

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CURTIS LEE ERVIN,

No. C 00-01228 CW

Petitioner,

ORDER GRANTING
PETITIONER'S
MOTION TO DEPOSE
GARY HINES, DOCKET
NO. 178, AND
GRANTING IN PART
AND DENYING IN
PART PETITIONER'S
MOTION FOR
SUPPLEMENTAL
DISCOVERY, DOCKET
NO. 179

v.

VINCENT CULLEN, Warden of
California State Prison at San
Quentin,

Respondent.

_____ /

United States District Court
For the Northern District of California

Petitioner Curtis Lee Ervin filed a first Amended Petition for a Writ of Habeas Corpus on September 7, 2007. In the present motions, Ervin seeks the following discovery: (1) a deposition of Gary Hines; (2) the production of case material in the possession of Spencer Strellis, trial counsel for co-Defendant Robert McDonald, which tends to exculpate Ervin, or mitigate the penalty imposed on him or both; and (3) the production of personnel records of lead investigating officer, Sergeant Dana Weaver, by the East Bay Regional Parks Police Department. Petitioner contends that Hines' testimony is relevant to his claims of innocence, numbered 32 through 34. Respondent has opposed all three requests for discovery. The East Bay Regional Parks Police Department was not served with the motion for the production of Weaver's personnel file, but nevertheless filed an opposition to the disclosure of the file. Although Strellis was served with a

1 subpoena duces tecum for exculpatory evidence in his McDonald
2 trial records, as previously authorized by the Court, and failed
3 to respond to the subpoena, he was not served with the present
4 motion and has not appeared to state his position.

5 BACKGROUND

6 Petitioner has been sentenced to death in connection with his
7 conviction for first degree murder and robbery. Petitioner was
8 found to have committed murder for financial gain, a special
9 circumstance rendering him eligible for the death penalty.

10 McDonald, an insurance broker involved in a bitter divorce,
11 allegedly hired Petitioner and two other men, Armond Jack and
12 Arestes Robinson, to kill his wife. Armond Jack turned state's
13 evidence and was granted full immunity for his cooperation.

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15 Petitioner contends that his federal counsel have uncovered
16 evidence that he suffers from organic brain damage and that he did
17 not kill McDonald's wife. According to Petitioner, McDonald, who
18 died of cancer, sought to give deposition testimony at the end of
19 his life exculpating Petitioner. However, the California
20 Appellate Project (CAP) represented both Petitioner and McDonald
21 at the time, and refused to assist McDonald in that effort due a
22 conflict of interest. CAP reportedly told Petitioner that
23 McDonald's deposition had been taken, although that was not the
24 case.
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27 Hines, another death row inmate, befriended McDonald.
28 McDonald reportedly shared with Hines that he did not hire

1 Petitioner to kill his wife and Petitioner was not involved in the
2 murder. Hines attested that he helped McDonald in his efforts to
3 provide testimony about Petitioner's innocence, although these
4 efforts were ultimately unsuccessful. McDonald died in 1993
5 before he was able to testify as to Petitioner's lack of
6 participation in the crime. Hines is currently ill with terminal
7 cancer and is unlikely to survive this litigation. Hines has
8 stated that he is not friends with Petitioner and they are housed
9 in different areas of San Quentin prison.
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11 On March 22, 2010, the Court granted in part Ervin's motion
12 for discovery. The Court authorized Petitioner to issue a
13 subpoena duces tecum to Strellis for exculpatory material in his
14 possession. However, as noted earlier, Petitioner served Strellis
15 the subpoena, but Strellis never responded. In addition, the
16 Court permitted the deposition of Weaver. Nevertheless,
17 Petitioner has been unable to depose Weaver because Weaver suffers
18 from advanced multiple sclerosis and, thus, has been medically
19 unable to participate in a deposition.
20

21 LEGAL STANDARD

22 "A habeas petitioner, unlike the usual civil litigant in
23 federal court, is not entitled to discovery as a matter of
24 ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997).
25 However, federal courts have "the power to fashion appropriate
26 modes of procedure, including discovery, to dispose of habeas
27 petitions as law and justice require." Id. (internal quotations
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1 marks and citations omitted). Under Rule 6(a) of the Rules
2 Governing § 2254 Cases, a party is entitled to discovery "if, and
3 to the extent that, the judge in the exercise of his discretion
4 and for good cause shown grants leave to do so . . ." Id. "A
5 party requesting discovery must provide reasons for the request.
6 The request must . . . specify any requested documents." Rules
7 Governing § 2254 Cases, Rule 6(b). Before addressing whether a
8 petitioner is entitled to discovery under Rule 6(a), the court
9 must first identify the "essential elements" of the claim. Bracy,
10 520 U.S. at 904. Good cause exists "where specific allegations
11 before the court show reason to believe that the petitioner may,
12 if the facts are fully developed, be able to demonstrate that he
13 is entitled to relief. Id. at 908-09.

