In the Supreme Court of the State of California

In re **KEITH ZON DOOLIN,** **On Habeas Corpus**	Case No. S234285 ***Death Penalty***

Appellate District, Case No. S054489
Fresno County Superior Court, Case No. 554289-9

INFORMAL RESPONSE

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PRELIMINARY STATEMENT

Petitioner, KEITH ZON DOOLIN, is lawfully confined and restrained of his liberty at San Quentin State Prison by respondent, Ronald Davis, Warden of San Quentin State Prison, pursuant to the June 18, 1996, judgment of the Fresno County Superior Court, case number 554289-9. Doolin filed this third petition for writ of habeas corpus (Third Petition) on June 4, 2016.

The Third Petition includes several claims that are procedurally defaulted because they were already presented to this Court, either on direct appeal or in a prior habeas petition. The claims asserted on direct appeal and in the first state habeas petition have already been decided by this Court. (*People v. Doolin* (2009) 45 Cal.4th 390 (*Doolin*); *In re Doolin*, June 24, 2009, S137884.) Moreover, as discussed *post*, Doolin has failed to state fully and with particularity sufficient facts which, if true, entitle him to relief, and Doolin has failed to provide all reasonably available documentary evidence in support of each claim. Accordingly, the Third Petition should be denied.

PROCEDURAL HISTORY

In 1996, a jury found Doolin guilty of two counts of murder and four counts of attempted murder. All enhancements and special circumstance allegations were found true. (2 CT[1] 526-529; 3 CT 656-662; 25 RT 4598-4610.) Following a penalty phase trial, the jury recommended that the death penalty be imposed. (26 RT 4901-4903.)

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[1] "CT" refers to the Clerk's Transcript on Appeal in case no. S054489; "RT" refers to the Reporter's Transcript on Appeal in case no. S054489. Transcript citations will be preceded by a volume designation, if appropriate.

The trial court sentenced Doolin to death on the two counts of special circumstance murder, plus a determinate term of 56 years for the additional counts and enhancements. (27 RT 5015-5018.)

In 2009, this Court affirmed the judgment and sentence on automatic review (*Doolin*, *supra*, 45 Cal.4th at p. 390), and denied Doolin's first petition for writ of habeas corpus (*In re Doolin*, June 24, 2009, S137884).

In 2011, Doolin filed his second petition for writ of habeas corpus in this Court. (*In re Doolin*, Oct. 24, 2011, S197391.)

In 2012, respondent filed an informal response to the Second Petition. Doolin filed his reply to the informal response on December 28, 2012. This Court has not yet issued a ruling on the Second Petition.

In 2016, Doolin filed the current petition (Third Petition). On May 6, 2016, this Court requested that the People file an informal response. Accordingly, respondent submits this informal response to the Third Petition.

STATEMENT OF FACTS

On direct appeal, this Court summarized Doolin's offenses as follows:

> Between November 2, 1994, and September 19, 1995, defendant murdered two Fresno prostitutes and attempted to murder four others. At trial, each surviving victim identified defendant as her assailant. One decedent's boyfriend saw her enter a car defendant was driving on the night she was murdered. Ballistics evidence established defendant's Firestar .45-caliber handgun was used to kill Espinoza and Tucker. Shell casings found at the Espinoza and Kachman crime scenes were fired from that same weapon. Defendant's sister lived with him during the time the shootings occurred. Her Lorcin .25-caliber pistol "probably" fired the shell casings found at the Alva crime scene. Tire impressions left at the Mendibles and Espinoza crime scenes were similar to the tread on defendant's truck tires.
>
> Incriminating statements and other evidence linked defendant to the crimes.

> The defense consisted of evidence of alibi, mistaken identification, and third party culpability.

(*People v. Doolin*, *supra*, 45 Cal.4th at p. 400; see also *id.* at pp. 401-410 [longer summary].)

HABEAS CORPUS STANDARDS

Unless a habeas petition states a prima facie case, that is, presents at least one claim that is not procedurally barred and is accompanied by supporting factual allegations which, if true, would entitle petitioner to relief under existing law, this Court must summarily deny the petition. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475; *People v. Romero* (1994) 8 Cal.4th 728, 737; *In re Clark* (1993) 5 Cal.4th 750, 781.) An informal response is designed to perform a "screening function" and assist this Court in its determination of whether any of petitioner's claims for habeas relief in his pending petition are procedurally barred, or state a prima facie basis for relief. (*People v. Romero*, *supra*, 8 Cal.4th at p. 742.)

A petitioner bears "a heavy burden" to plead sufficient grounds for relief. (*In re Visciotti* (1996) 14 Cal.4th 325, 351.) To satisfy this burden, he is required to plead with particularity the facts supporting each claim and he must provide all reasonably available documentary evidence, such as affidavits or declarations. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474.) He "must set forth specific facts which, if true, would require issuance of the writ," and a petition that fails in this regard must be summarily denied for failure to state a prima facie case for relief. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1258, superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 690.) Conclusory or speculative allegations are insufficient. (*Ibid.*; *People v. Duvall*, *supra*, 9 Cal.4th at p. 474.)

