



1 The Court, finding the matter amendable to resolution on the papers, GRANTS the  
2 requested relief, for the reasons discussed below.<sup>2</sup>

### 3 BACKGROUND

4 The record reflects Petitioner’s 1991 conviction and death sentence in Stanislaus County  
5 Superior Court case number 254100. In 2002, the California Supreme Court affirmed Petitioner’s  
6 conviction on direct appeal. In 2003, the United States Supreme Court denied certiorari.

7 In 2005, Petitioner began this federal proceeding pursuant to 28 U.S.C. § 2254. That  
8 same year, Petitioner filed in the case a Protective Petition pursuant to *Pace v. DiGuglielmo*, 544  
9 U.S. 408 (2005). (Doc. 8.) In 2014, after multiple exhaustion stays and state court denial of his  
10 three post-conviction petitions, Petitioner filed in the case his Second Amended Petition.<sup>3</sup>  
11 Respondent filed his Answer to the Second Amended Petition that same year. (Doc. 97.)

12 In 2020, the parties completed merits briefing of the Second Amended Petition.

13 Petitioner filed three evidentiary development motions: (1) a November 2, 2020  
14 Corrected Motion for Evidentiary Hearing, Expansion of the Record and Discovery (Doc. 146,  
15 hereinafter the “Corrected Motion”), (2) an October 17, 2023 Supplemental Motion for  
16 Evidentiary Hearing and Expansion of the Record (Doc. 174, hereinafter the “Supplemental  
17 Motion”), and (3) a March 4, 2024 Second Supplemental Motion for Expansion of the Record  
18 and Judicial Notice (Doc. 182, hereinafter the “Second Supplemental Motion”). These Motions  
19 have been fully briefed.<sup>4</sup> (See Docs. 151, 152, 176, 184, 189, 190.)

### 20 DISCUSSION

21 In determining whether to modify case scheduling, the Court considers the “good cause”  
22 standard set out by Federal Rule of Civil Procedure 16(b)(4). Rule 16(b)(4) provides that a  
23 schedule may be modified only for good cause and with the judge's consent. As this Court has

24 <sup>2</sup> The Court previously vacated the August 6, 2024 hearing. (Doc. 192.)

25 <sup>3</sup> The state supreme court issued an OSC for one claim regarding a clerical error in the abstract of judgment, which  
26 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.)

27 <sup>4</sup> In 2022, the Court granted Petitioner’s request for supplemental briefing of the Corrected Motion to address recent  
28 Supreme Court decisions. The parties completed this supplemental briefing in early 2023. (See Docs. 158, 163,  
164.)

1 observed:

2 The “good cause” requirement focuses primarily on the party's  
3 diligence and its reasons for not acting sooner. *In re W. States*  
4 *Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir.  
5 2013) (citing *Johnson v. Mammoth Recreations Inc.*, 975 F.2d 604,  
609 (9th Cir. 1992)), *aff'd on unrelated question sub nom. Oneok,*  
*Inc. v. Learjet, Inc.*, 575 U.S. 373, 135 S.Ct. 1591, 191 L.Ed.2d 511  
(2015).

6 *City of Lincoln v. Cnty. of Placer*, 2023 WL 2776091 at \*6 (E.D. Cal. Apr. 4, 2023). The Court  
7 may modify the pretrial schedule “if it cannot reasonably be met despite the diligence of the party  
8 seeking the extension.” *Johnson*, 975 F.2d at 609 (citing to Fed. R. Civ. P. 16 advisory  
9 committee's notes (1983 amendment)); *see also* 6A Wright, Miller & Kane, *Federal Practice and*  
10 *Procedure* § 1522.1 at 231 (2d ed. 1990) (“good cause” means scheduling deadlines cannot be  
11 met despite party's diligence).

12 Here, the Court finds good cause to grant Petitioner’s unopposed request to modify the  
13 case schedule to permit filing of the Third Supplemental Motion.

14 Petitioner asserts the Third Supplemental Motion is a necessary response to Respondent’s  
15 previously filed opposition to expansion of the record with evidence of trial counsel Fred  
16 Canant’s ethnic animus. (Doc. 191 at 4 citing Docs. 168, 172-2, 174, 174-2, 176.) Particularly,  
17 Petitioner asserts the Third Supplemental Motion relates to the Court’s ability to consider non-  
18 record, recently developed evidence proffered therewith (i.e. Exhibits 2F and 2G) in its merits  
19 determination of federal habeas Claims 1.J and 11.D, which allege Canant was ineffective in part  
20 because he harbored racial and ethnic prejudices.

21 The Court is satisfied that, notwithstanding the reasonable diligence of counsel for  
22 Petitioner, the need to develop and proffer the Declaration of Connie Padilla Serrano (Exhibit 2F)  
23 and the Declaration of Adam Brown (Exhibit 2G) became apparent only during the parties’  
24 briefing of the noted evidentiary development Motions; and that Ms. Serrano’s health issues  
25 delayed that process. (*See* Doc. 191 at 4, 7-8); *see also Kushner v. Nationwide Credit, Inc.*, 256  
26 F.R.D. 684, 687 (E.D. Cal. 2009) (“Good cause may be found to exist where the moving party  
27 shows that it diligently assisted the court with creating a workable scheduling order, that it is  
28 unable to comply with the scheduling order's deadlines due to matters that could not have

1 reasonably been foreseen at the time of the issuance of the scheduling order, and that it was  
2 diligent in seeking an amendment once it became apparent that the party could not comply with  
3 the scheduling order.”).

4 Respondent’s non-opposition to the instant motion to modify the case schedule appears  
5 implicitly to concede good cause and the absence of prejudice should the requested relief be  
6 granted. Moreover, the yet to be briefed Third Supplemental Motion relates to allegations raised  
7 in the Second Amended Petition and development thereof through the previously filed  
8 Supplemental and Second Supplemental Motions, reasonably suggesting the absence of prejudice  
9 should relief be granted on the instant scheduling motion.

10 THEREFORE, the Court GRANTS Petitioner’s unopposed motion to modify the case  
11 schedule to permit filing of the Third Supplemental Motion (Doc. 191).


12 The CLERK is directed to FILE on the public docket CM/ECF System Documents  
13 Number 191-1, 191-2, and 191-3 AS the THIRD SUPPLEMENTAL MOTION FOR  
14 EXPANSION OF THE RECORD.

15 RESPONDENT shall FILE any opposition to the Third Supplemental Motion not later  
16 than SIXTY (60) DAYS following the filed date thereof.

17 PETITIONER shall FILE any reply to the opposition by not later than SIXTY (60) DAYS  
18 following the filed date thereof.

19  
20 IT IS SO ORDERED.

21 Dated: June 21, 2024

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24 UNITED STATES DISTRICT JUDGE  
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