Michael Laurence (Bar No. 121854)
Cliona Plunkett (Bar No. 256648)
Bethany Lobo (Bar No. 248109)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov
Mlaurence@hcrc.ca.gov

Attorneys for Petitioner Ernest Dewayne Jones

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

Michael Laurence (Bar No. 121854)
Cliona Plunkett (Bar No. 256648)
Bethany Lobo (Bar No. 248109)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov
Mlaurence@hcrc.ca.gov
Attorneys for Petitioner Ernest Dewayne Jones

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

I. INTRODUCTION

Mr. Jones requests a federal evidentiary hearing followed by a single round of briefing that will allow the Court to determine Mr. Jones's satisfaction of both 28 U.S.C. section 2254(a) and (d). There are three primary reasons why *Pinholster* is consistent with this request and should not be construed to delay fact-finding and resolution of Mr. Jones's claims. *See Cullen v. Pinholster*, 563 U.S. ____, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). First, *Pinholster* merely resolved whether a federal court may consider new evidence in deciding whether 28 U.S.C. section 2254(d)(1) bars the granting of relief. Pet'r's Supplemental Br. on the Effect of *Cullen v. Pinholster* on the Ct.'s Power to Grant an Evidentiary Hr'g (Supp. Br.) 6-8, July 18, 2011, ECF No. 68. Significantly, *Pinholster* did not affect controlling case law regarding Mr. Jones's entitlement to a hearing and did not dictate that the hearing must follow a section 2254(d)

determination. Supp. Br. 8-10. Second, briefing the application of 28 U.S.C. section 2254(d) on a claim-by-claim basis at this early stage of the proceedings would result in substantial costs, delay the ultimate resolution of this case, and unnecessarily require a second round of comprehensive briefing on similar issues under section 2254(a) following a hearing. Supp. Br. 17-19. Third, prompt factfinding is particularly warranted given that Mr. Jones diligently developed and presented facts in support of his claims, but defects in California's postconviction process precluded the full and fair development and resolution of his claims. Supp. Br. 11-17. As set forth in Section IV, *infra*, when this Court conducts its section 2254(d) determination, Mr. Jones will demonstrate that he satisfies both section 2254(d)(1) and (d)(2) due, *inter alia*, to these systemic defects.

II. *PINHOLSTER* DID NOT MANDATE THE REORDERING OF FEDERAL HABEAS PROCEEDINGS, AND RESPONDENT'S REPEATED ASSERTION THAT THIS COURT MUST MAKE A "THRESHOLD" SECTION 2254(D) DETERMINATION IS WITHOUT SUPPORT.

Respondent repeatedly asserts that *Pinholster* requires this Court to treat section 2254(d) as a "threshold inquiry." Respondent's Opposition to Pet'r's Supplemental Br. on the Effect of *Cullen v. Pinholster* on the Ct.'s Power to Grant an Evidentiary Hr'g (Opp'n) 3, Sept. 14, 2011, ECF No. 71; *see also id*. at 4 (describing section 2254(d) as a "threshold determination"); *id*. at 5 (describing section 2254(d) as a "threshold bar"). Respondent's contention (1) disregards the express language of section 2254(d), which is framed as a bar to the *ultimate* grant of federal habeas relief rather than as a threshold inquiry;[1] and (2) ignores the limited nature of the issue that *Pinholster* resolved.[2] Critically, respondent offers no justification to conduct the section

[1] *See, e.g.*, *(Terry) Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Section 2254(d) "places a new constraint on the power of a federal habeas court *to grant* a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.") (emphasis added).

[2] *Pinholster*, 131 S. Ct. at 1398 (resolving only that the § 2254(d)(1) inquiry "is limited to the record that was before the state court that adjudicated the claim on the merits").

2254(d) inquiry at this stage of the proceedings—when a full understanding of the factual and legal bases of each claim is lacking and the application of the Supreme Court's recent decisions has not been fully resolved by the Ninth Circuit.

Respondent initially correctly states the sole relevant issue that *Pinholster* decided: whether a federal court may consider evidence not previously presented to the state court in determining whether a habeas corpus petitioner satisfies 28 U.S.C. section 2254(d)(1). Opp'n 1-2. The Court expressly left the law in two areas unchanged, as set forth below: (1) the permissibility of a federal court permitting fact development and conducting an evidentiary hearing prior to resolving whether section 2254(d) bars relief; and (2) as set forth in Section IV, *infra*, the application of 28 U.S.C. section 2254(d)(2). 131 S. Ct. at 1398, 141 n.20.

Post-*Pinholster* case law confirms that federal fact development is permitted prior to the section 2254(d) determination, when, as here, it is warranted by the particular facts of the case. *See, e.g.*, *Riel v. Warden*, No. CIV S-01-0507 LKK DAD, 2011 U.S. Dist. LEXIS 121661, *4 (E.D. Cal. Oct. 20, 2011) ("The Supreme Court in *Pinholster* did not bar this court from taking evidence in a federal habeas corpus proceeding."). As a result, courts have held that "*Pinholster* did not . . . alter or even speak to the standards governing discovery set forth in [Habeas] Rule 6," *Conway v. Houk*, No. 2:07-cv-947, 2011 WL 2119373, *3 (S.D. Oh. May 26, 2011), and have continued to order discovery prior to conducting an inquiry into whether section 2254(d) would ultimately bar relief. *See, e.g.*, *Riel*, 2011 U.S. Dist. LEXIS 121661, *5 (permitting deposition of petitioner's mother, after finding that *Pinholster* did not bar the gathering of evidence in a federal habeas corpus proceeding prior to a section 2254(d) determination where good cause exists); *Quezada v. Brown*, No. 08-CV-5088 (KAM), 2011 WL 4975343, *2 (E.D.N.Y. Oct. 19, 2011) (denying state's motion to reconsider order permitting discovery prior to section 2254(d) determination, because *Pinholster* did not address propriety of fact development); *Smith v. Bagley*, No. 1:00 CV 1961, 2011 WL 4345909, *2-3 (N.D. Oh. Sept. 15, 2011) (noting that *Pinholster* did not alter the standards governing discovery and thus refusing to vacate pre-*Pinholster* order permitting discovery prior to section 2254(d) determination); *Bemore v. Martel*,

No. 08-cv-0311 WAG, 2011 WL 2650337, *2-3 (S.D. Cal. Jul. 6, 2011) (granting petitioner's motion to expand the record to include witness declaration, prior to the section 2254(d) determination); *Gapen v. Bobby*, No. 3:08-cv-280, 2011 U.S. Dist. LEXIS 62177, *5-6 (S.D. Oh. June 10, 2011) (permitting pre-section 2254(d) discovery and 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.").

Similarly, courts have ordered evidentiary hearings. *See Ballinger v. Prelesnik*, No. 2:09-CV-13886, 2011 WL 4905583, *3 (E.D. Mich. Oct. 14, 2011) (holding that hearing was required where petitioner's allegations, if established, would support relief under 2254(a)); *Hale v. Davis*, No. 07-12397, 2011 WL 3163375, *8 (E.D. Mich. Jul. 27, 2011) ("Although *Cullen* certainly addresses how and when evidence may be considered, it did not decide or address when an evidentiary hearing is proper."). Notably, in *Ballinger*, the district court held that 2254(d) did not bar a federal evidentiary hearing because "[t]he state court . . . concluded that petitioner's claim was meritless without further factual development. However, it refused to provide [p]etitioner with any opportunity to develop a record to support his claim . . . ." 2011WL 4905583, *3.

Respondent erroneously relies on *Ybarra v. McDaniel*, 656 F.3d 984 (9th Cir. 2011), to assert that post-*Pinholster*, satisfying section 2254(d) is a prerequisite to the granting of an evidentiary hearing. *Ybarra* provides no support for respondent's assertion. Respondent cites to the court's discussion of Mr. Ybarra's claim that the trial court improperly denied his change of venue motion. Opp'n 3 (quoting footnote 3 of the Ninth Circuit's opinion); *see also Ybarra*, 656 F.3d at 991-94. The Nevada Supreme Court first resolved this issue in a pretrial interlocutory appeal, then reaffirmed its decision in a subsequent appeal from the denial of a state post-conviction petition. *Ybarra*, 656 F.3d at 991-94 & n.4. The issue on appeal to the Ninth Circuit was whether the district court erred in concluding that the issue was unexhausted, and if so, whether Mr. Ybarra was entitled to relief on the state court record. *Id*. at 991.

The Ninth Circuit concluded that the claim had been exhausted, but that Mr. Ybarra was not entitled to relief. *Id.* at 991-92. The basis for the court's decision, however, was not that

section 2254(d) precluded "additional factfinding." Opp'n 3. Rather, it was premised upon the case's lengthy, distinctive procedural history: The Nevada Supreme Court's 1980 ruling on Mr. Ybarra's interlocutory appeal had long ago resolved the underlying facts of his claim and was "entitled to a presumption of correctness." *Ybarra*, 656 F.3d at 992. Most importantly, because the underlying facts were undisputed, Mr. Ybarra did not argue—and had no reason to argue—that additional factfinding, such as a federal evidentiary hearing, was necessary to resolve his claim.[3] Given that the state record contained the universe of facts that Mr. Ybarra believed entitled him to relief, the Ninth Circuit's decision to resolve the merits of the claim, rather than to remand to the district court, provides no support for respondent's position.

