"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 Two

Harrington v. Richter, 131 S.Ct. 770 (2011)
Cullen v. Pinholster, 131 S.Ct. 1388 (2011)

In "*Richter*", the U.S. Supreme Court (SCOTUS) made ineffective assistance of counsel ("IAC") claims – heretofore the staple of habeas corpus litigation – even harder to win on federal habeas corpus than they were before; and in *Pinholster* the Court all but eliminated federal evidentiary hearings as an aid to satisfying AEDPA's requirement that the state court's denial of habeas relief be shown to be "unreasonable". 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 important cases and suggest some "Habeas Hints" for how to make the best of them. In Part One we focused on *Richter*. Here in Part Two we will zero in on *Pinholster*.

Pinholster concerned a defendant charged with capital murder after he solicited friends to rob local drug dealers and, when the dealers tried to prevent the robbers' escape, beat and stabbed them to death. After his arrest, Pinholster threatened to kill a cooperating witness unless he kept quiet. At the guilt phase of the trial Pinholster testified stupidly in his own defense – boasting that he had committed hundreds of robberies while insisting that he always used a gun, even though he had a history of having kidnapped a person while using a knife. The jury found Pinholster guilty of two counts of first-degree murder, thus triggering the penalty phase of the trial.

Shortly before the penalty phase started, the defense moved to exclude any aggravating evidence on the ground that the prosecution had not provided the notice to use such evidence that is required under California law. That motion was denied on the basis that Pinholster had represented himself at a previous stage of the case, during which the required notice had been provided. Defense counsel then stated that, having banked on the court's granting the motion to exclude, he was not prepared to offer any mitigating evidence. The court asked whether a continuance might be helpful but counsel declined, saying that, because he could not think of any mitigation witness other than Pinholster's mother, having more time wouldn't matter. Accordingly, although the prosecution produced eight penalty witnesses who testified about Pinholster's multiple acts of brutal violence, brazen assaults on police officers, involvement with

criminal gangs, and prison disciplinary violations, the defense called only Pinholster's mother, who testified that her son suffered a troubled childhood even though his siblings turned out fine. After 2 ½ days, the jury voted for death.

On state habeas corpus before the California Supreme Court, habeas counsel argued that trial counsel had been ineffective at the sentencing phase. This IAC claim was bolstered by a spate of mitigation evidence, including declarations showing that the upbringing of the entire Pinholster family was abysmal, and that Pinholster himself suffered from bipolar disease and seizure disorders. Nevertheless, the California Supreme Court summarily denied habeas relief on the merits. Counsel then presented the IAC claim on federal habeas corpus, whereupon the District Court granted an evidentiary hearing and subsequently granted the petition. The Ninth Circuit affirmed, holding that, both on the basis of the evidence admitted at the federal hearing as well as on the state record alone, the California Supreme Court's denial amounted to an unreasonable application of the *Strickland* standard.

SCOTUS granted cert and, in a 6-3 decision, reversed.

In a blockbuster holding that will apply to most prisoners seeking relief on federal habeas corpus, SCOTUS ruled that evidence introduced in federal court for the first time has "*no bearing*" on AEDPA's requirement that a federal habeas petitioner demonstrate that state court's denial of relief was an unreasonable application of Supreme Court law. Hence, and because there is no point in a federal court taking new evidence that it can't consider, federal courts entertaining habeas petitions under AEDPA as to claims that have been adjudicated on the merits in state court (i.e., virtually *all* of them, since no habeas claim can be filed in federal court that has not previously been exhausted by being denied on the merits in state court) will now have to do so *without granting evidentiary hearings* – even as to petitioners who were diligent but unsuccessful in seeking an evidentiary hearing at the state level.

The remainder of the SCOTUS majority opinion in *Pinholster* was devoted to denying his IAC claim by applying the reasoning of *Richter* to the state court evidence which remained after the evidence that had come in at the federal evidentiary hearing was excluded from consideration. First, even though defense counsel had no back-up plan for the penalty phase other than to rely entirely on Pinholster's mom, SCOTUS found that "the state court record supports the idea that Pinholster's counsel acted strategically to get the prosecution's aggravation witnesses excluded for lack of notice, and if that failed, to put on Pinholster's mother." The majority also found lack of prejudice, because Pinholster was an utterly "unsympathetic" client, and also because putting on psychiatric evidence of the defendant's mental difficulties "would have opened the door to rebuttal by a state expert". Thus, despite a vigorous dissent by three justices who made a strong argument for both deficient performance and prejudice, SCOTUS reversed the Ninth Circuit and reinstated Pinholster's death sentence.

