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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ERNEST DEWAYNE JONES,

Petitioner,

v.

MICHAEL MARTEL, Acting Warden of California State Prison at San Quentin,

Respondent.

Case No. CV-09-2158-CJC

CAPITAL CASE

Petitioner's Supplemental Brief on the Effect of *Cullen v. Pinholster* on the Court's Power to Grant an Evidentiary Hearing

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ERNEST DEWAYNE JONES, Petitioner, v. MICHAEL MARTEL, Acting Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC **CAPITAL CASE** **Petitioner's Supplemental Brief on the Effect of *Pinholster v. Cullen* on the Court's Power to Grant an Evidentiary Hearing**

INTRODUCTION

On February 17, 2011, Mr. Jones filed a 251-page Motion for Evidentiary Hearing providing substantial reasons why this Court should conduct an evidentiary hearing on Claims One, Three, Four, Five, Fifteen, Sixteen, Eighteen, Twenty-three and Twenty-four contained in the Petition for Writ of Habeas Corpus ("Petition"). Petitioner's Motion for Evidentiary Hearing (Motion), ECF No. 59. The Motion extensively demonstrates the reasons that the allegations in the Petition—which were also fully presented in the state habeas corpus proceedings—state a prima facie case

of several federal constitutional violations. In resolving whether Mr. Jones is entitled to an evidentiary hearing, this Court necessarily must determine whether "he has alleged facts that, if proven, would entitle him to habeas relief[.]" *Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2002). Answering this threshold question is a necessary prerequisite to determining both whether Mr. Jones is entitled to relief on these claims and whether the state court's adjudication of those claims merits deference under 28 U.S.C. section 2254(d). *See, e.g.*, *Tice v. Johnson*, ___ F.3d ___, No. 09-8245, 2011 WL 1491063, *15 (4th Cir. Apr. 20, 2011) ("At the risk of stating the painfully obvious, our perception of how reasonably another court applies the law in a particular case is best informed by conducting our own, independent application so that we may gauge how the two compare."); *Jones v. Basinger*, 635 F.3d 1030, 1040-44 (7th Cir. 2011) (determining whether petitioner met his "threshold burden" to show a Sixth Amendment confrontation violation before resolving whether the state court decision unreasonably applied clearly established federal law).

Prior to respondent filing a response to the Motion, on April 6, 2011, this Court ordered Mr. Jones to file a supplemental brief on the effect, if any, that the U.S. Supreme Court decision in *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388 (2011), had on his entitlement to an evidentiary hearing. Order, ECF 62. Mr. Jones respectfully submits that the Supreme Court's decision in *Pinholster* does not affect this Court's authority to order, or the propriety of, an evidentiary hearing in this case.

The *Pinholster* decision did nothing to alter the careful balance that federal habeas law strikes between ensuring federal vindication of constitutional rights and respecting state court processes that permit a full and fair adjudication of those constitutional rights. *See Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 780, 178 L. Ed. 2d 624 (2011) ("The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law."); *Doody v. Ryan*, ___ F.3d ___, No. 06-17161, 2011 WL 1663551, *37 (9th Cir. May 4, 2011) (Kozinski, C.J.,

concurring) ("Comity doesn't mean being comatose."). Instead, the *Pinholster* decision addressed a narrow question of law involving 28 U.S.C. section 2254(d)(1). Critically, the decision did not affect well-established law governing evidentiary hearings, including controlling Ninth Circuit precedent interpreting section 2254(d)(2), which mandates an evidentiary hearing in this case. *See Wellons v. Hall*, ___ U.S. ___, 130 S. Ct. 727, 730, 175 L. Ed. 2d 684 (2010); *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005).

Moreover, when, as here, the state court declines "the first opportunity to review [a] claim and to correct any constitutional violation," *Pinholster*, 131 S. Ct. at 1401 (internal quotations and citations omitted), by refusing to institute a proceeding in which issues of fact are framed and decided, federal principles of comity, federalism, and finality "do not require deference," *Winston v. Kelly*, 592 F.3d 535, 553 (4th Cir. 2010) (when state court had opportunity to consider "a more complete record, but chose to deny" request for evidentiary hearing, deference not required). On the contrary, the Constitution, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and fairness dictate that a federal court review the state court's legal determinations de novo because the state court's procedural tools for developing a factual record were not adequate either to ascertain the truth or resolve the petitioner's constitutional claims correctly. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 954, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007).