15 DISCUSSION

16 I. Pinholster and Post-Pinholster cases

17 Respondent argues that discovery cannot be permitted in light
18 of the Supreme Court's recent decision in Cullen v. Pinholster,
19 131 S.Ct. 1388, 1400 (2011). Pinholster addressed whether review
20 under section 2254(d)(1) permits consideration of evidence
21 introduced in an evidentiary hearing before the federal habeas
22 court.
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24 Section 2254(d) states that habeas relief on behalf of a
25 state prisoner shall not be granted under any claims adjudicated
26 on the merits in state court proceedings unless the adjudication
27 of the claim
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1 (1) resulted in a decision that was contrary to, or involved
2 an unreasonable application of, clearly established Federal
3 law, as determined by the Supreme Court of the United States;
4 or

5 (2) resulted in a decision that was based on an unreasonable
6 determination of the facts in light of the evidence presented
7 in the State court proceeding.

8 28 U.S.C. § 2254(d)(1) and (2).

9 Pinholster held that when the state court has decided an
10 issue on the merits, "review under § 2254(d)(1) is limited to the
11 record that was before the state court that adjudicated the claim
12 on the merits." 131 S.Ct. at 1398. Likewise, based on the plain
13 language in the statute, review under § 2254(d)(2) is limited to
14 "evidence presented in the State court proceeding." Id. at 1400
15 n.7. Section 2254(d) applies even where there has been a summary
16 denial. Id. at 1402 (citing Harrington v. Richter, 131 S. Ct.
17 770, 786 (2011)).

18 Nevertheless, the Supreme Court stated that "state prisoners
19 may sometimes submit new evidence in federal court" although
20 "AEDPA's statutory scheme is designed to strongly discourage them
21 from doing so." Id. at 1401. For example, section 2254(e)(2)
22 applies when a petitioner did not develop the factual basis of a
23 claim in state court proceedings. 28 U.S.C. § 2254(e)(2). The
24 Supreme Court chose "not to decide where to draw the line between
25 new claims and claims adjudicated on the merits," and noted that
26 dissenting Justice Sotomayor's hypothetical involving new evidence
27 of withheld exculpatory witness statements in violation of Brady
28 "may well present a new claim." Id. at 1401 n.10. This Court's

1 March 22, 2010 order granting discovery was largely directed at
2 discovery of potential Brady evidence.

3 Although Pinholster did not directly address the scope of
4 discovery under Rule 6(a), courts have relied on the case to limit
5 discovery in connection with petitions for habeas relief. See
6 e.g., Robinson v. Miller, 2011 WL 2193393, *2 (N.D. Cal.) (noting,
7 in connection with denial of discovery, that Pinholster generally
8 precludes holding an evidentiary hearing on a claim adjudicated by
9 the state court on its merits); Coddington v. Cullen, 2011 WL
10 2118855, at *1 (E.D. Cal.); Sok v. Substance Abuse Treatment
11 Facility, 2011 WL 1930408, *2 (E.D. Cal.) (finding no basis to
12 permit discovery because, "pursuant to Pinholster," the court was
13 "limited to reviewing only the record that was before the state
14 courts"); Wilson v. Humphrey, 2011 WL 2709696, *7 (M.D. Ga.)
15 ("After Pinholster, if a state court decides a particular claim on
16 the merits, district courts are not authorized to hold an
17 evidentiary hearing in which new evidence is introduced to support
18 that claim. It logically follows that conducting discovery on
19 that claim would be futile . . ."); Hurst v. Branker, 2011 WL
20 2149470, *4 (M.D.N.C.) ("'good cause' does not exist for the
21 discovery Petitioner seeks . . . because this Court may look only
22 to the state court record in applying § 2254(d)"). These
23 decisions are not controlling. Furthermore, only Hurst addressed
24 a claim for habeas relief under section 2254(e)(2). In Hurst, the
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1 record demonstrated that the petitioner could not seek relief
2 under section 2254(e)(2).

