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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN MICHAEL BEAMES,
Petitioner,
v.
RON DAVIS, Warden of California State
Prison at San Quentin,
Respondent.

Case No. 1:10-cv-01429-AWI-SAB
DEATH PENALTY CASE
ORDER GRANTING PETITIONER'S
MOTION FOR VIDEOTAPED DEPOSITION
OF MAUREEN GRIFFIN IN LIEU OF
TESTIMONY
(ECF No. 151)

Before the Court is Petitioner's motion filed November 13, 2015, for authorization to take a videotaped deposition of Maureen Griffin, a potential lay witness who was paralegal to trial counsel, and to use the deposition in lieu of live testimony at the February 1, 2016 evidentiary hearing. Petitioner argues that on November 2, 2015, Ms. Griffin, a Texas resident since 2007, advised counsel she is unwilling to travel to Fresno to testify at the hearing. Respondent filed a response to the motion on November 20, 2015. Petitioner replied to the response on November 23, 2015.

Based on the facts of this case and controlling law, the motion is amenable to decision without a hearing.

I.
BACKGROUND

Petitioner was arrested on January 20, 1994, in connection with the death of Cassie

1 McMains, the 15-month old daughter of Petitioner's girlfriend, Angelita McMains. He was
2 charged with murder (Pen. Code § 187), a special circumstance allegation that the murder
3 involved the infliction of torture (Pen. Code § 206), and possession of a firearm by an ex-felon
4 (Pen. Code § 12021).

5 On August 22, 1995, Petitioner was found guilty of all charges and the alleged special
6 circumstance. On September 1, 1995, the jury returned a verdict of death. On March 22, 2007,
7 the judgment was affirmed on automatic appeal in California Supreme Court Case No. S050455.
8 See People v. Beames, 40 Cal. 4th 907 (2007).

9 A petition for writ of habeas corpus was filed in the California Supreme Court on June 7,
10 2007. On July 28, 2010, the state petition was summarily denied on the merits.

11 Petitioner's federal petition was filed on July 27, 2011. The Court reviewed the federal
12 petition and directed the Respondent to file an answer to claim 11, which alleges that trial
13 counsel was prejudicially deficient at the guilt phase by failing to (1) retain and present his own
14 pediatric forensic pathologist with respect to Cassie's cause of death; (2) adequately cross-
15 examine the prosecution's medical experts on this subject; (3) request lesser included
16 instructions; and (4) conduct a reasonable investigation with respect to Cassie's cause of death.
17 Respondent filed his answer on August 29, 2011.

18 The Court has set a February 1, 2016 evidentiary hearing on claim 11.

19 **II.**

20 **SUMMARY OF ARGUMENTS**

21 Petitioner argues that he should be allowed to depose Ms. Griffin in Texas, by videotape,
22 because she is beyond the Court's subpoena power and unavailable to testify at the hearing.

23 Respondent opposes the motion, arguing that there is not good cause to depose Ms.
24 Griffin in Texas; that any deposition should occur only after the evidentiary hearing; and that as
25 an alternative to deposition, Ms. Griffin should provide live testimony during the hearing
26 remotely from a location near her residence in Texas.

27 Petitioner replies to the opposition by reiterating his request that he be allowed to depose
28 Ms. Griffin as an unavailable witness, but also by stating his non-opposition to live remote

1 testimony provided it occurs after the hearing.

2 **III.**

3 **ANALYSIS**

4 The Court finds that Petitioner's motion for videotaped deposition shall be granted for the
5 reasons that follow.

6 A subpoena is ineffective to command a nonparty witness to appear at a hearing that is
7 held more than 100 miles from her residence. Fed. R. Civ. P. 45(c)(1); see also Iorio v. Allianz
8 Life Ins. Co. of North America, --- F. Supp. ----, 2009 WL 3415689, at *1 (S.D. Cal. October 21,
9 2009) (Rule 45 governs the issuance and service of subpoenas in federal civil actions); Roller
10 Bearing Co. of America, Inc. v. American Software, Inc., 570 F. Supp. 2d 376, 389 (D. Conn.
11 2008) (a court cannot require a person who is not a party or an officer of a party to travel to a
12 place more than 100 miles from the place where that person resides, is employed, or regularly
13 transacts business to appear before it); In re Guthrie, 733 F.2d 634, 637 (4th Cir. 1984) (under
14 Rule 45, a nonparty witness outside the state in which the district court sits, and not within 100
15 miles of the court, may not be compelled to attend a hearing or trial, and the only remedy
16 available to litigants, if the witness will not attend voluntarily, is to take her deposition).

