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FILED

MAR 22 2004

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY GRANT FRYE,

Petitioner,

No. CIV S-99-0628 LKK JFM

vs.

DEATH PENALTY CASE

THOMAS P. GOUGHNOUR,¹
Acting Warden of California
State Prison at San Quentin,

Respondent.

ORDER

Petitioner's motion for reconsideration came on for hearing March 18, 2004 before the undersigned. Tim Schardl and Dennis Cusick appeared for petitioner. Wanda Hill Rouzan appeared for respondent. Petitioner seeks reconsideration of the denial of two requests for discovery related to his claim 37, that the California death penalty scheme fails to narrow the class of murderers eligible for the death penalty. Details of those discovery requests, as well as the history of petitioner's requests for discovery on claim 37, are set out in the court's January 8, 2004 order and will not be repeated here. It is noted, however, that petitioner's motion is his

¹ Mr. Goughnour is substituted for his predecessor, Jeanne S. Woodford, as Acting Warden of California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d).

1 third attempt to convince this court to require respondent to provide extensive data on California
2 homicide cases. In each attempt, petitioner has substantially revised his discovery requests. In
3 this third attempt, petitioner finally limits the materials sought to those his experts state are
4 necessary to create a statistical basis for claim 37.

5 Local Rule 78-230(k) requires a party seeking reconsideration to show "what new
6 or different facts or circumstances are claimed to exist which did not exist or were not shown
7 upon such prior motion, or what other grounds exist for the motion" and "why the facts or
8 circumstances were not shown at the time of the prior motion." Petitioner's stated reasons for
9 failing to present previously the support and arguments contained in the present motion are
10 simply that his counsel did not understand what the court required. While the undersigned is not
11 particularly impressed by this as a basis for petitioner's repeated and varied attempts to obtain
12 discovery on claim 37, the court recognizes that creating a statistical basis for claim 37 is
13 complex. In this motion for reconsideration, petitioner sets out specific requests for discovery
14 which are, for the first time, supported by expert declarations. These requests reflect an attempt
15 to minimize the burden on respondent while still providing the information necessary to
16 petitioner's experts. This court previously held that "[p]etitioner has made a sufficient factual
17 showing that the California special circumstances may be overbroad." Mar. 29, 2002 Order at
18 10. Given the court's statutory and common law discretion to reconsider or vacate a prior order,
19 this court finds the interests of justice best served by reconsidering the January 8, 2004 order.
20 See Fed. R. Civ. P. 54(b); City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882, 886-87
21 (9th Cir. 2001).

22 Petitioner's motion for reconsideration relies on the declaration of George G.
23 Woodworth, Ph.D. Feb. 6, 2004 Decl. of George G. Woodworth, Ph.D. ("Woodworth Decl."),
24 attached as ex. A to Pet'r's Feb. 6, 2004 Mtn. for Recon. Dr. Woodworth is a professor of
25 statistics at the University of Iowa. He has been involved in statistical studies of capital
26 sentencing schemes for more than twenty years. Id. at 1. Dr. Woodworth defines the universe of

1 cases relevant to claim 37 to be those in which: “(a) a person was convicted of first-degree
2 murder, second-degree murder, or voluntary manslaughter in California from November 7, 1978
3 to the present, and (b) the facts of the case would allow one to say that the criteria for a first-
4 degree murder conviction under California law are satisfied (regardless of the crime or degree of
5 which the person ended up being convicted).” Id. at 5. Dr. Woodworth refers to this universe of
6 relevant cases as “factual first-degree murder cases.” Id. The purpose of Dr. Woodworth’s
7 proposed study is to “assess how many of these factual first-degree murder cases also satisfy the
8 criteria for eligibility for a death sentence under California law.” Id. at 6. Dr. Woodworth’s
9 proposal requires approximately 700 randomly selected probation reports from first-degree
10 murder, second-degree murder, and voluntary manslaughter cases. Id. at 9-10. Dr. Woodworth
11 states that it will be necessary to obtain more than 700 probation reports to arrive at a final
12 sample of 700 cases because not all probation reports will have sufficient information. Id. at 10.

13 With these goals in mind, petitioner proposes the following discovery procedure:

14 Step 1. Obtain computerized data from respondent on all first-degree murder,
15 second-degree murder, and voluntary manslaughter cases in California from 1978 to the present
16 with the information necessary to create a representative sample.² The information sought
17 regarding each case is: name, CDC or CYA number, date of birth, county of control, county of
18 commitment, date of offense, date of sentence(s), and crime for which person convicted.
19 Submissions by both parties show that this information is contained in computer databases
20 available to respondent. Feb. 6, 2004 Decl. of Tim Schardl (“Schardl Decl.”), attached as ex. C
21 to Pet’r’s Feb. 6, 2004 Mtn. for Recon.; Mar. 3, 2004 Decl. of Lori Asuncion (“Asuncion Decl.”),
22 attached as ex. C to Resp’t’s Mar. 4, 2004 Oppo. to Pet’r’s Mtn. for Recon.