A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing the claims with facts

to be developed later. (*In re Clark, supra*, 5 Cal.4th at p. 781, fn. 16.) Further, a petitioner's obligation to provide specific factual allegations in the petition itself is not satisfied by generally "incorporating by reference" the facts set forth in the exhibits to the petition. (*In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12.)

For the reasons set forth below, Doolin fails to state a prima facie case for relief as to any of his claims.

PROCEDURAL BARS

The Third Petition is untimely and successive. Additionally, several of the claims are repetitive, in that they have already been raised and rejected on either direct appeal or in the First Petition. The particular procedural bars applicable to each claim are identified below, and in the sections where each of the claims are specifically addressed.

Respondent respectfully requests this Court expressly deny the pending petition and its various claims on the procedural grounds respondent sets forth, with citation to the applicable procedural bar and indication of the specific claims to which the bar is applicable in order to facilitate deference to this Court's application of procedural bars in any subsequent federal habeas corpus litigation in this case, as well as other California cases.[2]

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[2] A state's procedural requirements can only be respected by federal courts where the federal court can, in fact, determine that a state court has relied upon procedural bars in denying relief. (See *Harris v. Reed* (1989) 489 U.S. 255, 264, fn. 12 [simple one-line statement by state court invoking state procedural bar is sufficient].) Also, by applying this state's procedural bars whenever appropriate, the federal courts will know that this Court is regularly and consistently applying its procedural rules, which is a prerequisite to federal courts respecting state procedural bars. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 [federal courts will not respect state procedural bar which is not consistently enforced by state courts.])

A. Timeliness

As a threshold matter, respondent submits the Third Petition is untimely, and Doolin has failed to establish an exception justifying his substantial delay. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.)

A petitioner must file his habeas petition as "promptly as the circumstances allow." (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.) There is a presumption of timeliness if a petition is filed 180 days after the final due date for the filing of appellant's reply brief on direct appeal or within 36 months after habeas counsel has been appointed. (See Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, policy 3, std. 1-1.1.) If there is a delay beyond the presumptive time period in seeking habeas relief, a petitioner may establish an absence of substantial delay. This time period is measured from the time a petitioner knew or reasonably should have known of the information that forms the basis for the claim. (*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-787.) A court may nevertheless excuse a substantial delay if the petitioner can show good cause for the delay. (*Id.* at p. 780.) It is "particularly necessary" for a petitioner to explain delay as to a claim raised for the first time in a successive petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 765; *In re Swain* (1949) 34 Cal.2d 300, 302.) A petitioner "'must point to particular circumstances sufficient to justify substantial delay. . . .'" (*In re Clark*, *supra*, 5 Cal.4th at p. 765, quoting *In re Stankewitz* (1985) 40 Cal.3d 391, 397, fn. 1.) If the petitioner cannot show good cause for the delay, a court may still hear the merits of the claim if it falls within an exception to the untimeliness bar. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.)

The Third Petition was filed on May 4, 2016, more than 15 years beyond the presumptive period of timeliness. In order to overcome the procedural bar of untimeliness, Doolin must either show: (1) absence of substantial delay; (2) good cause for the delay; or (3) the claim falls within

an exception to the untimeliness bar. (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.)

1. Absence of Substantial Delay

At no point in the Third Petition does Doolin directly attempt to establish an absence of substantial delay. Regarding Claim 1, Doolin generally states that his attorneys have recently discovered new evidence that forms the basis of this claim. (Third Pet. at p. 6.) This general allegation is not enough; to meet his burden of establishing that a claim was filed without substantial delay, Doolin "must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time." (*In re Robbins*, *supra*, 18 Cal.4th at p. 787.) Doolin does not attempt to establish an absence of substantial delay with regard to any of the other claims in the Third Petition. Thus, Doolin has failed to meet his burden of establishing an absence of substantial delay in the presentation of the claims in the Third Petition.

2. Good Cause for the Delay

Doolin's general assertion that prior habeas counsel were ineffective for not raising these claims earlier is insufficient to establish good cause for the delay. Assuming, without conceding, that ineffective assistance of habeas counsel could establish good cause to excuse substantially delayed claims, Doolin still fails to establish good cause for the delay here because, as detailed in the relevant arguments *post*, Doolin fails to state a prima facie case of ineffective assistance of prior habeas counsel. "[A]ppellate counsel (and, by analogy, habeas corpus counsel as well) performs properly and competently when he or she exercises discretion and presents only the strongest claims instead of every conceivable claim." (*In re Robbins*, *supra*, 18 Cal.4th at p. 810.) Counsel is not ineffective for failing to raise

meritless claims. (*Ibid.*) The mere fact that prior counsel did not raise certain claims that current habeas counsel now raise, is not sufficient to establish ineffective assistance of prior counsel. (*Ibid.* ["The circumstance that present counsel has raised an issue not advanced by prior counsel does not itself establish inadequate performance by prior counsel"].) Delay is not justified merely because counsel asserts a claim is raised as soon as successor counsel became aware of the basis for the new claim. Any other conclusion would magnify the potential for abuse of the writ. (*In re Clark*, *supra*, 5 Cal.4th at p. 765.) Rather, the focus is on when the petitioner knew, or reasonably should have known, of triggering facts, and whether those facts present a basis for a meritorious claim. Absent triggering facts, prior counsel had no duty to investigate or raise claims. (*In re Gallego*, *supra*, 18 Cal.4th at p. 833.) Doolin has failed to show good cause for the substantial delay in filing his Third Petition, and it should be denied as untimely.

