SUPREME COURT COPY

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February 4, 2014

Hon Frank. A. McGuire
Clerk and Administrator
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *People v. Stanley Bryant, Donald Smith, and Leroy Wheeler* (S049596)
Los Angeles Sup. Ct. No. A711739

Dear Mr. McGuire:

I represent Mr. Le Roy Wheeler in his direct appeal and habeas corpus/executive clemency proceedings before this court. On December 2, 2013, this court requested that the parties submit letter briefs addressing whether Mr. Wheeler's motion for the appointment of a guardian ad litem should be granted or denied in light of the reference proceedings and the referee's report filed in this court on September 17, 2013.[1] Accordingly, I am submitting this letter brief to address this question. Briefly, it is my position that the motion should be granted. A more detailed discussion follows.

In its order of May 20, 2010, this court ordered a reference hearing on the motion for guardian ad litem. The order directed the presiding judge of the Los Angeles County Superior Court to appoint a judge to sit as referee, conduct a hearing, and make findings of fact and recommendations on the following referral questions:

> whether (1) defendant Leroy Wheeler is presently unable, as a result of mental disorder, to understand the nature of defense counsel's attempts to investigate grounds for the filing of a petition for a writ of habeas corpus; and (2) defendant Wheeler's counsel, Conrad Petermann, should be appointed as guardian ad litem for the purpose of preparing and pursuing defendant Wheeler's habeas corpus petition.

(Order of May 20, 2010.)

DEATH PENALTY

[1] Although the court's request for letter briefs referred to Mr. Wheeler as "appellant," I will refer to him herein as "petitioner" in view of the fact that the motion and referral order concern representation in connection with habeas corpus proceedings and the fact that a petition is now on file.

On June 17, 2010, the presiding judge appointed Hon. George G. Lomeli to sit as referee in this proceeding. An evidentiary hearing commenced on July 27, 2010, and continued on September 6, 2012, December 14, 2012, and April 19, 2013. The referee's report of September 17, 2013, recommends that the motion be denied and that I should not be appointed as guardian ad litem. For the reasons set forth herein, petitioner respectfully disagrees.

1. The Standard Of Competence This Court Directed The Referee To Apply Entirely Omits The Essential "Assistance" Component Which Due Process Requires In This Context

As petitioner argued to the referee, the reference order's formulation of the question omits an element from the legal standard applied by courts in all other cases in which the mental competence of a criminal defendant is properly in, including the only prior case in which this court has ordered a referee to make findings and recommendations regarding the mental competence to proceed of a capital habeas corpus petitioner.

The right to mental competence is a component of the due process right to be present at criminal proceedings (*In re Dennis* (1959) 51 Cal.2d 666, 672), and the courts lack jurisdiction to pass judgment on or sentence a defendant while he or she remains incompetent. (Pen. Code §1367, subd. (a); *People v. Laudermilk* (1967) Cal.2d 272, 282.) As first articulated by the United States Supreme Court, the constitutional standard for determining whether a criminal defendant is competent to stand trial requires inquiry into two elements: first, whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and second, whether the defendant has "a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States* (1960) 362 U.S. 402, 402; *People v. Ary* (2011) 51 Cal.4th 510, 517.)

These two elements are sometimes referred to, respectively, as the "assistance" or "consultation" prong, and the "cognitive" or "understanding" prong. (See, generally, Rogers & Shuman, *Fundamentals of Forensic Practice; Mental Health and Criminal Law* (Springer 2005), pp. 152-154; *Singleton v. State* (1993) 313 S.C. 75, 83-84, 437 S.E.2d 53, 58; *State v. Downs* (2006) 369 S.C. 55, 66, 631 S.E.2d 79, 85.)

As phrased, this court's May 20, 2010, reference order omitted the first prong and did not require the referee to determine whether petitioner is able to assist or consult with counsel in these habeas corpus proceedings. Petitioner respectfully submits that consideration of this element is constitutionally required in all circumstances in which the competence of a criminal defendant or habeas corpus petitioner is at issue and the client's assistance would potentially benefit his defense.

Nothing in the recent United States Supreme Court decision *Ryan v. Gonzales* (2013) ___ U.S. ___, 133 S.Ct. 696, alters this requirement. In *Gonzales*, the United States Supreme Court found that the statute guaranteeing federal habeas petitioners on death row right to counsel did not provide such petitioners a right to competence

during federal habeas proceedings or a right to a stay of such proceedings until competence had been regained, abrogating *Rohan ex rel. Gates v. Woodford* (9th Cir. 2003) 334 F.3d 803, *Nash v. Ryan* (9th Cir. 2009) 581 F.3D 1048, and *Carter v. Bradshaw* (6th Cir. 2011) 644 F.3d 329, 332. However, the Supreme Court's decision was expressly based on "the backward-looking, record-based nature of most federal habeas proceedings." (*Id.*, 133 S.Ct., at p. 704.) In such cases, where the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter, "the AEDPA") limits federal review to the record that was before the state court, "counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence." (*Ibid.*) However, *Gonzales* also held a stay of federal proceedings on the grounds of incompetence would be appropriate if "a district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, . . ." (*Id.*, at p. 709.)

Gonzales does not alter the analysis here. First, the case is not controlling authority in state court cases but applies only in federal habeas corpus proceedings. Such proceedings are limited to the determination of whether the state court's decision conformed to federal constitutional requirements as stated by the United States Supreme Court and are therefore based solely upon the record that was before the state court. (28 U.S.C. §2254, subd. (d); *Cullen v. Pinholster* (2011) 563 U.S. ___, 131 S.Ct. 1388, 179 L.Ed. 557, 572-573.) This limitation is imposed because "the basic structure of federal habeas jurisdiction [is] designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions." (*Id.*, 179 L.Ed. at p. 573.) Federal review is thus premised on the assumption that the state court permits the record to be adequately developed. (*See, e.g., Bourmediene v. Bush* (20) 553 U.S. 723, 782 [federal deference to state court based on assuming that defendant received a fair state court proceeding].) However, the limitations on federal review obviously do not apply to habeas corpus proceedings in the state courts, where the federal habeas corpus system presumes adequate factual development will take place.

