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Attorneys for Petitioner,
KEITH ZON DOOLIN

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KEITH ZON DOOLIN, **Petitioner,** **v.** **RON DAVIS, Warden of San Quentin State Prison,** **Respondent.**	**No. 1:09-CV-01453-AWI-SAB** **[Cal. Sup. Ct. No. S234285]** **MOTION FOR ORDER PERMITTING FORMER COUNSEL FOR JOSEFINA SALDANA, DECEASED, TO (1) DISCLOSE TO PETITIONER'S ATTORNEYS THE INFORMATION IN HIS POSSESSION BEARING ON THEIR CLIENT'S INNOCENCE, AND (2) BE DEPOSED (EXHIBITS A-B)** ***Death Penalty Case***

TO: THE HONORABLE STANLEY A. BOONE, JUDGE

COMES KEITH ZON DOOLIN through counsel who move for an order permitting David Raymond Mugridge, former attorney for Josefina Sonia Saldana, deceased, (1) to disclose to Petitioner's counsel the information he possesses that bears on the innocence of their capital client, and (2) to be deposed concerning such information. Petitioner sought such permission from the California Supreme Court, but it was "denied" without any reason being given. Ex. A (attached hereto), Order, Sept. 21, 2016, *In*

re Doolin, Cal. Sup. Ct. No. S234285. Petitioner has exhausted all available state remedies. Time is of the essence since crucial exculpatory evidence will be irreparably lost unless the requested relief is granted. *See* Ex. B, Decl. of David Raymond Mugridge, ¶ 8, Oct. 17, 2016.

Mr. Mugridge wishes to turn over the exculpatory evidence in order "*to ensure that an innocent man is not wrongfully executed*" and to avoid the loss of vital evidence. *Id*. at ¶¶ 7-8. However, because he learned of such evidence during his representation of his now-deceased client, Ms. Saldana, out of an abundance of caution Mr. Mugridge will only divulge the information pursuant to a court order.

This motion is based upon the records and evidence in this case, the accompanying memorandum of points and authorities, and the interests of justice in preventing the wrongful execution of an innocent person.

Dated: October 27, 2016

Respectfully submitted,

ROBERT R. BRYAN
PAMALA SAYASANE

By: */s/ Robert R. Bryan*
ROBERT R. BRYAN

Attorneys for Petitioner,
Keith Zon Doolin

Memorandum of Points and Authorities

A. Background and Relevant Facts

A jury convicted Petitioner of first degree murder for the deaths of Peggy Tucker and Inez Espinoza, as well as four counts of attempted murder with the use of a firearm. The special-circumstance allegations of multiple-murder were found true resulting in verdicts of death. The automatic appeal was denied January 5, 2009. *People v. Doolin* (2009) 45 Cal.4th 390, 399-400. Petitioner's first state habeas petition, filed October 11, 2005, was also rejected. *In re Doolin*, Cal. Sup. Ct. No. S137884.

A Petition for Writ of Habeas Corpus was filed in this Court on October 18, 2011. *Doolin v. Wong*, No. 09-CV-01453-AWI (Dkt. 85). That case was stayed and held in abeyance pending the exhaustion of unexhausted claims in the California Supreme Court. The state exhaustion petition was filed on October 24, 2011, with all briefing completed on December 28, 2012. *In re Doolin*, Cal. Sup. Ct. No. S197391. The matter remains pending. *In re Doolin*, Cal. Sup. Ct. No. S197391.

On May 4, 2016, Petitioner's newly-appointed counsel filed a state habeas petition due to the discovery, among other things, of crucial new evidence pertaining to his innocence. *In re Doolin*, Cal. Sup. Ct. No. S234285. That evidence suggests that Petitioner is innocent of the first-degree murder of Peggy Tucker, and that the actual killer was Josefina Saldana, whose home was located in the immediate vicinity of where Ms. Tucker's body was found. Two years earlier, the body of another woman, Natalie Carrasco, was found in the front of Ms. Saldana's home. *Clues Sought in Killing of Tattooed Prostitute, Motive for Slaying Undetermined, Police Say*, Fresno Bee, June 26, 1993. Though Ms. Saldana was not charged for either of the homicides, the new discovered

facts suggest she killed both Ms. Carrasco and Tucker. Pet. for Writ of Habeas Corpus, Case No. S234285, Claim 1 at 11-12.

