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CRIMINAL DIVISION
The Superior Court
LOS ANGELES, CALIFORNIA 90012

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CHAMBERS OF
GEORGE R. G. LOMELI
JUDGE

August 19, 2013

People v. Bryant, Smith + Wheeler

S049596

Ms. Mary Jameson
Automatic Appeals Unit Supervisor
Earl Warren Building
350 McAllister Street
San Francisco, CA.

Re: People v. Leroy Wheeler et.al. No. S049596 (Superior Court No. A711739)

Dear Ms. Jameson:

Enclosed please find the report/findings generated pursuant to order of the California Supreme Court directing this court to act as referee regarding the above-referenced matter. The report was prepared following an evidentiary hearing which addressed the specific issues outlined in the Supreme Court's order.

Very truly yours,

George G. Lomeli,

Superior Court Judge, Los Angeles

SUPREME COURT
FILED

SEP 17 2013

Frank A. McGuire Clerk
Deputy

S049596

(SA049596)

Ruling/Findings Report Following An Evidentiary Hearing on the Matter of the People versus Leroy Wheeler (Superior Court Nos. A711739 and A713611)

This matter is before this court pursuant to an order by the California Supreme Court appointing this court to act as referee in the above- referenced proceeding. The order specifically authorized this court to preside over discovery issues, if necessary, supervise the appointment of experts, take evidence, and make findings of fact and recommendations. In particular, the Supreme Court requested that this court determine whether:

> **(1)Appellant Leroy Wheeler is presently unable, as a result of a mental disorder, to understand the nature of appellate counsel's attempts to investigate grounds for the filing of a Petition for a Writ of Habeas Corpus; and (2) whether appellant Wheeler's counsel, Conrad Petermann, should be appointed as guardian ad litem for purposes of preparing and pursuing appellant Wheeler's habeas corpus petition.**

The Supreme Court further ordered this court prepare and submit a report of the proceedings conducted pursuant to this appointment, the evidence adduced, and the findings of fact made. The referee's findings and recommendations must be based solely on the record of the proceedings before it.

In keeping with the Supreme Court's order, this court has appointed the necessary experts, presided over discovery issues, and has taken evidence by way of hearings conducted on June 29, July 27, September 6, and December 14, 2012. Additionally, a final hearing was conducted on April 19, 2013. Following completion of the evidentiary hearing regarding the issues in question, and having considered counsels' respective summation briefs on the matter as well as all exhibits introduced, this referee submits the following report and findings for consideration by the California Supreme Court.--1

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1. The witnesses that testified in the evidentiary hearing consisted of Dr. Gregory Cohen, a witness for the Appellant whose cross-examination consisted of live testimony, while his direct examination was by way of Declaration(identified as Appellant's Exhibit 1); Additional testimony included that of Drs. Kaushal Sharma and Michael Maloney, witnesses for the Respondent.

Based Upon the Evidence Adduced in the Hearing, this Referee is Not Convinced that Appellant Leroy Wheeler is Presently Unable, as a Result of a Mental Disorder to Understand the Nature of Appellate Counsel's Attempts to Investigate Grounds for the Filing of a Petition for a Writ of Habeas Corpus and Consequently His Counsel Should Not be Appointed as Guardian Ad Litem

After consideration of the overall evidence presented at the evidentiary hearing, as well as all referenced documents, declarations and exhibits introduced at the hearing, this referee finds that under the totality of the circumstances, the appellant has failed to demonstrate by a preponderance of the evidence 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 a Writ of Habeas Corpus. This referee is not persuaded from the evidence that appellant is afflicted with a mental deficiency to the extent that it would prevent him from understanding the necessary efforts his attorney must undertake in order to file the petition in question and/or cooperate with his attorney's efforts to do so. Even assuming arguendo, that the appellant suffers from a mental disorder, the evidence reflects that his lack of cooperation is not caused by or is a product of that mental disorder, rather, should the appellant refuse to assist his counsel, said action and/or conduct would be the result of a volitional choice to not cooperate with his attorney as opposed to being attributed to a mental condition. Moreover, as this referee has made such a finding, this necessarily provides a response to the Supreme Court's second inquiry, namely, that the appellant's attorney should not be appointed as guardian ad litem for purposes of pursuing a habeas corpus petition.

