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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Shad Daniel Armstrong,

No. CV-15-00358-TUC-RM

10 Petitioner,

DEATH-PENALTY CASE

11 v.

ORDER

12 Charles L. Ryan, et al.,

13 Respondents.

14

15 Pending before the Court are two motions filed by Petitioner seeking the Court's
16 permission to exceed page limitations found in the District Court's Local Rules and in an
17 order entered in this case. (Docs. 83, 85). Respondents have filed responses to both
18 motions and Petitioner has filed replies. (Docs. 87–90). For the reasons stated below, the
19 motions are granted.

20 Petitioner has lodged a 32-page memorandum in support of Petitioner's motion for
21 order to show cause why the Federal Public Defender should not be allowed to issue a
22 subpoena *duces tecum* on Virginia Ruth Armstrong and have unimpeded access to
23 Armstrong's relatives. (Doc. 84.) Simultaneously, Petitioner seeks permission to exceed
24 the 17-page limitation found in Local Rule 7.2(e)(1). (Doc. 83.)

25 Petitioner has also lodged a 76-page memorandum in support of Petitioner's
26 request for evidentiary development (lodged at Doc. 86) and a motion to exceed the 60-
27 page limitation for evidentiary development motions imposed in the case management
28 order ("Order") (Doc. 5). (Doc. 85.)

1 **DISCUSSION**

2 I. Motion for Leave to File Motion for Order to Show Cause that Exceeds the
3 Page Limitation (Doc. 83)

4 Petitioner has alleged that the protections afforded to crime victims under Arizona
5 law prohibited his defense team from directly contacting his mother, adoptive father, and
6 half-sister, resulting in an incomplete mitigation defense. Petitioner further alleges that
7 the State’s continued reliance on those laws denies him a vehicle for vindicating his
8 federal constitutional rights. He requests leave to file a motion in excess of the 17-page
9 limitation found in Local Rule 7.2, requesting leave to file an order to show cause why he
10 should not be allowed to issue a subpoena *duces tecum* on his mother, and have
11 unimpeded access to his relatives. Petitioner asserts good cause for the motion is
12 demonstrated by the necessity to address an issue of first impression in federal court
13 under the First, Sixth, Eighth, and Fourteenth Amendments.

14 Respondents urge the Court to deny Petitioner’s motion for leave to file an order
15 to show cause and instruct Petitioner to file an amended motion for evidentiary
16 development that includes this request. Because the motion for leave to file a motion for
17 an order to show cause is currently only lodged before the Court, the Court does not
18 consider whether this motion is the proper procedural vehicle to address Petitioner’s
19 request; the Court addresses only Petitioner’s request to exceed page limitations in the
20 motion at issue.

21 Respondents contest Petitioner’s assertion that the motion is necessarily lengthier
22 because it involves an issue of first impression in federal court and note that Petitioner
23 has already extensively briefed this issue in his Petition and other filings. The Court
24 disagrees. Although the victim contact issue has been addressed in other cases in this
25 District, the Court finds that none of those cases have required the Court to consider the
26 complex factual issues alleged here: that the victims in the case are also family members
27 who represent a potentially untapped and primary source of mitigation to which
28 Petitioner was denied access by application of state law, and that Petitioner has now been

1 informed that Petitioner’s mother refuses to receive correspondence from Petitioner’s
2 defense team during federal habeas proceedings.

3 Having reviewed the motion to exceed page limitations and the accompanying
4 lodged motion, the response, and the reply, the Court finds Petitioner has demonstrated
5 good cause for filing a motion that exceeds the page limits, and will address
6 Respondents’ arguments that the motion for leave to file an order to show cause should
7 be denied when the motion is fully briefed.

