

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN MICHAEL BEAMES,

 Petitioner,

 v.

RON DAVIS, Warden of San Quentin State
Prison,

 Respondent.

Case No. 1:10-cv-01429-AWI-SAB

DEATH PENALTY CASE

ORDER FOLLOWING HEARING ON
PETITIONER’S MOTION TO EXCLUDE
ANGELITA McMAINS AS A WITNESS AT
EVIDENTIARY HEARING

(ECF No. 136)

Before the Court is Petitioner’s October 1, 2015 motion to exclude Respondent’s designated lay witness, Angelita McMains, from the February 1, 2016 evidentiary hearing on grounds Ms. McMains’s testimony would be irrelevant (Fed. R. Evid. 402), cumulative (Fed. R. Evid. 403), and subject her to harassment and embarrassment (Fed. R. Evid. 611). Respondent filed opposition to the motion on October 12, 2015. Petitioner replied to the opposition on October 13, 2015.

The matter came on for hearing on October 23, 2015, at 4:35 p.m., in the above-entitled Court, the Honorable Stanley A. Boone presiding. Counsel Harry Simon and Matthew Scoble appeared for Petitioner and counsel Robert Gezi and Kevin Quade appeared for Respondent, all appeared telephonically.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.

FACTUAL BACKGROUND

Petitioner was arrested on January 20, 1994, in connection with the death of Cassie McMains, the 15-month old daughter of Petitioner's girlfriend, Angelita McMains. The California Supreme Court, in summarizing the facts of this case, found that "[o]n January 19, 1994, Cassie bled to death due to a transection of her liver; that is, her liver had been hit so hard it was split nearly in two." People v. Beames, 40 Cal. 4th 907, 911 (2007).

Petitioner and Ms. McMains were charged with various crimes in relation to Cassie's death. Their trials were severed. Petitioner was charged with murder (Pen. Code § 187), a special circumstance allegation that the murder involved the infliction of torture (Pen. Code § 206), and possession of a firearm by an ex-felon (Pen. Code § 12021).

The evidence presented at Petitioner's trial included "medical testimony concerning the numerous physical injuries Cassie suffered in the weeks, days, hours, and minutes leading up to her death, and testimony from Cassie's natural father [Ricky Hager], [Petitioner's] siblings, McMains's father, and [Petitioner] himself." Beames, 40 Cal. 4th at 911.

On August 22, 1995, Petitioner was found guilty of all charges and the alleged special circumstance. On September 1, 1995, the jury returned a verdict of death. On March 22, 2007, the judgment was affirmed on automatic appeal in Case No. S050455. Beames, 40 Cal. 4th at 907.

II.

PROCEDURAL BACKGROUND

A petition for writ of habeas corpus was filed in the California Supreme Court on June 7, 2007. Claim 1 of the state petition alleged Petitioner's Sixth Amendment rights were violated by trial counsel's failure to challenge the prosecution's forensic evidence including as to the cause of Cassie's death. On July 28, 2010, the state petition was summarily denied on the merits, without issuance of an order to show cause.

Petitioner's federal petition was filed on July 27, 2011. The Court reviewed the federal petition and directed the Respondent to file an answer to claim 11, which alleges that trial

1 counsel was prejudicially deficient at the guilt phase by failing to (1) retain and present his own
2 pediatric forensic pathologist with respect to Cassie’s cause of death; (2) adequately cross-
3 examine the prosecution’s medical experts on this subject; (3) request lesser included
4 instructions; and (4) conduct a reasonable investigation with respect to Cassie’s cause of death.
5 Respondent filed his answer on August 29, 2011.

6 On April 9, 2015, the Court set a February 1, 2016 evidentiary hearing on claim 11. The
7 Court deferred merits briefing of record claims 3, 4, 5, 7, 19, 20, 21, 22, 28, 29, 30, 31, 32, 33,
8 34, 35A-C, 36, 37, 38, 39, 40, 41, 43A-N, 44, 45, 46, 47 and 48 until after the evidentiary
9 hearing.

10 **III.**
11 **DISCUSSION**

12 **A. Legal Standards**

13 1. Relevancy

14 “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than
15 it would be without the evidence; and (b) the fact is of consequence in determining the action.”
16 Fed. R. Evid. 401.

17 “Relevant evidence is admissible unless any of the following provides otherwise: the
18 United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme
19 Court. Irrelevant evidence is not admissible.” Fed. R. Evid. 402.