Dr. Gregory Cohen's Evaluation of the Appellant Failed to Convince this Referee that His Reluctance to Assist His Appellate Counsel is Due to a Mental Disorder

As a witness for the appellant on the issue of his mental status, his counsel presented the testimony of Dr. Gregory Cohen. Dr. Cohen, who is not a forensic psychologist nor board-certified as a forensic psychologist, evaluated appellant one time, consisting of a total period of three hours. (Reporters Transcript, hereinafter "R.T." at pages 65 and 70, dated June 29 and July 27, 2012). Although Dr. Cohen concluded that the appellant is presently unable, as result of a mental disorder, to assist his attorney in connection with the filing of a Petition, a review of the overall evidence presented in the evidentiary hearing on that issue suggests to this referee that appellant's refusal to cooperate with his counsel is not as a result of a mental disorder, but rather, is a volitional decision on his part, as well as the result of his seemingly antisocial personality. This personality trait was noted as far back as 1986, when he was evaluated by Dr. W. Wittner, who concluded in part:

"Based on today's interview, I consider Leroy [the appellant] to be a somewhat odd person. It was very hard to obtain information from him. He did not want to reveal much. I also noted that Leroy was touchy and irritable. He was annoyed by some of my questions. I wound up treating him with kid gloves. Leroy did not exhibit unusual or bizarre behavior. He was 'standoffish' and uninvolved. I sensed authority conflict within him, as well as a general aversion to interpersonal relationships and contacts. Affect was bland, except for the anger and the noted irritability." (R. T. at page 71, dated June 29 and July 27, 2012).

Thus, Dr. Wittner's evaluation did not conclude that appellant suffered from a major mental illness of a psychotic nature, but rather found a conduct disorder that, if carried out to adulthood, would lead to a diagnosis of antisocial personality disorder. (R. T. at pages 79-80). In sum, Dr. Wittner's psychiatric diagnoses was of a conduct disorder of adolescence and aggression. Moreover, appellant's history of noncooperation is reflected in other evaluations performed on him over the years. (Refer to Exhibit F, pages 000064; 000119-000122; Exhibit J, at page 00986-00987). Further, in an evaluation performed on the appellant in 2011 by the Los Angeles County Sheriff's Department Inmate Mental Health (identified as Exhibit M, at page T0034), psychiatrist, Dr. Kim Guy noted that the patient [appellant] was "very evasive [he] does not currently appear psychotic, manic, or depressed." The doctor noted no evidence of hallucinations or other psychotic symptoms.

Similarly, in an evaluation performed in 1995 by Adrienne Davis, PhD, she stateed in part, "there was no evidence of a thought disorder. Mr. Wheeler's associations' were tight. He is not hallucinating, delusional or paranoid and he denies such a history. Overall, Mr. Wheeler seemed to be a bright, articulate young man with a good command of the language, interactive and responsive. He did not seem to be suffering from any gross cognitive deficits." (Exhibit I, at page 8). Likewise in a 1995 psychological evaluation at San Quentin state hospital Dr.Litwile, indicated that the appellant did not have any indicia of psychosis, delusions, or thought disorder, an opinion also shared by a Dr. Lyons.