III. RESOLVING THE APPLICATION OF 28 U.S.C. SECTION 2254(D) AFTER THE EVIDENTIARY HEARING BEST SERVES THE INTERESTS OF JUDICIAL ECONOMY.

As explained in the Supplemental Brief, a claim-by-claim assessment of whether 2254(d) bars relief is best made after full factual development of the claims. At that point, the Court will be best positioned to assess whether the state court's decision may serve to bar relief that otherwise would be required by the Constitution. *Cf. Tice v. Johnson*, 647 F.3d 87, 103 (4th Cir. 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."). This approach also will afford this Court the benefit of the Ninth Circuit's resolution of any ambiguity in the application of *Pinholster* and *Harrington v. Richter*, __ U.S. __, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). This

[3] Given the extensive state court process that Mr. Ybarra received, he unsurprisingly did not argue that a federal evidentiary hearing was necessary to resolve any of his claims. Prior to the district court's denial of his federal habeas corpus petition, Mr. Ybarra had filed four state post-conviction petitions, at least one of which was resolved after an extensive evidentiary hearing. *Ybarra*, 656 F.3d at 988-89; *see also Ybarra v. State*, 103 Nev. 8, 10, 731 P.2d 353, 354 (1987) (explaining that the trial court conducted a two-day hearing on his ineffective assistance of counsel claims before denying them in a 58-page order). While the federal proceedings were ongoing, Mr. Ybarra's fourth state petition was denied after the state court conducted a separate two-day evidentiary hearing and considered more than 3,000 pages of exhibits. *Ybarra v. State*, 127 Nev. Adv. Op. 4, 247 P. 3d 269, 271 (2011).

Court already has ordered briefing of the effect of *Pinholster* in at least 25 capital habeas corpus cases and the issue has been presented in numerous capital cases before the Ninth Circuit. Unquestionably, briefing the application of section 2254(d) now will require the parties to (1) repeat the numerous arguments already presented in other cases and (2) re-brief the issues after the Ninth Circuit provides further guidance.

IV. MR. JONES SATISFIES SECTIONS 2254(D)(1) AND 2254(D)(2) BECAUSE HE WAS DEPRIVED OF A FAIR ADJUDICATION OF HIS CLAIMS IN STATE COURT.

As set forth above, *Pinholster* requires no deviation from the Court's previous practice of holding an evidentiary hearing prior to adjudicating section 2254(d) issues. Mr. Jones, however, is prepared to demonstrate that he satisfies both sections 2254(d)(1) and (d)(2) due to systemic deficiencies in the state court process, with respect to each of the claims on which he has requested an evidentiary hearing. If this Court believes it is appropriate to resolve section 2254(d) issues at this stage, Mr. Jones requests that the Court first solicit briefing and rule on these systemic issues. If the Court finds that section 2254(d) is satisfied on one of these bases, no costly claim-by-claim section 2254(d) briefing will be necessary. An overview of these systemic issues is set forth in sections IV. B. and IV. C. below.

A. California's Defective Postconviction Process

Under California law, after a habeas petition is filed, the court may request an informal response from the respondent. Petitioner is then entitled to file an informal reply. Cal. R. Ct. 4.551(b)(1) & (2) (West 2011). The court must then assume the petitioner's allegations to be true and determine whether his claims state a prima facie case for relief. If so, the court *must* issue an order to show cause (OSC) on the relevant claims. Cal. R. Ct. 4.551(c) (West 2011); *Durdines v. Super. Ct.*, 76 Cal. App. 4th 247, 252, 90 Cal. Rptr. 2d 217 (1999). Following the issuance of an OSC, respondent is entitled to file a return arguing that petitioner's detention is legal; petitioner may file a responsive traverse. Cal. R. Ct. 4.551(d) & (e) (West 2011). The court may then hold an evidentiary hearing prior to granting or denying the petition. Cal. R. Ct. 4.551(f) (West 2011).

As detailed below, the California Supreme Court fails to issue an OSC in the overwhelming majority of habeas proceedings. Consequently, nearly every petitioner is afforded only the limited discovery that California provides outside of the OSC context. Absent an OSC, California petitioners lack the power to issue subpoenas and compel witness testimony. Cal. Penal Code § 1484 (West 2011); *Durdines*, 76 Cal. App. 4th at 252 (holding that the court lacked power to solicit trial counsel's declaration before the issuance of a writ or OSC). Thus, the primary mechanism for postconviction discovery is California Penal Code section 1054.9. Section 1054.9 provides that, prior to filing their state habeas petitions, capital petitioners shall have reasonable access to materials they would have been entitled to receive at the time of trial, to the extent that such materials are currently in the possession of the prosecution or law enforcement authorities who were involved in the investigation or prosecution of the case. Cal. Penal Code § 1054.9 (West 2011); *In re Steele*, 32 Cal. 4th 682, 697, 10 Cal. Rptr. 3d 536 (2004). However, California courts—including the state Supreme Court—have limited the scope of available discovery by means of procedural hurdles that are frequently impossible for petitioners to surmount.

Chief among these limitations is the California Supreme Court's mandate that petitioners are not entitled to receive material that would have been discoverable at trial, but which has never been disclosed, unless they are able to demonstrate a basis to believe that the material exists (or existed at trial). *Barnett v. Super. Ct.*, 50 Cal. 4th 890, 901, 114 Cal. Rptr. 3d 576 (2010). In this way, postconviction discovery in California capital cases is determined by fiat of a guessing game. Petitioners can access discoverable material only to the extent that habeas counsel is able to divine sufficient clues to the existence of material that neither their counsel nor they have ever seen, but which they would unquestionably be entitled to access under the discovery rules were the material's existence known to them.

Capital petitioners in California are also hampered in their ability to develop the factual predicate of their claims due to facets of the state's system that enhance the probability that relevant evidence will be lost or destroyed. The California Supreme Court has held that section

1054.9 does not impose a duty on law enforcement or the prosecution to preserve evidence pending the resolution of postconviction proceedings. *Steele*, 32 Cal. 4th at 695. Moreover, state prosecutors routinely insist that there is no mechanism by which petitioners can obtain a preservation order, regardless of the circumstances. Declaration of Michael Laurence (Laurence Decl.), attached as an Exhibit to this Brief, ¶ 9, Ex. A (*In re La Twon Weaver*, No. CRN22688, Points and Authorities in Opposition to Motion for Postconviction Discovery at 26 (Sept. 30, 2011)). Thus, as the California Supreme Court has acknowledged, "the longer the delay [in bringing a postconviction discovery motion], the greater the likelihood that the postconviction discovery items sought will no longer exist[.]" *Catlin v. Super. Ct.*, 51 Cal. 4th 300, 308, 120 Cal. Rptr. 3d 135 (2011). In California, the state's unparalleled delay in appointment of capital postconviction counsel heightens the twin risks of evidence destruction and witness unavailability. All capital petitioners, including Mr. Jones, face delays of many years between their sentencing and appointment of habeas counsel, as illustrated by the 327 condemned prisoners currently awaiting habeas counsel. Laurence Decl. ¶ 8. Thus, even before a petitioner's postconviction investigation has begun, California's procedures have already impeded the full and fair development of meritorious claims for relief.

California petitioners face additional restrictions to their ability to develop the factual predicate of their claims. California state prosecutors routinely argue—and some lower courts have accepted—that section 1054.9 does not permit petitioners to access material that law enforcement or the prosecution did not possess at time of trial, despite the fact that they currently possess it. This includes both materials that were possessed by others at the time of trial and materials that did not exist until after the petitioner's conviction. Laurence Decl. ¶ 10, Ex. B (*In re Bell*, No. CR 133096, Memorandum of Points and Authorities in Opposition to Motion for Post-conviction Discovery at 43 (July 13, 2009) ("Any materials, however relevant to [petitioner's] trial, subsequently acquired by the prosecution team are not available under section 1054.9. This includes information that did not exist at the time of trial. Also, any materials whose relevance only became clear after trial would not be subject to discovery."); Laurence

Decl. ¶ 12, Ex. D (*In re Kerry Lyn Dalton*, No. CR 135002, Amended Statement of Decision re: Motion for Post-Conviction Discovery at 4 (June 28, 2011) (holding that section 1054.9 does not encompass materials that did not exist at the time of trial)).

