IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re:

CURTIS PRICE,

On Habeas Corpus.

No. S069685

Humboldt Superior Court No. CR9898
The Honorable W. Bruce Watson

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND TO RESPONDENT'S BRIEF ON THE MERITS

KEKER & VAN NEST LLP
Jan Nielsen Little - #100029
Steven A. Hirsch - #171825
Asim M. Bhansali - #194925
Steven P. Ragland - #221076
Caitlin Bales - # 257739
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400
Facsimile: (415) 397-7188
Attorneys for Petitioner
CURTIS PRICE

ROBERT L. McGLASSON
1024 Clairemont Avenue
Decatur, GA 30030
Telephone: (404) 314-7664
Facsimile: (404) 879-0005
Attorney for Petitioner
CURTIS PRICE

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ROBERT L. McGLASSON
1024 Clairemont Avenue
Decatur, GA 30030
Telephone: (404) 314-7664
Facsimile: (404) 879-0005
Attorney for Petitioner
CURTIS PRICE

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I. ARGUMENT

The State's Brief[1] persists in trying to make a "joke" of the jury-tampering that occurred at the Waterfront Café during the guilt phase of petitioner's trial. But the same brief also makes two critical concessions about the resulting *Remmer* claim based on that incident.

First, the State concedes by its silence that the *Remmer* presumption of prejudice arises here if petitioner established that juror Zetta Southworth received prosecutor Ron Bass's money and his message that the money was "for a guilty verdict." The State does not dispute that, if this occurred, it would constitute the very sort of improper juror contact that *Remmer* condemns—namely, a private communication, contact, or tampering with a juror during a criminal trial about the matter pending before the jury.

Although the State devotes a lengthy section of its brief to arguing that a trivial juror contact can't trigger the *Remmer* presumption, the State does not pretend that the contact that occurred here could be deemed trivial if Southworth received both Bass's money and Bass's message that the money was "for a guilty verdict." The State well knows, and does not dispute, that those facts would trigger the *Remmer* presumption. The State therefore confines itself to arguing that the incident *would* be trivial, and that no *Remmer* presumption would arise, if Southworth received only Bass's money but *not* his message.[2]

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[1] "The State's Brief" or "S. Br." refers to Respondent's Exceptions to the Referee's Findings and Brief on the Merits," filed in this matter on Jan. 21, 2010.

[2] See S. Br. at p. 20 (commencing six-page discussion with the topic sentence: "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

Second, the State concedes by its silence that, if the *Remmer* presumption of prejudice arises here, the State cannot possibly meet its heavy burden of rebutting that presumption. Indeed, the State has no choice but to concede this point, because its own years-long cover-up of the incident has deprived it of any evidence capable of rebutting the presumption. That is why the State cannot point to a single item of rebuttal evidence adduced during the reference hearing. Nor does the State dispute that its legal burden on rebuttal was to prove that that there is no substantial likelihood that the improper contact prejudiced even one juror against the defendant.

These concessions bring petitioner's *Remmer* claim into sharp focus, as they demonstrate that his right to habeas relief on that claim hinges on the correct answer to Reference Question 10(a)—"If [prosecutor] Bass directed, requested, or suggested that McConkey convey money to Southworth ***and tell her to vote guilty, did McConkey do so***?"[3]

If the answer to that question is "yes"—and the uncontradicted evidence proves that it is—then the *Remmer* presumption ***concededly*** arises, the State ***concededly*** has offered no evidence to rebut that presumption, and petitioner's conviction ***must*** fall.

The State therefore concentrates its efforts on justifying the referee's erroneous negative finding on Question 10(a). The referee found that, although McConkey did give Southworth Bass's money, there was "no

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course of business."); *id.* at pp. 20-26 (addressing that contention by citing case law that trivial contacts don't trigger the *Remmer* presumption).

[3] Emphasis added.

evidence" that McConkey also gave Southworth Bass's message that the money was "for a guilty verdict." But that finding rested on an illogical and counterfactual inference that McConkey wouldn't have retold a mere "joke" to Southworth. Unable to defend that inference, the State instead tries to rewrite the referee's finding to include and rely upon a determination that the key witnesses on this issue lacked credibility.