3 The Ninth Circuit has not directly ruled on the effect of
4 Pinholster on the availability of discovery, but, at least in one
5 case, has held that discovery is unwarranted where habeas relief
6 is precluded. In Kemp v. Ryan, 638 F.3d 1245 (9th Cir. 2011), the
7 Ninth Circuit considered an appeal from a district court's denial
8 of a state prisoner's petition for habeas relief from his state
9 conviction for felony murder. The court initially explained that,
10 because the federal habeas petition was filed after passage of the
11 AEDPA, federal habeas relief could only be granted if the state
12 court decision satisfied either section 2254(d)(1) or (2). Id. at
13 1254-55. After the court held that the Arizona Supreme Court did
14 not unreasonably apply clearly established federal law, the court
15 considered whether the Arizona court's factual determinations were
16 unreasonable. The petitioner, however, did not directly challenge
17 the state court's factual determination, but instead contended
18 that the district court should have granted his request for
19 further discovery on the issue. The petitioner admitted that he
20 had not developed the factual basis for his claim in the state
21 courts. Accordingly, the court applied section 2254(e)(2), rather
22 than sections 2254(d)(1) or (2). Id. at 1258-60.

23 Section 2254(e)(2) of AEDPA generally bars an evidentiary
24 hearing if the applicant failed to develop the factual basis for
25 the claim in state court. Under section 2254(e)(2), a court can
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1 hold an evidentiary hearing only if the petitioner meets two
2 requirements. First, the claim must rely on a new rule of
3 constitutional law announced by the Supreme Court or be based on
4 facts that could not have been previously discovered through the
5 exercise of due diligence. 28 U.S.C. § 2254(e)(2)(A). Second,
6 even if a petitioner raises a new claim or one based on a new
7 factual predicate, a hearing is allowed only if "the facts
8 underlying the claim would be sufficient to establish by clear and
9 convincing evidence that but for constitutional error, no
10 reasonable fact-finder would have found the applicant guilty of
11 the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

13 In Kemp, the Ninth Circuit first found that the petitioner
14 failed to meet the requirements of section 2254(e)(2), precluding
15 an evidentiary hearing. The court further held that the district
16 court did not err in denying discovery because it would have been
17 futile and amounted to a fishing expedition. The court did not
18 rely on Pinholster to affirm the denial of discovery. 638 F.3d at
19 1262.

21 Here, the Court has yet to determine whether an evidentiary
22 hearing is warranted with respect to any of the claims pursued in
23 this federal habeas petition. Respondent asserts that the
24 California Supreme Court has rejected Petitioner's claims on the
25 merits. However, "[s]ection 2254(e)(2) continues to have force
26 where § 2254(d)(1) does not bar federal habeas relief."
27 Pinholster, 131 S.Ct. at 1401. Respondent has not urged, and it
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1 is not apparent, that Petitioner has not met the requirements for
2 relief under section 2254(e)(2).

3 The Advisory Committee Note for Rule 6(a) indicates that
4 discovery is not necessarily limited to instances in which an
5 evidentiary hearing has been granted. The Advisory Committee
6 states, "Discovery may, in appropriate cases, aid in developing
7 facts necessary to decide whether to order an evidentiary hearing
8 or to grant the writ following an evidentiary hearing . . ."
9 Rules Governing § 2254 Cases, Rule 6(a). The committee further
10 explains, "While requests for discovery in habeas proceedings
11 normally follow the granting of an evidentiary hearing, there may
12 be instances in which discovery would be appropriate
13 beforehand. . . Such pre-hearing discovery may show an evidentiary
14 hearing to be unnecessary, as when there are 'no disputed issues
15 of law or fact.'" Id. Once it is determined that an evidentiary
16 hearing is unwarranted, there may be no basis for discovery, as
17 held in Kemp.
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20 In Blackledge v. Allison, 431 U.S. 63, 81-82 (1977), the
21 Supreme Court cited with approval the Advisory Committee's comment
22 on Rule 6(a). There, after holding that habeas relief was not
23 barred for state prisoners who enter a guilty plea, the Court
24 noted that not every set of sufficiently pleaded allegations will
25 entitle a habeas petitioner to an evidentiary hearing. However,
26 the Court stated that a district court could order discovery
27 before an evidentiary hearing to determine whether a hearing would
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1 be unnecessary. Id. at 81 (citing Advisory Committee Note to Rule
2 6, Rules Governing Habeas Corpus Cases).

