

1 Rule 2 of the Rules Governing § 2254 Cases specifies that a petition must:

- 2 1. Specify all the grounds for relief available to the petitioner;
- 3 2. State the facts supporting each ground;
- 4 3. State the relief requested;
- 5 4. Be printed, typewritten, or legibly handwritten; and
- 6 5. Be signed under penalty of perjury by the petitioner or by a person authorized to
7 sign it for the petitioner under 28 U.S.C. § 2242.

8 As the text of Rule 2 suggests, habeas corpus petitions, generally, are factually extensive. Capital
9 habeas petitions invariably are even more complex and factually intense.

10 The grounds for relief in habeas corpus petitions, including capital petitions, however, are basic.
11 All § 2254 petitions allege numerous and overlapping violations under the Fifth, Sixth, Eighth, and
12 Fourteenth Amendments to the United States Constitution. Since the vast majority of meritorious claims
13 presented in federal habeas corpus petitions have been exhausted in state court, the same numerous and
14 overlapping violations under the Fifth, Sixth, Eighth, and Fourteenth Amendments have been presented
15 in state court. It is the Court's experience that because capital habeas corpus petitions are presented with
16 the assistance of appointed counsel, they are presented in compliance with Rule 2.

17 In the past, when capital habeas petitioners were asked to file their petitions without
18 accompanying points and authorities, the petitions nonetheless did state, in a comprehensive manner,
19 the legal grounds for the claims, as Rule 2 requires. When in later stages of the litigation petitioners
20 filed formal points and authorities, those briefs were repetitive of the petitions and added little legal
21 authority to the legal grounds already presented. It was for this reason the Court made a case
22 management change in the procedure in the September 2011 Attorney Guide.

23 As the Warden notes in his statement, Rule 5 of the Rules Governing § 2254 Cases requires him
24 to file an answer which addresses the allegations in the petition and frames the issues. *See Williams v.*
25 *Calderon*, 52 F.3d 1465, 1483 (9th Cir. 1995). In order to meet that requirement, the answer necessarily
26 also must be factually intensive to respond to the factual allegations in the petition. The Warden
27 disputes the notion that his anticipated answer in this case must address the factual allegations in the
28 petition in a comprehensive manner.

1 The Warden’s view follows from his understanding of the deference federal courts owe state
2 court decisions under § 2254(d) and the holding in *Cullen v. Pinholster*, ___ U.S. ___, 131 S. Ct. 1388
3 (2011). He maintains that pleading requirements for habeas corpus cases are more circumscribed than
4 regular civil cases because a federal habeas petition necessarily is preceded by a conviction in the trial
5 court, affirmance of that judgment on direct appeal, and state post-conviction review. He claims
6 AEDPA limits the need to frame and narrow the facts presented in federal petitions due to having shifted
7 the focus in habeas corpus from resolution of factual issues to a threshold determination of a legal
8 question regarding the reasonableness of the adverse state decisions under § 2254(d). Relying on
9 *Pinholster*, he argues that the existence or non-existence of factual disputes is irrelevant to this threshold
10 analysis because new facts presented in federal court cannot be considered. His bottom line is that there
11 is no need at the pleading stage for the parties to identify potential areas of factual dispute for resolution.

12 It is for this reason the Warden requests the Court to adhere to the revised procedure in the
13 Attorney Guide, that is, requiring Perry to present his petition with points and authorities so that the
14 answer also will consist of points and authorities. There is merit to the Warden’s request, but not for
15 the reasons cited or in the manner suggested.

16 The Court has considered the authorities cited by the Warden in his statement. While they
17 provide ample support for the proposition that district courts may establish case management procedures
18 which are tried and true, or alternatively, on a case-by-case basis, they do not stand for the proposition
19 that factual issues pleaded in federal habeas corpus petitions need not be framed, narrowed, or resolved
20 in advance of a court’s § 2254(d) analysis. As the Warden states, *Williams v. Birkett*, 697 F.Supp. 2d
21 716, 723, n. 4 (E.D. Mich. 2010), holds that the answer to a habeas petition “should respond in an
22 appropriate manner to factual allegations contained in the petition and should set forth legal arguments
23 in support of respondent’s position, both the reasons why the petition should be dismissed and the
24 reasons why the petition should be denied on the merits.” The beginning of that same footnote also
25 states: “An answer to a habeas petition is not unlike an answer to a civil complaint. It must respond to
26 the allegations of the petition.” *Id.* In the next cited case, *Ebert v. Clark*, 320 F.Supp. 2d 902 (D. Neb.
27 2004), the petitioner challenged an order allowing the respondent to file a limited response raising
28 procedural default issues prior to addressing the merits. The court determined this was not an abuse of

1 discretion. *Id.* at 904, n. 4. The Warden then cites *Ukawabuto v. Morton*, 997 F. Supp. 605 (D. N.J.
2 1998), in which the court established a case management procedure just the opposite of that in *Ebert v.*
3 *Clark*. In *Ukawabuto*, after the court dismissed the respondent's motion to dismiss the petition for
4 failure to comply with the one-year AEDPA statute of limitations, the respondent filed a second motion
5 to dismiss because the petition presented both exhausted and unexhausted claims. The court dismissed
6 the second motion as well, explaining that the respondent could assert lack of exhaustion in his answer
7 as an affirmative defense. The court refused to permit the respondent to file piecemeal motions to
8 dismiss. *Id.* at 607. Rather it determined it would address the merits. Once the petition was answered,
9 no further motions were required. The court would simply decide the case. *Id.* at 608.

10 Nor is *Pinholster* supportive of the Warden's proposition that factual issues need not be resolved.
11 While it is indisputable that *Pinholster* limits the introduction of *new* facts not previously presented in
12 state court prior to the federal court's analysis of state court reasonableness under § 2254(d), that holding
13 in no way suggests that facts previously presented to state court need not be analyzed in federal court.
14 As the Michigan and New Jersey district courts decided in *Williams*, 320 F.Supp. 2d 902, and
15 *Ukawabuto*, 997 F. Supp. 605, the respondents need to respond to factual allegations in the petition, on
16 the merits. It is the framing of the factual issues in dispute that will inform this Court's § 2254(d)
17 analysis of the reasonableness of the state court decisions adverse to Perry. The Warden must respond
18 to the factual allegations in a detailed manner to enable the Court to determine what facts were before
19 the California Supreme Court and how the state court decided the claims predicated on those facts. The
20 existence or non-existence of factual disputes is key to the § 2254(d) analysis.

21 After considering the past practices of petitioners in presenting petitions on capital habeas corpus,
22 the records incidental to on the present case, and the Warden's statement, the Court orders as follows:

- 23 1. Perry shall file his federal petition within the federal statute of limitations, up to
24 and including July 27, 2012.
- 25 2. The petition shall be comprehensive and include all legal grounds for the claims
26 pleaded.
- 27 3. Legal points and authorities shall be included in the petition.
- 28 4. The Warden's answer shall be filed with points and authorities as well.

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- 5. In presenting his answer, the Warden shall frame the factual issues and address the merits of the claims pleaded in the petition.
- 6. General denials of the factual allegations will not be acceptable.
- 7. In addition, the Warden shall allege all procedural affirmative defenses, including procedural default, non-exhaustion, failure to comply with the statute of limitations, and the non-retroactivity bar.

IT IS SO ORDERED.

Dated: November 23, 2011

/s/ Anthony W. Ishii
Anthony W. Ishii
United States District Judge