The reasoning in *Gonzales* is relevant, however, on the question of whether habeas corpus proceedings in state court should be stayed during a period in which the petitioner, or prospective petitioner, is incompetent to proceed. *Gonzales* indicates that the resolution of this question turns on whether "the petitioner's claim could substantially benefit from the petitioner's assistance." (*Gonzales, supra*, 133 S.Ct., at p. 709; see also, *Stanley v. Chappell* (N.D. Cal. (7/16/2013) 2013 U.S. Dist. LEXIS 99324; WL 3811205.) *Gonzales* suggests that a capital appellant, whose appeal is limited to the four corners of the record, has no right to a stay of proceedings while mentally incompetent. However, without the assistance and input of the defendant, habeas corpus issues such as ineffective assistance of counsel generally cannot be developed. Indeed, this court's habeas corpus procedures have always assumed that the petitioner is directly involved in the investigation of his habeas corpus petition. (See, e.g., Supreme Court Policies on Death Penalty Cases, Timeliness Standards 1-1 [habeas counsel must make reasonable efforts to discuss

the case with defendant and trial counsel]; *In re Robbins* (1998) 18 Cal.4th 770, 781 [habeas counsel must interview the client]; Appendix of Appointed Counsel's Duties [habeas counsel "must promptly initiate and maintain communication with the defendant/appellant . . ." (www.courtinfo.ca.gov/documents/applica9b.pdf.); Gov't Code §68663 [petitioner has right to separate habeas counsel unless he expressly requests continued representation].) Accordingly, petitioner submits that both under this state's established habeas corpus procedures and in order to ensure complete factual development in state habeas proceedings to enable adequate federal review, a habeas corpus petitioner must be mentally competent to understand the proceedings and consult with and assist his counsel.

Petitioner further submits that his right to mental competence in habeas corpus extends to all potential claims. Without a competent petitioner, it cannot be known with certainty which claims will benefit from his input and which can be adequately investigated without his input. However, in the event that this court interprets *Gonzales* as requiring competence only with respect to habeas corpus claims in which "the petitioner's claim could substantially benefit from the petitioner's assistance," petitioner must be permitted to develop the record in order to show which claims require his assistance.

In this proceeding, the assistance prong was not before the referee at Mr. Wheeler's hearing, and as a consequence petitioner has not had the opportunity to add detail to his claim that his habeas counsel needs petitioner's reasoned, rational input to develop targeted habeas claims.[2] Petitioner has previously noted the omission of the "assistance" or "consultation" prong from the referral order both in this court and before the referee. The omission of this element is curious in view of the fact that the element was specifically included in the referral order issued by this court in the only other case with substantially similar circumstances to this one– the case of *People v. Jon Scott Dunkle* (S014200). In the *Dunkle* case, this court ordered the referee, *inter alia,* to:

> make a finding on the following question: Is defendant Jon Scott Dunkle presently unable, as a result of mental disorder, to understand the nature of defense counsel's attempts to investigate grounds for the filing of a writ of habeas corpus *or to assist counsel in that investigation.*

(*Dunkle* Order of December 11, 1996, emphasis added.)

In short, petitioner submits that in determining whether petitioner is constitutionally competent to proceed in this habeas corpus matter, the referee and

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[2] Petitioner respectfully submits that if this court requires additional development of the record to permit petitioner to set forth the claims which "could substantially benefit from his assistance," petitioner should be permitted to submit briefing on this issue ex parte and under seal in order to protect his attorney client work product privilege.

this court are both required to assess not merely petitioner's ability to understand his counsel's efforts on his behalf, but also his ability to rationally assist and communicate with counsel. In post-hearing briefing at the reference hearing, petitioner requested that the referee make supplemental findings on the "assistance" prong in the interests of judicial economy. However, the referee did not do so. Accordingly, the present record is not adequate to permit this court to reach a conclusion regarding petitioner's competence in accordance with federal constitutional standards. Petitioner therefore respectfully requests that the hearing be reopened and the referee directed to take evidence and make findings regarding the "assistance" prong.

2. Petitioner Is Presently Unable, As A Result Of Mental Disorder, To Understand The Nature Of Defense Counsel's Attempts To Investigate Grounds For The Filing Of A Petition For A Writ Of Habeas Corpus

With respect to the "cognitive" or "understanding" prong, the referee correctly applied the preponderance of the evidence standard (*Medina v. California* (1992) 505 U.S. 437, 448-449; *Cooper v. Oklahoma* (1996) 517 U.S. 348, 368-369; Referee's Findings, at p. 2), but erred in concluding that petitioner failed to demonstrate that he is presently unable, due to a mental disorder, to understand the nature of his counsel's attempts to investigate grounds for the filing of a petition for writ of habeas corpus. The referee concluded that petitioner either was not "afflicted with a mental deficiency to the extent that it would prevent him from understanding" his counsel's efforts on his behalf, or that in spite of his mental disorder his conduct in refusing to assist counsel was the "result of a volitional choice not to cooperate," a "choice" the referee attributes to "his seemingly antisocial personality." (Referee's Findings, p. 2.) Petitioner respectfully disagrees.

a. Petitioner has been psychotic since 2002

The referee's finding that petitioner is acting "volitionally" in failing to cooperate focuses in part on conclusions reached by Dr. W. Wittner, a psychiatrist who examined petitioner as a 17-year-old juvenile when he was housed in the California Youth Authority (Exhibit J, at p. 984); defense psychologist Dr. Adrienne Davis, who examined petitioner at the time of trial in 1995 (Exhibit I); and a Dr. Lyons, who performed the intake psychological evaluation on petitioner when he was admitted to San Quentin in 1995. (Exhibit G, at p. 199; Findings, p. 3.) The referee appears to find it significant that none of these experts concluded petitioner was psychotic, delusional, or suffering from a thought disorder.

However, as petitioner argued strenuously at the hearing and again in subsequent briefing, the conclusions of these experts are relevant only to the extent that they provide some insight into petitioner's baseline functioning *prior* to the onset of psychosis. They provide no guidance whatsoever in determining whether petitioner *currently* suffers from a mental disorder. Petitioner does not contend, nor has he ever contended, that he was psychotic prior to 2002. The reliance of the

referee and respondent's mental health experts on the fact that these prior evaluations did not disclose psychosis is therefore baffling and profoundly misplaced.

Because this court has requested letter briefs, petitioner assumes the court does not require a thorough recapitulation of the evidence at the hearing, much of which is summarized in petitioner's post-hearing briefing to the referee dated August 13, 2013. However, on the question of whether petitioner suffers from a mental disorder, the record overwhelmingly establishes the presence of a mental illness. Petitioner clearly suffers from psychosis not otherwise specified and has been psychotic since 2002.[3]

i. Correctional medical records show petitioner has been psychotic since 2002

The onset of petitioner's psychosis occurred on or slightly before September 5, 2002, the day guards on San Quentin's Death Row found Mr. Wheeler standing in his cell in a semi-catatonic state. He was generally unresponsive to questions and suffering from hallucinations and delusions. Mr. Wheeler was brought to the hospital in a litter and admitted to the infirmary. He whispered that he had eaten rat poison- a substance not available to Death Row prisoners- and asked hospital staff to check with the correctional sergeant and to check his trash. He was given a "rule-out" diagnosis of psychosis not otherwise specified and a secondary rule-out of possible intoxication, with a notation of "(less likely)." (Exh. F, p. 452.) Over the course of the next several days he repeatedly asserted his paranoid delusion that he had eaten rat poison. Staff members noted that he had auditory hallucinations but no suicidal ideation, and that he had told correctional officers that he had seen centipedes. (Exh. F, p. 235.) On September 6, 2002, he was again diagnosed on Axis I with psychosis NOS. (Exh. F, p. 236.) Another notation of that date, September 6, 2002, described him as "acting bizarre, inappropriate, and delusional" and stated that "this is a rapid deterioration from his baseline." The notation

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[3] Psychosis not otherwise specified, or psychosis NOS in shorthand, is defined in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition Text-Revised, as including "psychotic symptomatology (i.e. delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior) about which there is inadequate information to make a specific diagnosis or about which there is contradictory information, or disorders with psychotic symptoms that do not meet the criteria for any specific Psychotic Disorder." (DSM-IV-TR §289.9, p. 343.) The fourth edition, text-revised, was published in 2000 and was in effect at all times relevant to this case. It was recently replaced by the current Fifth Edition, published in 2013, which continues this diagnosis under the same diagnostic section number, but now under the name "Unspecified Schizophrenia Spectrum and Other Psychotic Disorder."

indicated that he required hospitalization and indicated he had been referred to the Department of Mental Health at Vacaville.