Additionally, California state prosecutors routinely argue that section 1054.9 does not permit petitioners to access favorable material possessed by various government entities, arguing that such entities are not part of the "prosecution team." Laurence Decl. ¶ 11, Ex. C (*People v. Dalton*, No. CR 135002, Points and Authorities in Opposition to Motion for Postconviction Discovery at 24–25 (Oct. 27, 2009) (arguing that petitioner is not entitled to access favorable material contained in the mental health records of prosecution witnesses possessed by government agencies such as the county jail and County Mental Health Services). State prosecutors have also opposed petitioners' requests for privilege logs that would allow the courts and petitioners to determine whether the prosecution has disclosed all discoverable material to petitioners. Laurence Decl. ¶ 9, Ex. A (*In re La Twon Weaver*, No. CRN22688, Points and Authorities in Opposition to Motion for Postconviction Discovery at 27 (September 30, 2011)).

The effect of the deficiencies in California's postconviction process is to insulate most meritorious constitutional claims from genuine review. This failing of the state postconviction system includes, but also extends far beyond, Mr. Jones's case. From the effective date of the AEDPA in April 1996 to the present, the California Supreme Court has denied or dismissed 388 of 446 capital habeas petitions, or 87 percent—including Mr. Jones' petition—without issuing an OSC. Laurence Decl. ¶ 6. In this time frame, it has granted relief in only 13 cases – just over two percent of those filed. *Id.* Since 2008, it has been exceptionally rare for the state court to issue an OSC concerning any claims other than those brought pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). From 2008-11, the state court adjudicated 120 capital habeas petitions, of which it denied 98. or 82 percent, without issuing an OSC. Fourteen of the 18 OSCs it granted, or 78 percent, concern *Atkins* claims. Laurence Decl. ¶ 7.

As detailed in the following sections, the U.S. Constitution and section 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) obligate this Court to provide a

forum for vindicating federal constitutional rights where, as here, the state habeas court has failed in its obligation to do so. *Pinholster* did nothing to alter these longstanding constitutional and statutory obligations of the federal courts.

B. ***Pinholster*** **Left Intact the Controlling Law Governing a Habeas Petitioner's Entitlement to an Evidentiary Hearing Under Section 2254(d)(2).**

The Ninth Circuit consistently has held that when a petitioner presents a colorable claim for relief, but the state court denies the claim without a hearing necessary to adjudicate the claim fairly, the denial constitutes an unreasonable determination of the facts under section 2254(d)(2). *See, e.g.*, *Hurles v. Ryan*, 650 F.3d 1301, 1311 (9th Cir. 2011) (holding post-*Pinholster* that state court decision was based on an unreasonable determination of the facts because the court "granted no evidentiary hearing or other opportunity for Hurles to develop his claim" of bias); *Earp v. Ornoski*, 431 F.3d 1158, 1169-70 (9th Cir. 2005) (holding that state court's failure to conduct hearing on prosecutorial misconduct claim was an unreasonable determination of the facts); *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003) (holding that state court's decision denying ineffective assistance of counsel claim without a hearing was unreasonable). Because *Pinholster* did not address the scope of section 2254(d)(2), it did not alter these well-established Ninth Circuit precedents 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); *see also 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)); *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*, 350 F.3d at 1054-55. 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*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), *overruled in part by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992). "If the defendant can establish any one of those [*Townsend*] 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." *Earp*, 431 F.3d at 1167.[4] Given that Mr. Jones has demonstrated his right to an evidentiary hearing under the *Townsend* factors, his federal habeas petition satisfies section 2254(d)(2).[5]

C. <u>The California Supreme Court's Summary Denial of Mr. Jones's Petition Was an Unreasonable Application of Relevant Supreme Court Precedent.</u>

The California Supreme Court's summary denial was an unreasonable application of U.S. Supreme Court precedent under section 2254(d)(1) for the two reasons set forth below. First, the

---

[4] 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.

[5] Respondent seeks to distinguish the Ninth Circuit's decisions in *Nunes* and *Earp* by assertion that section 2254(d)(2) does not apply to a "summary denial." Opp'n 5. Respondent's argument, however, ignores the fact that the California Supreme Court issued the same summary denial in *Earp* as it did in Mr. Jones's case. *Earp*, 431 F.3d at 1164 ("The California Supreme Court . . . summarily denied his state habeas corpus petition on the merits without affording him an evidentiary hearing on any of his claims.").

state court unreasonably applied *Carter v. Texas*, 177 U.S. 442, 20 S. Ct. 687, 44 L. Ed. 839 (1900), and its progeny, by unreasonably refusing to permit Mr. Jones factual development of his well-pled claims. Second, the state court unreasonably applied the Supreme Court's precedents which mandate that a habeas petitioner receive one full and fair opportunity to develop his claims. Construing *Pinholster* to mandate that Mr. Jones also be deprived of this opportunity in federal court would violate due process and the Suspension Clause.

1. The California Supreme Court Violated the Well-Established Rule Requiring Factual Development When a Well-Pled Claim Is Presented.

Although Mr. Jones presented the California Supreme Court with detailed allegations and supporting exhibits, the court refused to permit him to fully develop the facts in support of his claims. The California Supreme Court's summary denial was an unreasonable application of the clearly-established rules of *Carter v. Texas*, *McNeal v. Culver*, 365 U.S. 109, 81 S. Ct. 413, 5 L. Ed. 2d 445 (1961), and *Coleman v. Alabama*, 377 U.S. 129, 84 S. Ct. 1152, 12 L. Ed. 2d 190 (1964), which hold that a state court violates the Constitution when it dismisses a well-pleaded federal claim without an evidentiary hearing or other opportunities to develop facts in support of the claim.

In state court, Mr. Jones presented exhaustive and verified allegations complete with voluminous evidentiary support—which under California law must be accepted as true, *People v. Duvall*, 9 Cal. 4th 464, 474-75, 37 Cal. Rptr. 2d 259 (1995), in assessing whether petitioner established a prima facie case for relief on each of his claims. As exhaustively detailed in Petitioner's Motion for an Evidentiary Hearing, ECF No. 59, these allegations, if proved, entitle him to relief and thus an evidentiary hearing is required. The California Supreme Court's rejection of Mr. Jones's well-pleaded facts and refusal to permit merited factual development was an unreasonable application of well-established federal law.[6] As early as 1900, the United States

[6] As explained in the Supplemental Brief, California state law guaranteed such fact development by the issuance of an OSC. *See, e.g.*, *People v. Romero*, 8 Cal. 4th 728, 737, 35 Cal. Rptr. 2d 270 (1994); Cal. Penal Code § 1476 (West 2011). An OSC 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]

Supreme Court established a federal procedural rule, requiring state courts to permit the presentation of factual support for a "distinctly and sufficiently pleaded" federal constitutional violation. *Carter*, 177 U.S. at 447-49;[7] *see also Angel v. Bullington*, 330 U.S. 183, 188, 67 S. Ct. 657, 91 L. Ed. 832 (1947) (noting that states may not avoid obligations to adjudicate constitutional claims that are "plainly and reasonably made"); *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13. 68 L. Ed. 143 (1923) (holding that states may not "place unreasonable obstacles" in the way of persons seeking to vindicate federal rights that are "plainly and reasonably made"). In *Coleman*, the Court reaffirmed this principle, reversing the Alabama Supreme Court's denial of a challenge to the racial composition of a grand jury because "the record shows that petitioner was not permitted to offer evidence to support his claim." 377 U.S. at 133. Similarly, in cases arising on habeas review, the Supreme Court continued to invalidate

---

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), *rejected on other grounds by In re Fields*, 51 Cal. 3d 1063, 1070 n.3, 275 Cal. Rptr. 384 (1990). Second, it creates a cause of action that requires a reasoned, written resolution under Article VI, section 14 of the California Constitution. *Romero*, 8 Cal. 4th at 740. Consonant with this requirement, the court must "do and perform all other acts and things necessary to a full and fair hearing and determination of the case." Cal. Penal Code § 1484 (West 2011). Finally, it confers the power to authorize fact development through traditional forms of discovery, 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) *superseded by statue on other grounds as stated in Steele*, 32 Cal. 4th at 691; *Bd. of Prison Terms v. Super. Ct.*, 130 Cal. App. 4th 1212, 1236-42, 31 Cal. Rptr. 3d 70 (2005) (holding that court cannot order discovery before issuance of an OSC; court's powers as set forth in Penal Code section 1484 to hear evidence, subpoena witnesses, and do whatever is necessary to ensure fairness are not available until issues joined); *Durdines v. Superior Court*, 76 Cal. App. 4th at 252 (holding that court lacked power before the issuance of a writ or OSC to solicit a declaration from trial counsel).