3. Exception to Untimeliness Bar

Doolin also fails to meet his burden to show that his petition alleges facts that, if proven, would satisfy the exception to the untimeliness bar for claims involving a fundamental miscarriage of justice. To establish a fundamental miscarriage of justice, a petitioner must demonstrate either:

> (1) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that the petitioner is actually innocent of the crime of which the petitioner was convicted; (3) that the death penalty was imposed by a sentencing authority which has such a grossly misleading profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury would have imposed a sentence of death; [or] (4) that the petitioner was convicted or sentenced under an invalid statute.

(*In re Clark, supra*, 5 Cal.4th at pp. 797-798.) As to Claim 1, Doolin alleges that newly discovered evidence establishes he is actually innocent of the Tucker murder. (Third Pet. at p. 3.) However, as explained *post*, Doolin has failed to meet the extremely high actual innocence threshold. As to all other claims, Doolin's conclusory allegations that constitutional errors occurred and that these errors deprived him of a fair trial and reliable death verdict are insufficient to establish a fundamental miscarriage of justice, because he fails to state a prima facie case as to any of these claims. Thus, Doolin has not shown that any of the claims in his Third Petition fall under an exception to the untimeliness bar.

B. Second or Successive Petition

Before a state court will consider the merits of a second or successive habeas petition, the petitioner must justify the piecemeal presentation of habeas claims. (*In re Clark, supra*, 5 Cal.4th at p. 774.) A petitioner must demonstrate due diligence in pursuing potential claims. A court will entertain a claim on the merits only if (1) the factual basis for the claim was unknown to the petitioner, (2) the petitioner had no reason to believe the claim might be made, or if the petitioner was unable to present the claim at the time of the prior petition, and (3) the claim is being asserted as promptly as reasonably possible. (*Id.* at p. 775.)

Respondent submits that, aside from possibly Claim 1 (newly discovered evidence), Doolin has not demonstrated due diligence in pursuing the claims presented in the Third Petition. Several of the claims set forth in the Third Petition were previously presented to this Court either on direct appeal or in prior habeas petitions. Further, aside from Claim 1, all of the claims are based on facts that were known to Doolin at the time of his trial, his direct appeal, and/or first and second habeas petitions. Accordingly, aside from possibly Claim 1, all of the claims presented here should be barred as successive.

C. Repetitive Claims

A petition for writ of habeas corpus that is based on the same grounds as those of a previously denied petition will be denied when there has been no change in the facts or law substantially affecting the rights of the petitioner. (*In re Martinez* (2009) 46 Cal.4th 945, 950, fn. 1; *In re Miller*, *supra*, 17 Cal.2d at p. 735.) A claim is also barred as repetitive when it was previously decided on direct appeal. (*In re Lawley* (2008) 42 Cal.4th 1231, 1248, citing *In re Harris*, *supra*, 5 Cal.4th at pp. 824-829, and *In re Waltreus*, *supra*, 62 Cal.2d at p. 225.)

Claims 3, 4, and 5 are procedurally barred, because they are repetitive of claims that were previously raised in the First and Second Petitions. Claim 3 raises substantially the same issue that was previously raised as Claim 17 in the First Petition and Claim 6 in the Second Petition. (See Third Pet. at pp. 26-28; compare with First Pet. at pp. 262-264 and Second Pet. at pp. 335-339.) Claim 4 raises substantially the same issue that was previously raised as Claim 2 in the First Petition and Claim 5 in the Second Petition. (See Third Pet. at pp. 28-31; compare with First Pet. at pp. 55-151 and Second Pet. at pp. 297-308.) Claim 5 was raised as Claim 10 in the Second Petition. (See Third Pet. at pp. 31-33; compare with Second Pet. at pp. 378-388.)

Doolin has not alleged any changes in the facts or the law that substantially affect his rights with respect to these claims. Therefore, each of these claims should be barred as repetitive.

D. Conclusion

All claims in the Third Petition are procedurally barred. Accordingly, this Court should deny the Third Petition summarily invoking all applicable procedural bars.

ARGUMENT

I. DOOLIN HAS FAILED TO SET FORTH A PRIMA FACIE CASE FOR RELIEF BASED ON NEWLY DISCOVERED EVIDENCE OF ACTUAL INNOCENCE

Doolin first contends that he has "newly discovered" evidence that proves his actual innocence of the Tucker murder. Specifically, he alleges that his attorneys have recently discovered new evidence that Josefina Saldana, who was a prosecution witness, was the real killer. (Third Pet. at pp. 6-10.) As explained below, Doolin fails to make a prima facie case of his own actual innocence.

A. Doolin's Documentary Evidence

Attached to Doolin's petition is a declaration from attorney David Mugridge dated February 4, 2016. Mugridge declared that he was recently contacted by Doolin's current habeas attorneys regarding trial counsel Rudy Petilla's representation of Doolin. (Petitioner's Exh. 162 at p. 16 [Decl. of David Raymond Mugridge, Feb. 4, 2016].) Mugridge told Doolin's attorneys that he "had potentially exonerating information regarding Mr. Doolin." (Petitioner's Exh. 162 at p. 17.) Mugridge stated that he learned of this information during his representation of Josefina Sonia Saldana, also known as Josefina Sonya Hernandez, at her murder trial in 2001. (Petitioner's Exh. 162 at p. 16.) He further stated that he told Doolin's attorneys that he is "bound by the attorney-client privilege from disclosing how [he] came upon this information or the nature of the evidence." (Petitioner's Exh. 162 at p. 17.)