8 II. Motion for Leave to File Motion for Evidentiary Development that Exceeds
9 the Page Limitation (Doc. 85)

10 According to Petitioner, his Motion for Evidentiary Development exceeds the 60-
11 page limitation imposed by this Court notwithstanding his efforts to excise unnecessary
12 legal argument and to make the summary of each exhibit more concise. Petitioner asserts
13 that the length of the petition, response, and reply, as well as the number of exhibits
14 addressed in the Motion for Evidentiary Development, demonstrate good cause to exceed
15 the page limitation. (Doc. 85.)

16 Respondents argue that Petitioner has not demonstrated good cause because the
17 length of the Petition and subsequent briefs is irrelevant to the length of his Motion for
18 Evidentiary Development, and further, under *Jones v. Barnes*, 463 U.S. 745, 754 (1983),
19 and *Smith v. Robbins*, 528 U.S. 259, 288 (2000), counsel has a duty to winnow the
20 exhibits and argument to those most likely to warrant relief. (Doc. 87.) The Court
21 disagrees.

22 Respondents’ argument fails to distinguish between the role of appellate counsel
23 and habeas counsel. A habeas petition is the last chance for most capital defendants to
24 present federal challenges to their convictions and sentences. Unlike appellate practice, in
25 which counsel is advised to “winnow” issues and has no constitutional duty to raise every
26 non-frivolous claim, *see Jones*, 463 U.S. at 754, and *Robbins*, 528 U.S. at 288, counsel
27 representing a petitioner in a capital habeas case has a professional obligation to raise all
28 colorable claims. *See Am. Bar Ass’n Guidelines for the Appointment & Performance of*

1 Def. Counsel in Death Penalty Cases (“ABA Guidelines”) 10.15.1(C) (rev. ed. 2003)
2 (directing federal habeas counsel “to litigate all issues, whether or not previously
3 presented, that are arguably meritorious” and “make every professionally appropriate
4 effort to present issues in a manner that will preserve them for subsequent review”).

5 Respondents also fail to support their argument that Petitioner has a duty to
6 “winnow” the number of proffered exhibits. Respondents may of course argue, in
7 response to Petitioner’s Motion for Evidentiary Development, that the proffered exhibits
8 are irrelevant or cumulative, but the Court finds no support for Respondents’ argument
9 that Petitioner should “winnow” his exhibits to present just the most compelling exhibits
10 in support of his claims.

11 Finally Respondents argue that the winnowing process and page limitations are
12 especially appropriate in habeas cases under the AEDPA’s restrictive review.
13 Respondents’ view fails to take into account the procedural exceptions available to
14 petitioners that might allow them to present new evidence and new claims in a federal
15 habeas petition.

16 Having reviewed the motion to exceed page limitations and the accompanying
17 lodged motion, the response, and the reply, the Court finds Petitioner has demonstrated
18 good cause for filing a motion that exceeds the page limits.

19 III. Motion for Evidentiary Development (Doc. 86)

20 Finally, on the Court’s own motion, Petitioner’s lodged motion for evidentiary
21 development (Doc. 86) shall be construed as a “Notice of a Request for Evidentiary
22 Development.”

23 Accordingly,


24 **IT IS HEREBY ORDERED** that Petitioner’s motion for leave to file the motion
25 for order to show cause why the Federal Public Defender should not be allowed to issue a
26 subpoena *duces tecum* on Virginia Ruth Armstrong and have unimpeded access to
27 Armstrong’s relatives that exceeds the page limitation of Local Rule 7.2(e)(2) (Doc. 83)
28 is **granted**.

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IT IS FURTHER ORDERED that Petitioner’s Motion for Leave to File Motion for Evidentiary Development that Exceeds the Page Limitation (Doc. 85) is **granted**.

IT IS FURTHER ORDERED that the Clerk of the Court is **DIRECTED** to file Petitioner’s proposed motions lodged at Documents 84 and 86 in the Court’s electronic docket, and to enter Document 86 as a “Notice of Request for Evidentiary Development” in the Court’s electronic docket.

Dated this 4th day of June, 2018.



Honorable Rosemary Márquez
United States District Judge