

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

11 HERBERT JAMES CODDINGTON,  
12 Petitioner,  
13 v.  
14 MICHAEL MARTEL,  
15 Respondent.

Civ. No. S-01-1290 KJM CKD  
DEATH PENALTY CASE  
ORDER

17 Petitioner's motion for reconsideration of the magistrate judge's order, denying  
18 petitioner's request to undertake discovery, is pending before the court. This court heard  
19 argument on October 10, 2011. Bruce Cohen and Jennifer Mann appeared for petitioner; Eric  
20 Christoffersen and Ward Campbell appeared for respondent. After carefully considering the  
21 parties' arguments and pleadings, the court DENIES the motion for reconsideration.

22 I. BACKGROUND

23 On June 14, 2002, petitioner Herbert James Coddington filed a petition for a writ  
24 of habeas corpus challenging the death sentence imposed by El Dorado County Superior Court.  
25 ECF No. 16. He filed his First Amended Petition on May 27, 2005, raising 160 claims. ECF No.  
26 59.

27 On December 21, 2010, petitioner filed a motion for leave to conduct discovery on  
28 several of his claims. In claim three, petitioner asserts that Superior Court Judge Charles Fogerty,

1 who was under investigation by federal authorities for involvement with drug traffickers,  
2 transferred petitioner's case from South Lake Tahoe to Placerville for personal, non-legal  
3 motives, gave a false explanation for the transfer, and failed to disclose a conflict of interest  
4 relating to the transfer. Petitioner seeks discovery about the investigation of Judge Fogerty and  
5 the connection between the judge and witness Joe Tveten. In claim thirty-five, petitioner alleges  
6 that the testimony of Dr. Richard Sander, who conducted the autopsies and was later discharged  
7 for incompetence, was "highly suspect" and contends the prosecutor knew he was presenting  
8 testimony of an incompetent witness who had a reckless disregard for the truth. Petitioner asks  
9 for permission to serve subpoenas duces tecum on several agencies for material relating to Dr.  
10 Sander. Finally, in claims nine, forty-six, forty-seven and eighty-six, petitioner alleges that the  
11 prosecution failed to disclose and trial counsel failed to locate a report generated by a mental  
12 health worker shortly after petitioner's arrest; he seeks authority to issue a subpoena duces tecum  
13 to the El Dorado County Department of Mental Health for records about petitioner. ECF No.  
14 107. In a sealed portion of the motion, petitioner ask for discovery relating to claim 160(a) of the  
15 petition, which alleges that a juror was biased and committed misconduct by failing to reveal  
16 during voir dire that she had been the victim of a crime and her brother had been in trouble with  
17 the law. ECF No. 110. The parties do not dispute that the California courts rejected the claims  
18 on which petitioner seeks discovery on the merits.

19 On March 24, 2011, the magistrate judge heard argument on petitioner's motion.  
20 ECF Nos. 129, 142. The judge noted the parties appeared to agree there was good cause for  
21 discovery on the juror misconduct/bias claim and explored with them the scope of the request for  
22 information. He also discussed the limits of any request for mental health records from the jails  
23 that housed petitioner during the course of the state proceedings. *See generally* ECF No. 142.<sup>1</sup>

24 On April 4, 2011, the Supreme Court decided *Cullen v. Pinholster*, \_\_\_ U.S. \_\_\_,  
25 131 S.Ct. 1388, 1398 (2011), which held that "review under § 2254(d)(1) is limited to the record

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27 <sup>1</sup> The court notes that the magistrate judge who decided the discovery motion has since retired  
28 and resumed recall status, and a new magistrate judge has been assigned to the case. This change  
in the assigned magistrate judge does not affect the court's analysis.

1 that was before the state court that adjudicated the claim on the merits.” The magistrate judge  
2 asked for supplemental briefing on *Pinholster*’s impact on the discovery question. ECF No. 133.

3 On May 27, 2011, the magistrate judge denied petitioner’s motion for an order  
4 authorizing discovery. ECF No. 150. He reasoned that *Pinholster*’s holding necessarily limited  
5 discovery in federal habeas cases, because if “evidence introduced in federal court has no bearing  
6 on § 2254(d)(1) review,” *Pinholster*, 131 S.Ct. at 1400, then a court could not find good cause to  
7 permit discovery if the results could not be used as part of the court’s review. ECF No. 150.

8 Petitioner filed his motion for reconsideration on July 8, 2011. ECF No. 159. For  
9 the reasons discussed below, the motion is DENIED.

