In the Supreme Court of the State of California

In re CURTIS F. PRICE, On Habeas Corpus.	CAPITAL CASE Case No. S069683

Direct Appellate Case No. CR100898
Humboldt County Superior Court Case No. SC084719
The Honorable W. Bruce Watson, Judge

RESPONDENT'S EXCEPTIONS TO THE REFEREE'S FINDINGS AND BRIEF ON THE MERITS

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INTRODUCTION

Petitioner was convicted of two counts of special circumstances murder, robbery, and other crimes and was sentenced to death on July 9, 1986. His conviction and sentence were affirmed on direct appeal by this Court in 1991. (*People v. Price* (1991) 1 Cal.4th 324, 376, 494.) Petitioner's first application for collateral relief (habeas corpus) before this Court was denied on January 29, 1992. (*In re Price*, S018328.) Petitioner's second application for collateral relief was denied on February 19, 1992. (*In re Price*, S023791.) This reference hearing is related to petitioner's third petition for writ of habeas corpus. Petitioner has also filed a fourth petition before this Court that was denied on June 24, 2009. (*In re Price*, S139574.)

On February 14, 2007, this Court ordered an evidentiary hearing before the Humboldt County Superior Court[1] to determine the answers to a set of factual questions related to whether or not prosecutor Ron Bass and Geri Johnson patronized the Waterfront Cafe while juror Zetta Southworth was working as a cook and Robert McConkey was tending bar. (Exhibit A; Each reference question will be discussed separately below.) Additionally, the hearing was to determine whether or not Mr. Bass sent Ms. Southworth drinks and knew that she had a drinking problem. (*Ibid.*) The hearing was to determine the truth or falsity of the allegation that Mr. Bass gave money to Mr. McConkey to give to Ms. Southworth along with a message to her to vote guilty. (*Ibid.*) Whether or not the alleged statement and money were ever conveyed and whether the statement was made in a joking manner were the final factual issues to be resolved at the hearing. (*Ibid.*)

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[1] The Honorable W. Bruce Watson was appointed by Humboldt County Superior Court Presiding Judge the Honorable John T. Feeney.

After extensive briefing, the hearing was held over one week from April 6 to April 10, 2009. Testimony was taken from 11 witnesses. The Referee's Report and Findings of Fact was filed October 19, 2009. (Exhibit B.)[2] The Court requested the parties to file simultaneous exceptions to the report and briefs on the merits.

Respondent does not take exception to any of the referee's findings.

Petitioner has failed to meet his burden of proving that Mr. Bass engaged in any misconduct. Instead, as the referee found, the evidence at the hearing clearly showed that prosecutor Ron Bass never had any improper contact, directly or indirectly, with Juror Zetta Southworth at the Waterfront Café during petitioner's criminal trial. Specifically, Mr. Bass did not send Ms. Southworth drinks nor send her a message, with or without money, to vote for guilt in petitioner's trial. In sum, not only has petitioner failed to meet his burden of showing that Mr. Bass had an improper contact with Ms. Southworth, the evidence affirmatively proves that no such contact ever occurred. Based on the report and findings, we submit that petitioner is not entitled to relief.

STATEMENT OF FACTS

The referee's report and findings state:

> On a late fall, winter evening, in 1985, during the guilt phase of [petitioner's] 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 Café 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.

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[2] We refer to the referee's report as "Findings" with page and paragraph designations as appropriate.

> The two ordered drinks, and were offered or inquired as to appetizers. At some point Ms. Southworth came from the kitchen area bringing menus.
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> 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 [was] paying the bill, Mr. Bass said to Mr. McConkey in a joking, conspiratorial 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 café. The tip was in the range of $10-$20.

(Findings at pp. 7, ln. 23-8, ln. 13.)

Mr. Bass did not give Mr. McConkey money to specifically give to Ms. Southworth and convey a message and did not intend for Mr. McConkey to do so. (Findings at pp. 6, lns. 9-10, 7 lns. 2-3.) Mr. McConkey did not believe Mr. Bass actually wanted him to convey any money with a message to Ms. Southworth and he did not convey any money and message to her. (Findings at p. 7, lns. 4-10.) It is reasonable to conclude Mr. McConkey shared, split the tip with Ms. Southworth as he did normally in the ordinary course of business. (Findings at p. 7, lns. 11-12.)

The evidence did not support a finding that Mr. Bass asked Mr. McConkey to take alcoholic drinks to Ms. Southworth. (Findings at pp. 4, ln. 18-5, ln. 13.)

Ms. Johnson testified that she did relate all the events of the evening to Mr. Dikeman but Mr. Dikeman testified he was not told of any actual contact by Mr. Bass with Ms. Southworth. (Findings at p. 7, lns. 13-20.)

REFEREE'S ANSWERS TO REFERENCE QUESTIONS AND SUMMARY OF SUPPORTING EVIDENCE

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.

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 Café together, at a time when Mr. McConkey was tending bar, and Ms. Southworth cooking.

(Findings at pp. 3, ln. 25-4, ln. 6.)