[7] In *Carter*, the Supreme Court reversed a state appellate court's affirmance of a murder conviction where the trial court denied a motion to quash the indictment on the ground that the grand jury excluded African Americans. The defendant's motion set forth factual allegations concerning the exclusion of African-American grand jurors and offered to introduce witnesses to prove the allegations. The trial court refused to hear any evidence on the issue and overruled the motion "without investigating whether the allegation was true or false." 177 U.S. at 448. In reversing and remanding the case, the Court held: "The necessary conclusion is that the defendant has been denied a right duly set up and claimed by him under the Constitution and laws of the United States." *Id*. at 449.

state courts' decisions that were made without meaningful factfinding where constitutional claims were supported by "factual allegations not patently frivolous or false." *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 118-19, 76 S. Ct. 223, 100 L. Ed. 126 (1956); *see also Cash v. Culver*, 358 U.S. 633, 638, 79 S. Ct. 432, 3 L. Ed. 2d 557 (1959) (finding the allegations of the habeas petition "made it incumbent upon the Florida courts to determine what the true facts were"); *McNeal*, 365 U.S. at 117 (accord); *Reynolds v. Cochran*, 365 U.S. 525, 533, 81 S. Ct. 723, 5 L. Ed. 2d 754 (1961) ("The allegations of his petition for habeas corpus indicated, if true, that he had been denied the assistance of counsel he had retained. He is entitled to a hearing to establish the truth of those allegations."). In *Herman*, the Supreme Court noted the "sharp dispute as to the facts material to a determination of the constitutional questions involved" and described this as "the very kind of dispute which should be decided only after a hearing." *Id*. at 120-21. Because Mr. Jones sufficiently pled his claims, the California Supreme Court's decision denying him the opportunity to fully factually develop these claims was an unreasonable application of this well-established federal law as determined by the United States Supreme Court.

This conclusion fully comports with Supreme Court case law applying provisions of the AEDPA. In *(Michael) Williams v. Taylor*, 529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000), the Court reviewed the purposes of the AEDPA and reaffirmed that the statutory scheme may not prevent the vindication of federal constitutional rights when a state court has prevented a petitioner from fully developing the record in state proceedings:

> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal 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. Yet 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.

529 U.S. at 437; *see also Boumediene v. Bush*, 553 U.S. 723, 729, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) (observing that deprivation of the opportunity for federal review, after having been denied the same in state court, "effects an unconstitutional suspension of the writ").

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) (finding deference was not required when the state court had the opportunity to consider "a more complete record, but chose to deny" the request for an evidentiary hearing); *Rivera v. Quarterman*, 505 F.3d 349, 356-57 (5th Cir. 2007) (ruling that deference was not due where state court dismissal for failing to make a prima facie showing was an unreasonable application of clearly established federal law). On the contrary, the Constitution, the 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. As the United States Supreme Court succinctly held in *Panetti v. Quarterman*:

> [A]fter failing to provide petitioner with this process, notwithstanding counsel's sustained effort, diligence, and compliances with court orders . . . . our review of petitioner's underlying incompetency claim is unencumbered by the deference AEDPA normally requires.

551 U.S. 930, 948, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007); *see also Winston*, 592 F.3d at 553; *Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir. 2011) (en banc) ("[I]f we succumb to the temptation to abdicate our responsibility on habeas review, we might as well get ourselves a big, fat rubber

stamp, pucker up, and kiss The Great Writ good-bye."), *cert. denied*, __ S. Ct. __, 2011 WL 3512283 (Oct. 11, 2011); *id.* at 1024 (Kozinski, C.J. concurring) ("deference is neither a blindfold nor a bandana"); *id.* at 1027 ("Comity doesn't mean being comatose.").[8]

Just as the deficiencies in a Texas competency proceeding merited scrutiny in *Panetti*, California's idiosyncratic system for resolving post-conviction petitions for relief generally, and the state's review and consequent denial of the state habeas claims in Mr. Jones's case in particular, compels the conclusion that section 2254(d) does not bar federal habeas relief. This Court is not reviewing a state-court decision that found Mr. Jones failed to prove his claims after being given a full and fair opportunity to do so. Rather, this Court is reviewing the state court's erroneously premature conclusion that, taking all of Mr. Jones's allegations as true and credible, he would not be entitled to relief even if permitted the opportunity to prove his allegations through further fact development, including an evidentiary hearing.[9] Thus, the relevant question is not whether the state court unreasonably denied relief, but whether it unreasonably denied him the benefit of a full and fair fact-finding, including discovery and an evidentiary hearing, in light of controlling law. As set forth in Section IV.A, because the California Supreme Court failed to

---

[8] Respondent's sole response to this argument is that "*Michael Williams* was concerned with § 2254(d)(2) . . . . [and] [n]othing 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." Opp'n 3. Respondent's assertion, however, is contradicted by the Supreme Court's reliance in *Panetti* on the due diligence principles articulated in *(Michael) Williams'*s holding. *Panetti*, 551 U.S. at 948 (holding section 2254(d) did not bar relief when the state's determination was made "after failing to provide petitioner with this process, notwithstanding counsel's sustained effort, diligence, and compliance with court orders").

[9] In California, the 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"), *disapproved on other grounds by People v. Lara*, 48 Cal. 4th 216, 228 n.19, 106 Cal. Rptr. 3d 208 (2010). Under California law, upon receipt of a petition, the court must determine whether it is "sufficient on its face" (i.e., it states facts that, if true, would enable petitioner to prevail). *Romero*, 8 Cal. 4th at 737. In making this initial assessment, the court not only must assume that all factual allegations and incorporated information from appended documents are true, *id.*, but also that all of the allegations and evidence incorporated into them are credible, *In re Serrano*, 10 Cal. 4th 447, 456, 41 Cal. Rptr. 695 (1995).

issue Mr. Jones an OSC, it deprived him of the meaningful, necessary tools for factual development.

2. The Suspension Clause Guarantees a Habeas Petitioner to One Full and Fair Opportunity to Demonstrate the Unconstitutionality of His Detention.

The Suspension Clause of the U.S. Constitution and section 2254(d) of the AEDPA together obligate this Court to provide Mr. Jones with what the California Supreme Court denied him: one meaningful opportunity to vindicate his federal constitutional claims.

a. The Requirements of the Suspension Clause

The Suspension Clause provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. The Supreme Court interprets this provision to guarantee a prisoner in postconviction proceedings one adequate and effective opportunity to demonstrate the illegality of his detention, including a "full and fair opportunity to develop the factual predicate of his claims." *Boumediene*, 553 U.S. at 779, 790; *Felker v. Turpin*, 518 U.S. 651, 663-64, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) (assuming that the Suspension Clause protects the writ of habeas corpus in its modern form).

The Suspension Clause thus permits restriction of federal habeas review only insofar as an alternative collateral review framework affords a full and fair inquiry, including fact-development of claims. *See Swain v. Pressley*, 430 U.S. 372, 381, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977) ("[T]he substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."). *Swain* upheld a statute restricting federal habeas review of petitions originating from the District of Columbia. *Id*. at 375-76. Because the statute maintained the federal courts' authority to review habeas petitions when the local postconviction remedy was "*inadequate or ineffective* to test the legality" of a petitioner's detention, it avoided the serious Suspension Clause questions that would otherwise have been presented. *Id*. at 381 (emphasis added); *see also Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998) (holding that a Suspension Clause

violation occurs where a restriction on habeas renders the writ "inadequate or ineffective" to test the legality of detention). The Court also relied on the same reasoning to uphold the constitutionality of a collateral challenge mechanism for federal prisoners, 28 U.S.C. section 2255, which restricted prisoners' access to federal habeas corpus under section 2254 unless the section 2255 remedy was "inadequate or ineffective" to test the legality of their detention. *United States v. Hayman*, 342 U.S. 205, 223, 72 S. Ct. 263, 96 L. Ed. 2d 232 (1952). The Court found it unnecessary to address whether the writ had been suspended *because* this mechanism sustained petitioners' entitlement to full and fair development and presentation of their postconviction claims. *Id*. at 213-14, 223.

b. Reconciliation of the Suspension Clause and the AEDPA

The Suspension Clause's requirement of a "full and fair opportunity" to present constitutional claims is fully reconcilable with the AEDPA's modification of federal habeas jurisdiction over state prisoners' claims following state postconviction review. Section 2254(d) presupposes that state postconviction courts will assume primary responsibility to adjudicate constitutional violations suffered by state prisoners. *Pinholster*, 131 S. Ct. at 1401. When—and only when—state postconviction courts provide state prisoners with one "full and fair opportunity" to litigate their claims, section 2254(d) requires federal courts to defer to the state courts' decisions by limiting federal relitigation of prisoners' already-adjudicated claims. This promotes comity, finality, and federalism. *Id.* However, "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 (internal citations and quotations omitted). Conversely, affording a prisoner the benefit of adequate state fact-finding procedures is a necessary prerequisite to limiting subsequent federal review to the underlying record.[10] *Boumediene*, 553 U.S. at 790-91; *Winston*, 592 F.3d at 554 (holding

[10] Federal habeas courts may not defer to state court practices that have the object or effect of frustrating enforcement of constitutional rights. *See, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105-06, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (federal courts must consider the effect on state law of a federal scheme of regulation, as well as the state law's purported purposes); *Davis v. Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 68 L. Ed. 143 (1923);

AEDPA deference not required when the state court had the opportunity to consider a more complete record, but denied petitioner's request for an evidentiary hearing).

