IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re, CURTIS PRICE, On Habeas Corpus.	No. S069685 Humboldt Superior Court No. CR98898 The Honorable W. Bruce Watson

PETITIONER'S POST-HEARING BRIEF AND EXCEPTIONS TO THE REFEREE'S REPORT

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I. INTRODUCTION

The factual record developed at the reference hearing in this case confirmed the worst: During the guilt phase of a capital trial, one of the prosecutors sent money and a message to vote "guilty" to a juror in that case—a juror whom the prosecutor knew to be particularly vulnerable to his improper influence due to her alcoholism, her own brushes with the law, and the fact that her son was a probationer in the county's justice system.

More specifically, the record shows that, one night during the winter of 1985-86, during the guilt phase of petitioner's trial, prosecutor Ron Bass patronized the Waterfront Café in Eureka, accompanied by Geri Johnson (the wife of Worth Dikeman, Bass's co-prosecutor in the case). Bob McConkey was tending bar that night, and juror Zetta Southworth was working as a cook in the kitchen.

It is undisputed that—after a face-to-face encounter with Southworth in which Bass made a great show of his unwillingness to interact with her directly—Bass asked McConkey to give Southworth money as a "tip," along with a message that the money was "for a guilty verdict."

The next day, Johnson told her husband, co-prosecutor Worth Dikeman, about the incident. Although Bass, Johnson, and Dikeman all were attorneys, none of them ever disclosed the incident to the trial court or to the defense. Consequently, the defense did not learn about the incident until ten years later, in 1995-96, when McConkey related the story in a serious and consistent manner to two attorneys—Gena Rae Eichenberg and Sandra Michaels—who testified at the reference hearing to McConkey's

1995-96 descriptions of the event. By 1995, when McConkey first divulged the facts, Zetta Southworth had been dead several years and couldn't be interviewed about what happened that night.

Although the referee court confirmed many of these facts in its findings, it essentially dismissed the entire incident as a "joke" that no living witness had taken seriously. But there is no "joke" exception to the strict constitutional prohibition against jury tampering. Under *Remmer v. United States* (1954) 347 U.S. 227 [74 S.Ct. 450, 98 L.Ed. 654], and similar precedents from this Court, a presumption of prejudice arises when a criminal defendant (or habeas petitioner) establishes that an improper contact with a juror occurred, concerning a matter pending before the jury. The State then assumes the heavy burden of proving that the improper contact did not prejudice even one juror in a manner detrimental to the defendant.

This constitutionally mandated burden-shifting framework makes no exception for "jokes." Indeed, the improper juror contact in *Remmer* itself was made "in jest," but the presumption of prejudice arose anyway. (*Remmer, supra*, 347 U.S. at pp. 228-230.) Thus, the only way in which Bass's supposedly "joking" tone properly could have affected the analysis here was in a rebuttal phase, where the State might have tried to prove that juror Southworth regarded Bass's statement as a mere joke and therefore was not prejudiced by it. But the State couldn't possibly meet its heavy rebuttal burden under *Remmer*—in part, at least, because its own years-long cover-up of the incident had deprived both the State and petitioner of the ability to question Southworth about her reaction to Bass's conduct.

Even without direct input from Southworth, however, the evidence developed below, "covering the total picture, reveals such a state of facts that [no one] could say that [Zetta Southworth] was not affected in [her] freedom of action as a juror." (*Remmer v. United States* (1956) 350 U.S. 377, 381 [76 S.Ct. 425, 427; 100 L.Ed. 435] ["*Remmer II*"].) Among the "the other facts and circumstances in the case that may have influenced and disturbed [Southworth] in the untrammeled exercise of [her] judgment" (*Id.* at p. 382.) was the fact that she was a known alcoholic who repeatedly came to the trial court's attention because of her behavior outside the courtroom—including two DUI arrests that occurred during the Price trial itself. Indeed, Southworth stayed out of jail and on the Price jury only because the State intervened to put off her probation-revocation hearing until Price's trial ended.

And Southworth remained under the State's thumb throughout the trial, not only because of her DUI arrests, but also because she knew that she could be prosecuted for having lied during voir dire about her own criminal record and that of her son. She also would have been keenly aware that her son—a parolee in the same county—depended on the district attorney's good will to maintain his freedom. All these factors combined to make Southworth uniquely vulnerable to Bass's improper influence—and the same factors likewise made it impossible for the State to carry its heavy burden of rebutting the *Remmer* presumption of prejudice.

Thus, the referee court erred in accepting the State's argument that it could brush aside Bass's jury-tampering as a joke. Accepting that fallacy led to several incorrect factual findings, the most serious of which was the

finding in response to Reference Question 10(a) that there was "no evidence" that McConkey told Southworth about Bass's message that the money was for a guilty verdict. That finding was both logically flawed and factually insupportable.

The referee's finding on Question 10(a) was illogical because the referee simply inferred without any basis that McConkey wouldn't have bothered to repeat a mere "joke" to Southworth (even though the referee also found that McConkey ***had*** repeated his account of Bass's conduct to three other people because he thought it was a "good lawyer story").[1] This inference was profoundly counterintuitive. What are jokes for, if not to be retold? And this "joke" came with its own set of instructions, from a respected authority figure, that it be retold to a particular person—a juror in a capital case that the "jokester" was prosecuting. There is simply no logical basis for inferring—against all the evidence—that this "joke" did not find its intended target.

The referee's "no evidence" finding on Question 10(a) also was dead wrong, factually. ***All*** of the evidence relating to that Question demonstrated without contradiction that McConkey gave Southworth Bass's money and Bass's message to vote for guilt. McConkey himself said so in consistent, repeated admissions to attorneys Eichenberg and Michaels in 1995-96. Those admissions were in no way contradicted by McConkey's testimony at the reference hearing, 13 years after he made

[1] See Clerk's Transcript ("CT") 1082-1084, CT1087 (Report of Proceedings: Finding of Facts Pursuant to Appointment as Referee filed Aug. 21, 2009 [hereinafter "Report"] at pp. 3-5, 8, attached hereto as Exhibit A).

those admissions to Eichenberg and Michaels, that he no longer could recall telling Southworth about Bass's message. One can forget a lot in 13 years. Significantly, the referee made no finding that Eichenberg's and Michaels' testimony about McConkey's admissions lacked credibility. Instead, the referee simply ignored those admissions and then pronounced that "no evidence" existed for the admitted facts.

Petitioner therefore challenges the referee's illogical and factually unsupported finding on Question 10(a), as well as several other findings that lack any basis in the law or the factual record. This Court owes no deference to the challenged findings, as none of them were based on credibility determinations that turned on the referee's firsthand observation of witness demeanor.

In sum, the record developed below demonstrates that a juror in a California capital trial was "subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." (*Remmer II, supra*, 350 U.S. at p. 382.) It would be deeply wrong, violate the federal and state Constitutions, and reflect terribly on California's justice system to excuse this disgraceful infringement on the jury's independence as a mere "joke." The obligation to prosecute a capital case fairly and honorably and in accordance with the highest ethical standards is not a joking matter. A lawyer's ethical obligation to report juror contacts during a capital case is not a joking matter. And, unquestionably, a prosecutor's sending a juror money "for a guilty verdict" in a capital case cannot be dismissed as

harmless fun—even if it was done in a "joking tone" so that the prosecutor later could claim that he didn't mean it.

Accordingly, this Court should reject the challenged findings of the referee court and grant the other remedies requested at Part V, below.

II. THE LEGAL FRAMEWORK FOR EVALUATING PETITIONER'S *REMMER* JURY-TAMPERING CLAIM

A. Petitioner's jury-tampering claim must be evaluated according to *Remmer*'s unique burden-shifting framework.

Petitioner's habeas petition cites *Remmer v. United States, supra,* 347 U.S. 227, and characterizes the juror-tampering issue as a *Remmer* claim.[2] Accordingly, petitioner's claim must be evaluated according to the unique burden-shifting framework mandated by *Remmer*—a framework made all the more necessary in this capital case because, under Eighth Amendment principles, "[w]hen a defendant's life is at stake," courts must be "particularly sensitive to insure that every safeguard is observed." (*Gregg v. Georgia* (1976) 428 U.S. 153, 187 [96 S.Ct. 2909, 2933-2932; 49 L.Ed.2d 859].)

1. Under *Remmer*, prejudice is presumed when there has been *any* private communication, contact, or tampering—directly or indirectly—with a juror during a criminal trial about the matter pending before the jury.

In *Remmer*, the United States Supreme Court held that, "[i]n a criminal case, ***any*** private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the

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[2] See Petition for Writ of Habeas Corpus, filed Apr. 21, 1998, at pp. 147-148, 161, 216.

jury is, for obvious reasons, deemed presumptively prejudicial." (*Remmer*, U.S. 347 at p. 229, emphasis added.)

Because the *Remmer* presumption is triggered by "***any***" improper juror contact,[3] it extends to all instances and variants of jury-tampering. (See generally *United States v. Rutherford* (9th Cir. 2004) 371 F.3d 634, 640-44.) For purposes of applying the *Remmer* presumption, "jury tampering is 'normally understood' as 'an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors.'" (*Rutherford*, 371 F.3d at p. 642, fn.6, emphasis added, citation omitted.) Drinks and money are obvious "inducements." But the concept of "jury tampering" extends further still, encompassing any direct or indirect conduct that "'interfered with the jury's deliberations by distracting one or more of the jurors, or by introducing some other extraneous factor into the deliberative process.'" (*Id.* at p. 642, citation omitted.)

Like federal courts, this Court applies a presumption of prejudice in jury-tampering cases. As this Court wrote in *In re Hamilton* (1999) 20 Cal.4th 273 [84 Cal.Rptr.2d 403], "[m]isconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable ***'presumption' of prejudice***. . . . This presumption aids parties who are barred by statute from establishing the actual prejudicial effect of the incident under scrutiny[4] . . . and accommodates the fact that the

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[3] *Remmer*, 347 U.S. at p. 229.

[4] The *Hamilton* court was referring to the fact that Evidence Code section 1150, subdivision (a), bars admission of evidence to show the effect of an allegedly prejudicial statement or conduct upon a juror's vote or thinking.

external circumstances of the incident are often themselves reliable indicators of underlying bias . . . ." (*Id.* at p. 295, emphasis added.)

This presumption of prejudice is "even stronger in the context of a capital case" (*In re Stankewitz* (1985) 40 Cal.3d 391, 402 [220 Cal.Rptr. 382]); for, as previously mentioned, "[w]hen a defendant's life is at stake, the [Supreme] Court has been particularly sensitive to insure that every safeguard is observed." (*Gregg*, *supra*, 428 U.S. at p. 187.)

2. Once the *Remmer* presumption arises, reversal is required unless the State carries its heavy burden of proving that there is *no substantial likelihood* that the improper contact biased *even one juror* against the defendant.

Once the petitioner proves that an improper "private communication, contact, or tampering" occurred, "the burden rests heavily" upon the State to establish that the contact was "harmless to the defendant." (*Remmer*, 347 U.S. at p. 229.) This Court has referred to the State's rebuttal burden as a "heavy" one. (*Stankewitz*, *supra*, 40 Cal.3d at p. 402.)

But the State's rebuttal burden under *Remmer* involves much more than a run-of-the-mill "harmless error" analysis. The State cannot carry its heavy rebuttal burden by attempting to show that the improper juror contact couldn't have affected the ultimate verdict. Rather, it must show that there is ***no reasonable likelihood*** that the contact biased ***even one juror*** against the defendant.

Thus, this Court has observed that the "prejudice" analysis in a jury-tampering case is "different from, and indeed less tolerant than, 'harmless-error analysis' for ordinary error at trial" because "[a]ny deficiency that undermines the integrity of a trial . . . introduces the taint of fundamental

unfairness and calls for ***reversal without consideration of actual prejudice***." (*In re Marshall* (1999) 50 Cal.3d 907, 951, [269 Cal.Rptr. 269] emphasis added.) Thus, "[w]hen the misconduct in question supports a finding that there is a substantial likelihood that ***at least one juror*** was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial." (*Ibid.*, emphasis added.)

Accordingly, the State may rebut the *Remmer* presumption of prejudice only "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." (*Hamilton, supra*, 20 Cal.4th at p. 296, emphases in original.) The issue is "the impact [of the improper contact] upon the [individual] juror, and whether or not it was prejudicial." (*Remmer*, 347 U.S. at pp. 229-230.)

Accordingly, in a *Remmer* hearing, "the entire picture should be explored" and "no unduly narrow limits" imposed on the trial court's inquiry concerning the improper juror contact. (*Remmer II*, 350 U.S. at p. 379; see also *Rutherford*, 371 F.3d at p. 644.)

3. There is no "joke exception" to the *Remmer* burden-shifting framework.

Because there is no "joke" exception to the *Remmer* burden-shifting framework, no weight should be given to the referee court's findings that

the incident at the Waterfront Café was, in essence, a joke. The State therefore bore the heavy burden—which it did not meet—of proving that Bass's conduct did ***not*** prejudice juror Zetta Southworth to petitioner's detriment.

Remmer itself—the leading case—condemns the notion of a "joke exception." In *Remmer*, the defendant was convicted of tax evasion. After the trial, the defendant and his lawyers found out that someone had approached one juror during the trial and had told him that he might profit from returning a guilty verdict. The judge and prosecutor had been informed, but not the defense. After concluding that the offer of a bribe had been made "***in jest***," the judge had allowed the juror to remain on the jury and to serve as the foreman. But the Supreme Court held that the defendant had a right to a hearing to determine whether the contact was prejudicial, based on the impact on the juror rather than the intent of the person making the offer. (*Remmer,* 347 U.S. at pp. 228-230, emphasis added.) And, as previously explained, the Supreme Court assigned the State—not the defense—the heavy burden of proving that the contact did ***not*** prejudice the affected juror against the defendant.

It could hardly be otherwise. Imagine what the law would look like if a "joke" exception existed. An attorney could approach a juror and say, "Vote our way, because we know where you live. *Just kidding!*" Under a "joke" exception, the State would be relieved of its *Remmer* burden of proving that the "joke" had no prejudicial effect on the juror. That cannot be the law.

Accordingly, it was utterly irrelevant, as a matter of law, (1) whether Bass spoke in a joking tone when he told McConkey to tell Southworth that the money was "for a guilty verdict"; (2) whether Bass intended to be taken seriously when he said that; or (3) whether McConkey believed that Bass really wanted him to tell Southworth what Bass had said.