As noted by the referee, respondent does not dispute and the evidence clearly proves that sometime during the Curtis Price trial, Mr. Bass and Ms. Johnson patronized the Waterfront Café on an evening when Mr. McConkey and Ms. Southworth were working. In their testimony, Mr. McConkey, Ms. Johnson, and Mr. Bass all indicated that this was true and there was no evidence to the contrary. (1 RHT 42-43, 47-48, 58-59, 125-130, 214-215, 218-219.)[3]

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

Answer: During the winter of 1985-86.

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

(Findings at p. 4, lns. 7-10.)

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[3] The two volumes of reporter's transcripts of the evidentiary portion of this hearing, April 6-10, 2009 will be cited as "1 RHT" and "2 RHT" respectively. Any citation to a transcript from any other dates will specifically reference the date.

Both parties agree Mr. Bass and Ms. Johnson patronized the Waterfront Café together while Ms. Southworth was on the jury sometime in the winter of 1985-86 during the guilt phase of petitioner's trial. (1 RHT 47-48, 129-130.)

2. (a) While at the Waterfront Café, 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.

(Findings at p. 4, lns. 11-14.)

As noted by the referee, respondent does not dispute and there is evidence to support the conclusion that Mr. Bass did see and speak to Ms. Southworth. While neither Mr. Bass nor Mr. McConkey recall Mr. Bass seeing Ms Southworth outside of the kitchen of the Waterfront, Ms. Johnson had a distinct and detailed memory that Ms. Southworth brought out their menus and Mr. Bass spoke to her. (1 RHT 63, 128-129, 138, 221-225.)

(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.

(Findings at 4, lns. 15-17.)

Based on Ms. Johnson's testimony, upon seeing Ms. Southworth, Mr. Bass, in a serious tone, moved behind Ms. Johnson's bar stool, held up his hands, and told Ms. Southworth that he couldn't talk to her and had to maintain propriety. Ms. Southworth then gave them the menus, recommended the crab cakes or fritters, and returned to the kitchen. (1 RHT 128-129, 138.)

3. (a) While at the Waterfront Café, 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 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, Mr. 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.

(Findings at pp. 4, ln. 18-5, ln. 7.)

There is no credible evidence to support a finding that Mr. Bass ever asked Mr. McConkey to send drinks back to Ms. Southworth. Ms. Johnson had the most detailed memory of the night in question and testified that neither she nor Mr. Bass sent Ms. Southworth any drinks or even discussed sending her a drink while at the Waterfront Café. (1 RHT 138-140.) While he had very little detailed recall of the night, Mr. Bass did testify that in his entire career, he had never and would never send a drink to a sitting juror in a case he was prosecuting. (1 RHT 300.) Mr. McConkey testified that it was possible, but he didn't remember any patrons ever sending drinks back to Ms. Southworth while she was working at the Waterfront Café. (1 RHT

62.) When asked if Mr. Bass sent a drink to Ms. Southworth in the kitchen, Mr. McConkey answered:

A. I don't remember anything like that.

Q. You don't recall Mr. Bass having any – sharing any kind of a drink with Zetta in the kitchen?

A. No.

Q. You sure about that?

A. I'm positive.

(1 RHT 67.) Mr. McConkey did not remember telling Ms. Eichenberg or Ms. Michaels that Mr. Bass sent a drink or drinks to Ms. Southworth. (1 RHT 73, 75.) He later explained that it would be "unusual" and "extremely unusual" for him to do so. (1 RHT 78-80.) He further clarified that it was possible that Mr. Bass sent a drink to Ms. Southworth, but he doubted it. (1 RHT 84.)

Petitioner attempted to impeach Mr. McConkey's live testimony with two alleged prior inconsistent statements given to Ms. Eichenberg and Ms. Michaels. (Pet.Exh. N;[4] Resp. Exh. 2; 1 RHT 95, 112; 2 RHT 476, 481-482.) However, the referee clearly credited Mr. McConkey's live, sworn testimony over the alleged prior inconsistent statements offered by Ms. Eichenberg and Ms. Michaels. (Findings at pp. 4, ln. 24-5, ln., 5.) Respondent asserts that the referee's conclusion is justified and supported by the evidence because the strength of any impeachment was greatly diminished by the circumstances surrounding the taking of those statements as well as the clear bias shown by both Ms. Eichenberg and Ms. Michaels.

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[4] Petitioner's and respondent's reference hearing exhibits are part of the reference hearing record and are referenced by the letter and number designations used in the reference hearing.

Regarding the circumstances surrounding the telling of the incident to Ms. Eichenberg, it is clear that Mr. McConkey was telling a "good lawyer story" for entertainment, just like any bar story. Ms. Eichenberg admitted that Mr. McConkey prefaced his telling of the story, nearly ten years after the incident, by asking if she wanted to hear a "good lawyer story." (1 RHT 91.) She added that Mr. McConkey "was getting a kick out of it - - putting lawyers in a bad light and he sort of enjoyed that." (1 RHT 101.) He also liked to tell lawyer stories, lawyer jokes, and bar stories that exaggerated the truth. (1 RHT 81, 111-112.) The manner in which the story was told and the nearly ten year time gap between the incident and the telling of the story show that Mr. McConkey did not take the story seriously and never thought that Mr. Bass had done anything improper.