In 1998, two years after Petitioner was convicted and sentenced to death, Ms. Saldana was arrested and subsequently convicted of the murder of Margarita Flores and the unborn baby which had been cut out of the victim. In a newly-obtained declaration, Ms. Saldana's attorney, David R. Mugridge, states that during his representation of her, he learned of information which would exonerate Petitioner of the Tucker murder. As provided in his declaration which is provided herewith:

> 1. I am an attorney in good standing and licensed to practice in the state of California. My law practice is in Fresno, California, where I have litigated numerous homicides including those involving the death penalty. I am a state bar certified criminal law specialist. Most of my time involves special circumstance cases which I have receive by courts appointment. I have been a trial lawyer for approximately 30 years. I am an attorney in private practice, limited exclusively to criminal defense—trials and appellate work.
>
> 2. During my years practicing law in Fresno County, I became familiar with Rudy Petilla, now deceased, who represented Keith Zon Doolin on capital murder charges in 1996. Rudy had a poor reputation in the Fresno legal community. I was shocked to learn that he was appointed as counsel in the Doolin case.
>
> 3. Recently I was contacted by attorneys Pamala Sayasane and Robert R. Bryan, new state and federal habeas counsel for Mr. Doolin. They asked me about what I knew regarding Rudy and his representation of Mr. Doolin.
>
> 4. I related to them that I have exonerating information regarding Mr. Doolin which came to my attention during my representation of Josefina Sonia Saldana, aka Josefina Sonya Hernandez. I represented during her 2001 murder trial for killing Margarita Flores and her baby. Shortly after being convicted, Ms. Saldana committed suicide in the Fresno County Jail by hanging. I recall that she had lived at 2369 South Grace Street, Fresno, at the time of her arrest.
>
> 5. *I explained to Ms. Sayasane and Mr. Bryan that I had potentially exonerating information regarding Mr. Doolin. However, it was*

> *explained that I am bound by the attorney-client privilege from disclosing how I came upon this information or the nature of the evidence.*
>
> 6. *I told the attorneys that I would gladly tell them what I know, and even provide them with access to the materials in my possession, if a court directed me to do so.*
>
> 7. *I have struggled about what to do with this predicament. As an attorney who has practiced for many years, I strongly believe in the rule of law. However, I also believe in doing what is right, and that includes doing whatever I can to ensure that an innocent man is not wrongfully executed. I agreed to provide Mr. Doolin's counsel with this declaration so that they could preserve their client's right and alert the court to this matter.*
>
> 8. As I get older and further removed in time from the Saldana trial I know that *my memory of events and conversations with my client are fading and will continue to further erode.* Knowing what I do of my client I cannot conceive that she would resist my assistance with the attorneys representing Keith Doolin if it would be helpful to them. I have maintained all of the files and notes in the Saldana case. Although I can maintain those papers indefinitely, my concern is that *as every day passes it will become more difficult for me to recall the specifics of the Saldana matter for a case that is now over 15 years old.*

Ex. B, Decl. of David R. Mugridge, italics added.

The new evidence reflects Petitioner's innocence of the Tucker murder. Pet. for Writ of Habeas Corpus, May 4, 2016, Claim 1 at 3-13, *In re Doolin*, Cal. Sup. Ct. No. S234285. Establishment of that would eliminate the multiple-murder special circumstance allegation, render invalid the death judgment, and necessitate a new trial.[1] Even if there were no death penalty, that unfounded murder charge contaminated the entire trial and the jury's fair determination of the remaining murder accusation, thereby necessitating a new trial. It would mandate a new trial because the jury heard evidence that was prejudicial and untrue.

[1] Other evidence presented in the pending state exhaustion petition (Case No. S197391) supports the conclusion that Petitioner is innocent of all charges.

Because Petitioner feared the loss of the foregoing exculpatory information, he sought an urgent order from the California Supreme Court allowing Mr. Mugridge to reveal to Petitioner's attorneys what he knows and possesses regarding Petitioner's innocence, but that request was "denied" without any explanation. Ex. A (attached hereto), Order, Sept. 21, 2016, *In re Doolin*, Cal. Sup. Ct. No. S234285. Thus, Petitioner has nowhere else to turn but to seek relief from this Court.

B. There is Good Cause for the Requested Relief

Good cause exists for this Court to grant Petitioner's request for Mr. Mugridge (1) to disclose to Petitioner's counsel the information he possesses that bears on the innocence of their capital client, and (2) to be deposed concerning such information. Petitioner has exhausted available state remedies. Although the federal litigation is in abeyance, Petitioner cannot afford to wait for state exhaustion proceedings to be completed in order to seek relief from this Court. The state proceedings have been languishing for years, and there is no indication of when the matter will be resolved. Time is of the essence since crucial exculpatory evidence will be irreparably lost unless this Court acts. Ex. B, Decl. of David Raymond Mugridge, ¶ 8, Oct. 17, 2016. Further, this issue has been exhausted.

