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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RONALD AVERY McPETERS,

 Petitioner,

 v.

KEVIN CHAPPELL, AS WARDEN OF SAN
QUENTIN CALIFORNIA STATE PRISON,

 Respondent.

Case No. 1:95-cv-05108-LJO-SAB

DEATH PENALTY CASE

ORDER CONTINUING EVIDENTIARY
HEARING

Continued Hearing:
Date: June 9, 2015
Time: 9:00 a.m.
Courtroom: 9
Judge: Stanley A. Boone

SCHEDULING ORDER FOR EVIDENTIARY
HEARING

Petitioner’s federal petition was filed on April 22, 1996. Following litigation concerning the procedural default of several claims and merits briefing by the parties, Petitioner filed a motion for evidentiary hearing, record expansion, and discovery on June 7, 1999. On October 8, 2004, the Court granted this motion, in part, as to Claims 4, 6, 15A, 16, 21, and 22. Claim 4 alleges ineffective assistance of counsel for the failure to present an insanity defense. Claim 6 alleges ineffective assistance of counsel for failure to present a defense that Petitioner was legally unconscious due to mental illness, drug-induced psychosis, or both, and lacked the mens

1 rea necessary for the crimes for which he was convicted. Claims 15A and 16 allege ineffective
2 assistance of counsel for failure to present mitigating evidence and conduct adequate cross-
3 examination at the penalty phase. Claim 21 raises a substantive claim of mental incompetence
4 throughout the entire proceeding. Claim 22 alleges Petitioner was deprived of the benefit of
5 adequate mental health assistance due to the ineffective assistance of counsel alleged in Claims
6 4, 6, and 15A.

7 Besides the six Claims for which an evidentiary hearing was granted, Claims 11 and 35
8 were reserved pending the outcome of the evidentiary hearing. The merits of record-based
9 Claims 8, 18, 27, 28, 29, 30, 31, 33, and 34 have not been addressed.

10 The matter was stayed on September 18, 2006, pursuant to Rohan ex rel. Gates v.
11 Woodford, 334 F.3d 803 (9th Cir. 2003), due to Petitioner's incompetence (ECF No. 244).
12 Following the Supreme Court's decision in Ryan v. Gonzales, 133 S. Ct. 696 (2013), this Court,
13 on November 19, 2013, issued an order reinstating preparations for the evidentiary hearing
14 (ECF No. 265).

15 The November 19, 2013 order identified, and directed the parties to respond to, the
16 following issues to be resolved at evidentiary hearing (ECF No. 265 at 4:6-26):

- 17 1) Petitioner's mental and physical condition after his arrest and prior to his booking
18 into the Fresno County Jail;
- 19 2) Whether Petitioner was placed in a safety cell contemporaneous with his booking into
20 the Fresno County Jail and the reasons therefor;
- 21 3) Whether Petitioner's anti-psychotic medication was prescribed for and administered
22 to him contemporaneous with his booking into the Fresno County Jail;
- 23 4) Whether Petitioner's attorney abandoned his guilt phase defense strategy to present
24 mental health experts because he was unable to establish a foundation of drug
25 involvement;
- 26 5) Whether the results of drug tests conducted on Petitioner's blood were reliable
27 indicators of his intoxication and/ or mental state at the time of the offense;
- 28 6) Whether Petitioner's attorney fully appreciated the import of the toxicological test

1 results, erroneously accepted the prosecutor's inaccurate characterization that the
2 blood vial which tested positive for PCP in an appreciable quantity was contaminated,
3 and incompetently failed to investigate the matter himself; and

- 4 7) Whether the declarations of Petitioner's mental health experts, including the turn-
5 around testimony of Dr. Joel Fort, are based on reliable, supportable facts, including
6 Petitioner's alleged long-term history of drug and alcohol abuse.

7 The parties filed their respective responses to these issues (ECF Nos. 268-270). The parties also
8 filed an initial joint pre-evidentiary hearing statement (ECF No. 275).

9 A telephonic case management conference was held on August 4, 2014 during which an
10 evidentiary hearing was set for June 2, 2015 (ECF No. 276).

11 A telephonic status conference was held on January 16, 2015, during which the parties
12 agreed to continue the June 2, 2015 evidentiary hearing to June 9, 2015. Counsel Gary Sowards
13 and Margo Hunter appeared for Petitioner and Counsel Tami Krenzin and Jeff Grant appeared
14 for Respondent.

15 The Court now provides further scheduling and direction for the evidentiary hearing.

16 It is HEREBY ORDERED as follows:

17 1. The evidentiary hearing currently set for June 2, 2015 at 9:00 a.m. in Department
18 9 is continued to June 9, 2015 at 9:00 a.m. in Department 9 before the undersigned. The parties
19 need not appear for hearing on June 2, 2015.

