SUPREME COURT COPY

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In the Supreme Court of the State of California

In re

DAVID ESCO WELCH,

On Habeas Corpus

Case No. S107782

Trial: Alameda County Superior Court, Case No. 90396
The Honorable Stanley P. Golde, Judge
Ref. Hearing: Contra Costa County Superior Court, Case No. 070855-2
The Honorable Mary Ann O'Malley, Judge

RESPONDENT'S REPLY TO "PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT"

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INTRODUCTION

The parties have filed simultaneous exceptions to the referee's report and opening briefs on the merits. Respondent here responds to petitioner's brief on the merits and exceptions to the referee's report (PBM). Fundamentally, on the jury misconduct issue, petitioner would have this Court find credible the witnesses the referee experienced in person and found least worthy of belief, and adopt as true the opposite of whatever was testified to by the bailiff and the prosecutor simply because each candidly agreed that the execution-style murder of infants is a bad thing. On the ineffectiveness issue, while embracing the referee's finding that petitioner was subject to some physical abuse in the form of corporal punishment at his father's hands, petitioner downplays the accuracy and thoroughness of the penalty phase mental health presentation, the counter-evidence to the newly developed evidence, and the overall lack of prejudice attributable to any failure on counsel's part to break through the family's solid stone wall.

ARGUMENT

I. PETITIONER HAS WRITTEN THE PREJUDICE REQUIREMENT OUT OF THE STANDARDS FOR HABEAS CORPUS AND UNDERSTATES THIS COURT'S FINAL DETERMINATION ON THE FACTS RELATED TO ERROR AND PREJUDICE

Petitioner's statement of the law sets the tone for his pleading. His statement of the law minimizes or omits two crucial steps in the evaluation of habeas corpus: petitioner's burden to provide *credible* substantial evidence; and the ultimate determination by this Court of both error and prejudice. The referee was asked to make factual determinations on preliminary issues, findings that permit this Court to evaluate error and prejudice, even determine the need to make error findings in the absence of prejudice, but which do not, standing alone, establish entitlement to relief. Not surprisingly, given his view of the law and his rejection of the many

adverse findings of the referee, petitioner jumps to a conclusion that he is entitled to habeas corpus relief simply because he has provided some evidence, without addressing prejudice directly and while minimizing this Court's role.

Petitioner quotes *People v. Duvall* (1995) 9 Cal.4th 464, 475, which holds that "[i]ssuance of an [order to show cause] signifies the [issuing] court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." (PBM 11.) The order to show cause "is the means by which the issues are joined and the need for an evidentiary hearing determined." (*People v. Romero* (1994) 8 Cal.4th 728, 740.) Petitioner states "the central purpose of the reference hearing was for the referee to hear the evidence and make factual and credibility determinations necessary to permit this Court to decide whether petitioner's factual allegations are true and, therefore, whether petitioner is entitled to relief." (PMB 11.) But the thrust of his argument, to the extent adverse findings were made, is that he provided "substantial" evidence and the fact that the referee found much of it not worthy of belief should be disregarded because the referee's underlying credibility findings were not themselves supported by substantial evidence. We address this issue in more detail in argument II, infra. It suffices to point out here that there are two separate rules in play: evidence is not substantial if it is not credible; and the factual findings of the referee are due great deference if they are supported by substantial evidence. (*In re Lawley* (2008) 42 Cal.4th 1231, 1241.) The referee's preliminary and underlying assessment of whose testimony is worthy of belief, based on observations of demeanor and assessments of testimony in context and in comparison to other testimony and established facts, is essential to his or her factual findings, but not itself subject to the substantial evidence rule as traditionally employed. The presumption that the referee is performing the duties of a referee leads to the presumption

that any discrepancies in testimony and the demeanor of the witness have been taken into account prior to the referee's conclusion whether the witness is credible or not. (*In re Boyette* (2013) 56 Cal.4th 866, 877.) Thus petitioner cannot simply say the credibility determinations should be rejected because their basis has not been set forth in the record so there is no substantial evidence. He has to rebut the presumption that the referee was performing her duties. The substantial evidence standard applies to the findings made by the referee following a "quintessentially factual inquiry" dependent on the assessment of credibility. (*Ibid.*; see *In re Cox* (2003) 30 Cal.4th 974, 999 [findings accepted as true because based on the referee's credibility assessments and supported by substantial evidence].)

