

1 the new exhibits. Respondent opposes both motions.

2 **I. MOTION TO EXPAND THE RECORD**

3 Petitioner seeks to expand the record as to Claim 21 to include the following exhibits:

- 4
- 5 Exhibit 1: Statement of the Vote: General Election (November 1986);
- 6 Exhibit 2: Judicial Independence, the Confirmation Election, and Republican Government, Text of Talk (January 29, 1986);
- 7 Exhibit 3: California District Attorneys Association, Prosecutor’s Whitepaper on the Supreme Court Confirmation (February 28, 1985);
- 8 Exhibit 4: Californians to Defeat Rose Bird (September 15, 1985);
- 9 Exhibit 5: Declaration and Testimony of Justin McCrary (July 6, 2008);
- 10 Exhibit 6: Declaration and Testimony of Sam Kamin (July 14, 2009);
- 11 Exhibit 7: Declaration and Testimony of John Poulos (July 26, 2009);
- 12 Exhibit 8: California Supreme Court Capital Decisions, 1982-2011; and
- 13 Exhibit 9: Declaration and Testimony of Gerald Uelman (January 28, 2010).
- 14

15 Petitioner contends that these exhibits demonstrate that opponents of former Chief Judge Rose Bird
16 manipulated the California Supreme Court’s death penalty jurisprudence by removing justices who
17 had decided cases in favor of death-sentenced appellants. Petitioner acknowledges that Exhibits
18 1 through 4 contain information that has been available publicly since the mid-1980s, but he asserts
19 that those exhibits provide necessary background for the expert declarations and testimony
20 contained in Exhibits 5-7 and 9. The experts conclude that since the 1980s “purge,” the California
21 Supreme Court has decided capital cases in an arbitrary and disparate manner.

22 Petitioner seeks to expand the record as to Claim 22 to include the following exhibits:

- 23
- 24 Exhibit 9: Declaration of Gerald Uelman (January 28, 2010)
- 25 Exhibit 10: Declaration and Testimony of George Woodworth (November 22, 2010)
- 26 Exhibit 11: Declaration and Testimony of Steven Shatz (January 28, 2010)
- 27 Exhibit 12: Declaration of Donald Heller (January 27, 2010)
- 28

- 1 Exhibit 13: California Commission on the Fair Administration of Justice,
2 Testimony and Report (January 27, 2010)
3 Exhibit 14: Declaration and Testimony of David Baldus (November 19, 2010)
4 Exhibit 15: Declaration of Steven Shatz (June 18, 2013)

5 Petitioner contends that these exhibits describe the political influences that have shaped California’s
6 death penalty jurisprudence and demonstrate that very few convicted murderers are not death-
7 eligible under California’s death penalty law.

8 **A. Legal Standards**

9 If a habeas petition “is not dismissed, the judge may direct the parties to expand the record
10 by submitting additional materials relating to the petition.” 28 U.S.C. foll. § 2254, R. 7(a). “The
11 materials that may be required include letters predating the filing of the petition, documents,
12 exhibits, and answers under oath to written interrogatories propounded by the judge.” 28 U.S.C.
13 foll. § 2254, R. 7(b). “Affidavits may also be submitted and considered as part of the record.” *Id.*

14 A district court’s discretion to grant a petitioner’s motion to expand the record is constrained
15 by the requirements of 28 U.S.C. § 2254(e)(2). *Holland v. Jackson*, 542 U.S. 649, 653 (2004)
16 (holding that the requirements of § 2254(e)(2) “apply *a fortiori* when a prisoner seeks relief based
17 on new evidence without an evidentiary hearing”); *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1241
18 (9th Cir. 2005) (holding that “the conditions of § 2254(e)(2) generally apply to Petitioners seeking
19 relief based on new evidence, even when they do not seek an evidentiary hearing”). As relevant
20 here, § 2254(e)(2) provides that if a petitioner “has failed to develop the factual basis of a claim in
21 State court proceedings,” a district court may not hold an evidentiary hearing on the claim unless the
22 petitioner shows that: the claim relies on “a factual predicate that could not have been previously
23 discovered through the exercise of due diligence”; and “the facts underlying the claim would be
24 sufficient to establish by clear and convincing evidence that but for constitutional error, no
25 reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. §
26 2254(e)(2).

27 “A petitioner ‘fail[s] to develop the factual basis of a claim in State court proceedings’ under
28 the opening clause of § 2254(e)(2) where ‘there is lack of diligence, or some greater fault,

1 attributable to the prisoner or the prisoner’s counsel.” *Lopez v. Ryan*, 630 F.3d 1198, 1205 (9th Cir.
2 2011) (quoting *Williams v. Taylor*, 529 U.S. 420, 432 (2000)) (alternation in original). “Diligence
3 ‘depends upon whether the prisoner made a reasonable attempt, in light of the information available
4 at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether
5 those efforts could have been successful.” *Id.* at 1205-06 (quoting *Williams*, 529 U.S. at 435). “If
6 there has been no lack of diligence at the relevant stages in the state proceedings, the prisoner has
7 not ‘failed to develop’ the facts under § 2254(e)(2)’s opening clause, and he will be excused from
8 showing compliance with the balance of the subsection’s requirements.” *Williams*, 529 U.S. at 437.

