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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY GRANT FRYE,

Petitioner,

vs.

WARDEN, San Quentin  
State Prison,

Respondent.

No. CIV S-99-0628 LKK KJM

DEATH PENALTY CASE

ORDER

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In an order dated May 12, 2009, this court denied petitioner's request to exclude the testimony of respondent's expert Dr. Reese Jones as unreliable. The court permitted petitioner to renew his motion after Dr. Jones testified. Petitioner has done so. He moves to exclude Dr. Jones' testimony as unreliable under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). He argues Dr. Jones neither based his opinions on sufficient data nor used reliable methods to reach them.

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1 I. Applicable Standards

2 Federal Rule of Evidence 702 provides:

3 If scientific, technical, or other specialized knowledge will assist  
4 the trier of fact to understand the evidence or to determine a fact in  
5 issue, a witness qualified as an expert by knowledge, skill,  
6 experience, training, or education, may testify thereto in the form  
7 of an opinion or otherwise, if (1) the testimony is based upon  
8 sufficient facts or data, (2) the testimony is the product of reliable  
9 principles and methods, and (3) the witness has applied the  
10 principles and methods reliably to the facts of the case.

11 The Supreme Court in Daubert listed “four non-exclusive factors for consideration in the  
12 reliability analysis:”

13 “(1) whether the scientific theory or technique can be (and has  
14 been) tested; (2) whether the theory or technique has been  
15 subjected to peer review and publication; (3) whether a particular  
16 technique has a known potential rate of error; and (4) whether the  
17 theory or technique is generally accepted in the relevant scientific  
18 community.”

19 Metabolife Intern., Inc. v. Wornick, 264 F.3d 832, 841 (9th Cir. 2001) (citing Daubert, 509 U.S.  
20 at 593-94).

21 In the May 2009 order, this court described the role of Daubert and the preference  
22 for allowing evidence to be subject to the adversarial system rather than simply excluding it. The  
23 point is worth repeating here.

24 Rule 702 was amended in 2000 “in response to Daubert v. Merrell  
25 Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) . . .” Advisory  
26 Committee Notes to 2000 Amendments to Fed. R. Evid. 702. “In  
Daubert the Court charged trial judges with the responsibility of  
acting as gatekeepers to exclude unreliable expert testimony. . . .”  
Id. “The amendment affirms the trial court's role as gatekeeper and  
provides some general standards that the trial court must use to  
assess the reliability and helpfulness of proffered expert  
testimony.” Id. The Note warns, however, that

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1 [a] review of the caselaw after Daubert shows that  
2 the rejection of expert testimony is the exception  
3 rather than the rule. Daubert did not work a  
4 seachange over federal evidence law, and the trial  
5 court's role as gatekeeper is not intended to serve as  
6 a replacement for the adversary system. United  
7 States v. 14.38 Acres of Land Situated in Leflore  
8 County, Mississippi, 80 F.3d 1074, 1078 (5th Cir.  
9 1996). As the Court in Daubert stated: Vigorous  
10 cross-examination, presentation of contrary  
11 evidence, and careful instruction on the burden of  
12 proof are the traditional and appropriate means of  
13 attacking shaky but admissible evidence. 509 U.S.  
14 at 595.

15 Id.

16 May 12, 2009 Order at 6-7.

## 17 II. Analysis

18 Petitioner argues respondent bears the burden of showing Dr. Jones' testimony is  
19 both relevant to claims that are the subject of the evidentiary hearing and reliable under Rule 702.

### 20 A. Relevance

21 Petitioner initially argues that Dr. Jones' testimony is relevant only to claim 25  
22 because Dr. Jones testified that he was only asked to render an opinion as to petitioner's  
23 competence. Claim 25 is the only evidentiary hearing claim to which petitioner's competence is  
24 relevant. In claim 25 petitioner argues that the jail's withdrawal of petitioner's anti-anxiety  
25 medication just prior to the beginning of the penalty phase interfered with petitioner's ability to  
26 assist his counsel. Second Am. Pet. (Docket No. 104) at 207-210. Respondent argues that Dr.  
27 Jones' testimony also is relevant to claim 2 because he considered petitioner's "mental  
28 condition" as well as his competence. In claim 2 petitioner argues trial counsel should have  
29 investigated and presented evidence that petitioner lacked the mental state necessary for first  
30 degree murder. Id. at 72-81.