When Ms. Eichenberg had Mr. McConkey repeat the story in front of petitioner's attorney Mr. McGlasson, she made sure it was a casual meeting at a bar, engaged in chit chat, and had Mr. McGlasson buy Mr. McConkey a drink. She then smiled and continued the casual conversation when she told Mr. McConkey "Hey, I told Robert [Mr. McGlasson] about your story, Bobby, the one about the Curtis Price case. He doesn't believe me. Tell him." (1 RHT 110.) The form of her request strongly implies that Mr. McConkey should tell the same bar story he told before. He apparently did, this time adding the fact that a drink had been sent back to Ms. Southworth. (1 RHT 95.) At a later date in the same bar, when again asked to repeat the story to Ms. Michaels and Mr. McGlasson, Mr. McConkey modified the tale to include several drinks being sent back to Ms. Southworth by Mr. Bass. (2 RHT 476.) This despite the fact that Mr. McConkey made clear in his testimony that prior to the alleged incident, Ms. Southworth was not allowed to and did not drink at the restaurant during work and the owners of the Waterfront made it part of Mr. McConkey's responsibility to ensure

that Ms. Southworth did not stay after her shift and drink. (1 RHT 61, 75, 78-80.)

Ms. Eichenberg admitted that she is an opponent of the death penalty, has defended death penalty cases as both primary and *Keenan* counsel, and that her shift from criminal law to child welfare law was motivated by an urge to help children avoid becoming potential defendants in death penalty cases. (1 RHT 105-106.) Additional evidence of her bias is shown by the fact that, even though she was president of the local bar association when she first heard the story, she did not report the alleged juror bribe to any authorities; choosing instead to phone only petitioner's attorney. (1 RHT 104-107.) The totality of the circumstances surrounding the "good lawyer story" told by Mr. McConkey to Ms. Eichenberg, along with her opposition to the death penalty, show that Mr. McConkey's sworn, in court testimony was not impeached in any way by the testimony of Ms. Eichenberg.

Similar circumstances and bias destroy any impeachment offered by Ms. Michael's testimony. Her conversation with Mr. McConkey took place in the same bar under similar circumstances. (1 RHT 116.) In fact, Ms. Eichenberg, Ms. Michaels, and Mr. McGlasson had to go to the local bar and wait for two nights before "casually" encountering Mr. McConkey. (2 RHT 472.) Ms. Eichenberg again introduced them, and Ms. Michaels questioned Mr. McConkey about the story. Mr. McConkey added two new facts to the story this time. He stated that Mr. Bass asked whether or not Ms. Southworth was working at the restaurant that night and that Mr. Bass sent multiple drinks back to Ms. Southworth. (2 RHT 474, 476.) With each meeting at the local bar to discuss the issue with Mr. McConkey, the "good lawyer story" just kept getting better.

Despite Ms. Michael's claims that she asked pointed questions and sought to discover as much information as possible about the incident, in the end, she admitted she was really just there to confirm the facts as she

believed them to be. (2 RHT 478-479, 493.) She did not question why Mr. McConkey would be sending Ms. Southworth drinks after he disclosed that Ms. Southworth was an alcoholic and that he had to make her go drink elsewhere after work. She did not ask any questions about Ms. Southworth's reaction to the alleged drinks and money sent to her. Most importantly, in her declaration made under penalty of perjury that the declaration accurately reflected the statement of Mr. McConkey, Ms. Michaels failed to include the fact that Mr. McConkey directly told her that he thought Mr. Bass was only joking. (2 RHT 489.) During her testimony Ms. Michaels explained that she did not think that it was really an important fact. (*Ibid.*) Ms. Michaels finally expressly revealed her bias when she stated at the end of her testimony: "The money and the message and the messenger which were the three critical factors for my interview with him which is why I was there. Those three factors – those were confirmed. End of story." (2 RHT 493.) She was there to get the story she wanted to hear whether or not it was the entire story or even the actual story. As a result of all these factors, her testimony did not impeach the forthright, sworn testimony given by Mr. McConkey during the hearing.

(b) If so, did McConkey do so?

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

(Findings at p. 5, lns. 8-9.)

Based on the analysis above (question 3(a.)), this question is not applicable and there is no credible evidence to support a finding that Mr. McConkey took any 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.

(Findings at p. 5, lns. 10-13.)

Based on the analysis above (question 3(a.)), this question is not applicable. However, respondent concedes that the underlying trial record provides ample evidence that at some point in the trial, the prosecution was aware that Ms. Southworth had an alcohol 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.

(Findings at p. 5, lns. 14-18.)

Mr. McConkey and Ms. Johnson both confirmed that Mr. Bass made a joking comment when paying the bill or the tip telling Mr. McConkey that he should give one of the twenty dollar bills to Ms. Southworth and tell her to vote guilty. (1 RHT 64, 80, 131-132, 140.) They both also made it absolutely clear that they had no doubt that the comment was a joke and that all three of them laughed. (1 RHT 64-65, 80, 83, 140-142.)