23
24 ² Petitioner seeks data from 1978 when the Briggs Initiative was passed. The Briggs
25 Initiative, also known as Proposition 7, expanded the list of special circumstances for which
26 death could be imposed and altered procedures for weighing mitigating and aggravating
circumstances. While voters have approved propositions since then which further expand the
special circumstances, the general framework for imposition of the death penalty has remained
the same since 1978. See Cal. Penal Code § 190.2.

1 Step 2. Based on analysis of the computerized data, identify and obtain 120
2 probation reports to enable experts to predict the percentage of reports that have sufficient
3 information to determine: (a) whether the case is a “factual first degree murder case;” and (b)
4 whether there was evidence to support a special circumstance finding.

5 Step 3. Using the percentage created in step 2, obtain enough probation reports to
6 arrive at a random sample of 700 useable probation reports.

7 See Woodworth Decl. at 9-18.

8 Respondent poses various legal objections to petitioner’s new requests. The court
9 addressed many of those objections previously. See Dec. 3, 2002 Order (rejecting arguments
10 that petitioner is barred from presenting factual support for claim 37 and that Court of Appeals’
11 decisions bar claim 37); see also Mar. 29, 2002 Order; Oct. 6, 2003 Order; and Jan. 8, 2004
12 Order. Respondent adds a few new legal objections.³ He argues that the new evidence would
13 render claim 37 unexhausted. However, since petitioner requested, and the California Supreme
14 Court denied,⁴ a request for discovery and an evidentiary hearing on this claim, petitioner is not
15 barred from introducing additional evidence in support of the claim here. See Williams v.
16 Taylor, 529 U.S. 420 (2000).

17 Respondent makes two significant objections to the discovery sought: that it
18 implicates privacy concerns and that it creates an undue burden of production. Petitioner has
19 addressed the privacy issue by proposing a protective order. Attached to petitioner’s December
20 19, 2003 Reply to the State’s Further Opposition to Discovery is a proposed protective order
21

22 ³ Respondent also makes the rather astonishing argument that new evidence may not be
23 presented on federal habeas unless it “unquestionably establishes innocence.” He relies on a case
24 involving the standards for consideration of a subsequent federal habeas petition. See Schlup v.
Delo, 513 U.S. 298 (1995). Those standards are not relevant to this court’s consideration of
petitioner’s discovery request in his first federal habeas petition.

25 ⁴ See In re Jerry Grant Frye, No. S062455, June 28, 1997 Pet. for Writ of Habeas Corpus
26 at 2-3 and 95, and Oct. 14, 1998 Order of the California Supreme Court; both lodged herein Apr.
27, 2001.

1 which: (1) limits dissemination of materials discovered by this order to counsel for petitioner,
2 petitioner's experts, and persons working under their direct supervision in connection with these
3 proceedings; and (2) requires petitioner's counsel and experts to identify each individual whose
4 computer records or probation reports are disclosed by numeric code in any filings made in the
5 public record of this case. Respondent has not shown this protective order would be inadequate
6 to address any privacy concerns. The court finds petitioner's proposed protective order
7 reasonably protects the privacy of those whose records would be disclosed by the discovery
8 sought.

9 Like petitioner's prior discovery requests on claim 37, the current request seeks an
10 immense amount of discovery. However, petitioner's current request is far more limited than the
11 prior ones. Moreover, the issue is not whether petitioner's requests create a burden, but whether
12 "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account
13 the needs of the case, the amount in controversy, the parties' resources, the importance of the
14 issues at stake in the litigation, and the importance of the proposed discovery in resolving the
15 issues." Fed. R. Civ. P. 26(b)(2).

16 It is difficult, at this point, to put a precise figure in terms of time and expense on
17 respondent's burdens as a result of petitioner's requests. With respect to step 1 of petitioner's
18 proposal, petitioner submits the declaration of Richard Newell, a computer data management
19 consultant. Feb. 5, 2004 Decl. of Richard Newell ("Newell Decl."), attached as ex. B to Pet'r's
20 Feb. 6, 2004 Mtn. for Recon. Mr. Newell states that he is familiar with the software used by
21 respondent to store the relevant data, and that he can write programs to retrieve, sort, and compile
22 the data. Respondent argues that Department of Corrections' employees will not relinquish
23 control of the databases and must retrieve the information themselves. However, he has not
24 shown the protective order is inadequate to address many of these concerns. Nor has respondent
25 shown just how much work collecting the data requested in step 1 would entail. It does appear
26 that the data sought in step 1 is available in various databases maintained by respondent and that

1 the data can be extracted. Asuncion Decl. at 1; Newell Decl. at 2-5. Respondent has not shown
2 that the burdens of producing the data requested through step 1 are undue.