As discussed in Part A, below, that argument suffers from two fatal flaws: the referee never made any such finding; and that finding would have been improper had it been made, as it rests entirely on politically-driven stereotyping of the witnesses rather than firsthand observation of their demeanor or actual evidence that they testified dishonestly.[4]

Although Question 10(a) is the dispositive issue, petitioner also briefly discusses three additional, erroneous arguments by the State that require correction. See Part B, below.

A. This Court owes no deference to the referee's erroneous finding on Question 10(a), which—contrary to the State's assertions—does not rest on any demeanor-based credibility determination.

The State tries to rewrite the referee's finding on Question 10(a) to make it seem as though that finding turned on demeanor-based credibility judgments that, in fact, the referee never made, and that would have been utterly improper had they been made.

[4] The State gets so carried away by its own rhetoric that it actually states, in its Introduction, that "Mr. Bass did not send Ms. Southworth drinks nor a message, with or without money, to vote for guilt in petitioner's trial." S. Br. at p. 2. This assertion flatly contradicts the referee's findings on Reference Questions 4(a) and (b), 5(a) and (b), and 7(a).

As explained on pages 37-39 of petitioner's opening brief[5], all of the evidence on Question 10(a) proved ***without contradiction*** that the correct answer to that question is, "Yes, McConkey conveyed to Southworth Bass's money and his message that the money was 'for a guilty verdict.'"

The two key witnesses to this fact were attorneys Gena Rae Eichenberg and Sandra Michaels. Eichenberg testified at the reference hearing that McConkey told her in Spring and December 1995—14 years closer to the events in question—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.[6] 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.[7] 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.[8] McConkey's testimony on this subject in

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[5] "Petitioner's opening brief" or "opening brief" refers to Petitioner's Post Hearing Brief and Exceptions to the Referee's Report, filed in this matter on Jan. 21, 2010.

[6] Reporter's Transcript ("RT") T253-258. Petitioner's RT citations are to the Reporter's Transcript on Appeal, Volumes 1 & 2, which were delivered to Petitioner, Respondent, and this Court on or about October 16, 2009. Petitioner believes that the State's citations to the Reporter's Transcript ("RHT") are to a preliminary version of the Reporter's Transcript which contains only the evidentiary portion of this hearing. This preliminary version was delivered to Petitioner and to the State on or about April 27, 2009, but was not transmitted to this Court. Since the Reporter's Transcript on Appeal delivered on October 16, 2009 contains transcripts of hearings held before and after the evidentiary hearing, the page numbering is different.

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

[8] RT641.

no way contradicted Eichenberg's or Michaels', as explained on pages 37-39 of petitioner's opening brief.

Despite the fact that all of the evidence pointed to a "yes" answer, the referee answered: "No. It is reasonable to conclude [that] Mr. McConkey shared, split the tip with Ms. Southworth, but there is ***no evidence*** [that] Mr. McConkey conveyed the joke."[9] The referee apparently inferred that, since McConkey testified that he had regarded Bass's statement as a "joke,"[10] McConkey wouldn't have bothered to relate a mere "joke" to Southworth. Pages 38-39 of petitioner's opening brief explained why that inference was illogical and unfounded.[11]

Tacitly acknowledging that the referee's "joke" inference is insupportable, the State tries to slide a new foundation under the referee's finding and thereby manufacture a basis for appellate deference. The State therefore pretends that the referee arrived at his finding based on a credibility judgment that Eichenberg and Michaels—the two key witnesses on Question 10(a)—harbored a disabling "anti-death-penalty bias."

This contention fails on two grounds.

First, it is simply untrue. The referee made no finding whatsoever concerning Eichenberg's or Michael's credibility. There is, accordingly, no demeanor-based credibility judgment to which this Court must or should defer.

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[9] See referee's response to Question 10, CT1086 (Report at 7) (emphasis added).

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

[11] Opening Br. at 38-40.

Instead, the referee simply ignored Eichenberg's and Michaels' testimony in favor of an inference that McConkey wouldn't have repeated a mere "joke" to Southworth. For a multitude of reasons, the Court should reject this illogical and counterintuitive inference.

- Jokes are meant to be retold—that is what they are for. The referee's inference thus contradicts common sense and experience—the usual bases for drawing a sound inference.[12]
- As a bartender who supposedly loved retelling a "good lawyer story,"[13] McConkey was especially likely to convey Bass's "joke" to its intended recipient.
- This particular "joke" came with a specific instruction from a powerful local figure that it be delivered, along with money, to Southworth.
- McConkey in fact delivered the money, as the referee found.
- The "joke" was ***about*** the money that McConkey undisputedly delivered to Southworth—that is, the "joke" was that the money was "for" a guilty verdict.
- Most significantly, the referee's inference contradicts the actual evidence of record, as provided—without contradiction—by Eichenberg and Michaels.