(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.

(Findings at p. 5, lns. 19-23.)

Although unclear on the amount, Mr. McConkey stated that Mr. Bass gave him $10 to $20 for the tip when he made the joking comment. (1 RHT 63-64.) Ms. Johnson testified that Mr. McConkey made change from the twenty dollar bills he was given and that Mr. Bass left a tip from that change. (1 RHT 140.) They both also very clearly stated that the tip amount was appropriate in relation to the bill. (1 RHT 81, 146.)

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.

(Findings at pp. 5, ln. 24-6, ln. 3.)

According to Ms. Johnson, Mr. Bass did not in actuality give any money to Mr. McConkey to convey to Ms. Southworth. Mr. Bass made the joking comment, got his change, and left an appropriate tip. (1 RHT 131-132, 140-143.) Mr. McConkey was less clear that the comment was made before he returned the change, but still understood it was a joke and only split the tip with Ms. Southworth because he usually splits the tips with her in the normal course of business. (1 RHT 64-66.) The referee's findings are supported by substantial evidence. There is no credible evidence that Mr. Bass actually gave Mr. McConkey money specifically for Ms. Southworth other than the appropriate tip that Mr. McConkey normally splits with her.

(b) Did Southworth accept it?

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

(Findings at p. 6, lns. 4-5.)

The evidence does allow the inference that Ms. Southworth accepted her share of the tips in the normal course of business but not as a result of any comment by Mr. Bass. (1 RHT 64-66.)

> **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.

(Findings at p. 6, lns. 6-10.)

As stated above, Mr. McConkey and Ms. Johnson both confirmed that Mr. Bass made a joking comment when paying the bill or the tip telling Mr. McConkey that he should give one of the twenty dollar bills to Ms. Southworth and tell her to vote guilty. (1 RHT 64, 80, 131-132, 140.) They both also made it absolutely clear that they had no doubt that the comment was a joke and that all three of them laughed. (1 RHT 64-65, 80, 83, 140-142.) Ms. Johnson testified that Mr. McConkey did not give one of the twenties to Ms. Southworth as indicated in the joke but instead made change and returned it to Mr. Bass. (1 RHT 140.) As a result, the evidence showed that Mr. Bass did not provide any money with an actual direction or request that it be conveyed to Ms. Southworth, nor did he in actuality ask that any message be conveyed.

> (b) If so, what message?
>
> Answer: The message, as discussed below in #7, was, tell her to vote guilty.

(Findings at p. 6, lns. 11-12.)

As noted above, the joking comment made by Mr. Bass was that Mr. McConkey should give money to Ms. Southworth with the message that she vote guilty. (1 RHT 64, 80, 131-132, 140.) However, the referee's

findings and the clear testimony proved that the comment was a joke and, as a result, there was no actual request to convey any message.

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.

(Findings at p. 6, lns. 13-16.)

As stated above, Mr. McConkey and Ms. Johnson both confirmed that Mr. Bass made a joking comment when paying the bill or the tip telling Mr. McConkey that he should give one of the twenty dollar bills to Ms. Southworth and tell her to vote guilty. (1 RHT 64, 80, 131-132, 140.)

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

Answer: In a joking tone.

(Findings at p. 6, lns. 17-18.)

Mr. McConkey and Ms. Johnson both confirmed that Mr. Bass made a joking comment when paying the bill or the tip telling Mr. McConkey that he should give one of the twenty dollar bills to Ms. Southworth and tell her to vote guilty. (1 RHT 64, 80, 131-132, 140.) They both also made it absolutely clear that they had no doubt that the comment was a joke and that all three of them laughed. (1 RHT 64-65, 80, 83, 140-142.)

(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 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.

(Findings at p. 6, lns. 19-23.)

Mr. McConkey and Ms. Johnson both confirmed that Mr. Bass made the comment as a joke. (1 RHT 64, 80, 131-132, 140.) Ms. Johnson added the detail that Mr. Bass leaned down conspiratorially, slid the bills across the bar, and made the comment while smiling. (1 RHT 140.) Ms. Johnson and Mr. McConkey both also made it absolutely clear that they had no doubt that the comment was a joke and that all three of them laughed. (1 RHT 64-65, 80, 83, 140-142.) Ms. Johnson testified that Mr. McConkey did not give one of the twenties to Ms. Southworth as indicated in the joke but instead made change and returned it to Mr. Bass. (1 RHT 140.) As a result, based on the surrounding circumstances and Mr. Bass' tone and gestures, there is no doubt that the comment was made in a joking manner.

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?

Answer: No.

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

(Findings at pp. 6, ln. 24-7, ln. 3.)

As noted above, the comment was only made in a joking manner, and Mr. Bass did not intend that Mr. McConkey carry out the joke. (1 RHT 64-65, 80, 83, 140-142.) The fact that the comment was merely a joke was not impeached by petitioner's witnesses because the circumstances of the statements taken by Ms. Eichenberg and Ms. Michaels, along with their biases, destroyed any potential impeachment value of their testimony.