3 The Eighth Amendment entails a "heightened 'need for
4 reliability in the determination that death is the appropriate
5 punishment in a specific case.'" Caldwell v. Mississippi, 472
6 U.S. 320, 323 (1985) (citing Woodson v. North Carolina, 428 U.S.
7 280, 305 (1976) (plurality opinion). Here, Petitioner faces the
8 ultimate punishment, and his discovery requests relate to
9 potentially exculpatory evidence. Contrary to Respondent's
10 contention, Pinholster does not bar discovery in this instance.

12 II. Hines deposition

13 Hines' testimony is relevant to Petitioner's claims of
14 innocence. Hines stated in his declaration that MacDonald told
15 him that he never hired Ervin to kill his wife, that Ervin was not
16 involved in the murder, and that Ervin was not one of the two men
17 he paid to kill his wife. Even though McDonald was not present at
18 the murder, this evidence would undermine the basis for
19 Petitioner's conviction and sentence. There is good cause to
20 permit Hines' deposition now, because he is terminally ill and
21 will not likely survive the duration of this litigation.

22 Respondent argues that the request is untimely because it was
23 filed on June 6, 2011. The Court's December 22, 2011 order,
24 Docket No. 177, set a deadline of April 1, 2011 for the completion
25 of discovery. Respondent has not established that the two month
26 delay in filing the discovery motion prejudices him. Several
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1 extensions have been granted in this case, including extensions
2 for Respondent. The motion to depose Hines discloses that
3 Respondent was aware, as of May 12, 2011, that Petitioner would
4 seek to depose Hines, and that initially Respondent was unsure
5 whether he would oppose the motion.

6 Petitioner's request to depose Hines is granted.

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8 III. Weaver deposition

9 This Court has already authorized a deposition of Weaver, but
10 at the time denied Petitioner's request for his personnel file as
11 overly broad and unduly burdensome. Petitioner renews his request
12 for the file because Weaver is medically unable to sit for a
13 deposition. Due to this circumstance, the Court will allow
14 limited discovery of Weaver's personnel file. The EBRPPD shall
15 disclose to Petitioner any evidence in the file indicating any on-
16 the-job misconduct by Weaver. Weaver shall be notified of the
17 disclosure of such evidence. In the event that there are privacy
18 concerns, the EBRPPD or Weaver or both may move for a protective
19 order with respect to the evidence. If the evidence is used in
20 support of a motion or pleading, the parties may also move to seal
21 it.
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23 The request for Weaver's personnel records will not be denied
24 based on untimeliness. Respondent has again failed to show how he
25 would be prejudiced by permitting the discovery to go forward.
26

27 Accordingly, Petitioner's request for Weaver's personnel file
28 is granted in part, pursuant to the following instructions.

1 Within fourteen days of this order, EBRPPD shall review Weaver's
2 personnel file for any documentation indicating misconduct on the
3 job. In the event that the EBRPPD identifies any such documents,
4 the EBRPPD shall notify Weaver of Petitioner's discovery request,
5 the responsive documents and this Court's order, and shall notify
6 Petitioner. Weaver may oppose the disclosure of said documents to
7 Petitioner by filing a motion within fourteen days of service of
8 the notification from EBRPPD. If Weaver does not oppose the
9 disclosure, the EBRPPD shall immediately turn over the documents.
10 If Weaver opposes the disclosure, Petitioner may respond within
11 fourteen days.
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13 IV. Strellis trial records

14 In its March 22, 2010 order, the Court found that any
15 exculpatory material in Strellis' possession would be relevant to
16 Petitioner's claims and authorized the subpoena for the materials.
17 There is no need to revisit the issue, and Respondent has not
18 demonstrated that requiring Strellis to respond to this discovery
19 request after the initial deadline will prejudice him. Petitioner
20 shall serve Strellis with a copy of this order. Within ten days
21 of service, Strellis shall produce any responsive materials or
22 provide a declaration swearing that there are none. If he fails
23 to do so, Petitioner may apply for an order for Strellis to appear
24 and show cause why he should not be held in contempt.
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CONCLUSION

Petitioner's request to depose Hines and for an order requiring Strellis to produce any exculpatory material in his possession is GRANTED. Petitioner's request for the production of Weaver's personnel records by the EBRPPD is GRANTED IN PART.

IT IS SO ORDERED.

Dated: 9/8/2011



CLAUDIA WILKEN
United States District Judge

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