Petitioner notes that he was only required to provide substantial evidence to the reference court (PMB 13), and implies that if he provided a single witness (PMB 14) he believes the referee should have believed on a factual issue (or where the referee has not stated the basis for finding the witness not credible), the petition must be granted. But that is neither the full statement of the law nor the procedure employed in this case. "The referee's findings of fact, though not binding on [this Court], are given great weight when supported by substantial evidence." (*In re Hitchings* (1993) 6 Cal.4th 97, 109.) "[A]ny conclusions of law or mixed questions of fact and law that the referee provides are subject to [this Court's] independent review." (*In re Hamilton* (1999) 20 Cal.4th 273, 296-297.) Whether counsel's performance was deficient, and whether any deficiency prejudiced petitioner are mixed questions. (*In re Ross* (1995) 10 Cal.4th 184, 201.) This Court independently reviews prior testimony and other factual matters not based on the evidence outside the record presented to the referee. (*In re Hardy* (2007) 41 Cal.4th 977, 993-994.)

On both issues, this Court has posed questions to the referee requiring factual determinations based on the resolution of conflicting testimony. On

those factual questions deference is due by way of the substantial evidence rule. However, this Court was not required to, nor did it, submit the ultimate questions to the referee. This Court independently reviews the record of petitioner's murder trial (prior testimony) and employs deferential substantial evidence review to the facts found by the referee to make an independent determination of the ultimate issue, whether *prejudicial* error has been shown for which habeas corpus provides a remedy.

II. THE REFEREE'S CREDIBILITY FINDINGS ON THE JUROR MISCONDUCT ISSUE ARE WELL SUPPORTED

A. Any Claim Concerning Contact by the Deputy District Attorney with the Jury is Beyond the Scope of the Petition and the Order to Show Cause

This Court issued an order to show cause on claims 6 and 18 of the petition. Claim 6 of the petition asserts juror misconduct on the basis of "Private Communications by Bailiff to Jurors of Material, Extrinsic Evidence." (Pet. at p. 132.) Respondent can find no mention of Deputy District Attorney Anderson in claim 6. (Pet. at pp. 132-141.) Nor can respondent find any mention of Deputy District Attorney Anderson in the order to show cause. "When an order to show cause does issue, it is limited to the claims raised in the petition and the factual bases for those claims alleged in the petition . . . . [T]he scope of the proceeding . . . is limited to the claims the court initially determined stated a prima facie case for relief." (*In re Clark* (1993) 5 Cal.4th 750, 781.)

Had this been an issue in this case, respondent would have prevailed. Juror Cruz testified that he thought the prosecutor addressed the jury about safety during trial, not in the court room, and with no other attorneys, no judge, and no court reporter present. (ERT 1431-1433.) As the referee noted, Juror Cruz was equivocal and suggestible, paused often, and became confused at times. (RRR 9, see especially examples of these traits quoted

at RRR 8.) Sequences of events seemed to be a particular issue for him. The conclusion is inescapable that Juror Cruz was confused about when the prosecutor made himself available to answer juror questions about the case in general and their safety in particular. Deputy District Attorney Anderson explained that although he never addressed the jury out of court during trial, after the trial was over, and the jurors released from their admonitions, the jurors asked to meet with the attorneys in the jury room. He went and discussed the case with the then former jurors, but the defense attorneys declined. (ERT 1747-1749.)

This is interesting background information on the temporal confusions of Juror Cruz, but it cannot be an independent issue in these proceedings as it was neither raised in the petition nor subject of an order to show cause.

B. The Referee's Factual Findings on the Juror Misconduct Issue are Supported by Substantial Evidence

"[A]fter carefully listening to the evidence and observing the demeanor of the witnesses" the referee found former jurors Carol Finley Hayward, Sally Ann Jessie, and Joanne Gonzales to be credible witnesses. (RRR 4-6.) She found former bailiff Dimsdale, former defense attorney Cross, and retired Deputy District Attorney Anderson to be credible. (RRR 9-12.) She found former alternate juror Bernard Wells biased and his memory affected by his health problems. (RRR 6-7.) She found former juror Joseph Cruz not to be credible. (RRR 7-9.) Petitioner takes exception to the referee's initial credibility findings, asserting there was no substantial evidence to support them. (PBM 21.) What needs substantial evidence support, however, are the findings of the referee on the reference questions. The referee does not have to report on the eye movements, poker tells, or blood pressure of each witness, she just has to decide whom she believed on the basis of her careful listening and observations of

demeanor. The substantial evidence required to support the referee's findings is the testimony of the witnesses the referee believed.