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?

Answer: No.

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

(Findings at p. 7, lns. 4-7.)

Mr. McConkey clearly stated that he understood the comment to be a joke without a doubt and did not think that he was meant to carry out the joke. (1 RHT 64-65, 80, 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: 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.

(Findings at p. 7, lns. 8-12.)

As noted in question 9, Mr. McConkey clearly stated that he understood the comment to be a joke without a doubt and did not think that he was meant to carry out the joke. (1 RHT 64-65, 80, 83.) Mr. McConkey did indicate that he shared the appropriate tip with Ms. Southworth in the normal course of business. (1 RHT 64-66.)

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

Answer: Yes.

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

(Findings at p. 7, lns. 13-17.)

Both Ms. Johnson and Mr. Dikeman confirmed that Ms. Johnson told Mr. Dikeman about the joking comment made by Mr. Bass at the Waterfront Café. (1 RHT 132-133, 144-145, 311-313.)

(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.

(Findings at p. 7, lns. 18-20.)

Both Ms. Johnson and Mr. Dikeman confirmed that Ms. Johnson told Mr. Dikeman about the joking comment made by Mr. Bass at the Waterfront Café. (1 RHT 132-133, 144-145, 311-313.) Although Ms. Johnson testified that she told Mr. Dikeman about seeing Ms. Southworth, Mr. Dikeman testified with equal clarity that he was not told about any juror contact. (1 RHT 132-133, 144-145, 323-325.) Given the credibility of both Ms. Johnson and Mr. Dikeman, there is no preponderance of evidence regarding whether or not Mr. Dikeman was told about Mr. Bass and Ms. Johnson encountering Ms. Southworth.

ARGUMENT

THERE WAS NO IMPROPER CONTACT BETWEEN MR. BASS AND JUROR MS. SOUTHWORTH

The issue to be examined here surrounds the claim by petitioner that Mr. Bass sent juror Southworth drinks knowing she had an alcohol problem and sent her a bribe with the message to vote guilty. As demonstrated in the referee's report and findings of fact, petitioner failed to carry his burden of proof and is not entitled to relief.

A. Standards for Reviewing Referee's Report

"In a habeas corpus proceeding, the burden of proof lies with the petitioner to prove, by a preponderance of the evidence, facts that establish the invalidity of the judgment under which he is restrained." (*In re Andrews* (2002) 28 Cal.4th 1234, 1252-1253.) When a reference hearing has been ordered, the referee's findings on factual questions, while not binding on the Court, "are entitled to great weight when supported by substantial evidence." (*In re Johnson* (1998) 18 Cal.4th 447, 461.) Deference to the referee is premised on his ability to assess credibility, observing the witnesses' demeanor and manner of testifying. (*In re Hamilton* (1999) 20 Cal.4th 273, 296.) Indeed, the reason the Court requires petitioners to prove their claims at an evidentiary hearing "is to obtain credibility determinations." (*In re Scott* (2003) 29 Cal.4th 783, 824.) The referee's credibility determinations as to the witnesses in this reference hearing are fully supported by the record and thus entitled to great weight.

B. Applicable Law

This Court set out much of the law on this topic in *People v. Danks* (2004) 32 Cal.4th 269. The Court began by noting that the threshold question was whether there was any misconduct. While " 'a non-juror's tampering contact or communication with a sitting juror, usually raises a rebuttable "presumption" of prejudice. . . .' ", much that might strictly be labeled extraneous contact cannot be deemed misconduct. The Court stressed that the criminal justice system " 'must not be rendered impotent in quest of an ever-illusive perfection . . .' " and that the jury system is fundamentally human, requiring that " 'we must tolerate a certain amount of imperfection short of actual bias.' " (*Id.* at p. 304.)

Accordingly, at the threshold, we assert there was no misconduct, and no presumption of prejudice in this case. This Court in *In re Hamilton*

(1999) 20 Cal.4th 273, 305-306, discussed the presence of misconduct in our context as follows:

> Any claim of direct jury tampering, real or imagined, appears to fail at the threshold under California law. "[W]hen the alleged misconduct involves an unauthorized communication with or by a juror, the presumption [of prejudice] does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, i.e., the guilt or innocence of the defendant."

(*Hamilton, supra*, 20 Cal.4th at pp. 305-306.) *Hamilton* found that a witness's brief sighting of an individual perhaps linked to the defendant could not "give rise to [a] substantial likelihood that the encounter resulted in [the juror's] actual bias against petitioner." (*Id.* at p. 306.)

Here, because the referee found and the evidence showed that there was no contact between Mr. Bass and juror Ms. Southworth about "the matter pending before the jury, i.e., the guilt or innocence of the [petitioner]" the incident does not give rise to a substantial likelihood of any actual bias against petitioner. The referee found that the only actual contact between Mr. Bass and Ms. Southworth was when she brought out the menus and he stated that he could not speak to her because he had to maintain propriety. (Findings at p. 8, lns. 3-7.) Respondent asserts, and petitioner has not claimed to the contrary, that this incidental contact did not cause any prejudice to petitioner's trial or raise any presumption of prejudice.

