

# “Habeas Hints”

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*This column provides “habeas hints” to prisoners who are considering or handling habeas corpus petitions as their own attorneys (“in pro per”). The focus of the column is on “AEDPA”, the federal habeas corpus law which now governs habeas corpus practice in courts throughout the United States.*

## STARING DOWN THE TWO-HEADED MONSTER:

*Richter - Pinholster*

### Part One

*Harrington v. Richter*, 131 S.Ct. 770 (2011)

*Cullen v. Pinholster*, 131 S.Ct. 1388 (2011).

In “Richter” and “Pinholster”, the U.S. Supreme Court (SCOTUS) dealt body blows to the already slim chances for relief on federal habeas corpus by making IAC claims even harder to win (Richter); and by all but eliminating federal evidentiary hearings as an aid to satisfying AEDPA’s requirement that the state court’s denial of habeas corpus relief be shown to be “unreasonable”. Because evidentiary hearings in federal court have traditionally been the gateway to relief on habeas corpus, and because IAC claims – which by definition bring something new to the table that wasn’t considered at trial – have heretofore been the staple of habeas litigation, the decisions in Richter and Pinholster represent a two-headed monster which prisoners will frequently face, and will have to stare down.

In this two-part column, I discuss these two landmark cases and suggest some “Habeas Hints” for how to make the best of them. Here in Part One we focus on Richter, and in Part Two we will zero in on Pinholster.

**Richter** involved a robbery-murder amid murky facts as to how the shooting went down. A victim who was shot but survived (Johnson) told police that Richter’s accomplice had shot him in the bedroom; that he found the other victim shot to death on a living room couch; and that Johnson’s gun safe, a pistol, and cash were missing. Johnson’s account was corroborated by spent casings and blood evidence found at the scene, as well as by a search of Richter’s home, which turned up the missing safe and ammunition matching evidence at the scene. Richter initially lied about not being at the scene, but then admitted that he’d not only been there but had disposed of guns belonging to Johnson and Richter’s co-defendant. At trial, with the prosecution having planned its case against Richter based on Johnson’s account, Richter’s defense attorney gave an opening statement in which he claimed self-defense. Taken by surprise, the prosecution hurriedly obtained expert testimony from a blood expert, whose findings undercut Richter’s self-defense claim. Meanwhile, Richter’s defense counsel called Richter and a several lay witnesses and cross-examined the People’s expert, but did not call a blood expert for the defense. Richter was convicted and sentenced to LWOP, and he lost on direct appeal.

Represented by new counsel, Richter sought relief on habeas corpus from the California

Supreme Court (CSC), claiming that his trial lawyer had been ineffective in failing to present expert testimony regarding the blood evidence. The claim was supported by declarations from new experts who had been retained by habeas counsel. The CSC denied the habeas petition as it usually does: in a one-sentence, summary order.

Richter then filed a federal habeas corpus petition re-alleging his IAC claim. The U.S. District Court denied the petition, but a divided Ninth Circuit en banc (entire court) panel reversed, holding that the California court's denial of the IAC claim constituted an unreasonable application of the *Strickland* standard, which supports habeas relief where the petitioner has shown deficient performance and prejudice.

SCOTUS granted review on certiorari and, in a unanimous decision, reversed the Ninth Circuit's grant of habeas relief.

The first issue SCOTUS addressed was whether a state court's summary dismissal of a habeas petition – i.e., a one-sentence denial without a statement of reasons – is nevertheless an “adjudication on the merits”, which therefore is entitled to deference under AEDPA. SCOTUS not only found that it was, but that the absence of reasons for the decision was a burden the petitioner had to bear by (1) addressing all the arguments or theories that “could have supported the state court's decision”, and then (2) showing that *each* hypothetical argument was *so* bogus that *no* fair-minded judge could *possibly* have found it consistent with established U.S. Supreme Court authority.

Hard as the above standard was to meet, SCOTUS made it doubly difficult to satisfy in the context of IAC claims: Pursuant to the prevailing *Strickland* standard, a party must show both deficient performance (“incompetence under prevailing professional norms”) and prejudice (a reasonable probability that, but for counsel's errors, the result would have been different”), and the petitioner has the burden of establishing both by evidence sufficient to shake the court's presumed confidence in counsel's performance and in the jury's verdict. Obviously, satisfying this standard is no day at the beach. Yet, as SCOTUS went on, this is just half the battle on federal habeas corpus, because the deference due under *Strickland* is doubled down by the deference due to state court denials under AEDPA. Thus, to overcome a denial of an IAC claim by a state court, a habeas petitioner must not only convince the federal judge that he or she would personally find both deficient performance and prejudice, but also show that no “fairminded” judge could disagree with either of those findings!

Applying this enormous burden to the facts in *Richter*, SCOTUS: (1) nixed deficient performance because trial counsel's assumption that the defense wouldn't need forensic testimony was a “reasonable miscalculation”, and because “it was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence in the circumstances here”; and (2) found prejudice lacking either because the expert evidence tendered by habeas counsel did not obliterate the conclusions reached by the prosecution's experts, and/or because there was so much circumstantial evidence of guilt that it “eclipsed” whatever habeas counsel had produced which pointed to innocence.