Rather, what matters here is (1) whether McConkey conveyed Bass's money and message to Southworth (in which case the *Remmer* presumption of prejudice surely arises),[5] and (2) whether Bass's message had any prejudicial effect on Southworth (a fact that the State bore the heavy burden of ***dis***proving under the *Remmer* burden-shifting framework).

B. This Court owes no deference to the referee court's findings, except to the extent that they are founded on credibility determinations or are supported by ample, credible evidence.

"The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations." (*In re Lawley*, (2008) 42 Cal.4th 1231, 1241 [74 Cal.Rptr.3d 92].) Accordingly, this Court grants "special deference" to the superior court's "resolution of testimonial conflicts and assessment of witnesses' credibility," as these are based on a first-hand evaluation of "the witnesses' demeanor and manner of testifying." (*Ibid.*)

In general, however, the referee's findings are "not binding" on this Court, which may "disregard them" if they are "not supported by ample, credible evidence." (*In re Johnson* (1998) 18 Cal.4th 447, 461 [75 Cal.Rptr.2d 878].) Credibility determinations aside, therefore, this Court

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[5] The answer to that first question is "yes." The referee court's contrary finding lacks any record support. (See Part IV.D., below.)

gives "no deference to the referee's findings" and "independently review[s] prior testimony . . . as well as all mixed questions of fact and law." (*In re Hardy* (2007) 41 Cal.4th 977, 993 [63 Cal.Rptr.3d 845].) Thus, "[u]ltimately, the referee's findings are not binding on" this Court; and "it is for this [C]ourt to make the findings on which the resolution of [petitioner's] habeas corpus claim will turn." (*Ibid.*)

In this case, therefore, the Court's review will be almost entirely non-deferential, because the referee court made almost no credibility findings; and, to the extent that its factual findings diverged from those set forth in Part III below, they were not supported by "ample, credible evidence." (*Johnson*, *supra*, 18 Cal.4th at p. 461.) Rather, this Court must review the referee court's findings independently to determine whether they are supported by ample, credible evidence.

III. THE EVIDENTIARY RECORD ON PETITIONER'S *REMMER* CLAIM

The evidentiary record developed in the reference hearing confirmed that the prosecutor in this case engaged in a "private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury"—conduct that is, "for obvious reasons, deemed presumptively prejudicial" under *Remmer* and its state-law counterparts. (*Remmer*, 347 U.S. at p. 229; see also *Hamilton, supra,* 20 Cal.4th at pp. 295-296; *Marshall, supra,* 50 Cal.3d at pp. 950-951; *Stankewitz, supra,* 40 Cal.3d at p. 402.)

The record also showed that the State did not, and could not, carry the burden which "rests heavily" upon it to rebut the *Remmer* presumption

of prejudice by establishing that the improper juror contact was "harmless to the defendant." (*Remmer*, 347 U.S. at p. 229.)

Because the referee court avoided making credibility determinations almost entirely,[6] this Court is free to review the record independently. (*See* Part II.B., above.) So viewed, these were the key facts.

A. Petitioner proved that prosecutor Ron Bass engaged in a presumptively prejudicial attempt to influence juror Zetta Southworth by sending her drinks and money "for a guilty verdict."

The hearing evidence demonstrates that an improper juror contact occurred one evening in the winter of 1985-86, when Deputy Attorney General Ron Bass and his colleague Worth Dikeman were trying the guilt phase of the capital case against petitioner Curtis Price.[7]

That evening, Bass patronized the Waterfront Café in Eureka with Dikeman's wife, attorney Geri Ann Johnson. Price juror Zetta Southworth was working in the kitchen. Robert McConkey was tending bar.[8]

McConkey asked Bass and Johnson whether they wanted to order food. When they said that they did, a woman came out with menus. Bass later identified the woman as Zetta Southworth, a juror in the Price case. When Bass saw Southworth, he jumped up from his barstool, held up his

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[6] See Part IV.A., below (discussing referee's determination that new, in-court McConkey testimony was "more accurate" than older, out-of-court McConkey admissions) and Part IV.D.1., below (discussing referee's implicit finding that Bass was not credible).

[7] Reporter's Transcript ("RT") 288-293, RT303, RT205-206, RT210-211, CT404-405.

[8] CT1002 (Respondent's Post Hearing Brief); see also RT205-206; RT210-211; RT221-222; RT288-293; RT377-378; RT381-382.

hands as if he were being arrested,[9] went behind Johnson, and said something like, "I can't talk to you. I've got to maintain propriety."[10] Southworth gave them menus and recommended that they order crab fritters. Then she returned to the kitchen.[11] Johnson said that she did not see Southworth again that evening,[12] but admitted that, from the kitchen, Southworth could have viewed the area of the bar where Johnson and Bass were sitting.[13]

Over the next 90 minutes, Bass and Johnson had drinks and appetizers.[14] There was evidence, albeit disputed, that Bass had McConkey take at least two drinks back to Southworth[15] even though Bass knew that she was both a juror in the Price case and a severe alcoholic.[16]

What is not disputed is that, before Bass and Johnson left the Waterfront Café that night, Bass gave McConkey $10 or $20 and told him to "split this [money] with Zetta" and tell her that it was "for a guilty

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[9] At the hearing, Johnson said that he held up his hand "like this," RT292, but her declaration clarifies that he held up his hands "as if he were being arrested." CT404-405.

[10] RT292.

[11] RT292-293.

[12] RT290-293; CT404-405.

[13] RT290; see also RT220 (McConkey); Petitioner Price's Exhibit LL used at the Evidentiary Hearing held April 6-April 10 and transmitted to this Court by the Humboldt County Superior Court (such exhibits are hereinafter referred to as "Evidentiary Hearing Exhibit").

[14] RT221-223; RT294.

[15] See evidence summarized in Part IV.A., below.

[16] See evidence summarized in Part II.B.2.a., below.

verdict."[17] McConkey delivered Bass's money and message to Southworth.[18]

The next day, Johnson told her husband, Worth Dikeman, about the incident, including the facts that Bass had asked McConkey to give Southworth money and a message to vote for guilt.[19] Each of the three lawyers involved in the incident—Bass, Dikeman, and Johnson—had an ethical duty under then-existing Rule of Professional Conduct 7-106 (now Rule 5-320(G)) to report the improper juror contact to the Court.[20] Yet none of them ever notified the trial court or defense counsel about it.

Although this version of the story is bad enough, there is additional evidence—furnished in court by Southworth herself at the time of the Price trial—indicating that Southworth's contact at the Waterfront Café with Johnson (and thus with Bass) may have been far more extensive than suggested above.

On April 2, 1986, during the Price trial, Judge Buffington questioned Southworth outside the jury's presence about the fact that she had been observed earlier that day leaving the courtroom and then embracing and talking to "a red-headed lady"—Geri Johnson—who was standing outside.[21] This questioning occurred in the presence of prosecutors Ron Bass and Worth Dikeman and Price's defense counsel, Bernard DePaoli.

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[17] RT226-227; RT303.

[18] See evidence summarized in Part IV.D.1., below.

[19] RT307.

[20] See Part IV.D.2., below.

[21] CT477.

In response to Judge Buffington's questions, Southworth did not deny having hugged and talked to Johnson. Indeed, Southworth initially called Johnson "a friend of mine," but then backpedaled, stating that Johnson was "not really a good friend or anything," just "an acquaintance" who had visited Southworth's workplace "one evening."[22] On that occasion, Southworth said, "we just got acquainted and talked and that's it."[23] Upon further questioning, Southworth initially denied knowing who Johnson's husband was, but then reluctantly admitted knowing that he was prosecutor Worth Dikeman.[24] Southworth also stated that she had seen Johnson only twice—"that one time" at her workplace, and again when leaving the courtroom at noon that day.[25]

Ron Bass—who had witnessed and participated in the workplace contact that Judge Buffington was asking Southworth to describe—stood mute throughout this colloquy (as did Dikeman). Neither prosecutor said a word to contradict, correct, or modify Southworth's account of what had transpired at the Waterfront Cafe. Near the end of the questioning, however, Bass piped up to ask Southworth whether her contact with Johnson would have any effect on her ability to remain fair and impartial as a juror. Southworth answered that it wouldn't.[26] No mention was made by anyone of the fact that Bass had been there with Southworth at the Waterfront Café; that Bass had sent Southworth drinks; or that Bass had

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[22] CT477.

[23] CT477.

[24] CT477-478.

[25] CT478-479.

[26] CT479.

sent Southworth money along with a message that the money was "for a guilty verdict."

Southworth's statements to Judge Buffington in 1986 show that, on that night at the Waterfront Café, Southworth had enough direct contact with Johnson to converse and become acquainted;[27] to learn that Johnson's husband was Worth Dikeman; and to form enough of a bond that the two women would embrace and talk outside the Price courtroom the next (and only other) time they met. And while this rather warm acquaintance was being formed, Ron Bass was right there by Johnson's side.

Thus—whether or not one grants any weight to Southworth's 1986 statements—petitioner carried his burden at the reference hearing of proving an improper contact between prosecutor and juror that raises the *Remmer* presumption of prejudice.

B. The State failed to carry its heavy burden of rebutting the *Remmer* presumption of prejudice by demonstrating that there was no substantial likelihood that Bass's misconduct biased juror Southworth against the petitioner.

The hearing evidence also shows that the State did not, and could not, carry its heavy burden of rebutting the *Remmer* presumption of prejudice. Indeed, the State went so far as to argue below—unsuccessfully—that "logic, reason, experience, and common sense" all dictated that petitioner "not be allowed to produce evidence related to Mrs. Southworth's state of mind."[28] It's no surprise, therefore, that the State

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[27] Twenty-three years later, Johnson testified at the reference hearing that she may have greeted but did not converse with Southworth at the Waterfront Café. RT310.

[28] CT646 (State's Supplemental Motion in Limine, filed March 20, 2009, at p. 4).

made no serious attempt to adduce such evidence itself.

1. The State's years-long, unethical cover-up of the Waterfront Café incident deprived it of any direct evidence from Southworth about the prejudicial effect of Bass's conduct.

To the extent that the State even tried to shoulder its *Remmer* rebuttal burden, it appears to have relied on the theory that Bass's "for a guilty vote" statement was just a little joke that none of the living witnesses—meaning Bass, Johnson, and McConkey—took seriously. The problem with that theory, as explained above in Part II.A.3., is that there is no "joke" exception to the *Remmer* burden-shifting framework. Therefore, the relevant legal issue is not whether Bass, Johnson, and McConkey viewed Bass's statement as a "joke," but rather, whether the statement—joke or not—had any prejudicial effect on juror Southworth. And the State could not, and did not, proffer any evidence that Southworth remained unaffected by the incident.

The State's burden of disproving prejudice was made difficult—we think impossible—by the fact that Zetta Southworth died in 1989 and never was interviewed about the incident. It is no doubt for this reason that the State now tries to shift the focus to whether the non-jurors thought it was a joke. But—as discussed in Part IV.D.2., below—the State has no one but itself to blame for the absence of the evidence it would need to disprove juror prejudice. For it was the State's illegal cover-up of the incident—in direct violation of ethical rules compelling disclosure—that ensured that no one ever questioned Southworth on this subject before she died. (See Part IV.D.2., below.)

2. The hearing evidence showed that Southworth was especially vulnerable to improper prosecutorial influence.

Even if the State had tried to carry its burden of disproving prejudice, it would have failed, because petitioner submitted extensive evidence that—for a variety of reasons—Southworth was uniquely vulnerable to improper prosecutorial influence. Indeed, the evidence suggested that Bass knowingly exploited Southworth's vulnerabilities. That evidence—summarized below—is of critical importance here, for this Court is constitutionally charged with considering "all" of the "facts and circumstances in the case that may have influenced and disturbed [Southworth] in the untrammeled exercise of [her] judgment as a juror." (*Remmer II, supra,* 350 U.S. at p. 382.)

a. Southworth was an alcoholic, and Bass knew it.

Bass knew about Southworth's alcoholism—a condition that placed her at legal risk, undermined her independence, and became an ongoing issue during the Price trial. On October 28, 1985, while jury selection was still underway, one of Price's lawyers, Anna Klay, informed the Court that she had learned that Southworth had a severe drinking problem.[29] The defense urged the court to excuse Southworth from jury service.[30] The source of Klay's information was Jennifer Tyrrell, a court reporter at the Price trial and a neighbor of Southworth's. Tyrrell had told Klay that Southworth appeared to be drunk whenever Tyrrell saw her.[31] A short time

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[29] Evidentiary Hearing Ex. D, p. 9246.

[30] Evidentiary Hearing Ex. D, pp. 9246-9247.

[31] Evidentiary Hearing Ex. D, pp. 9246-9247.

later, Tyrrell testified outside the jury's presence that she had lived next door to Southworth for 14 months and had seen her once or twice a week, and that Southworth rarely was sober, even in the middle of the day.[32] Tyrrell testified that Southworth usually had difficulty walking or talking; that her speech generally was heavily slurred; and that Tyrrell had had to help Southworth up the stairs once when Southworth visited her home.[33] Bass cross-examined Tyrrell at this hearing during the Price trial and therefore was entirely aware of Southworth's alleged drinking problem well before he visited the Waterfront Café with Geri Johnson.[34]

Following this revelation, the defense renewed its objections to Southworth's jury service.[35] In arguing for her retention as a juror, Bass's co-counsel, prosecutor Worth Dikeman, did ***not*** argue that Southworth was not an alcoholic. Rather, he argued that whatever Southworth did on her own time after court hours did not reflect on whether she would be drunk at trial.[36] Judge Buffington ultimately denied the defense motion to excuse Southworth for cause,[37] apparently crediting Southworth's (false) testimony that she had no alcohol problem[38] as well as her reassurances that, in the court's words, she wasn't "going to be inebriated . . . either at home or in

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[32] CT458-460.

[33] CT459-460.

[34] CT461-462.

[35] CT462.

[36] CT462-463.

[37] Defense counsel argued that keeping Southworth on the jury posed unacceptable risks of absence, of being intoxicated during the testimony, and of memory loss. CT462-464.