The Habeas Rules, the Civil Rules and the interest of justice require that Petitioner be permitted to preserve and perpetuate the exculpatory evidence. Under Rule 6(a) of the rules applicable to section 2254 proceedings, discovery procedures under the Federal Rules of Civil Procedure may be utilized for "good cause." *See Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Harris v. Nelson*, 394 U.S. 286, 300 (1969). "Rule 6(a) gives the District Court wide discretion in determining whether there is good cause to

permit discovery in a habeas proceeding." *Tennison v. Henry*, 203 F.R.D. 435, 439 (2001 U.S. Dist. LEXIS 18436). Depositions are one of the common forms of discovery utilized in habeas cases where factual development is necessary, and depositions are also a common alternative way of preserving and presenting testimony. *See, e.g.*, *Ross v. Kemp*, 785 F.2d 1467, 1469 (11th Cir. 1986); *Coleman v. Zant*, 708 F.2d 541, 547 (11th Cir. 1983). Rule 30 of the Federal Rules of Civil Procedure sets forth the procedure for the taking of depositions upon oral examination.

A party is permitted to use deposition testimony in any civil case when the court finds "the witness is unable to attend or testify because of age, illness, [or] infirmity." Fed. R. Civ. P. 32(a)(4)(C). Where a witness's evidence may be lost due to ill health, there is cause to perpetuate the witness's testimony by deposition under Fed. R. Civ. P. 27.[2] *See, e.g., Penn Mutual Life Ins., Co. v. United States*, 68 F.3d 1371, 1375 (D.C. Cir. 1995); 6 Moore's Federal Practice, § 27.13[4][b] (3d ed. 2004). *See also Ervin v. Cullen*, 2011 WL 4005389 (N.D. Cal.) Sept. 8, 2011 (court granted deposition where witness was terminally ill and not likely to survive the duration of the litigation.) Indeed, as this case remains pending in the state court, it is likely that it will be quite some time before any fact-finding will be conducted in the federal litigation.

Moreover, Fed. R. Civ. P. 27(c) acknowledges that the rule is not intended to limit the Court's authority to entertain an action to perpetuate testimony. Alternatively, section 2246 of the Judicial Code provides that "evidence may be taken orally or by

[2] The Ninth Circuit has held that Rule 27 is appropriate for use in habeas corpus proceedings. *Calderon v. U.S. Dist. Court for No. Dist. of California*, 144 F.3d 618, 621 (9th Cir. 1998),

deposition" in habeas corpus proceedings. "To be sure, the use of hearsay evidence in habeas corpus proceedings is nothing extraordinary, as 28 U.S.C. § 2246 (2006) explicitly contemplates the admission into the evidentiary record of sworn out-of-court statements in considering an applicant's habeas petition." *Sulayman v. Obama*, 729 F. Supp. 2d 26, 35 (D.D.C. 2010).

It is imperative that Petitioner be immediately allowed to depose Mr. Mugridge. As provided in his declaration, Mr. Mugridge is concerned that with each passing day his "memory of events and conversations with [his former client, Josefina Saldana, whom he represented over 15 years ago] are fading and will continue to further erode." Ex. B at ¶ 8. Thus, there is "significant risk" that the evidence will be lost if it is not perpetuated. *See, e.g., Tennison v. Henry*, 203 F.R.D. 435, 440 (2001 U.S. Dist. LEXIS 18436) (citation omitted).

There is also "an immediate need to perpetuate [Mr. Mugridge's] testimony," which may become unavailable due to age and/or infirmity if not obtained soon. *Penn. Mutual Life Ins.* 68 F.3d at 1375. The advanced age or failing health of a declarant warrants preservation of testimony. *See Stanley v. University of Southern California*, 13 F.3d 1313, 1326 (9th Cir. 1994) (good cause required for deposition taken outside of normal discovery schedule); *see also Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3rd Cir. 1967) ("It would be ignoring the facts of life to say that a 71-year old witness will be available, to give his deposition or testimony, and an undeterminable future date. . . ."). "Good cause is present when 'the need for expedited discovery, in consideration of the administration of justice, outweighs prejudice to the responding party.'" *Cartwright v. Viking Indus., Inc.*, 249 F.R.D. 351, 354 (E.D. Cal. 2008) (*citingSemitool, Incl. v. Tokyo*

Electron America, Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002)). See also, *Riel v. Warden*, 2011 U.S. Dist. LEXIS 121661 (October 19, 2011) (order issued granting deposition to preserve testimony of 71 year old declarant with multiple serious health problems).