Doolin also attached two newspaper articles in support of his actual innocence claim. The first article, titled "Police Suspect Serial Killer," was published by the Fresno Bee on September 21, 1995. (Petitioner's Exh. 163 at p. 18.) The article, which was published two days after the Tucker murder, discussed the investigation into the shootings of four women

working as prostitutes in Fresno and the possibility that the shootings were connected. (Petitioner's Exh. 163 at p. 18.) The article also mentioned the possibility that the murder of Natalie Ann Carrasco two years earlier may be connected to the current cases. (Petitioner's Exh. 163 at p. 19.) Carrasco's body had been found near the area where Tucker's body was found, but there were also several differences between the Carrasco case and the four most recent cases. (Petitioner's Exh. 163 at p. 19.)

The second article, titled "Three Violent Deaths—One Killer?," was published by the Fresno Bee on September 24, 1995. (Petitioner's Exh. 164 at p. 21.) The article reiterated law enforcement's belief that the murders of Tucker and Espinoza, and the shootings of Marlene Mendibles and Stephanie Kachman, were the work of one man. (Petitioner's Exh. 164 at p. 21.) It also mentioned the murder of Natalie Carrasco two years earlier, and noted that the Carrasco murder was not officially grouped with the other shootings but that a possible connection was being investigated because Carrasco's body had been found near where Tucker was killed. (Petitioner's Exh. 164 at p. 21.)

Doolin has also attached what appears to be part of a newspaper article titled "Clues Sought in Killing of Tattooed Prostitute," that was published in the Fresno Bee on June 26, 1993. (Petitioner's Exh. 165 at p. 25.) The portion of the article that is included in the exhibit states that the body of Natalie Carrasco, who was shot to death, was found in southwest Fresno. (Petitioner's Exh. 165 at p. 25.) It further states that Carrasco was working as a prostitute at the time of her murder, and she was last seen near a motel in the 2300 block of South G Street. (Petitioner's Exh. 165 at p. 25.)

B. Doolin Fails to Demonstrate that he is Innocent

"Habeas corpus will lie to vindicate a claim that newly discovered evidence demonstrates a prisoner is actually innocent." (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) "[N]ewly discovered evidence is evidence that could not have been discovered with reasonable diligence prior to judgment." (*Ibid.*, internal quotation marks omitted.) The newly discovered evidence cannot be the basis for habeas relief where it merely might have weakened the prosecution's case or presented a more difficult question for the trier of fact. (*In re Clark, supra*, 5 Cal.4th at p. 766.) Rather, the test is whether the newly discovered evidence casts "fundamental doubt on the accuracy and reliability of the proceedings" such that if the evidence is credited at the guilt phase, it "must undermine the entire prosecution and point unerringly to innocence or reduced culpability." (*In re Lawley, supra,* 42 Cal.4th at p. 1239, internal quotation marks omitted.) It must be "of such character as will completely undermine the entire structure of the case upon which the prosecution was based." (*Ibid.*, internal quotation marks omitted.) Hence, if "a reasonable jury could have rejected the evidence presented, a petitioner has not satisfied his burden." (*Ibid.*, internal quotation marks omitted.)

Petitioner's actual innocence claim falls short of overcoming such a high hurdle. The newspaper articles are not newly discovered evidence, because they were published before Doolin was even arrested. Nor does the information contained in the articles, which is primarily hearsay, provide any support for Doolin's claim that he did not murder Tucker.

The only arguably newly discovered evidence is Mugridge's declaration. However, the declaration does not unerringly point to innocence. Doolin alleges that this newly discovered evidence establishes that Saldana killed Tucker. (Third Pet. at p. 6.) However, Mugridge's declaration does not include any statement to that effect. Mugridge only

states that he has "potentially exonerating information regarding Mr. Doolin," and that he obtained that information during his representation of Saldana. (Petitioner's Exh. 162 at pp. 16-17.) Mugridge does not state that Saldana killed Tucker; in fact, he never even mentions Tucker in his declaration, and he explicitly states that he cannot disclose how he "came upon this information or the nature of the evidence." (Petitioner's Exh. 162 at p. 17.) Thus, Doolin's allegation that the newly discovered evidence proves Saldana killed Tucker is purely speculative.

Moreover, such an allegation is not even plausible unless there is some evidence linking Saldana to Doolin's gun, which was determined to be the murder weapon. But Doolin provides no reasonably available documentary evidence, such as a declaration from himself or his cousin Bill Moses—the only two people known to have possessed the murder weapon—to establish that Saldana was in possession of the gun at the time Tucker was killed. This claim should be denied on that basis alone. (See *People v. Duvall, supra,* 9 Cal.4th at p. 474 [to satisfy his burden, petitioner must provide reasonably available documentary evidence in support of his claim].)