31 In his declaration, Dr. Jones stated that he was asked by respondent's counsel to  
32 "offer my professional opinions concerning [petitioner's] mental condition and competence

1 during his trial in 1988.” June 11, 2008 Decl. of Dr. Reese Jones (Jones Decl.; Docket No.  
2 298-1) ¶ 3. Dr. Jones repeated that instruction during his deposition. Aug. 7, 2008 Depo. of Dr.  
3 Reese Jones (Docket No. 384) at 10-11. Dr. Jones’ declaration also addresses the question:  
4 “How seriously impaired is [petitioner’s] mental capacity?” Jones Decl. ¶ 14. While Dr. Jones’  
5 final conclusion does appear to be about competence, he also opines about petitioner’s mental  
6 state relevant to claim 2. See id. ¶ 37 (“My opinion is that this summary of Mr. Frye’s complex  
7 behaviors just before and during the murders and during the weeks following them illustrates that  
8 Mr. Frye capable [sic] of carrying out complex, planned and sustained behaviors, and assess  
9 [sic] alternatives and consequences of his actions.”). Testimony regarding petitioner’s mental  
10 abilities at the time of the crimes is relevant to the prejudice component of petitioner’s assertion  
11 of ineffective assistance of counsel in claim 2.

12           Petitioner has attempted previously to limit Dr. Jones’ testimony to claim 25.  
13 This court has made clear more than once that Dr. Jones’ testimony was limited to the subjects  
14 raised in his declaration and deposition. Nov. 14, 2008 Order (Docket No. 388) at 4:8-12;  
15 Transcript of Aug. 3, 2009 Testimony of Dr. Reese Jones (Docket No. 497) at 8:16-22, 9:7-9. As  
16 stated above, Dr. Jones’ declaration covers matters relevant to claim 2. The court will consider  
17 Dr. Jones’ testimony with respect to both claims 2 and 25.

18           Petitioner’s more specific arguments regarding relevance relate to claim 25.  
19 Petitioner first argues Dr. Jones’ testimony is not relevant because it addresses only petitioner’s  
20 “capacity” for competence.

21           Petitioner spends a great deal of time arguing that Dr. Jones’ testimony is  
22 irrelevant because he considered petitioner’s capacity for competence as opposed to petitioner’s  
23 competence on the day in question, the first day of the penalty phase. For several reasons,  
24 petitioner’s arguments are not persuasive. First, petitioner’s “capacity for competence” is  
25 relevant to whether or not petitioner was competent on the day in question. His capacity is not  
26 definitive; and it may not even be particularly helpful depending on the entire record relevant to

1 claim 25. However, it cannot be said that Dr. Jones' testimony is so irrelevant that it has no  
2 "potential to assist the trier of fact."<sup>1</sup> Fed. R. Evid. 702.

3 Second, the issue of Dr. Jones' failure to opine on petitioner's competence on the  
4 day in question was grounds for extensive cross-examination of Dr. Jones. Petitioner has had  
5 more than adequate opportunity to show and argue Dr. Jones' opinion is not entitled to much  
6 weight, and he will have another opportunity to make this argument in final merits briefing on  
7 claim 25.

8 B. Reliability

9 Petitioner claims Dr. Jones had insufficient facts to render an opinion regarding  
10 petitioner's competence on the first day of the penalty phase. However, this argument is based  
11 on petitioner's claim that Dr. Jones' opinion regarding petitioner's capacity for competence was  
12 irrelevant. Because, as discussed above, petitioner's capacity for competence is relevant to claim  
13 25, it is not necessary to examine petitioner's claim that Dr. Jones' testimony is unreliable  
14 because he did not consider observations of petitioner on the day in question. Moreover, Dr.  
15 Jones did not base his opinion on pure speculation. According to respondent, Dr. Jones  
16 reviewed:

17 transcripts from Petitioner's state competency trial; various reports  
18 written by mental health professionals for both sides at the time of  
19 trial; various medical records that predated the trial; factual  
20 summaries of trial testimony from all three phases of the state trial;  
21 statements from jail personnel in contact with Petitioner during the  
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24 <sup>1</sup> Petitioner also claims there is no factual dispute that he had a "capacity for  
25 competence" during the time in question so Dr. Jones' testimony is not necessary. Whether or  
26 not petitioner agrees that petitioner had the capacity at issue, respondent should have the  
opportunity to prove a relevant point through an expert because expert testimony may provide it  
more weight.

