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February 27, 2014

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

RE: People v. Stanley Bryant, Donald F. Smith, and Leroy Wheeler
Supreme Court of the State of California, Supreme Court California S.F., Case No. S049596

Dear Mr. McGuire:

Respondent hereby submits this letter brief addressing whether appellant Leroy Wheeler's motion for appointment of Conrad Peterman as guardian ad litem should be granted. In light of the referee's report filed in this Court on September 17, 2013, finding appellant competent, the motion should be denied.

Summary of Argument

The referee in this case has made a factual finding that appellant's refusal to cooperate with counsel is a volitional decision and product of his seemingly antisocial personality. This finding is entitled to deference because it is based on a resolution of conflicting mental health expert opinions and finds reasonable support in the record below. The record reasonably supports the suggestion that appellant is a malingering sociopath who has decided to display symptoms of mental illness and not cooperate with counsel for any number or combination of reasons: 1) such behavior might assist him in his long-standing request for a quieter placement on death row, 2) his behavior might delay resolution of appellate and collateral review and imposition of his death sentence, 3) such behavior arises out of mistrust of counsel as a result of counsel's initial failures to get himself recognized by this Court as either appointed or retained counsel on habeas, and 4) such behavior is yet another example of appellant's long-held personality traits identified as "immaturity, self-centeredness, and an exaggerated feeling of self-importance."

A key factor in support of this reading of the record is the undisputed fact that appellant has a documented history of mental health evaluations, including a very thorough one by his own mental health expert at trial, that have unequivocally found him not to suffer from *any* mental

disorders. Questions as to appellant's mental health arose only for the first time in 2002. A single incident at San Quentin in 2002 led to an almost 50-day evaluation at psychiatric unit at Vacaville state prison where an initial San Quentin diagnosis of cognitive disorder NOS was changed to a rule-out diagnosis, and malingering was suspected. The reason the diagnosis was changed to a rule out diagnosis was that appellant did not display observable mental illness symptoms and instead was aloof, disdainful and angry, often irritated and annoyed by questions and refusing to speak or participate. Of particular importance, appellant allowed himself to be tested only for reading ability, and discontinued further IQ testing, and disallowed altogether any objective neuropsychological or personality testing.

To this day, no comparable mental health evaluation has been conducted. Tellingly, the one thing the psychiatric unit felt was most needed in light of appellant's failure to cooperate during his 47-day evaluation, objective formal psychological testing, is the one thing appellant's expert in this case decided was simply unnecessary to a proper resolution of the competency issue. Instead, appellant's expert thought it would be far more fruitful to spend taxpayers dollars on an expensive MRI exam, the type of exam that would appear to require a great deal of cooperation from appellant, and which has now revealed appellant's brain to be perfectly normal. The prosecution's experts, on the other hand, agreed that such psychological testing would be a wise use of public funds. However, when the subject matter was raised during one prosecution expert's examination, appellant refused to cooperate with such testing, terminated the interview, and refused to meet again with the expert. Appellant then refused to come out of his cell for two subsequent attempts by another prosecution expert to examine him. A reasonable inference here is that appellant's cooperation is selective and he will not participate in standardized psychological testing out of fear that it might produce objective evidence that he is feigning or exaggerating symptoms of mental illness. In other words, appellant is savvy enough to steer the inquiry here away from discovering objective proof that he is a malingering sociopath.

A. Summary of Facts

Appellant is a self-described "loner." According to him, he has always been one, dating back to when he was a juvenile, when his mother taught him isolation in order to avoid trouble and friction with others. As an example, when appellant would ditch school during the 7th and 8th grades, he would spend his time staying home, sleeping or watching television and not associating with others. Appellant also describes himself as having a "quick temper" and his mother confirms him as having been temperamental as a child.

The combination of appellant being a loner and having a quick temper has led to a longstanding history of temperamental uncooperative behavior and self-isolation in custody. The psychiatrist who evaluated appellant twice at the California Youth Authority (CYA), Dr. Wittner, found him to be "guarded, aloof, and not very willing to discuss matters." Dr. Wittner had to bring up all issues, and appellant's answers were as brief as possible. Appellant took no initiative on any topic and did not feel there was any need for Dr. Wittner to talk with him. Staff reported that appellant did not like to talk in groups. Dr. Wittner found appellant to be standoffish and unwilling to reveal much information. Apellant was touchy and irritable, and

annoyed both by the fact that he was being required to talk to Dr. Witnner, and also by certain questions Dr. Wittner asked. Dr. Wittner was forced to treat appellant with kid gloves.