Thus, section 2254(d) is consistent with the Suspension Clause, because—similarly to the statutes upheld in *Swain* and *Hayman*—it affirms the federal courts' power to review petitioners' claims de novo and grant habeas relief when the state courts' legal or factual determinations inadequately protect petitioners' constitutional rights, specifically including the state court's provision of inadequate postconviction process. *See Panetti*, 551 U.S. at 954; *Dist. Atty's Office v. Osborne*, ___ U.S. ___, 129 S. Ct. 2308, 2319-20, 174 L. Ed. 2d 38 (2009). For instance, section 2254(d)(2) preserves the federal courts' authority to grant relief when a state court summarily denies habeas claims, without affording adequate fact-development (including an evidentiary hearing), despite a prisoner's presentation of a prima facie case for relief. *Nunes*, 350 F.3d at 1055; *see also Wiggins v. Smith*, 539 U.S. 510, 528, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004); *Schriro v. Landrigan*, 550 U.S. 465, 474, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007).

Consistent with the Suspension Clause and section 2254(d), the right of habeas corpus requires that *some* forum afford full and fair fact development of claims, absent fault on the part of the prisoner or his counsel. *See Boumediene*, 553 U.S. at 791 ("§ 2254 'does not equate prisoners who exercise diligence in pursuing their claims with those who do not'") (quoting *Michael Williams*, 529 U.S. at 436-37). Precluding federal review in the absence of such full and fair fact development "effect[s] an unconstitutional suspension of the writ." *Cf. id*. at 792.

Stop the Beach Renourishment v. Fla. Dept. of Envtl. Protection, ___ U.S. ___, 130 S. Ct. 2592, 2608, 177 L. Ed. 2d 184 (2010) (federal courts must ensure that there is no evasion of federal authority to review federal questions by insisting that a non-federal ground of decision has "fair support"). Thus, where "rules" (e.g., those governing summary review) operate to provide more gloss than depth, federal habeas courts must be vigilant in ensuring that the Constitution remains the supreme law of the land. *See, e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (federal courts may even examine a state court interpretation of state law if it appears to be an obvious subterfuge to evade consideration of a federal issue).

c. California's Postconviction Process Presents Federal Constitutional Defects Because It Does Not Allow Most Petitioners, Including Mr. Jones, a "Full and Fair Opportunity" To Develop Their Habeas Claims.

Mr. Jones placed "specific allegations" before the state court that "show[ed] reason to believe" that, were the underlying facts fully developed, he could demonstrate serious constitutional violations that would establish the illegality of his confinement and his entitlement to relief. *Harris v. Nelson*, 394 U.S. 286, 300, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969). However, as set forth in Section IV.A, the state court failed in its duty "to provide the necessary facilities and procedures for an adequate inquiry." *Id*. Once this Court directs section 2254(d) briefing in this case, Mr. Jones will set forth in greater detail the inadequacies of the state court process that were briefly described in that section.[11]

Each claim in Mr. Jones's state petition stated a prima facie case for relief, entitling him to an OSC. The OSC would, in turn, have given him access to the additional discovery procedures that were previously described. The OSC would also potentially have allowed him a state evidentiary hearing to establish the credibility of his witnesses. *See Serrano*, 10 Cal. 4th at 456. Instead, as with nearly all state prisoners, Mr. Jones was denied an OSC with respect to *any* of his claims. The state court's summary denial prejudiced Mr. Jones generally by denying him a full and fair opportunity to develop the factual predicates to his challenge of his confinement under sentence of death, despite his diligent efforts to do so. It also prejudiced him specifically by denying him the opportunity to preserve the testimony of his since-deceased witnesses.[12] *Cf. Riel*, 2011 U.S. Dist. LEXIS 121661, *3-5 (finding good cause, post-*Pinholster*, to allow California condemned prisoner to depose material witness who was elderly and sick, for

[11] Given that an assessment of the defects in the state process involve a factual inquiry, an evidentiary hearing will be necessary if respondent disputes these facts.

[12] The state court rejected Mr. Jones's request for leave to notice the depositions of declarant witnesses in order to preserve their testimony for future evidentiary hearings. Laurence Decl. ¶ 3. Since the filing of Mr. Jones's state petition, six declarant witnesses have died, including four family members, a family friend, and one juror. Laurence Decl. ¶ 4.

preservation of witness testimony, in advance of a section 2254(d) determination). This state habeas process he received was so defective that it does not independently satisfy the demands of the Suspension Clause as an "adequate substitute" for federal review.[13] *Cf. INS v. St. Cyr*, 533 U.S. 289, 305, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), partially superseded by statute on other grounds. Accordingly, a "serious Suspension Clause issue would be presented" if section 2254(d) was construed to preclude Mr. Jones's full and fair presentation of his habeas claims, following necessary fact development, in federal court. Nor does the state court's decision bar the granting of relief under section 2254(d)(1), because it was an unreasonable application of controlling federal law: "[B]ased on the existing (non)record it was impossible for [the state

[13] The Supreme Court has not adjudicated any Suspension Clause (or separation of powers) challenge to section 2254(d), let alone under circumstances where, as here, the state postconviction review mechanism is constitutionally defective. In cases which have presented no allegations or evidence of defective state court process—and have often featured briefing whose inadequacy the courts have explicitly noted—the lower federal courts have concluded that challenged aspects of section 2254(d)(1) do not violate the Suspension Clause because the section "simply modifies the prerequisites for habeas relief." *Crater v. Galaza*, 491 F.3d 1119, 1125-26 & n. 6 (9th Cir. 2007) (also noting that "[t]he brevity of [petitioner's] argument causes us some confusion as to the precise premise for his Suspension Clause claim"); *see also Green v. French*, 143 F.3d 865, 875-76 (4th Cir. 1998), *partially overruled on other grounds*, (observing that "[Petitioner] does not, however, articulate *why* the source of law limitation of section 2254(d)(1) violates the Suspension Clause, nor does he cite to any authority defining the contours of the Suspension Clause"); *Lindh v. Murphy*, 96 F.3d 856, 867 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) ("Almost as an afterthought, [petitioner] … asserts that *any* alteration in the scope of collateral review after a prisoner has filed a petition under § 2254 violates [the Suspension Clause] … [Petitioner] does not cite any authority for this proposition, and we think the contention feckless.") (emphasis in original); *Evans v. Thomas*, 518 F.3d 1, 11-12 (1st Cir. 2008); *Sanders v. Curtin*, No. 2:08-CV-14448, 2011 U.S. Dist. LEXIS 49094, *59-60 (E.D. Mich. May 9, 2011). However, none of these cases have considered whether section 2254(d)(1) suspends the writ vis-à-vis prisoners who, *due to a systemically defective state court process*, are denied a full and fair adjudication of their claims in any forum. In *Felker v. Turpin*, the Supreme Court held only that section 2254(b)'s restraint on second and successive petitions did not suspend the writ. 518 U.S. at 663-64. *Felker*'s upholding of AEDPA's restriction on multiple habeas petitions is wholly consistent with Mr. Jones's present request for *one* full and fair opportunity to present his claims.

court] to reasonably adjudicate Petitioner's claim." *Ballinger*, 2011 WL 4905583, *2; *see also Earp*, 431 F.3d at 1167.[14]

d. Because Mr. Jones Was Denied His Full and Fair Opportunity to Demonstrate the Unconstitutionality of His Detention in State Court, to Deny His Federal Habeas Petition Without an Evidentiary Hearing Would Violate the Suspension Clause.

Consistent with *Pinholster*,[15] Mr. Jones should be granted a federal evidentiary hearing and other fact development procedures to uncover new evidence that may support his allegations or lead to the development of additional claims or subclaims. *See* 28 U.S.C. § 2254(e)(2); *Pinholster*, 131 S. Ct. at 1401 n. 10 (majority opinion), 1412 (Breyer, J., concurring in part); *see also Ballinger*, 2011 WL 4905583, *3 (directing federal evidentiary hearing post-*Pinholster* where petitioner was denied any state court "opportunity to develop a record to support his claim.").

The alternative—to construe section 2254(d)(1) to deny federal fact-development to petitioners who were also denied state fact-development—would "effect an unconstitutional suspension of the writ" of habeas corpus as to Mr. Jones and other similarly-situated petitioners. It would unprecedentedly create a demographic of prisoners who are denied *any* adequate, effective forum to develop the facts of their claims fully and to test the legality of their detention. *Boumediene*, 553 U.S. at 791-92; *see also Swain*, 430 U.S. at 376; *Hayman*, 342 U.S. at 209, 219-21, 223. It is well-established that an unconstitutional statutory interpretation should be avoided where a reasonable alternative construction is available. *Swain*, 430 U.S. at 378; *United*

---

[14] As previously set forth, *Pinholster* does not alter the Ninth Circuit precedent construing § 2254(d)(2), and it does not bar consideration of evidence from a federal evidentiary hearing authorized under § 2254(e)(2).

[15] *Pinholster* did not specifically evaluate the adequacy of the California postconviction process. It is particularly appropriate for this Court to address the state process's inadequacies, because the Supreme Court's practice is to defer to the views of local federal courts "skilled in the law of particular states" on such issues. *See Bishop v. Wood*, 426 U.S. 341, 346 n. 10 (1976), 96 S. Ct. 2074, 48 L. Ed. 2d 684 (collecting cases); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004).