Thus, no "inference" was necessary to answer Question 10(a); the raw, testimonial evidence was dispositive, and any inference contrary to that evidence is counterfactual and unworthy of deference.[14] But if any inference should have been drawn, it was that the circumstances listed

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[12] See Evidence Code § 600(b) (defining "inference" as "a deduction of fact that may *logically and reasonably* be drawn from another fact or group of facts found or otherwise established in the action") (emphasis added).

[13] CT1082, CT1083, CT1087 (Report at pp. 3, 4, 7).

[14] An inference may and should be based on evidence, but it cannot contradict or substitute for the available evidence of record. (See Assembly Committee on Judiciary Comment to Evidence Code § 600 ["Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence."].)

above furnish additional indicia that McConkey's 1995-96 admissions were accurate, and that Eichenberg and Michaels recounted those admissions accurately at the reference hearing.

Second, the State's attack on Eichenberg's and Michaels' testimony is unfounded because there is no evidence that they said anything untrue; nor did the referee make any negative finding regarding their demeanor. Indeed, the State itself filed a post-hearing brief below in which it admitted that Michaels and Eichenberg "***seemingly testi[fied] truthfully***."[15] Now, almost seven months later, the State tries to retract that admission, having belatedly recognized that the referee's "no evidence" finding on Question 10(a) is untenable unless Eichenberg and Michaels are somehow discredited—a step that the referee himself refused to take.

The State therefore attempts to discredit Eichenberg and Michaels as "biased" anti-death-penalty advocates. But—as the State previously conceded—there is no evidence of dishonesty by Eichenberg or Michaels. They were not impeached in any respect. Instead, the State resorts to the more slippery concept of "bias." The State's apparent theory—never adopted by the referee—is that Eichenberg and Michaels are incapable of accurately observing and describing objective facts due to their alleged "bias."

But the State's *ad hominem* attacks are unjustified and unfair. They do not rest on any individual assessment of the witnesses' honesty. Rather, those attacks are founded on politically-based stereotypes of the witnesses'

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[15] CT1001 (State's Post-Hr'g Br.) at p. 2, line 11 (emphasis added).

character and moral commitments. The subtext is: these are bleeding-heart anti-death-penalty liberals who can't be trusted to testify accurately about McConkey's admissions because they will do or say anything to save Curtis Price's life.

But this canard falls flat. Eichenberg's and Michaels' work as defense attorneys has no bearing on their character for truthfulness. Indeed, the undersigned defense counsel take the strongest possible exception to any such argument. And the State ignores the evidence that Eichenberg is a respected member of the Humboldt County bar. Indeed, Eichenberg was the former President of the Humboldt County Bar Association in 1995 when McConkey told her about the incident at the Waterfront Café.[16] She has practiced law in Eureka for over 20 years.[17] The State's charge of "bias" completely ignores the fact that Eichenberg risks losing her considerable reputation in her community if she is viewed as having assisted a loathed death-row inmate.

And the State doesn't stop there. It also tries to "spin" the fact that, at the time of the reference hearing, Eichenberg represented Child Welfare Services as Deputy County Counsel.[18] The State proffers a despicable argument that Eichenberg is "biased" and unreliable because she has chosen to devote her career to helping abused and neglected children so they won't end up on death row like Curtis Price. Again, the subtext is that

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[16] RT256-257.

[17] RT251.

[18] S. Br. at p. 9 citing (1 RHT 105-106), this citation should be RT268-269.

anyone who helps poor children must be a liberal who can't be trusted to testify accurately about prosecutorial misconduct in a capital case.

The State fares no better when attempting to discredit Michaels. The State argues that, when Michaels spoke to McConkey in 1996, she was an anti-death-penalty defense lawyer who just wanted to confirm the facts as she already believed them to be. But the account that Michaels sought to confirm was one that came straight from McConkey's mouth, and that he previously had volunteered to Eichenberg. And Michaels ***did*** in fact confirm that account—including McConkey's statement that he carried out Bass's instructions to give Southworth the money and the message to vote for guilt. There is no evidence that Michaels asked McConkey leading questions or somehow put words in his mouth. McConkey volunteered this information to Michaels, as he had to Eichenberg.[19] The State has presented no legitimate reason for discrediting Michaels' testimony.