[38] CT470-471.

court to such a degree [that she wouldn't] be able to pay attention . . . in court[.]"[39]

These sworn reassurances soon were disproved. Twice in a single week in late December of 1985, while serving as a juror in the Price trial, Southworth was arrested for driving under the influence of alcohol.[40] She was convicted of each charge in separate proceedings in January 1986. On January 6, 1986, prosecutor Dikeman reported Southworth's first DUI conviction to Judge Buffington, who nevertheless kept her on the jury over defense objections.[41]

Southworth was able to remain physically present on the jury instead of going to jail because the DUI court suspended her sentence for the first conviction.[42] After her second conviction, she was placed on probation.[43] But when she violated the probation terms by failing to attend the "Lucky Deuce" treatment program,[44] her probation was not revoked. Instead, her probation-revocation hearing was continued until after the Price trial, and she was given another chance to attend the Lucky Deuce.[45]

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[39] CT470.

[40] Evidentiary Hearing Ex. GG (court took judicial notice of pages 1-12 without objection at RT356-357); RT328-347.

[41] Evidentiary Hearing Ex. F, p. 12295; CT473-475.

[42] Evidentiary Hearing Ex. GG, p. 4; Ex. F, pp. 12297-12298.

[43] Evidentiary Hearing Ex. GG, pp. 5-9; RT339-344.

[44] Evidentiary Hearing Ex. GG, pp. 10-12.

[45] CT481-484; Evidentiary Hearing Ex. GG, p. 11. Judge Buffington, the trial judge in Price's case, personally arranged for a public defender, Peter Vodopals, to represent Southworth in connection with her probation-revocation hearing. See RT329-332, RT344-345, RT354-355. Vodopals and Price prosecutor Dikeman later agreed—in an off-the-record meeting held without the presence of Price's lawyers—that Southworth's hearing could be postponed. CT482-484.

Thus, it is clear that—beginning during jury selection in the fall of 1985 and continuing thereafter—Bass knew or should have known that Southworth was an alcoholic. Since Bass's improper contact occurred after jury selection, during the winter of 1985-86, Bass must have known that Southworth was an alcoholic at the time of his encounter with Southworth at the Waterfront Café.

b. Southworth and her son had criminal records; Southworth lied about both; and her son was under the county's direct supervision.

Besides her alcoholism, Southworth had other reasons to be peculiarly susceptible to Bass's attempt to influence her. Petitioner's post-conviction investigations revealed that Southworth lied in voir dire when asked whether she or any close friend or relative ever had been involved in a criminal case, either as a victim, defendant, or witness. Southworth answered "no" in her sworn voir dire questionnaire and again orally in open court while under oath.[46] But she knew that her answers were false in two significant respects.

First, Southworth herself had been convicted at least twice for passing bad checks in North Carolina in the 1970s.[47]

Second, Southworth knew that her son, Rodney Lee Emerson, had an extensive criminal record.[48] Specifically, Southworth knew, but failed to disclose in voir dire, that Rodney had been convicted of breaking and

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[46] See CT429, answer to Question 18; Evidentiary Hearing Ex. C at p. 9028.

[47] Evidentiary Hearing Ex. NN.

[48] RT317; RT320-322; RT326.

entering and larceny in North Carolina in 1972[49] and that he had been convicted of transporting marijuana in California in 1984.[50] More significantly, Rodney remained on probation in the Humboldt County penal system throughout the Price trial.[51]

Thus, on the evening that Bass sent her money and a message that the money was "for a guilty vote," Southworth was an alcoholic who knew that she could be prosecuted for lying during voir dire, and who also knew that her son was under the control of the Humboldt County justice system. Southworth would have been hard-pressed to ignore Bass's improper suggestion. Therefore, Bass's conduct was nothing less than an attempt to exploit a juror's known physical, mental, and legal vulnerabilities to influence her vote on guilt in a capital case.

Little wonder, then, that the State made almost no attempt to carry its *Remmer* burden of disproving that the illicit juror contact caused no prejudice.

IV. PETITIONER'S EXCEPTIONS TO THE REFEREE COURT'S FINDINGS

The referee court found many facts that support petitioner's claim for relief. Among other things, it found that

- the Waterfront Café incident actually occurred (Question 1(a));
- the incident occurred during the trial's guilt phase (Question 1(b);
- Bass had direct contact with Southworth during the incident (Question 2);

[49] RT317; RT320; RT326.

[50] RT320-321; RT326.

[51] RT320-322.

- Bass sent Southworth money, which she received and accepted (Questions 4 and 5);

- Bass knew that Southworth had a drinking problem (Question 3(c));

- Bass told McConkey to split $10 or $20 with Southworth and to tell her that it was for a guilty verdict (Questions 4(a), 4(b), 6(a) and 7(a)).

In four other respects, however, the referee's findings sharply diverged from the evidentiary record and should be rejected. Petitioner takes exception to each of these findings.

(1) The referee court found that Bass did not ask McConkey to take, and that McConkey did not take, any alcoholic drinks to Southworth.[52] (Question 3.) We submit that this finding is not supported by "ample, credible evidence." (*Johnson, supra*, 18 Cal.4th at p. 461.) The referee's erroneous finding turned on his crediting McConkey's 2009 testimony (that he no longer could recall the facts regarding the drinks) over his much earlier admissions in 1995-96 (that he ***had*** taken drinks back to Southworth at Bass's request). But McConkey's present lack of recollection should not be construed as negating the admissions that he clearly made over a decade earlier, when his memory was much fresher. (See Part IV.A., below.)

(2) The referee court found that Bass "did not give Mr. McConkey money to specifically give to Ms. Southworth" (Questions 5(a) and 6(a)).[53] That finding erroneously suggests that Bass never instructed McConkey to give Southworth any money. Yet, the referee also found that

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[52] CT1083-1084 (Report at 4-5).

[53] CT1084-1085 (Report at 5-6).

Bass "gave Mr. McConkey money, telling [him] to give, or split, the money with Ms. Southworth" (Questions 4(a) and 7(a)).[54] And the evidence showed that Bass did, indeed, give McConkey money with an instruction to give half of it to Southworth. As discussed in Part IV.B., below, the difference in the referee's findings appears to turn on a meaningless semantic distinction between (a) giving McConkey a "tip" with the direction that he split it with Southworth and (b) giving McConkey "money for" Southworth. That distinction is not entitled to any deference and should be rejected, along with the resulting negative findings on Questions 5(a) and 6(a).

(3) The referee court found that Bass used a "joking tone" when instructing McConkey to tell Southworth to vote for guilt (Question 7(b)); that Bass did not intend that McConkey follow those instructions (Questions 7(c) and 8(a)); and that McConkey understood the instructions to be a "joke."[55] (Question 9). These findings are legally irrelevant for reasons stated at Part II.A.3., above, and further, are unsupported by "ample, credible evidence." (*Johnson*, *supra*, 18 Cal.4th at p. 461; see Part IV.C., below.)

(4) Most critically, the referee court inexplicably found that there was "no evidence" that McConkey conveyed Bass's "joke" about voting for guilt to juror Southworth (Question 10). That finding is not supported by "ample, credible evidence." (*Johnson*, *supra*, 18 Cal.4th at p. 461; see Part

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[54] CT1084 (Report at 5).

[55] CT1085-1087 (Report at 6-8).

IV.D., below.) In fact, the uncontradicted evidence is that McConkey ***did*** convey Bass's statement to McConkey.

A. This Court should reject the referee court's findings on Question 3 (whether Bass sent alcoholic drinks to Southworth).

Reference Question 3(a) asked: "While at the Waterfront Café, did Bass ask McConkey to take any alcoholic drinks to Southworth?" The referee court answered this question "[n]o" because the "evidence does not support" such a finding. But the referee's reasoning is contrary to the record and unworthy of deference.

Petitioner's key evidence that Bass had McConkey take drinks back to Southworth consisted of McConkey's own admissions to attorneys Gena Rae Eichenberg and Sandra Michaels in 1995-96. Local attorney Gena Rae Eichenberg testified at the hearing that, in December 1995, McConkey told her and petitioner's habeas counsel, Robert McGlasson, that Bass had asked him to take drinks to Southworth that evening.[56] Sandra Michaels, an attorney whom McGlasson had hired as an investigator,[57] likewise testified at the hearing that, in Spring 1996, McConkey told her that Bass had asked McConkey to take more than one drink back to Southworth, and that McConkey did so.[58]

McConkey testified on direct examination at the hearing that he did not recall Bass's "sharing" a drink with Southworth "in the kitchen."[59] The

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[56] RT258-259; RT275. Eichenberg was the former President of the Humboldt County Bar Association. RT256-257.

[57] RT636.

[58] RT647-648.

[59] RT230.

issue, however, was not whether Bass "shared" a drink with Southworth "in the kitchen," but rather, whether Bass had McConkey take one or more drinks to Southworth in the kitchen—not to "share," but to drink by herself, alone.

On cross-examination, McConkey testified that it was "not uncommon" for people to send drinks back to people they knew who were working in the kitchen, but that it would have been "unusual" for him to take drinks to Southworth, given her drinking problem.[60]

On redirect, McConkey testified that Southworth had been sent drinks on other occasions; that he "doubt[ed]" that Bass had sent her drinks that evening; but that he just didn't recall.[61]

The referee court did ***not*** find that Eichenberg and Michaels lacked credibility. Rather, the referee framed the credibility issue as a contest between Mr. McConkey and himself. On the one hand was McConkey's sworn, in-court statement in 2009 that he no longer could recall whether Bass had sent Southworth drinks that evening, 24 years earlier.[62] On the other hand were McConkey's admissions to Eichenberg, Michaels, and McGlasson—made in 1995-96, more than a decade closer in time to the event—that he had complied with Bass's request to send one or more drinks back to Southworth in the kitchen.

Apparently weighing these two sets of statements against each other, the referee court found the new, in-court McConkey more "accurate"

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[60] RT242-243.

[61] RT246-247.

[62] RT246-247.

because he "was under oath at the hearing and appeared to be testifying truthfully," whereas the earlier (closer to the event), out-of-court McConkey had not been entirely consistent in his admissions about the drinks—once not mentioning them,[63] once mentioning just one drink,[64] and once mentioning "drinks plural."[65]

Even assuming that this amounted to a "credibility" determination entitled to appellate deference—a dubious proposition[66]—it fails to support the referee's ultimate finding that Bass did not send drinks back to Southworth. Even if one fully credits McConkey's testimony that he could no longer recall in 2009 whether Bass sent drinks back to Southworth, that testimony in no way contradicts McConkey's prior admissions, made 13 and 14 years earlier, that Bass ***did*** send one or more drinks back to Southworth. Rather, McConkey's 2009 testimony merely proves (unsurprisingly) that McConkey remembered things better only 10 years after they happened than he did 24 years after they happened. The fact that McConkey testified under oath in 2009 may have bolstered his credibility

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[63] CT1084 (Report at 5); RT254-255.

[64] RT258.

[65] RT642.

[66] Deference is paid to credibility judgments when they turn on the factfinder's opportunity to observe "the witnesses' demeanor and manner of testifying." (*Lawley*, *supra*, 42 Cal.4th at p. 1241.) But this credibility determination—if that's what it was—could not have turned on the referee's firsthand observation of demeanor, because McConkey's admissions occurred out of court in 1995-96. This Court therefore is equally well positioned to determine whether those admissions were rendered incredible by the minor inconsistencies that the referee apparently found dispositive. This Court owes the referee no deference on that point.

as to his lack of present recollection—but to what end? All he said was that he no longer could remember.

The referee court also observed that "Ms. Johnson and Mr. Bass testified [that] no drinks were sent to Ms. Southworth."[67] That misstates their testimony.

Johnson testified that, to the best of her knowledge, Bass did not send Southworth drinks that evening.[68] But she acknowledged that she may have visited the restroom at some point, leaving Bass alone with McConkey at the bar.[69] Of course, that would have been an opportune moment for Bass to ply Southworth with drinks.

Bass did not recall any details of the Waterfront Café incident, except that he and Johnson went to "a local tavern" after playing racquetball; that they had appetizers and drinks; and that he found out that a sitting juror was working in the kitchen.[70] Consistent with this general lack of recollection, Bass also testified that he couldn't recall sending any drinks to a sitting juror during the trial.[71] (He also testified that he couldn't recall sending any money to a sitting juror during the trial[72]—although the referee

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[67] CT1083, Report at 4.

[68] RT301-302.

[69] RT314.

[70] CT363 at ¶¶ 3-5; RT372-382; RT384-390.

[71] RT389:9-17.

[72] RT389:18-19.

court found that, in fact, he had.[73]) Bass's testimony therefore boiled down to a complete lack of recall on the drinks issue.

Accordingly, the referee court's negative findings on Question 3 are not supported by ample, credible evidence, and do not warrant any deference by this Court, which should reject them.

B. This Court should reject the referee court's findings on Questions 5(a) and 6(a) (whether Bass gave McConkey "money for" Southworth).

Question 5(a) asked, "If Bass gave McConkey money for Southworth, did McConkey give Southworth the money?" Question 6(a) asked, "If Bass gave McConkey money for Southworth, did he ask McConkey to convey any message with the money?"

The referee answered both questions "***no***," explaining that "***Mr. Bass did not give Mr. McConkey money to specifically give to Ms. Southworth***. Mr. McConkey testified that he shared, split tips with Ms. Southworth in the normal course of business, it is reasonable to assume then she did receive money from Mr. McConkey that came from Mr. Bass."[74]

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[73] CT1084-1085, Report at 5-6 (Questions 4(a) and 7(a)); see also discussion at Part IV.B., below. Bass's lack of recollection and general lack of credibility apparently prevented the referee court from relying on his testimony in any way. The referee's implicit credibility finding against Bass is entitled to deference (see Part II.B., above) and is more than amply supported by the hearing evidence summarized in Petitioner's Post-Hearing Brief at pp. 18-24 (CT983-989), the cited portions of which petitioner hereby incorporates by reference herein. Indeed, the record demonstrated that Bass has a penchant for obscuring or failing to remember events that he believes might jeopardize a conviction that he has obtained, his own professional reputation, or the reputation of the organization that he serves.

[74] CT1084-1085, Report at 5-6 (Questions 5(a) & 6(a)), emphases added.