20 In order to be “relevant”

21
22 [E]vidence need not be conclusive proof of a fact sought to be proved, or even
23 strong evidence of the same. All that is required is a tendency to establish the fact
24 at issue. The Advisory Committee Notes to the 1972 Proposed Rules remind us
25 that [r]elevancy is not an inherent characteristic of any item of evidence but exists
26 only as a relation between an item of evidence and a matter properly provable in
27 the case. In that relation, [t]he fact to be proved may be ultimate, intermediate, or
28 evidentiary; it matters not, so long as it is of consequence in the determination of
the action.

27 U.S. v. Curtin, 489 F.3d 935, 943 (9th Cir. 2007).

28 Determinations of relevance and admissibility of evidence are largely with the discretion

1 of the trial court. U.S. v. Linetsky, 533 F.2d 192, 204 (5th Cir. 1976). The judge decides
2 whether evidence makes more or less probable the existence of a fact of consequence in the suit,
3 and this issue is one of admissibility under Rule 104(a). 1 Federal Evidence § 4:3 (4th ed.)

4 The federal rules favor admission of evidence rather than exclusion if the evidence has
5 any probative value at all. U.S. v. Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977).

6 2. Prejudice

7 “The court may exclude relevant evidence if its probative value is substantially
8 outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,
9 misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”
10 Fed. R. Evid. 403; see also U.S. v. Hankey, 203 F.3d 1160, 1168 (9th Cir. 2000) (recognizing
11 that the court's Rule 104(a) authority allows it to exclude evidence under Rule 403).

12 Exclusion of evidence under Rule 403 is in the first instance a matter for the sound
13 exercise of discretion by the trial judge. 1 Federal Evidence § 4:11 (4th ed.)

14 3. Protection of Witnesses

15 “The court shall exercise reasonable control over the mode and order of interrogating
16 witnesses and presenting evidence so as to (1) make the interrogation and presentation effective
17 for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect
18 witnesses from harassment or undue embarrassment.” Fed. R. Evid. 611(a).

19 The trial court has a duty to protect a witness from questions which merely harass, annoy
20 or humiliate him. Alford v. U.S., 282 U.S. 687, 694 (1931).

21 There is an “ever present need, power and duty resting upon the trial court to protect
22 witnesses from undue harassment or embarrassment; as well as to move, with reasonable
23 dispatch, the trial of the action and to limit its ranging too far afield.” U.S. v. Crosby, 462 F.2d
24 1201, 1202 (1972).

25 If a question has been asked and answered, the trial court has broad discretion to limit or
26 preclude repetitive and unduly harassing interrogation. See e.g., Delaware v. Van Arsdall, 475
27 U.S. 673, 679 (1986) (trial judge retains wide latitude to impose reasonable limits on cross-
28 examination based on concerns about harassment, prejudice, or that the interrogation is repetitive

1 or only marginally relevant).

2 **B. Summary of Parties' Arguments**

3 1. Petitioner

4 Petitioner argued at the hearing that should Ms. McMains be allowed to testify, she
5 would not be able offer percipient testimony contradicting the opinions of Petitioner's experts,
6 Drs. Ophoven and Bux, or add to her previous statements and testimony (see ECF No. 136, Ex.'s
7 1-3), that:

- 8 • She never saw Petitioner physically abuse Cassie (ECF No. 136, Ex. 1, at 13-14;
9 id., Ex. 2, at 37; id., Ex. 3, at 83, 87-88).
- 10 • Petitioner never physically abused her (ECF No. 136, Ex. 1, at 21; id., Ex. 2, at
11 42; id., Ex. 3, at 67-68).
- 12 • The broken leg Cassie suffered some months before her death was an accident
13 (ECF No. 136, Ex. 1, at 15; id., Ex. 2, at 34-35, 56-57; id., Ex. 3, at 69).
- 14 • Shortly before Cassie's death, Petitioner told her that Cassie had burned herself
15 on a heating grate; she saw burns on Cassie's hands and feet (ECF No. 136, Ex. 1,
16 at 16; id., Ex. 2, at 39-41, 42-43, 45, 58-59; id., Ex. 3, at 74).
- 17 • Petitioner was very possessive of Cassie and insisted on caring for her himself
18 (ECF No. 136, Ex. 1, at 26-27; id., Ex. 2, at 36, 38, 44; id., Ex. 3, at 72-73).
- 19 • She did not see what condition Cassie was in just before her death (ECF No. 136,
20 Ex. 1, at 9, 22; id., Ex. 2, at 50-53; id., Ex. 3, at 77).
- 21 • She saw Petitioner changing Cassie around midnight on the night of January 18,
22 1994 (ECF No. 136, Ex. 1, at 7, 18, 24-25; id., Ex. 2, at 47-48; id., Ex. 3, at 76).
- 23 • Petitioner did not let her see Cassie on the morning of January 19 [1994] and was
24 anxious that she leave the house quickly to take Darrian to a scheduled medical
25 appointment (ECF No. 136, Ex. 1, at 8-10, 19-20, 30; id., Ex. 2, at 50-53; id., Ex.
26 3, at 77).
- 27 • Later on the morning of January 19, [1994], when she returned after Darrian's
28 medical appointment, Petitioner told her that Cassie was dead and that her death