On September 10, after his condition did not improve substantially, psychiatrists prescribed Risperdal, an anti-psychotic drug. (Exh. F, p. 239.) The following day, he reported feeling better after taking the drug, a strong indication that he suffered from psychotic symptoms that were being alleviated by medication. (Exh. F., p. 239.) However, he continued to ramble incoherently and suffer from hallucinations. (*Id.*; see also Exh. F., p. 241.)

On September 13, Mr. Wheeler was admitted to the Department of Mental Health facility in Vacaville for treatment. His intake report indicates he did not know why he had been sent to Vacaville, but that "if I am here I need some sort of help." He reported auditory hallucinations, specifically hearing "vague comforting voices." He believes his food was "spit on" and complained of "all kinds of bacteria." He stated, "I don't sleep" and was described as having a flat affect. All of these statements and symptoms are characteristic of psychosis. Once again, Axis I intake diagnosis was "psychosis" with a notation to rule out "NOS," meaning psychosis "not otherwise specified." (Exh. F., p. 75.)

Mr. Wheeler remained at Vacaville for nearly two months. Respondent and respondent's experts focus almost entirely upon Vacaville evaluations that show Mr. Wheeler was a difficult patient, generally did not participate in tests of his intellectual or neuropsychological functioning, and often refused to respond to staff members' questions. His mood was described as "aloof, disdainful and angry," and he was "hypervigilant." His insight and judgment were described as "poor." His affect was described as "constricted within the irritable/angry/annoyed range." These records, as well as records dating to adolescence and throughout his incarceration at San Quentin, paint a picture of a person who is and has always been irritable and hard to get along with. However, this description applies to many people who are severely mentally ill and certainly does not justify the referee's conclusion that Mr. Wheeler's lack of cooperation is "volitional." Indeed, neither of respondent's experts ever diagnosed malingering. Moreover, while Mr. Wheeler's final evaluation– cited by the referee as the Lois Armstrong evaluation– reported that in the absence of psychological testing "few reliable diagnostic conclusions can be made at this time," the evaluation again assessed Mr. Wheeler on Axis I with a rule-out diagnosis of "psychotic disorder not otherwise specified." (Exh. F, pp. 119-122.)

Petitioner's San Quentin records show that his psychosis persisted after his return from Vacaville and has persisted, within a normal range of waxing and waning of symptoms, since 2002. Upon his return to San Quentin on November 1, Mr. Wheeler was evaluated and found to suffer from disorganized thought process and thought content and was still experiencing auditory hallucinations. (Exh. F, p. 446.) Another report on November 8 also found him suffering from disorganized thoughts and hallucinations. (Exh. F, p. 444.) Mr. Wheeler continued to be

uncooperative, refusing mental health evaluations on November 12, 13, 21, and 26, and often denying hallucinations. However, in a note indicating that he refused a mental health evaluation on November 13, either the evaluator or a corrections officer concluded that Mr. Wheeler might be experiencing hallucinations even though he denied them. (Exh. F, p. 443.)

Thereafter, the records paint a consistent picture of psychosis. An evaluation on March 28, 2003, psychologist Dr. Charles Carlson found him to be hallucinating and delusional with "extreme paranoia." In the interview he was defensive, agitated, and confused, and appeared tense, anxious, and ill-at-ease. His thought organization was hesitant, vague, and blocked, and the evaluator noted "poverty of speech." He was again diagnosed on Axis I with a psychotic disorder and insomnia due to his psychosis. (Exh. F., pp. 468-469.) An evaluation on May 4, 2004 again found Mr. Wheeler to be suffering from auditory hallucinations and again diagnosed him with psychotic disorder not otherwise specified. (Exh. F., p. 401.) On June 8, 2004, Mr. Wheeler was again found to be suffering from hallucinations and was again diagnosed with psychotic disorder not otherwise specified. (Exh. F, p. 397.)

Mr. Wheeler generally denied experiencing hallucinations during most of 2004 and 2005 (Exh. F, 100-119), but in a cell-side visit on October 19, 2005, it was clear that he was still suffering from psychosis. The evaluator, a clinical psychologist identified as "A. Parsons," stated that Mr. Wheeler "continues to stay in his cell in the dark." Dr. Parsons indicated that Mr. Wheeler never went out to the yard and was not showering or bathing. His shirt sleeves were ragged and his fingernails were long. Dr. Parsons, described Mr. Wheeler's speech as "rambling and tangential" and his thoughts as showing "looseness of association." Mr. Wheeler was also found to be "internally preoccupied." Dr. Parsons quoted Mr. Wheeler as variously saying "I'm talking to people about my case," "I'm winning at college trivia," and "I'm in the future and you're in the past." Dr. Parsons concluded that Mr. Wheeler was "psychotic but not in distress." (Exh. F, p. 391.)

Dr. Parsons met with Mr. Wheeler again on January 20, 2006. Mr. Wheeler stated that he felt "depleted" and perseverated on the "information highway in his cell." Mr. Wheeler denied auditory hallucinations but Dr. Parsons noted, "however, likely," and later checked a box on the evaluation form for auditory hallucinations. Dr. Parsons also found a number of other characteristics consistent with psychosis, such as pressured speech, flights of ideas, and delusions. Dr. Parsons described Mr. Wheeler as suffering from an internal preoccupation or an audio hallucination which Mr. Wheeler attributed to the "information highway." Mr. Wheeler also made a number of bizarre, delusional statements, including, "When I was young, I was a child star," "I made so much money, I reinvested it," and "I'm a baron." Mr. Wheeler also said he had his own business. Dr. Parsons checked a box for "delusions," and wrote next to it "grandiose." (Exh. F, p. 387.)

There is much more material in petitioner's prison medical files that also corroborates his longstanding diagnosis of psychosis not otherwise specified.