These findings erroneously suggest that Bass never instructed McConkey to give Southworth any money. Yet, in response to Question 4(a)— "Did Bass give McConkey any money with the direction or request that it be conveyed to Southworth?"—the referee answered: "***Yes***. Mr. McConkey and Ms. Johnson testified that, when paying the bill and/or leaving a tip, Mr. Bass gave Mr. McConkey money, ***telling Mr. McConkey to give, or split, the money with Ms. Southworth***."[75] Likewise, in response to Question 7(a)—"Did Bass direct, request or suggest that McConkey convey money to Southworth and tell her to vote guilty in Price's trial?"—the referee answered: "***Yes***. Mr. McConkey and Ms. Johnson testified [that] Mr. Bass made the comment to Mr. McConkey, as he paid the bill and left the tip, to the effect, ***give her this money and tell her to vote guilty***."[76]

The difference between the two sets of findings appears to turn on a meaningless semantic distinction between Bass's giving McConkey a "tip" with the direction that he "split" it "with" Southworth, and Bass's giving McConkey "money for" Southworth.[77] The referee failed to explain the significance of this distinction, and it has none. Money is still money, regardless of whether you call it a "tip" or "money"; and giving Person A "money for" Person B is still just that, even if Person A is told that he may

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[75] CT1084, Report at 5 (Question 4(a)), emphases added; see also CT1085, Report at 6 (Question 7(a)).

[76] CT1085, Report at 6 (Question 7(a)), emphases added.

[77] CT1084-1085, Report at 5-6 (Question 5(a)).

keep half of it for himself. This Court owes no deference to the referee's hair-splitting.

Accordingly, the Court should reject the referee's erroneous negative findings on Questions 5(a) and 6(a).

C. This Court should reject the referee court's finding on Questions 7(b), 7(c), 8(a), and 9 (whether Bass's misconduct was a "joke").

The referee court found that Bass used a "joking tone" when instructing McConkey to tell Southworth to vote for guilt (Question 7(b)); that Bass did not intend that McConkey do as Bass "joking[ly]" had instructed (Questions 7(c) and 8(a)); and that McConkey understood the comment as a "joke."[78] (Question 9). These findings are both legally irrelevant and unsupported by "ample, credible evidence." (*Johnson*, *supra*, 18 Cal.4th at p. 461.)

The referee's "joke" findings are legally irrelevant for the reason discussed in Part II.A.3., above: there is no "joke" exception to the *Remmer* burden-shifting framework, nor to *Remmer*'s condemnation of improper juror contacts. The presumption of prejudice arises regardless of the tone used, the speaker's subjective intent, or the way he was understood by those who heard him (especially where, as here, the juror targeted by the speaker's statement never heard him utter it aloud, and thus couldn't possibly have been put at ease by his supposedly "joking" tone). And once the *Remmer* presumption of prejudice arises, the State assumes the heavy burden of proving that the misconduct did ***not*** cause prejudice by affecting the juror—a burden that the State here failed to carry.

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[78] CT1085-1087, Report at 6-8.

One of the referee's "joke" findings also contradicts the record evidence and, for that reason as well, deserves no deference from this Court. Question 7(c) asked, "Did [Bass's] tone, gestures ***and other surrounding circumstances*** suggest that he was serious or joking?"[79] The referee answered, "The manner in which the comment was made, in a conspiratorial fashion with a stranger, the surrounding circumstances of alcohol consumption in a bar, and Mr. Bass having earlier stated to Ms. Southworth 'I cannot have contact with you,' suggests the intent of the remark was a joke."[80]

But the referee court ignored at least two "surrounding circumstances" demonstrating that—whatever his tone of voice may have been—Bass was serious about using McConkey to communicate improperly with, and influence, Southworth.

Bass's experience and knowledge of legal and ethical norms. The most compelling "surrounding circumstance" is that Bass was an experienced prosecutor, and an attorney with well-defined legal and ethical duties, who knew full well that it is improper to have any but the most brief, attenuated, and unplanned contact with a sitting juror—let alone a juror in a capital case. By the time of the Waterfront Café incident, Bass had worked in the Contra Costa District Attorney's office for 10 years and in the Attorney General's office for 5 years.[81] He already had tried two

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[79] Emphasis added.

[80] CT1085, Report at 6 (Question 7(c)).

[81] RT400-401.

capital cases.[82] And his testimony showed that he well understood the rules governing lawyer-juror contacts:

> Q. When you run into—as a trial lawyer when you run into a juror outside of a courtroom, what's your practice generally?
>
> A. Nod your head and walk off.
>
> Q. Why is that?
>
> A. You don't want to be talking to jurors. You don't want to have anyone see you talking to jurors. Everyone knows that you're not supposed to—well, the judge admonishes everybody in the courtroom before the trial, during the trial, and they all know it as well.
>
> So usually it is no problem. You'll see them and you might nod your head and go your way, but you don't stop and talk and say how's the trial going or anything like that. It's not done.[83]

Indeed, Johnson testified that, when Southworth came out of the kitchen to deliver the menus, Bass jumped out of his chair, raised his hands, and told her that he could not speak to her because he had to maintain "propriety."[84] Bass's co-prosecutor, Worth Dikeman, testified that he routinely reports even accidental contacts with a juror to the court or the defense.[85] Johnson, an experienced attorney in her own right, testified that she believed that Dikeman was concerned about the fact that she and Bass had gone to Southworth's workplace.[86] And Mr. Bass's own character witness, former appellate Justice Michael Phelan, conceded that he would

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[82] RT402.

[83] RT383.

[84] RT301.

[85] RT485.

[86] RT308.

have "misgivings" about, and would "reconsider," his good opinion of Bass if Bass sent Southworth money with the message to vote guilty.[87]

Thus, there is no way that Bass could have violated these norms unintentionally, or without understanding the gravity of his conduct. Indeed, Bass's failure to report the incident, as he was ethically required to do, strongly suggests that he was conscious of his guilt and understood that his conduct was unlikely to be regarded as a mere joke.

Bass's sending Southworth money. The pertinent "surrounding circumstances" include the fact that Bass sent Southworth money along with the message that the money was "for a guilty verdict." This act—in and of itself—displayed a flagrant disregard for the normal rules governing juror contacts. (It also was inconsistent with Bass's own normal practice in restaurants—he admitted that it would be "unusual" to send money back to a cook.[88]) It is therefore impossible to conclude that Bass was "just kidding" about using McConkey to convey his message to vote for guilt.

But the money possesses additional significance—because it dramatically elevated the likelihood that McConkey actually would convey Bass's message to Southworth. By sending Southworth money, Bass virtually ensured that McConkey would go back in the kitchen and say ***something*** about Bass to Southworth. McConkey indeed testified, and the referee found, that he told Southworth that Bass had instructed McConkey to split the tip with her.[89] That alone is an improper contact and message.

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[87] RT546-547.

[88] RT399.

[89] CT1084 (Report at 5); RT229.

Moreover, when Bass sent Southworth the money, he must have known that whatever McConkey told her was highly likely to include Bass's "joke" that the money was "for a guilty verdict." Had Bass merely been "joking" about passing that comment on to Southworth, he surely would have hastened to warn McConkey ***not*** to do so. But he did not. This demonstrates that Bass was not joking about getting McConkey to give Southworth both the money and the message about how to vote.

Accordingly, the referee court's "joke" findings are legally irrelevant, factually deficient, and unworthy of deference. This Court should reject them.

D. This Court should reject the referee court's finding on Question 10(a) (whether McConkey conveyed Bass's message to vote for guilt to Southworth).

Question 10(a) asked: "If Bass directed, requested or suggested that McConkey convey money to Southworth and tell her to vote guilty, did McConkey do so?"

Here is the referee court's entire answer to, and analysis of, this critical Question: "No. It is reasonable to conclude [that] Mr. McConkey shared, split the tip with Ms. Southworth, but there is ***no evidence*** Mr. McConkey conveyed the joke."[90]

The referee's terse finding lacks any basis in the record—indeed, is contradicted by all of the available evidence—and also reflects an erroneous failure to impose a proper burden of proof. This Court owes that finding no deference, and should reject it.

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[90] CT1086 (Report at 7), emphasis added.

1. The referee court's finding on Question 10 conflicts with all of the available evidence, which proves without contradiction that McConkey told Southworth that Bass had urged her to vote for guilt.

At the reference hearing, attorney Gena Rae Eichenberg testified that McConkey told her in Spring and December 1995 that he took $10 or $20 from Bass, gave the money to Southworth in the kitchen, and told Southworth that Bass had said to give her the money and to tell her to vote for a guilty verdict in the Price case.[91]

Attorney Sandra Michaels likewise testified that McConkey told her in the Spring of 1996 that he had given Southworth Bass's money and Bass's message to vote guilty.[92] She added that McConkey did not appear to be making the story up and that the conversation in which McConkey told her this was "very serious" in tone.[93]

McConkey also testified on this subject at the reference hearing—14 years after his talk with Eichenberg and 13 years after his talk with Michaels. On direct examination, McConkey testified that Bass gave him the money, told him to share it with Southworth, and told him to tell her that the money was from Bass and that it was for a guilty verdict.[94] McConkey further testified that he accepted the money from Bass and then did what Bass had told him to do.[95]

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[91] RT253-258.

[92] RT640-641; RT651; RT657; RT659; see also CT410-412at ¶¶ 4-7.

[93] RT641.

[94] RT226-229.

[95] RT229:9-13.

On cross-examination, however, McConkey retreated from that testimony and said that he no longer could recall whether he told Southworth about Bass's message to vote for guilt; but he admitted that it was possible that he had done so.[96]

Significantly, McConkey did ***not*** testify that he had lied or misspoken to Eichenberg and Michaels during their discussions in 1995-96; nor did he ever deny that he had conveyed Bass's message to vote for guilt to Southworth. Thus, McConkey's ambivalent testimony showed, at worst, that he was unsure of his present recollection on the matter; and his testimony in no way contradicted that of Eichenberg and Michaels. Accordingly, the testimony adduced at the reference hearing supported, without contradiction, the conclusion that McConkey conveyed to Southworth Bass's message to vote for guilt.

The referee court's finding that there was "**no** evidence" of this fact is therefore inexplicable—and the referee made no attempt to explain it. The referee did not, for example, find that Eichenberg and Michaels lacked credibility. Indeed, he did not refer to their testimony on this issue at all. Nor did the referee find that McConkey's 1995-96 admissions on this issue contained any disabling inconsistencies that would prevent the court from crediting them (as the referee apparently concluded in the case of McConkey's 1996-96 admissions about the drinks—see Part IV.A., above.)

Rather, the referee apparently inferred that, since McConkey testified that he had regarded Bass's statement as a "joke,"[97] McConkey

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[96] RT243-244.

[97] See referee's response to Question 9, CT1086 (Report at 7).

wouldn't have bothered to relate a mere "joke" to Southworth.

But that inference is unwarranted. Factfinders not only can, but inevitably must, draw upon their "common sense and experience" when finding facts.[98] Everyone knows that people in general—and perhaps bartenders especially—retell jokes. Indeed, that is what jokes are ***for***—nothing is more "viral" than a joke. And here, Bass specifically ***directed*** McConkey to pass on to Southworth both his money and his "joke" that the money was "for a guilty verdict."[99] Moreover, the referee repeatedly described McConkey as someone willing to recount his "good lawyer story" about Bass to others (namely, Eichenberg, Michaels, and McGlasson).[100] The referee cited no basis for assuming that McConkey would have withheld the key component of that story from its ***intended*** recipient.

In short, characterizing Bass's statement as a "joke" does nothing to alter or undermine the evidence on Question 10, which demonstrates without contradiction that McConkey conveyed to Southworth Bass's money and his message that the money was "for a guilty verdict."

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[98] *People v. Campos*, (2007) 156 Cal.App.4th 1228, 1240 [67 Cal.Rptr.3d 904] (upholding use of common sense and experience in credibility determinations).

[99] RT226-228.

[100] See CT1082-1083, CT1087 (Report at pp. 3, 4, 8).

2. The referee erroneously failed to shift the burden of proof on Question 10 to the State, whose unethical cover-up prevented petitioner from obtaining Zetta Southworth's testimony about whether McConkey told her that Bass wanted her to know that the money was "for a guilty verdict."

Petitioner's pre- and post-hearing briefs offered additional reasons—unrelated to *Remmer*—for shifting the burden of proof to the State on Reference Question 10. But the referee court refused to shift the burden of proof, although there were compelling reasons to do so.

Petitioner's burden-shifting argument proceeded as follows. Only two people—Bob McConkey and Zetta Southworth—actually witnessed what McConkey told Southworth on the night in question and therefore could have testified from direct knowledge on that subject. At the reference hearing, McConkey gave ambiguous testimony marked by a lack of recollection; and Zetta Southworth of course did not testify because she had died in 1989[101] —years before petitioner learned about the Waterfront Café incident. Therefore, the only testimony on the matter came from two witnesses (Eichenberg and Michaels) who testified about admissions that McConkey had made to them on this subject in 1995-96.[102]

Petitioner therefore argued, both before and after the hearing, that if the referee court did not find McConkey's 1995-96 admissions sufficient to answer Question 10 affirmatively, the court should shift the burden to the State to prove that McConkey did ***not*** convey Bass's money and message to Southworth. Petitioner argued that this burden-shifting was justified

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[101] RT315.

[102] See Part IV.D.1., above, for a detailed discussion of the evidence on Question 10.

because the State's own wrongdoing had prevented petitioner from securing the testimony of the other eyewitness—Zetta Southworth—before she died.

Strong legal, practical, and equitable justifications existed for shifting the burden of proof to the State on Question 10. Ron Bass, Geri Johnson, and Johnson's husband Worth Dikeman were all lawyers, and two of them were prosecutors seeking a death sentence against the petitioner. Each had an ethical duty under then-existing Rule of Professional Conduct 7-106 (now Rule 5-320(G)) to report the improper juror contact to the Court. Had they done so, it is a certainty that the defense—which already had moved unsuccessfully to excuse Southworth for cause due to her alcoholism[103] and her DUI convictions[104]—would have moved for a mistrial or, at least, would have renewed their motion to excuse Southworth on the ground that she had been tampered with. (See *Garden Grove Sch. Dist. of Orange County v. Hendler* (1965) 63 Cal.2d 141, 144-145 [45 Cal.Rptr. 313], citing Code Civ. Proc. § 605.) Even if informed about the improper contact ***after*** the verdict, the defense could have invoked Penal Code section 206 to contact Southworth and find out what really happened. (See *People v. Simms* (1994) 24 Cal.App.4th 462, 465-466 [29 Cal.Rptr.2d 436], superseded by statute as stated in *People v. Jefflo* (1998) 63 Cal.App.4th 1314, 1321, fn.8. [74 Cal.Rptr.2d 622])

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[103] Evidentiary Hearing Ex. D, pp. 9246-9247; CT458-462.

