SUPREME COURT COPY

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In the Supreme Court of the State of California

In re **CURTIS F. PRICE,** **On Habeas Corpus.**	**CAPITAL CASE** Case No. S069685

Direct Appellate Case No. CR009898
Humboldt County Superior Court, Case No. S004719
The Honorable W. Bruce Watson, Judge

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

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DEATH PENALTY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION

Petitioner has failed to meet his burden of proving by a preponderance of the evidence that Mr. Bass engaged in any misconduct. In response to the Referee's Report of Proceedings and Findings of Fact, petitioner "[a]s might be expected, because the referee's report was generally unfavorable to him, [] states many exceptions." (*In re Scott* (2003) 29 Cal.4th 783, 816.) He also insists that the evidence developed in the reference hearing established that Mr. Bass engaged in misconduct by bribing a sitting juror with drinks and less than $20. In short, because of the referee's adverse findings, petitioner simply assumes that an improper contact was made and argues his case as if the factual record actually supported his position. However, the reference hearing proved that a joke was told to Mr. McConkey and never relayed to any juror. As a result, no federal or state presumption of prejudice is triggered. Petitioner's failure to prove any improper conduct by Mr. Bass is the reason his petition must be denied.

The only evidence in support of petitioner's allegations was testimony by Gena Eichenberg and Sandra Michaels regarding alleged prior inconsistent statements by Mr. McConkey. However, the referee clearly rejected the testimony of Ms. Eichenberg and Ms. Michaels and credited the sworn testimony of Mr. McConkey. Also, the clear biases of Ms. Eichenberg and Ms. Michaels (along with the circumstances surrounding the "good lawyer story") destroyed any impeachment value offered by their testimony. 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 happened.

ARGUMENT

I. PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT ARE NOT SUPPORTED BY THE EVIDENCE AND HIS LEGAL ANALYSIS IS FATALLY FLAWED

A. The Referee's Report Resolves Testimonial Conflicts, Relies on Credibility Determinations, and Should Be Given Great Weight.

When an evidentiary hearing has been ordered, the referee's findings of fact are given great weight if supported by substantial evidence, particularly on issues requiring resolution of testimonial conflicts and assessment of a witness's credibility. (*In re Cox* (2003) 30 Cal.4th 974, 998.) Petitioner seeks to avoid application of the deference standard by challenging the report and findings on a number of grounds. Although lengthy and at times overwrought, petitioner's objections are ultimately unavailing because they are premised on a mistaken view of the evidence and of the referee's role.

When the Court issues an order to show cause it is making a "preliminary assessment that petitioner would be entitled to relief if he proved the factual allegations" of the petition. (*In re Johnson* (1998) 18 Cal.4th 447, 461.) The petitioner bears the burden of proving the facts supporting his claim for relief by a preponderance of the evidence. (*People v. Duvall* (1995) 9 Cal.4th 464, 475; see *In re Michael Allen Hamilton* (1999) 20 Cal.4th 273, 293 [referee found that petitioner failed to show juror bias, juror lies in voir dire, or juror prejudgment by preponderance of evidence].)

While the referee's report in this case is short, this Court has never established any particular standard as to the structure and content of the report beyond answering the questions asked in the reference order. Indeed, it appears that a variety of different styles have been utilized in presenting a

referee's findings. (See, e.g., *In re Cox*, *supra*, 30 Cal.4th at p. 981 [noting that referee's report, filed four years after the hearing, was 1,129 pages long]; *In re Roberts* (2003) 29 Cal.4th 726, 739-740 [referee apparently set forth findings on questions with no detailed summary of the evidence]; *In re Johnson*, *supra*, 18 Cal.4th at pp. 456-457 [referee's report apparently limited to credibility findings and some additional conclusions without a summary of the evidence presented].)