Staff interactions with appellant revealed him to be moody and depressed, demanding of attention, immature, self-centered, having an exaggerated feeling of self-importance, and someone who pouted when he did not get his way. CYA Staff likewise described appellant as a "loner," explaining that he spent much of his time on his bed. Dr. Wittner diagnosed appellant has having an adolescent conduct disorder, socialized, aggressive. Dr. Wittner found that appellant was unamenable to psychotherapy because he was neither interested in nor accessible to it. He also predicted that upon his release from CYA, appellant would have "certain deficiencies in his personality."

A number of years after his releases from CYA, appellant was back in custody for the capital murder charges leading to his current confinement. During pre-trial proceedings in 1995, Petitioner's trial counsel retained a forensic psychologist, Dr. Adrienne Davis. Appellant fully cooperated with Dr. Davis as she conducted a mental status evaluation, IQ testing, and neuropsychological testing. All of these evaluations yielded normal results. IQ testing reveled Petitioner to have a 100 IQ, and Dr. Davis diagnosed Petitioner with no mental health disorders.

As revealed by Dr. Davis's trial testimony:

"Q: [BY THE PROSECUTOR] There is no signs of, in any fashion, that Leroy is psychotic; correct?

A: That's correct.

Q: There's nothing in his history at all to suggest he's delusional; correct?

A: That's correct.

. . . .

Q: In fact, he has above average intelligence; correct?

A: That's correct."

(RT 17892-17893.)[1]

Upon his conviction and sentence to death, appellant was imprisoned at San Quentin, and immediately thereafter refused receipt of legal mail from this Court. He also refused to submit to standardized diagnostic testing given to all inmates. Two events then preceded the triggering event for the current inquiry, which at the hearing below, was referred to as the "rat poison" incident.

First, his appellate counsel unsuccessfully sought dual representation of appellant on appeal and on habeas corpus as either appointed or retained counsel. This Court denied the dual appointment request and then just one month before the "rat poison" incident, counsel informed appellant that his attempts to become retained counsel also had failed. (Ex. N.)

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[1] Both Drs. Sharma and Maloney read Dr. Davis's trial testimony prior to rendering their opinions in this case. Dr. Cohen did not. (EHT 263.)

Second, for years, appellant had been attempting to get his cell assignment moved to a quieter section of death row. This required him to apply for the reassignment through prison administrative channels. Appellant's request for the reassignment identified his desire for a quieter program as the basis for the request. Appellant appears to have closely monitored his placement on the waiting list for this particular assignment, to the point that just months before the "rat poison" incident, he complained to prison authorities that he was being passed over for reassignment by other inmates who had not been on the waiting list as long as he has. A discussion ensued about the range of factors affecting movement on the list, and it appears that appellant's mental health status might have been a factor in the decision. (Ex. H.)

Six months after the reassignment denial, and one month after being advised by counsel of failed retainer efforts, the "rat poison" incident occurred. The only documented account of what appellant actually said during the incident is that appellant stated to a guard, "Check my trash. I ate rat poison." The incident was not initially treated as a psychiatric event, with prison staff attempting to secure a drug test sample from appellant. Appellant, however, destroyed the sample in front of staff, and a second drug test a day later revealed no indication of drug use. Appellant's behavior, however, was odd, and he was initially diagnosed by San Quentin as suffering from a psychotic disorder not otherwise specified (NOS). A transfer to the psychiatric unit at Vacaville for observation was ordered, Notations in the prison record document only one dose of antipsychotic medication being given and the day before his transfer appellant had not taken antipsychotic medication and appeared to improve.

Appellant was then transferred to a mental health facility at Vacaville State Prison for a 47-day comprehensive psychological evaluation period initiated on September 13, 2002 and completed on October 31, 2002. At the conclusion of this extended and intensive mental health evaluation, appellant was not diagnosed with any mental health disorder, and instead was tentatively diagnosed with only cannabis dependence and insomnia, with a rule-out diagnosis of psychotic disorder NOS. Appellant's lack of cooperation played a major factor in reaching these conclusions, and much of appellant's behavior during this comprehensive mental health evaluation period mirrored exactly the same type of temperamental behavior appellant exhibited with Dr. Wittner and CYA staff during the six-week period 15 years earlier. Appellant was once again "aloof, disdainful, and angry." His "[a]ffect was constricted within the irritable/angry/annoyed range." Just as he did with Dr. Wittner, appellant was slow to answer questions or nonresponsive, uncooperative, and annoyed by certain questions: "He glared intensely at the person asking the question seemingly attempting to act in an intimidating manner." "He frequently stared in an intense manner at the examiner, refusing to speak or participate in what was being asked of him." (Ex. F, 119-120.)

