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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]** **REPLY TO RESPONSE (ECF No. 192) TO MOTION FOR ORDER PERMITTING FORMER COUNSEL FOR JOSEFINA SALDANA, DECEASED, TO ALLOW PETITIONER'S ATTORNEYS ACCESS TO THE INFORMATION IN HIS POSSESSION BEARING ON THEIR CLIENT'S INNOCENCE (EX. A-B), AND TO PERPETUATE HIS TESTIMONY THROUGH TAKING HIS DEPOSITION** ***Death Penalty Case***

TO: THE HONORABLE STANLEY A. BOONE, JUDGE

Respondent has filed a Response To Motion for Evidentiary Development During Abeyance. ECF No. 192. This concerns the disclosure to Petitioner of evidence bearing on his innocence of capital murder that is presently being withheld by David Mugridge, attorney for the source, Josefina Saldana, who committed suicide after being convicted of murder.

It is conceded by Respondent that his "interests are limited because there is no relationship either between respondent and Mugridge or between respondent and Sal-

dana. Nor is respondent involved in the interpretation of application of the state's rules of professional conduct." *Id.* at 2:7-9. Nonetheless he asks "that this Court deny Doolin's motion without prejudice to him renewing it sometime after he exhausts his claims in state court." *Id.* at 12-14.

Petitioner disagrees, because exonerative evidence will be lost if there is not positive action on the pending motion. Petitioner needs to review the Saldana files of Mr. Mugridge and perpetuate his testimony through deposition.

ARGUMENT

1. There Is Good Cause for Petitioner To Be Granted Access to the Evidence of Innocence Possessed by David R. Mugridge, Attorney, Including the Taking of His Deposition

There is a realistic fear that the sought evidence will be lost if Mr. Mugridge's memory continues to fade. Further, in the event he becomes unavailable due to health or other reasons, the evidence will vanish forever. That recollection is key evidence that is crucial to Petitioner.

> 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.

Respondent incorrectly asserts that one "is not entitled to discovery prior to the exhaustion of his or her claims in state court." ECF No. 192 at 4:8-9. That is incorrect. To the contrary, it is well established that such discovery is permissible in a case of this posture. In a case in which a habeas corpus petition had been held in abeyance pending state exhaustion, as here, it was held:

> We similarly find the district court's order authorizing the taking of David Kohn's deposition in accord with established law.
>
> We have held that discovery requests should not be granted when the district court does not have a valid habeas corpus petition before it. *See Calderon v. United States Dist. Ct.* ("Hill"), 120 F.3d 927, 928 (9th Cir. 1997); *Calderon v. United States Dist. Ct. ("Nicolaus")*, 98 F.3d 1102, 1106-07 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1830 (1997). We have also held that discovery requests should not be granted when the petition filed involves both exhausted and unexhausted claims. *Calderon v. United States Dist. Ct. ("Roberts")*, 113 F.3d 149 (9th Cir. 1997). However, in this case there is a valid petition with only exhausted claims pending before the district court. With a valid petition before the district court, the inquiry in this mandamus action is whether the issuance of the discovery order was "clearly erroneous as a matter of law." *Executive Software N. Amer., Inc. v. United States Dist. Ct. ("Page")*, 24 F.3d 1545, 1551 (9th Cir. 1994).
>
> *Rule 6(a) of the Federal Rules Governing Section 2254 Cases allows parties to engage in discovery in the discretion of the court "for good cause shown."* The rule provides, in pertinent part:
>
> > A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. . . .

> 28 U.S.C. § 2254 Rule 6(a); see also *Bracy v. Gramley*, [520 U.S. 899], 117 S.Ct. 1793, 1796-97 (1997).

Calderon v. U.S. Dist. Court for N. Dist. of California, 144 F.3d 618, 621-22 (9th Cir. 1998) (emphasis added).

Case law expressly provides that while "the claim to which [the sought-after] deposition relates is currently unexhausted," the "application of Fed.R.Civ.P. 27(c) [is] an appropriate use of the procedures available to district courts." *Calderon v. U.S. Dist. Court for N. Dist. of California*, 144 F.3d at 621. The Court clearly is authorized to grant the sought deposition as part of his discovery efforts:

> "Unlike other discovery rules, Rule 27(a) allows a party to take depositions prior to litigation if it demonstrates an expectation of future litigation, explains the substance of the testimony it expects to elicit and the reasons the testimony will be lost if not preserved." *Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1373 (D.C. Cir. 1995). *If the court is "satisfied that the perpetuation of the testimony may prevent a failure or delay of justice," it shall permit the deposition to be taken.* Fed.R.Civ.Pro. 27(a)(3).

Id. (emphasis added).