The referee acts "as an impartial fact finder for this court." (*In re Scott*, *supra*, 29 Cal.4th at p. 818.) In determining whether relief should be granted the Court has the benefit of the referee's report and the transcript of the hearing upon which it is based. (*Id.* at p. 824.) Obviously, the more "reliable and helpful" the report, the more likely it is the Court will adopt the credibility and other factual determinations. In this report, the referee made several express and implied credibility determinations in support of his findings as well as several clear resolutions of testimonial conflicts. As a result his findings should be given great weight. (*In re Cox*, *supra*, 30 Cal.4th at p. 998.) Despite the strength of the report's findings, or more likely because of it, petitioner raises claims that no such credibility determinations were made or supported and pretends that no resolution of conflicting testimony was made. (Petitioner's Exceptions "Pet. Excep." at pp. 12, 24-26.) Petitioner's arguments are not supported by the weight of the evidence and the referee's report should be adopted.

Finally, petitioner's specific request that the referee and this Court shift the burden to respondent on question no. 10 highlights the fact that there is insufficient evidence to support petitioner's claims. (Pet. Excep. At pp. 40-44.) Petitioner's argument that respondent should be punished for not reporting the alleged improper juror contact, puts the cart before the horse. The evidence clearly showed that Mr. Bass did indeed make the joke to Mr. McConkey and saw that Mr. McConkey obviously got the joke

because he laughed and did not keep any twenty dollar bill, instead bringing the change back to Mr. Bass. (1 RHRT 303-305.)[1] After receiving his change and leaving an appropriate tip from the change, Mr. Bass would not expect Mr. McConkey to take any money to Ms. Southworth much less convey a message for her to vote guilty. Nonetheless, petitioner asks this Court to shift his burden onto respondent when there is no credible proof of any improper juror contact, nor any proof of conduct by Mr. Bass suppressing an improper juror contact. Because the strength of the actual evidence does not support his theory, petitioner asks this Court to presume that Mr. McConkey conveyed the message and money to Ms. Southworth. This request has no basis in logic or law and should be denied.

In any event, regardless of which party bore the burden, the referee clearly found that the evidence proved the answer to question no. 10 was "No." (Findings at p. 7, lns. 8-12; RHCT 1086.)[2] The referee could have answered equivocally if the evidence was evenly balanced as he did in other answers. (See, e.g., referee's answer to question 11(b), Findings at p. 7, lns. 18-20; RHCT 1086.) Instead, the referee evaluated the testimony given and determined that the weight of the evidence proved that Mr. McConkey did not convey any message regarding voting guilty to Ms. Southworth. (Findings at p. 7, lns. 8-12.)

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[1] To avoid confusion with references to the reporter's transcript and clerk's transcript of the underlying trial, respondent refers to this reference hearing's reporter's transcript and clerk's transcript as "RHRT" and "RHCT" respectively.

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

B. The Referee Resolved the Testimonial Conflicts In Favor of Respondent and Neither Ms. Michaels Nor Ms. Eichenberg Provide Credible Impeachment of Mr. McConkey's Testimony.

Petitioner's version of the facts is not supported by the evidence produced at the reference hearing. The main support for petitioner's claims consists of the testimony of Gena Eichenberg and Sandra Michaels regarding alleged prior inconsistent statements by Mr. McConkey. There was directly conflicting testimony about whether Mr. McConkey took drinks from Mr. Bass to Ms. Southworth and whether Mr. McConkey conveyed the joke and money to Ms. Southworth. (1 RHRT 230, 246-248, 254, 258; 2 RHRT 640-642.) The referee unquestionably resolved the dispute in favor of Mr. McConkey's sworn testimony. (Findings at pp. 4, ln 18-5, ln. 9, 7, lns. 8-12; RHCT 1083-1084, 1087; see Part I, C. below.) The direct observation of the witnesses, the circumstances surrounding the taking of the allegedly impeaching statements, and the biases of Ms. Michaels and Ms. Eichenberg clearly provided the referee with ample grounds to reject the alleged impeachment.

A brief examination of whether or not drinks were sent to Ms. Southworth shows the weakness of petitioner's alleged impeachment evidence. Sandra Michaels, an attorney hired by petitioner's legal team, was the only witness who claimed that multiple drinks were sent to Ms. Southworth. (2 RHRT 642.) However, 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 RHRT 301-303.) While he has 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 RHRT 462-463.) 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 RHRT 225.) He was positive Mr. Bass did not share a drink with Ms. Southworth. (1 RHRT 230.) He later explained that it would be "unusual" and "extremely unusual" for him to take a drink back to Ms. Southworth and stated that it is possible that Mr. Bass sent a drink to Ms. Southworth, but he doubts it. (1 RHRT 241-243, 247.)