In short, Dr. Armstrong concluded that "[o]bservation of Mr. Wheeler's behavior/functioning on this unit throughout this admission is not consistent with his self-report of psychotic symptoms."[2] (Ex. F 122.) The day before his release from the psychiatric unit,

[2] Appellant self-reported to Vacaville staff that he was referred there for "delusions of grandeur." When asked what he meant by that phrase, appellant became visibly annoyed,

(continued...)

another doctor concluded that appellant was malingering symptoms of mental illness and suffering from antisocial personality disorder. Dr. Armstrong noted that appellant failed to cooperate in attempts to administer to him intelligence, neuropsychological and psychological testing, allowing himself only to be tested for his reading ability before terminating the testing. Dr. Armstrong concluded n light of appellant's failure to cooperate, the lack of observable signs of mental illness, and the absence of formal objective psychological testing, few reliable conclusions could be drawn. (Ex F 122.)

Since the time of appellant's return to San Quentin, no comparable extended evaluation of any type has occurred, with appellant receiving periodic cell-side visits from San Quentin doctors who have noted certain odd behaviors and repeated the prior psychotic disorder NOS. Some of these doctors, including the psychiatrist who made the initial psychotic disorder NOS diagnosis in response to the "rat poison" incident, suspect that appellant was malingering symptoms of mental illness and an antisocial personality.

In connection with this inquiry, appellant has allowed himself to be seen only twice, once for three hours by appellant's expert, Dr. Cohen, and once for an hour and a half by one of the prosecution's experts, Dr. Maloney. Appellant was also seen by a county jail psychiatrist as part of the normal screening process all inmates go through once they are received into custody at the county jail. During that brief examination, appellant exhibited no signs of mental illness and reported that he did not know why he had been transferred from San Quentin to Los Angeles. Two days later he was seen by Dr. Cohen, and reported that he was his own attorney, a "computerized attorney," who had effectuated his own transfer to Los Angeles for resentencing. Appellant made similar statements to Dr. Maloney during his interview and Dr. Maloney found appellant's statements to possess a "gamey" quality to them. San Quentin psychiatric staff had likewise observed a gamey quality to appellant's behavior since his return from the psychiatric unit at Vacaville.

The major differences between appellant's and the prosecution's experts' approach to the interviews was that appellant's made no effort to follow up on Vacaville's suggestion to conduct formal psychological testing, believing that it was simply unnecessary. Instead, Dr. Cohen felt that an MRI of appellant's brain was a wiser use of public funds, and ordered the test, which revealed appellant to have a perfectly normal brain, and would have required a high level of cooperation from appellant to obtain a proper scan. Drs. Maloney and Sharma, however wanted to have objective psychological testing done, and when Dr. Maloney informed appellant of his intent to conduct such test, appellant refused to cooperate with such testing and terminated the interview with Dr. Maloney. (EHT 395-396.) Appellant thereafter refused to have any further visits with Dr. Maloney, and twice refused to meet Dr. Sharma for an examination.

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stating, "Why you come at me like that?" He also self-reported hearing voices and seeing people from Greek mythology, but showed no observable evidence of delusions or hallucinations and no speech content or behavior consistent with delusional thinking. (Ex. F 119-120.)

At the hearing in this case, neither Dr. Maloney nor Dr. Sharma were willing to conclude that appellant suffered from any mental illness, and both disagreed that psychotic disorder NOS was not a proper diagnosis in this case for a number of reasons. To begin with, while the diagnosis was reasonable in response to appellant's behavior after the "rat poison" incident, it was inappropriate after the 47-day evaluation at the psychiatric unit at Vacaville when it was changed to a rule-out diagnosis and malingering . (EHT 384-385.) Proper use of that diagnosis required that it only be used as a preliminary or working catch-all diagnosis used when a patient does not meet the criteria for a hierarchy of specific diagnoses. Drs. Maloney and Sharma agreed with Dr. Armstrong's opinion that few reliable conclusions could be made in the absence of appellant's cooperation and formal psychological testing.

As one Dr. Sharma testified, the record reveals appellant to be "a spoiled child. He wants to do things the way he wants to do it. That's how he has done since he was ten years old. This is his style. This is not psychosis, this is his style." (EHT 289.)

