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JUL 2 7 2004
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY ________
DEPUTY

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JERRY GRANT FRYE,

Petitioner,

v.

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

Respondent.
_______________________________/

NO. CIV. S-99-628 LKK/JFM

DEATH PENALTY CASE

CHARLES D. RIEL,

Petitioner,

v.

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

Respondent.
_______________________________/

NO. CIV. S-01-507 LKK/KJM

O R D E R

DEATH PENALTY CASE

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1 The above-captioned death penalty cases come before the
2 court on motions for reconsideration of discovery orders by the
3 assigned magistrate judges. Because the two magistrate judges
4 have reached conflicting conclusions regarding the same discovery
5 issue, I decide the motions together, on the basis of the papers
6 and pleadings filed herein. Discovery rulings concerning non-
7 dispositive matters are reviewed under a "clearly erroneous or
8 contrary to law" standard. See 28 U.S.C. § 636(b)(1)(A).
9 In Frye v. Goughnour, Judge Moulds, on a motion for
10 reconsideration of his own previous order, granted petitioner's
11 requests for discovery relating to his claim that the California
12 death penalty scheme fails to narrow the class of murderers
13 eligible for the death penalty. In Riel v. Goughnour, by
14 contrast, Judge Mueller denied a nearly identical set of
15 discovery requests. Before turning to the discovery issue,
16 however, some background regarding petitioners' underlying legal
17 theory is necessary.

18 **I.**

19 **PETITIONERS' LEGAL THEORY AND DISCOVERY REQUESTS**

20 In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court
21 struck down the death penalty schemes of Georgia and other states
22 on the grounds that they created too great a risk of arbitrary
23 death sentences. Under Furman, a death penalty scheme must
24 narrow the class of persons eligible for the death penalty in
25 such a way that those receiving it are not "a capriciously
26 selected random handful." Id. at 309-10 (Stevens, J.,

1 concurring). "Furman mandates that where discretion is afforded
2 a sentencing body on a matter so grave as the determination of
3 whether a human life should be taken or spared, that discretion
4 must be suitably directed and limited so as to minimize the risk
5 of wholly arbitrary and capricious action." Gregg, 428 U.S. at
6 189 (opinion of Stewart, Powell and Stevens, JJ.). This
7 requirement remains the law. See, e.g., Wade v. Calderon, 29
8 F.3d 1312, 1319 (9th Cir. 1994) ("The Eighth Amendment requires
9 that a jury's discretion be sufficiently channeled to allow for
10 a principled distinction between the subset of murders for which
11 the sentence of death may be imposed and the majority of murders
12 which are not subject to the death penalty.") (citing Zant v.
13 Stephens, 462 U.S. 862, 876-77 (1983) and Godfrey v. Georgia, 446
14 U.S. 420, 428-29 (1980)).
15 The Furman Court "held that as a result of giving the
16 sentencer unguided discretion to impose or not to impose the
17 death penalty for murder, the penalty was being imposed
18 discriminatorily, wantonly and freakishly, and so infrequently
19 that any given death sentence was cruel and unusual." Gregg, 428
20 U.S. at 220-21 (White, J., concurring, joined by Burger, C.J.,
21 and Rehnquist, J.). Studies cited in Furman estimated that, in
22 the late 1960s and early 1970s, only 15 to 20% of death-eligible
23 murderers were actually sentenced to death and, the Court
24 concluded, there was no meaningful basis for distinguishing the
25 cases in which the death penalty was imposed. See Furman, 408
26 U.S. at 386 n. 11.