17 Petitioner has demonstrated that Ms. Griffin is unwilling to come to Fresno, California
18 for the hearing, and that she resides in McKinney, Texas. (See ECF No. 151, Ex. 1 at ¶ 3; id.,
19 Ex. 2 at ¶ 4.) The Court takes notice that there are 1330 miles from Fresno, California to
20 McKinney, Texas. See Distances Between Cities, [http://www.distance-cities.com/distance-](http://www.distance-cities.com/distance-fresno-ca-to-mckinney-tx)
21 [fresno-ca-to-mckinney-tx](http://www.distance-cities.com/distance-fresno-ca-to-mckinney-tx) (last visited November 24, 2015). Ms. Griffin is unavailable as a
22 witness for hearing in Fresno, California. Moreover, Ms. Griffin has resided in McKinney,
23 Texas since 2007. (See ECF No. 151, Ex. 2 at ¶ 4.) Nothing before the Court suggests her
24 absence from the evidentiary hearing has been procured by Petitioner. Fed. R. Civ. P.
25 32(a)(4)(B).

26 Respondent argues that its and the Court's preference is for live testimony. However, in
27 this instance, the witness is unavailable to testify.

28 The Court rejects as unsupported Respondent's arguments that other witnesses may cover

1 Ms. Griffin’s proposed testimony and that any deposition of Ms. Griffin should take place only
2 after the conclusion of live testimony at the evidentiary hearing.

3 Respondent also argues that Ms. Griffin could give live remote testimony pursuant to
4 Federal Rule of Civil Procedure 43(a), which provides that “for good cause shown in compelling
5 circumstances and upon appropriate safeguards, [a court may] permit presentation of testimony
6 in open court by contemporaneous transmission from another location.” However, the advisory
7 committee notes to Rule 43(a) provide that such “[t]ransmission cannot be justified merely by
8 showing that it is inconvenient for the witness to attend trial.” Fed. R. Civ. P. 43 advisory
9 committee's note (1996 Amendment).

10 Though counsel for both sides may be agreeable in concept to live remote testimony, they
11 are unable to agree whether the remote testimony should occur during the evidentiary hearing or
12 only after its conclusion. Significantly, Petitioner has not motioned for relief under Rule 43.
13 Even if he had, the basis for such relief appears to be nothing more than mere inconvenience – an
14 insufficient basis under the noted authority. The Court finds no sufficient facts demonstrating
15 “good cause in compelling circumstances” which might support testimony in open court by
16 contemporaneous transmission from a different location. See Fed. R. Civ. P. 43(a); see also
17 Dagen v. CFC Group Holdings Ltd., --- F. Supp. 2d ----, 2003 WL 22533425, at *1 (S.D.N.Y.
18 November 7, 2003) (good cause for remote testimony found where witnesses resided in Hong
19 Kong and a named party would suffer incurable prejudice without their testimony).

20 The Court finds that Ms. Griffin may be deposed and her deposition used at the
21 evidentiary hearing. Fed. R. Civ. P. 32(a)(4); see also Johnson v. Bay Area Rapid Transit
22 District, --- F. Supp. ----, 2014 WL 2514542, at *3, (N.D. Cal. June 4, 2014) (deposition of
23 witness may be used where the witness is unavailable).

24 IV.

25 ORDER

26 For the reasons stated, it is hereby ORDERED that Petitioner’s motion for videotaped
27 deposition of Maureen Griffin in lieu of testimony at the evidentiary hearing is GRANTED, said
28 deposition to occur within 100 miles of Mr. Griffin’s residence in McKinney, Texas, at a place

1 designated by Petitioner's counsel and on such date and at such time as may be agreed upon by
2 the parties and Ms. Griffin, provided that the deposition shall be completed by not later than
3 January 2, 2016, and further provided that nothing precludes the parties from stipulating to Rule
4 30(b)(4) video deposition by remote means otherwise consistent with this order.

5
6 IT IS SO ORDERED.

7 Dated: December 3, 2015


UNITED STATES MAGISTRATE JUDGE

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