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8	UNITED STATES DISTRICT COURT	
9	FOR THE EASTERN DISTRICT OF CALIFORNIA	
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11	MICHAEL A. COX,	No. 2:04-CV-0065 MCE CKD
12	Petitioner,	DEATH PENALTY CASE
13	v.	
14	WARDEN, San Quentin State Prison,	<u>ORDER</u>
15	Respondent.	
16		
17	On May 27, 2015, the undersigned heard argument on petitioner's motions to perpetuate	
18	the testimony of five social history witnesses, two jurors, and trial expert Dr. Albert Globus.	
19	(ECF Nos. 143, 146.) Lissa Gardner and Lindsay Bennett appeared for petitioner. Todd Marshall	
20	appeared for respondent. After considering the parties' briefs and the arguments of counsel, the	
21	court finds and orders as follows.	
22	A court may permit the preservation of testimony by deposition upon a showing that the	
23	testimony is material to a party's claims and there is a risk that the testimony may be permanently	
24	lost if the party is required to wait through the normal course of litigation. <u>See</u> Fed. R. Civ. P.	
25	27(a); Penn Mutual Life Ins. Co. v. United States, 68 F.3d 1371, 1375 (D.C. Cir. 1995)	
26	(permitting deposition of elderly witnesses to preserve testimony). Petitioner demonstrates that	
27	the witnesses' expected testimony is material to his claims of ineffective assistance of counsel	
28	and/or juror misconduct and is not cumulative of other possible testimony. Cf. In re Bay County	

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Middlegrounds Landfill Site, 171 F.3d 1044, 1046-47 (6th Cir. 1999) ("Evidence that throws a different, greater, or additional light on a key issue might well 'prevent a failure or delay of justice.""). With respect to all witnesses except Ms. Giardina, petitioner also demonstrates that their testimony may become unavailable if it is not obtained soon. See Penn Mutual, 68 F.3d at 1375.

Respondent has not established that permitting the perpetuation of testimony at this stage of the proceedings is inappropriate. Cf. Cullen v. Pinholster, 118 S. Ct. 1388, 1411 n. 20 ("[W]e need not decide . . . whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied.") Nor has respondent established that resolution of the merits of petitioner's claims or their procedural issues is a necessary precursor to permitting the perpetuation of testimony. Finally, it should be noted that by permitting the perpetuation of testimony at this point, this court is making no decision about the admissibility of each witnesses' testimony in any evidentiary proceeding.

Accordingly, and good cause appearing, IT IS HEREBY ORDERED as follows:

- 1. Petitioner's March 13, 2015 Motion to Perpetuate the Testimony of Dr. Albert Globus (ECF No. 143) is granted.
- 2. Petitioner's April 15, 2015 Motion to Introduce Declarations in Lieu of Testimony and/or to Perpetuate Testimony (ECF No. 146) is granted with respect to witnesses Marjorie Comer, Joanne Wells, Shirley Garrett, Timothy Jayne, Fairman Jayne, and David Kurtzman. The motion is denied with respect to witness Marijo Giardina. Within thirty days of the filed date of this order, the parties shall meet and confer regarding the method for taking the testimony of these witnesses.

Dated: May 28, 2015

CAROLYN K. DELANEY

UNITED STATES MAGISTRATE JUDGE