Thus, *Pinholster* is only relevant to the question of whether this Court should require the parties to brief the application of 28 U.S.C. section 2254(d) ("section 2254(d)") at this early stage of the proceedings. Judicial efficiency, comity, and fundamental fairness in capital sentencing require that section 2254(d)'s application be addressed after full factual development of Mr. Jones's claims, when all substantive issues may be briefed in a single document. Whether an application of federal law is objectively unreasonable under section 2254(d)(1) often requires an "intensive fact-

bound inquiry highly dependent upon the particular circumstances of a given case." *Chia v. Cambra*, 360 F.3d 997, 1002 (9th Cir. 2004). To conduct such an inquiry at this early stage of the proceedings is neither warranted nor a prudent use of limited resources.

I. THE SUPREME COURT'S DECISION IN *PINHOLSTER* DID NOT ALTER THE WELL-ESTABLISHED PRINCIPLES GOVERNING MR. JONES'S RIGHT TO AN EVIDENTIARY HEARING.

A. The Limitation on the Ability to Grant Relief Contained in Section 2254(D) Is Distinct From the Requirements of Section 2254(E)(2) for Conducting a Hearing.

The AEDPA "sets several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner[,]" *Pinholster*, 131 S. Ct. at 1398, including the limitation on a federal court's ability to grant relief contained in section 2254(d). For "any claim" that has been "adjudicated on the merits in State court[,]" section 2254(d) precludes a federal court from granting relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1),[1] or "resulted in a decision that was based on an unreasonable

[1] The Supreme Court has identified "two categories of cases" in which Section 2254(d)(1) authorizes a federal court to grant habeas relief to a state prisoner, on a claim that has been adjudicated on the merits by a state court:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Terry Williams, 529 U.S. at 412-13; *see also Brown v. Payton*, 544 U.S. 133, 141, 125 S. Ct. 1432, 161 L. Ed. 2d 334 (2005) (defining "unreasonable application").

determination of the facts," 28 U.S.C. § 2254(d)(2).[2] Once a petitioner satisfies either section 2254(d)(1) or (d)(2), a federal court's determination of the merits of the claim are reviewed de novo. *See, e.g.*, *Panetti*, 551 U.S. at 953-54 (considering petitioner's claim on the merits without any deference to the state court's decision after concluding that the state court had unreasonably applied federal law under (d)(1)).

In contrast to section 2254(d)'s limitation on a federal court's ability to grant relief, section 2254(e) applies to a court's ability to conduct an evidentiary hearing. As the Supreme Court explained in *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007), prior to the enactment of the AEDPA, the decision to grant an evidentiary hearing was left to the "sound discretion" of district courts. Although the AEDPA did not alter that "basic rule," *id.*, section 2254(e)(2) added new requirements for petitioners who have "failed to develop the factual basis of a claim in State court proceedings" because of a "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Michael Williams v. Taylor*, 529 U.S. 420, 432, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000). When the petitioner "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court," however, the diligence requirement is satisfied. *Id.* at 435. If the state court record "precludes habeas relief," the district court is "not required to hold an evidentiary hearing." *Pinholster*, 131 S. Ct. at 1399 (quoting *Landrigan*, 550 U.S. at 474). In other words, it is only when the record precludes relief, such as when "the record refutes the applicant's factual allegations," that

[2] When a state court fails to adjudicate a claim on its merits, section 2254(d) does not apply and this Court must independently assess the merits of a petitioner's claims. *See Pinholster*, 131 S. Ct. at 1400; *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) ("Because the state courts found the representation adequate, they never reached the issue of prejudice, and so we examine this element of the *Strickland* claim de novo.") (internal citation omitted).

Landrigan vests in the district court the authority to deny an evidentiary hearing. *See Landrigan*, 550 U.S. at 474; *see also* Motion at 5-6.

B. The Decision in *Pinholster* Is Limited to the Scope of the Evidence to Be Considered Under Section 2254(D)(1).

In *Pinholster*, the Supreme Court addressed the narrow issue of "whether review under section 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court." *Pinholster*, 131 S. Ct. at 1398. The Court held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. at 1398. The narrow scope of the Supreme Court's inquiry and the application of the rule to the unique circumstances of Mr. Pinholster's case limit the relevance of the decision to Mr. Jones's case.