Doolin further alleges that Natalie Carrasco's mother Becky Carrasco believed that Saldana killed her daughter and Tucker. (Third Pet. at p. 12.) This belief was based on conversations that Becky Carrasco had with the police and Saldana before she died. (Third Pet. at p. 12.) Doolin notes that this information came from an interview of Becky Carrasco that was conducted on January 31, 2005. (Third Pet. at p. 11, fn. 7.) Doolin does not state who conducted the interview and for what purpose. He also does not attach a declaration from Becky Carrasco or a transcript of the interview. Without any evidence to support this allegation, it is nothing more than speculation and none of the statements attributed to Becky Carrasco should be considered by this Court.

In sum, the evidence that Doolin provided in support of his claim is not sufficient to establish a prima facie case for relief. Further, he has failed to provide additional, reasonably available documentary evidence necessary to prove the truth of his allegation that Saldana killed Tucker. Thus his actual innocence claim should be denied.

II. DOOLIN IS NOT ENTITLED TO HABEAS RELIEF ON THE GROUND OF JUDICIAL BIAS

Doolin alleges that the trial court judge harbored undisclosed bias against him and engaged in misconduct that met the statutory grounds for disqualification and denied him a fair trial. Specifically, Doolin alleges that the trial judge (1) met the grounds for disqualification under the Code of Civil Procedure because he had a "prior negative history with Petitioner's family and was privy to personal information about them;" (2) showed bias by failing to disclose this history; and (3) made "numerous unfair rulings" against Doolin. (Third Pet. at pp. 13-25.) Doolin's disqualification claim is not cognizable because he did not seek to disqualify the trial judge under Code of Civil Procedure section 170.3. Moreover, Doolin fails to establish a prima facie case of judicial bias.

A. Legal Principles Regarding Judicial Bias and Disqualification

Both the state and federal constitutions guarantee a criminal defendant the right to an impartial judge. (*People v. Cowan* (2010) 50 Cal.4th 401, 455.) "'A fair trial in a fair tribunal'" is a fundamental component of due process. (*Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868, 876.) Additionally, Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii) provides "an explicit ground for judicial disqualification based on a public perception of partiality, that is the appearance of bias." (*People v. Cowan*, *supra*, 50 Cal.4th at p. 456, internal quotation marks

omitted.) The scope of due process protection for judicial bias claims, however, is much narrower:

> [W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist "'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" [Citation.]

(*People v. Freeman* (2010) 47 Cal.4th 993, 996.) It is only "the exceptional case presenting extreme facts where a due process violation will be found. [Citation.] Less extreme cases—including those that involve the mere appearance, but not the probability, of bias—should be resolved under the more expansive disqualification statutes and codes of judicial conduct. [Citation.]" (*Id.* at p. 1005)

In the absence of any evidence of some extrajudicial source of bias or partiality, neither adverse rulings nor impatient remarks are generally sufficient to overcome the presumption of judicial integrity, even if those remarks are critical or even hostile to counsel, the parties, or their case. (*Liteky v. United States* (1994) 510 U.S. 540, 555.) "[A] trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112; see also *People v. Pearson* (2013) 56 Cal.4th 393, 447; *People v. Avila* (2006) 46 Cal.4th 680, 701.)

The reviewing court employs an objective standard in reviewing judicial bias claims. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 457.) The court "must determine whether a judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to perfect, trial. [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 78.)

B. Doolin's Statutory Disqualification Claim Is Not Cognizable On State Habeas

Under Code of Civil Procedure section 170.3, if a judge who should disqualify himself fails to do so, any party may file with the clerk a verified written statement setting forth the facts constituting the ground for disqualification. (Code Civ. Proc., § 170.3, subd. (c)(1).) Doolin has not affirmatively alleged that he ever filed a motion to disqualify the trial judge, and respondent's review of the clerk's transcript has not revealed any such motion. However, if he did file such a motion and the motion was denied, an interlocutory writ of mandate was the exclusive remedy available to challenge the denial. (Code Civ. Proc., § 170.3, subd. (d).) Thus, his claim that the trial judge met the grounds for statutory disqualification is not cognizable in this habeas proceeding.

C. Doolin's Unsupported Allegations Do Not Amount to a Prima Facie Case of Judicial Bias

Doolin makes numerous allegations of misconduct by the trial judge that he claims show actual bias. Many of these allegations are not supported by competent evidence, and are based on nothing more than speculation. Still others are nothing more than a recasting of previously raised claims of error in the trial court's rulings under the prism of judicial bias—in other words, the trial court erred because of an inherent bias in favor of the prosecution. None of the exhibits that Doolin offers in support of his allegations establish bias on the part of the trial judge.

Doolin first alleges that "Judge Quaschnick was likely privy to confidential and biased information about Petitioner and his family" because, in 1981, an attorney that worked for Judge Quaschnick's then-law firm represented Charles Doolin in divorce proceedings against Doolin's mother Donna. (Third Pet. at pp. 15-16.) Therefore, Doolin claims, Judge Quaschnick "was inclined to prejudge the case against the defense." (Third

Pet. at p. 16.) This claim is purely speculative. Doolin provides no evidence to establish that Judge Quaschnick would have had access to information from another attorney's case or, if he did have access, what specific "biased information" existed. The alleged representation occurred approximately fifteen years before Doolin's trial, so it is difficult to imagine that Judge Quaschnick would have remembered anything about the representation let alone somehow connect it to Doolin. It is also difficult to imagine what information could have come up during the divorce proceedings that would have biased Judge Quaschnick against Doolin, who would have only been approximately eight years old at that time. Doolin has not provided declarations from Judge Quaschnick or the attorney who represented Charles to try to establish any evidentiary support for his claim, and he fails to explain why he was not able to obtain such documentary evidence with reasonable diligence. Thus, he fails to establish bias on this ground.