1 state trial; evaluations of Petitioner conducted by San Quentin  
2 personnel shortly after the trial and for a few years thereafter;  
3 current reports -- including test results and family interviews --  
4 generated by Petitioner's mental state witnesses and social  
5 historian.

6 Resp't's Brief re Jones' Testimony (Docket No. 512) at 5:17-23. That Dr. Jones could, or  
7 should, have reviewed more data goes to the weight, not the admissibility of his opinions. See  
8 Coleman v. De Minico, 730 F.2d 42, 46 n.4 (1st Cir. 1984) ("that [the expert] [based] his  
9 opinions . . . on sufficient, albeit incomplete, facts . . . take[s] his opinions outside the realm of  
10 mere guess and conjecture").

11 Petitioner also argues that respondent has made no showing that Dr. Jones'  
12 methods were reliable. The objective of Daubert is "to 'make certain that an expert ... employs in  
13 the courtroom the same level of intellectual rigor that characterizes the practice of an expert in  
14 the relevant field.'" Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199-200 (4th Cir. 2001)  
15 (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)). As other courts have  
16 recognized, the Daubert factors do not necessarily apply easily when considering the testimony of  
17 a mental health expert. See Lindh v. Murphy, 96 F.3d 856, 884 (7th Cir. 1996) (Wood, J.,  
18 concurring in part and dissenting in part) ("in a field like psychiatry . . . methodologies are not  
19 readily subject to the kind of objective scientific verification the Supreme Court called for in  
20 Daubert"), rev'd on other grounds, 521 U.S. 320 (1997).

21 Further, while petitioner insists repeatedly that meeting the standards of Rule 702  
22 and Daubert is "required," the Supreme Court has recognized that the Daubert standard is  
23 flexible and reliability must be analyzed in the context of each case:

24 Our emphasis on the word "may" thus reflects Daubert's  
25 description of the Rule 702 inquiry as "a flexible one." 509 U.S., at  
26 594. Daubert makes clear that the factors it mentions do *not*  
constitute a "definitive checklist or test." Id., at 593. And Daubert  
adds that the gatekeeping inquiry must be " 'tied to the facts' " of a  
particular "case." Id., at 591. We agree with the Solicitor General  
that "[t]he factors identified in Daubert may or may not be  
pertinent in assessing reliability, depending on the nature of the  
issue, the expert's particular expertise, and the subject of his

1 testimony." The conclusion, in our view, is that we can neither  
2 rule out, nor rule in, for all cases and for all time the applicability  
3 of the factors mentioned in Daubert, nor can we now do so for  
4 subsets of cases categorized by category of expert or by kind of  
evidence. Too much depends upon the particular circumstances of  
the particular case at issue.

5 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 150 (1999) (emphasis in original; internal  
6 citations abbreviated or omitted). Thus, the Daubert factors are "illustrative rather than  
7 exhaustive" and they are not "equally applicable (or applicable at all) in every case." Daubert v.  
8 Merrell Dow Pharmaceuticals, Inc. ("Daubert II"), 43 F.3d 1311, 1317 (9th Cir. 1995) (case on  
9 remand). In other words, "[t]he reliability inquiry is case-specific." Crowe v. Marchand, 506  
10 F.3d 13, 18 (1st Cir. 2007) (citing Kumho Tire, 526 U.S. at 141).

