



1 Evidentiary Hearing and Expansion of the Record (Doc. 174, hereinafter the “Supplemental  
2 Motion”).

3 Petitioner asserts the proposed Second Supplemental Motion is a necessary response to  
4 Respondent’s recently filed Opposition to the Supplemental Motion (Doc. 176).

5 Counsel for Petitioner represents that counsel for Respondent, Deputy Attorney General  
6 Joseph Penney, does not oppose the proposed modification of the case schedule to permit filing of  
7 the Second Supplemental Motion.

8 The Court finds the matter amendable to resolution on the papers. *See* Local Rule 230(g).

### 9 BACKGROUND

10 The record reflects Petitioner’s 1991 conviction and death sentence in Stanislaus County  
11 Superior Court case number 254100.

12 In 2002, the California Supreme Court affirmed petitioner’s conviction on direct appeal.

13 In 2003, the United States Supreme Court denied certiorari.

14 In 2005, Petitioner began this federal proceeding pursuant to 28 U.S.C. § 2254. That  
15 same year, Petitioner filed in the case a Protective Petition pursuant to *Pace v. DiGuglielmo*, 544  
16 U.S. 408 (2005). (Doc. 8.) In 2014, after multiple exhaustion stays and state court denial of his  
17 three post-conviction petitions, Petitioner filed in the case his Second Amended Petition.<sup>2</sup>

18 Respondent filed his Answer to the Second Amended Petition that same year. (Doc. 97.)

19 In 2020, the parties completed merits briefing of the Second Amended Petition. Also in  
20 2020, Petitioner filed the Corrected Motion. The parties completed briefing of the Corrected  
21 Motion in 2021.

22 In 2022, the Court granted Petitioner’s request for a round supplemental briefing of the  
23 Corrected Motion to address recent Supreme Court decisions. The parties completed this  
24 supplemental briefing in early 2023.

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27 <sup>2</sup> The state supreme court issued an OSC for one claim regarding a clerical error in the abstract of judgment, which  
28 was subsequently discharged following correction of the clerical error. This Court dismissed the corresponding  
federal claim (i.e. claim 47) in 2015, upon stipulation of the parties. (*See* Doc. 100.)



1 The Court is satisfied that notwithstanding Petitioner's reasonable diligence and that of his  
2 federal counsel, the need to proffer Exhibit 2E became apparent only after Respondent filed his  
3 Opposition to the Supplemental Motion. (See Doc. 180 at 5)<sup>4</sup>; see also *Kuschner v. Nationwide*  
4 *Credit, Inc.*, 256 F.R.D. 684, 687 (E.D. Cal. 2009) ("Good cause may be found to exist where the  
5 moving party shows that it diligently assisted the court with creating a workable scheduling order,  
6 that it is unable to comply with the scheduling order's deadlines due to matters that could not have  
7 reasonably been foreseen at the time of the issuance of the scheduling order, and that it was  
8 diligent in seeking an amendment once it became apparent that the party could not comply with  
9 the scheduling order.").

10 Respondent's non-opposition to the instant motion to modify the case schedule appears  
11 implicitly to concede good cause and the absence of prejudice should the requested relief be  
12 granted. Moreover, the yet to be briefed Second Supplemental Motion relates to allegations  
13 raised in the Second Amended Petition to be developed through the previously filed Supplemental  
14 Motion, reasonably suggesting the absence of prejudice should relief be granted on the instant  
15 scheduling motion.

16 ACCORDINGLY, Petitioner's unopposed motion to modify the case schedule to permit  
17 filing of the Second Supplemental Motion (Doc. 180) is GRANTED. The CLERK is directed to  
18 FILE on the public docket CM/ECF System Documents Number 180-1 and 180-2 AS the  
19 SECOND SUPPLEMENTAL MOTION FOR EXPANSION OF THE RECORD AND  
20 REQUEST FOR JUDICIAL NOTICE. RESPONDENT shall FILE any opposition to the Second  
21 Supplemental Motion not later than SIXTY (60) DAYS following the filed date thereof.  
22 PETITIONER shall FILE any reply to the opposition by not later than SIXTY (60) DAYS  
23 following the filed date thereof.

24 DATED: March 1, 2024.

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27 CHIEF UNITED STATES DISTRICT JUDGE

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<sup>4</sup> Reference to pagination is to CM/ECF System pagination.