Petitioners here are attempting to prove that the California death penalty scheme defines death-eligibility so broadly that it operates in a similarly capricious manner. Petitioners' theory is supported in part by a study by Professors Shatz and Rivkind, which purports to demonstrate that the imposition of the death penalty under the California scheme is even more discriminatory, wanton, and freakish than under the pre-Furman death penalty schemes. See S. Shatz & N. Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283 (1997). Based on an analysis of California statutory and decisional law and on a statistical study of appealed first-degree murder cases, Professors Shatz and Rivkind conclude that Furman compels the conclusion that the California death penalty scheme is unconstitutional. In their discovery requests, petitioners seeks to obtain additional statistical evidence in order to prove this theory. Specifically, Frye proposed the following discovery procedure: (a) obtain basic computerized data from respondent on all first-degree murder, second-degree murder, and voluntary manslaughter cases in California from 1978 to the present with the information necessary to create a representative sample; (b) based on analysis of the computerized data, identify and obtain 120 probation reports to enable experts to predict the percentage of reports that have sufficient information to determine whether the case is a "factual first degree murder case" and whether there was evidence to support a special circumstance finding; and (c) using the percentage

created in step 2, obtain enough probation reports to arrive at a random sample of 700 useable probation reports. Riel sought nearly identical discovery with minor differences not relevant to this order.

II.

MOTIONS FOR RECONSIDERATION

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). Nonetheless, "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Bracy v. Gramley, 520 U.S. 899, 908-09 (1997) (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)). This is particularly so given "the heightened concern for fairness and accuracy that has characterized . . . review of the process requisite to the taking of a human life." Ford v. Wainwright, 477 U.S. 399, 414 (1986) (plurality). "[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." Id. (quoting Solesbee v. Balkcom, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting)).

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As explained above, the success of petitioners' legal theory with respect to the narrowing claim hinges upon whether the death penalty scheme in California actually results in as capricious an application of the penalty as under the pre-Furman schemes. Adequate factual support is thus critical to petitioners' ability to "substantiate [their] claim before it is rejected." Ford, 477 U.S. at 414. As Justice McMorrow of the Illinois Supreme Court recently explained in the context of a similar challenge to Illinois' death penalty scheme under Furman:

> Furman and its progeny can be read as providing guidelines for determining how narrowly a death penalty statute must be drawn to satisfy constitutional concerns. Regardless of where the line is ultimately drawn, however, *the question of whether the constitutional requirement of narrowing has occurred is a factual one*. In other words, to determine whether the Illinois death penalty statute is actually narrowing the pool of death-eligible defendants, we must know what the scope of the statute is with respect to actual cases. We must have some idea, for example, what percentage of first degree murder defendants are potentially death eligible and what percentage of those defendants actually receive the death penalty. Defendant, however, has not supplied us with this information. Although one might suspect that relatively few first degree murders in Illinois are not death eligible, suspicion is not a substitute for evidence. We cannot answer defendant's argument without the pertinent empirical data. Accordingly, defendant's contention that the death penalty statute is unconstitutional fails in this case, not as a matter of law, but rather, as the majority notes, because defendant has failed to 'substantiate [his] contention in any way.'

People v. Ballard, 794 N.E.2d 788, 826 (Ill. 2002) (McMorrow, J., concurring) (emphasis added).

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1 Judge Mueller's opinion denying Riel's request for discovery
2 did not question the merits of his legal theory, or even the
3 ability of the requested discovery to substantiate that theory.
4 Rather, Judge Mueller denied the discovery request based on the
5 suggestion of petitioner's counsel at oral argument that the
6 Shatz and Rivkind study alone would be sufficient to establish
7 the narrowing claim. The discovery request at issue, however,
8 was clearly designed to substantiate an argument made in the
9 alternative, namely, that even if the Shatz and Rivkind data were
10 insufficient to substantiate petitioner's claim, the California
11 death penalty scheme could nevertheless be shown to be
12 unconstitutional under Furman based on the additional data.

13 Petitioner is entitled to make such arguments in the
14 alternative, and should not suffer the consequence of being
15 denied one source of factual support for his theory as a
16 consequence of insisting on the adequacy of another. This basic
17 rule of procedural fairness is embodied in the Federal Rules of
18 Civil Procedure and is reflected in the case law. See, e.g.,
19 Fed. R. Civ. P. 8 ("A party may set forth two or more statements
20 of a claim or defense alternately or hypothetically . . ."); Oki
21 America v. Microtech Intern Inc., 872 F.2d 312, 314 (9th Cir.
22 1989) ("[O]ne of two inconsistent pleas cannot be used as
23 evidence in the trial of the other because a contrary rule would
24 place a litigant at his peril in exercising the liberal pleading
25 . . . provisions of the Federal Rules." (internal quotation marks
26 omitted)). This rule must particularly be observed where the

very life of the petitioner is at stake.