11 Petitioner's argument that respondent "must" establish the reliability of Dr. Jones'  
12 methods by "reference to articles, papers or studies validating the expert's methodology" is, in  
13 light of the discussion above, misleading. See Pet'r's Reply Brief at 5-6. Respondent has shown  
14 that the Court of Appeals for the Ninth Circuit recognizes that experts may make a retrospective  
15 competency determination based on data like that used by Dr. Jones. See Boyde v. Brown, 404  
16 F.3d 1159, 1167 & n.7 (9th Cir. 2005) (accurate retrospective evaluation may be possible by  
17 "consulting contemporaneous medical reports" (quoting Williams v. Woodford, 384 F.3d 567,  
18 609 (9th Cir. 2004))<sup>2</sup>; cf. Odle v. Woodford 238 F.3d 1084 (9th Cir. 2001) (retrospective  
19 competency hearing possible where testimony and reports of mental health experts,  
20 contemporaneous accounts of the defendant's behavior, and other medical and jail records  
21 available). The fact that Dr. Jones may have relied upon insufficient data is an issue that  
22 petitioner may, and did, raise on cross-examination. It does not require this court to exclude Dr.  
23 Jones' testimony. Dr. Jones' experience is adequate to allow him to render an opinion, based on  
24 historical data, regarding petitioner's competence, or capacity for competence, at the time of trial.

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26 <sup>2</sup> The Boyde decision has been amended, but the amendment does not affect the portion  
of the original decision cited here. See Boyde v. Brown, 421 F.3d 1154 (9th Cir. 2005).

1 It also allows him to render an opinion regarding petitioner's mental state at the time of the  
2 crimes. That Dr. Jones' testimony might not be particularly credible or persuasive after cross-  
3 examination also does not require this court to exclude it.

4           Petitioner argues that Dr. Jones' own testimony shows he had no basis for the  
5 methodology used. As noted, the Supreme Court has stated that the objective of Daubert's  
6 gatekeeping requirement is to "make certain that an expert ... employs in the courtroom the same  
7 level of intellectual rigor that characterizes the practice of an expert in the relevant field."  
8 Kumho Tire, 526 U.S. at 152. Here, Dr. Jones did testify that if he were "treating a patient," then  
9 relying solely on historical data would "be nonsensical and wrong, malpractice, entirely."  
10 Transcript of Aug. 3, 2009 Evidentiary Hearing (Docket No. 502) at 106:12-14, 29-31. Dr.  
11 Jones was not asked to treat petitioner; he was asked, as many mental health experts are asked, to  
12 review records to determine whether or not they supported another doctor's opinion regarding  
13 someone's mental health. The question under Kumho Tire is not whether Dr. Jones would have  
14 relied upon historical records only to treat a patient, but whether, in a non-judicial setting, he  
15 would have relied on historical records to provide an opinion about someone's mental state in the  
16 past. See Sheehan v. Daily Racing Form, 104 F.3d 940, 942 (7th Cir. 1997) (standard is whether  
17 expert "is being as careful as he would be in his regular professional work outside his paid  
18 litigation consulting"). Moreover, a physical examination is neither required nor necessarily  
19 reliable when making a retrospective determination of competency. See Boyde, 404 F.3d at  
20 1166-67 (expert's reliance on personal examination of the petitioner to make retrospective  
21 competency determination disfavored).

### 22           C. No Jury Confusion

23           Many cases cited by petitioner involve decisions by trial judges about what juries  
24 may or may not hear. There is no issue of jury confusion in an evidentiary hearing in a federal  
25 habeas corpus case. This court had and will have the opportunity at each step of the way --  
26 during the hearing, in reading the transcripts, and in considering the parties' briefs -- to determine

1 just what parts, if any, of Dr. Jones' testimony survived petitioner's counsel's thorough cross-  
2 examination so as to support respondent's arguments that petitioner was competent to consult  
3 with his attorneys during the first day of the penalty phase and that petitioner's counsel was not  
4 ineffective for failing to investigate and present evidence that petitioner lacked the mental state  
5 necessary for first degree murder.

6 For the foregoing reasons, petitioner's request to exclude Dr. Jones' testimony on  
7 the basis of Federal Rule of Evidence 702 and Daubert is denied.

8 DATED: August 9, 2010.

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12 U.S. MAGISTRATE JUDGE  
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