However, rather than belabor the point, petitioner will simply summarize and cite to the relevant pages which report a diagnosis. By petitioner's count, the combined San Quentin and Vacaville records show 15 separate diagnoses of psychosis not otherwise specified made over a period of several years. Six of these diagnoses were made by at least three different psychiatrists. (Exh. F, pp. 75, 188, 192, 236, 243, 247.) The remaining nine diagnoses were made either by individual psychologists (Exh. F, pp. 137, 138, 142, 391), or by teams of mental health professionals which included both psychiatrists and psychologists. (Exh. F, pp. 137, 201, 204, 210, 213.) Petitioner notes that the foregoing diagnoses do not include "rule out" diagnoses in which psychosis not otherwise specified was treated as a "working" or likely diagnosis. There were also nine such separate "rule out" diagnoses during this period. (Exh. F, pp. 64, 68, 99, 102, 111, 122, 193, 207, 251.) All told, there were at least 22 different mental health professionals involved in arriving at the foregoing diagnoses; one psychiatrist's name is illegible. In short, petitioner's medical records dating to 2002 consistently show that petitioner has suffered since that time from psychosis not otherwise specified.

ii. Two mental health experts who examined petitioner at the time of the hearing concluded he was psychotic

The fact that petitioner continues to suffer from psychosis has also been confirmed by two mental health experts retained by petitioner. Petitioner's principal mental health expert, forensic psychiatrist Dr. Gregory Cohen, has served on the Superior Court's panel of psychiatrists since 1995 and since that time has acted as an expert witness in thousands of cases. (Exh. 2, p. 1.) In preparing his declaration, Dr. Cohen reviewed Mr. Wheeler's San Quentin medical and correctional records; a report prepared by a psychologist, Dr. Adrienne Davis, at the time of trial in 1995; reports of recent neurological examinations; and other records and also interviewed both Mr. Wheeler and his habeas corpus counsel. (Exh. 1, pp. 1-2.)

In his July, 2011, declaration,[4] Dr. Cohen noted many of the foregoing highlights from the prison records, including both the numerous diagnoses of psychosis not otherwise specified and the one malingering diagnosis. He noted that Mr. Wheeler has been uncooperative with habeas corpus counsel, and that during the visit between Mr. Wheeler and habeas counsel on October 9, 2008, Mr. Wheeler told habeas counsel that he was a "morph" of his former self. Since that time, Mr. Wheeler has refused to come out of his cell for visits and has not responded to mail. (Exh. 1, p. 4.)

Dr. Cohen met with Mr. Wheeler at Los Angeles County Jail on March 23, 2011. During that interview, Mr. Wheeler stated that habeas counsel was not his lawyer and insisted that he had been "pro per" since 1989. He said that he and habeas counsel had been involved in a "business relationship" regarding the music

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[4] The parties stipulated that the declarations and reports of the mental health experts and my own would take the place of our direct testimony.

industry in the past, and that the last time he had spoken with habeas counsel was in 2002, at which time Mr. Wheeler said he was "in crisis." He stated that although habeas counsel had tried to have Mr. Wheeler sign papers pertaining to representation on habeas corpus, he had not signed the papers. (Exh. 1, p. 4.)

Mr. Wheeler made a number of other delusional statements during this interview. For example, he claimed that he himself was "a computer oriented attorney . . . I'm a computer. If I needed a document, I'd order one." When asked to elaborate, he made gestures with his fingers as though typing on a keyboard. Mr. Wheeler stated that he had arranged for his own transfer from San Quentin to Los Angeles so that he could be "re-sentenced," and said that "Petermann had nothing to do with it." He said he had been called out of his cell at San Quentin to have his picture taken and referred to having filled out papers "to come to court" in 1993. He believed that habeas counsel had been "trying to take control of my case. He has been listening to my co-defendants." When Dr. Cohen asked about a large keloid scar on his occipital area, Mr. Wheeler explained that he had been "shot in 1999 at San Quentin." However, he had not realized he had been shot until "10 days ago." (Exh. 1, p. 5.)

Dr. Cohen concluded from the history, including prior prison psychiatric evaluations, and his own interviews with Mr. Wheeler and habeas counsel that Mr. Wheeler suffers from a psychotic disorder which is of psychiatric rather than neurological origin. His brief summary of the basis for this conclusion is worth repeating verbatim:

> He has demonstrated signs of substantial mental impairment for many years. Indications of the psychotic nature of Mr. Wheeler's illness include reports of auditory hallucinations and catatonia, his apparent total withdrawal and isolation, and a number of bizarre delusions, such as his belief that the prison had placed rat poison in his food. He also has expressed psychotic delusional beliefs that his attorney has been "morphed" or physically replaced by another being. He believes he has telepathic access to computers, and that he relies upon these powers to represent himself as a "computer orientated lawyer." He believes that he himself is responsible for his transfer to Los Angeles County Jail and believes that he is back in court for resentencing. He does not understand that Mr. Petermann is his habeas corpus attorney and believes that his relationship with Mr. Petermann involves a business transaction having to do with the music industry. He believes that a lesion on his scalp resulted from having been shot while on the yard at San Quentin–an event which the records indicate never occurred. He also appears to be disoriented as to the timing of past events. He believes his last encounter with Mr. Petermann occurred in 2002 rather than 2008, and although he says he was shot in 1999, he thinks he did

not discover the wound which he believes resulted from the shooting until ten days prior to our meeting in March, 2011.

(Exh. 1, p. 6.)

Dr. Cohen referred Mr. Wheeler for a neurological examination, which was conducted by Dr. Robert Freundlich, M.D. In a report of May 10, 2011, Dr. Freundlich noted that in conversation Mr. Wheeler's delusions became clear. He reported "since I've been locked up, I graduated from Wharton," and "I got a degree in banking," and "I got a degree in business administration." He also claimed to have his own bank, "Leroy Wheeler On Line." (Exh. L, p. 4, Bates 810.) Mr. Wheeler claimed that he had no hallucinations of any kind, but did claim to be "pro per." He said "I haven't had an attorney since the beginning" and that he "became pro per in 1995." He said he had obtained a severance from his codefendants and complained that "this guy, Conrad Petermann, keeps sending me papers." He claimed that his relationship with Mr. Petermann involved "music" and said "I have some people writing music." He recalled seeing Mr. Petermann about the music business but declining his offer. He insisted that Mr. Petermann was not his attorney. (Exh. L, p. 4, Bates 810.) Mr. Wheeler also described his occipital keloid scar as "a liquid branding," like a "fraternity brand." (Exh. L, p. 4, Bates 811.) Dr. Freudlich reviewed the history, physical examination, and neurodiagnostic studies and concluded that Mr. Wheeler had a "psychiatric disorder," but not a neurological disorder. (Exh. L, p. 8, Bates 814.)