Furthermore, this referee noted that Dr.Gregory Cohen's three hour evaluation of Mr. Wheeler was without the administration of any type of psychological testing, which the doctors at Vacaville prison who evaluated the appellant over a period of time opined that "in the absence of formal psychological tests data, few reliable diagnostic conclusions can be made...." (R. T. at pages 189 – 190, dated December 14, 2012). In fact, according to psychologists Lois Armstrong, who evaluated the appellant in 2002 at the Vacaville facility, in order to make reliable diagnostic conclusions of appellant's mental condition, formal psychological tests data is necessary. Dr. Armstrong ultimately concluded that appellant's "behavior/functioning...throughout his admission is not consistent with his self-report of psychotic symptoms...." Dr. Armstrong assessed Mr. Wheeler as having an

average intellectual ability as well as an antisocial personality disorder. (Refer to Exhibit F, page 0000122). Although Dr. Armstrong stated that there was a possibility of some form of a mental condition regarding the appellant, the doctor ultimately indicated that there was no evidence to suggest that perhaps a diagnosis of psychosis may be applicable, however, there was insufficient data to make such a diagnosis without further evaluation to rule it in or out. (R. T. at page 228, dated December 14, 2012). In the end, Dr. Armstrong described Mr. Wheeler as having no observable evidence of delusions or hallucinations and, finding among other things, an antisocial personality disorder.

Overall, this referee carefully considered the testimony of appellant's witness, Dr. Cohen (including that which is contained in his Declaration identified as Exhibit 1), which, as has been stated, concluded that although the appellant was of average intelligence, he could not because of a mental disorder, assist his attorney in the filing of a habeas corpus petition. However, this referee having had the opportunity to observe and hear the testimony of Dr. Cohen, finds that it suffered in a number of respects, in that for most part it consisted of unreliable opinions and/or conclusions. First, although Dr. Cohen, in rendering his conclusions did consider certain prior evaluations performed on the appellant by various other clinicians, by his own admission, Dr. Cohen failed to consider other several prior evaluations of the appellant which this referee found significant. Some examples include the appellant's mental health evaluation at the Los Angeles County Jail Reception Center performed in 2011, which concluded that the appellant did not appear psychotic, manic or depressed. (As previously referenced herein, Exhibit M, at page T0034; R. T. at pages 89-90, dated June 29 and July 27, 2012). Nor did he consider the evaluation prepared in 1986 by Dr. W. Wittner, who, as previously noted, concluded that the appellant was not suffering from any major mental illness of a psychotic nature, but rather, had an antisocial personality. (Exhibit J at page 00986). Additionally, Dr. Cohen did not consider the evaluation prepared by Dr. Michael Maloney. (R. T. at pages 99-100, dated June 29 and July 27, 2012). Likewise, Dr. Cohen failed to comment on Dr. Roy Johnson's conclusion rendered in 2002, that Mr. Wheeler was not presenting a true case of psychosis, but rather was playing a game with the staff. (R. T. at page 214, dated December 14, 2012). However, as reflected at pages 5 and 6 of his declaration, Dr. Cohen nonetheless is of the opinion that appellant suffers from a psychotic disorder and the doctor disagrees with certain opinions rendered by prison staff that the appellant is simply malingering.

Although this referee heard evidence that an individual can develop a mental condition as an adult that may not have existed as an adolescent and that it is further possible to be psychotic one day and then a week later be nonpsychotic, based upon the entirety of the evidence presented, this referee is not convinced that this is the situation with the case at hand. Dr. Kaushal Sharma generated evaluation reports on the appellant on March 29, 2012 and a follow-up on April 13, 2012. Dr. Sharma has three board certifications, including one by the American Board of Psychiatry and Neurology. He has been a forensic psychiatrist over the last 30 years, during which time he has evaluated approximately 1700 individuals for mental competency. (R.T. dated December 14, 2012,

at pages 272-274). Dr. Sharma is of the opinion that although the appellant's was given a diagnosis of psychotic disorder not otherwise specified in the past, he notes that the appellant denied any hallucinations and cannot be characterized as being truly psychotic, in other words, suffering from psychosis. Unlike Dr. Cohen, Dr. Sharma reviewed all available materials for approximately 35 hours before reaching his conclusions. He noted that the appellant was more reluctant to meet for purposes of evaluation with doctors assigned by the respondent, versus those assigned by the appellant's counsel, including Dr. Cohen and Freundlich, which action would suggest, according to Dr. Sharma, selective cooperation which is volitional and shows reasoning and logic, rather than crazy random thought on the appellant's part.(R.T. December 14, 2012, at pages 276-279).