After Mr. Pinholster filed a petition for writ of habeas corpus in the California Supreme Court, that court issued an order to show cause on his penalty-phase ineffective assistance of counsel claim.[3] The warden filed a forty-one page return, exclusive of exhibits, and Mr. Pinholster filed a traverse.[4] A month later, the California Supreme Court vacated the order to show cause as improvidently issued and denied the petition.[5]

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[3] Under California law, when a petition "is sufficient on its face (that is, the petition states a prima facie case on a claim that is not procedurally barred), the court is obligated by statute" to issue an order to show cause. *People v. Romero,* 8 Cal. 4th 728, 737, 35 Cal. Rptr. 2d 270 (1994); Cal. Penal Code § 1476 (West 2011).

[4] Although the issuance of the order to show cause entitled Mr. Pinholster to avail himself to state mechanisms to further discover and develop additional facts to support his ineffective assistance of counsel claim, he did not do so. Cal. Penal Code § 1484 (West 2011).

[5] *See* Docket, *In re Pinholster*, California Supreme Court Case No. S034501, available at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1766270&doc_no=S034501 (last visited July 18, 2011).

Mr. Pinholster thereafter instituted federal proceedings and after exhausting additional claims in state court, he sought and was granted an evidentiary hearing in the federal district court. *Pinholster*, 131 S. Ct. at 1396-97. During the hearing, Mr. Pinholster presented the testimony of two medical experts, Dr. Sophia Vinogradov and Dr. Donald Olson, whose opinions were not presented in state court. *Id*. at 1397. Relying in part on this expert testimony, the district court granted Mr. Pinholster relief. *Id*.

On rehearing en banc, the Ninth Circuit Court of Appeals affirmed. *See Pinholster v. Ayers*, 590 F.3d 651, 655 (9th Cir. 2009), *reversed by Cullen v. Pinholster*, 131 S. Ct. 1388. The Ninth Circuit determined that, even though Mr. Pinholster had not presented Dr. Vinogradov's and Dr. Olson's testimony to the state court, it was relevant to determining the reasonableness of the state court's decision pursuant to section 2254(d)(1). *Id*. at 666-69. Relying on that evidence, the Ninth Circuit concluded that the California Supreme Court unreasonably applied *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), when it denied Mr. Pinholster's ineffective assistance of counsel claim.

The Supreme Court reversed, holding that, when a federal court is reviewing a claim under section 2254(d)(1), "the record under review is limited to the record in existence at that same time – i.e., the record before the state court." *Pinholster*, 131 S. Ct. at 1398. Because Mr. Pinholster had never presented the expert testimony to the state court, the Ninth Circuit should not have considered that evidence when determining whether the state court decision was an "unreasonable application" of clearly established federal law. *Id*.

The Supreme Court then reviewed the state court record, including the state's factual response and petitioner's traverse in the state court proceedings and determined that the California Supreme Court's denial of the ineffective assistance of counsel claim was not an unreasonable application of federal law. *Id*. at 1403-04.

With respect to the "deficient performance" prong, in several respects, the facts contained in the state record contradicted Mr. Pinholster's allegations, *id*. at 1404-05 (referring to billing and time records), and with respect to the "prejudice prong," the post-trial facts "largely duplicated" the facts heard by the jury, *id*. at 1409. Thus, *Pinholster* did nothing more than clarify how a federal court is to conduct the inquiry under section 2254(d)(1).

C. *Pinholster* Does Not Disturb the Law Regarding Evidentiary Hearings Under the AEDPA.

In *Townsend v. Sain*, the Supreme Court held that "[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." 372 U.S. 293, 312, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963). The Supreme Court has affirmed that *Townsend* continues to govern a district court's responsibility to grant an evidentiary hearing in AEDPA-governed cases. *Landrigan*, 550 U.S. at 473.

