KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General
HERBERT S. TETEF
Deputy Attorney General
State Bar No. 185303
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-0201
Fax: (213) 897-6496
E-mail: DocketingLAAWT@doj.ca.gov
Attorneys for Respondent

IN THE 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.

CV-09-2158-CJC

DEATH PENALTY CASE

OPPOSITION TO PETITIONER'S SUPPLEMENTAL BRIEF ON THE EFFECT OF *CULLEN V. PINHOLSTER* ON THE COURT'S POWER TO GRANT AN EVIDENTIARY HEARING

Honorable Cormac J. Carney
United States District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

Pursuant to this Court's Order of April 6, 2011, Respondent Michael Martel, the Acting Warden of San Quentin State Prison,[1] submits this Opposition to Petitioner Ernest Dewayne Jones's Supplemental Brief on the Effect of *Cullen v. Pinholster* on the Court's Power to grant an Evidentiary Hearing.

ARGUMENT

UNDER *PINHOLSTER*, THIS COURT'S EXAMINATION OF THE REASONABLENESS OF THE STATE COURT MERITS DECISION MUST BE CONFINED TO THE RECORD BEFORE THE STATE COURT; PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING MUST THEREFORE BE DENIED

On April 4, 2011, the United States Supreme Court decided *Cullen v. Pinholster*, __ U.S. __, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011), and resolved what evidence should be examined when a federal court is determining whether a state court's resolution of the merits of a claim was reasonable under 28 U.S.C. § 2254(d)(1). The *Pinholster* Court held that federal review of the (d)(1) question "is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 131 S. Ct. at 1398. The High Court observed that "[i]t would be contrary to [the purpose of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)] to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in the federal habeas court." *Id*. at 1399. AEDPA review is necessarily "backward-looking." *Id*. at 1398. In other words, it requires "examination of the state-court decision at the time it was made" and "is limited to the record in existence at that same time – *i.e.*, the record before the state court." *Id*.

As such, no evidence developed in federal court can have any effect on the § 2254(d)(1) analysis. Consequently, "evidence adduced in federal court has no

[1] Michael Martel is the Acting Warden of San Quentin State Prison. Substitution of the proper custodian's name is authorized by Federal Rule of Civil Procedure 25(d).

bearing on § 2254(d)(1) review." *Pinholster*, 131 S. Ct. at 1400. Put another way, "evidence later introduced in federal court is irrelevant to § 2254(d)(1) review." *Id*.

Given its interpretation of § 2254(d)(1), the Court in *Pinholster* found it unnecessary to decide when "§ 2254(e)(2) prohibit[s] the District Court from holding [an] evidentiary hearing." *Pinholster*, 131 S. Ct. at 1411 n.20. The Court observed, however, that it is "a fundamental misunderstanding of § 2254(e)(2)" to suppose that § 2254(d)(1) must be read in a way that 'accommodates' § 2254(e)(2)." *Id*. at 1401 n.8. Instead, "[t]he focus of [§ 2254(e)(2)] is not on 'preserving the opportunity' for hearings, [] but rather on *limiting* the discretion of federal district courts in holding hearings." *Id*. (emphasis in original).

The Court in *Pinholster* also found it unnecessary to confront directly "whether a district court may ever choose to hold an evidentiary hearing before it determines that § 2254(d) has been satisfied." *Pinholster*, 131 S. Ct. at 1411 n.20. But in combination, the Court's case law makes the answer plain. As the Court has stated,

> [A] federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief. Because the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate.

Schriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

Indeed, the Court made clear that "[a]lthough state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Pinholster*, 131 S. Ct. at 1401; *see also Landrigan*, 550 U.S. at 475 ("If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary

hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts.").

In short, unless § 2254(d) is overcome, "there can be no additional factfinding by the district court." *Ybarra v. McDaniel*, __F.3d__, __, No. 07-99019, 2011WL3890741 (9th Cir. Sept. 6, 2011), *14 n.3. If a petitioner fails to overcome § 2254(d)'s limitation to federal relief, "a writ of habeas corpus 'shall not be granted' and [the federal court's] analysis is at an end." *Pinholster*, 131 S. Ct. at 1411 n.20; *see Coddington v. Cullen*, No. CIV S-01-1290 KJM GGH DP, 2011 WL 2118855 (E.D. Cal. May 27, 2011), *1 (finding *Pinholster* "remarkable" for its restrictions on the right to an evidentiary hearing).