Ms. Michaels' bias in favor of hearing only what she wanted to hear was made clear in her testimony. Ms Michaels admitted that Mr. McConkey told her that he thought that Mr. Bass was only kidding when she testified "And what he said to me was, 'I thought he was just kidding and didn't really mean for her to vote guilty.' He thought that the guy was just kidding." (2 RHRT 648-649, 653-655.) After the interview, Ms. Michaels signed a declaration made under penalty of perjury that claimed that a declaration they had prepared for Mr. McConkey accurately reflected the statements of Mr. McConkey. However, Ms. Michaels failed to include in that declaration the crucial fact that Mr. McConkey told her that he thought Mr. Bass was only joking. (2 RHRT 655.) During her testimony, Ms. Michaels explained that she did not think that it was really an important fact. (*Ibid.*)

Ms. Michaels' bias is further shown by her reaction to Mr. McConkey's statement that he thought Mr. Bass was just kidding. She testified that when Mr. McConkey seemed to realize the seriousness of the situation, he became uncomfortable and informed her that Mr. Bass was just kidding. (2 RHRT 648-649.) Based on no statement of Mr. McConkey, but simply upon her pure speculation, Ms. Michaels testified that she concluded that Mr. McConkey was worried about the reaction that customers and other locals would have so he made up the story about Mr. Bass kidding around. (2 RHRT 656.) However, the evidence shows that Mr. McConkey prefaced his telling of the story, in the casual setting of a

bar nearly ten years after the incident, by saying it was a "good lawyer story." (1 RHRT 254.) When telling the story, Mr. McConkey "was getting a kick out of it - - putting lawyers in a bad light and he sort of enjoyed that." (1 RHRT 264.) He also likes to tell lawyer stories, lawyer jokes, and bar stories that exaggerate the truth. (1 RHRT 245, 273-275.) Based on the circumstances of the telling of the story by Mr. McConkey, the more likely reason he clarified that Mr. Bass was just kidding was the fact that he realized Ms. Michaels was inappropriately taking his bar story seriously.

Ms. Michaels also expressly revealed her own 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 RHRT 659.) 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, the referee was correct in finding that her testimony did not impeach Mr. McConkey's forthright, sworn testimony during the hearing.

While, Ms. Eichenberg did not display the extreme bias of Ms. Michaels, she nonetheless had biases that clouded her interpretation of Mr. McConkey's bar story. She testified 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 RHRT 268-269.)

Regarding the circumstances surrounding the telling of the incident to Ms. Eichenberg, petitioner alleges that the statement was very serious in tone. (Pet. Excep. at p. 37.) However, the weight of the credible evidence made it clear that Mr. McConkey was telling a "good lawyer story" for

entertainment, just like any bar story. 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.[3] (1 RHRT 271-272.) 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 RHRT 273.) The form of her request strongly implied that Mr. McConkey should tell the same bar story he told before. He apparently did, this time adding the fact that a drink was sent back to Ms. Southworth. (1 RHRT 258.)

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 RHRT 642.) Mr. McConkey made this modification to the tale 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 RHRT 224-225, 238, 241-243.) As a result, petitioner's reliance on the alleged prior statements by Mr. McConkey to Ms. Michaels and Ms. Eichenberg provide no impeachment of his sworn testimony. The referee clearly came to the same conclusion, expressly noting that the statements were no more than the re-telling of a "good lawyer story" and varied with each telling. (Findings at pp. 3, lns. 4-6, 4, ln.

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[3] The evidence proved that petitioner's attorney bought Mr. McConkey a drink during his interview while failing to prove the allegation that Mr. Bass bought Ms. Southworth a drink.

18-5, ln. 7; RHCT 1082-1084.) The referee appropriately rejected the attempted impeachment in favor of Mr. McConkey's sworn testimony and his findings should be given great weight.