Petitioner's authorities say as much, although he chooses to misinterpret them. He quotes *In re Burton* (2006) 40 Cal.4th 205, 214, as follows (we present the full paragraph):

> In evaluating Burton's allegations, "this court gives great weight to those of the referee's findings that are supported by substantial evidence. [Citations.] 'This is especially true for findings involving credibility determinations. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations (*In re Scott* (2003) 29 Cal.4th 783, 824, 129 Cal.Rptr.2d 605, 61 P.3d 402); consequently, we give special deference to the referee on factual questions "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 Malone* (1996) 12 Cal.4th 935, 946, 50 Cal.Rptr.2d 281, 911 P.2d 468).'" (*In re Freeman* (2006) 38 Cal.4th 630, 635, 42 Cal.Rptr.3d 850, 133 P.3d 1013.) With that standard in mind, we proceed to consider Burton's claim.

Petitioner interprets this paragraph as requiring substantial evidence to support each determination of credibility. That is not what the paragraph is about. The paragraph is about the deference due to the referee's findings on factual questions, precisely because they require the resolution of testimonial conflicts and assessments of credibility by a fact-finder in the courtroom. The referee is presumptively well aware of Evidence Code section 780 and how to evaluate credibility. (Evid. Code, § 664.) Although the referee provided many insights into the reasons for her credibility determinations, there is no requirement that she specifically address all 12 elements of the Evidence Code's assessment suggestions for each witness she believed or disbelieved.

For example, when in *Burton*, this Court "proceed[ed] to consider Burton's claim" with the above standard in mind, it described the

testimonial conflict the referee had to resolve and accepted the referee's conclusion, quoting the referee's credibility conclusions that Burton "did not seem very persuasive" while another witness "appeared credible" and had no reason to do what he was accused of doing. This Court recited some of the enriching details that supported the resolution of this conflict, but never required that the referee detail what was unpersuasive about the former testimony and credible about the latter. (*In re Burton*, *supra*, 40 Cal.4th at p. 216.)

Petitioner's assertion that the referee's resolution of the factual disputes in the juror misconduct issue is unsupported, because she only explained why she did not believe Cruz and Wells, without explaining why she did believe the other witnesses, is an argument without reason or precedent. Moreover, the reasons for not believing Cruz are spelled out with illustrative quotes (RRR 8), so taking exception to the credibility findings on the other witnesses cannot rehabilitate him. As explained in some detail in respondent's opening brief, pp. 35-39, since the temporally challenged and overly suggestible Cruz was reasonably not believed by the trier of fact, there is no credible substantial evidence of juror misconduct involving the bailiff. In addition, urging the rejection of the testimony of a law enforcement officer and a career prosecutor, because they find the murders of children to be atrocities (see PBM 23-26) is simply a request to discount any witness for respondent, because they are likely to be against crime. To the contrary, substantial evidence in the form of testimony by the credible bailiff and the credible jurors supports the finding of no juror misconduct.

III. AS PETITIONER WAS NOT PREJUDICED, NO FINDING OF ERROR (INEFFECTIVE ASSISTANCE) IS REQUIRED

Petitioner's attack on the referee's credibility determinations, begun in the jury misconduct section, continues into his treatment of the

ineffectiveness claim. Again, unless he rebuts the presumption of performance of duty, the credibility determinations are presumed to be based on a weighing of conflicting testimony and observations of demeanor and need no further substantial evidence support in the record to be upheld. Added to this non-starter of a complaint is the assertion that the referee's summaries of the relevant evidence were too "summary." Most of petitioner's 300-page brief consists of a reprinting of his proposed findings of fact (a document already before the Court) to show just how much information the referee did not include in the report and recommendations. For her screening of voluminous material and editing down to the facts relevant to this Court's determination the referee should be applauded not castigated. By limiting the order to show cause to the question of serious child abuse, the court impliedly found petitioner had not established a prima facie case on tangential issues raised elsewhere in the petition concerning, for example, environmental conditions, social history generally, jail conditions, petitioner's alcohol and drug use, and the myriad other issues referenced in passing by petitioner's witnesses. (*In re Visciotti* (1996) 14 Cal.4th 325, 329.) These issues and others like them were not relevant, so were not entitled to space in the referee's report and recommendations on the reference questions.