In his testimony, Dr. Cohen reiterated that he found Mr. Wheeler to be psychotic. He based this conclusion both on Mr. Wheeler's long documented history of psychosis at San Quentin and Vacaville and his own observations during his three-hour interview with him. (EH 338.) He was given antipsychotic medication at the prison and showed some improvement, though he continued to demonstrate psychotic symptoms for years. Chiefly, these symptoms included hallucinations and delusions. (EH 338-339.) During his clinical interview with Mr. Wheeler, Dr. Cohen stated he demonstrated clear psychosis, including a delusion that his habeas counsel was a "morph" and was not his attorney. He also exhibited bizarre delusions, including the delusion that he himself was a computer-oriented attorney capable of having documents produced or printed. He also demonstrated evidence of auditory hallucinations and had an odd affect, consistent with psychosis. (EH 339.) He also noted that Dr. Freundlich had documented further signs of psychosis. (EH 339-340.) Dr. Cohen diagnosed psychosis not otherwise specified, as had many other diagnosticians over the preceding 11 years. (EH 340.)

Dr. Cohen also noted that in addition to the substantial evidence of Mr. Wheeler's psychosis going back to 2002, including auditory hallucinations, Mr. Wheeler may also be denying psychotic symptoms he is actually experiencing. (EH 262-263.) For example, during both the jail intake report and Dr. Cohen's own interview, Mr. Wheeler wore earplugs. While this may simply have been due to noise levels in the jail (EH 349), in Dr. Cohen's experience psychotic patients who

are experiencing auditory hallucinations often wear earplugs in an effort to block the hallucinations. (EH 327.) Dr. Cohen also testified that Mr. Wheeler was not fully cooperative with him. He frequently either did not answer or gave incomplete or combative answers to questions. (EH 326-327.)

The referee's report discounts much of Dr. Cohen's testimony but the referee's reasons for doing so are either factually inaccurate or do not actually support the referee's conclusions. For example, the referee states that Dr. Cohen "failed to consider other several (sic) prior evaluations of the appellant which this referee found significant." (Findings, p. 4.) Among these were a Los Angeles County Jail intake evaluation performed by Dr. Guy in 2011 (Exhibit M, at p. 34), Dr. Wittner's 1986 evaluation (Exhibit J, at p. 984), and Dr. Roy Johnson's "conclusion," which the referee incorrectly describes as being made in 2002, that Mr. Wheeler was "playing a game with the staff." (Exhibit G, at pp. 385-386, 359-360.) However, the referee is simply incorrect in suggesting that Dr. Cohen did not consider these three reports. With respect to the Guy report in 2011, Dr. Cohen did not have this report at the time he prepared his 2011 declaration because it was not provided to the defense until shortly before the hearing when the parties exchanged discovery. However, Dr. Cohen reviewed the report before he testified. (EH 91, 248.) Dr. Cohen did review both the Wittner report and the Johnson notation prior to preparing his declaration, and these reports and the Guy report were extensively discussed in direct and cross examination (EH 79-85; 119-124; 231-235). Dr. Cohen's opinion was that in view of the overwhelming evidence and repeated diagnoses of psychosis NOS, these three reports were only minimally relevant and did nothing to undermine the conclusions of the many experts over the years who have diagnosed petitioner with that mental illness. (E.g., EH 121, 124.)

Moreover, Dr. Cohen was manifestly correct. The three reports are of questionable relevance or weight, do not contradict Dr. Cohen's opinion, and at best constitute outliers that were "cherry-picked" by respondent out of a wealth of material which otherwise paints a consistent picture of psychosis over the course of many years. The evaluation performed by Dr. Guy in 2011 was not a competence evaluation or even a thorough psychological assessment but rather an jail intake evaluation designed for triage purposes in order to assign the inmate to the appropriate level of care. In professional terms, the report was a "drive-by" evaluation; it consists of only half a page of notes, and based upon the times indicated on the report, the entire evaluation appears to have required only eight minutes.[5] (Exhibit M, at p. 34.) Under the circumstances, the fact that Dr. Guy did

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[5] Dr. Maloney, who supervises mental health programs at the Los Angeles County Jail, said that the jail books between 500 and 1,100 people each day. Each one is screened with mental health and medical questions, and if the inmate responds in the affirmative to any questions, he is then interviewed by a mental health professional. (RH 425-426.) Dr. Maloney could not determine from this report precisely how long the interview took, but said the average interview required

not note any obvious psychotic symptoms is not particularly surprising. Petitioner has already addressed the Wittner report, which has virtually no relevance here because it was prepared in 1986 when petitioner was a 17-year-old juvenile, fully 16 years prior to the onset of petitioner's psychosis. However, the referee's report also mischaracterizes Dr. Wittner's conclusion in that report; the report did not diagnose petitioner with antisocial personality disorder but rather with "conduct disorder of adolescence" and "mixed" personality disorder with "schizoid and passive characteristics."[6] The referee then cites language at EH 79-80 to the effect that this "conduct disorder, if carried out to adulthood, would lead to a diagnosis of antisocial personality disorder." (Findings, at p. 3.) However, this completely misstates the facts. This statement, which the referee asserts as a conclusion reached by Dr. Wittner, was not the conclusion by *any* expert but was instead a statement made by the district attorney in a question he posed to Dr. Cohen, who strongly disagreed with the district attorney's assertion. (EH 79-80.) Indeed, while petitioner was clearly not psychotic at the age of 17 when Dr. Wittner examined him, schizoid features in adolescence are entirely consistent with the later development of psychosis. (EH 238.)

The referee also mischaracterizes Dr. Johnson's report in several respects. First, contrary to the findings, the report to which the referee refers was not made in 2002, when petitioner was clearly and indisputedly psychotic, but rather in June, 2006, nearly four years after what even Dr. Johnson describes as a "clear psychotic break." (Exhibit G, at p. 359.) The referee also mischaracterizes the report as reaching a "conclusion" that petitioner was not presenting a true case of psychosis. Dr. Johnson's June 13, 2006 report of a single interview lists a number of apparently delusional statements made by petitioner. Dr. Johnson notes that he found petitioner's "presentation seems more gamey than product of psychosis." (*Id.*) Dr. Johnson was left with a "marked impression that cross-cultural dynamic; desire for control most salient feature of relating to interviewer." (*Id.*)

The report shows that four years after the onset of petitioner's psychosis, Dr. Johnson had some doubt about petitioner's symptoms, but contrary to the referee's report it does not state a "conclusion" that petitioner was not psychotic. Indeed, the referee fails to note that Dr. Johnson's *actual Axis I diagnosis* at the conclusion of the June 13, 2006 report was a "rule-out" diagnosis of psychosis NOS with a notation "in remission?" (Exhibit G, at p. 360.) Moreover, Dr. Johnson's report reflects one clinician's impression of petitioner on one occasion. While the report raises

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35 minutes. (EH 425.) However, the computerized timer in the program in which Dr. Guy entered his notes clearly shows that a matter of only eight minutes passed during entry of the data.

[6] The referee's citation to the Wittner report is also wrong. The referee cites Exhibit J, page 986, as the cite for Dr. Wittner's 1986 report. (Findings, at p. 4.) That is the citation for Dr. Wittner's subsequent 1987 report; the 1986 report to which the referee refers is actually Exhibit J, page 984.

questions Dr. Johnson had regarding petitioner's symptoms, all the experts agreed that symptoms of psychosis do wax and wane over time (EH 257, 276), and it would be highly inappropriate both medically and legally to view this single report in isolation in view of the overwhelming evidence of multiple diagnoses of psychosis documented over a period of 11 years. The referee's report simply accepts respondent's three cherry-picked outlier reports as though they somehow trumped all the other evidence, and in that respect the findings are simply wrong.