At the core of the dispute below are the experts' differing interpretations of appellant's demonstrated lack of cooperation with Mr. Conrad Peterman, who has been appellant's appointed counsel on automatic appeal since 1999, and habeas counsel since 2002. Over the course of the past twelve years or so, appellant has ceased cooperating with some of Mr. Peterman's efforts to work with appellant as his habeas counsel. As described by Mr. Peterman, appellant has repeatedly refused legal mail from Mr. Peterman, has repeatedly refused to come out of his cell to see Peterman on attorney visits, has not mailed any correspondence to Peterman, and has stated more than once to Mr. Peterman, and others that he is his own attorney. Dr. Cohen interpreted these behaviors as psychotic. Dr. Sharma, who was Dr. Cohen's mentor when he studied at U. S. C. Institute of Psychiatry and the Law, disagreed. (EHT 66, 290-292.) Dr. Maloney was unwilling to say the totality of the records he reviewed suggested appellant was genuinely mentally disturbed. (EHT 399.)

As Dr. Sharma recognized in both his report to the referee and in his testimony below, appellant "does make some crazy-sounding statements" (EHT 315-316), but there is an insufficient basis to conclude that the statements are a true product of psychosis, or even assuming appellant may be psychotic, that the psychosis is the cause of appellant's non-cooperation with Mr. Peterman. (EHT 280.) As Dr. Sharma explained, a psychotic person can do many things that have nothing to do with there psychosis. Dr. Sharma explained, "[M]ost people eat their food because they're hungry, not because they're psychotic. Most psychotic people put their pants on the bottom, shirts on the top, not because they're psychotic; you and I do it the same way." (EHT 293-294.) It's not an all-or-nothing inquiry of being 100% crazy versus 0% crazy. (EHT 294.) Sharma recognized that appellant has expressed a belief that he is his own attorney in this case, an assertion whose truth might have legal relevance, but from a psychiatric view revealed nothing inherently psychotic. It is not an uncommon occurrence for an inmate to see himself as representing himself and ignoring and resisting a lawyer's attempts to change that to professional representation. (EHT 291-292.)[3]

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[3] As Dr. Sharma explained:

(continued...)

As for Dr. Cohen's diagnosis in this case of psychotic disorder NOS, neither Dr. Sharma nor Dr. Maloney were willing to ascribe to that diagnosis. While both prosecution doctors agreed that the diagnosis was a perfectly reasonable one made by the San Quentin psychiatrist who referred appellant to Vacaville for an extended evaluation, a proper use of the diagnosis is as a "working" diagnosis, used when a person does not meet any of a hierarchy of specified psychotic disorders. In other words, it is a diagnosis used when a clinician has no reason to doubt the authenticity of symptoms presented, and needs to delve further to determine what disorder, if any, is actually being presented. (EHT 228-230, 407-408, 412-413.) Dr. Sharma, in particular, found it significant that after a 47-day evaluation in a specialized mental health unit, the diagnosis was changed to a rule out diagnosis, and that few reliable conclusions could be drawn in the absence of formal diagnostic testing and appellant's lack of cooperation. A rule out diagnosis is one "where there is insufficient data to make the diagnosis and it needs to be further evaluated to rule it in or rule it out." (EHT 228.) Indeed, the Vacaville discharge doctor concluded at the end of appellant's stay there that he was malingering. For Dr. Cohen's part, he acknowledged the use of psychosis NOS as a residual category and working diagnosis, but he did not rebut the testimony that it should not remain after further inquiry has rendered the record insufficient to draw any reliable conclusions.

Since the conclusion of that evaluation, there is no evidence that appellant has actually cooperated with any further mental health inquiry by San Quentin doctors, and no inquiry comparable to the Vacaville evaluation has been attempted. Instead, there are notations by San Quentin clinicians who have had contact with appellant for any number of reasons, but no efforts to resolve any questions left unanswered by the Vacaville doctors. However, there is a notation from one of the the San Quentin doctors who initiated the transfer to Vacaville, where he takes note of the Vacaville report and suspected appellant was malingering. (EHT 377-379.) The diagnosis of psychotic disorder NOS does appear in a number of other doctor's notations, but there is no indication in the records whether the doctors were simply repeating the original diagnosis without the benefit of or careful reading of the Vacaville modification of that diagnosis to a rule-out diagnosis.

Picking up where the Vacaville doctors left off, the prosecution's experts felt that objective diagnostic testing was in order, since it seemed like the most logical thing to do and sound practice, particularly in light of notations in the San Quentin's records of malingering.