In *Pinholster*, the Supreme Court made clear that it was not departing from its prior law on evidentiary hearings under the AEDPA. *Pinholster*, 131 S. Ct. at 1399 ("Our recent decision in *Schriro v. Landrigan* . . . is consistent as well with our holding here.") (citation omitted); *id*. at 1401 n. 8 ("We see no need in this case to address the proper application of § 2254(e)(2)); *id*. at 1411 n. 20 ("[W]e need not decide whether § 2254(e)(2) prohibited the District Court from holding the evidentiary hearing. . . .").

The distinction between sections 2254(d)(1) and (e)(2) is important. An evaluation of the "deference owed under" section 2254(d)(1) to the state court decision relates to "whether to grant habeas relief," not whether to grant an evidentiary hearing. *Wellons v. Hall*, 130 S. Ct. at 730. The court in *Pinholster* explicitly did not decide "whether a district court may ever choose to hold an

evidentiary hearing before it determines that § 2254(d) has been satisfied." 131 S. Ct. at 1411 n.20. Consequently, the Court did not alter its long-standing holding that "AEDPA does not require a federal habeas court to adopt any one methodology" in deciding section 2254(d)(1) issues. *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 1172, 155 L. Ed. 2d 144 (2003); *see also Gapen v. Bobby*, No. 3:08-cv-280, 2011 U.S. Dist. LEXIS 62177, *5-6 (S.D. Oh. June 10, 2011) (noting that *Pinholster* "does not purport to make any change in the habeas discovery practice at all or to dictate any sequence in which decisions in habeas corpus cases must be made."). In addition, the Court was silent on the separate question of whether federal habeas courts should examine the merits of the constitutional claim before deciding the section 2254(d) issues. *See Wellons*, 130 S. Ct. at 730 (explaining that the decision to grant an evidentiary hearing is analytically distinct from the decision to grant relief); *Jones*, 635 F.3d at 1040-44 (determining whether petitioner met his "threshold burden" to show a Sixth Amendment confrontation violation occurred before determining whether the state court decision unreasonably applied clearly established federal law). Thus, resolving Mr. Jones's entitlement to a hearing is appropriate without first resolving any section 2254(d)(1) issues. *See* Section III, *infra*.

D. *Pinholster* Did Not Affect Ninth Circuit Precedent Interpreting 28 U.S.C. Section 2254(D)(2).

As noted above, the Court in *Pinholster* did not address the scope of section 2254(d)(2) and thus did not alter the well-established Ninth Circuit precedent holding that a state court violates section 2254(d)(2) when it does not "afford a petitioner a full and fair hearing." *Tilcock v. Budge*, 538 F.3d 1138, 1143 n.2 (9th Cir. 2008) (internal citation omitted); *Houston v. Schomig*, 533 F.3d 1076, 1083 (9th Cir. 2008) ("AEDPA allows for an evidentiary hearing when a petitioner (1) alleges facts, which, if proven, would entitle him to relief; and (2) shows that he did not receive a full and fair hearing in the state court.") (citing 28 U.S.C. § 2254(e)(2));

Earp, 431 F.3d at 1167 (concluding that where "the state court's decision was based on an unreasonable determination of the facts . . . the federal court can independently review the merits of that decision"); *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) ("If . . . a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts.").

These decisions hold that a state-court decision summarily denying claims for relief constitutes an unreasonable determination of the facts under section 2254(d)(2) unless the record shows the allegations "are entirely without credibility or that the allegations would not justify relief even if proved." *Nunes v. Mueller*, 350 F.3d 1045, 1054-55 (9th Cir. 2003). In *Earp*, 431 F.3d at 1167, the Ninth Circuit held that the California Supreme Court's summary denial of a state petition involved "an unreasonable determination of the facts," within the meaning of section 2254(d)(2) where the petitioner demonstrated his entitlement to a hearing under *Townsend v. Sain*. "If the defendant can establish any one of those circumstances, then the state court's decision was based on an unreasonable determination of the facts and the federal court can independently review the merits of that decision by conducting an evidentiary hearing." *Id.*[6] Given that Mr. Jones's Motion for an Evidentiary Hearing fully explains why he is entitled to a hearing under the *Townsend* factors, no further consideration of section 2254(d) is necessary at this stage of the proceedings.

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[6] In *Townsend*, the Supreme Court identified several factors requiring that a district court conduct an evidentiary hearing:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

Townsend, 372 U.S. at 313.