The State's political stereotyping is notable for its lack of evenhandedness. One could argue with equal merit—or lack of merit—that all testimony by prosecutors Bass and Dikeman should be discredited because, as prosecutors, they are "biased" death-penalty proponents. Witness Geri Johnson likewise could be written off as Dikeman's obviously "biased" spouse. Yet the State detects no "bias" in their testimony.

Thankfully, the referee did not stoop to this level. His finding on Question 10(a) was not based on the State's crude political caricatures. In fact, his finding wasn't based on credibility determinations of any kind, but

[19] RT642.

rather, on an illogical and counterfactual inference that the State finds it impossible to defend.

Thus, the referee's finding on Question 10(a) cannot stand; the *Remmer* presumption concededly arises; the State concededly failed to rebut that presumption; and petitioner's *Remmer* claim must be granted.

B. This Court should reject three additional arguments made by the State.

The parties' opening briefs fully set forth their views of the evidence and of the referee's findings. Petitioner need not belabor all of those points here.[20] But a few arguments proffered by the State warrant an additional response.

First, the Court should reject the State's illogical argument that, because McConkey gave Bass some change from his $20 bill, "Mr. Bass did not in actuality give any money to Mr. McConkey to convey to Ms. Southworth."[21] That argument might have made some sense if Bass had collected the change instead of leaving it behind. But he didn't. He left it there as a tip and then did nothing to retract his initial instructions that McConkey (a) split the tip with Zetta, (b) tell her that the tip came from Bass, and (c) tell her that the money was for a guilty verdict. The State fails to explain how McConkey's act of making change could have cleansed the money of Bass's "direction or request that it be conveyed to

[20] Petitioner's decision not to burden the Court with repetitive arguments in no way constitutes a waiver of any argument made in his opening brief to this Court. Petitioner reasserts each and every argument made in his opening brief.

[21] S. Br. at pp. 12-13 (discussing Reference Questions 5(a) and 6(a).

Ms. Southworth."[22] And the State casts its own credibility to the wind when it further asserts that McConkey's act of making change shows that Bass did not "in actuality ask that any message be conveyed."[23] In fact, the referee found that Bass instructed McConkey to "give [Southworth] this money and tell her to vote guilty."[24] Accordingly, this Court should disregard the State's bizarre contention that McConkey's act of making change somehow cleansed the money of any impropriety.

Second, the Court should reject the State's preposterous contention that it is normal for a prosecutor to send money to a sitting juror in a capital case. Labeling the money a "tip" given "in the normal course of business" in no way redeems it.[25] In fact, Bass's conduct displayed a flagrant disregard for the normal rules governing juror contacts and was inconsistent with Bass's own normal practice in restaurants—he admitted that it would be "unusual" to send money back to a cook,[26] an admission that fully accords with the common experience of most restaurant-goers. And Bass compounded that impropriety by failing to report it to the trial court or to the defense.

Third, it is simply untrue that "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

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[22] S. Br. at p. 13.

[23] S. Br. at p. 13.

[24] CT1085, Report at p. 6.

[25] S. Br. at p. 12.

[26] RT399.

drinks to Ms. Southworth."[27] Once again the State tries to prop up an erroneous finding by claiming that it rested upon a determination that Eichenberg and Michaels were not credible. And once again, the referee made no such determination. As explained on pages 27-28 of petitioner's opening brief, the referee framed the credibility issue as a contest between Mr. McConkey and himself—and its resolution of that issue made no sense, was not based on the referee's firsthand observation of witness demeanor, and is owed no deference.[28]

II. CONCLUSION

For the reasons stated above, the Court should grant the remedies specified on page 46 of petitioner's opening brief.

Respectfully submitted,

Dated: February 22, 2010

KEKER & VAN NEST LLP

By: 

STEVEN A. HIRSCH
Attorneys for Petitioner CURTIS PRICE

[27] S. Br. at p. 19.

[28] See Opening Br. at p. 28 & fn. 66.

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 RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND TO RESPONDENT'S BRIEF ON THE MERITS contains 3,059 words excluding parts not required to be counted under Rule 8.204(c)(3).

Dated: February 22, 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.

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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

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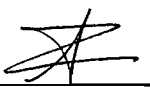

Laura Lind