

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

CHARLES D. RIEL,

Petitioner, No. CIV S-01-0507 LKK KJM

vs. DEATH PENALTY CASE

WARDEN, San Quentin  
State Prison,

**Respondent.** **ORDER**

Petitioner proposed submitting the direct testimony of the following witnesses by declaration: David Bailey, David G. Cumming, Kay Gray, Randy Newman and Thomas C. Pollgreen. (Dkt. No. 329.) Respondent agreed to submission of this testimony by declaration if he were permitted to submit his cross-examinations by declaration. (Dkt. No. 359.) The court allowed respondent to submit the cross-examination declarations. (*Id.*) He has done so. (Dkt. No. 367.) As permitted by the court, petitioner filed a response. (Dkt. No. 378.)

Petitioner accepts respondent's proffered cross-examination declarations of David Bailey, Randy Newman and Thomas C. Pollgreen. However, he notes that the declarations of Mr. Bailey and Mr. Pollgreen have not been signed and reserves the right to contest their

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1 admission should the signed copies differ from those submitted on June 1. The court finds this  
2 procedure acceptable and will order respondent to file signed copies.

3 With respect to Kay Gray, petitioner objects to the submission of her testimony on  
4 cross-examination by declaration. Submission of cross-examination by declaration is a novel  
5 method. While live cross and re-direct examinations are preferred, the court will accept  
6 submission of cross-examination by declaration to the extent both parties agree to it.

7 With respect to David G. Cumming, petitioner objects to a number of statements  
8 in his declaration submitted by respondent. The court is willing to accept Mr. Cumming's cross-  
9 examination testimony by declaration if the parties can reach an agreement that resolves  
10 petitioner's objections, and also is willing to consider written objections to his declaration  
11 testimony.

12 The parties will be ordered to meet and confer to resolve their differences with  
13 respect to both witnesses Gray and Cumming.

14 Accordingly, and good cause appearing, IT IS HEREBY ORDERED as follows:

15 1. The declarations of David Bailey, Randy Newman and Thomas C. Pollgreen  
16 filed by petitioner on April 6, 2010 are admitted as their direct testimony. The May 27, 2010  
17 declaration of Randy Newman filed by respondent on June 1 is admitted as Mr. Newman's  
18 testimony on cross-examination. Within fourteen days of the filed date of this order, respondent  
19 shall file the signed declarations of Mr. Bailey and Mr. Pollgreen. Within seven days of that  
20 filing, petitioner shall inform the court if any differences between those signed declarations and  
21 the declarations submitted on June 1 cause him to contest their admission.

22 2. Within fourteen days of the filed date of this order, the parties shall meet and  
23 confer and file a joint statement specifying: (a) whether respondent agrees to the submission of  
24 Ms. Gray's direct testimony by the declaration filed by petitioner on April 6; (b) if respondent  
25 wishes to cross-examine Ms. Gray, how her deposition testimony will be recorded;

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1 (c) respondent's response to the issues raised by petitioner regarding the cross-examination  
2 declaration of Mr. Cumming and petitioner's proposed submission of the three reports prepared  
3 by Mr. Cumming; and (d) any agreement regarding the submission of Mr. Cumming's direct  
4 testimony and cross-examination.

5 DATED: June 8, 2010.

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8 U.S. MAGISTRATE JUDGE  
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