[104] Evidentiary Hearing Ex. GG (court grants pages 1-12 judicial notice without objection at RT356-357); RT328-347; Evidentiary Hearing Ex. F, p. 12295; CT473-475.

But Bass, Johnson, and Dikeman failed to notify the defense or the court at any time[105]—either at the time of the incident or on the several occasions when unusual circumstances surrounding Southworth arose (as when Bass and Dikeman stood mute while Judge Buffington questioned Southworth about her contacts with Geri Johnson). Petitioner's counsel therefore did not learn about the improper contact until about six years after Southworth's death. The State's misconduct thus deprived the defense of any ability to corroborate McConkey's admissions concerning the money and message that he conveyed to Southworth.

Under California law, this fact furnishes a sufficient basis for shifting the burden to ***the State*** to come forward with evidence that McConkey did ***not*** convey Bass's money and message to Southworth. Petitioner cited three valid grounds for invoking this procedure.

First, Evidence Code section 413 provides that, "[i]n determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's . . . willful suppression of evidence relating thereto . . . ." As the Supreme Court observed in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12 [74 Cal.Rptr.2d 248], "[c]hief among" those remedies that seek to punish and deter the intentional spoliation of evidence is this

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[105] See RT386 (Bass testifies that he could not recall ever notifying the trial court about any contact with a juror); RT485-486; RT489; RT490-491 (Dikeman testifies that he never reported to the trial court what his wife, Geri Johnson, told him about the incident); RT489-490 (Dikeman testifies same re Johnson and Bass not reporting incident to trial court); RT295-297 (Johnson recounts notifying Dikeman about the incident but not trial court; believes (incorrectly) that Dikeman or Bass may have reported the incident).

"evidentiary inference that evidence which one party has destroyed or rendered unavailable was unfavorable to that party." (*Id.* at p. 11.) The State's unethical cover-up of the Waterfront Café incident "rendered unavailable" Southworth's testimony on that subject, warranting an inference under Evidence Code section 413 that her testimony would have been unfavorable to the State.

Second, under Evidence Code section 500, when a court is determining "whether the normal allocation of the burden of proof should be altered," it considers "a number of factors: [1] the knowledge of the parties concerning the particular fact, [2] the availability of the evidence to the parties, [3] the most desirable result in terms of public policy in the absence of proof of the particular fact, and [4] the probability of the existence or nonexistence of the fact." (*Lakin v. Watkins Associated Indus.* (1993) 6 Cal.4th 644, 660-661 [25 Cal.Rptr.2d 109], bracketed numbers added.) Here, (1) the evidence about the improper juror contact was known to the State but not the defense and therefore (2) was available only to the State; (3) the most desirable result in terms of public policy is to presume that McConkey conveyed Bass's message to Southworth, as the alternative would be to execute a man whose conviction may have rested upon an egregious subversion of the criminal-justice system; and (4) there is considerable evidence, in the form of McConkey's hearing testimony[106] and consistently repeated statements in 1995-1996, that McConkey conveyed to

[106] As related in Part IV.D.1., above, McConkey initially testified that he had done what Bass asked, but later said he couldn't recall whether he'd conveyed the message.

Southworth Bass's money and message to vote for guilt (and there is no evidence that he ***didn't*** convey the money and the message). Accordingly, the referee should have shifted the burden of proof to the State under Evidence Code section 500.

Third, tort law sometimes shifts the burden of proof where the alleged negligence itself eliminated the plaintiff's ability to prove an element of his case. In *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756 [91 Cal.Rptr. 745], for example, this Court approved of shifting the burden of proof on causation to a defendant whose negligence was the reason that the accident had no living eyewitness. (See *id.* at p. 771.) Here, the case for burden-shifting is stronger than in any civil tort case, for "[w]hen a defendant's life is at stake, the [U.S. Supreme] Court has been particularly sensitive to insure that every safeguard is observed." (*Gregg*, 428 U.S. at p. 187.)

Brushing these arguments aside, the referee court refused to shift the burden of proof to the State on Question 10. As a result, although it found that McConkey split Bass's money with Southworth, it concluded that there was "no evidence" that McConkey also gave Southworth Bass's message to vote for guilt. Accordingly, the referee court's finding on Question 10 is legally unsound and this Court owes it no deference.

E. Alternatively, the Court should grant petitioner the discovery that the referee court denied, and should permit further briefing as necessary in light of the newly disclosed evidence.

Before and during the evidentiary hearing, petitioner repeatedly sought to further develop the factual record surrounding the Waterfront Café incident. Petitioner's counsel asked or moved for the following:

- Disclosure of AG files concerning juror Southworth and the incident at the Waterfront Café;[107]

- Release of sealed records from the underlying trial;[108]

- Disclosure of documents from the Humboldt County DA,[109] Probation Department,[110] and Sheriff,[111] the Napa County DA[112] and Probation Department,[113] the California Highway Patrol,[114] the Department of Motor Vehicles,[115] and the Eureka Police Department;[116]

- Admission into evidence of court records concerning Rodney Emerson's criminal history;[117]

- Permission to inspect Emerson's probation records;[118]

- Disclosure of an accordion file of documents that Bass retained from the Price trial, which he apparently located days before the evidentiary hearing;[119]

- Permission to see Dikeman's handwritten notes taken during Southworth's voir dire, which Dikeman was permitted to review privately on the stand during the reference hearing;[120] and

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[107] CT27-33; CT322-336; CT804-806.

[108] CT206-207; CT959-960.

[109] CT308-320.

[110] CT597-604.

[111] CT759-766.

[112] CT774-777.

[113] CT779-782.

[114] CT784-789.

[115] CT798-802.

[116] CT751-757.

[117] RT507.

[118] CT597-599.

[119] CT886.

[120] CT887-888.

- Permission to depose Judge Buffington.[121]

Petitioner sought this discovery because he expected it to yield evidence about what happened at the Waterfront Café, the impact that Bass's communication had on juror Southworth, and Bass's overwhelming bias against any proceeding that could impact petitioner's conviction or death sentence or bring his work or that of the Special Prosecutions Unit into disrepute. But the referee court denied each of these requests, despite their relevance.

Thus, this Court should grant the requested discovery, as well as any additional briefing that appears necessary in light of the newly disclosed evidence.

V. CONCLUSION AND REQUESTED REMEDIES

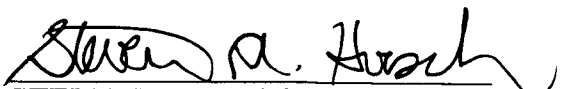
For the reasons stated above, the Court should

- reject the four challenged findings by the referee court,
- adopt the petitioner's proposed findings, submitted below and attached hereto as Exhibit B,
- grant petitioner's habeas petition, and
- either order petitioner released immediately or grant him a new trial before a jury untainted by prosecutorial misconduct.

Respectfully submitted,

Dated: January 21, 2010

KEKER & VAN NEST LLP

By: 

STEVEN A. HIRSCH
Attorneys for Petitioner CURTIS PRICE

[121] CT890.

CERTIFICATE OF WORD COUNT

PURSUANT TO CALIFORNIA RULES OF COURT 8.504(a), 8.504(d)(1) AND 8.204(c)(1)

Pursuant to California Rules of Court 8.504(a), 8.504(d)(1) and 8.204(c)(1), and in reliance upon the word count feature of the software used, I certify that the attached PETITIONER'S POST-HEARING BRIEF AND EXCEPTIONS TO THE REFEREE'S REPORT contains 11,456 words, excluding parts not required to be counted under Rule 8.204(c)(3).

Dated: January 21, 2010

Steven A. Hirsch

STEVEN A. HIRSCH

CERTIFICATE OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest, LLP, 710 Sansome Street, San Francisco, California 94111.

On January 21, 2010, I served the following document(s):

PETITIONER'S POST-HEARING BRIEF AND EXCEPTIONS TO THE REFEREE'S REPORT

by regular **UNITED STATES MAIL** by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker & Van Nest, LLP for collection and processing of correspondence for mailing. According to that practice, items are deposited with the United States Postal Service at San Francisco, California on that same day with postage thereon fully prepaid. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation date or the postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

Peter Flores
David H. Rose
Deputy California Attorneys General
455 Golden Gate Ave., #11000
San Francisco, CA 94102
Facsimile: (415) 703-1234

Clerk of the Superior Court
Humboldt County Superior Court
825 5th Street, #231
Eureka, CA 95501
For delivery to Hon. W. Bruce Watson

Curtis Floyd Price, CDC # D34425
California State Prison Corcoran
(CSP-COR)
J.D.K.M.H., HU02-B12
P.O. Box 3456
C.S.P. Corcoran, CA 93212-3456

Executed on January 21, 2010, at San Francisco, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Laura Lind

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

In re **CURTIS PRICE,** **On Habeas Corpus.**	**Case No.: CR9898** **Cal. Supreme Court No. S069685** **REPORT OF PROCEEDINGS: FINDING OF FACTS PURSUANT TO APPOINTMENT AS REFEREE**

On February 14, 2007 the Supreme Court of California directed this court to:

"[Take] evidence and make findings of fact on the following questions regarding the case of People v. Curtis F. Price (Humboldt County Sup. Ct. No CR 9898; 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 Cafe 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 Cafe, did Bass see or directly speak to Southworth? What, if anything, did he say to her?

3. While at the Waterfront Cafe, 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 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 Cafe 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."

Introduction and Background

The California Supreme Court appointed this court as referee to conduct an evidentiary hearing to answer 11 factual questions related to whether prosecutor Deputy Attorney General Ronald Bass had contact with a sitting juror during the trial in this matter.

The guilt phase of the trial took place from June 11, 1985 - June 9, 1986, the penalty phase from June 9, 1986 - July 10, 1986. Opening statements began November 12, 1985. The trial prosecutors were Deputy Attorney General Ronald Bass and Deputy District Attorney Worth Dikeman. Gerri Ann Johnson, an attorney, is Worth Dikeman's wife. Zetta Southworth, a juror in the case, was employed as a cook at a local cafe, the Waterfront Cafe. Robert McConkey was, and is, a

bartender at the Waterfront Cafe. The questions posed by the Supreme Court center on whether Mr. Bass and Ms. Johnson patronized the Waterfront Cafe during the trial, on an evening Ms. Southworth was working, and have contact, directly or through Mr. McConkey with Ms. Southworth.

The questions regarding an evening at the Waterfront arose when in 1995 Mr. McConkey asked Gina Eichenberg, an attorney who patronized the Waterfront, if she wanted to hear a "good lawyer story." Ms. Eichenberg reported the story to Petitioners' counsel at the time. Mr. McConkey later repeated the story to Petitioners' present counsel, Robert McGlasson, and Mr. McGlasson's investigator, assistant Sandra Michaels.

Ms. Southworth passed away in 1989.

The evidentiary hearing was held over a one week period. Testimony was given by:

1. Robert McConkey: Bartender at the Waterfront Cafe.
2. Gina Eichenberg: Attorney
3. Geri Ann Johnson: Attorney
4. Rodney Emerson: Juror Southworth's son
5. Peter Vodopals: Attorney
6. Ronald Bass: Deputy Attorney General, Trial Prosecutor
7. Worth Dikeman: Deputy District Attorney, Trial Prosecutor
8. Justice Michael Philan: Character witness for Mr. Bass
9. Oscar Breiling: Former DOJ investigator
10. Virginia Bass: Character witness for Mr. Bass; Mr. Bass' sister
11. Sandra Michaels: Assistant, Investigator for Petitioners' counsel Mr. McGlasson

Findings of Fact

1. (a.) During the Curtis Price trial, did then Deputy Attorney General Ronald Bass and Geri Anne Johnson together patronize the Waterfront Cafe in Eureka

on an evening when Zetta Southworth was cooking at the restaurant and Robert McConkey was tending bar?

Answer: Yes.

The parties agree, and the testimony confirms that after playing racquetball in the evening at a local facility Mr. Bass and Ms. Johnson patronized the Waterfront Cafe together, at a time when Mr. McConkey was tending bar, and Ms. Southworth cooking.

(b.) If so, on approximately what date did this occur?

Answer: During the winter of 1985 - 1986.

The exact date is uncertain but the patronizing occurred in the late fall, winter months during the guilt phase of the trial.

2. (a.) While at the Waterfront Cafe, did Bass see or directly speak to Southworth?

Answer: Yes.

Respondent agrees Mr. Bass saw and spoke to Ms. Southworth. Ms. Johnson testified Ms. Southworth brought menus to them at the bar and Mr. Bass spoke to her at that time.

(b.) What, if anything did he say to her?

Answer: Ms. Johnson testified Mr. Bass, upon seeing Ms. Southworth, held up his hands, moved away from her, telling her he could not speak to her, he had to maintain propriety.

3. (a.) While at the Waterfront Cafe, did Bass ask McConkey to take any alcoholic drinks to Southworth?

Answer: No.

The evidence does not support a finding Mr. Bass asked Mr. McConkey to take alcoholic drinks to Ms. Southworth. Mr. McConkey testified he had no recollection of drinks being sent to Ms. Southworth. Ms. Johnson and Mr. Bass testified no drinks were sent to Ms. Southworth.

In 1995, when Mr. McConkey first related his "good lawyer story" to Ms. Eichenberg, drinks being sent to Ms. Southworth were not mentioned. Later when Mr. McConkey related the story to

Mr. McGlasson a drink being sent to Ms. Southworth was a part of the story. Then when the story was related, again to Mr. McGlasson, and Ms. Michaels drinks plural being sent to Ms. Southworth were a part of the story.

Considering Mr. McConkey was under oath at the hearing and appeared to be testifying truthfully, his hearing testimony appears most accurate. Further, Mc. McConkey testified he was aware Ms. Southworth had a drinking problem, had spoken with the Waterfront owners regarding her drinking, and they prohibited her from drinking at the Waterfront.

(b.) If so, did McConkey do so?

Answer: Mr. McConkey did not take alcoholic drinks to Ms. Southworth.

(c.) If Bass did send drinks to Southworth, did he know she was an alcoholic or had an alcohol problem?