II. AN EVIDENTIARY HEARING IS WARRANTED GIVEN THE LACK OF STATE COURT PROCESS AFFORDED TO MR. JONES.

To the extent that this Court desires the parties to address the application of section 2254(d)(1), *Pinholster* does not control here, because it addressed only the situation in which a petitioner has received all state process necessary to develop factually and present his claims, but nonetheless withholds readily available evidence from the state court and seeks to add additional evidence through a federal evidentiary hearing. Mr. Jones's case is instead controlled by *Michael Williams* and *Wellons v. Hall*, which authorize federal evidentiary hearings when the state court process unfairly thwarted the full development of facts to support a petitioner's claims.[7] Further, post-*Pinholster*, petitioners are still permitted to prove, pursuant to Section 2254(a), that a constitutional violation invalidates their capital judgment.

A. A Hearing Is Necessary Because the State Court Failed to Accord Mr. Jones a Fair Opportunity to Develop and Present the Facts Supporting His Claims.

In *Michael Williams*, the U.S. Supreme Court recognized the unfairness of

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[7] In fact, Mr. Pinholster himself affirmatively disavowed the proposition that the state court had adjudicated his ineffective assistance of counsel claim on an underdeveloped record. *See Pinholster*, 131 S. Ct. at 1402 n.11. Accordingly, the Court proceeded on the premise that the case did not involve a diligent petitioner who had been prevented, through no fault of his own, from developing the facts material to his claim in state court. *See*, *e.g.*, *id*. at 1401 (quoting *Michael Williams*, 529 U.S. at 437) ("Provisions like §§ 2254(d)(1) and (e)(2) ensure that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings."); *id*. at 1412 (Alito, J., concurring) ("I would hold that the federal-court hearing should not have been held because respondent did not diligently present his new evidence to the California courts."); *id*. at 1417 (Sotomayor, J., dissenting) ("It would undermine the comity principles motivating AEDPA to decline to defer to a state-court adjudication of a claim because the state court, through no fault of its own, lacked all the relevant evidence.").

applying the AEDPA to thwart factual development in federal court when a habeas petitioner—through no fault of his or her own—was unable to develop facts in state court. As the Court recognized, "comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort." *Michael Williams*, 529 U.S. at 437. The Court refused to deprive Mr. Williams of an evidentiary hearing because the AEDPA "does not equate prisoners who exercise diligence in pursuing their claims with those who do not." *Id.* at 436.

In *Wellons v. Hall*, the Court reaffirmed the fundamental principle that a state may not avail itself of AEDPA limitations on federal review when it has deprived the habeas petitioner of the means to prove a constitutional violation. The Court held that discovery and a federal evidentiary hearing were required because Wellons "repeatedly tried, in both state and federal court, to find out what occurred, but … found himself caught in a procedural morass."[8] 130 S. Ct. at 729. In contrast, "had there been discovery or an evidentiary hearing, Wellons may have been able to present more than 'speculation' and 'surmise' [which the Eleventh Circuit found existed in Wellons's allegations]." *Id*. at 730; *see also id*. at 730 n.3 ("[I]it would be bizarre if a federal court had to defer to state-court factual findings, made without any evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual findings were erroneous."). Accordingly, a district court should not rely "on the very holes in the record that [a petitioner is] trying to fill" when determining that an evidentiary hearing is not warranted. *Id*. at

[8] The Eleventh Circuit affirmed the denial of Mr. Wellons' motions for discovery and an evidentiary hearing, stating that his claims "do not entitle [him] to habeas relief." 130 S. Ct. at 733. The Supreme Court explained that the relevant inquiry for determining a petitioner's right to a hearing was not "whether petitioner was entitled to ultimate relief in the form of a new trial," but instead "whether petitioner's allegations . . . entitled him to the discovery and evidentiary hearing that he sought." *Id*. at 730.

731. These principles apply prior to a section 2254(d) determination. When, as here, a state court process denies a habeas petitioner the opportunity to develop the factual basis of his constitutional claims, section 2254(d)(1) may not be invoked to preclude factual development in federal court. *See Pinholster*, 131 S. Ct. at 1401 ("Provisions like §§ 2254(d)(1) and (d)(2) ensure that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.'") (quoting *Michael Williams*, 529 U.S. at 437).