Petitioner is aware that in *Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998), the Supreme Court held that the attorney-client privilege survives the death of the client. *Ibid.* However, *Swidler* is distinguishable because here an innocent person's life is at stake. As stated in the dissenting opinion of Justice O'Connor, with whom Justices Scalia and Thomas joined, the attorney-client privilege is not without exceptions: "Although the attorney-client privilege ordinarily will survive the death of the client, . . . *a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality*." *Id.* at 411, emphasis added. As further noted: "We have long recognized that 'the fundamental basis upon which all rules of evidence must rest--if they are to rest upon reason—is their adaptation to the successful development of the truth.' [Citation omitted.] In light of the heavy burden that they place on the search for truth, [citation], 'evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances,' [citation]. Consequently, we construe the scope of privileges narrowly." [Citation] *Ibid.* Moreover, a "number of exceptions to the privilege already qualify its protections," such as in cases where there is "a dispute between heirs over the decedent's will" and the privilege "give[s] way to the interest in settling the estate." *Id.* at 414. Thus, "[w]here the exoneration of an innocent criminal defendant . . . is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disin-

centive to forthright communication." *Id.* at 416. Accordingly, "the cost of silence," here Petitioner's very life, "warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client." *Ibid.*

Moreover, disclosure of the privileged information would have little to no impact on Mr. Mugridge's deceased client. As noted in *Swidler*, "*after death, the potential that disclosure will harm the client's interests has been greatly diminished*, and the risk that the client will be held criminally liable has abated altogether. *Id.* at 412 (O'Connor, joined by Scalia and Thomas, JJ, *dissenting*), emphasis added. This is especially true in this case where Ms. Saldana's reputation was that of a kidnapper and brutal murderer. Her crimes garnered intense television, radio and print media coverage, both in the U.S. and Mexico. They describe her kidnapping and killing of an 8 1/2 months pregnant woman, disembowelment and cutting out the fetus, dismembering the body, scattering the body parts in both Mexico and California, and then bringing the dead fetus home. *See, e.g.*, Arrest Made, But Woman Still Missing, Fresno Woman Suspected Of Luring A Pregnant Margarita Flores From Her Home, Fresno Bee, Sept. 19, 1998, at A1; Saldana Kin Describe Blood, Body Testimony Provides Evidence Against The Suspected Killer of Fresnan Margarita Flores, Fresno Bee, May 21, 1999, at A1.

Thus, given Ms. Saldana's horrific acts, and because she has been deceased for over 15 years (*See* Ex. B), any disclosure by Mr. Mugridge that his former client committed other killings could not possibly cause further harm to her. *See HLC Properties, Ltd. v. Superior Court*, 35 Cal.4th 54, 66 (2005) (once deceased's client's estate is distributed and his personal representative discharged, the privilege terminates because there is no longer any privilege holder statutorily authorized to assert it); Cal. Evid. Code § 953, subd. (c).

Moreover, such disclosure would serve two valuable purposes: (1) provide comfort and closure to Peggy Tucker's family (and perhaps close other unsolved murders), and (2) instill trust and public confidence in our criminal justice system, as citizens will be assured that the courts will do all that is necessary to ensure that an innocent person is not wrongfully executed.

Indeed, the unique circumstances presented here justifies disclosure under the California Rules of Professional Conduct, which provides: "A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes *the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.*" Rule 3-100(B), emphasis added; see also Bus. & Prof. Code § 6068 (e)(2). Here, Petitioner will likely be wrongfully executed unless Mr. Mugridge is allowed to reveal what he knows.

Thus, good cause exists to grant the requested relief as it is reasonably likely that exculpatory information and evidence will otherwise be lost. The execution of an innocent person violates the Constitution. *Herrera v. Collins*, 506 U.S. 390, 419 (1993). "[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event." O'Connor, J., joined by Kennedy, J., *concurring*. "[T]he Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence." *Id.* at 431, Blackmun, J., joined by Stevens and Souter, JJ., *dissenting*.

One of the underlying principles guiding the Fifth, Sixth, Eighth, and Fourteenth Amendments is the protection of an innocent person from wrongful conviction. When the

violation of an innocent person's constitutional rights results in their wrongful conviction and death sentence, then the purpose of the writ is no greater served than when seeking to correct such a grave injustice. *See Harris v. Nelson*, 394 U.S. 286, 290-91 (1969).