9 **B. Discussion**

10 The Court concludes that Petitioner was diligent in attempting to investigate and pursue
11 Claims 21 and 22 in state court and thus that he need not meet the remaining requirements of §
12 2254(e)(2). As set forth in his moving papers, Petitioner raised these claims in state court and
13 requested an evidentiary hearing, discovery, funding, and the opportunity to investigate. Mot. to
14 Expand R. at 1-6, 16-17, ECF No. 293. Respondent does not argue that Petitioner failed to develop
15 the facts underlying Claims 21 and 22 in state court. Nor does Respondent offer any argument with
16 respect to the requirements of § 2254(e)(2) . Instead, Respondent asserts that the motion is futile
17 because the new exhibits relate to claims as to which the Court has granted summary judgment for
18 Respondent. Opp. to Mot. to Expand R. at 1-2, ECF No. 297. However, as noted above, Petitioner
19 seeks leave to file a motion for reconsideration as to those rulings.² Because the new exhibits are
20 offered in support of that motion, which potentially could afford Petitioner relief, the Court
21 concludes that the motion to expand the record is not futile. Moreover, the new exhibits fall within
22 the scope of those authorized by Rule 7. Accordingly, the motion to expand the record will be
23 granted.

24 **II. MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION**

25 Petitioner seeks leave to file a motion for reconsideration of the Court’s adverse summary
26

27 ² Respondent states that in the event the Court grants Petitioner leave to seek reconsideration,
28 Respondent will present substantive argument as to why reconsideration is not warranted. Opp. to
Mot. to Expand R. at 2, ECF No. 297.

1 judgment rulings as to Claims 21 and 22.

2 **A. Legal Standards**

3 “Before the entry of a judgment adjudicating all of the claims and the rights and liabilities of
4 all the parties in a case, any party may make a motion before a Judge requesting that the Judge grant
5 the party leave to file a motion for reconsideration of any interlocutory order on any ground set forth
6 in Civil L.R. 7-9 (b).” Civ. L.R. 7-9(a). The party seeking reconsideration “must specifically show
7 reasonable diligence in bringing the motion.” Civ. L.R. 7-9(b). In addition, the moving party must
8 show one of the following:

9
10 (1) That at the time of the motion for leave, a material difference in fact or law exists
11 from that which was presented to the Court before entry of the interlocutory order for
12 which reconsideration is sought. The party also must show that in the exercise of
13 reasonable diligence the party applying for reconsideration did not know such fact or
14 law at the time of the interlocutory order; or

15 (2) The emergence of new material facts or a change of law occurring after the time
16 of such order; or

17 (3) A manifest failure by the Court to consider material facts or dispositive legal
18 arguments which were presented to the Court before such interlocutory order.

19 *Id.*

20 **B. Discussion**

21 Petitioner has not shown reasonable diligence in bringing this motion for leave to seek
22 reconsideration. *See* Civ. L.R. 7-9(b). Petitioner’s motion is based upon new exhibits containing:
23 records that have been available publicly since the 1980’s, California Supreme Court capital
24 decisions published between 1982 and 2011, and expert testimony and declarations. With one
25 exception, the expert testimony and declarations date between 2008 and 2010. Petitioner did not
26 seek leave to file a motion for reconsideration until February 2014. Petitioner has not submitted a
27 declaration or other evidence explaining this delay of several years.³ The motion will be denied on
28 this basis.

29 However, even if he had been diligent in seeking leave to file a motion for reconsideration,

30 _____
31 ³ Even the single declaration dated after 2010 was executed eight months before Petitioner filed this
32 motion for leave to seek reconsideration.

1 Petitioner has not established that the new exhibits contain new or different “material” facts. With
2 respect to Claim 21, Petitioner asserts that Exhibits 1 through 9 show that political pressure has
3 changed the California Supreme Court’s jurisprudence on capital punishment and has caused the
4 California Supreme Court to apply the death penalty in an arbitrary and disparate manner. With
5 respect to Claim 22, Petitioner asserts that Exhibits 9 through 15 show that California’s death penalty
6 law does not adequately narrow the class of death-eligible offenders. None of the exhibits purports
7 to show that the justices who considered *Petitioner’s* case were influenced by political
8 considerations or deprived *Petitioner* of any constitutional rights. Nor are the exhibits sufficient to
9 overcome “the general presumption that judges are unbiased and honest.” *Ortiz v. Stewart*, 149 F.3d
10 923, 938 (9th Cir. 1998); *see also Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (holding that a
11 claimant asserting bias “must overcome a presumption of honesty and integrity in those serving as
12 adjudicators”). The Court has not discovered a single reported decision adopting the arguments
13 raised by Petitioner here; to the contrary, all of the relevant decisions reject those arguments
14 soundly. *See, e.g., Frye v. Warden, San Quentin State Prison*, No. 2:99-cv-0628 LKK CKD, 2013
15 WL 6271928, at *13-14, *66-67 (E.D. Cal. Dec. 4, 2013); *Rundle v. Warden*, No. 2:08-cv-01879
16 TLN KJN, 2013 WL 6178506, at *181-82 (E.D. Cal. Nov. 22, 2013); *Carter v. Chappell*, No.
17 06cv1343 BEN (KSC), 2013 WL 1120657, *194-95, *197-201 (S.D. Cal. Mar. 18, 2013);
18 *Carpenter v. Martel*, No. C 00–3706 MMC, 2011 WL 5444165, at *15 (N.D. Cal. Nov. 9, 2011).
19 The Court concludes that the new facts proffered by Petitioner do not give rise to any potential for
20 relief with respect to Claims 21 and 22 and thus are not “material” within the meaning of Civil
21 Local Rule 7-9(b).

22 **III. ORDER**

23 Accordingly, and good cause therefor appearing,

- 24 (1) Petitioner’s motion to expand the record is GRANTED; and
25 (2) Petitioner’s motion for leave to file a motion for reconsideration is DENIED.

26 DATED: February 24, 2014

27 
28 JEREMY FOGEL
United States District Judge