To the extent that the referee critiques Dr. Cohen's "demeanor" while testifying (Findings, at p. 6), the referee is again off-base. As a matter of personal style, Dr. Cohen does not engage in conversational debate or badinage with counsel but pauses, often for a considerable period of time, before answering counsel's questions both to fully consider questions that were often somewhat vague and to ensure the accuracy of his answers. This was in contrast to the personal styles of both prosecution experts, who sometimes began their answers before counsel had finished asking their questions. The referee appeared to petitioner to be somewhat impatient with Dr. Cohen's pauses and with the time required for his testimony, but petitioner strenuously takes exception to the referee's conclusion that Dr. Cohen's personal style reflected "some degree of uncertainty" or "difficulty in answering." While the referee clearly wanted the hearing to move along more quickly, the fact that Dr. Cohen took extra care in responding to questions cannot legitimately be interpreted as reflecting adversely on the accuracy of his conclusions or the credibility of his testimony

b. Respondent's experts did not diagnose malingering, and their conclusion that petitioner's behavior involves a "volitional" component is both medically and legally meaningless

In concluding that petitioner is not mentally incompetent to proceed, the referee relies almost entirely on respondent's experts, Dr. Kaushal Sharma and Dr. Michael Maloney, who both opined that petitioner is acting "volitionally" in failing to cooperate with his counsel. (Findings at pp. 4-5.) The referee's reliance on these experts' opinions for that conclusion is misplaced.

Petitioner agrees with the referee's conclusions that both experts are qualified mental health professionals with board certifications and considerable experience in their professions. (*See* Findings at p. 4.) However, contrary to the implication of the referee's report, neither expert ever concluded that Mr. Wheeler was not mentally ill, and neither expert ever concluded that Mr. Wheeler was malingering. Indeed, Dr. Maloney did not have enough information to reach any conclusion regarding whether Mr. Wheeler is mentally ill or incompetent. (Exhibit B, p. 8; EH 399.) Dr. Sharma also never concluded that Mr. Wheeler was not mentally ill, and while he found Mr. Wheeler competent, he based this conclusion entirely on the presumption of competence– i.e., since he could not conclude Mr. Wheeler was incompetent, and since there is a presumption of competence, he concluded that petitioner must be treated as competent. (Exhibit A, at pp. 7-8, et seq.)

Thus, with respect to whether Mr. Wheeler has a mental disorder, two experts– Dr. Cohen and Dr. Freundlich– believe the answer is yes, while two doctors– Dr. Maloney and Dr. Sharma– cannot actually reach a conclusion. The opinions of respondent's experts plainly do not justify rejecting the conclusion of petitioner's experts that Mr. Wheeler suffers from a mental disorder.

With respect to the question of whether petitioner's mental illness prevents him from understanding the efforts of his counsel to investigate a habeas corpus petition, neither the testimony nor the reports of Drs. Sharma or Maloney justify the referee's rejection of Dr. Cohen's conclusion that petitioner is not competent.

As noted above, Dr. Maloney stated both in his written report and in his testimony that he could reach no conclusion either about petitioner's mental illness or his competence (Exhibit B, p. 8; EH 399), and on this basis alone his evidence does nothing to overcome Dr. Cohen's conclusion. Dr. Maloney repeatedly stated in his report and on the stand that he felt petitioner's noncooperation with his counsel may have had a "volitional" component, but in the context of a competence determination, this term is utterly meaningless. Even profoundly mentally ill people act "volitionally" in the sense that they intend the consequences of their actions, and Dr. Sharma admitted as much on the stand. (EH 294.) However, for purposes of a competency evaluation, the question is whether a defendant is mentally ill and, if so, whether his or her illness prevents him or her from understanding and assisting counsel. From a medico-legal perspective, the only relevance of "volition" is whether petitioner is "malingering," i.e., whether he is faking his psychotic symptoms in an effort to achieve some other goal. The *Diagnostic and Statistical Manual of Mental Disorders*, the so-called "Bible" of the mental health professions, contains a diagnosis of malingering (see DSM-IV-TR, at p. 739-740; DSM-V, at pp. 726-727[7]), but neither Dr. Maloney nor Dr. Sharma ever made such a diagnosis, and Dr. Maloney expressly testified that he was *not* making a finding that petitioner was malingering. (EH 411.) The experts' repeated use of variants of the term "volitional" is in fact meaningless; their use of the term is intended to imply a conclusion neither expert is actually willing to make or defend.

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[7] The edition of the *Manual* that was in effect at the time of the referral order and throughout the reference hearing was the *DSM-IV-TR* (4th ed., text revised). On May 27, 2013, after the conclusion of the hearing, the American Psychiatric Association published the fifth edition, *DSM-V*. Because the 4th edition with revised text was in effect throughout the proceedings below, petitioner will cite to that edition hereafter. The definition of "malingering" remains essentially unchanged. "Psychotic disorder not otherwise specified" is now classified either within the category of "other specified schizophrenia spectrum and other psychotic disorder," if the clinician chooses to state the reasons why criteria for a more specific diagnosis are not met, or "unspecified schizophrenia spectrum and other psychotic disorder" if the clinician does not provide such an explanation.

It is also noteworthy that on the stand Dr. Maloney could not identify any document in the prison medical records that supported his report's statement that "some mental health practitioners at these facilities were of the opinion that he may have suffered a psychotic mental disorder NOS combined with volitional behavior." (Exh. D, p. 5; EH 410-411.) He also agreed that he did not find petitioner to be malingering. (EH 411.) He admitted that Mr. Wheeler did in fact meet with him for between 30 and 40 minutes. During that meeting Mr. Wheeler told him, as he told Dr. Cohen, that habeas counsel was not his attorney, and he insisted he had always been pro per. (EH 438.) He denied ever saying that he had eaten rat poison, although the prison medical records document such statements repeatedly, and he believed one of his co-defendants must have said this to his habeas counsel. (EH 439.) Furthermore, Dr. Maloney never even asked Mr. Wheeler if he was hearing voices or having visual hallucinations. (EH 442.) He also never identified himself either as someone sent by the district attorney, or as someone sent to determine Mr. Wheeler's competence. (EH 396, 439.) In short, nothing in Dr. Maloney's evidence undermines Dr. Cohen's or Dr. Freundlich's conclusions, nor does it provide any support for Dr. Sharma's supposition that petitioner cooperated with his own experts but not the prosecution's.

As for Dr. Sharma, the referee's report both fails to address the fact that this expert's conclusion that petitioner is competent is based on his belief that petitioner bears the burden of demonstrating incompetence not merely to the court but also to the expert himself. (EH 317.) The referee also fails to discuss the impact on the reliability and validity of Dr. Sharma's opinion of the fact that he has never met petitioner.