Doolin next alleges that Judge Quaschnick was biased against him because of the judge's relationship with William Baker, the man that Donna married (and then ultimately divorced) after she divorced Charles. (Third Pet. at p. 16.) Doolin specifically alleges that Judge Quaschnick was friends with Baker's parents, and that after Baker was convicted of molesting multiple young girls, including Doolin's sister, Judge Quaschnick helped Baker get an early release from prison. (Third Pet. at pp. 16-17.) In support of this allegation, Doolin provides a declaration from family friend Jim Bacon in which he claims to have "learned that the judge was friends with the parents of Bill Baker, the ex-husband of Keith's mother, Donna Larsen." (Petitioner's Exh. 161 at p. 14 [Decl. of Jim Bacon].) Bacon further states that Donna divorced Baker after she discovered that he had molested her daughter. (*Ibid.*) Bacon then claims to have "heard that Judge Quaschnick used his influence to get [Baker] an

early release," and he only served 18 months of his eight-year sentence. (*Ibid.*) Bacon's statements are hearsay because they are not based on personal knowledge, and are insufficient to establish a prima facie case of judicial bias. Moreover, Doolin has failed to provide declarations from anyone with personal knowledge of the facts he alleges, such as Judge Quaschnick, Baker, or Baker's parents. Nor has he explained why he was not able to obtain such documentary evidence with reasonable diligence. Again, he fails to establish bias on this ground.

Doolin also alleges that Judge Quaschnick's failure to disclose his friendship with Doolin's great aunt and uncle, Marie and Charlie Nipp, and the judge's use of that friendship to dissuade the Nipps from attending the trial provides further evidence of judicial bias. (Third Pet. at p. 17.) To support this allegation, Doolin relies on Bacon's declaration along with the declaration of private investigator Richard L. Barnes. It is apparent from Bacon's declaration that he has no personal knowledge of the relationship between Judge Quaschnick and the Nipps or the reason why the Nipps did not return to court after the first day of the preliminary hearing. (Petitioner's Exh. 161 at p. 14.) Thus, his statements are not competent evidence and they do not establish bias or misconduct on the part of Judge Quaschnick. Barnes's declaration suffers from the same fatal flaws. In essence, Barnes's declaration states that the Nipps told him that their friend Betty Funk told them that Judge Quaschnick told her that he did not want the Nipps to attend the trial, because he "did not want them to sit through the testimony of the prostitutes who would be testifying in the case." (Petitioner's Exh. 160 at p. 10 [Decl. of Richard L. Barnes].) Even if there was some way to get past the multiple levels of hearsay, it is not clear from the declaration whether the judge asked Funk to convey this message to the Nipps, or whether Funk did that of her own accord. Moreover, even if Judge Quaschnick did use Funk as an intermediary, it does not evince a bias

against Doolin but simply concern for his friends. Doolin has failed to provide declarations from anyone with personal knowledge of the alleged facts, like Judge Quaschnick, Funk, or the Nipps, and he does not state why he would not have been able to obtain such documentary evidence with reasonable diligence. Thus, he has failed to prove bias.

Lastly, Doolin claims that Judge Quaschnick's "bias against Petitioner and his family was evident in the numerous unfair rulings in the case." (Third Pet. at p. 19.) The first of these alleged unfair rulings was the denial of defense counsel's request for second counsel. (Third Pet. at pp. 19-20.) This ruling, however, was not made by Judge Quaschnick; it was made by Judge Kane. (2 CT 319.) Thus, it could not possibly show bias on the part of Judge Quaschnick. Doolin next alleges that Judge Quaschnick's denials of his repeated requests to substitute counsel show bias. (Third Pet. at p. 20.) The adequacy of defense counsel's representation—and various permutations of the same claim—has previously been discussed at length by this Court and by respondent in prior pleadings. It is not necessary to repeat the same discussion here, because "a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112; see also *People v. Pearson*, *supra*, 56 Cal.4th at p. 447; *People v. Avila*, *supra*, 46 Cal.4th at p. 701.) Doolin further alleges that Judge Quaschnick's decision to allow the prosecutor to impeach his mother Donna with evidence of prior bad acts was erroneous and, thus, shows bias. (Third Pet. at p. 24.) This Court previously rejected the underlying claim of error on direct appeal. (*People v. Doolin*, *supra*, 45 Cal.4th at pp. 440-443.) This legally correct, but adverse, ruling is insufficient to establish bias.

In sum, the evidence that Doolin provides in support of his claim is not sufficient to establish a prima facie case for relief. Further, he has

failed to provide additional, reasonably available documentary evidence that is necessary to prove the truth of his allegation that Judge Quaschnick was biased against him. Thus, his judicial bias claim should be denied.