Here, Petitioner has met the requisite criteria. It is undisputed that unless this issue is resolved now, the issue of whether Mr. Mugridge may disclose to Petitioner's counsel information he possesses concerning innocence will the subject of future litigation. Second, Petitioner has explained the substance of the testimony he expects from Mr. Mugridge – namely, that through his representation of Ms. Saldana in her murder trial, he learned of information that may potentially exonerate Petitioner. And finally, as Mr. Mugridge provided in his declaration, there is a real fear that he will forget crucial information with the passage of time. Ex. B, Decl. of David R. Mugridge. While Mr. Mugridge noted that he kept his files on the Saldana case, those do not necessarily represent everything he knows. Moreover, the documents themselves are hearsay. Thus,

if anything should happen to Mr. Mugridge, evidence he possesses from attorney-client interviews and his case files bearding on Petitioner's innocence will be irreparably lost.

Respondent argues that Rule 27 "cannot be used to allow a petitioner to discover "information that is as yet completely unknown to the petitioner," and that here "the information is *completely unknown* to Doolin due to Mugridge's refusal to disclose it." ECF No. 192 at 5:23-27 (emphasis added). However, as discussed above, that is incorrect. The information is not "completely unknown." Mr. Mugridge has already disclosed that through his representation of Ms. Saldana he learned of information that might lead to Petitioner's exoneration. Moreover, Petitioner has laid out other facts which suggest that Saldana, a convicted multiple-murder, not only killed Peggy Tucker, who died just outside of Saldana's home, but also another prostitute, Natalie Carrasco, who met a similar death two years earlier.

2. This Court Is Authorized To Permit David R. Mugridge To Reveal To Petitioner's Counsel All Information In His Possession Generated Through the Representation of Josefina Saldana, Deceased, In Order "To Ensure that An Innocent Man Is Not Wrongfully Executed"

As established in his declaration, Mr. Mugridge wishes to provide to Petitioner's counsel all exculpatory evidence in his possession and knowledge in this matter, in order "to ensure that an innocent man is not wrongfully executed" and to avoid the loss of crucial evidence. Ex. B at ¶¶ 7-8; *see Herrera v. Collins*, 506 U.S. 390, 419 (1993). He simply needs the permission of this Court.

Respondent states that he is not "involved in the interpretation of application of the state's rules of professional conduct." ECF No. 192 at 2:8-9. Yet, it is contended in the second argument that there is no "procedural mechanism by which the Court could

issue" an order allowing Mr. Mugridge the exculpatory information his possession to Petitioner's counsel. *Id.* at 6:23-25. Further, Respondent argues permission should not be allowed because the Court lacks "subject-matter jurisdiction" and there is no federal question. *Id.* at 7:1-12. However, as Respondent notes, "subject-matter jurisdiction in a habeas case is limited to claims attacking the petitioner's custody" (*Id.* at 7:5-6), and that precisely is the goal here. The whole point of this litigation is to preserve and present evidence showing that Petitioner was wrongfully convicted and sentenced to death.

The execution of an innocent person is intolerable. *Herrera v. Collins*, 506 U.S. at 419. Where the violation of constitutional rights results in a wrongful conviction and death judgment, the very purpose of the writ of habeas corpus of correcting a grave injustice is no longer served. *See Harris v. Nelson*, 394 U.S. 286, 290-91 (1994).

3. Granting Petitioner's Motion Would Not Result in Piecemeal Litigation or Delay

Finally, Respondent opposes Petitioner's motion on the grounds that it would result in "piecemeal proceedings in federal court [and] risk delaying the proceedings in state court." ECF No. 192 at 2:9-12. Respondent's fears are misplaced. First, the California Supreme Court has already denied Petitioner's motion for Mr. Mugridge's information regarding Saldana, so that issue has been exhausted. Second, Petitioner has been in exhaustion proceedings in the California Supreme Court for over five years, with all informal briefing having been completed years ago. Thus, there is no reason to believe the state court will treat Petitioner's most recent habeas filing any differently. Petitioner's case, and the justice he seeks, is already being significantly delayed through no fault of his own. While Respondent will not be harmed by the state court's inaction, the

same cannot be said of Petitioner. Any further delay could literally cost him his life.

By granting Petitioner's motion, this Court would not only help to speed up the litigation by resolving now what must inevitably be addressed at a future date, but also ensure that justice is being served by preserving evidence of his innocence. *Calderon v. U.S. Dist. Court for N. Dist. of California*, 144 F.3d at 621; Fed.R.Civ.Pro. 27(a)(3).

CONCLUSION

WHEREFORE, this Court is moved to authorize David R. Mugridge to make available to Petitioner's attorneys all files and information in his possession and knowledge that bear on innocence, and that they be allowed to take his deposition.

Dated: December 15, 2016

Respectfully submitted,

/s/ Robert R. Bryan
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/s/ Pamala Sayasane
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