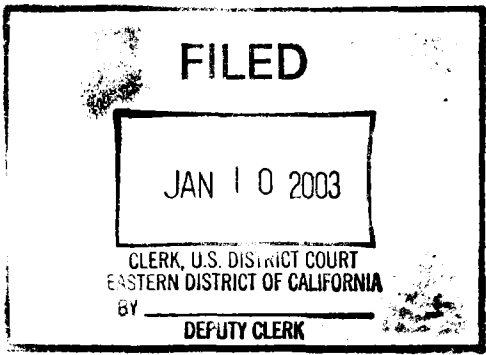


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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JERRY GRANT FRYE,  
Petitioner,

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

v.

O R D E R

ARTHUR CALDERON, Warden of  
California State Prison  
at San Quentin,

**DEATH PENALTY CASE**

Respondent.

Respondent in the above-captioned case seeks reconsideration of the magistrate judge's December 3, 2002, order granting the petitioner's motion to compel answers to petitioner's interrogatories relating to his claim 37. I resolve the motion on the pleadings and papers on file herein, and without oral argument. See Local Rule 78-230(h).

The magistrate judge's order granting petitioner's motion to compel was a non-dispositive order. Non-dispositive pre-trial motions referred to the magistrate judge pursuant to

1 28 U.S.C. § 636(b)(1)(A) are reviewed under a clearly erroneous  
2 or contrary to law standard. See 28 U.S.C. § 636(b)(1)(A); Local  
3 Rule 303(f); United States v. Raddatz, 447 U.S. 667, 673 (1980).  
4 Under this standard, I do not find it appropriate to reconsider  
5 and revise the magistrate judge's order.

6       Petitioner's claim 37 asserts that the California death  
7 penalty statute violates the Eighth and Fourteenth Amendments  
8 by failing to genuinely narrow the class of persons eligible for  
9 the death penalty. In opposition to the petitioner's motion to  
10 compel, the respondent argued that petitioner's claim was purely  
11 legal, making discovery unnecessary. Respondent also contended  
12 that Teague v. Lane, 489 U.S. 288 (1989) barred petitioner's  
13 claim 37. Respondent now argues that the magistrate judge's  
14 rejection of both of these contentions was contrary to law.  
15 I do not agree.

16       As the magistrate judge correctly noted, there is no  
17 authority for the proposition that factual support is irrelevant  
18 to the question of whether a death penalty statute properly  
19 narrows in accordance with Furman v. Georgia, 408 U.S. 238  
20 (1972). While the Ninth Circuit has considered narrowing claims  
21 solely by considering the scheme set forth in California's death  
22 penalty statute, see Karis v. Calderon, 283 F.3d 1117, 1141 n.11  
23 (9th Cir. 2002), it has not suggested that evidence concerning  
24 the effect of the statute could never be relevant. As to the  
25 respondent's Teague argument, the narrowing requirement, upon  
26 which petitioner's claim 37 is premised, is as old as Furman,

1 supra, and can hardly be said to be "new ground."

2       Because the magistrate judge's conclusions in his December  
3 3, 2002, order were not clearly erroneous or contrary to law,  
4 I decline to reconsider or revise that order. Respondent's  
5 motion for reconsideration is DENIED.

6       IT IS SO ORDERED

7       DATED: January 8, 2003.

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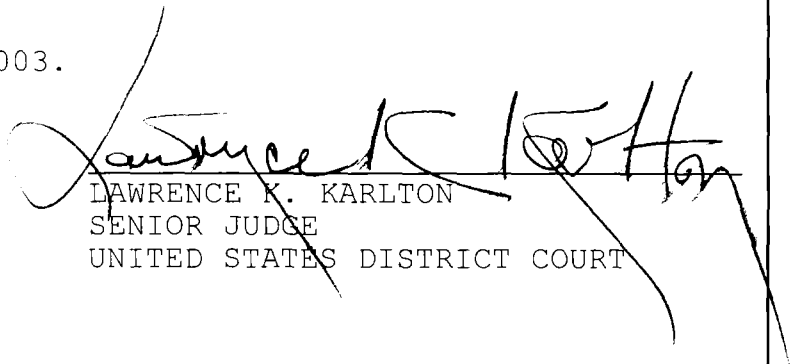
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LAWRENCE K. KARLTON  
SENIOR JUDGE  
UNITED STATES DISTRICT COURT