Petitioner relies on *Michael Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000), for the proposition that, under § 2254(e)(2), a district court has discretion to grant an evidentiary hearing as long as the petitioner satisfied the "diligence" requirement by making a reasonable attempt to investigate and pursue his claims in state court. (Pet. Brief at 5.) What the Supreme Court said in *Michael Williams* was that a federal court is not barred from holding an evidentiary hearing under § 2254(e)(2) where a state prisoner is "unable to develop his claim in state court despite diligent effort." *Michael Williams v. Taylor*, 529 U.S. at 436-37. *Michael Williams* was concerned with § 2254(e)(2), which, as *Pinholster* recognized, *limits* the discretion of federal district courts to hold hearings. *Pinholster*, 131 S. Ct. at 1401 n.8. Nothing in *Michael Williams* changes the fact that the § 2254(e)(2) question is secondary to the § 2254(d)(1) question, which is the threshold inquiry. Thus, Petitioner's reliance on *Michael Williams* is misplaced.

Petitioner contends that *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) and *Schriro v. Landrigan*, 550 U.S. 465, support his right to an evidentiary hearing. (Pet. Brief at 8.) Nothing in these Supreme Court decisions provides authority for this Court ordering an evidentiary hearing absent Petitioner

satisfying the threshold determination required by § 2254(d). First, *Townsend* was decided several decades before AEDPA was even enacted. It is axiomatic that a decision issued before AEDPA's enactment cannot serve to inform interpreting the impact of AEDPA on the entitlement to an evidentiary hearing in a § 2254 proceeding. Petitioner's reliance on *Landrigan* for the proposition that *Townsend* still governs the determination of whether to grant an evidentiary hearing (Pet. Brief at 8) ignores the fact that *Landrigan* held that habeas relief was barred by § 2254(d)(2), thus negating any need for a federal evidentiary hearing. *Schriro v. Landrigan*, 550 U.S. at 474-81. Indeed, under *Pinholster*, "§ 2254(d)(1) bars a district court from conducting such an evidentiary hearing because the statute 'requires an examination of the state court decision at the time it was made[.]'" *Pape v. Thaler*, 645 F.3d 281, 288 (5th Cir. 2011).

Landrigan makes clear that a federal habeas court must take into account "the deferential standards prescribed by § 2254," in deciding the propriety of a federal evidentiary hearing. *Landrigan*, 550 U.S. at 474. "In practical effect," an evidentiary hearing on the merits is useless, and therefore an abuse of discretion, when a petitioner's habeas claim is barred at the threshold. *Pinholster*, 131 S. Ct. at 1399. Thus, if the merits of a claim may not be litigated because of a threshold bar, no showing of an entitlement to habeas relief could be made at an evidentiary hearing. *See Schriro v. Landrigan*, 550 U.S. at 474; *see also Pinholster*, 131 S. Ct. at 1402 n.11. Therefore, to answer the question whether factual development on the merits is warranted, the § 2254(d) question must be answered first.

Pinholster illustrates the point. In *Pinholster*, while no evidentiary hearing was held in state court, an evidentiary hearing was held in the district court, and the new evidence taken in the federal hearing was relied upon by the federal court to find both that the petitioner had overcome the relitigation bar of § 2254(d)(1), and that his claim succeeded on the merits. *Pinholster*, 131 S. Ct. at 1396-97. On review, the Supreme Court held that the § 2254(d)(1) inquiry is limited to the

record that was before the state court that adjudicated the claim on its merits. *Id*. at 1398. Consequently, the evidentiary development undertaken in the district court was irrelevant to the threshold bar issue. The Court found that relitigation on the merits was prohibited by § 2254(d)(1), and then observed that "[this] brings our analysis to an end. Even if the evidence adduced for the first time in the District Court supported the petitioner's claims, the federal court was precluded from considering it." *Pinholster*, 131 S. Ct. at 1402 n.11. In other words, developing new evidence or facts in federal court that cannot be considered for purposes of granting relief would be a wasted exercise and an abuse of discretion in light of an applicable threshold bar. *See Atkins v. Clarke*, 642 F.3d 47, 49 (1st Cir. 2011) (*Pinholster* overrules full and fair hearing requirement as to claims asserted under § 2254(d)(1)).

Petitioner insists that *Pinholster* did not affect his right to an evidentiary hearing under Ninth Circuit law. (Pet. Brief at 9-10.) Petitioner's reliance on any Ninth Circuit authority to support a grant of an evidentiary hearing absent sustaining his burden under § 2254(d) is inappropriate, as that authority is necessarily abrogated by the holding in *Pinholster*. For example, Petitioner relies on *Nunes v. Mueller*, 350 F.3d 1045, 1054-55 (9th Cir. 2003), and *Earp v. Ornoski*, 431 F.3d 1158, 1167 (9th Cir. 2005), for the proposition that a summary denial in state court is the equivalent of an unreasonable adjudication of facts under § 2254(d)(2), which allows for an evidentiary hearing in federal court. (Pet. Brief at 10.) The short answer to this contention is that § 2254(d)(2) is inapplicable to a summary denial because the denial does not constitute a determination of the validity of any facts -- a summary denial assumes that all of the petitioner's facts are true, and that the claim fails. What the decisions in *Pinholster* and *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), make clear is that state court summary denials of habeas corpus claims are governed by § 2254(d)(1), not § 2254(d)(2). Indeed, the United States Supreme Court was fully aware of