For purposes of section 2254(d)(1)'s "unreasonable application" standards, the relevant state court post-conviction record and process in Mr. Jones's case are significantly different from *Pinholster*. As explained *supra*, in *Pinholster*, the state court's order to show cause: (1) afforded Mr. Pinholster numerous mechanisms to develop his factual allegations, *see* Cal. Pen. Code § 1484 (West 2011); (2) required the state to file a return containing detailed factual allegations and certain supporting documents, *see* Cal. Pen. Code § 1480 (West 2011); *In re Lewallen*, 23 Cal. 3d 274, 277-78, 152 Cal. Rptr. 528 (1979); and (3) allowed Mr. Pinholster to file a traverse. These formal pleadings joined the factual and legal issues for resolution. *See, e.g.*, *Lewallen*, 23 Cal. 3d at 277-78. Understandably, Mr. Pinholster made no complaint in federal court about any deficiencies in this thorough state court process. *Pinholster*, 131 S. Ct. at 1402 n.11.

Mr. Jones's state court proceedings are materially distinguishable. Unlike Mr. Pinholster, Mr. Jones was not denied relief after receiving a full and fair state court opportunity to prove his claims. Mr. Jones was deprived of all formal state habeas proceedings, including affirmative mechanisms to develop his allegations and the state's detailed factual responses to his allegations.[9]

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[9] Indeed, in California, a petition for writ of habeas corpus serves a "limited function." *In re Lawler*, 23 Cal. 3d 190, 194, 151 Cal. Rptr. 833 (1979); *see also People v. Pacini*, 120 Cal. App. 3d 877, 884, 174 Cal. Rptr. 820 (1981) (affirming that the petition is "preliminary in nature")). Following the filing of a habeas corpus

Thus, the state court's review in this case was a preliminary one. The decision to deny relief, rather than grant an order to show cause, represents a determination that discovery and an evidentiary hearing were unwarranted, because even taking all of Mr. Jones's allegations as true and credible, he failed to state a prima facie case for relief. *See, e.g., People v. Duvall*, 9 Cal. 4th 464, 474-75, 37 Cal. Rptr. 2d 259 (1995). To make this initial assessment under California law, the court must determine whether the petition states facts that, if true, would enable petitioner to prevail. *See, e.g., Romero*, 8 Cal. 4th at 737; Cal. Rules of Ct., Rule 4.551(c)(1). The state court's determination must assume that all factual allegations and incorporated information and evidence from appended documents are true and credible. *Romero*, 8 Cal. 4th at 737; *In re Serrano*, 10 Cal. 4th 447, 456, 41 Cal. Rptr. 2d 695, 700-01 (1995).[10] The court is obligated to issue an order to show cause when presented with a facially sufficient petition. *Romero*, 8 Cal. 4th at 737; *see also Duvall*, 9 Cal. 4th at 475; *see generally* Cal. Penal Code § 1476 (West 2011).

The issuance of an order to show cause critically transforms the state habeas process in three ways critical to full, fair, and accurate fact development. First, it allows the petitioner "an opportunity to present evidence in support of the allegations . . . [and] institute[s] a proceeding in which issues of fact are to be framed and decided." *In re Hochberg*, 2 Cal. 3d 870, 876 n.4, 87 Cal. Rptr. 681 (1970) (italics omitted). Second, it creates a cause of action which, under Article VI, section 14 of the California Constitution, requires a written, reasoned resolution. *Romero*, 8 Cal. 4th at 740. The court must "do and perform all other acts and things necessary to a

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petition, the California Supreme Court may summarily deny it, request an informal response from the respondent, or issue an order to show cause. The informal response "is not a pleading, does not frame or join issues, and does not establish a 'cause' in which a court may grant relief." *Romero*, 8 Cal. 4th at 741.