First, the presumption of competence is a legal presumption to be applied by the court. (*Medina v. California, supra*, 505 U.S. at pp. 445-450.) It is not a presumption a mental health expert may apply in determining whether a person suffers from a mental disorder, or whether that person is capable of understanding counsel's attempts to investigate a habeas corpus petition. It is also not a burden of proof a mental health professional bears. For Dr. Sharma to have applied the burden as part of his diagnostic process was incorrect and effectively imposed an unfair and dual burden on petitioner.

Second, as a general rule, mental health professionals are required to meet personally with an individual they diagnose or, at least, must to explain how their failure to meet with a patient affects the reliability of their diagnosis. For example, the American Psychological Association's Ethics Code provides:

> Standard 9.01(b). Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable

> impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (See also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results.)
>
> (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

(American Psychological Association's Ethical Principles of Psychologists and Code of Conduct, adopted 2003, as amended 2010 (hereinafter, the "APA Ethics Code.")

Dr. Sharma's report and testimony both show that he was unable to meet with Mr. Wheeler. However, nowhere in his report or testimony was there any attempt by Dr. Sharma to clarify the "probable impact of [his] limited information on the reliability and validity of [his] opinion" as professional ethical standards require. Dr. Sharma testified that a mental health professional can ethically diagnose someone he has never actually met with if he has *attempted* to examine the person (EH 287), but neither his report nor his testimony explain what impact his inability to actually meet with petitioner might have on the reliability of his findings. The referee's report fails to consider or comment upon the fact that Dr. Sharma's opinion is of limited credibility due to the fact that he never met with petitioner.

Furthermore, the referee never addresses the fact that both Dr. Sharma's report and testimony were highly argumentative. Petitioner will not discuss each of the errors in Dr. Sharma's report or testimony in this letter brief, but instead respectfully directs the court's attention to the post-hearing briefing submitted to the referee on August 18, 2013. Briefly, however, the report is filled with statements that are either completely inaccurate or that omit or mischaracterize significant facts. Most notably, Dr. Sharma ignores the many diagnoses of psychosis NOS made by 22 mental health professionals at San Quentin and Vacaville over a period of years. While the referee takes Dr. Cohen to task for failing to comment in his declaration on three outlier documents with little relevance, the referee never applies this same standard to Dr. Sharma, who repeatedly and throughout his declaration ignored hundreds of pages of records containing numerous diagnoses of psychosis NOS.

Moreover, in his testimony, Dr. Sharma completely mischaracterized psychosis NOS as a diagnosis that is only given "if a clinician believes that something is wrong with the patient but they do not know what is wrong." (Exh. A, p. 5.) To the contrary, the diagnosis of psychosis NOS is given not only when there is "psychotic symptomatology (i.e. delusions, hallucinations, disorganized speech, grossly disorganized or catatonic behavior) about which there is inadequate information to make a specific diagnosis or about which there is contradictory

information" but also when a clinician finds "disorders with psychotic symptoms that do not meet the criteria for any specific Psychotic Disorder." (DSM-IV-TR §289.9, p. 343.) The DSM requirements for a diagnosis of schizophrenia or bipolar disorder are quite specific, and the fact that many psychotic disorders do not meet those specific criteria does not mean the clinician has no idea what is wrong or that the patient is any the less psychotic.

Finally, Dr. Sharma's conclusion regarding petitioner's supposedly "volitional" non-cooperation with the prosecution makes little sense in view of the testimony of not only Dr. Cohen, but also Dr. Maloney and Dr. Sharma themselves, regarding their contacts with petitioner. Petitioner was not cooperative with *any* expert, including Dr. Cohen. The fact that Dr. Cohen was able to conduct a three-hour interview with petitioner was due to Dr. Cohen's extraordinary patience in sitting with petitioner, enduring long pauses, and keeping petitioner talking. Indeed, petitioner actually did meet with Dr. Maloney and responded to his questions for half an hour. Moreover, there is no evidence whatsoever that petitioner knew that Dr. Maloney or Dr. Sharma were affiliated with respondent. Dr. Maloney testified that he never identified himself to Mr. Wheeler as a representative of the district attorney, and also did not explain that he was there to conduct a competency examination. (EH 396, 439.) Dr. Sharma testified that he attempted to meet with Mr. Wheeler on two occasions in November, 2011, and was told both times by the deputy that Mr. Wheeler did not wish to see him. (EH 284.) However, Dr. Sharma testified that he had no idea what Mr. Wheeler was told about who it was that wanted to see him. He had no idea whether Mr. Wheeler was told that Dr. Sharma was a prosecution psychiatrist. (EH 285.) He said that it sometimes occurs that inmates from the jail come downstairs and are surprised to see him because they assumed their attorney had come to visit them, and thus it was possible that Mr. Wheeler refused to come down because he thought his attorney had come. (EH 285.) In any event, Dr. Sharma's conclusion that petitioner "volitionally" chose to meet with his own experts rather than the prosecution's experts falls apart in view of the fact that petitioner apparently never had any information about which expert represented which party. Once again, the referee's conclusion that petitioner acted "volitionally" in refusing to cooperate with counsel is without any factual basis.

c. Petitioner's Mental Disorder Renders Him Presently Unable to Understand the Nature of Defense Counsel's Attempts to Investigate Grounds for the Filing of a Petition for a Writ of Habeas Corpus

This court's formulation of the referral question inquires whether the petitioner understands the "nature of defense counsel's attempts to investigate grounds for the filing of a petition for writ of habeas corpus." The "nature" of what habeas counsel is required to investigate and the reasons such an investigation is required are found in this court's policies and in the professional standards counsel is required to satisfy.

According to this court's Policies Regarding Cases Arising From Judgments of Death:

> Habeas corpus counsel in a capital cases shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that come to counsel's attention in the course of reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs, and in the course of making reasonable efforts to discuss the case with the defendant, trial counsel and appellate counsel.

(California Supreme Court Policies, Policy 1-1.)

The 2003 edition of the American Bar Association Guidelines for the Appointment and Performance of Attorneys in Death Penalty Cases (hereinafter, the "Guidelines"), and the Commentary to those Guidelines, describe the investigative duties of post-conviction counsel in greater detail. One of these guidelines requires counsel to "continue an aggressive investigation of all aspects of the case." (Guideline 10.15.1(E), "Duties of Post-Conviction Counsel.") The Commentary to Guideline 10.15.1 provides a concise explanation of the "nature" of habeas corpus counsel's investigation, as follows:

> Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments– those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal– are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system. Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not. For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case. That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new

developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues. These include not only challenges to the conviction and sentence, but also issues which may arise subsequently. Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications. Counsel should also be aware that any change in the availability of post-conviction relief may itself provide an issue for further litigation. This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.