California's practice of adjudicating habeas corpus claims based on assumed facts. Under California law, the court presumes that the well pleaded factual allegations in a petition are true, so that the petitioner need not prove them in the petition. *See People v. Duvall*, 9 Cal. 4th 464, 474-75, 37 Cal. Rptr. 2d 259 (1995) ("An appellate court . . . [asks] whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief"); *In re Clark*, 5 Cal. 4th 750, 769 n.10, 21 Cal. Rptr. 2d 509 (1993) (court reviews petition to see "whether petition states a prima facie case for relief, i.e., whether it states facts which, if true, entitle the petitioner to relief" (citation omitted)). In *Pinholster*, the Court cited California's general habeas practice rule with approval. *Id.*, 131 S. Ct. at 1402-03, n.12.[2]

Relying on *Michael Williams v. Taylor*, 529 U.S. 420, and *Wellons v. Hall*, __ U.S. __, 130 S. Ct. 727, 175 L. Ed. 2d 684 (2010) (per curiam), Petitioner contends that he is entitled to an evidentiary hearing because the state court failed to afford him a fair opportunity to develop and present the facts supporting his claims. (Pet. at 11-13.) However, in denying Petitioner's habeas corpus petition, the California Supreme Court assumed the truth of the factual allegations that Petitioner alleged. Thus, Petitioner's claims were put in the best possible factual posture and Petitioner in effect received the benefit of an evidentiary hearing. In

[2] During oral argument, the Chief Justice pointed out to Pinholster's counsel the advantage state habeas practitioners have in California when alleged facts are assumed true. In defending the Ninth Circuit Court of Appeal's reliance on new evidence presented in federal court, Pinholster's counsel denigrated California's habeas procedures:

> [Respondent's counsel Sean Kennedy]: "But turning to the new evidence, there is a reason things like this happen. In California, the claim was denied without any hearing and without any explanation. And then the -- the case moved to Federal court. . . ."
>
> [Chief Justice John G. Roberts]: "Just to pause for a moment, you said there was no hearing in the State court. Well, that was because the State court, pursuant to the established procedures, assumed everything you wanted to show was true. It's a little bit much. I mean, you were not going to be in any better position after a hearing than you were before the State court."

http://www.supremecourt.gov/oral_arguments/argument_transcripts.aspx (09-1088, *Cullen v. Pinholster* transcript at 30.)

light of this, nothing in *Michael Williams* supports Petitioner's claim for an evidentiary hearing.

Petitioner's reliance on *Wellons* is also misplaced. In *Wellons*, the petitioner alleged a claim relating to ex parte contacts between the judge and the jury. There was no record on which to raise the issue on appeal, and the claim was then inexplicably deemed procedurally barred under the doctrine of res judicata by the state court on habeas. *Wellons v. Hall*, 130 S. Ct. at 728. The majority in *Wellons* stated that "it would be bizarre if a federal court had to defer to state-court factual findings, made without an evidentiary record." *Id.* at 730 n.3. Petitioner fails to explain how the observation in *Wellons* relates to his claims pending before this Court. All of Petitioner's claims were denied by the state court on the merits after the state court assumed the truth of his allegations.

Petitioner also argues that the state habeas record in this case is significantly different from the one the California Supreme Court reviewed in *Pinholster* because, there, the state court issued an Order to Show Cause, but the state court in Petitioner's case deprived Petitioner of an opportunity to develop his claims. (Pet. Brief at 13.) This is a distinction without a difference. In *Pinholster*, the California Supreme Court initially issued an Order to Show Cause but later retracted it as improvidently granted. *Pinholster*, 131 S. Ct. at 1396 n.1. The issuance of the Order to Show Cause did not establish a prima facie determination that *Pinholster* was entitled to the relief requested; instead, it only established "a preliminary determination" that a prima facie case existed. *In re Serrano*, 10 Cal. 4th 447, 454-55, 41 Cal. Rptr. 2d 695 (1995). The subsequent withdrawal of the Order to Show Cause as improvidently granted resulted in a summary denial, just as in this case.