The second alleged "improper" contact concerns petitioner's claim that Mr. Bass sent a drink or several drinks to Ms. Southworth that evening knowing that she had an alcohol problem. However, the referee made very clear credibility determinations based on substantial evidence in concluding that, although Mr. Bass was aware of her alcohol problem, he did not send any drinks to Ms. Southworth. (Findings at pp. 4, ln. 18-5, ln. 13.) Accordingly, in this regard there was no contact between Mr. Bass and Ms.

Southworth and there could not have been any improper influence on the jury or any unfair prejudice to petitioner's trial.

The third alleged improper contact is petitioner's assertion that Mr. Bass gave money to Mr. McConkey to give to Ms. Southworth along with the message to her to vote guilty. Again, the referee had to make credibility determinations between the sworn testimony at the hearing and the attempted impeachment of that testimony by petitioner's witnesses. Based on substantial evidence, the referee found that Mr. Bass did not give Mr. McConkey any money to specifically give to Ms. Southworth. (Findings at p. 6, lns. 1-3.) He also found that Mr. Bass's comment was a joke, was made in a joking tone, and was understood to be a joke by both Mr. McConkey and Ms. Johnson. (Findings at pp. 6, ln. 17-7, ln. 7.) Finally, the referee found Mr. Bass did not intend for Mr. McConkey to follow the suggestion to carry a bribe to Ms. Southworth, Mr. McConkey did not think that Mr. Bass wanted him to do so and, most importantly, Mr. McConkey did not do so. (Findings at p. 7, lns. 2-12.) As a result, no message to vote for guilt was ever sent to Ms. Southworth on the night in question. Again, there was no contact between Mr. Bass and Ms. Southworth in this regard and there could not have been any improper influence on the jury or any unfair prejudice to petitioner's trial.

Petitioner may point to the trial court's finding that Mr. Bass gave the bartender a tip that he split with Ms. Southworth in the normal course of business, and argue that this formed juror misconduct. Petitioner may also argue that prejudice is presumed and that it is respondent's burden to rebut that presumption of prejudice. We would counter that, first, the facts do not show sufficiently substantial acts to constitute misconduct, and so no prejudice is presumed. The tip was found to have been between $10 and $20 resulting in a split to Ms. Southworth of only $5 to $10. (Findings at pp. 5, ln. 19-6, ln. 5.) Such a de minimis amount given as a tip and shared

by two restaurant employees in the ordinary course of business does not rise to the level of an improper contact or influence on a juror. Additionally, there was no convincing evidence that Ms. Southworth was aware of the portion of her total night's tips that came from Mr. Bass. Second, even if prejudice is presumed, that presumption is rebutted under the applicable test because, on this record, there is no substantial likelihood Ms. Southworth was adversely affected.

This Court in *People v. Danks* (*supra*) 32 Cal.4th 269, discussed juror misconduct, in relation to receipt of extraneous information, as follows:

> If we conclude there was misconduct, we then consider whether the misconduct was prejudicial. This standard is well established. "[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias. Such bias can appear in two different ways." ([*In re*] *Carpenter,* [1995] 9 Cal.4th [634] at p. 653, 38 Cal.Rptr.2d 665, 889 P.2d 985.)
>
> "First, we will find bias if the extraneous material, judged objectively, is inherently and substantially likely to have influenced the juror." (*Carpenter, supra*, 9 Cal.4th at p. 653, 38 Cal.Rptr.2d 665, 889 P.2d 985.) "Under this standard, a finding of 'inherently' likely bias is required when, but only when, the extraneous information was so prejudicial in context that its erroneous introduction in the trial itself would have warranted reversal of the judgment. Application of this 'inherent prejudice' test obviously depends upon a review of the trial record to determine the prejudicial effect of the extraneous information." (*Ibid.*)
>
> Second, "even if the extraneous information was not so prejudicial, in and of itself, as to cause 'inherent' bias under the first test," the nature of the misconduct and the "totality of the circumstances surrounding the misconduct must still be examined to determine objectively whether a substantial likelihood of actual bias nonetheless arose." (*Carpenter, supra,* 9 Cal.4th at pp. 653-654, 38 Cal.Rptr.2d 665, 889 P.2d 985.) "Under this second, or 'circumstantial,' test, the trial record is

> not a dispositive consideration, but neither is it irrelevant. All pertinent portions of the entire record, including the trial record, must be considered. 'The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual' " bias. (*Id.* at p. 654, 38 Cal.Rptr.2d 665, 889 P.2d 985.)
>
> "The judgment must be set aside if the court finds prejudice under either test." (*Carpenter, supra*, 9 Cal.4th at p. 653, 38 Cal.Rptr.2d 665, 889 P.2d 985.) "Whether prejudice arose from juror misconduct ... is a mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler* (1997) 16 Cal.4th 561, 582, 66 Cal.Rptr.2d 454, 941 P.2d 87 (*Nesler*) (lead opn. of George, C.J.).) However, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*Ibid.*)

(*Danks, supra,* 32 Cal.4th 269, 303-304.)