More to the point, the denial of discovery, in the absence of a negative conclusion as to the merits of petitioner's theory or the likelihood that the requested evidence might tend to support that theory, is a misapplication of the Bracy standard. Under Bracy, because the "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Bracy, 520 U.S. 899, 908-09. Accordingly, Riel should be permitted to obtain discovery along the lines permitted in Frye.

In his motion for reconsideration in Frye, respondent requests that this court reach the opposite conclusion and reverse Judge Moulds' decision to grant discovery on the narrowing claim, contending that the burden caused by the discovery is not supported by good cause based on the case law concerning the merits of petitioner's legal theory as to narrowing. Because the State has not demonstrated any "new or different facts or circumstances . . . or . . . other grounds" for revisiting the court's prior orders on this matter pursuant to Local Rule 78-230(k), respondent's request will be denied. In particular, as the court has previously explained, the court does not find that the Ninth Circuit's decisions in Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001) and Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002), authoritatively forcelose petitioner's

claim. See Order of January 10, 2003 ("Karis . . . has not suggested that evidence concerning the effect of the [death penalty] statute could never be relevant."). Respondent's motion is therefore denied.[1] Finally, the court notes that the district court has discretion to determine the scope of the discovery in a habeas case based on the particular facts and circumstances of the case. See id., 520 U.S. at 909 (noting that, while "given the facts of this particular case, it would be an abuse of discretion not to permit any discovery, Rule 6(a) makes it clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court"). The court therefore

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[1] In addition to the discovery issues discussed above, both parties raise a number of additional points, none of which require the court to reverse either magistrate judge under the "clearly erroneous or contrary to law" standard. In particular, Riel seeks reconsideration of the magistrate judge's denial of his request for (a) records describing the procedures to be followed when carrying out a lethal injection and (b) records describing the training and experience of personnel responsible for administering a lethal injection, in support of the theory that the method of execution by lethal injection scheduled to be used on Mr. Riel will cause such pain and suffering that his execution will be in violation of the Eighth Amendment.

The Ninth Circuit, however, has firmly held that "[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review." Campbell v. Wood, 18 F.3d 662, 687 (9th Cir. 1994) (rejecting petitioner's claim that execution by hanging posed an unacceptable risk of death by asphyxiation or decapitation because petitioner had "failed to establish that the risk of either result is more than slight"). The Campbell court held that petitioner "is not entitled to a painless execution, but only to one free of purposeful cruelty." Id. While Campbell concerned hangings in Utah rather than lethal injections in California, the applicable legal standards are the same. See LaGrand v. Lewis, 883 F.Supp. 469 (D. Ariz. 1995) (applying Campbell to lethal injections). The magistrate judge correctly concluded that petitioner had failed to put forward *specific allegations* with respect to lethal injections showing reason to believe that petitioner may be entitled to relief.

leaves to the assigned magistrate judges in the first instance the task of determining the precise scope and extent of the discovery to be permitted.

V.

CONCLUSION

For the foregoing reasons, the court hereby ORDERS as follows:

1. Respondent's request for reconsideration in Frye v. Goughnour, 99-0628 is DENIED.

2. Petitioner's motion for reconsideration in Riel v. Goughnour, 01-0507 is GRANTED IN PART AND DENIED IN PART as explained herein.

3. Both cases are REMANDED to the respective assigned magistrate judges for further proceedings consistent with this order.

IT IS SO ORDERED.

DATED: July 26, 2004.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
July 27, 2004

* * CERTIFICATE OF SERVICE * *

2:99-cv-00628

Frye

v.

Calderon

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 27, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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