3 The burdens associated with step 2 are more quantifiable. Respondent shows the
4 time necessary to locate, pull, and re-file probation reports and to update their outcards would be
5 ten minutes per report. Dec. 23, 2003 Decl. of Kristine Hubbard ("Hubbard Decl."), attached as
6 ex. B to Resp't's Oppo. to Pet'r's Mtn. for Recon. Therefore, respondent would use twenty
7 hours of staff time to respond to step 2. Again, there is no showing that step 2 creates an undue
8 burden.

9 Respondent's greatest objection is to step 3. Until petitioner's experts have the
10 opportunity to complete steps 1 and 2, they will not know just how many reports will be sought
11 under step 3. It is clear the total will exceed 700 reports. Therefore, at a minimum of 700
12 reports and ten minutes per report, respondent will be required to provide at least 117 hours of
13 staff time to respond to step 3. The court understands that this amount of staff time will create a
14 burden on a cash-strapped state agency. Hubbard Decl. at 2; Sept. 4, 2003 Decl. of Janet
15 Rodriguez ("Rodriguez Decl."), attached as ex. A to Resp't's Mar. 4, 2004 Oppo. to Pet'r's Mtn.
16 for Recon. On balance, however, the court finds the discovery necessary.

17 Petitioner establishes good cause for this discovery by showing he may be entitled
18 to relief if the facts are fully developed. Bracy v. Gramley, 520 U.S. 899, 904 (1997). Petitioner
19 has provided legal and factual support for claim 37. A death penalty scheme must narrow the
20 class of persons eligible for the death penalty so that those receiving it are not "a capriciously
21 selected random handful." Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stevens, J.,
22 concurring). "The Eighth Amendment requires that a jury's discretion be sufficiently channeled
23 to allow for a principled distinction between the subset of murders for which the sentence of
24 death may be imposed and the majority of murders which are not subject to the death penalty."
25 Wade v. Calderon, 29 F.3d 1312, 1319 (9th Cir. 1994) (citing Zant v. Stephens, 462 U.S. 862,
26 876-77 (1983) and Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980)). In a study examining 404

1 first degree murder convictions over a five-year period, the authors concluded that 83% of first
2 degree murderers were death eligible yet only 9.5% of those convicted of first degree murder
3 were sentenced to death. S. Shatz & N. Rivkind, The California Death Penalty Scheme:
4 Requiem for Furman, 72 N.Y.U.L. Rev. 1283 (1997). While this court found some problems
5 with a draft of this study presented in another case,⁵ it is certainly sufficient, at this stage of the
6 proceedings, to support petitioner's claim that a more thorough study may show that the
7 California death penalty scheme violates Furman's narrowing requirement. Given the
8 complexity of claim 37 and petitioner's showing of support for it, this court finds the benefits of
9 discovery outweigh the burden of production.

10 For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED
11 as follows:

- 12 1. Petitioner's February 6, 2004 Motion for Reconsideration is granted.
- 13 2. Upon reconsideration of the court's January 8, 2004 order, the court finds good
14 cause for petitioner's discovery requests as they are set out in the February 6 motion for
15 reconsideration. Rule 6, Rules Governing § 2254 Cases.
- 16 3. Within ten days of the filed date of this order, petitioner shall lodge a copy of
17 the proposed protective order attached to his December 19, 2003 Reply to the State's Further
18 Opposition to Discovery with any changes indicated herein.
- 19 4. Within twenty days of the filed date of this order, counsel for the parties shall
20 meet and confer regarding a procedure to accomplish step 1 of petitioner's discovery request. If
21 necessary, the parties may seek resolution of any disputes by setting a hearing before the court on
22 shortened time.

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26 ⁵ See May 29, 1997 Findings and Recommendations in Karis v. Calderon, CIV S-89-0527 LKK JFM.

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5. If petitioner intends to seek an evidentiary hearing on any claims in the Second Amended Petition besides claim 37, within thirty days of the filed date of this order he shall file a motion for an evidentiary hearing on those claims. A separate motion for an evidentiary hearing on claim 37 may be made at a later date.

DATED: March 19, 2003.

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UNITED STATES MAGISTRATE JUDGE