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> "I have not read anything from anybody that he thinks that Mr. Peterman is trying to kill him or is trying to steal his testicles and sell them to the Martians so they can inhabit Jupiter. There is nothing crazy that he describes.
>
> "Therefore , I believe his non-cooperation is because he is a little strange dude, but he doesn't want to cooperate because he thinks "Hey, I want to be my own attorney." (EHT 319.)

(EHT 275-276, 396-398.) Dr. Cohen, for his part, however disagreed. He felt that objective psychological testing was simply unnecessary , finding his 3-hour interview of appellant and his review of the records sufficient for him to determine that psychotic disorder NOS, was not just a working diagnosis, but instead the correct diagnosis in this case. Dr. Cohen did refer appellant for further testing. However, it was for an MRI scan of appellant's brain, a test which Dr. Cohen conceded is quite noisy and requires the patient to cooperate by remaining very still during the exam. The results of this effort revealed appellant's brain to be normal.

The prosecution's expert's desire for objective testing, however, was thwarted by appellant the minute Dr. Maloney announced his intention to do so. Appellant indicated to Dr. Maloney we would not undergo such testing and terminated the interview at that point, and refusing to meet with Dr. Maloney further, and then refused to come out to see Dr. Maloney at a subsequent visit. (EHT 395-396, 398.) Subsequently, appellant twice refused to come out of his cell to meet with Dr. Sharma for his examination. Dr. Sharma concluded that these refusals were on their face indicative of selective cooperation and therefore volitional and not the product of any mental disorder.[4] (EHT 279-281, 283.)

B. Appellant's Contention That The Referee Failed To Apply The Correct Legal Standard For Present Competency Is Belied By The Expert's Use Of The Competency-To-Stand-Trial Standard And The Referee's Express Adoption Of That Same Legal Standard

In appellant's post-evidentiary hearing briefing in the superior court, he argued that this Court had failed in its reference order to articulate the proper standard for present competency to be used by the referee in this matter. In particular, appellant argued that the reference question submitted below omitted the assistance prong of the constitutionally required test for present competency. (Wheeler Post-Hearing Brf. On Competence and Guardian ad litem Appointment 3-6.) Here, appellant reasserts this argument, and further asserts that the Court should remand the case back to the superior court for yet another hearing where appellant would present evidence going to both prongs of the competency test. (Letter Brf. 2-5.) This argument fails for three reasons.

First, this is simply a make-weight issue having nothing to do with the resolution of the competency issue before the Court. None of the three doctors who testified at the evidentiary hearing below approached the inquiry any differently than as if they were testifying at a pre-trial competency hearing. In fact, appellant presented evidence specific to the allegedly missing prong in the assessment below. Dr. Cohen, opined that appellant did not meet the assistance

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[4] On cross-examination appellant's counsel challenged Dr. Sharma's conclusion here since Dr. Sharma had no way of knowing what appellant knew or said to county jail staff at the time of his refusals. This did not pose a problem for Dr. Sharma because ". . . God created common sense." (EHT 285-286.) As Dr. Sharma explained, it is not as if appellant has three parts to his brain, one for each of the testifying experts here, that caused him to spend 3 hours with Dr. Cohen, and hour and a half with Dr. Maloney, and no time with Dr. Sharma. That would not suggest that appellant is psychotic and has different ideas about Dr. Cohen. (EHT 319.)

prong of the competency-to-stand-trial standard ("As a result of his psychiatric disorder, Mr. Wheeler is unable to rationally communicate with his attorney.") (Ex. 1 7 ¶16.) (EHT 341 (petitioner cannot "understand and assist" habeas counsel).) In the same vein, Dr. Sharma did not parse his opinion. He unequivocally testified that appellant is competent. (EHT 283-284.) Specifically, Dr. Sharma testified that appellant "is mentally capable of assisting his attorney in a writ of habeas corpus[.]" (EHT 284.) Indeed, Dr. Sharma's report and testimony below explicitly stated that "competency for dealing with Writ of Habeas Corpus is not different than for competency to stand trial, even though the actual work involved is different." (Report 7, EHT 316.) In addition, the referee accepted appellant's position arguendo that there is a constitutional requirement that imposes on habeas corpus that the petitioner possess the same competence as required to stand trial, and the referee held that appellant's evidentiary showing failed under that standard. (Report 5-6.) Second, the referee found that appellant does not suffer from a mental disorder. (Report 2-5.) As a result, appellant's evidentiary showing fails under any standard. Third, the referee assumed arguendo that even if appellant suffered from a mental disorder, his failure to cooperate in the past, as well as any future non-cooperation, has been, and would be, volitional. (Report 2.) Accordingly, appellant's showing would fail again under his proffered standard.