III. DOOLIN IS NOT ENTITLED TO HABEAS RELIEF ON THE GROUND OF JUROR MISCONDUCT

Doolin claims his "death judgment must be reversed because misconduct by state actors allowed a juror during penalty phase deliberations to seek her religious advisor's blessing to vote for death." (Third Pet. at p. 26.) This claim is procedurally barred as untimely, successive, and repetitive. It was previously raised and rejected by this Court in the first habeas proceedings. It was also re-raised in the Second Petition as claim 6. The facts Doolin now relies upon to support this claim are not substantially or materially different from the facts relied upon in the First or Second Petitions. Thus, this Court should find the claim procedurally barred. (See *In re Martinez*, *supra*, 46 Cal.4th at p. 950, fn. 1; *In re Miller*, *supra*, 17 Cal.2d at p. 735.) Doolin's claim is also meritless.

Doolin couches his claim in terms of misconduct by state actors, namely the judge, prosecutor, and defense attorney, but it is nothing more than a rewording of the juror misconduct claim that he previously raised in the First and Second Petitions. Doolin has provided no evidence to support his conclusory allegation that the judge and prosecutor were somehow complicit in this alleged juror misconduct. The only new evidence he provides with respect to this claim is a hearsay statement from Bacon in which he states that, after the jury came back with their death verdict, defense counsel said that a female juror was allowed to call her pastor to get permission to vote for death. (Petitioner's Exh. 161 at pp. 3-4.) However, it is not clear how defense counsel would have known this information immediately after the verdict was read, because the parties would not have had access to the jurors at that time.

More importantly, it simply does not matter what the judge, prosecutor, or defense counsel knew, because Doolin has failed to establish a prima facie case of juror misconduct. In other words, none of these "state actors" could have been complicit in juror misconduct if there was no juror misconduct. Regarding the juror misconduct claim, respondent has previously addressed the merits of this claim in the informal responses to the First and Second Petitions, and hereby incorporates and reiterates those arguments. (Informal Response [Case No. S137884] at pp. 58-62; Informal Response [Case No. S197391] at pp. 108-111.) Because Doolin has not presented any additional evidence in support of the underlying juror misconduct claim, it is unnecessary to provide any additional response beyond what respondent has previously argued. Petitioner has failed to establish a prima facie case for relief, and this Court should once again deny this claim.

IV. DOOLIN IS NOT ENTITLED TO HABEAS RELIEF ON THE GROUND THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT AND PENALTY PHASES OF TRIAL

Doolin claims that defense counsel failed to "reasonably investigate and present viable mental-state defenses, based upon the fact that Petitioner suffered from mental deficits including organic brain damage, which would have negated premeditation, deliberation, and malice aforethought." (Third Pet. at p. 28.) To the extent that this claim was previously raised and rejected in the first state habeas proceedings and was re-raised in the Second Petition, it is procedurally barred as untimely, successive, and repetitive. The facts Doolin now relies upon to support this claim are not substantially or materially different from the facts relied upon in the First and Second Petitions. Thus, this Court should find the claim procedurally barred. (See *In re Martinez*, *supra*, 46 Cal.4th at p. 950, fn. 1; *In re Miller*, *supra*, 17 Cal.2d at p. 735.) Petitioner's claim is also meritless.

To prevail on an ineffective assistance of counsel claim, petitioner must establish both that counsel's performance was deficient and that he was prejudiced by the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Doolin has failed to establish either deficient performance or prejudice.

To support his claim, Doolin relies on exhibits presented in the original habeas proceedings and supplemental exhibits presented in the second habeas proceedings. Those exhibits include school and medical records, declarations from relatives, friends, and jurors, declarations from the psychiatrist and psychologist who examined him before the guilt and penalty phases, and the declaration of a psychologist who examined him in 2011. However, none of these exhibits support Doolin's claim that he suffered from mental deficits significant enough to negate the requisite mental states of premeditation, deliberation, and malice.

None of the physicians or psychologists who examined Doolin as a young child ever confirmed that he suffered from organic brain damage. No doctor has ever found Doolin to be mentally ill or brain damaged, not even the psychiatrist and psychologist who examined him at the time of trial. As recently as 2011, the psychologist who examined Doolin could only conclude that he had minor learning disorders. (See Petitioner's Supp. Exh. 131 at pp. 5466-5472 [Declaration of Karen Bronk Froming, Ph.D.] [Case No. S197391].)

Various school records also contradict Doolin's claim of organic brain damage. In the second grade, a Madera school report said Doolin "exhibits at least average intellectual potential, good visual-motor perceptual skills, good verbal comprehension skills . . ." although the report added, "There is evidence that Keith's failure to perform as expected academically is due to anxiety." (Petitioner's Exh. 1at p. 193 [School Records] [Case No. S137884].)

In a physical examination conducted by Dr. Janet Bell when Doolin was 14 years old, prior to his admission to the Santa Cruz Traveling School, Dr. Bell concluded Doolin had no head or spinal injury, no psychiatric disorder, no ulcers or nervous stomach, and had normal hearing. (Petitioner's Exh. 1 at p. 46 [Case No. S137884].)

