

1 (Docs. 102, 103.) Respondents object to Petitioner’s use of an IAC expert witness. (Doc.
2 105.) In his reply, Petitioner contends that Mr. Ford’s testimony will assist the Court on the
3 standard of Arizona capital defense practice at the time of trial. (Doc. 106.)

4 As the Court has already reiterated, the scope of the evidentiary hearing will not
5 include a probing of all the decisions deceased trial counsel made at sentencing and his
6 reasons for making those decisions. Both the Ninth Circuit’s remand instructions and
7 previous Orders of this Court have set forth the limited factual scope of the hearing, that is,
8 the failure of trial counsel to provide Dr. Hammitt’s notes to the medical experts, and
9 whether such performance was both deficient and prejudicial to Petitioner at sentencing.
10 However, the Court will allow Mr. Ford to testify, but his testimony will be limited to how
11 Petitioner suffered IAC prejudice at sentencing. *See, e.g., Nationwide Transport Finance v.*
12 *Cass Information Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (discussing the limitations of
13 expert testimony). The Court authorizes the discovery deposition of Mr. Ford as scheduled.

14 Next, the Court believes that an intervening United States Supreme Court opinion is
15 relevant to further litigation of this case. The Supreme Court recently issued *Cullen v.*
16 *Pinholster*, 131 S. Ct. 1388 (2011), a death penalty sentencing case which discusses habeas
17 review under the AEDPA, § 2254(d)(1). The claim at issue in *Pinholster* was IAC at
18 sentencing, where counsel allegedly failed to adequately investigate and present available
19 mitigation. In reviewing the applicable state court decision, the Supreme Court held that
20 AEDPA review under § 2254(d)(1) is limited to the evidentiary record before the state court,
21 *id.* at 1398, and consequently habeas review does not include new evidence that was
22 developed at a federal evidentiary hearing. *Id.* at 1400 (“Today, we . . . hold that evidence
23 introduced in federal court has no bearing on § 2254(d)(1) review.”).

24 At this juncture, the Court requires supplemental briefing on the effect of *Pinholster*
25 to this case. In particular, the Court asks the parties to address the appropriate habeas review
26 of the remaining IAC issue in this case, and the relevance of evidence to be developed at the
27 upcoming federal evidentiary hearing where such evidence was not reviewed by the state
28 court.

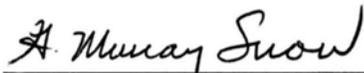
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Accordingly,

IT IS HEREBY ORDERED that Respondents' objection to the expert testimony of Attorney Tim Ford at the evidentiary hearing is **DENIED**. (Doc. 105.) As limited by the terms of this Order, the Court authorizes Mr. Ford to testify as an expert on behalf of Petitioner at the evidentiary hearing. The discovery deposition of Mr. Ford set for June 2, 2011, may go forward as scheduled.

IT IS FURTHER ORDERED scheduling supplemental briefing on the effect of *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) on this case. Within fifteen (15) days of this Order, Petitioner shall brief the appropriate habeas review of the remaining IAC issue in this case, and the relevance of evidence to be developed at the upcoming federal evidentiary hearing that was not before the state court. Respondents shall have fifteen (15) days to respond and Petitioner shall have ten (10) days to reply.

DATED this 27th day of May, 2011.



G. Murray Snow
United States District Judge