C. Specific Reference Questions

Respondent provided the evidentiary support for the referee's answers to the reference questions in its brief on the merits and exceptions to the referee's report, but here provides additional information in response to some of petitioner's exceptions.

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

Answer: No.

Petitioner asserts in his exceptions to the referee's findings that Mr. McConkey testified only that he could not remember whether he sent drinks to Ms. Southworth and, as a result, does not contradict the alleged impeachment offered by the "good lawyer story" he told Ms. Michaels and Ms. Eichenberg. (Pet. Excep. at pp. 27-29.) However, a full reading of his testimony makes it clear that Mr. McConkey did not believe Mr. Bass sent drinks to Ms. Southworth. Mr. McConkey testified that it was possible, but he did not remember any patrons ever sending drinks back to Ms. Southworth while she was working at the Waterfront Café. (1 RHRT 225.) He later explained that it would be "unusual" and "extremely unusual" for him to do so. (1 RHRT 241-243.) He further clarified that it was possible that Mr. Bass sent a drink to Ms. Southworth, but he doubted it. (1 RHRT 247.) Petitioner's attempt to dismiss Mr. McConkey's testimony as a mere lack of recall is a distortion of the full record and should be rejected. Mr. McConkey's clear meaning in his testimony as found by the referee was that Mr. Bass did not send any drinks to Ms. Southworth on the night in question.

Additionally, 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 RHRT 301-303.) 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 RHRT 462-463.)

Reference Questions 5(a) and 6(a)

Petitioner misunderstands or misconstrues the referee's findings on questions 5(a) and 6(a) when he accuses the referee of "hair-splitting" based on "meaningless semantic distinctions." (Pet. Excep. at pp. 30-32.) The referee's findings clearly turn on the condition precedent contained in the questions, namely, "If Bass gave McConkey money for Southworth, . . .?" The referee obviously found and respondent has not disputed that Mr. Bass spoke the words that Mr. McConkey should split money with Ms. Southworth. (Findings at pp. 5, ln. 14-7, ln. 10; RHCT 1084-1086.) However, as respondent has argued, the referee found that Mr. Bass simply made the comment as a joke and did not in fact give Mr. McConkey any money to give to Ms. Southworth. (*Ibid.*) The fact that Mr. McConkey split his tips with Ms. Southworth in the normal course of business, does nothing to change this finding. The referee engaged in no semantic "hair-splitting" as alleged by petitioner, he simply did not view the evidence in the way petitioner wished. The referee's answers and findings are supported by substantial evidence and should be accepted.

Reference Questions 7-9

Reference questions seven through nine all turn on the issue of whether or not the alleged incident occurred and whether or not Mr. Bass intended any comment to be a joke. Petitioner claims that these questions are factually and legally irrelevant. (Pet. Excep. at pp. 9-11, 32-33.) This

can only be based on petitioner again putting the factual conclusion ahead of the factual findings. The joking tone and surrounding joking circumstances are directly relevant to the question of whether or not any improper juror contact ever even occurred. As noted above, the testimony of Mr. McConkey and Ms. Johnson made it absolutely clear that they had no doubt that the comment was a joke and that all three of them laughed. (1 RHRT 227-228, 243, 246, 303-305.) 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 RHRT 303-305.) Further, from 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. In sum, Mr. Bass's comment was not meant to be taken any more seriously than when an annoyed parent tells his or her overly rambunctious children to "go outside and play on the freeway" or when a person tells a co-worker to "go jump in a lake."

Petitioner again relies on Ms. Eichenberg and Ms. Michaels to attempt to impeach the testimony of Mr. McConkey and Ms. Johnson that the comment was made in a joking manner. (1 RHRT 227-228, 243, 246, 303-305.) Petitioner also ignores the testimony by Mr. McConkey, Ms. Johnson, Mr. Bass, Mr. Dikeman, Justice Phelan, and Virginia Bass that Mr. Bass has a character trait of constantly making jokes. (1 RHRT 309; 2 RHRT 463-464, 477-478, 542-543, 634.) As noted above, Ms. Eichenberg obviously misunderstood the bar story to be serious despite the fact that Mr. McConkey was getting a big kick out of it and never intended that it be taken seriously, and Ms. Michaels was only interested in confirming her view of the story rather than getting the truth.