## 10 II. STANDARDS FOR A MOTION TO RECONSIDER

11 Federal Rule of Civil Procedure 72(a) directs district judges to consider timely  
12 objections to nondispositive pretrial orders issued by magistrate judges and to “modify or set  
13 aside any part of the order that is clearly erroneous or is contrary to law.” *See also* Local Rule  
14 303(f); 28 U.S.C. § 636(b)(1)(A). “[T]he ‘contrary to law’ standard applies to the magistrate  
15 judge’s legal conclusions, which are reviewed *de novo*.” *Morgal v. Maricopa Cnty. Bd. of*  
16 *Supervisors*, 284 F.R.D. 452, 458 (D. Ariz. 2012) (internal citations and quotation marks  
17 omitted); *see also Garcia v. Benjamin Grp. Enter., Inc*, 800 F. Supp. 2d 399, 403 (E.D.N.Y.  
18 2011) (“[U]nder the ‘contrary to law’ standard of review, a district court may reverse a finding  
19 only if it finds that the magistrate [judge] ‘fail[ed] to apply or misapplie[d] relevant statutes, case  
20 law or rules of procedure.’”) (quoting *Catskill Dev., LLC v. Park Place Entm’t.*, 206 F.R.D. 78, 86  
21 (S.D.N.Y. 2002)).

## 22 III. ANALYSIS

### 23 A. The Magistrate Judge’s Order

24 In his order filed May 27, 2011, the magistrate judge acknowledged that  
25 *Pinholster* “dealt specifically with evidentiary hearings,” but found “its linkage to the discovery  
26 issue . . . unquestionably present.” ECF No. 150 at 1. First, the magistrate judge explored  
27 *Pinholster*’s impact on review under subsections 2254(d)(1) and (d)(2), noting that it restricted  
28 such review to the record before the state court and finding no ambiguity in *Pinholster*’s holding

1 that “[e]vidence later introduced in federal court is irrelevant to § 2254(d)(1) review.”” ECF No.  
 2 150 at 3 (quoting *Pinholster*, 131 U.S. at 1398). He concluded that “in habeas cases where the  
 3 state courts had made an ‘adjudication on the merits’ with respect to particular issues, previous  
 4 rulings by the circuit and district courts permitting federal factual development on such issues  
 5 prior to a resolution of those issues initially on the state court record have been abrogated.” ECF  
 6 No. 150 at 4 (footnote omitted).

7 Next, he turned to *Pinholster*’s relevance to discovery, asking rhetorically “how  
 8 could a district court ever find good cause for federal habeas discovery” if the facts developed  
 9 during discovery could not be used. ECF No. 150 at 4. He rejected petitioner’s suggestion that a  
 10 court could grant discovery in the federal proceedings to allow petitioner to develop facts he then  
 11 could take back to state court for exhaustion of state remedies. ECF No. 150 at 5-6.

12 Finally, the magistrate judge concluded that if petitioner were to prevail on a (d)(1)  
 13 claim, “it would be inappropriate to issue a final federal ruling with the accuracy of the facts  
 14 never having been tested,” so discovery would be available at that point, assuming it was  
 15 otherwise appropriate. ECF No. 150 at 8-9.

16       B. The Motion For Reconsideration

17       On July 8, 2011, petitioner filed a motion for reconsideration, arguing that the  
 18 magistrate judge “has extrapolated from *Pinholster* a holding the Supreme Court did not make”  
 19 and offering “sound systemic reasons” for granting discovery “when, as here, the state factfinding  
 20 process was demonstrably inadequate.” ECF No. 159 at 11. He takes issue with the magistrate  
 21 judge’s apparent assumption that cases come to federal court after a fair hearing, arguing that the  
 22 California Supreme Court is so overburdened with habeas petitions that it must rely on summary  
 23 dispositions, as it did with petitioner’s state habeas petitions. ECF No. 159 at 16-17. Petitioner  
 24 poses his own rhetorical question: “Does *Pinholster* logically require that California’s  
 25 ‘dysfunctional’ and inadequate capital habeas process be accorded such deference that none of  
 26 Mr. Coddington’s very modest discovery requests can be granted until the parties have whacked  
 27 their way through the § 2254(d) thicket?” *Id.* at 17. He argues strenuously that the magistrate  
 28 judge’s interpretation of *Pinholster* is contrary to law in numerous particulars.

### i. Discovery in Federal Habeas Cases

Rule 6 of the Rules Governing Section 2254 cases provides in pertinent part:

(a) Leave of Court Required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery. . . .

(b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also . . . specify any requested documents.