Habeas Hints

$ Although this was touched on in Part One, it bears repeating here that, although both *Richter* and *Pinholster* concluded that the petitioner could not show that the state court had unreasonably applied Supreme Court law, neither case considered whether the state fact-finding

procedures which led up to the state court's summary denial of habeas relief may have been so deficient that they "resulted in a decision that was based on *an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding". (See 28 USC § 2254(d)(2), presenting this as an alternative basis for federal habeas corpus relief under AEDPA.) Challenges to the facts under (d)(2) can take two forms: (1) A petitioner may challenge the *substance* of the state court findings and attempt to show that those findings were not supported by substantial evidence in the state court record; or (2) He or she can challenge the fact-finding *process* itself on the ground that it was deficient in some material way. (See, e.g., *Hibbler v. Benedetti*, 693 F.3d 1140, 1146 (9th Cir. 2012).) Challenging the substance of the state court's factual findings is fairly straight-forward – for example, in IAC cases you present the facts showing deficient performance and prejudice and argue that there is no substantial evidence in the state record to show otherwise – but doing so requires the petitioner to negate every fact or inference that could possibly have supported the denial. Less amoeba-like – because what the state courts did or didn't do procedurally is a fixed target – is to argue that the state's fact-finding process was defective because the petitioner never had a fair chance in state court to have the relevant habeast facts heard and determined. For example, the state court's fact-finding procedures have been found to be faulty under (d)(2) of AEDPA when 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 basic requirements for relief (i.e., stated a "prima facie case") as to a specific habeas corpus claim. (See, e.g., *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003) [where petitioner makes out a prima facie case under *Strickland*, state court's summary denial of IAC claim without an evidentiary hearing amounts to an unreasonable determination of the facts]; see also *Hurles v. Ryan*, 706 F.3d 1021-1038-40 (9th Cir. 2013) [state's purported determination of the facts without a fair opportunity for petitioner to present evidence violates AEDPA].)

$ *Pinholster* acknowledged that the "state court record" includes everything that was presented to the state courts, whether or not cited to the state's highest court on state habeas. Therefore, *Pinholster* won't be an obstacle if your federal habeas claim depends wholly on transcripts or evidence contained somewhere in the record of the trial, the direct appeal, or on state habeas.

$ *Pinholster*'s ban on federal evidentiary hearings applies only at the stage where the federal court is determining whether the state court's denial of habeas corpus is "unreasonable" under AEDPA. Granted, that's 90% of the battle on federal habeas corpus, but if you get to the point where the A.G. takes the position that habeas corpus relief is barred because you did not demonstrate that a state court's violation of AEDPA was not only unreasonable but also prejudicial [see *Brecht v. Abrahamson*, 507 U.S. 619 (1993)], argue that an evidentiary hearing on this latter issue is appropriate and necessary notwithstanding *Pinholster*.

$ SCOTUS has not yet addressed whether AEDPA's limits on federal review of state decisions and federal fact development, combined with practically non-existent fact development procedures on state habeas, amounts to an unconstitutional "suspension of the writ" (see

Boumedine v. Bush, 553 U.S. 723 (2008) [a constitutionally adequate habeas corpus proceeding must at least include a meaningful opportunity to satisfy the requirements of AEDPA]); or denies the petitioner Due Process(see, e.g., *District Attorney's Office v. Osborne*, 557 U.S. 52 (2009) [Due Process affords a habeas corpus petitioner the right to a fair opportunity in state court to discover and present potentially exculpatory evidence that was not contained in the record on direct appeal]). In the pre- *Pinholster* world, these arguments failed because, although it was fairly apparent that state courts were rarely if ever providing discovery or evidentiary hearings to state habeas petitioners seeking to develop evidence beyond that which was presented at trial, U. S. District Courts could fill the constitutional gap by allowing for new evidence to be developed at the federal level. But, now that *Pinholster* pretty much prohibits the consideration of any new evidence on federal habeas corpus, the federal safety valve has been shut off, thereby paving the way for a reincarnation of these arguments in the wake of *Pinholster*. While there is not just one way to skin the cat, consider the following strategy when pursuing a habeas claim that depends on factual development at the state level in states which (e.g., California) prohibit discovery to non-capital habeas petitioners. (1) On state habeas, make specific discovery demands relevant to the claims in your state habeas petition (e.g. requests for production of documents, interrogatories, subpoenas for witnesses who otherwise won't testify voluntarily, etc.). These discovery requests will probably be ignored, but making them and having them summarily denied highlights the fundamental unfairness in the state's fact-finding procedure and blocks the A.G. from later arguing in federal court that you did not exhaust your discovery demands. (2) When you get to federal court, move for discovery under Habeas Rule 6 *before* the court decides whether the state court's denial of habeas relief was unreasonable under AEDPA. (3) If the District Court denies discovery, make one or both of the arguments set forth above in your Traverse. Alternatively, if the district court allows discovery and new evidence is thereby obtained: (a) request that the federal proceedings be stayed while you go back to state court and present the new evidence there; (b) after the state court denies relief on the basis of the new evidence (thereby accomplishing exhaustion), return to federal court, incorporate the new evidence into the federal habeas claim(s) that had been stayed, and *now* ask the District Court to find that the state courts' denial of habeas relief violated AEDPA.