According to teacher notes, in sixth grade, Doolin was described as a "leader in homeroom activities" who wanted to be a mechanic. In seventh grade, he wanted to be a computer programmer, had a perfect attendance record and a "positive attitude." In eighth grade, he was described as a "leader in homeroom" with a positive attitude, "well liked by his peers" and "a responsible young man." (Petitioner's Exh. 1 at p. 96 [Case No. S137884].)

In another analysis of his academic performance while in the Santa Cruz traveling program, at the age of 13, petitioner was described as being in the "average range of intellectual functioning," scoring "above average in vocabulary and general information. He speaks well." He was again described as "well liked by his peers and tends to be a leader." (Petitioner's Exh. 1 at p. 108 [Case No. S137884].)

Initially, Doolin's ineffective assistance of counsel claim fails because he has not shown that defense counsel lacked a tactical reason for not presenting a mental state defense in either the guilt or penalty phases. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) The reasonableness of a defense attorney's actions "may be determined or substantially influenced by the defendant's own statements or actions." (*Strickland, supra*, 466 U.S. at p. 691.) In any effectiveness claim, a particular decision not to investigate must be directly assessed for reasonableness in light of all the circumstances, applying a heavy measure of deference to counsel's judgments. (*Ibid.*) From the beginning, Doolin has proclaimed his innocence of all of the crimes he has now been convicted of, and to this day

he continues to maintain his innocence. (See Third Pet. at pp. 3-13 [Claim 1]; Petitioner's Exh. 166 at pp. 26-85 [Petitioner's *pro se* submissions to California Supreme Court, June-Dec. 2015].) Thus, it was reasonable for defense counsel to forego further investigation and presentation of a mental state defense which would have been in direct conflict with Doolin's declaration of actual innocence.

Moreover, Doolin has also failed to show prejudice. None of the evidence Doolin now relies upon to support this claim includes a medical determination that he suffered from any mental illness or organic brain damage. These assertions are only hindsight speculation. Considering the lack of evidence supporting a mental state defense, it is not reasonably likely Doolin would have obtained a more favorable result at the guilt phase even if defense counsel had conducted further investigation. Nor is there anything in the proffered evidence that "so clearly changes the balance of aggravation against mitigation that its omission 'more likely than not' altered the outcome [of the penalty phase]." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1246.)

V. DOOLIN'S CLAIM THAT PROLONGED CONFINEMENT PRIOR TO EXECUTION VIOLATES HIS CONSTITUTIONAL RIGHTS FAILS TO STATE A PRIMA FACIE CLAIM FOR RELIEF

Doolin claims that his "prolonged confinement under sentence of death . . . constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, as well as International Law." (Third Pet. at p. 33.) To the extent that this claim was previously raised in the Second Petition, it is procedurally barred as untimely, successive, and repetitive. The facts Doolin now relies upon to support this claim are not substantially or materially different from the facts relied upon in the Second Petition. Thus, this Court should find the claim procedurally barred. (See

In re Martinez, *supra*, 46 Cal.4th at p. 950, fn. 1; *In re Miller*, *supra*, 17 Cal.2d at p. 735.) Petitioner's claim is also meritless.

This Court has repeatedly rejected such claims, and Doolin presents nothing specific to his case that would warrant reconsideration of those prior determinations. (*People v. Gonzales* (2011) 51 Cal.4th 894, 958; *People v. Vines* (2011) 51 Cal.4th 830, 892; *People v. Bennett* (2009) 45 Cal.4th 577, 630; *People v. Richardson* (2008) 43 Cal.4th 959, 1037.)

This claim should be denied.

VI. DOOLIN IS NOT ENTITLED TO HABEAS RELIEF ON THE GROUND OF CUMULATIVE ERROR

Doolin claims that the constitutional errors committed during his trial, when considered cumulatively, rendered his trial fundamentally unfair. (Third Pet. at pp. 33-35.) Doolin fails to state a prima facie case for relief.

For the reasons discussed above, and those advanced in the two previous informal responses and in the respondent's brief on direct appeal, any errors, whether viewed separately or in combination, do not warrant relief. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1274; *People v. Bacon* (2010) 50 Cal.4th 1082, 1129; *People v. Lynch* (2010) 50 Cal.4th 693, 767; *People v. Loker* (2008) 44 Cal.4th 691, 756-757.)

This claim should be denied.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Third Petition for Writ of Habeas Corpus be denied.

Dated: October 25, 2016

Respectfully submitted,

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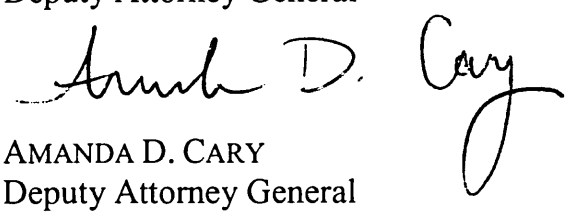

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CERTIFICATE OF COMPLIANCE

I certify that the attached **INFORMAL RESPONSE** uses a 13 point Times New Roman font and contains 7,550 words.

Dated: October 25, 2016

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Doolin on Habeas Corpus**
No.: **S234285**

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 27, 2016, I served the attached **INFORMAL RESPONSE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, CA 93721, addressed as follows:

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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 27, 2016, at Fresno, California.

Jacquelyn Ornelas
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Signature

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