Answer: As discussed above the evidence did not establish Mr. Bass sent alcoholic drinks to Ms. Southworth. The evidence established he was aware she had a drinking problem.

4. (a.) Did Bass give McConkey any money with the direction or request that it be conveyed to Southworth?

Answer: Yes.

Mr. McConkey and Ms. Johnson testified that, when paying the bill and/or leaving a tip, Mr. Bass gave Mr. McConkey money, telling Mr. McConkey to give, or split, the money with Ms. Southworth.

(b.) If so, what amount of money?

Answer: $10 to $20

Mr. McConkey was uncertain of the exact amount of money Mr. Bass gave him as a tip. The testimony was that the tip was appropriate to the bill, Mr. McConkey testified the bill was in the range of $60 to $70.

5. (a.) If Bass gave McConkey money for Southworth, did McConkey give Southworth the money?

Answer: Mr. Bass did not give Mr. McConkey money to specifically give to Ms. Southworth. Mr. McConkey testified he shared, split tips with Ms. Southworth in the normal course of business, it is reasonable to assume then she did receive money from Mr. McConkey that came from Mr. Bass.

(b.) Did Southworth accept it?

Answer: It is reasonable to assume Ms. Southworth accepted her share of the tips that evening.

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

Answer: No.

Mr. Bass did not give Mr. McConkey money to specifically give to Ms. Southworth and convey a message.

(b.) If so, what message?

Answer: The message, as discussed below in #7, was, tell her to vote guilty.

7. (a.) Did Bass direct, request or suggest that McConkey convey money to Southworth and tell her to vote guilty in Price's trial?

Answer: Yes.

Mr. McConkey and Ms. Johnson testified Mr. Bass made the comment to Mr. McConkey, as he paid the bill and left the tip, to the effect, give her this money and tell her to vote guilty.

(b.) If so, in what tone of voice did he do so?

Answer: In a joking tone.

(c.) Did his tone, gestures and other surrounding circumstances suggest that he was serious or joking?

Answer: The manner in which the comment was made, in a conspitorial fashion with a stranger, the surrounding circumstances of alcohol consumption in a bar, and Mr. Bass having earlier stated to Ms. Southworth, "I cannot have contact with you," suggests the intent of the remark was a joke.

8. (a.) 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?

Answer: No.

The evidence does not suggest or establish Mr. Bass intended Mr. McConkey follow his suggested statement.

9. (a.) 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?

Answer: No.

Mr. McConkey and Ms. Johnson testified they believed the comment a joke.

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

Answer: No.

It is reasonable to conclude Mr. McConkey shared, split the tip with Ms. Southworth, but there is no evidence Mr. McConkey conveyed the joke.

11. (a.) Did Johnson tell her husband, Worth Dikeman, about encountering Southworth while at the Waterfront Cafe with Bass?

Answer: Yes.

The following morning Ms. Johnson told Mr. Dikeman about she and Mr. Bass encountering Ms. Southworth at the Waterfront.

(b.) If so, what did she tell Dikeman?

Answer: Ms. Johnson testified she related the events of the evening to Mr. Dikeman. Mr. Dikeman however, testified equally clearly that he was not told of any contact with Ms. Southworth.

Summary of Findings

On a late fall, winter evening in 1985, during the guilt phase of the trial, Deputy Attorney General Ronald Bass and Gerri Ann Johnson, attorney and wife of Deputy District Attorney Worth Dikeman, after playing racquetball, went together to the Waterfront Cafe in Eureka. The Waterfront

was not busy, the two patrons sat at the bar attended by Robert McConkey. Juror Zetta Southworth was cooking in the kitchen. Mr. Bass had not been to the Waterfront before.

The two ordered drinks, and were offered or inquired as to appetizers. At some point Ms. Southworth came from the kitchen area bringing menus.

Mr. Bass upon seeing Ms. Southworth recognized her as a juror, held up his hands, and said in effect, I can't have contact with you, I have to maintain propriety. Ms. Southworth left the menus, made a food recommendation, and returned to the kitchen.

The two ordered and consumed appetizers and alcoholic drinks. The bill at the end of the evening was $60 - $70.

As they were leaving and Mr. Bass paying the bill, Mr. Bass said to Mr. McConkey in a joking, conspitorial manner, "give this, or split this, money with Zetta, and tell her to vote guilty." The three, Mr. Bass, Mr. McConkey, and Ms. Johnson, then laughed and Mr. Bass and Ms. Johnson left the cafe. The tip was in the range of $10 - $20.

The following morning Ms. Johnson related the encounter with Ms. Southworth to Mr. Dikeman.

Ten years later Mr. McConkey relates, possibly for the first time, his good lawyer story to Ms. Eichenberg. As Mr. McConkey later related the story to Mr. McGlasson and Ms. Michaels, added was Mr. Bass going to the Cafe and asking whether Ms. Southworth was working, and in the sending of drinks to her in the kitchen.

Dated: August 20, 2009

W. Bruce Watson, Judge of the Superior Court

STATE OF CALIFORNIA,)
COUNTY OF HUMBOLDT) SS. AFFIDAVIT OF SERVICE BY MAIL

I, _____, say:

That I am a citizen of the United States, over 18 years of age, a resident of the County of Humboldt, State of California, and not a party to the within action; that my business address is Humboldt County Courthouse, Eureka, California; that I served a true copy of the attached REPORT OF PROCEEDINGS: FINDING OF FACTS PURSUANT TO APPOINTMENT AS REFEREE by placing said copies in the attorney's mail delivery box in the Court Operations Office at Eureka, California on the date indicated below, or by placing said copies in envelope(s) and then placing the envelope(s) for collection and mailing on the date indicated below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Eureka, California in a sealed envelope with postage prepaid. These copies were addressed to:

Michael Millman, CA Appellate Project, 101 Second St., Suite 600, San Francisco, CA 94105
Humboldt County District Attorney, Box #64, Court Ops
Robert L. McGlasson, Attorney at Law - Via Fax: (404) 373-9338
Peter Flores, Deputy Attorney General - Via Fax: (415) 703-1234

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 24 day of August 2009, at the City of Eureka, County of Humboldt, State of California.

KERRI L. KEENAN, Clerk of the Court

By c.a. Debra K. Rogers
Deputy Clerk

EXHIBIT B

FAX FILE

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Attorneys for CURTIS PRICE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF HUMBOLDT

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff/Respondent,

v.

CURTIS PRICE,

Defendant/Appellant.

IN RE CURTIS PRICE

On Habeas Corpus.

Humboldt Superior Court No. CR9898

(Cal. Supreme Court No. S069685)

PETITIONER'S PROPOSED "REPORT OF PROCEEDINGS PURSUANT TO APPOINTMENT"

Judge: Hon. W. Bruce Watson

On August 21, 1997, petitioner Curtis F. Price filed a petition for writ of habeas corpus in the California Supreme Court raising, among other things, a claim that his conviction and sentence of death, rendered in 1986, were unconstitutional and must be reversed due to jury tampering in violation of *Remmer v. United States* (1954) 347 U.S. 227, and related precedents.[1] Petitioner allegedly did not discover the facts underlying his *Remmer* claim until late 1995. The affected juror, Zetta Southworth, died in 1986.

On February 14, 2007, the California Supreme Court ordered the Presiding Judge of this Court to appoint a judge as referee to "take evidence and make findings of fact" on 11 questions concerning the alleged jury-tampering incident. On March 14, 2007, the Presiding Judge appointed the undersigned judge to serve as referee. The Supreme Court ordered that the referee prepare and submit to the Supreme Court "a report of the proceedings conducted pursuant to this appointment, the evidence adduced, and the findings of fact made." This is that report.

I. PROCEEDINGS CONDUCTED PURSUANT TO SUPREME COURT'S APPOINTMENT

The Court held hearings in this matter on March 30 and on April 6-10, 2009.

The People were represented by Deputy Attorney General Peter E. Flores, Jr.

Petitioner Curtis F. Price was represented by Robert L. McGlasson of McGlasson & Associates, PC, Decatur, Georgia, and by Jan N. Little, Asim Bhansali, Steven P. Ragland, and Caitlin E. Bales of Keker & Van Nest, LLP, San Francisco, California.

Before the hearing, both sides filed extensive briefing on procedural and evidentiary issues.

During the hearing, the Court heard live testimony by 11 witnesses:

- **Robert McConkey**, who tended bar at the Waterfront Café in Eureka on the night of the incident in question.
- **Gena Rae Eichenberg**, a local attorney with whom McConkey discussed the incident in 1995.

[1] See Petition for Writ of Habeas Corpus by a Person in State Custody, filed Apr. 21, 1997, ¶¶ 336-338, at pp. 143-144.

- **Geraldine Anne Johnson**, who accompanied Deputy Attorney General Ronald Bass to the Waterfront Café on the night of the incident.
- **Rodney Emerson**, son of Zetta Southworth, the juror involved in the incident.
- **Peter Vodopals**, who represented Ms. Southworth in her probation-revocation proceedings during the Price trial.
- **Ronald Bass**, former Deputy Attorney General and co-prosecutor in the Price case, who accompanied Ms. Johnson to the Waterfront Café on the night of the incident and who allegedly sought to communicate improperly with juror Southworth.
- **Worth Dikeman**, Ms. Johnson's husband and Mr. Bass's colleague and co-prosecutor in the Price case.
- **Michael Phelan**, retired Presiding Justice of the First District Court of Appeal, a character witness for Mr. Bass.
- **Oscar Breiling**, retired agent in the Special Prosecutions Unit, California Department of Justice, a character witness against Mr. Bass.
- **Virginia Bass**, Mayor of Eureka, California, sister of Mr. Bass, and character witness for him.
- **Sandra Michaels**, an attorney retained as an investigator by petitioner's habeas counsel, with whom McConkey discussed the incident in 1996.

After the hearing, both sides filed post-hearing briefs summarizing the record as they viewed it, and also filed replies to each other's post-hearing briefs.

The Court, having read and considered all the briefs and having heard and considered all the evidence and argument submitted by the People and by the petitioner, now makes the following findings.

II. Evidence Adduced and Findings of Fact

A. Allocation of the burden of proof

Price's habeas petition cited *Remmer v. United States* (1954) 347 U.S. 227, and framed the juror-tampering issue as a *Remmer* claim.[2] Basing the claim on *Remmer* has procedural ramifications for this Court's factfinding under the Supreme Court's reference order. Specifically, the burden of proof on the 11 reference questions is dictated by *Remmer* and its progeny—including several state-habeas decisions by the California Supreme Court. (See *In re Hamilton* (1999) 20 Cal.4th 273, 295-296; *In re Marshall* (1990) 50 Cal.3d 907, 950-51; *In re Stankewitz* (1985) 40 Cal.3d 391, 402.) These cases have effectively constitutionalized the burden of proof for jury-tampering claims.

In *Remmer*, the United States Supreme Court held that, "[i]n a criminal case, ***any*** private communication, contact, or tampering directly or indirectly, with a juror during trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." (*Remmer v. United States* (1954) 347 U.S. 227, 229, emphasis added.) Once the petitioner proves that such a "private communication, contact, or tampering" occurred, "the burden rests heavily upon the [State] to establish . . . that such contact with the juror was harmless to the defendant." (*Ibid.*)

Like federal courts, the California Supreme Court applies a presumption of prejudice in jury-tampering cases. As that court wrote in *Hamilton*, "[m]isconduct by a juror, or a nonjuror's tampering contact or communication with a sitting juror, usually raises a rebuttable ***'presumption' of prejudice***. . . . This presumption aids parties who are barred by statute from establishing the actual prejudicial effect of the incident under scrutiny[3] . . . and accommodates the fact that the external circumstances of the incident are often themselves reliable indicators of underlying bias . . . ." (*In re Hamilton, supra*, 20 Cal.4th at p. 295, emphasis added.)

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[2] See Petition for Writ of Habeas Corpus by a Person in State Custody, filed Apr. 21, 1997, ¶¶ 336-338, at pp. 143-144; First Amended Petition for Writ of Habeas Corpus, Vol. I., filed Aug. 31, 2006, ¶¶ 457-458, at pp. 219-220.

[3] The *Hamilton* court was referring to the fact that Evidence Code section 1150, subdivision (a), bars admission of evidence to show the effect of an allegedly prejudicial statement or conduct upon a juror's vote or thinking.

The California Supreme Court has observed that the "prejudice" analysis in a jury-tampering case is "different from, and indeed less tolerant than, 'harmless-error analysis' for ordinary error at trial" because "[a]ny deficiency that undermines the integrity of a trial . . . introduces the taint of fundamental unfairness and calls for ***reversal without consideration of actual prejudice.***" (*In re Marshall* (1990) 50 Cal.3d 907, 951, emphasis added.) Accordingly, "[w]hen the misconduct in question supports a finding that there is a substantial likelihood that at least one juror was impermissibly influenced to the defendant's detriment, we are compelled to conclude that the integrity of the trial was undermined: under such circumstances, we cannot conclude that the jury was impartial." (*Ibid.*) This presumption of prejudice is "even stronger in the context of a capital case." (*Stankewitz, supra*, 40 Cal.3d at p. 402).

The presumption of prejudice may be rebutted "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." (*Hamilton, supra*, 20 Cal.4th at p. 296, emphasis in original.) The California Supreme Court has referred to the State's rebuttal burden as a "heavy" one. (*Stankewitz, supra*, 40 Cal.3d at p. 402).

For reasons explained in Parts II.B. and C., the Court finds as a purely factual matter that petitioner carried his initial burden of proving that a private communication, contact, or tampering occurred about the matter pending before the jury. Accordingly, the Court finds that the State had the burden of proving any other facts offered to rebut the presumption of prejudice. Questions eliciting such facts are asterisked in Part II.C., below.[4] The Court acknowledges that it will be up to the Supreme Court ultimately to determine whether facts proven by the State are sufficient to rebut the presumption of prejudice.

[4] The Court was not asked to, and does not, opine on whether the asterisked questions are material to the *Remmer* inquiry, but notes that petitioner maintains that they are not. Specifically, petitioner claims that his *Remmer* claim does not depend upon whether Bass spoke in a joking tone (Question 7(b)), what Bass subjectively intended (Questions 7(c) and 8), or what McConkey subjectively believed that Bass intended (Question 9).