Here, it is simply not reasonable to believe that, in the circumstances of this case, any reasonable juror, or this juror, would have been influenced by Mr. Bass's provision of a routine tip. There is no evidence that Mr. Bass intended this act to ingratiate himself with Ms. Southworth, and there is no evidence that she, or any reasonable person, would have interpreted leaving a routine tip as such an attempt.[5] Under this Court's precedent, the totality of the circumstances must be considered, and these circumstances include the fact that, on initially encountering Ms. Southworth, Mr. Bass demonstratively raised his hands and forcefully stated that he could have no contact with her. This act must have impressed on Ms. Southworth that Mr. Bass intended to act at all times within the bounds of strictly proper behavior, and had no desire to communicate with her or influence her.

---

[5] Petitioner's assertions regarding an alleged vulnerability of Ms. Southworth to influence because of her alcohol problem and her son's minor criminal record do not alter this conclusion.

Additionally, there was no convincing evidence that Ms. Southworth was even aware of the portion of her total night's tips that came from Mr. Bass.

Accordingly, while we assert that there was no misconduct, and no presumption of prejudice was raised, even assuming arguendo that such a presumption was raised, the standards established by this Court show there was no substantial likelihood of prejudice. In *People v. Wilson* (2008) 44 Cal.4th 758, 839, this Court found that brief comments early in the guilt phase of the trial made by one juror to another were a technical violation of the admonition not to discuss the case, but that the violation was "a trivial one . . . ." *Wilson* cited with approval *People v. Loot* (1998) 63 Cal.App.4th 694, where a sitting juror asked a Deputy Public Defender in an elevator during a break at trial whether the prosecutor was romantically "available." *Wilson* quoted *Loot* as follows:

> "Among the factors to be considered when determining whether the presumption of prejudice has been rebutted are 'the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued.' " . . . While the juror's questions were "a technical violation of Penal Code section 1122, they were certainly not as serious as questions designed to obtain extrinsic evidence regarding the case itself. [Citation.] We see little possibility actual prejudice may have ensued. All 12 jurors voted defendant guilty. There is no evidence to suggest [the offending juror] would have been the lone holdout for acquittal but for her possible amorous interest in the prosecutor or that based solely on the prosecutor's attractiveness she was able to sway the other 11 jurors to a guilty verdict on each count. On the other hand, there is unrefuted evidence the juror did not discuss the incident on the elevator with the other jurors and her interest in [the prosecutor] did not affect her deliberations." (*Ibid.*)

(*Wilson, supra*, 44 Cal.4th at p. 839, see also *People v. Tafoya* (2007) 42 Cal.4th 147, 192 ["in general, when the evidence of guilt is overwhelming, the risk that exposure to extraneous information will prejudicially influence a juror is minimized."])

Similarly, in *People v. Hardy* (1992) 2 Cal.4th 86, this Court noted: "it came to light that one of the jurors, Lipman, gave a gift of some fruit cocktail to Detective Bobbitt, one of the investigating police officers and a prosecution witness." The Court concluded:

> The presumption of prejudice may be rebutted, inter alia, by a reviewing court's determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm. *People v. Holloway* (1990) 50 Cal.3d 1098, 1108-1110, 269 Cal.Rptr. 530, 790 P.2d 1327. Although Juror Lipman's unauthorized contact with Detective Bobbitt was improper, his misconduct was de minimis under the circumstances of this case. There was no evidence that Lipman even spoke to Bobbitt or that the fruit cocktail was from him. As the trial court astutely discerned, this would be a different case had there been evidence of any "personal contact" between Lipman and Detective Bobbitt. Considering the trivial nature of the misconduct, we conclude the presumption of prejudice was amply rebutted on this record.

(*Hardy, supra*, 2 Cal.4th at 174.)

The law ruled applicable by this Court is at least as rigorous as that required by the Federal Constitution. *United States v. Rutherford* (9th Cir. 2004) 371 F.3d 64 ruled that:

> . . . in cases in which the circumstances suggest that the improper communication or contact is sufficiently serious that it might prejudice the jurors we have afforded the presumption of prejudice; in the case of other more "prosaic kinds of jury misconduct" we have not.

(*Rutherford, supra,* 371 F.3d at p. 643.)

Rutherford explained:

> Similarly, in [*United States v.*] *Dutkel*, [(9th Cir. 1999] 192 F.3d [893] at 897, we held that, in determining whether the defendant had made a prima facie showing of jury tampering, thereby triggering the presumption of prejudice, the relevant inquiry is whether the intrusion had an adverse effect on the deliberations. To give meaning to the term "adverse effect," we instructed that in determining whether there was a possibility of prejudice a

> court should consider "whether the intervention 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.* Because, in *Dutkel*, the juror's concerns resulting from improper contacts might well have "prevented [him] from thinking about the evidence or paying attention to the judge's instructions," *id.* at 898, we held that a prima facie case had been established, which triggered the presumption of prejudice.