Respondent has addressed in respondent's exceptions and merits brief the standards of review, the substantial evidence supporting the vast majority of the referee's findings, and the few inconsistencies in the referee's findings that must be taken into account in determining the ultimate questions. Only a few assertions by petitioner, buried in the 300-page onslaught require direct attention.

Petitioner chides the referee for not delving deeply into the testimony of mitigation witnesses Thomson and Stetler. (PMB 50.) Respondent can see no particular factual dispute addressed by these two witnesses and

relevant to the questions presented to the referee that required in depth recognition of the testimony these two witnesses give in every such case. Attorneys Selvin and Strellis are regular attendees at the Monterey Conference and keep their capital case procedure notebooks updated with every bit of information they receive from the defense bar. They were keenly aware of the need to learn as much as they could about petitioner's social history. Mental health experts were engaged, school, adult criminal justice and probation, and youth probation and criminal justice records were obtained and reviewed, but petitioner would not discuss his upbringing with the attorneys or the mental health experts, multiple appointments with the family members were broken, and without the input of petitioner or his family, the names of additional persons to interview were not made available. What was real and apparent to counsel, the mental health experts and, even the jury, were petitioner's observable behaviors. As he remains untreated, those behaviors continue to this day and provide the raw data for a mental health picture that has remained fairly constant since petitioner's youth.

What mattered to the referee in responding to the questions this Court posed, was not the repeated exhortations of those who make a living asserting ineffective assistance of counsel on the basis of failure to employ them or someone like them as mitigation specialists, that whether you suspect a dark family secret or not you cannot stop hounding your client until you find one, even if it ruins the relationship with the client, but the actual evidence uncovered by the habeas corpus team and how much of it would have been uncovered prior to the penalty phase.

Petitioner also condemns the referee for finding credible the conclusion of trial counsel Selvin that he would not have interviewed Glenn Riley about petitioner's firearms assault on his neighbors. (PMB 154.) Respondent has addressed this incident in the brief on the merits. Petitioner

views the addition of the empty coffee cup, and inference that coffee, perhaps even hot coffee, tossed at petitioner, may have been an impetus for this rampage, as an important detail. Competently presented to a jury, however, the incident is petitioner's Frankenstein moment, the time when he took his anger at his father out of the house for the first time and turned it on his neighbors with a firearm in hand. Counsel Selvin did not know about the empty coffee mug, but he recognized an incident in aggravation, best left as a youthful loss of control or grist for the mental health mill (Drs. Pierce and Benson both addressed it as a mental health data point at the penalty phase), that would only get worse for his client the more the jury focused on the similarities between the Mabrey murders and this first assault on a neighborhood family.

Petitioner takes repeated exception to the referee's basing credibility determinations of experts, in part, on their reliance on extreme declarations that did not prove to be precisely true. (See for example PMB 111.) The declarations contained assertions or inferences of blows to petitioner's head and kicks or blows to petitioner's mother's abdomen while she was pregnant with him, for example, that mental health experts took as true and relied upon as the sources of head trauma, that were never established in testimony. This was a very close case on whether any child abuse was severe, since there were no broken bones, no trips to the hospital, no characteristic twisting or shaking injuries that are the hallmarks of "severe" child abuse. (See, e.g., Welf. & Inst. Code, §§ 300, subd. (e) [defining severe physical abuse for purposes of juvenile court jurisdiction]; 361.5, subd. (b)(6) [defining the severe physical harm supporting a denial of reunification services].) With attitudes like that of Dr. Stewart, that it must be severe child abuse if he is being called to testify, since he only handles the most severe cases, discrepancies between the incidents as shared with the experts and the incidents as they came into evidence were critical.