1 was an accident (ECF No. 136, Ex. 1, at 11-13; id., Ex. 2, at 54-55; id., Ex. 3, at
2 77).

3 (See also ECF No. 136 at 3:14-4:10).

4 Petitioner argued that Ms. McMains's previous statements and testimony regarding
5 Cassie's history of some abuse and significant neglect is conceded both by his experts and by
6 Respondent's expert, Dr. Cohen.

7 Petitioner argued that Ms. McMains's proposed testimony would be prejudicial to the
8 extent she refused to testify at Petitioner's criminal proceeding and was not offered immunity to
9 do so.

10 2. Respondent

11 Respondent argued at the hearing that Ms. McMains is the sole percipient witness and
12 would testify as to facts and circumstances leading up to and surrounding Cassie's death,
13 probative of Petitioner's alternative cause of death theory. He points to statements from
14 interviews Ms. McMains gave to local law enforcement on January 20, 1994 (see ECF No. 137,
15 Ex.'s A-C), that:

- 16 • Petitioner told her that he had tried to revive Cassie by performing hours of
17 "mouth to mouth" resuscitation (ECF No. 137, Ex. B, at 82).
- 18 • Prior to Cassie's death, she saw burns on Cassie's feet that appeared to be healing
19 (ECF No. 136, Ex. 3, at 74; ECF No. 137, Ex. A, at 17, 23, 29, 44; id., Ex. B, at
20 103).
- 21 • Petitioner was responsible for feeding Cassie the meals prepared by Ms. McMains
22 (ECF No. 137, Ex. A, at 18, 25-27, 41-42).
- 23 • Petitioner would not allow her to hold or care for Cassie in the days preceding
24 Cassie's death (id., Ex. A, at 21-27).
- 25 • Petitioner told her, on the morning of January 19, 1994, that Cassie had been sick
26 (ECF No. 136, Ex. 2, at 50, 52), yet she could not recall Cassie having shown
27 signs of sickness (id., Ex. 3, at 79).
- 28 • Petitioner had been violent with Cassie (ECF No. 137, Ex. A at 31, 59; id., Ex. C,

1 at 110-11, 126-27) and Cassie was timid in Petitioner's presence (ECF No. 136,
2 Ex. 3, at 79).

3 Respondent argued that only a portion of Ms. McMains's prior statements and testimony
4 is sworn and in the record in this action.

5 Respondent argued that Ms. McMains's credibility, to the extent it is in issue, could best
6 be evaluated at the hearing.

7 Respondent argued that any prejudice arising from Ms. McMains's heretofore unasserted
8 Fifth Amendment rights is ameliorated by available use immunity.

9 **C. Analysis**

10 Central to claim 11 is whether trial counsel unreasonably failed to contest the
11 prosecution's theory that Cassie had been killed by blunt force trauma to her midsection that
12 nearly severed her liver and caused a fatal internal hemorrhage.

13 Petitioner plans to offer opinion from Drs. Bux and Ophoven, that a competent autopsy
14 and forensic analysis would have shown that Cassie died not from trauma, but from malnutrition,
15 dehydration, aspirational pneumonia and a head wound, leading to a massive infection and septic
16 shock; and that Cassie's internal injuries including the lacerated liver and multiple broken ribs
17 were incurred post-mortem when Petitioner attempted CPR.