(*Id.* at 642.) *United States v. Dutkel* (9th Cir. 1999) 192 F.3d 893, which found a juror had actually been bribed to acquit a defendant, did not rule on the merits, but sent the case back to the trial court for a hearing on prejudice to a codefendant. (*Dutkel, supra*, 192 F.3d at 898.)

Similarly, in *United States v. Elias* (9th Cir. 2001) 269 F.3d 1003, two jurors stated that they believed defendant asked what it would take to get an acquittal, but both jurors believed that the defendant had made the statement "jokingly." The jurors further testified that the statement did not preoccupy them, frighten them, or distract them from focusing on the evidence. *Elias* affirmed the trial court's conclusion there that the defendant had not "borne his burden of showing juror bias . . . ." (*Elias, supra*, 269 F.3d at 1021, footnote omitted.)

Appellant's cited cases require no different result. *Remmer v. United States* (1954) 347 U.S. 227 merely set out the standard of review of the issue, with which this Court's standard is concordant. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1309.) *People v. Marshall* (1990) 50 Cal.3d 907 950-952, found the presumption of prejudice had been rebutted. There, a juror claimed to have a background in law enforcement and told other jurors during deliberations that juvenile records are sealed. This Court found that the statement could not have produced any "significant effect" given the lack of evidence of criminal background by the defendant, and given the trial court's instructions. Such misconduct during deliberations

plainly was a more serious violation than the routine leaving of a tip in this case by the prosecutor.

In re Stankewitz (1985) 40 Cal.3d 391 described conduct far more prejudicial than the giving of a routine tip. There, a juror vouched for his own reliability by stating he had been a police officer for over 20 years and gave legal advice that the Court concluded "was totally wrong." (*Stankewitz, supra,* 40 Cal.3d at p. 399.) That juror misdefined felony murder for the other jurors in a way that negated an element of the defendant's defense. Once again, this misconduct was far more serious than anything that allegedly occurred here.

In sum, petitioner has failed to meet his burden of proving that there was any improper contact between Mr. Bass and Ms. Southworth, much less a prejudicial contact. He is not entitled to relief.

CONCLUSION

For the reasons stated above respondent respectfully submits that the order to show cause should be discharged and the petition for writ of habeas corpus should be denied.

Dated: January 20, 2010

Respectfully submitted,

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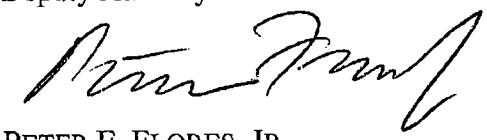

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S EXCEPTIONS TO THE REFEREE'S FINDINGS AND BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,774words.

Dated: January 20, 2010

EDMUND G. BROWN JR.
Attorney General of California

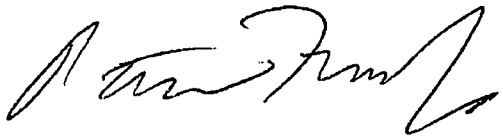

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EXHIBIT A

FILED: February 14, 2007

IN THE SUPREME COURT OF CALIFORNIA

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

THE COURT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT B

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

DECLARATION OF SERVICE BY FACSIMILE AND MAIL

Case Name: **In re Curtis F. Price, On Habeas Corpus** No.: **S069685**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business. My facsimile machine telephone number is (415) 703-1234.

On January 21, 2010, I served the attached **RESPONDENT'S EXCEPTIONS TO THE REFEREE'S FINDINGS AND BRIEF ON THE MERITS** by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2.306. The facsimile machine I used complied with Rule 2.306, and no error was reported by the machine. Pursuant to rule 2.306(g)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope with postage thereof fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

Robert L. McGlasson
1024 Clairemont Ave.
Decatur, GA 30030
Fax #: (404) 373-9338

Jan Little
Attorney at Law
Keker and Van Nest
710 Sansome Street
San Francisco, CA 94111
Fax #: (415) 397-7188

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 21, 2010, at San Francisco, California.

Pearl Lim
Declarant

Signature

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EDMUND G. BROWN JR.
Attorney General

State of California
DEPARTMENT OF JUSTICE

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NAME: **Jan Nielsen Little, Asim M. Bhansali, Steven P. Ragland**
OFFICE: Keker & Van Nest, LLP
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FROM:

NAME: **Peter E. Flores, Jr., Deputy Attorney General**
OFFICE: **Appeals, Writs & Trials**
LOCATION: **San Francisco**
FAX NO.: **(415) 703-1234** PHONE NO.: **(415) 703-5874**

MESSAGE/INSTRUCTIONS

Re: In re Curtis F. Price, On Habeas Corpus

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Curtis F. Price, On Habeas Corpus**
No.: **S069685**

I declare:

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

On January 21, 2010, I served the attached **RESPONDENT'S EXCEPTIONS TO THE REFEREE'S FINDINGS AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

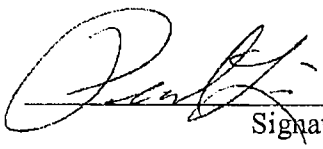
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 21, 2010, at San Francisco, California.

Pearl Lim
Declarant



Signature

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