Petitioner has written a two-page paragraph on the kicks or blows to the abdomen question that asserts the referee should not have used the failure of the evidence to match the declarations relied upon by the experts to color her thinking on whether the expert's opinions about head trauma were believable. (PMB 192-193.) Yet nowhere in those two pages does petitioner refute that there was absolutely no evidence of kicks or blows to the abdomen of petitioner's mother. Where the assertion is that petitioner was harmed in a particular way and this explains his behavior, the failure to prove he was harmed in that way is telling. The same analysis applies to the cold-cocking punch into unconsciousness at a corner restaurant that turned out to be perhaps no more than a swat that cause petitioner to drop to the ground before standing up again. That witnesses like Dr. Pablo Stewart and Dr. Kreigler reveled in the details of incidents that proved to have less substance in court was certainly a basis for evaluating their credibility.

Finally we address the various attacks on the sole, but compelling expert witness for respondent, Dr. Martell. (PMB 249 et seq.) Dr. Martell's testimony was directly responsive to the testimony of fellow neuropsychologist Dr. Froming, whose notes he reviewed, and whose test results he evaluated in the context of the testing conditions, shackling, failure to test for malingering, failure to test for antisocial personality disorder, and failure to treat or account for petitioner's treatable mental health deficits and instead ascribe all of petitioner's trouble with completing the tests on time to neurological causes. A court's or referee's decision to admit or exclude evidence is discretionary. (*In re Johnson* (1998) 18 Cal.4th 447, 458.) The referee did not abuse discretion in admitting the evidence.

There was additional value to the evidence of course, in that it showed what rebuttal evidence would have been available to respondent had petitioner made an issue of mental health deficits traceable to severe child

abuse an aspect of his penalty phase case. Respondent established considerable rebuttal evidence on cross-examination of various witnesses, showing, for example, that the attorneys were aware of the need for additional social history information and tried to get it, but were stonewalled, and that petitioner would never cooperate with a confirming clinical interview or testing by any expert proposed by the prosecution or the court, rendering defense testing results inadmissible. The referee did not abuse discretion in considering Dr. Martell's evidence for this rebuttal purpose as well, as the question of available rebuttal was directly posed in the reference questions. Petitioner asserts the testimony of Dr. Martell was not "made necessary" by any evidence presented by petitioner at the evidentiary hearing. (PMB 249.) Petitioner's protestations, that some portion of Dr. Martell's observation that Dr. Froming's findings could in no way explain petitioner's calculated killing of the Mabrey Family, whereas an antisocial personality disorder would explain his behavior that night as well as most of Dr. Froming's results is not proper rebuttal, are nonsense. The 800-pound (300-page) gorilla in the room that petitioner continues to ignore at high speed is prejudice. He cannot just show that there was evidence available that was not presented at the penalty phase. He ultimately has to convince this Court that having such evidence presented at the penalty phase would likely have resulted in a more favorable outcome. "[U]nder both California law [citation] and the United States Constitution [citation], the determination of punishment in a capital case turns on the defendant's personal moral culpability." (*In re Scott* (2003) 29 Cal.4th 783, 821, citing *People v. Rowland* (1992) 4 Cal.4th 238, 279.) If the mental health evidence related to child abuse, proffered by petitioner, explained petitioner's outbursts in the courtroom, but in no way mitigated his murderous behavior at the Mabrey home, if it instead supported the conclusion he enjoyed the feeling of being out of control and sought out

situations where he could rev himself up into a state where he knew killing was wrong but felt entitled to do it anyway (a kind of self-medication), the lack of prejudice in failing to open up this can of worms is patent.

CONCLUSION

For the reasons set forth above, and in respondent's return, pleadings before the referee, and respondent's exceptions and brief on the merits, respondent urges the Court to deny the petition for writ of habeas corpus.

Dated: October 4, 2013 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Response to "Petitioner's Brief on the Merits and Exceptions to the Referee's Report" uses a 13 point Times New Roman font and contains 4,182 words.

Dated: October 4, 2013

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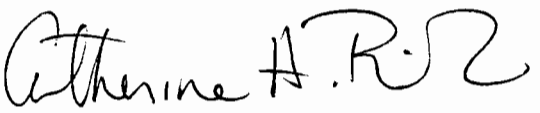

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S107782**

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 October 4, 2013, I served the attached

RESPONDENT'S REPLY TO "PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT"

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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 October 4, 2013.

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