States v. Rumely, 345 U.S. 41, 45, 73 S. Ct. 543, 97 L. Ed. 770 (1953); *Richmond Screw Anchor. v. United States*, 275 U.S. 331, 346, 48 S. Ct. 194, 72 L. Ed. 303 (1928). Thus, by providing Mr. Jones with his constitutionally-required forum—*i.e.*, finding section 2254(d) satisfied, conducting an evidentiary hearing, and reviewing his claims de novo—this Court avoids violating the Suspension Clause.

V. 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 evidentiary hearing 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: October 28, 2011

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: /s/ Michael Laurence
MICHAEL LAURENCE

Attorneys for Petitioner
Ernest Dewayne Jones

Michael Laurence (Bar No. 121854)
Cliona Plunkett (Bar No. 256648)
Bethany Lobo (Bar No. 248109)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov
Mlaurence@hcrc.ca.gov

Attorneys for Petitioner Ernest Dewayne Jones

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**

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

DECLARATION OF MICHAEL LAURENCE

TAB	EXHIBIT
1	Declaration of Michael Laurence
A	Points and Authorities to Motion for Post-Conviction Discovery [Penal Code § 1054.9], No. CRN22688 (San Diego Super. Ct. Nov. 1, 2011)
B	Memorandum of Points and Authorities in Opposition to Motion for Post-Conviction Discovery (Pen. Defendant. Code, § 1054.9), No. CR133096 (San Diego Super. Ct. July 13, 2009)
C	Points and Authorities In Opposition to Motion for Post-Conviction Discovery [Penal Code § 1054.9], No. CR135002 (San Diego Super. Ct. Oct. 27, 2009)
D	Amended Statement of Decision on Motion for Post-Conviction Discovery (PC 1054.9), No. CR135002 (San Diego Super. Ct. June 28, 2011)

DECLARATION OF MICHAEL LAURENCE

I, MICHAEL LAURENCE, declare as follows:

1. I am an attorney at law admitted to practice by the State of California and before this Court. I am the Executive Director of the Habeas Corpus Resource Center (HCRC).

2. On October 20, 2000, the California Supreme Court appointed the HCRC to represent Ernest Jones in habeas corpus proceedings stemming from his convictions and judgment of death. On April 14, 2009, this Court appointed the HCRC to represent Mr. Jones in his federal habeas corpus proceedings. I was designated lead counsel in both proceedings.

3. Mr. Jones filed a petition for writ of habeas corpus in the California Supreme Court on October 21, 2002. While Mr. Jones's petition was still pending, on October 16, 2007, Mr. Jones submitted Supplemental Allegations in Support of Petition for Writ of Habeas Corpus in which he sought leave to notice the depositions of his declarant witnesses in order to preserve their testimony for future evidentiary hearings. Court staff at the California Supreme Court informed counsel orally that Mr. Jones would have to file a motion requesting leave to file the supplement to the 2002 petition, and that the supplemental allegations could not contain allegations concerning the need for appropriate subpoena authority to preserve witness testimony. According to the filing clerk, the research attorneys denied Mr. Jones's counsel's request that these new filing directives be issued in writing. In accordance with the Court's directions, on October 31, 2007, Mr. Jones submitted revised Allegations in Support of Petition for Writ of Habeas Corpus, without the request for subpoena authority.

4. Since the filing of Mr. Jones's petition in state court in 2002, six of his declarant witnesses have died, including four family members, a family friend, and one juror. In addition, three witnesses that Mr. Jones was unable to obtain statements from, but most likely would have subpoenaed had a hearing been ordered or a deposition permitted, also have died.

5. Pursuant to its legislative mandate as a resource center for California capital postconviction attorneys (Cal. Gov't Code § 68661), the HCRC collects and analyzes information concerning the California Supreme Court's disposition of state habeas petitions. The following three paragraphs contain portions of its information-gathering function.

6. From April 24, 1996—the effective date of the Antiterrorism and Effective Death Penalty Act of 1996—to the present, the California Supreme Court has adjudicated 446 capital habeas petitions. It has denied or dismissed 388 of those petitions, or 87 percent, without issuing an order to show cause. It has granted 13 petitions, or 2.9 percent of those filed.

7. From January 1, 2008 to the present, the California Supreme Court has adjudicated 120 capital habeas petitions. It has denied or dismissed 98 of those petitions, or 82 percent, without issuing an order to show cause. It has issued orders to show cause in 18 cases, of which 14, or 78 percent, concern claims brought pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

8. California currently has 327 condemned prisoners who are awaiting appointment of postconviction counsel.

9. Attached to this declaration as Exhibit A are relevant portions of the District Attorney's Opposition to Motion for Postconviction Discovery filed in the Superior Court of California on September 30, 2011 in *In re La Twon Weaver*, No. CRN22688.

10. Attached to this declaration as Exhibit B are relevant portions of the District Attorney's Memorandum of Points and Authorities in Opposition to Motion for Post-Conviction Discovery filed in the Superior Court of California on July 13, 2009 in *In re Bell*, No. CR133096.

11. Attached to this declaration as Exhibit C are relevant portions of the District Attorney's Memorandum of Points and Authorities in Opposition to Motion for Post-Conviction Discovery filed in the Superior Court of California on October 27,

2009 in *In re Dalton*, No. CR135002.

12. Attached to this declaration as Exhibit D are relevant portions of the California Superior Court's Amended Statement of Decision on Motion for Postconviction Discovery filed on June 28, 2011 in *In re Dalton*, No. CR135002.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct. This declaration is executed on October 28, 2011.

/s/ Michael Laurence
MICHAEL LAURENCE

Michael Laurence (Bar No. 121854)
Cliona Plunkett (Bar No. 256648)
Bethany Lobo (Bar No. 248109)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov
Mlaurence@hcrc.ca.gov

Attorneys for Petitioner Ernest Dewayne Jones

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**

EXHIBIT A TO THE DECLARATION OF MICHAEL LAURENCE

Points and Authorities to Motion for Post-Conviction Discovery [Penal Code § 1054.9], No. CRN22688 (San Diego Super. Ct. Nov. 1, 2011)

BONNIE M. DUMANIS
District Attorney
KATHRYN GAYLE, SBN 125517
Deputy District Attorney
330 West Broadway, Suite 860
San Diego, CA 92101
Tel: (619) 531-4206
Fax: (619) 515-8632
Email: katy.gayle@sdcda.org

Attorneys for Plaintiff/Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

In re LA TWON WEAVER, On Habeas Corpus.	DEATH PENALTY CASE Cal. Supreme Court Case No. S033149 Superior Court Case No. CRN22688 Date: November 1, 2011 Time: 9:00 a.m. Dept: 55

POINTS AND AUTHORITIES IN OPPOSITION

TO MOTION FOR POST-CONVICTION DISCOVERY

[PENAL CODE §1054.9]

true name and location were ascertained by the prosecution and its investigating agencies." (Proposed Order, p. 12, lns. 8-15.) Because Gillies was never an intended witness, the People were not required to provide discovery of her statements, and are not required to disclose any of the other requested information. Nor are the People required to conduct an investigation for Weaver.

The People provided Weaver with a report detailing statements made by Karim Taylor in informal post-conviction discovery. Weaver now complains, "The prosecution did not disclose this report to trial counsel . . . ." (Ps & As p. 45, ln. 22.) Weaver also complains that the post-conviction discovery does not include information about "how Ms. Taylor was identified or located." (Ps & As p. 45, lns. 25-26.) Karim Taylor was not named on any of the prosecution's three witness lists. The prosecution never intended to call her as a witness, and she did not testify at trial. Nevertheless, Weaver now asks the court to order the People to provide "[a]ny information concerning Ms. Taylor's true name and other identifying information, including but not limited to her date of birth, her whereabouts between May 6, 1992, and the date of sentencing, and how and when her true name and location were ascertained by the prosecution and its investigating agencies." (Proposed Order, p. 12, lns. 20-25.) Because Taylor was never an intended witness, the People were not required to provide discovery of her statements, and are not required to disclose any of the other requested information.

Weaver theorizes that Summersville, Gillies, and Taylor are liars and may have been involved in his crimes more than they admit.[10] Weaver argues that if this is the case, his responsibility for the crimes might be mitigated: "Each witness . . . is relevant to the question of petitioner's level of culpability [and] the existence of mitigating circumstances." (Ps & As p. 50, lns. 3-6.)

---

[10] Weaver claims, "Except for the fact that the three witnesses [Summersville, Gillies, and Taylor] agree that they met at the mall on May 6, their versions of the events of the day are substantially in conflict. The inconsistencies in their statements raise at least two reasonable inferences: 1) Byron Summersville, Jenean Gillies and/or Karim Taylor lied to law enforcement and to the District Attorney's Office about their knowledge of and involvement in the crimes; and 2) these falsehoods were known or reasonably should have been known to the prosecution." (Ps & As p. 50, lns. 8-14.)

withheld materials relating to CRN25195, and requests that the court examine the withheld materials *in camera* to determine if they should be turned over. (Ps & As p. 51, lns. 10-20.)