Ultimately, Dr. Sharma's professional opinion is that the appellant is competent to assist his counsel and that he may choose not to for other reasons, but in the end, he has "what it takes mentally" and that if he chooses to assist or cooperate with his counsel or not is not the product of a mental illness. Specifically, Dr. Sharma states that the appellant is mentally capable of assisting his attorney with respect to the filing of a writ of habeas corpus and any noncooperation would be volitional and not due to a mental deficiency. (R.T. dated December 14, 2012, at pages 280-284). Further, Dr. Sharma is of the opinion that appellant's noncooperation is partly due to his wanting to be his own attorney and not because he is psychotic. (R.T. at page 319). Again, an example of the appellant's noncooperation can be seen by his actions not to cooperate with Dr. Michael Maloney in 2012 for purposes of evaluation, as well as his refusal to meet with Dr. Sharma himself which suggests to Dr. Sharma a willful choice on the part of the appellant. (Refer to Dr.Sharma's report identified as Respondent's Exhibit A). Furthermore, appellant's refusal to take letters from the Supreme Court or from his assigned counsel, indicates his desire to be pro per and that he is "a spoiled child wanting to do things his way ever since he was 10 years old." (R.T. at p.289; also refer to Dr. Sharma's report at page 2, Exhibit A).

Additionally, in a report prepared by Dr. Michael Maloney, dated April 15, 2012, at page 8, the doctor points out that after reviewing voluminous documents in the case, it is his opinion that the appellant's behavior has a strong volitional component. However, he was unable to conclude, because of the appellant's noncooperation, whether he has a serious mental illness wihich would preclude him from proceeding with a habeas corpus petition. (Respondent's Exhibit D). Although appellant refused to meet with Dr. Maloney in 2012 for evaluation, in an evaluation performed on him by Dr. Maloney in 2011, the doctor opined that the appellant's responses to the doctor's questions were indirect and gave the suggestion of being rehearsed or premeditated. The doctor stated that there was a clear game playing quality in the appellant's response to the examination. This same conduct was noted in mental health reports at San Quentin and Vacaville. (R.T. at pages 277-278, transcript dated December 14, 2012). Moreover, even if one were to accept the appellant's contention that in an evaluation for competency to pursue federal habeas relief in a death penalty case requires that a given petitioner possess essentially the same mental capacity that renders him competent to stand trial, specifically, the ability to

understand and communicate rationally with counsel when necessary, again, from the overall evidence, this referee concludes that any such refusal in the instant case by the appellant to cooperate with his counsel is volitional in nature and not due to a mental disorder.

In the end, Dr. Cohen's overall conclusions and assessment regarding the appellant's mental condition left a lot to be desired. This refereenoted that Dr. Cohen's demeanor and responses to questions posed in the course of the underlying hearing reflected some degree of uncertainty with respect to some of his responses, as well as exhibiting some difficulty in answering certain questions propounded, and at times, also exhibited a degree of hesitation in explaining the basis for rendering certain conclusions regarding his three hour evaluation of the appellant. Consequently, when weighed against the overall evaluations of the appellant performed over the years, as well as considering the conclusions of Dr. Sharma and all exhibits introduced at the hearing for this referee's consideration, this referee concludes that the appellant's unwillingness to assist his counsel for purposes of filing a Petition for a Writ of Habeas Corpus is based upon nonpsychotic reasons and not due to a mental disorder. As such, this referee is also of the opinion that the appellant's counsel should not be appointed as guardian ad litem for purposes of preparing and pursuing the petition in question.