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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEITH ZON DOOLIN,)	Case No. 1:09-CV-01453-AWI-P
)	
Petitioner,)	
)	<u>DEATH PENALTY CASE</u>
vs.)	
)	
MICHAEL MARTEL, Acting Warden)	Order Amending Schedule for
of San Quentin State Prison,)	Petitioner’s Case Management
)	and Budget Plan
Respondent.)	

On March 9, 2011, the Phase I-B Case Management and Budget Plan for Petitioner Keith Zon Doolin (“Doolin”) was approved. The Phase 1-B Budget includes tasks necessary to prepare and file Doolin’s federal habeas petition, extends through the determination of exhaustion and abeyance, if necessary, or the filing of the answer, and is currently scheduled to extend through August, 2011.

Doolin first sought federal habeas corpus relief August 17, 2009, and the Federal Defender was appointed to represent him October 14, 2009. The parties agreed the statute of limitations (“SOL”) would expire October 5, 2010, one year after the denial of certiorari on Doolin’s direct appeal. During the investigation of Doolin’s federal habeas petition, the Federal Defender discovered a conflict in their representation which required them to withdraw, and new counsel was

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1 appointed under the Criminal Justice Act to represent Doolin on June 15, 2010.

2 The Court found that seven months of equitable tolling was reasonable in
3 light of the facts of this case. The one year statute of limitations for Doolin's
4 federal habeas petition was extended to April 27, 2011. The parties subsequently
5 stipulated to additional equitable tolling to July 20, 2011, based on the
6 unexpected illness of one of Doolin's counsel.

7 After approval of Doolin's Phase I-B budget, the United States Supreme
8 Court issued *Cullen v. Pinholster*, 563 U.S. ___, 131 S. Ct. 1388 (April 4, 2011),
9 limiting the evidence a federal court can consider in determining whether a
10 petitioner has met the requirements of 28 U.S.C. § 2254(d)(1). On April 7, 2011,
11 this Court issued an order in this case, suspending all work on issues affected by
12 *Pinholster*. An order was issued on May 18, 2011, to clarify the information
13 needed from Doolin to inform reconsideration of the Phase I-B Budget in light of
14 *Pinholster*.

15 *Pinholster* noted the following limitations the AEDPA has imposed on
16 applications for federal habeas relief, in Title 28 of the United States Code:

- 17 1. Section 2254(a) only permits consideration of applications for habeas relief
18 which allege that a person is in state custody "in violation of the
Constitution or laws or treaties of the United States."
- 19 2. Sections 2254(b) and (c) prohibit granting applications, with certain
20 exceptions, where the applicant has not exhausted state remedies.
- 21 3. Section 2254(d) prohibits granting applications that have been "adjudicated
22 on the merits in State court proceedings, . . . unless the adjudication of the
23 claim,
" (1) resulted in a decision that was contrary to, or involved an
unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or
24 " (2) resulted in a decision that was based on an unreasonable
25 determination of the facts in light of the evidence presented in the
State court proceeding."
- 26 4. For claims not subject to § 2254(d) (i.e., procedurally defaulted claims), if a

1 prisoner “failed to develop the factual basis of a claim in State court
2 proceedings,” § 2254(e)(2) bars a federal court from holding an evidentiary
3 hearing, unless the applicant meets certain statutory requirements.

4 The standard of 2254(d) is “difficult to meet,” *Harrington v. Richter*, 562 U.S.
5 ___, 131 S. Ct. 770, 786 (2011), and it is a “highly deferential standard for
6 evaluating state-court rulings, which demands that state-court decisions be given
7 the benefit of the doubt,” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)
8 (citation and internal quotation marks omitted). The petitioner carries the
9 burden of proof. *Id.*, at 25. Section 2254(d) applies even where there has been a
10 summary denial. *Richter*, 131 S. Ct. at 786. *Pinholster* clarified that “review under
11 § 2254(d)(1) is limited to the record that was before the state court that
12 adjudicated the claim on the merits.” *Pinholster*, 131 S. Ct. at 1398. Further, the
13 Court in *Pinholster* noted that the focus of section 2254(e)(2) is not to preserve the
14 opportunity for hearings, but to limit the discretion of federal courts in holding
15 hearings. *Id.*, at 1401 n.8.

16 The holding of *Pinholster* presents questions about when investigative and
17 expert services may be authorized, and when the threshold of § 2254(d)(1) must
18 be applied. The following process for approval of funding prior to filing the
19 petition will be imposed in this case:

- 20 1. In the case of legally exhausted claims for which a factual basis was
21 presented in state court, pre-petition fact development will be precluded,
22 unless the factual basis presented in state court is shown to have been
23 incomplete so that additional fact development would lead to the
24 formation of a new, unexhausted claim.
- 25 2. For unexhausted claims, the authorization of funds for pre-petition fact
26 development will be determined by the following factors in addition to
guiding principles outlined in the Ninth Circuit Judicial Council CJA
Capital Habeas Costs Policy:
 - a. A description of the evidence sought to be uncovered.
 - b. The efforts previously undertaken to develop the evidence sought
and the reason those efforts were unsuccessful.

- 1 c. Reasonable assurance by counsel that the investigation, expert
- 2 service, or other ancillary assistance will be efficacious in uncovering
- 3 the evidence sought.
- 4 d. Whether the evidence sought existed and was reasonably accessible
- 5 at the time of trial.
- 6 e. The connection of the evidence sought to a prospective claim that
- 7 will be raised in the federal petition.

8 Applying these guidelines will allow the development of unexhausted
9 claims where petitioners can establish diligence, efficacy, and claim cognizability.
10 This approach also will facilitate any further determination under (d)(1) of the
11 reasonableness of the state decision based on the same record that was before the
12 state court prior to granting further evidentiary development. This Court is
13 mindful that the development of evidentiary facts does not necessarily render
14 existing claims unexhausted. *See Vasquez v. Hillery*, 474 U.S. 254, 257-58, 260
15 (1986) (rejecting challenge to new evidence because it did not fundamentally alter
16 the legal claim the state courts previously considered).

17 The following briefing schedule is set for this proceeding;

- 18 1. Doolin's supplemental brief in support of funding for unexhausted claims
- 19 shall be filed, ex parte and under seal, by June 15, 2011.
- 20 2. Doolin's motion for additional equitable tolling of the statute of limitations
- 21 shall be filed within 20 days of the order amending his Phase 1-B Budget.
- 22 3. The Warden's opposition, if any, to additional equitable tolling shall be
- 23 filed within 20 days of Doolin's motion.
- 24 4. Doolin's reply shall be filed within 10 days of any opposition.

25 IT IS SO ORDERED.

26 DATED: May 18, 2011

/s/ Anthony W. Ishii

Chief United States District Judge