20 2. Not later than February 27, 2015:

21 a. The parties shall disclose expert witness testimony and related reports
22 pursuant to Rule 26(a)(2). Any motion to conduct a pre-hearing discovery deposition of an
23 opposing party's expert shall be filed within 10 days of the disclosure. Any motion to exclude an
24 opposing party's proffered expert witness shall also be filed within 10 days of the disclosure.
25 Opposition to either motion shall be filed 10 days thereafter, and if the Court deems a hearing
26 necessary the matter shall be set for telephonic hearing 7 days thereafter or on the next available
27 date on the Court's calendar.

28 b. The parties shall disclose lay witness lists. Any motion to conduct a pre-

1 hearing discovery deposition of an opposing party's lay witness shall be filed within 10 days of
2 the disclosure. Any motion to exclude an opposing party's lay witness shall also be filed within
3 10 days of the disclosure. Opposition to either motion shall be filed 10 days thereafter, and if the
4 Court deems a hearing necessary the matter shall be set for telephonic hearing 7 days thereafter
5 or on the next available date on the Court's calendar.

6 c. The parties may request that Petitioner attend the evidentiary hearing in
7 person or participate via video conference.

8 3. Not later than April 24, 2015:

9 a. The parties shall disclose rebuttal expert witness testimony and related
10 reports. Any motion to conduct a pre-hearing discovery deposition of an opposing party's
11 rebuttal expert shall be made within 10 days of the disclosure. Any motion to exclude an
12 opposing party's proffered rebuttal expert shall also be filed within 10 days of the disclosure.
13 Opposition to either motion shall be filed 10 days thereafter, and if the Court deems a hearing
14 necessary the matter shall be set for telephonic hearing 7 days thereafter or on the next available
15 date on the Court's calendar.

16 b. Either party may file any discovery motion(s) not otherwise provided for
17 in this schedule. Opposition to such motions shall be filed 10 days thereafter, and if the Court
18 deems a hearing necessary the matter(s) shall be set for telephonic hearing 7 days thereafter or on
19 the next available date on the Court's calendar. Within 5 days of the Court's ruling on any
20 motion for discovery, any additional discovery ordered by the Court shall be produced.

21 4. Not later than May 22, 2015:

22 a. The parties shall file with the Court and serve upon each other final
23 witness and exhibit lists pursuant to Rule 26(a)(3). The parties shall also file copies of any listed
24 exhibits not previously filed in this matter.

25 5. Following the exchange of the parties' witness and exhibit lists, the parties shall
26 meet and confer to determine (i) whether the testimony of certain witnesses, if any, can be
27 introduced via written declaration with either a waiver of cross-examination, or consent to
28 conduct cross-examination by written interrogatories or by production of the witness by the

1 proffering party for cross-examination in court, and (ii) whether they can stipulate to any
2 undisputed facts or legal or evidentiary issues.

3 6. Not later than June 2, 2015:

4 a. The parties shall file any in limine motions regarding the admissibility of
5 evidence, scope of witness testimony, etc. These motions may be taken up at the outset of the
6 evidentiary hearing.

7 b. The parties shall file a supplemental joint pre-hearing statement, which
8 shall (i) identify counsel who will appear at the hearing, (ii) identify any stipulated and
9 uncontested facts, and (iii) identify the contested issues of fact and law.

10 c. The parties shall separately file proposed findings of fact and conclusions
11 of law.

12 7. The evidentiary hearing will address Claims 4, 6, 15A, 16, 21 and 22. Claims 4,
13 6, and 21 pertaining to the guilt phase shall be addressed first. The parties, in addressing these
14 six Claims, shall include the issues for resolution identified above and the other party's
15 previously filed response thereto and state why proffered evidence does or does not support the
16 Claims.

17 8. After the evidentiary hearing, the Court may, if necessary, address reserved
18 Claims 11 and 35 as well as record-based Claims 8, 18, 27, 28, 29, 30, 31, 33, and 34.

19 9. Evidence shall be presented via live testimony unless the parties stipulate
20 otherwise, or the Court so orders. If the other party waives the right to cross-examination or
21 consents to conduct cross-examination by written interrogatories, see 28 U.S.C. § 2246, or in
22 court, the Court will generally permit the admission of testimony by written declaration. Further,
23 under certain circumstances the Court may allow testimony to be introduced from a pre-hearing
24 deposition.

25 10. Counsel shall create five complete, legible and identical sets of exhibits in binders
26 as follows: (a) three sets of binders to be delivered to Courtroom Deputy Mamie Hernandez no
27 later than **May 29, 2015** (one for use by the Courtroom Clerk and one for use by the Court and
28 one for purposes of questioning witnesses to be placed at the witness stand); and (b) one set for

