

1 As a premise for his Motion, Petitioner states,

2 As Petitioner understands the Court's Order, in view of the Supreme
3 Court's decision in [*Pinholster*], the Court is now denying an
4 evidentiary hearing on four of the five claims on which it had
5 previously granted such a hearing. The one exception appears to be
6 Petitioner's claim of actual innocence, focused on the portion of the
7 California Supreme Court order that acknowledged that Petitioner
8 had not been able to produce any information or evidence concerning
9 his claim of alibi. [Citation.] The Court thereafter directed the
10 parties to offer briefing to address the actual innocence and alibi
11 evidence.

12 (Doc. No. 316-1 at 1–2.)

13 Petitioner misunderstands the Order Regarding § 2254(d)(1): Petitioner's inference that the
14 Court decided more than it purported to decide is incorrect. The Court concluded only that 28
15 U.S.C. § 2254(d)(1) (2012) presently does not permit granting Petitioner federal habeas relief on the
16 claims at issue. It does not necessarily follow that the Court cannot or should not hold an
17 evidentiary hearing on the claims.

18 As the Court noted in the Order, “*Pinholster*, though seemingly straightforward and
19 unambiguous, actually raises more questions than it provides answers regarding a district court's
20 ability to conduct evidentiary hearings and permit new evidence in federal habeas proceedings.”
21 (Doc. No. 315 at 24–25 (quoting *Rodriguez v. Adams*, No. 4-4-cv-2233-PJH, 2012 WL 610482, at
22 *2 (N.D. Cal. Feb. 24, 2012).) Indeed, “while the *Pinholster* decision limits the evidence that may
23 be considered in adjudicating a federal habeas petition, it did not decide or even address when an
24 evidentiary hearing is proper in a federal habeas proceeding, nor does it prohibit a federal court from
25 holding an evidentiary hearing.” *Lor v. Felker*, No. 2-8-cv-2985-GEB-DAD-P, 2012 WL 1604519,
26 at *5 n.3 (E.D. Cal. May 7, 2012).

27 Thus, for example, it may be that the Court should hold an evidentiary hearing on the claims
28 and, if the new evidence “strengthen[s any] claim to the point that [it] would be potentially
meritorious—that is, that a reasonable state court might be persuaded to grant relief on that claim,”
then “stay the proceeding in order to give [Petitioner] an opportunity to return to state court and
present his claim with the benefit of the materials that were not available and not part of the record
at the time of the California Supreme Court decision.” *Gonzalez v. Wong*, 667 F.3d 965, 972 (9th

1 Cir. 2011); *see, e.g., Hughes v. Chappell*, No. 3-3-cv-266-JSW, 2012 WL 3542475, at *2–3 (N.D.
2 Cal. July 25, 2012); *cf., e.g., Runnigeagle v. Ryan*, 686 F.3d 758, 773 (9th Cir. 2012). Moreover,
3 it may be that in *Pinholster*, “the majority d[id] not intend to suggest that review is limited to the
4 state-court record when a petitioner’s inability to develop the facts supporting his claim was the fault
5 of the state court itself,” 131 S. Ct. at 1417 n.5 (Sotomayor, J., dissenting), as is the case for
6 Petitioner, (Doc. No. 119 at 9–15). Similarly, an evidentiary hearing on the claims may be
7 appropriate if relief may be permitted under 28 U.S.C. § 2254(d)(2) (2012), depending on whether
8 the “state court’s fact-finding process survives the intrinsic review of Section 2254(d)(2).”² *Hurles*
9 *v. Ryan*, 650 F.3d 1301, 1311 (9th Cir. 2011) (citing *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir.
10 2004)); *see also Detrich v. Ryan*, 677 F.3d 958 (9th Cir. 2012). It also may be appropriate for the
11 Court to hold an evidentiary hearing on Petitioner’s claim of innocence because, “[e]ven [though]
12 the [C]ourt finds that § 2254(d)(1) applies in full, it is arguably unconstitutional to the extent that
13 it bars relief for a death row inmate who has established his innocence.” *In re Davis*, 557 U.S. ____,
14 130 S. Ct. 1, 1 (2009) (Stevens, J., concurring).

15 As the Court observed, “[t]he parties have not yet had an opportunity to brief these issues
16 in this rapidly changing area of the law.” (Doc. No. 315 at 25.) The Court therefore requested
17 briefing regarding “what issues, and in what format, remain to be resolved.” (*Id.* at 24.) While the
18 Court noted that it “is particularly concerned about the adequacy of the record with respect to actual
19 innocence and alibi evidence,” (*id.*), that is not its exclusive concern: the Court is also concerned
20 generally with how much further evidentiary development of the five claims is appropriate or
21 necessary.

22 A fundamental premise of Petitioner’s Motion is mistaken, and the Court need not presently
23 reconsider its Order Regarding § 2254(d)(1). Accordingly, Petitioner’s Motion for Leave to File
24 Motion for Reconsideration of Order Regarding § 2254(d)(1), (Doc. No. 316), is denied. The parties

25
26 ² The Court found that the state courts unreasonably refused to permit Petitioner to submit his
27 alibi evidence. (Doc. No. 315 at 18–19 n.7.) The Court is particularly (but not exclusively) interested in
28 the parties’ views as to whether this is sufficient under § 2254(d)(2) for the Court to proceed to review
Petitioner’s claims de novo. *Cf. Williams v. Woodford*, 859 F. Supp. 2d 1154 (E.D. Cal. 2012) (Kozinski,
C.J.).

1 jointly shall file an appropriate proposed schedule within thirty days after the present Order is
2 posted.

3 **IT IS SO ORDERED.**

4



5 DATED: March 29, 2012

SUSAN ILLSTON
United States District Judge

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28