B. The Referee's Findings That Appellant Does Not Suffer From a Mental Disorder And That His Failure To Cooperate With Counsel's Attempts To Investigate Habeas Corpus Claims Is Volitional Is Entitled To Deference Because It Is Supported By Substantial Evidence

At the center of the controversy here are a number of behaviors by petitioner where he has been uncooperative with habeas counsel, behaviors which his expert, Dr. Cohen, has interpreted as delusional and proof-positive of an alleged mental disorder as the cause of appellant's non-cooperation. Two prosecution experts, Drs. Sharma and Maloney, disagreed after examining detailed documentation of appellant's background and mental health history dating back to appellant's adolescence. The referee implicitly sided with the State's experts, finding them more experienced, more credible, better prepared, and their opinions worthy of greater weight than Dr. Cohen's opinion. In particular, the referee found that appellant does not suffer from a mental disorder, and further, even assuming that he does suffer from one, his non-cooperative behavior is volitional.

"The law on competency is well established. A defendant is presumed competent unless it is proved otherwise by a preponderance of evidence." (*People v. Ramos* (2004) 34 Cal.4th 494, 488.) The burden of proof is constitutional and remains even after a defendant has raised reasonable doubt as to his competence sufficient to trigger a hearing. (*People v. Medina* (1990) 51 Cal.3d 870, 1291-1292.) The findings of a referee after a reference hearing are entitled to great weight when supported by substantial evidence. (*In re* Boyette (2013) 56 Cal.4th 866, 876-877.) "'Deference to the referee is particularly appropriate on issues requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying.'" (*In re Price* (2011) 51 Cal.4th 547, 559.) Triers of fact are free to disbelieve expert opinions based on unsupported assumptions, matters not reasonably relied upon by other experts, or upon factors that are

speculative, remote or conjectural. (*Burger v. Department of Motor Vehicles* (2011) 192 Cal.App.4th 1118, 1122 .) Similarly, triers of fact may reasonably chose to credit the testimony of one expert over another even when the experts share certain opinions and disagree as to others. Neither the trier of fact nor the reviewing court is required to pick out isolated items of testimony as the basis to disbelieve an expert's conclusion. (*People v. Rittger* (1960) 54 Cal.2d 720, 731.)

These principles are especially applicable here because the referee found the opinion of Petitioner's mental health expert, Dr. Cohen, that Petitioner is currently incompetent unbelievable in light of the record, the contrary and better-reasoned opinions of the prosecution experts, Drs. Sharma and Maloney, and Dr. Cohen's demeanor and manner of testifying at the evidentiary hearing. The referee found that Dr. Cohen rendered unreliable opinions and/or conclusions based on "having had the opportunity to observe and hear the testimony of Dr. Cohen[.]" (Report 4.) In particular, Dr. Cohen's demeanor and response to questions posed "reflected some degree of uncertainty . . ., as well as exhibiting some degree of hesitation in explaining the basis for rendering certain conclusions[.]" (Report 6.) These findings are supported by substantial evidence and should be adopted by this Court.

To begin with, the referee's decision to give greater weight to Drs. Sharma and Maloney's opinions, is based, in part on the referee's conclusion that these doctors had superior training and credentials. The referee noted that Dr. Cohen was neither board certified nor a forensic psychologist. (Report 2 citing EHT 65, 70.)[5] Indeed, Dr. Cohen testified at the hearing that while he advertises himself as "subspecializing" in both forensic psychology and forensic psychiatry, he would not even qualify himself as an expert in forensic psychology. (EHT 64-65.) He further added that he was not board certified in forensic psychiatry, and has never sought certification, for no other reason than he did not believe certification was "appropriate, necessary [or] worthwhile." (EHT 66.) Dr. Cohen nonetheless agreed, that board certification meant that others who have expertise in the area examine one's credentials and determine whether the person meets certain heightened standards. (EHT 66.) He agreed that both Drs. Sharma and Maloney met these standards. (EHT 65, 67.)

Next, as noted, the referee discounted Dr. Cohen's testimony, in part, on the basis that Dr. Cohen hesitated at times, and the manner in which he testified. One major inconsistency on this front is that Dr. Cohen had considerable difficulty recalling the basis of his opinion, contradicting himself a number of times on whether he had actually read critical portions of appellant's mental health records prior to formulating his opinion in this case.