(Commentary to Guideline 10.15.1, "The Labyrinth of Post-Conviction Litigation, Section B. Collateral Counsel- State and Federal" footnotes omitted.)

Petitioner's counsel is thus required under state policies and national professional guidelines to conduct a "two-track" investigation. The first track requires counsel to review the appellate record, exhibits, defense counsel files, police reports, forensic records, and other relevant materials in search of guilt-phase defenses which might have been missed at trial. The second track requires counsel to conduct an investigation of the client himself in search of potential mitigating evidence that might have been missed at trial. Along the way, counsel may discover evidence suggesting other claims, such as prosecutorial misconduct, Brady error, jury misconduct, and a variety of other potential claims that might not have been apparent to appellate counsel. The commentary to the guidelines also requires counsel to understand and be able to explain to the client the impact federal and state habeas corpus procedural law may have on the merits of potential claims.

This court's referral question thus inquires whether Mr. Wheeler is presently unable to understand the nature of the investigation described above. While no one expects a capital habeas corpus petitioner himself to have a thorough understanding

of the intricacies of the law, the petitioner must be able to understand what counsel is investigating and why.

The evidence before this court plainly demonstrates that Mr. Wheeler lacks the requisite understanding of the nature of his attorney's efforts to investigate his case in habeas corpus. Perhaps the most succinct statement on this question was given by Dr. Cohen at the conclusion of his testimony on April 19, 2013:

> Mr. Wheeler is severely mentally ill. He's psychotic. He has - he holds fixed, false delusions about his attorney; that his attorney is actually not his attorney; that his attorney has been morphed; that his attorney has somehow been altered and changed. He does not believe that his attorney is representing him or helping him. And due to his delusions - these beliefs are due to his delusions.
>
> Furthermore, he believes that he is representing himself, which is delusional. He believes - he has delusional beliefs about being a computer-oriented attorney; that he can perform duties as an attorney through a computer that doesn't exist; that he can have documents generated, essentially, telepathically.
>
> He's very difficult to speak with, negativistic, and tends to be uncooperative. And, in my opinion, his lack of cooperation is primarily due to his psychotic disorder.

(EH 341-342.)

Mr. Wheeler does not understand that the undersigned is his habeas corpus counsel. He has repeatedly stated to multiple mental health experts for both petitioner and respondent that I am not his attorney. He has told this court that I am not his attorney but have been posing as such since 1999. Obviously, Mr. Wheeler cannot very well understand his counsel's attempts to investigate a habeas corpus petition if he does not even understand that he has an attorney to begin with, and does not recognize that the attorney represents him as his habeas corpus counsel. Indeed, his own statements in the reference hearing eloquently demonstrated that he did not understand what the hearing was about; he instead fixated on his various case numbers. (EH 311-312.) He believed the alternative assisting counsel who also represented him at the hearing was "not working in my behalf" and "sounds like the D.A." (EH 268, 270.)

Moreover, as Dr. Cohen noted, Mr. Wheeler maintains a delusional belief that he himself is a "computer oriented attorney" and that he represents himself. The San Quentin records also show that he believes the "information highway" runs through his cell and causes his auditory hallucinations. (Exh. F, p. 387.) However, there is no computer in Mr. Wheeler's cell, and while some death row inmates are permitted to have typewriters with small amounts of memory, Mr. Wheeler has no

such typewriter, and inmates are not given access to computers and cannot call up, print, or order documents.[8] Petitioner also made reference in court to his belief that "all the information that I have is on the computer. It's- it's computerized. And if I was to have access to a computer, it would- it will- it would disqualify you (indicating), as well as you (indicating), as to what is transpiring here." (EH 270.)

Petitioner has repeatedly asserted that he is pro per and not represented by counsel (Exhibit L, p. 810; Exhibit 1, p. 4), in spite of the fact that I was appointed both as his appellate counsel and his habeas corpus counsel and this court sent copies of the appointment orders to Mr. Wheeler at the prison. However, while Mr. Wheeler appears to believe he is pro per, he has done absolutely nothing to represent himself. He has filed no documents at all in this court. His delusion extended to the reference hearing itself. He told Dr. Cohen that he believed he had himself transferred to Los Angeles County Superior Court for resentencing as a result of "paperwork" he filled out in 1993. It was clear from his statements in court that he did not understand he was in court for a competence determination.

Although the second "assistance" prong of the competence test was not included in the referral question, it is also clear that Mr. Wheeler cannot rationally assist his counsel in investigating a habeas corpus petition. Apart from the fact that Mr. Wheeler does not believe he has counsel, his delusional beliefs would also make him an unreliable reporter with respect to the facts pertaining to his case, as well as biographical details of his own background that might lead to evidence in mitigation. For example, Mr. Wheeler believes the keloid scar on his occipital region resulted either from a "liquid branding, . . . like a fraternity branding," as he told Dr. Freundlich (Exhibit L, p. 811), or a bullet wound he received on the yard at San Quentin in 1999 (Exhibit 1, p. 5), as he told Dr. Cohen. He thinks I obtained the information that Mr. Wheeler claimed to have been given rat poison from Mr. Wheeler's co-defendants (EH 439), individuals with whom I obviously cannot ethically communicate.

The conclusion is therefore inescapable that Mr. Wheeler suffers from a mental disorder which renders him presently unable to understand his counsel's attempts to investigate a habeas corpus petition. In addition, the same mental disorder renders Mr. Wheeler incapable of rationally consulting with and assisting his counsel. He is not competent to proceed in habeas corpus.

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[8] Title 15 of the California Code of Regulations, section 3041.3, permits certain inmates with authorized work, vocational, or educational assignments to use computers if permitted by the department's Information Services Officer. These provisions to not apply to death row inmates, who do not have such assignments.

3. Petitioner's Lengthy And Uninterrupted Mental Disorder Warrants Order To Respondent To Discuss With The District Attorney A Sentencing Settlement Of This Case

In *Ford v. Wainwright* (1986) 477 U.S. 399 the Court held the Eighth Amendment prohibits a state from inflicting the penalty of death upon a prisoner who is insane. As Justice Powell stated the principal from *Ford*, the Eighth Amendment bars execution of "those who are unaware of the punishment they are about to suffer and why they are to suffer it." (*Id.* at p. 422.)

Confronted with a case like Mr. Wheeler's, the district court in *McPeters v. Chappell* (E.D. Cal. 7/29/2013), not reported in F.Supp., WL 360260 is illustrative of the rational approach to be taken when there is no reasonable hope for a petitioner's competence. There the court directed the Warden to meet and confer with the District Attorney of the County of where McPeters was convicted to discuss a course of action that would bring the interests of the litigants, the Court, and the tax payers to the forefront.

It is respectfully submitted that this is the appropriate remedy here.

Sincerely,

Conrad Petermann

cc: Wesley A. Van Winkle
Alternative assisting counsel

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CASE NUMBER: S049596
(Related LA County A711739)

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address. On the date executed below, I served the *Petitioner's Letter Brief* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 2014, at Ojai, California.

Conrad Petermann