[10] *See also Duvall*, 9 Cal. 4th at 474-75; *Lawler*, 23 Cal. 3d at 194; *Serrano*, 10 Cal. 4th at 456.

full and fair hearing and determination of the case." Cal. Penal Code § 1484 (West 2011). Finally, it confers the power to authorize fact development, beyond the very limited discovery specifically authorized by California Penal Code section 1054.9, including the power to issue subpoenas and compel witness testimony. Cal. Penal Code § 1484 (West 2011); *see also People v. Gonzalez*, 51 Cal. 3d 1179, 1256-58, 275 Cal. Rptr. 729 (1990) (discussing state court's lack of jurisdiction to order "free-floating" postconviction discovery absent a proceeding pending before that court); *Bd. of Prison Terms v. Sup. Ct.*, 130 Cal. App. 4th 1212, 1236-42, 31 Cal. Rptr. 2d 70, 87-92 (2005) (holding that court cannot order discovery before issuance of an order to show cause; court's powers as set forth in Penal Code section 1484 to hear evidence, subpoena witnesses, and do whatever is necessary to ensure fairness not available until issues joined); *Durdines v. Superior Court*, 76 Cal. App. 4th 247, 252, 90 Cal. Rptr. 3d 217, 221 (1999) (holding that court lacked power before the issuance of a writ or order to show cause to solicit a declaration from trial counsel).

Mr. Jones was summarily denied the issuance of an order to show cause and all the fact development procedures available thereafter. The state court thus failed to provide an adequate or effective forum to test the legality of his detention, despite thousands of pages of detailed allegations and documentary support, which stated multiple claims on which relief could have (and would have) been granted, if the state had provided Mr. Jones with the means to prove them.

Under these circumstances, an interpretation of sections 2254(d)(1) and (d)(2) that forecloses discovery, expansion of the record, and/or an evidentiary hearing precludes the application of section 2254(d), for it rewards the state for its own failure to provide an adequate process for ensuring that the facts are fully presented in the state proceeding. Having had no "alternative forum for trying facts and issues" in state court to prove or fill any holes in his allegations, *Pinholster*, 131 S. Ct. at 1401, Mr. Jones is entitled to an evidentiary hearing to allow him the opportunity to

develop the record so that this Court may have an appropriate basis from which to determine his entitlement to relief.[11]

B. A Federal Evidentiary Hearing and Fact-Finding May Be Necessary to Uncover New Evidence.

The majority in *Pinholster* observed that evidence first developed on federal habeas may ultimately lead to relief if that evidence forms the basis for a "new claim[]." *Pinholster*, 131 S. Ct. at 1401 n.10. As Justice Breyer noted, the majority's ruling "does not mean that Pinholster is without recourse to present new evidence. He can always return to state court presenting evidence not previously presented." *Id*. at 1412 (Breyer, J., concurring in part); *see also Rhines v. Weber*, 544 U.S. 269, 277 (2005). Given the truncated state court process, Mr. Jones should be afforded an opportunity to develop facts that may lead to additional claims and or evidence in support of the claims already presented to the California Supreme Court. *See* California Commission on the Fair Administration of Justice, Final Report 58 (2008) ("Because California does not provide adequate resources to lawyers handling state habeas claims, 74% of federal habeas applications filed by California death row inmates are stayed for the exhaustion of state remedies.").[12] Particularly, in a "death penalty habeas corpus case," it is preferable "to err on the side of gathering too much information rather than too little." *Conway v. Houk*, No. 2:07–cv–947, 2011 WL 2119373, *3-4 (S.D. Oh. May 26, 2011) (permitting the filing of a second discovery

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[11] Moreover, applying section 2254(d) to preclude an evidentiary hearing when the state thwarted full factual development renders the AEDPA vulnerable to a constitutional challenge that it effectuates a suspension of the writ of habeas corpus in violation of Article I, section 9, clause 2 of the Constitution and a violation of the Due Process Clause. Such an interpretation should be avoided where an alternative reasonable interpretation exists. *See Swain v. Pressley*, 430 U.S. 372, 378, 97 S. Ct. 1224, 1228, 51 L. Ed. 2d 411 (1977).

[12] *See* http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf (last visited July 18, 2011).

motion notwithstanding Pinholster and noting that the petition "intends to ask the Court to hold these proceedings in abeyance while he returns to state court to exhaust all of the new facts that he identified during the litigation in this court"); *see also Gapen*, 2011 U.S. Dist. LEXIS 62177 at *5 ("Cullen does not purport to make any change in the habeas discovery practice at all or to dictate any sequence in which decisions in habeas corpus cases must be made … capital litigation is so protracted that it might serve judicial economy to allow depositions while memories are fresher.").