Contrary to petitioner's argument, Mr. Bass's knowledge of the rules of conduct related to juror contacts proves that he did not violate any of

those rules. Petitioner again assumes that his conclusion of improper conduct is true and uses that assumption to impute guilty knowledge to Mr. Bass. (Pet. Excep. at pp. 14-15.) However, when viewed in light of the circumstances surrounding the allegations, it becomes clear that Mr. Bass could not have attempted to send a bribe Ms. Southworth. The evidence showed that Mr. Bass and Ms. Johnson were not well acquainted and the night at the Waterfront was their first time socializing alone. (1 RHRT 286-287.) Additionally, Mr. Bass had never before met Mr. McConkey the bartender. (1 RHRT 209.) The evidence also clearly showed that upon the inadvertent contact with Ms. Southworth, Mr. Bass told her he couldn't talk to her to maintain propriety and Ms. Southworth promptly returned to the kitchen. (1 RHRT 291-293.) Given his limited familiarity with Ms. Johnson and Mr. McConkey, along with his legal knowledge and prior appropriate conduct, it requires tremendous conjecture to conclude that Mr. Bass would openly attempt to bribe Ms. Southworth with less than twenty dollars.

Finally, in an absurdly circular analysis, petitioner attempts to use his false conclusion that Mr. Bass sent a bribe to Ms. Southworth as a surrounding circumstance to "prove" that Mr. Bass' comment was not a joke. (Pet. Excep. at pp. 35-36.) However, 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 RHRT 295-296, 303-305.) Mr. McConkey was less clear that the comment was made before the change was made, but still understood it was a joke and only split the tip with Ms. Southworth because he splits the tips with her in the normal course of business anyway. (1 RHRT 227-228.) As a result, 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.

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.

Petitioner claims that the referee was wrong in stating that ". . . there is no evidence that McConkey conveyed the joke." (Pet. Excep. at pp. 36-39.) In fact, petitioner claims that the referee's finding "is contradicted by all of the available evidence." (Pet. Excep. at p. 36.) Not surprisingly, petitioner again unequivocally credits the testimonies of Ms. Michaels and Ms. Eichenberg, but the referee's finding just as clearly rejects their testimonies. The dubious quality of the alleged impeaching statements has been detailed above and provides a reasonable basis for the referee to have rejected the statements and credited Mr. McConkey's sworn testimony.

There is ample support in the record for the referee's answer that Mr. McConkey did not tell Ms. Southworth the joking comment made by Mr. Bass. Mr. McConkey was clearly a somewhat suggestible witness who made it clear that he did not think he conveyed the joke but because he was testifying honestly admitted that it was possible.

While testifying on direct, Mr. McConkey gave an equivocal positive response regarding telling the joke to Ms. Southworth; during cross-examination, he clarified that while it was possible, he did not remember telling Ms. Southworth the joke; and during re-direct, he finally, strongly made it clear that he did not believe he told the joke to Ms. Southworth. (1 RHRT 227-229, 243-244, 246-248.) The following exchange at the end of Mr. McConkey's re-direct by petitioner's counsel leaves no doubt of Mr. McConkey's actual belief:

> Q. And same thing with what you did say to Ms. Southworth about Mr. Bass's comment, I think I heard – I wrote it down, it's possible that you told her what he said; is that right?

A. I guess.

Q. But you just don't recall at this point?

A. Correct.

Q. Excuse me one second. And when—what I'm asking about, just to be clear, when I ask you is it possible that you told her what Mr. Bass said, I'm talking about the comment that – the joke comment or whatever?

A. Right.

Q. It's possible, but you just don't recall?

A. Correct.

Q. That Mr. Bass – I'm sorry, that you told Zetta Southworth what Mr. Bass said about vote guilty in the Price case?

A. I don't think I said that.

Q. But it's possible?

A. I don't remember it.

(1 RHRT 247-248.)

