

1 mitigating evidence and conduct adequate cross examination) and Claim 22 (deprivation of
2 assistance of adequate mental health assistance due to ineffective assistance of counsel). After
3 the evidentiary hearing, the Court may, if necessary, address reserved Claims 11 and 35 as well
4 as record-based Claims 8, 18, 27, 28, 29, 30, 31, 33, and 34.

5 **I.**

6 **BACKGROUND**

7 The Court ordered a limited evidentiary hearing on October 8, 2004. Afterwards, the
8 Court entered an order regarding hearing preparation on March 11, 2005. Petitioner filed a
9 response on March 1, 2006. Petitioner identified 36 documents and declarations. All of the
10 identified evidentiary material was filed with his response. Respondent filed a response to
11 Petitioner's submission on February 15, 2007. Respondent identified a single witness, expert
12 Reese Jones, M.D., accompanied by Dr. Jones' February 14, 2007 declaration. Further
13 evidentiary hearing preparations were then interrupted pursuant to Rohan ex rel. Gates v.
14 Woodford, 334 F.3d 803 (9th Cir. 2003) as the parties litigated the propriety of staying the
15 proceedings because Petitioner lacked competence to assist his attorneys with preparation. The
16 Court entered a Gates stay on September 18, 2007. The Gates stay was lifted effective January
17 8, 2013 when the Supreme Court filed its opinion in Ryan v. Gonzales, ___ U.S. ___, 131 S. Ct.
18 696 (2013). See Order filed January 29, 2013 by this Court.

19 **A. Claims 4 and 6**

20 In his response to the November 19, 2013 order, Respondent refutes every factual
21 conclusion advocated by Petitioner in Claims 4 and 6, from Petitioner's mental condition up to
22 his arrival at the County Jail, to the alleged professional incompetence of defense counsel in
23 relying on incorrect information about the drug screen tests. Respondent contends that Herb
24 Bivens, M.D., an emergency room doctor who administered medical care to Petitioner on the
25 night of his arrest, will testify at the evidentiary hearing. In addition, Respondent refers to Dr.
26 Jones' declaration.

27 Respondent concedes the existence of "undisputed evidence" supporting the fact that
28 Petitioner has been battling schizophrenia since his early twenties to the present. Respondent

1 agrees that Petitioner’s behavior leading up to and subsequent to the murder “most likely” was a
2 consequence of the cumulative effects of long-time PCP ingestion and mental illness. However,
3 during the murder, Respondent claims Petitioner was goal-directed and not influenced by PCP
4 ingestion or mental illness.

5 In his response, Petitioner referenced prior declarations (not objected to by Respondent)
6 evidencing his long term substance abuse and mental illness.

7 **B. Claim 21**

8 In granting an evidentiary hearing for Claim 21, the Court considered documentary
9 evidence, declaration testimony, and Petitioner’s trial testimony. See October 8, 2004 Order, pp.
10 24-30, 166-68. The documents included Fresno County Jail records from the infirmary, the
11 Safety Cell, and the Acute Psychiatric Unit. The expert testimony included declarations from
12 Allen Middleton, Ph.D., Markham Kirsten, M.D., Paul Levy, M.D., Mary Heatley, R.N., Shirley
13 Reece, M.S.W., Allan Hedberg, Ph.D., and Vernon Foster, M.D. The lay testimony included
14 declarations from Juanita McPeters, Hansel Baber, Levester Johnson, Lonzel McPeters, and
15 Denise McPeters. Petitioner’s trial testimony was that he had not been present at the crime
16 scene, in spite of the overwhelming evidence that he was the perpetrator.

17 Respondent does not object the introduction of any of the foregoing evidence. However,
18 Respondent intends to rebut the evidence with the previously submitted declaration of Dr. Jones,
19 the August 12, 1992 declaration of Petitioner’s defense counsel, and Jail infirmary records
20 during the state trial proceedings.

21 **C. Claims 15 and 16**

22 Claims 15 and 16 address Petitioner’s mental state based on witness observations and
23 documentary evidence. Family and third party witnesses state in declarations that Petitioner’s
24 behavior and appearance was consistent with PCP use. One third-party witnesses, Daniel
25 Malcher, was called by the prosecution to explain Petitioner’s violent response to a traffic
26 altercation during penalty proceedings. Other witnesses were involved with McPeters’ treatment
27 while incarcerated at the County Jail prior to and during trial.