III. REQUIRING THE PARTIES TO BRIEF THE APPLICATION OF SECTION 2254(D) NOW WOULD BE PREMATURE AND WOULD DEFEAT JUDICIAL EFFICIENCY.

This Court ordinarily reserves merits briefing until after factual development of the claims and an evidentiary hearing have concluded. To brief section 2254(d)'s application first would require the Court prematurely to resolve merits-related issues – thus squandering scarce judicial resources and unnecessarily taxing the Criminal Justice Act budget. The circumstances of this case—in which the state court did not permit factual development or fact-finding—already have complicated the adjudication of Mr. Jones's claims. As the California Commission on the Fair Administration of Justice found, "[T]he absence of a [state] published opinion and/or an evidentiary hearing" places a substantial burden on federal courts to adjudicate constitutional claims in capital cases." California Commission on the Fair Administration of Justice, *supra*, at 24.

To address the complicated and lengthy habeas corpus process, this Court established an orderly process for adjudicating capital habeas petitions by adopting the Guide to Case Management and Budgeting in Capital Cases, which provides for four

phases of litigation.[13] Recognizing that multiple submissions of merits briefing unnecessarily strain the federal district courts' limited resources, the Guidelines allocate final briefing on the merits of a petitioner's claims to Phase IV, after discovery and factual development, including an evidentiary hearing, have been completed. This process appropriately allows the Court to address simultaneously the merits of a petitioner's claims and any section 2254(d)(1) limitations on the Court's ability to grant relief. This unitary process vindicates the Court's interest in judicial efficiency. *See, e.g.*, *Conway*, 2011 WL 2119373, at *4 ("Moreover, the Court concludes that its discretion is better exercised in not foreclosing at this stage the possibility of discovery. Were the Court to permit discovery only after it appears that *Pinholster* would not bar consideration of new evidence, the Court would be adding months of delay to the proceedings, a result that could be avoided by simply permitting discovery that otherwise appears to be warranted under Rule 6.").

This Court's Guidelines are consistent with the traditional doctrinal requirements of section 2254(d)'s application. *See, e.g.*, Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure § 32.3, at 1580 (5th ed. 2005) ("[T]he federal court should ordinarily examine the merits of the claim first and then, if the court finds constitutional error, move on to a review of the state court's decision to determine whether the criteria of section 2254(d)(1) preclude a grant of habeas corpus relief"); *see also id*. at 1614-26 (collecting and discussing U.S. Supreme Court decisions employing this doctrinal analysis). As the Supreme Court recently explained, the provisions of section 2254(d) function independently from section 2254(a); the latter provides that habeas relief may be afforded to a state prisoner only when his custody violates federal law. *Wilson v. Corcoran*, 562 U.S.

[13] *See* http://www.cacd.uscourts.gov/cacd/AttyAsst.nsf/c8b9bc4dd3050a24882567c500769e4f/fd93b2dee6fe2b1d88256e770072236b?OpenDocument (last visited July 18, 2011).

___, 131 S. Ct. 13, 17, 178 L. Ed. 2d 276 (2010). The Supreme Court in *Wilson* ruled that once a petitioner asserts the existence of a constitutional violation, the federal court must determine whether it "agrees with that assertion." *Id.*; *see also Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 831, 172 L. Ed. 2d 532 (2009) (noting that courts must determine whether a state court determination is erroneous as well as whether it is objectively unreasonable). Indeed, "[i]n most instances, a federal court's assessment of the reasonableness of the state court's reasoning and result needs to be informed by the federal court's own analysis of the merits." Randy Hertz *et al.*, *supra*, at 1625; see also *Tice,* 2011 WL 1491063 at *15.

IV. CONCLUSION

For reasons set forth above and in the Motion, Mr. Jones is entitled to fact development procedures including an evidentiary hearing, de novo review of each constitutional violation presented in his Petition, and to relief. Should the Court determine that the parties should address the application of section 2254(d) to each of the specific claims in the Motion at this stage of the proceedings, Mr. Jones requests permission to seek an amendment of the Criminal Justice Act budget governing this phase of the proceedings and sufficient time to complete the briefing.

Dated: July 18, 2011

Respectfully submitted,

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