What is not shown in the written record is the emphatic nature of Mr. McConkey's last answers that he did not think he said that and that he did not remember it. Mr. McConkey was clearly of the belief that he never told the joking comment to Ms. Southworth and was attempting to prevent petitioner's counsel from putting words in his mouth. As a result, all that remains of petitioner's evidence is the mere possibility that the message was conveyed to Ms. Southworth. This amounts to nothing more than speculation and is insufficient to prove by a preponderance of the evidence that the joke was ever told to Ms. Southworth. The referee was in a position to observe the emphasis of each answer, put it in the context of the entire testimony, and avoid any overly literal interpretation of the testimony.

The referee also seems to have found that mere speculation provided no actual evidence that Mr. McConkey conveyed any message regarding guilt to Ms. Southworth. As such, his findings should be accepted.

D. Petitioner's Legal Analysis Is Flawed

Petitioner for the most part correctly describes the relevant legal standards for evaluating potential juror tampering. However, petitioner misses the point when he argues that there is no "joke exception" to the burden shifting that occurs once an improper juror contact has been proved. (Pet. Excep. at pp. 9-11, 32-33.) Respondent does not argue that Mr. Bass's comment should be excused merely because it was a joke. Instead we assert that because it was only a joke and because that joke was not told to Ms. Southworth, the burden shifting analysis is simply not applicable. Clearly, if Mr. Bass had told the joke directly to Ms. Southworth, respondent would have to show that there was no substantial likelihood that it caused Ms. Southworth to be biased. However, despite petitioner's argument, the law does not require the Court to presume facts that petitioner has not proven.

Petitioner's reliance on the fact that the jury tampering in *Remmer v. United States* (1956) 350 U.S. 377, was based on a purported joke is unavailing because in *Remmer* it was established in the factual record that the alleged joke was based on a conversation about hundreds of thousands of dollars and was told directly to the juror. (*Id.* at p. 380.) Here the evidence shows just the opposite. The joke involved less than $20 and was not told to the juror. None of the relevant state or federal law on jury tampering requires shifting any presumption of prejudice to the respondent simply because a joke was made to a third party.

Petitioner's evidence about Ms. Southworth's alleged vulnerability to a bribe is the same as the allegations he raised in his fourth petition for habeas corpus, (*In re Price*, S139574) which was previously denied by this

Court. His repeating of this evidence is not relevant to the reference questions and, in any event, carries little weight. For example, petitioner's claims regarding Ms. Southworth's alleged lies on her jury questionnaire in terms of her or her family's criminal histories reveal that the only criminal contacts consisted of minor, common crimes. Ms. Southworth had two insufficient funds checks from North Carolina approximately 10 years before petitioner's trial. (Pet. RH Exh. FF.) This is the kind of incident that any juror could easily forget. Further, the criminal record of her son consisted of a theft he committed as a juvenile where he was committed to a youthful offender facility, transportation of marijuana for which he was on probation, and petty theft for cutting wood from a piece of redwood driftwood. (1 RHRT 317-322, 327; Pet. RH Exhs. BB, DD.) These are hardly the types of serious crimes that evidence a juror who was vulnerable to undue influence. They are more likely the types of crimes that Ms. Southworth did not think were important enough to report or were simply too old and insignificant for her to recall.

CONCLUSION

Petitioner has failed to meet his burden of showing that Mr. Bass had an improper contact with Ms. Southworth and the evidence affirmatively proves that no such contact ever happened. 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: February 22, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S RESPONSE TO PETITIONER'S POST-HEARING BRIEF AND EXCEPTIONS TO THE REFEREE'S REPORT** uses a 13 point Times New Roman font and contains 4,847 words.

Dated: February 22, 2010

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Attorneys for Respondent

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 February 22, 2010, I served the attached **RESPONDENT'S RESPONSE TO PETITIONER'S POST-HEARING BRIEF AND EXCEPTIONS TO THE REFEREE'S REPORT** 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:

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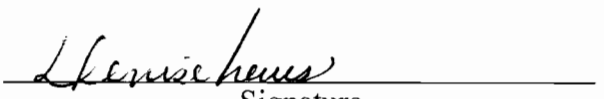
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 22, 2010, at San Francisco, California.

Denise Neves
Declarant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