B. Summary of factual findings

The evidence adduced at the reference hearing established all of the following facts:

[1] The improper jury contact occurred one evening in the winter of 1985-86, when Deputy Attorney General Ron Bass and his colleague Worth Dikeman were trying the guilt phase of the capital case against petitioner Curtis Price. That evening, Bass patronized the Waterfront Café in Eureka with Dikeman's wife, attorney Geri Ann Johnson. Price juror Zetta Southworth was working in the kitchen. Robert McConkey was tending bar.

[2] Over the next 90 minutes, Bass and Johnson had drinks and appetizers. The weight of the evidence is that Bass had McConkey take at least two drinks back to Southworth, although he knew that she was both a juror in the Price case and a severe alcoholic. Southworth was especially vulnerable to illicit prosecutorial influence because her son was on probation in Humboldt County at the time (a fact that she tried to hide by lying during voir dire) and because of her own DUI arrests during the Price trial.

[3] Before Bass and Johnson left, Bass gave McConkey $10 or $20 as a tip and told him to "split this [money] with Zetta" and tell her that it was "for a guilty verdict." McConkey certainly delivered Bass's money to Southworth, and the weight of the evidence is that he delivered Bass's message to her as well.

[4] The next day, Johnson told her husband, Worth Dikeman, about the incident, including the facts that Bass had asked McConkey to give Southworth money and a message to vote for guilt. Of the three lawyers involved in the incident, however—Bass, Dikeman, and Johnson—none ever notified the trial court or defense counsel about it.

C. Evidentiary Record and Findings of Fact

For the sake of clarity, the Court separately summarizes the evidentiary record and findings of fact under headings corresponding to each subpart of each Reference Question.

1. (a) **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?**

Answer: Yes. McConkey testified that, one evening during the Price trial when he and Southworth were working at the Waterfront Café,[5] Bass and Johnson entered the Café after playing racquetball together.[6] They ordered two or three drinks[7] and some appetizers.[8] They stayed for roughly 1-1/2 hours.[9] At some point, en route to the restroom, one of them spotted Southworth working in the kitchen and recognized her as a juror.[10]

Johnson testified that, one evening during the Price trial, after playing racquetball together, she and Bass went to the Waterfront Café and ordered drinks. McConkey asked if they wanted to order food. When they said that they did, a woman came out with menus. Bass later identified the woman as Zetta Southworth, a juror in the Price case.[11]

Further corroboration of the incident came from Southworth herself on April 2, 1986, during the Price trial. On that date, she was questioned by Judge Buffington outside the jury's presence about the fact that she had been observed leaving the courtroom and then embracing and talking to Geri Johnson, who stood outside.[12] Southworth admitted that Johnson had come to her workplace one evening during the trial and that the two of them had "got acquainted and

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[5] 47. All free-standing footnoted numbers (e.g., "47") refer to the consecutively numbered transcript of the reference hearing.

[6] 42-43, 58.

[7] Two apiece, according to Johnson. 131.

[8] 58-60.

[9] 58-59.

[10] 63 ("I think one of them went into the bathroom. You have to go right by the kitchen and I think they recognized her as . . . being a juror.").

[11] 127-30; 138; Ex. K.

[12] Ex. H.

talked," though not about legal matters.[13] She also admitted knowing that Johnson was prosecutor Worth Dikeman's wife.[14]

Prosecutor Ron Bass admitted that, during the Price trial, he and Johnson patronized a "local tavern" on an evening when a Price juror was working in the kitchen.[15]

(b) If so, on approximately what date did this occur?

Answer: During the trial's guilt phase, during the winter of 1985-86.

The guilt phase of the Price trial took nearly a year, from June 11, 1985-June 9, 1986, while the penalty phase took about a month, from June 9, 1986-July 10, 1986. Because voir dire took several months, opening statements did not begin—and the trial accordingly did not get underway—until November 12, 1985.

Johnson testified that the incident took place one evening[16] after December 2, 1985,[17] indicating that it occurred during the guilt phase, after the trial had gotten underway. Johnson also testified that Bass put two twenties down, slid them across the bar to McConkey, leaned over "conspiratorially," and told McConkey, "[G]ive one of the twenties to Zetta and tell her to vote guilty," or something like that.[18] A juror votes "guilty" in the guilt phase of a capital trial, not in the penalty phase.

Consistent with Johnson's account, McConkey testified that the improper contact occurred on a winter evening during the Price murder trial. He testified that it must have been during the winter because the bar was slow that night and winter is when the bar tends to be slow.[19] This statement, too, places the improper contact during the guilt phase, during the winter of 1985-86.

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[13] Ex. H, p. 18921.

[14] Ex. H, p. 18921.

[15] Ex. L, ¶¶ 2-4; 218-19, 221-23.

[16] 125.

[17] 129-30 (Johnson acknowledged that the incident occurred after the start of crab season, which began on December 2nd in those days).

[18] 140.

[19] 43, 47-48.

2. (a) **While at the Waterfront Café, did Bass see or directly speak to Southworth?**

Answer: Yes. Johnson testified that Bass saw and spoke directly to Southworth. See response to Question 2(b), below.[20]

Bass testified that he had no recollection whether he saw Southworth, but that it was possible.[21] He also vouched for Johnson's "great memory" of the Waterfront Café incident.[22]

(b) What, if anything, did he say to her?

Answer: According to Johnson, McConkey asked if they wanted to order food. When they said that they did, a woman came out with menus. Bass later identified the woman as Zetta Southworth, a juror in the Price case. When Bass saw Southworth, he jumped up from his barstool, held up his hands as if he were being arrested,[23] went behind Johnson, and said something like, "I can't talk to you. I've got to maintain propriety." Southworth gave them menus and recommended that they order crab fritters. Then she retreated to the kitchen. Johnson said that she did not see Southworth again that evening,[24] but admitted that, from the kitchen, Southworth could have viewed the area of the bar where Johnson and Bass were sitting.[25]

Bass did not recall his exchange with Southworth but testified that "[i]t sounds like something that I would say."[26] He also vouched for Johnson's "great memory" of the Waterfront Café incident.[27]

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[20] 128-29.

[21] 224.

[22] 247.

[23] At the hearing, Johnson said that he held up his hand "like this," 129, but her declaration clarifies that he held up his hands "as if he were being arrested." Ex. K.

[24] 127-30; Ex. K.

[25] 127; see also 57 (McConkey); Ex. LL.

[26] 222.

[27] 247.

3. (a) **While at the Waterfront Café, did Bass ask McConkey to take any alcoholic drinks to Southworth?**

Answer: Although the evidence is disputed, the weight of the evidence is that he did. Local attorney Gena Rae Eichenberg testified that, in December 1995, McConkey told her and Price habeas counsel Robert McGlasson that Bass had asked him to take drinks to Southworth that evening.[28] Price investigator and attorney Sandra Michaels[29] likewise testified that, in Spring 1996, McConkey told her that Bass asked McConkey to take more than one drink back to Southworth, and that McConkey did so.[30] At the hearing 14 years later, however, McConkey no longer could recall whether Bass had asked him to take drinks back to Southworth.[31]

Johnson testified that, to the best of her knowledge, Bass did not send Southworth drinks that evening.[32] But she acknowledged that she may have visited the restroom at some point, leaving Bass alone with McConkey at the bar.[33] Her testimony on this point therefore is not inconsistent with that of Eichenberg and Michaels.

Bass did not recall any details of the Waterfront Café incident, except that he and Johnson went to "a local tavern" after playing racquetball; that they had appetizers and drinks; and that he found out that a sitting juror was working in the kitchen.[34] Given his lack of memory, his testimony is also not inconsistent with that of Eichenberg and Michaels.

(b) **If so, did McConkey do so?**

Answer: Yes. See response to Question 3(a), above.

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[28] 95-96; 112.

[29] 470.

[30] 481-82.

[31] 83-84. More specifically: McConkey testified on direct examination that he did not recall Bass's "sharing" a drink with Southworth "in the kitchen." 67. On cross-examination, McConkey testified that it was "not uncommon" for people to send drinks back to people they knew working in the kitchen, but that it would have been "unusual" for him to take drinks back to Zetta given her drinking problem. 79-80. On redirect, McConkey testified that Zetta had been sent drinks on other occasions; that he "doubt[ed]" that it was possible that Bass had sent her drinks that evening; but that he just didn't recall. 83-84.

[32] 138-39.

[33] 151.

[34] Ex. L, ¶¶ 3-5; 209-19; 221-27.

(c) If Bass did send drinks to Southworth, did he know she was an alcoholic or had an alcohol problem?*

Answer: Yes. Zetta Southworth's drinking problem was notorious. Indeed, her alcoholism undermined her independence and became an ongoing issue during the Price trial.

On October 28, 1985, while jury selection was still underway in the Price trial, one of Price's lawyers, Anna Klay, informed the Court that she had learned that Southworth had a severe drinking problem.[35] The defense urged the court to excuse Southworth from jury service.[36] The source of Klay's information was Jennifer Tyrrell, a court reporter at the Price trial and a neighbor of Southworth's. Tyrrell had told Klay that Southworth appeared to be drunk whenever Klay saw her.[37] A short time later, Tyrrell testified outside the jury's presence that she had lived next door to Southworth for 14 months and had seen her once or twice a week, and that Southworth rarely was sober, even in the middle of the day.[38] Tyrrell testified that Southworth usually had difficulty walking or talking; that her speech generally was heavily slurred; and that Tyrrell had had to help Southworth up the stairs once when Southworth visited her home.[39] Bass cross-examined Tyrrell at this hearing during the Price trial and therefore was entirely aware of Southworth's alleged drinking problem well before he visited the Waterfront Café with Geri Johnson.[40]

The defense renewed its objections to Southworth's jury service following this revelation.[41] In arguing for her retention as a juror, Bass's co-counsel, prosecutor Worth Dikeman, did ***not*** argue that Southworth was not an alcoholic; rather, he argued that whatever Southworth did on her own time after court hours did not reflect on whether she would be drunk

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[35] Ex. D, p. 9246.
[36] Ex. D, pp. 9246-47.
[37] Ex. D, pp. 9246-47.
[38] Ex. E, pp. 9265-67.
[39] Ex. E, pp. 9266-67.
[40] Ex. E, pp. 1680-81.
[41] Ex. E, p. 1681.

at trial.[42] Judge Buffington ultimately denied the defense motion to excuse Southworth for cause,[43] apparently crediting Southworth's false testimony that she had no alcohol problem[44] as well as her reassurances that, in the court's words, she wasn't "going to be inebriated . . . either at home or in court to such a degree that [she wouldn't] be able to pay attention . . . in court[.]"[45]

The sworn reassurances soon were disproved. Twice in a single week in late December of 1985, while serving as a juror in the Price trial, Southworth was arrested for driving under the influence of alcohol.[46] She was convicted of each charge in separate proceedings in January, 1986. On January 6, 1986, prosecutor Dikeman reported Southworth's first DUI conviction to Judge Buffington, who nevertheless kept her on the jury over defense objections.[47]

Southworth was able to remain physically present on the jury instead of going to jail because the DUI court suspended her sentence for the first conviction.[48] After her second conviction, she was placed on probation.[49] But when she violated the probation terms by failing to attend the "Lucky Deuce" treatment program,[50] her probation was not revoked. Instead, her probation-revocation hearing was continued until after the Price trial, and she was given another chance to attend the Lucky Deuce.[51]

Thus, it is clear that—beginning during jury selection in the fall of 1985 and continuing thereafter—Bass knew or should have known that Southworth was an alcoholic. Since Bass's improper contact occurred after jury selection, during the winter of 1985-86, Bass must have known that Southworth was an alcoholic when he sent Southworth drinks and money and urged

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[42] Ex. E, pp. 9269-70.

[43] Defense counsel argued that keeping Southworth on the jury posed unacceptable risks of absence, of being intoxicated during the testimony, and of memory loss. Ex. E, pp. 9269-71.

[44] Ex. E, pp. 9277-78.

[45] Ex. E, p. 9277.

[46] Ex. GG (court grants pages 1-12 judicial notice without objection at 193-94); 165-84.

[47] Ex. F, p. 12295; Ex. G, pp. 1254-55.

[48] Ex. GG, p. 4; Ex. F, pp. 12297-98.

[49] Ex. GG, pp. 5-9; 176-81.

[50] Exh. GG, pp. 10-12.

[51] Ex. I, pp. 22649-50; Ex. GG, p. 11.

her to vote for guilt.

Besides her alcoholism, Southworth had other reasons to be peculiarly susceptible to Bass's attempt to influence her. Petitioner's post-conviction investigations revealed that Southworth lied in voir dire when asked whether she or any close friend or relative ever had been involved in a criminal case, either as a victim, defendant, or witness. Southworth answered "no" in her sworn voir dire questionnaire and again orally in open court while under oath.[52] But she knew that her answers were false in two significant respects.

First, Southworth herself had been convicted at least twice for passing bad checks in North Carolina in the 1970s.[53]

Second, Southworth knew that her son, Rodney Lee Emerson, had an extensive criminal record and was on probation in the Humboldt County penal system during the trial.[54] Specifically, Southworth knew, but failed to disclose in voir dire, that Rodney had been convicted of breaking and entering and larceny in North Carolina in 1972[55] and that he had been convicted of transporting marijuana in California in 1984.[56]

Thus, on the evening that Bass sent her drinks and money and told her to vote guilty, Southworth was an alcoholic whose son who was under the control of the Humboldt County justice system. Southworth would have been hard-pressed to ignore Bass's improper suggestion. Therefore, sending drinks to Southworth and telling her how to vote was an attempt to exploit a juror's known physical, mental, and legal vulnerabilities to influence her vote on guilt in a capital case.

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[52] See Ex. U, p. 36, answer to Question 18; Ex. C, p. 9028.

[53] Ex. NN.

[54] 154; 157-59; 163.

[55] 154; 157; 163.

[56] 157-58; 163.