1 Petitioner contends that defense counsel failed to conduct an adequate investigation to
2 refute the testimony of the prosecution's expert witness, Joel Fort, M.D.. Dr. Fort's trial
3 testimony strongly discounted signs that Petitioner was under the influence of PCP or was
4 mentally ill at the time of the crime and asserted that any signs of Petitioner's mental illness
5 constituted malingering. Petitioner also faults defense counsel for his failure to develop evidence
6 to mitigate the penalty, such as evidence of his sadistic upbringing and developmental problems
7 in school.¹ The Court granted Petitioner an evidentiary hearing to develop these factual issues
8 based 1) on expert testimony universally disputing the validity of all drug screens, 2) percipient
9 witness testimony, including an employee at the APU discounting an escape attempt by
10 Petitioner, and 3) documentary evidence from the County Jail.

11 **D. Claim 22**

12 Claim 22 presents an amalgamation of the issues raised in Claims 4, 6, 15, and 21. With
13 respect to Claims 4, 6, and 15, Petitioner claims defense counsel's incompetent representation
14 resulted in him not receiving adequate mental health assistance under Ake v. Oklahoma, 475
15 U.S. 68 (1985).² By incorporating Claim 21, Petitioner claims ineffective assistance of counsel
16 for defense counsel's failure to request a competence examination during trial proceedings.
17 Claim 22 relies upon the same evidence as the other four related claims.

18 **II.**

19 **DISCUSSION AND ORDER**

20 The Court will conduct a scheduling conference to address evidentiary issues pertaining
21 to the claims identified above. Specifically, the parties should be prepared to address the
22 appropriate and most efficient manner of presenting the evidence with respect these claims at the
23 evidentiary hearing. Further, with respect to Claims 15, 16, and 22, the parties should be
24 prepared to address any disputes regarding the admissibility of the evidence relied upon by both
25 parties.

26 ¹ The Court denied Petitioner's request to challenge defense counsel's competence in Claim 15 regarding
27 admission of prior violent conduct during penalty proceedings.

28 ² The Court denied the portion of Claim 22 alleging that prosecutorial misconduct caused Petitioner's
deprivation of adequate mental health assistance.

1 Generally, the Court prefers the presentation of evidence via live testimony because it is
2 more succinct and complete. However, the court will consider alternatives if its meets with
3 judicial and economic efficiency for all. One exception may be if both parties agree to submit
4 testimony via written declaration. If all other parties waive their right to cross examination or
5 consent to conducting cross examination by written interrogatories, the Court will generally
6 permit the admission of testimony by written declaration. See 28 U.S.C. § 2246. Further, under
7 certain circumstances the Court may allow testimony to be introduced from a pre-hearing
8 deposition. However, neither party requested to preserve testimony by deposition. Further,
9 although Respondent has voiced no objection to the admission of a number of declarations, he
10 has not waived his right to cross examine those witnesses.

11 The Court notes that in Petitioner's March 1, 2006 identification of evidence sought to be
12 admitted at the anticipated evidentiary hearing, Petitioner did not mention all of the individuals
13 whose declarations were considered in the Court's October 8, 2004 order. The most notable
14 omission was that of Dr. Fort: Dr. Fort initially testified in favor of the prosecution at the state
15 trial, but later gave a declaration repudiating his earlier conclusions based on information that
16 was provided by Petitioner's habeas attorneys and withheld by the prosecutor. Dr. Fort's
17 declaration is dated March 2, 1992 and would be relevant to Claims 15, 16, and 22. However, in
18 light of the passage of time, it is not clear that Dr. Fort or the other witnesses listed in
19 Petitioner's March 1, 2006 submission would be still available to testify at an evidentiary
20 hearing.

21 At the scheduling conference, the parties should be prepared to discuss mutually
22 agreeable documentary evidence as well as the identity of available witnesses for examination.
23 It appears from the parties' respective responses that an agreement is likely with respect to
24 documentary evidence.

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