Weaver's discovery rights before and during trial were protected by an impartial tribunal. His attempt to use 1054.9 to gain court supervision of his desired investigation into whether the prosecution properly fulfilled its discovery obligations at trial is an abuse of discovery rights granted by the statute, and violates the separation of powers doctrine.

VI

WEAVER'S NUMEROUS IRREGULAR DEMANDS SHOULD BE SUMMARILY DENIED

A. The Prosecution Has No Duty to Preserve Evidence

Barnett reiterated the point made in *Steele* that section 1054.9 "imposes no preservation duties that do not otherwise exist." (*Barnett*, *supra*, at p. 901, citing *Steele*, *supra*, at p. 695.) The court should deny Weaver's request for an order requiring the prosecution to preserve evidence. (Proposed Order, p. 3, lns. 17-20.)

B. The Prosecution Is Not Obligated to Describe the Circumstances of Any Loss of Evidence or Failure to Preserve Evidence

No statute or constitutional provision requires the prosecution to disclose "information about the date and circumstances of [the] disappearance or destruction" of various items of evidence. Weaver's request for an order requiring the prosecution to do so should be denied. (Ps & As p. 14, lns. 3-4.)

C. Weaver's Requests for "Certification" Should Be Denied

Weaver makes numerous requests that the court order the prosecution to "certify" that all requested items within certain categories of evidence have been provided. "Certification" of compliance with a court order is not required by any statute or constitutional provision. The trial court did not require any statement of compliance with its orders by the prosecution, much less any "certification." The prosecution is presumed to have complied with the court's orders, absent evidence to the contrary. (Evid. Code, § 664.)

///

///

D. The Demand for an "On The Record" Statement By the Prosecution That Certain Items of Evidence Do Not Exist Should Be Denied

Weaver's discovery rights were adjudicated in motion hearings which resulted in court orders granting or denying his discovery requests. The prosecution is presumed to have complied with court orders. No statute or constitutional provision requires the prosecution to "state on the record, that the requisite inquiry has been made and that the items do not exist." (Ps &As p. 14, lns. 1-2.)

E. Weaver's Request to Compare, Identify, and Provide "Most Legible Copies" of Documents Should Be Denied

Weaver requests the court order the prosecution to "certify" that "based upon a search of its files and its inquiry of the San Diego Sheriff's Department, counsel for petitioner have received the most legible and complete copies of these items that are available." (Proposed Order, p. 4, lns. 8-11.) No statute or constitutional provision requires the prosecution to exercise its judgment for the benefit of a defendant on a matter which is completely subjective.

F. Weaver's Request for a Privilege Log Should Be Denied

Weaver claims, "[a]t a minimum, the District Attorney must provide a basis for its claim of privilege in response to requests for specific discoverable documents . . . ." (Ps & As p. 17, lns. 2-3.) Weaver requests the court "require the District Attorney to provide the basis for any act of non-disclosure regarding items it possesses that are responsive to petitioner's previous and on-going requests" (Ps & As p. 17, lns. 6-7) and states "the interests of efficiency and fairness would be served by requiring the District Attorney to produce a privilege log of all items currently withheld." (Ps & As p. 16, lns. 22-24.) No statute, constitutional provision or case law authority requires the prosecution to prepare a privilege log documenting acts taken to fulfill criminal discovery obligations.

G. Weaver's Request for Access to the Entire District Attorney's File Should Be Denied

Weaver's counsel states: "Since current counsel have no way of determining fully which of the documents that were, or should have been, provided at trial are now missing, we request access to the District Attorney's entire file." (Decl. p. 14, lns. 1-3.) This request is particularly

Michael Laurence (Bar No. 121854)
Cliona Plunkett (Bar No. 256648)
Bethany Lobo (Bar No. 248109)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov
Mlaurence@hcrc.ca.gov

Attorneys for Petitioner Ernest Dewayne Jones

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**

EXHIBIT B TO THE DECLARATION OF MICHAEL LAURENCE

Memorandum of Points and Authorities in Opposition to Motion for Post-Conviction Discovery (Pen. Defendant. Code, § 1054.9), No. CR133096 (San Diego Super. Ct. July 13, 2009)

Bonnie M. Dumanis
District Attorney
James E. Pitts (SBN 106191)
Deputy District Attorney
San Diego Hall of Justice
330 West Broadway, Suite 860
San Diego, CA 92101
(619) 531-4069 telephone
(619) 515-8632 facsimile
james.pitts@sdcda.org

Attorneys for Plaintiff

Superior Court of the State of California

County of San Diego, Central Division

The People of the State of California, Plaintiff, v. **Steven M. Bell,** Defendant.	NO. CR133096 DA P14499 **Memorandum of Points and Authorities in Opposition to Motion for Post-conviction Discovery (Pen. Code, § 1054.9)**

Statement of Issues

Steven M. Bell—who was convicted of first degree murder with special circumstances and sentenced to death in 1994, and has filed a petition for habeas corpus—seeks numerous items of post-conviction discovery under Penal Code section 1054.9. The District Attorney objects to each and every item of discovery requested by Bell.

Statement of the Case

On August 12, 1992, the District Attorney filed an Information in case number CR133096 charging Bell in count one with the murder of 11-year-old John Joseph Anderson.[1] The information alleged two special circumstances;[2] that Bell committed the murder while engaged in the commission or attempted commission of a robbery and he committed the murder

[1] Penal Code section 187, subdivision (a).
[2] Pursuant to Penal Code section 190.2, subdivision(a)(17).

second compact disc containing discovery pages 559-1017. By the time of the hearing, the District Attorney's Office will deliver to Bell compact discs and DVDs containing all photographs, audio and video from this case.

Thus, by the time of the hearing, the District Attorney's Office will have provided all Category 1 materials to Bell without requiring that he specify which pages of the original discovery had been lost since the trial.

Bell has not alleged under Category 2 that there are materials the prosecution should have provided at time of trial because they came within the scope of a discovery order the trial court actually issued at that time. He has not alleged there are materials the prosecution should have provided at time of trial because they came under a statutory duty to provide discovery. He has not alleged there are materials the prosecution should have provided at the time of trial because they came within the constitutional duty to disclose exculpatory evidence. And he has not alleged there are materials that the defense specifically requested at that time and was entitled to receive.

Accordingly, he is not entitled to a discovery order for any materials under Category 2.

Bell has not alleged under Category 3 that there are materials the prosecution had no obligation to provide at time of trial but to which he would have been entitled had he specifically requested them.

Accordingly, he is not entitled to a discovery order for any materials under Category 3.

D. The discovery request is overbroad.

Section 1054.9 provides for *only limited discovery*. It does *not* allow "free-floating" discovery asking for virtually anything the prosecution possesses. The statute is limited to materials to which the defendant would have been entitled *at the time of trial*. Thus, any materials that the District Attorney and law enforcement authorities did not possess at trial are outside the scope of section 1054.9.

Any materials, however relevant to Bell's trial, subsequently acquired by the prosecution team are not available under section 1054.9. This includes information that did not exist at the time of trial. Also, any materials whose relevance only became clear after trial would not be subject to discovery. The relevance of materials must be evaluated and determined based on the

record at trial and not through the benefit of hindsight. The prosecution will comply with their Brady obligations as to materials obtained post-trial.

Each of Bell's current discovery requests objected to by the District Attorney is overbroad.

Some of his requests are limited as to time; others are not limited as to time. His requests, therefore, include materials that occurred after the trial. And they include materials whose claimed relevance has been made after trial.

This court is not required to parse Bell's overbroad section 1054.9 requests looking for subsets of discoverable items. Instead, this court should deny such requests in their entirety.

E. The discovery request is not reasonably specific.

Discovery includes, and is limited to, *specific materials* the prosecution or law enforcement authorities involved in the case currently possess. Thus, a motion for discovery under section 1054.9 must be "*reasonably specific.*"

Requests for "any and all other records, of any kind and in any form," "any other relevant discovery materials," or any other so-called "catchall requests" are not reasonably specific. Bell's requests run afoul of this rule.