Petitioner claims that applying § 2254(d) to preclude an evidentiary hearing when he was unable to fully develop facts in state court violates the Suspension Clause. (Pet. Brief at 16, n.11.) Petitioner is wrong. The Supreme Court made it clear over a decade ago that AEDPA does not violate the Suspension Clause even

though "it does affect the standards governing the granting of such relief." *Felker v. Turpin*, 518 U.S. 651, 654, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). The Ninth Circuit Court of Appeals, citing *Felker*, has similarly held that § 2254(d)(1)'s restriction of habeas relief to state court decisions that are contrary to or an unreasonable application of clearly established federal law is not an unconstitutional suspension of the writ because it "simply modifies the preconditions for habeas relief, and does not remove all habeas jurisdiction." *Crater v. Galaza*, 491 F.3d 1119, 1125-26 (9th Cir. 2007).[3] Certainly, denying Petitioner an evidentiary hearing when he cannot meet the required threshold showing that the state court decision was unreasonable within the meaning of § 2254(d) does not violate the Suspension Clause. *See Sanders v. Curtin*, No. 08-CV-14448, 2011 WL 1753491, at *12, *22 (E.D. Mich. May 9, 2011) (holding that *Pinholster* precludes a hearing or considering evidence not presented to state court, and denying claim that AEDPA violates the Suspension Clause).

Petitioner's claim that he is entitled to an evidentiary hearing to develop new evidence and/or additional claims to be presented to the state court (Pet. Brief at 16-17) is meritless. The Supreme Court made it clear in *Pinholster* that Congress did not enact AEDPA in order to have federal courts developing claims to then be presented to state courts. Rather, AEDPA's provisions are designed to "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.'" *Pinholster*, 131 S. Ct. at 1401, quoting *Michael Williams v. Taylor*, 529 U.S. at 429. In *Coddington v. Cullen*, the court described such an approach as "turn[ing] the

[3] *Accord Evans v. Thompson*, 518 F.3d 1, 11-12 (1st. Cir. 2008), *affirming Evans v. Thompson*, 465 F. Supp. 2d 62 (D. Mass. 2006) (rejecting Suspension Clause and due process claims). Indeed, even those portions of AEDPA that completely bar federal habeas review do not violate the Suspension Clause. *Villanueva v. United States*, 346 F.3d 55, 61 (2d Cir. 2003) (restrictions on successive petitions do not violate Suspension Clause); *Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (statute of limitations does not violate Suspension Clause); *Miller v. Marr*, 141 F.3d 976, 977-78 (10th Cir. 1998) (same).

entire federal habeas process on its head." *Id*., 2011 WL 2118855, *3. It also explained that "[t]o place the federal courts in the position of a handmaiden to the state courts, i.e., the fact developer, would require an entire revamping of federal law." *Id*.

Petitioner argues that briefing the application of § 2254(d) before conducting an evidentiary hearing would be premature and contrary to the goal of judicial efficiency. (Pet. Brief at 17-18.) Just the opposite is true. Conducting an evidentiary hearing before a petitioner satisfies the "threshold restrictions" set forth in § 2254(d), *Renico v. Lett*, __ U.S. __, 130 S. Ct. 1855, 1862 n.1, 176 L. Ed. 2d 678 (2010), would be an utter waste of judicial resources, since a petitioner's inability to satisfy §2254(d) would end the litigation. *Pinholster*, 131 S. Ct. at 1411 n.20 (if § 2254(d) is not overcome, the writ of habeas corpus cannot be granted and the court's analysis is at an end). Furthermore, in every instance where a petitioner is allowed to develop evidence for the first time in federal court without passing through the "threshold restrictions" of § 2254(d), the deference standard is being improperly forced to "accommodate" and "preserve" the "opportunity" for future litigation and possible evidentiary hearings. *Pinholster*, 131 S. Ct. at 1411 n.20. Such factual development will needlessly prolong resolution of the case on claims upon which *Pinholster* precludes relief based solely on the state court record. It would therefore be an abuse of discretion to develop evidence before conducting the § 2254(d) inquiry. Delaying resolution of such claims conflicts with AEDPA's legislative purpose "'to reduce delay in the execution of state and federal criminal sentences, particularly in capital cases . . .'" *Baze v. Rees*, 553 U.S. 35, 69-70, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008).

///

///

///

For the above reasons, Petitioner's request for an evidentiary hearing must be denied.

Dated: September 14, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
KEITH H. BORJON
Supervising Deputy Attorney General

/s/ Herbert S. Tetef
HERBERT S. TETEF
Deputy Attorney General
Attorneys for Respondent

LA2009505879
50972011.doc

CERTIFICATE OF SERVICE

Case Name: **Ernest Dewayne Jones v. Michael Martel, Acting Warden of California State Prison at San Quentin (DEATH PENALTY CASE)**

No. **CV-09-2158-CJC**

I hereby certify that on September 14, 2011, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO PETITIONER'S SUPPLEMENTAL BRIEF ON THE EFFECT OF *CULLEN v PINHOLSTER* ON THE COURT'S POWER TO GRANT AN EVIDENTIARY HEARING

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 14, 2011, at Los Angeles, California.

Linda Greenfield
Declarant

Linda Greenfield
Signature

50973340.doc