Of particular relevance here is Dr. Cohen's evaluation of the mental health evidence concerning appellant when he was evaluated as a juvenile. The evidence presented at the hearing revealed that when appellant was 17 years old, he underwent a general psychiatric examination upon his arrival at the California Youth Authority (CYA). The examination entailed two

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[5] "EHT" refers to the evidentiary hearing transcript held pursuant to the Court's reference order. Page 70 does not reference any of Dr. Cohen's credentials or lack thereof.

interviews conducted six weeks apart by a consulting psychiatrist, Dr. Wittner. Dr. Wittner's two reports, dated December 31, 1986 and February 17, 1987 reveal appellant's basic personality, which has not changed much in the past 28 years.

Drs. Sharma and Maloney both found these records significant. Dr. Cohen also testified that these reports were a significant factor in forming his opinion. (EHT 72.) These records give detailed insight into appellant's personality type that the referee found provide the better explanation of appellant's failure to cooperate than Dr. Cohen's conclusion that appellant was psychotic. Yet despite Dr. Cohen's apparent reliance upon these reports, he could not even remember whether he had actually reviewed the first evaluation prior to forming his opinion in this case. (EHT 75.) He explained that he must have instead reviewed a summary of Dr. Wittner's evaluations taken from a subsequent report. However, after considering that he did not have had Drs. Sharma and Maloney's reports at the time he formed his opinion, he concluded that it must have been Dr. Adrienne Davis's report that he had seen. (EHT 75-76.) But when he actually reviewed her report, he found that it could not have been her report since her report did not contain information from Dr. Wittner's report described in Dr. Cohen's report. (EHT 76-77, 79.) At that point, Dr. Cohen contradicted himself and testified that he might have seen Dr. Wittner's first report, but he was of the opinion he did not have the full CYA file at the time he formed his opinion, and in particular, he did not have Dr. Wittner's report from February 1987. (EHT 77-78, 116.) Dr. Cohen then conceded that the February 1987 report played no part in the formation of his opinion, but nonetheless concluded that quoted portions of the 1987 report would only be minimally relevant to his opinion. (EHT 123, 124-126.) On re-direct examination, Dr. Cohen changed this testimony to say that he, in fact, "had" the second Wittner report at the time he formed his opinion. However, he did not specifically retract his testimony that the February 1987 report played "no part" in the formulation of his opinion. (EHT 232-233.)

At a minimum, even based on a cold reading of the record, this illustrates one basis upon which the referee could reasonably infer that Dr. Cohen's opinion in this case was not well-thought out and based on an incomplete or less-than-careful review of appellant's mental health records. Dr. Cohen's lack of careful and complete consideration of the juvenile evaluations is revealed in his refusal to infer from specific behaviors described in the report as indicative that appellant was a loner. In particular, Dr. Cohen refused to interpret how appellant spent his time when truant from school during 7th and 8th grades, staying home, sleeping or watching television, and not associating with others, as indicative of him being a "loner." (EHT 123.) However, the report elsewhere reveals that is exactly how CYA staff characterized appellant based on how much time he spent on his bed. More importantly, appellant described himself to Dr. Wittner as always having been a "loner," explaining that is mother taught him isolation in order to avoid trouble and friction with people. Dr. Cohen's refusal to acknowledge an obviously reasonable characterization of appellant's behavior, one which appellant himself conceded was longstanding trait of his, and one which was personally observed and confirmed by CYA staff reflected either Dr. Cohen's unfamiliarity with the finer details of the report or plainly unreasonable interpretations of the report. In either case, the referee's decision to credit the prosecution's experts over Dr. Cohen's was plainly reasonable.

At separate times in the hearing below, appellant's expert, Dr. Cohen testified that he did not have these two reports prior to forming his opinion in this case, claiming he was given incomplete CYA records. To explain why his report omitted certain information from Dr. Wittner's reports, Dr. Cohen testified that he gleaned what was in Dr. Wittner's reports from reading other doctors' reports in the case. But he later retracted that testimony after he reviewed the reports, and eventually conceded that he had both of Dr. Wittner's reports at the time he formed his opinion in the case. Substantively, Dr. Cohen testified that Dr. Wittner's reports were significant factors in forming his opinion in this case, but later backed away from that assessment, testifying that the reports were only minimally relevant.

In sharp contrast, the prosecution's experts found Dr. Wittner's reports revealing the extent they shed light on appellant's personality and propensity for isolating himself and not cooperating with custodial staff. Reliance on the CYA reports provide reasonable support for the conclusion that appellant is simply a temperamental loner.