Item two begins with "All discovery materials." Items three, through five, seven, ten and eleven, thirteen and fifteen through twenty contain the phrase "all information and tangible things." Item six begins with "Identifying information of all persons."[116] Item nine begins with "All physical or biological evidence or things recovered." Item twelve begins with "All real evidence seized or obtained." Item twenty four begins with "To the extent not covered by the

---

[116] Bell's Points and Authorities states that " 'information' and 'tangible things' include all types of information and things in all formats on all media. They include any form of knowledge, communication, or representation, such as letters, words, pictures, graphs, charts, sounds, or symbols, or combinations thereof, and any record of them, regardless of the manner in which the record has been stored. They therefore include, but are not limited to, statements (whether or not acknowledged or signed by the person making them), communications, documents, reports, memoranda, records, notes, letters, messages, charts, graphs, drawings, diagrams, photographs, casts, molds, data, tests, test materials, test data, evaluations, analyses, transcripts, translations, printouts, slides, transparencies, reprints, exemplars, audio recordings, video recordings, digital recordings, computer files, data compilations, books, papers,

Michael Laurence (Bar No. 121854)
Cliona Plunkett (Bar No. 256648)
Bethany Lobo (Bar No. 248109)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov
Mlaurence@hcrc.ca.gov

Attorneys for Petitioner Ernest Dewayne Jones

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**

EXHIBIT C TO THE DECLARATION OF MICHAEL LAURENCE

Points and Authorities In Opposition to Motion for Post-Conviction Discovery [Penal Code § 1054.9], No. CR135002 (San Diego Super. Ct. Oct. 27, 2009)

BONNIE M. DUMANIS
District Attorney
JEFF B. DUSEK, SBN 70719
Chief Deputy District Attorney
KATHRYN GAYLE, SBN 125517
Deputy District Attorney
330 West Broadway, Suite 860
San Diego, CA 92101
Tel: (619) 531-4206
Fax: (619) 515-8632
Email: katy.gayle@sdcda.org

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	DEATH PENALTY CASE
v.	Cal. Supreme Court Case No. S046848 Superior Court Case No. CR135002
KERRY LYN DALTON, Defendant.	POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR POST-CONVICTION DISCOVERY [PENAL CODE §1054.9]
	Date: Time: Dept:

Comes now the plaintiff, the People of the State of California, by and through their attorneys, BONNIE M. DUMANIS, District Attorney, JEFF DUSEK, Chief Deputy District Attorney, and KATHRYN GAYLE, Deputy District Attorney, and respectfully submits the following Points and Authorities in Opposition to Motion for Post-Conviction Discovery.

STATEMENT OF THE CASE

In an information filed by the San Diego County District Attorney on November 13, 1992, moving party Kerry Dalton, Mark Lee Tompkins, and Sheryl Ann Baker were charged with conspiracy to murder Irene Melanie May (count 1: Pen. Code, § 182, subd. (a)(1)) and the

Case law is continuing to develop in this area. The issue of whether an out-of-state law enforcement agency is part of the prosecution team for *Brady* purposes if the agency's involvement is limited to providing the prosecution with records is pending before the California Supreme Court in *Barnett v. Superior Court*, review granted September 17, 2008, S165522.

d. The holding of *Pennsylvania v. Ritchie* should not be used to characterize outside agencies as prosecution team members.

Dalton cites *Pennsylvania v. Ritchie* (1987) 480 U.S. 39 as authority for the proposition that third-party agencies holding relevant, privileged records are members of the prosecution team, even when the prosecution lacks possession of the records, and has no ability to access the privileged records. In *Ritchie*, *supra*, the Supreme Court held that, "the records of Children and Youth Services constituted evidence in the government's possession for purposes of *Brady*." (*Pennsylvania v. Ritchie*, *supra*, 480 U.S. 39, 57.)

Ritchie concerned a defendant's ability to obtain materials possessed by a government agency (Children and Youth Services, CYS), but not available to the prosecution. (*Ritchie*, *supra*, 480 U.S. at pp. 43-45.) The defendant served a subpoena on CYS seeking materials that he claimed were relevant to the credibility of the victim. (*Id.* at p. 43.) The materials were confidential as a matter of state law. (*Id.* at p. 44.) The Court held, as a matter of due process, the defendant was entitled to an in camera review by the trial court of the material "to determine whether it contain[ed] information that probably would have changed the outcome of his trial." (*Id.* at p. 58.) The Court was clear, however, that the defendant did not have a right to examine the materials himself and that he could "not require the trial court to search through the CYS file without first establishing a basis for his claim that it contains material evidence." (*Id.* at p. 58, n. 15.)

Although *Ritchie* addressed a defendant's due process right to access evidence in the possession of the government, it had no occasion to consider the scope of the "prosecution team." The prosecutor in that case had no authority to access the information. The Court did not conclude that the prosecution was in constructive possession of the materials or that the prosecution was at fault for failing to obtain the CYS evidence for the defense.

///

Ritchie is best understood as establishing only a defendant's due process rights to materials that are possessed by a third party government agency that is outside of the prosecution team. Since discovery pursuant to section 1054.9 is limited to materials in possession of the prosecution team, *Ritchie* is not relevant to this particular question, as was recognized by the California Supreme Court in *People v. Webb* (1993) 6 Cal.4th 494, 518 which observed:

> [W]e question whether records stemming from Sharon's voluntary treatment by private and county therapists can be deemed "in the possession" of the "government" in the manner assumed by *Ritchie*. The records were not generated or obtained by the People in the course of a criminal investigation, and the People have had no greater access to them than defendant. Given the strong policy of protecting a patient's treatment history, it seems likely that defendant has no constitutional right to examine the records even if they are "material" to the case.

It would be senseless to allow Dalton to prevail on her claim that outside agencies holding witnesses' mental health records are members of the prosecution team under the authority of *Ritchie*, when the prosecution has no access to the privileged records.

e. The prosecution team consists of the Sheriff's Department, San Diego Police Department, and the District Attorney's Office.

The investigation into the crimes against May was first handled by the Law Enforcement Services Division of the San Diego County Sheriff's Department, who conducted a missing person investigation and then initiated a homicide investigation. In 1991 the San Diego Metropolitan Task Force took over the investigation. Thereafter, the San Diego County District Attorney's Office joined the investigation.

The "prosecution team" in this case is comprised of the District Attorney's Office, the Law Enforcement Services Division of the San Diego County Sheriff's Department, and the San Diego Police Department. In addition, because forensic work was conducted by Forensic Science Associates, Forensic Science Laboratories, and the Serological Research Institute, these agencies are team members as well.

///

///

Michael Laurence (Bar No. 121854)
Cliona Plunkett (Bar No. 256648)
Bethany Lobo (Bar No. 248109)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hcrc.ca.gov
Mlaurence@hcrc.ca.gov

Attorneys for Petitioner Ernest Dewayne Jones

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**

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

EXHIBIT D TO THE DECLARATION OF MICHAEL LAURENCE

Amended Statement of Decision on Motion for Post-Conviction Discovery (PC 1054.9), No. CR135002 (San Diego Super. Ct. June 28, 2011)

FILED
Clerk of the Superior Court
JUN 28 2011
By: V.S. HENNESSY-SCHIFF, Deputy

SUPERIOR COURT OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

In re KERRY LYN DALTON On Habeas Corpus.	**CAPITAL CASE** Case No. CR 135002 (California Supreme Court No. S046848 [on automatic appeal and habeas corpus]) **AMENDED STATEMENT OF DECISION ON MOTION FOR POSTCONVICTION DISCOVERY (PC 1054.9)**

Kerry Lyn Dalton moves this court for an order for postconviction discovery under Penal Code section 1054.9[1]. Dalton requests discovery of twenty-eight categories of material. The requests are numerous and detailed. They present a wide variety of issues relating to the developing law under section 1054.9. The court has reviewed extensive points and authorities filed by both petitioner and the District Attorney and heard oral arguments. A Statement of Decision was filed March 8, 2010, granting the motion in part and denying it in part. A petition for writ of mandate was filed in the Court of Appeal which issued an opinion on November 23, 2010, directing modifications to portions of this

[1] All references will be to the Penal Code unless otherwise specified.

While *Brady* requires production of "favorable" evidence, it appears to this court that the terms "favorable" and "exculpatory" are equivalents for all practical purposes and that the legislative intent in section 1054.1(e) was to codify the constitutional requirement. Also, *Brady* only provides postconviction relief if the prosecution withholds evidence that is "material" to the issues in the case. However, the California Supreme Court has recently made clear that a defendant need not show "materiality" in order to be entitled to exculpatory evidence prior to trial or under section 1054.9. (*Barnett, supra*, at 901.)

To be entitled to postconviction discovery, petitioner must provide a reasonable basis to believe that specific materials requested actually exist, though she need not prove that they are actually in the possession of the prosecution. (*Barnett, supra*, at 899, 901.)

To the extent she fails to identify them specifically, there is little to talk about. Absent a specific dispute over an identifiable piece of evidence, there is nothing a court can do to strengthen or sharpen the prosecutor's pre-existing constitutional obligation. Particularly with regard to material requested under *Brady*, petitioner bears the burden of identifying the material sought and showing, with particularity, how they are favorable to her. Without this, there is no basis for a ruling. (*Kennedy, supra*, at 372.)

Section 1054.9 only requires production of such material petitioner would have been entitled to at the time of trial. It does not, on its own terms, require production of materials that did not exist at the time of trial. While the prosecutor has a continuing constitutional duty to disclose *Brady* evidence discovered after trial (*Steele, supra*, at 694), this duty is imposed directly by the constitution and is self-executing. It is not statutory. Further, it is presumed the prosecution has fulfilled this obligation unless the defense overcomes that presumption. (*Barnett, supra*, at 900; *Steele, supra*, at 694.) However, since continuing discovery of materials that did not exist at the time of trial is not required by section 1054.9, it is not a proper part of a request under that section.

///

/ / /

/ / /