### **Habeas Hints**

- § One thing that is perfectly clear from both *Richter* and *Pinholster* is that the *state* proceedings on habeas corpus are now the “main event” on habeas corpus – so much so that a petitioner who fails to make a sufficient habeas record in state court is going to be toast when he or she gets to federal court. Therefore, start early and do everything you possibly can to make the best possible record in state court – including providing detailed declarations from key witnesses and experts – and be prepared to live and die with your state record when it comes to federal habeas corpus.
- § Because relief on federal habeas corpus is now almost totally dependent on the state court’s habeas record, where financial resources are limited, be prepared to expend a substantial share of your resources on state habeas in general and the state habeas investigation in particular. Hence, assuming you can afford to pay for private counsel on habeas corpus, start by retaining an experienced habeas corpus lawyer who is licensed to practice in the state where you were convicted and who is familiar with whatever state procedures exist for filing a state habeas corpus petition and supporting it with evidence from the existing record as well as new declarations from lay and expert witnesses whose testimony can support the facts alleged in the petition. Then, be prepared to pay that lawyer whatever is necessary to supervise an investigation into the facts supporting your claims and to competently present those facts to the state’s highest court *before* you proceed to federal court with competent federal counsel.
- § It’s always best to pay for private counsel on habeas corpus after you’ve used up your right to court-appointed counsel on your first (direct) appeal. However, in the unfortunate situation in which neither you nor your family have any money at all to pay for private counsel on habeas corpus, urge your appointed lawyer on appeal to carefully investigate the possibility of filing a “companion” habeas corpus petition along with the direct appeal. If the appointed lawyer simply refuses to do anything for you on habeas corpus, consider writing a letter to the lawyer which: (a) summarizes the law and facts in support of one or more habeas claims you believe may have merit; (b) states that neither you nor your family has any funds to pay for an independent habeas corpus investigation; and (c) reminds your lawyer that, pursuant to *Martinez v. Ryan*, you have a constitutional right to effective assistance of counsel on what will be your first and only chance to file a state habeas corpus petition.
- § Because *Richter* was a unanimous opinion, there’s little hope that it will be overruled or undermined at any time in the foreseeable future. However, in many instances, *Richter* can be distinguished on the facts. For example, in *Richter* there were several issues besides serology (blood) on which expert testimony could have been used, and testimony by the prosecution’s blood expert was not the sole basis for defendant’s conviction. That situation invites more leeway for tactical decisions by defense counsel than a case in which expert testimony by a single expert is critical. Compare, for example, a gang case in which a single gang expert’s testimony is crucial to both the validity of enhanced

charges and an enhanced sentence. I would argue that in the latter situation, unlike in *Richter*, the need to call a specific expert for the defense is so essential that failing to do so is *necessarily* deficient performance. Similarly, when arguing prejudice on an IAC claim where the A.G. invokes *Richter*, point out that Richter's credibility was completely shot when he at first denied any involvement and then changed his story to self-defense after damning inculpatory evidence was found at his home, and argue that the evidence pointing to guilt in your own case was far less overwhelming.

§ *Richter*'s holding that the state court denial can be based on any reasonable argument that an A.G. or judge can come up with at the federal level only applies where the state court gives no reasons for its denial. Where specific reasons for the denial are provided – as more typically occurs in the lower courts than in the state's highest court – the federal court is not free to supply its own rationale for the denial. Nevertheless, beware of going through the lower state courts when the petition in pushing the 1-year-from-finality deadline under the AEDPA statute of limitations, since a state untimeliness ruling, no matter how poorly supported by state precedent, is an absolute bar to federal habeas corpus.

§ Although holding that a summary denial of habeas corpus relief by a state court qualifies as a decision on the merits which is entitled to deference under AEDPA, Richter mentions nothing about possible defects in state court procedures that may have *preceded* the summary denial. Specifically, *Richter* does not consider or address whether the state court denial in a particular case may have amounted to an unreasonable determination of the *facts* [see AEDPA, 28 USC sec. 2254(d)(2)], either because the state failed to accept as true factual allegations in the petition that were neither incredible on their face nor clearly refuted by the record; or failed to hold a hearing where those facts, accepted as true, satisfied the requirements for relief (“prima facie case”) as to a specific habeas corpus claim.

§ Although SCOTUS went out of its way in *Richter* and *Pinholster* to find “strategic” bases for defense counsel's failures, both decisions rely on specific support in the record for these “tactics”. Hence, *Richter* and *Pinholster* notwithstanding, the federal court is not free to pull alleged strategic decisions by defense counsel out of thin air.

*Kent A. Russell specializes in habeas corpus and is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus under AEDPA. The 6<sup>th</sup> Edition, completely revised in Septmeber of 2015, can be purchased for \$49.99, which includes priority mail postage. An optional order form can be obtained from Kent's website ([russellhabeas.com](http://russellhabeas.com)), or simply send a check or money order to: Kent Russell, “Cal. Habeas Handbook”, 3169 Washington St., San Francisco, CA 94115.*