The new evidence of innocence is of great constitutional significance. When factored in with the substantial evidence of innocence presented in the pending exhaustion petition (*In re Doolin*, Cal. Sup. No. S197391), no juror could have found Petitioner guilty beyond a reasonable doubt.

C. Conclusion

Accordingly, in the interests of justice, this Court is moved to authorize David Raymond Mugridge to make available to the undersigned all files and information in his possession that bear on Petitioner's innocence, and that they be allowed to take his deposition.

Dated: October 27, 2016

Respectfully submitted,

ROBERT R. BRYAN
PAMALA SAYASANE

By: */s/ Robert R. Bryan*
ROBERT R. BRYAN

Attorneys for Petitioner,
Keith Zon Doolin

CERTIFICATE OF SERVICE

It is hereby certified that I electronically filed the foregoing **Motion for Order Permitting Former Counsel for Josefina Saldana, Deceased, To (1) Disclose To Petitioner's Attorneys The Information In His Possession Bearing On Their Client's Innocence, and (2) Be Deposed (Exhibits A-B)** with the Clerk of the Court by using the CM/ECF system. All participants in this case are registered CM/ECF users and service is being accomplished by the CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this the 27th day of October 2016, in San Francisco, California.

/s/ Robert R. Bryan
ROBERT R. BRYAN
Lead counsel for Petitioner

S234285

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re KEITH ZON DOOLIN on Habeas Corpus.

Petitioner's "Motion for Order Permitting Former Counsel for Josefina Saldana, Deceased, to Grant Petitioner's Attorneys Access to the Files and Any Other Information in his Possession Bearing on Their Client's Innocence," filed on June 29, 2016, is denied.

CANTIL-SAKAUYE

Chief Justice

EXHIBIT A

DECLARATION OF DAVID RAYMOND MUGRIDGE

I, David Raymond Mugridge, declare as follows:

1. I am an attorney in good standing and licensed to practice in the state of California. My law practice is in Fresno, California, where I have litigated numerous homicides including those involving the death penalty. I am a state bar certified criminal law specialist. Most of my time involves special circumstance cases which I have received by court appointment. I have been a trial lawyer for approximately 30 years. I am an attorney in private practice, limited exclusively to criminal defense—trials and appellate work.
2. During my years practicing law in Fresno County, I became familiar with Rudy Petilla, now deceased, who represented Keith Zon Doolin on capital murder charges in 1996. Rudy had a poor reputation in the Fresno legal community. I was shocked to learn that he was appointed as counsel in the Doolin case.
3. Recently I was contacted by attorneys Pamala Sayasane and Robert R. Bryan, new state and federal habeas counsel for Mr. Doolin. They asked me about what I knew regarding Rudy and his representation of Mr. Doolin.
4. I related to them that I exonerating information regarding Mr. Doolin which came to my attention during my representation of Josefina Sonia Saldana, a.k.a. Josefina Sonya Hernandez. I represented her during her 2001 murder trial for killing Margarita Flores and her baby. Shortly after being convicted, Ms. Saldana committed suicide in the Fresno County Jail by hanging. I recall that she had lived at 2369 South Grace Street, Fresno, at the time of her arrest.
5. I explained to Ms. Sayasane and Mr. Bryan that I had potentially exonerating information regarding Mr. Doolin. However, I explained that I am bound by attorney-client privilege from disclosing how I came upon this information or the nature of the evidence.

EXHIBIT B

6. I told the attorneys that I would gladly tell them what I know, and even provide them with access to the materials in my possession, if a court directed me to do so.

7. I have struggled about what to do with this predicament. As an attorney who has practiced for many years, I strongly believe in the rule of law. However, I also believe in doing what is right, and that includes doing whatever I can to ensure that an innocent man is not wrongfully executed. I agreed to provide Mr. Doolin's counsel with this declaration so that they could preserve their client's right and alert the court to this matter.

8. As I get older and further removed in time from the Saldana trial I know that my memory of events and conversations with my client are fading and will continue to further erode. Knowing what I do of my client I cannot conceive that she would resist my assistance with the attorneys representing Keith Doolin if it would be helpful to them. I have maintained all of the files and notes in the Saldana case. Although I can maintain those papers indefinitely, my concern is that as every day passes it will become more difficult for me to recall the specifics of the Saldana matter for a case that is now over 15 years old.

I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct.

Executed on this the 17th day of October, 2016, in Fresno County, California.

David Raymond Mugridge