In forming his diagnostic opinions, Dr. Wittner was aided by information provided by appellant's mother, appellant himself, and CYA staff observations made over the six-week interval between interviews. Appellant's mother described appellant as temperamental as a child, and appellant readily admitted to Dr. Wittner that he had a quick temper. Appellant further described himself as having always been a "loner," and explained that his mother taught him isolation in order to avoid trouble and friction with people. During 7th and 8th grades, appellant would ditch school, but spent that time staying home sleeping or watching television, rather than associate with others. CYA Staff likewise described appellant as a "loner," explaining that he spent much of his time on his bed.

In the same vein, Dr. Wittner found appellant in both interviews to be "guarded, aloof, and not very willing to discuss matters." Dr. Wittner had to bring up all issues, and appellant's answers were as brief as possible. Appellant took no initiative on any topic and did not feel there was any need for Dr. Wittner to talk with him. Staff reported that appellant did not like to talk in groups. Dr. Wittner found appellant to be standoffish and unwilling to reveal much information. Apellant was touchy and irritable, and annoyed both by the fact that he was being required to talk to Dr. Witnner, and also by certain questions Dr. Wittner asked. Dr. Wittner was forced to treat appellant with kid gloves.

Staff interactions with appellant revealed him to be moody and depressed, demanding of attention, immature, self-centered, having an exaggerated feeling of self-importance, and someone who pouted when he did not get his way. Dr. Wittner diagnosed appellant has having an adolescent conduct disorder, socialized, aggressive. Dr. Wittner found that appellant was unamenable to psychotherapy because he was neither interested in nor accessible to it. He also predicted that upon his release from CYA, appellant would have "certain deficiencies in his personality."

Similar conclusions were drawn by San Quentin and Vacaville prison psychiatrists after appellant was transferred to a mental health facility at Vacaville State Prison for a 47-day comprehensive psychological evaluation period initiated on September 13, 2002 and completed on October 31, 2002. At the conclusion of this extended and intensive mental health evaluation, appellant was not diagnosed with any mental health disorder, and instead was tentatively diagnosed with only cannabis dependence and insomnia, with a rule-out diagnosis of psychotic disorder not otherwise specified. Appellant's lack of cooperation played a major factor in reaching these conclusions, and much of appellant's behavior during this comprehensive mental health evaluation period mirrored exactly the same type of behavior appellant exhibited with Dr. Wittner and CYA staff during the six-week period 15 years earlier. Appellant was once again "aloof, disdainful, and angry." His "[a]ffect was constricted within the irritable/angry/annoyed range." Just as he did with Dr. Wittner, appellant was slow to answer questions or nonresponsive, uncooperative, and annoyed by certain questions: "He glared intensely at the person asking the question seemingly attempting to act in an intimidating manner." "He frequently stared in an intense manner at the examiner, refusing to speak or participate in what was being asked of him." (Ex. F, 119-120.)

As noted above, the referee has found petitioner competent to assist habeas counsel. "[T]his referee concludes that the appellant's unwillingness to assist counsel for the purposes of filing a Petition for Writ of Habeas Corpus is based on non-psychotic reasons and not due to a mental disorder." (Report 6.) The record fully supports this determination

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Appellant's lack of cooperation can reasonably stem from mistrust of Mr. Peterman as a result of Mr. Peterman's initial failures to come through on his promises of his appointment as habeas counsel. Or appellant reasonably could see a benefit in engaging in certain behaviors, with the goal obtaining a better placement on death row, as he has been seeking for a number of years. Or perhaps appellant simply sees such behaviors as a means of further delaying his death sentence. Or perhaps not cooperating with counsel and others it is simply another example of what was long ago identified as "immaturity, self centeredness, and an exaggerated feeling of self importance." Or perhaps it is a combination of any number of these circumstances. Whatever the case may be, it is sufficient that the referee found appellant's non-cooperative behavior volitional, and that appellant is capable of assisting counsel, but chooses not to. The motion should be denied.

Respectfully submitted,

KEITH H. BORJON
Supervising Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

KHB:diy

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DECLARATION OF SERVICE

Case Name: **People v. Stanley Bryant, Donald F. Smith, and Leroy Wheeler**
No.: **S049596**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 4, 2014, I served the attached **Letter Brief re Motion for Appointment of Guardian Ad Litem**. by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On April 4, 2014, I caused the original and eight (8) copies of the **Letter Brief re Motion for Appointment of Guardian Ad Litem** in this case to be served on the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by Federal Express mail service.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 4, 2014, at Los Angeles, California.

Linda Sarenas
Declarant

Signature

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