
District Attorney
Humboldt County District Attorney's Office
825 Fifth Street
Eureka, CA 95501

County of Humboldt
Humboldt County Courthouse
Superior Court of California
825 5th Street, Room 226
Eureka, CA 95501-1153

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 30, 2008, at San Francisco, California.

Pearl Lim	[signature]
Declarant	Signature

40274495.wpd