4. (a) **Did Bass give McConkey any money with the direction or request that it be conveyed to Southworth?**

Answer: Yes. McConkey testified that, just before leaving the Waterfront Café, Bass paid the bill,[57] which totaled around $60 to $70.[58] He also handed McConkey $10 or $20 and instructed McConkey to "split this [money] with Zetta" and tell her that it was "for a guilty verdict."[59] Eichenberg testified that McConkey gave her a similar account in Spring and December 1995,[60] and Michaels testified that McConkey gave her a similar account in the Spring of 1996.[61] Johnson likewise testified that, as she and Bass prepared to leave, McConkey gave them the check. The bill was for more than $20. Bass put two twenties down, slid them across the bar to McConkey, leaned over "conspiratorially," and told McConkey, "[G]ive one of the twenties to Zetta and tell her to vote guilty," or something like that.[62] McConkey took the money, turned around to the cash register behind him, got change, and gave it to Bass, who then left the tip.[63]

Bass did not recall any details of the Waterfront Café incident, except that he and Johnson went to "a local tavern" after playing racquetball; that they had appetizers and drinks; and that he found out that a sitting juror was working in the kitchen.[64] But he vouched for Johnson's "great memory" of the Waterfront Café incident[65] and testified that he always has had "a serious problem."[66] Given his lack of memory, his testimony is not inconsistent with that of McConkey, Eichenberg, and Michaels.

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[57] 63-64.
[58] 60.
[59] 64-65.
[60] 90-95.
[61] 471-74; 485; 491; 493; see also Ex. J, ¶¶ 4-7.
[62] 140.
[63] 131-32; 140-41.
[64] Ex. L, ¶¶ 3-5; 209-19; 221-27.
[65] 247.
[66] 301.

(b) If so, what amount of money?

Answer: $10 or $20, in 1986 dollars.[67]

5. (a) If Bass gave McConkey money for Southworth, did McConkey give Southworth the money?

Answer: Yes. McConkey testified that he gave Southworth the money and told her that Bass had instructed him to split the tip money with her.[68] Eichenberg testified that McConkey told her in Spring and December of 1995 that he had done what McConkey asked,[69] and Michaels testified that McConkey told her the same thing in the Spring of 1996.[70]

(b) Did Southworth accept it?*

Answer: Yes. McConkey testified that he shared the tip with Southworth.[71] Eichenberg testified that McConkey told her in Spring and December of 1995 that he had done what Bass asked,[72] and Michaels testified that McConkey told her the same thing in the Spring of 1996.[73]

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

Answer: Yes. See response to Question 6(b), below.

(b) If so, what message?

Answer: As previously mentioned, McConkey testified that Bass handed him $10 to $20 and instructed McConkey to "split this [money] Zetta" and tell her that it was "for a guilty verdict."[74] Eichenberg testified that McConkey told her a similar account in Spring and December of 1995.[75] Michaels testified that McConkey told her a similar account in the Spring

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[67] 64-65 (McConkey); see also 131-32 & Ex. K (Johnson states that Bass gave McConkey two twenties as a tip and told him to give one to Zetta).

[68] 66.

[69] 90-95.

[70] 469-74; 485; 491; 493; see also Ex. J, ¶¶ 4-7.

[71] 66.

[72] 90-95.

[73] 469-74, 485, 491, 493; see also Ex. J, ¶¶ 4-7.

[74] 64-65.

[75] 95-97.

of 1996.[76] Johnson likewise testified that Bass put two twenties down, slid them across the bar to McConkey, leaned over "conspiratorially," and told McConkey, "[G]ive one of the twenties to Zetta and tell her to vote guilty," or something like that.[77]

Bass did not recall this,[78] but vouched for Johnson's "great memory" of the Waterfront Café incident[79] and testified that he always has had "a serious memory problem."[80] Given his lack of memory, his testimony is not inconsistent with that of McConkey, Eichenberg, and Michaels.

7. **(a) Did Bass direct, request or suggest that McConkey convey money to Southworth and tell her to vote guilty in Price's trial?**

Answer: Yes. See response to Question 6(b), above.

(b) If so, in what tone of voice did he do so?*[81]

Answer: The weight of the evidence suggests that Bass deliberately couched his misconduct in a "joking" tone. But the evidence on this point is in conflict. Indeed, at least two items of evidence cast doubt on whether Bass used a "joking" tone.

First, Eichenberg testified that, on the two occasions in 1995 when McConkey related the story to her, he did ***not*** say that Bass behaved jokingly. Rather, McConkey regarded the incident as "weird" or "odd."[82]

Second, Michaels testified that, when she interviewed McConkey in Spring 1996, McConkey didn't mention the "joking" aspect until she asked him whether he had carried out

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[76] 474.

[77] 140.

[78] 226.

[79] 247.

[80] 301.

[81] See discussion of asterisked questions at Part II.A., above. The Court takes no position on petitioner's contention that this question is legally and factually irrelevant because no "joking tone" on Bass's part can redeem his improper communication with Southworth. (See *Remmer v. United States* (1954) 347 U.S. 227, 228-30 [indicating that prejudice could occur even if offer to bribe juror was made "in jest"]). This legal issue lies outside the scope of the Supreme Court's reference order.

[82] 118-19.

Bass's requests. At that point, "like a light going off in his head," McConkey appeared to realize that "this was a serious situation" and seemed to become "uncomfortable that he had been a go-between the prosecution and a juror."[83] McConkey then shifted gears and told Michaels that he "'thought [Bass] was just kidding and didn't really mean for [Southworth] to vote guilty.'"[84] The conversation then ended.[85] Michaels concluded that McConkey "clearly at the end became uncomfortable that this [conversation with her] had turned into an interview and that he'[d] involved himself into a situation."[86] Michaels explained that "Mr. McConkey was concerned that he was now involved in a case with people that he lived in town with and people that frequented the restaurant that he managed and I think he was trying to distance himself from the situation by saying that he thought Bass was just kidding around."[87]

But other evidence suggests that Bass cloaked his misconduct in a "joking" tone. McConkey testified that Bass was laughing and smiling when he instructed McConkey to give Southworth the money and the message to vote for guilt,[88] and that McConkey had believed that Bass was joking.[89] McConkey testified that Johnson also was laughing.[90] Johnson testified that she, Bass, and McConkey all laughed[91] when Bass made the remark to McConkey, and that all three viewed the remark as a joke.[92] Worth Dikeman testified that Johnson related the incident to him as something that she deemed funny. She prefaced the story with the remark, "I thought I'd die," which she often used to introduce funny stories.[93] Dikeman testified that he likewise

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[83] 483.

[84] 483.

[85] 486-87.

[86] 483; see also 486-87.

[87] 490; see also 492-93. Michaels' testimony was consistent with Eichenberg's testimony that McConkey became upset when he realized that his story could result in the community's blaming him for helping Price. 98-99, 114-15.

[88] 65-66.

[89] 65-66; 80; 82-83.

[90] 66.

[91] 140; 147.

[92] 142; 147.

[93] 311-12.

found Bass's statement to McConkey funny and that it had caused him no concern because he "didn't think it involved any contact between Mr. Bass and Zetta Southworth."[94] Dikeman viewed Bass's remark as the type of "gallows humor" that "helped keep us sane" while seeking the death penalty for Price.[95] Bass testified that he is a person who "just joke[s] around a lot" and who always has felt the urge, when he walks into a room, to "do whatever I have to do" to "make everybody happy."[96] He observed that there are "very few things that are not capable of being funny or . . . made fun of" to make things "more interesting."[97]

(c) Did [Bass's] tone, gestures and other surrounding circumstances suggest that he was serious or joking?*[98]

Answer: At least two "surrounding circumstances" demonstrate that Bass was serious about using McConkey to communicate improperly with, and influence, Southworth.

[i] Bass's experience and knowledge of legal and ethical norms. The most compelling "surrounding circumstance" is that Bass was an experienced prosecutor, and an attorney with well-defined legal and ethical duties, who knew full well that it is improper to have any but the most brief, attenuated, and unplanned contact with a sitting juror—let alone a juror in a capital case. By the time of the Waterfront Café incident, Bass had worked in the Contra Costa District Attorney's office for 10 years and in the Attorney General's office for five years.[99] He already had tried two capital cases.[100] And his testimony showed that he well understood the rules governing lawyer-juror contacts:

> Q. When you run into—as a trial lawyer when you run into a juror outside of a courtroom, what's your practice generally?
>
> A. Nod your head and walk off.

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[94] 312-13.
[95] 320.
[96] 300-01.
[97] 302.
[98] See discussion of asterisked questions at Part II.A., above.
[99] 237-38.
[100] 239.

Q. Why is that?

A. You don't want to be talking to jurors. You don't want to have anyone see you talking to jurors. Everyone knows that you're not supposed to—well, the judge admonishes everybody in the courtroom before the trial, during the trial, and they all know it as well.

So usually it is no problem. You'll see them and you might nod your head and go your way, but you don't stop and talk and say how's the trial going or anything like that. It's not done.[101]

Indeed, Johnson testified that, when Southworth came out of the kitchen to deliver the menus, Bass jumped out of his chair, raised his hands, and told her that he could not speak to her because he had to maintain "propriety."[102] Bass's co-prosecutor, Worth Dikeman, testified that he routinely reports even accidental contacts with a juror to the court or the defense.[103] And Mr. Bass's own character witness, former appellate Justice Michael Phelan, conceded that he would have "misgivings" about, and would "reconsider," his good opinion of Bass if Bass sent Southworth a tip with the message to vote guilty.[104] Thus, the Court finds it incredible that Bass could have violated these norms unintentionally, or without understanding the gravity of his conduct.

(ii) Bass's sending Southworth money. The pertinent "surrounding circumstances" include the fact that Bass sent Southworth money along with the message to vote for guilt. This act—in and of itself—displayed a flagrant disregard for the normal rules governing juror contacts. (It also was inconsistent with Bass's own normal practice in restaurants—he admitted that it would be "unusual" to send money back to a cook.[105]) It is therefore impossible to conclude that Bass was "just kidding" about using McConkey to convey his message to vote for guilt.

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[101] 220.

[102] 138.

[103] 322.

[104] 381-82.

[105] 236.

But the tip possesses additional significance because it dramatically elevated the likelihood that McConkey actually would convey Bass's message to Southworth. By sending Southworth a tip, Bass virtually ensured that McConkey would go back in the kitchen and say *something* about Bass to Southworth. McConkey indeed testified that he told Southworth that Bass had instructed him to split the tip with her.[106] That alone is an improper contact and message. Moreover, when Bass sent Southworth the tip, he must have known that whatever McConkey told her was highly likely to include Bass's "joke" about voting for guilt. Had Bass merely been "joking" about passing that comment on to Southworth, he surely would have hastened to warn McConkey not to do so. But he did not. This demonstrates that Bass was not joking about getting McConkey to give Southworth both the money and the message about how to vote.

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?*[107]

Answer: Yes. See response to Question 7(c), above.

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?*[108]

Answer: Yes. As discussed in the response to Question 10, below, McConkey gave Southworth the money and the message to vote guilty. Since McConkey did not think up these activities himself, the only reasonable inference is that he was doing what he thought Bass wanted him to do. Although McConkey testified that he had believed that Bass was joking,[109] McConkey's actions show that he believed that Bass wanted him to convey both the money and the purported "joke" to Southworth.

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[106] 66.

[107] See discussion of asterisked questions at Part II.A., above.

[108] See discussion of asterisked questions at Part II.A., above.

[109] 65-66, 80, 82-83.

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

Answer: Yes. Eichenberg testified that McConkey told her in Spring and December 1995 that he took $10 or $20 from Bass, gave the money to Southworth in the kitchen, and told Southworth that Bass had said to give her the money and to tell her to vote for a guilty verdict in the Price case.[110] Michaels likewise testified that McConkey told her in the Spring of 1996 that he had given Southworth Bass's money and Bass's message to vote guilty.[111] She added that McConkey did not appear to be making the story up and that the conversation in which McConkey told her this was "very serious" in tone.[112]

At the hearing (13 years after his talk with Michaels), McConkey testified that Bass gave him the money, told him to share it with Southworth, and told him to tell her that the money was from Bass and that it was for a guilty verdict.[113] McConkey further testified that he accepted the money from Bass and then did what Bass had told him to do.[114] Later, during cross-examination, McConkey said that he no longer could recall whether he told Southworth about Bass's message to vote for guilt; but he admitted that it was possible that he had done so.[115] Thus, McConkey's testimony was not inconsistent with that of Eichenberg and Michaels.

11. (a) Did Johnson tell her husband, Worth Dikeman, about encountering Southworth while at the Waterfront Café with Bass?

Answer: Yes. Johnson testified that, the next morning, she told her husband, Worth Dikeman, about encountering Southworth at the Waterfront Café with Bass.[116] Dikeman confirmed that Johnson told him about the incident.[117]

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[110] 91-95.
[111] 474-75, 485, 491, 493; see also Ex. J, ¶¶ 4-7.
[112] 475.
[113] 63-66.
[114] 66:9-13.
[115] 80-81.
[116] 132-33; Ex. K.
[117] 311-12.

(b) If so, what did she tell Dikeman?

Answer: The next morning, Johnson gave Dikeman the following account[118]:

One evening during the Price trial, after playing racquetball together, she and Bass went to the Waterfront Café and ordered drinks. McConkey asked if they wanted to order food. When they said that they did, a woman came out with menus. Bass later identified the woman as Zetta Southworth, a juror in the Price case. When Bass saw Southworth, he jumped up from his barstool, held up his hands as if he were being arrested,[119] went behind Johnson, and said something like, "I can't talk to you. I've got to maintain propriety." Southworth gave them menus and recommended that they order crab fritters. Then she retreated to the kitchen. Johnson said that she did not see Southworth again that evening.[120]

As she and Bass prepared to leave, McConkey gave them the check. The bill was for more than $20. Bass put two twenties down, slid them across the bar to McConkey, leaned over "conspiratorially," and told McConkey, "[G]ive one of the twenties to Zetta and tell her to vote guilty," or something like that.[121] McConkey took the money, turned around to the cash register behind him, got change, and gave it to Bass, who then left the tip.[122]

Dikeman testified that Johnson told him that, after playing racquetball together, she and Bass had had a drink at the Waterfront Café where Southworth worked, and that, upon leaving, Bass had paid the bill and had said to McConkey "something along the lines of tell Zetta guilty."[123]

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[118] See 132:27-133:10 (Johnson recounted to Dikeman "the entire set of events" that she had witnessed the previous night).

[119] At the hearing, Johnson said that he held up his hand "like this," 129, but her declaration clarifies that he held up his hands "as if he were being arrested." Ex. K.

[120] 127-30; Ex. K.

[121] 140.

[122] 131-32; 140-41.

[123] 311-12.

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Respectfully submitted,

Dated: June 19, 2009

ROBERT L. McGLASSON

Dated: June 19, 2009

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