18 Respondent plans to offer expert opinion from Dr. Cohen, that the cause of death was as
19 stated at trial. To this end, Respondent has designated Ms. McMains as a potential lay witness,
20 in order that she may testify about

21
22 [I]njuries suffered by Cassie prior to her death, namely burns, bruising and a
23 broken femur. Ms. McMains may also testify that [Petitioner] was very possessive
24 of Cassie and that he was her primary caretaker during the days leading up to
25 Cassie's death. Ms. McMains may also testify about [Petitioner's] statements and
26 conduct in connection with Cassie's death.

27 (ECF No. 135 at 1:24-2:2.)¹

28 The Court finds the instant motion to be a close call. The alternative cause of death
theory raises issues which, though largely in the province of experts, can be informed by lay

¹ All pagination references are to Bates numbering unless otherwise noted.

1 testimony. The parties' dispute the immediate cause of death, though their experts appear to
2 concede that some abuse and significant neglect including malnutrition, probable dehydration,
3 and possible infection with or without sepsis were at least factors contributing to death. (See
4 e.g., ECF No. 127, at 18-19; *id.*, at 67-68; ECF No. 128-1, at 7-8.)

5 Ms. McMains's prior statements and testimony, to the extent admissible evidence, may or
6 may not be comprehensive of her knowledge relevant to the alternative cause of death.
7 Significantly, the alternative cause of death was not in issue when Ms. McMains gave the bulk of
8 her prior statements and testimony. Evidence of new matter, and even evidence that is relevant
9 on a conceded point or one established or supported by other proof, is not necessarily cumulative
10 or wasteful of time. 1 Federal Evidence § 4:15 (4th ed.); see also U.S. v. Hearod, 499 F.2d 1003,
11 1004-1005 (5th Cir. 1974) (admitting evidence of injuries suffered even though defendant had
12 previously admitted the existence of the injuries).

13 The possibility that Ms. McMains may be impeached is not a basis to exclude her. Ms.
14 McMains apparently concedes that some of her prior statements and testimony is equivocal and
15 self-conflicting. (ECF No. 137, Ex. A at 1412.) Nonetheless, the parties are free to attack her
16 credibility. Fed. R. Evid. 607. Moreover, other witnesses appear to have given testimony which
17 differs from Ms. McMains's testimony. For example, Petitioner stated to at least one other
18 witness that "he had been giving [Cassie] CPR for like five hours . . ." (see trial testimony of
19 Tammy Beames, Vol. 8, RT: 833), in contrast to Ms. McMains's noted statement that Petitioner
20 administered only "mouth to mouth."

21 The Court finds that at this juncture, the best course of action is to hold the instant motion
22 in reserve and allow counsel a brief opportunity to meet and confer and submit a stipulated
23 resolution related to the issues presented if they wish. At the October 23, 2015 hearing, the
24 parties discussed the "possibility" of a stipulation relating to admission of Ms. McMains's prior
25 statements and testimony. The Court intends that the parties participate in this discussion
26 irrespective of whether she will provide live testimony or not. The parties should be mindful that
27 in looking to the stipulation the Court may foreclose any use of live testimony or may include
28 some or all of the requested live testimony. This stipulation may involve past evidence related to

1 Ms. McMains as well as any stipulation regarding live testimony by her. Therefore, the parties
2 should keep this fact in mind in negotiating stipulations and should use the opportunity provided
3 herein to stipulate wisely. The Court is mindful that it cannot order the parties to stipulate to
4 anything but that any stipulation does assist in the Court's in its analysis as to the ultimate issue
5 regarding admissible of evidence. The Court will assess the parties' stipulated submittal and
6 then rule on the motion without further hearing.

7 **IV.**

8 **ORDER**

9 Accordingly, it is hereby ORDERED that counsel for the parties, within twenty-one (21)
10 days of the filed date of this order, shall meet and confer and file a joint statement which shall
11 include their efforts to reach a stipulated resolution of the instant motion including the issues of
12 Ms. McMains's prior statements and testimony becoming part of the record in this case and Ms.
13 McMains's proposed live testimony at the evidentiary hearing and the results of such efforts.
14 Petitioner's motion to exclude Angelita McMains from the February 1, 2016 evidentiary hearing
15 (ECF No. 136) is held in reserve pending the foregoing.

16 IT IS SO ORDERED.

17 Dated: November 3, 2015

18 
19 _____
20 UNITED STATES MAGISTRATE JUDGE