12 Habeas petitioners are not entitled to discovery as a matter of course, but only  
13 when specific allegations show reason to “believe that the petitioner may, if the facts are fully  
14 developed, be able to demonstrate that he is . . . entitled to relief.” *Bracy v. Gramley*, 520 U.S.  
15 899, 908-09 (1997); *Smith v. Mahoney*, 611 F.3d 978, 996 (9th Cir. 2010). This inquiry is  
16 informed by the essential elements of the claims for which petitioner seeks discovery, but the  
17 petitioner need not demonstrate that he will ultimately prevail on the underlying claim before he  
18 may pursue discovery. *Bracy*, 520 U.S. at 904; *Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir.  
19 2005).

ii. *Pinholster*

21 The decision whether to grant an evidentiary hearing is grounded in the  
22 Antiterrorism and Effective Death Penalty Act (AEDPA), which provides in relevant part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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

3 (e)(1) In a proceeding instituted by an application for a writ of  
4 habeas corpus by a person in custody pursuant to the judgment of a  
5 State court, a determination of a factual issue made by a State court  
shall be presumed to be correct. The applicant shall have the burden  
of rebutting the presumption of correctness by clear and convincing  
evidence.

6 (2) If the applicant has failed to develop the factual basis of a claim  
7 in State court proceedings, the court shall not hold an evidentiary  
hearing on the claim unless the applicant shows that--

8 (A) the claim relies on--

9 (i) a new rule of constitutional law, made retroactive  
10 to cases on collateral review by the Supreme Court,  
that was previously unavailable; or

11 (ii) a factual predicate that could not have been  
12 previously discovered through the exercise of due  
diligence; and

13 (B) the facts underlying the claim would be sufficient to  
14 establish by clear and convincing evidence that but for  
constitutional error, no reasonable factfinder would have  
15 found the applicant guilty of the underlying offense.

16 28 U.S.C. § 2254.

17 In *Pinholster*, the Supreme Court held that “review under § 2254(d)(1) is limited to  
18 the record that was before the state court that adjudicated the claim on the merits” because the  
19 review “focuses on what a state court knew and did.” 131 S.Ct. at 1398, 1399. The Court  
20 reiterated that “[i]f a claim has been adjudicated on the merits by a state court, a federal habeas  
21 petitioner must overcome the limitation of § 2254(d)(1) on the record that was before the state  
22 court.” Id. at 1400.

23 *Pinholster* restricts the consideration of evidence that was not before the state  
24 court under § 2254(d)(2) as well as under (d)(1); to determine whether there has been an  
25 unreasonable determination of fact, a district court must consider the record before the state court.  
26 *Pinholster*, 131 S.Ct. at 1400 n.7 (noting the “additional clarity” in (d)(2), which specifically  
27 provides that review is limited to the state record); *Blue v. Thaler*, 665 F.3d 647, 656 (5th Cir.  
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<sup>1</sup> 2011), cert. denied, 133 S.Ct. 105 (2012); *Lor v. Felker*, No. CIV S-08-2985 GEB DAD P, 2012 WL 1604519, at \*5 (E.D. Cal. May 7, 2012), *aff'd*, 2012 WL 3201961 (E.D. Cal. Jul. 31, 2012).

8                   Despite the apparent clarity of its pronouncements, the Supreme Court stopped  
9 short of a holding: it said that because the petitioner had not shown that the state court decision  
10 ran afoul of § 2254(d), it “need not decide whether § 2254(e)(2) prohibited the District Court  
11 from holding the evidentiary hearing or whether a district court may ever choose to hold an  
12 evidentiary hearing before it determines that § 2254(d) has been satisfied.” *Id.* at 1420 n.20.

### iii. *Pinholster and Discovery*

14 Since *Pinholster* was decided, district courts have wrestled with its implications, if  
15 any, for discovery in habeas cases, with little guidance from the Courts of Appeal. Although the  
16 Ninth Circuit has mentioned *Pinholster* in connection with discovery, it has done so in passing,  
17 with little analysis. *See, e.g., Jamerson v. Runnels*, 713 F.3d 1218, 1226 (9th Cir. 2013)  
18 (*Pinholster* “was concerned with preventing ‘habeas-by-sandbagging’”); *Runningeagle v. Ryan*,  
19 686 F.3d 758, 773-74 (9th Cir. 2012) (petitioner “not entitled to an evidentiary hearing or  
20 additional discovery in federal court because his claim is governed by 28 U.S.C. § 2254(d)(1).  
21 As the Supreme Court has recently held, review of such claims ‘is limited to the record that was  
22 before the state court . . . .’); *Peraza v. Campbell*, 462 F. App’x 700, 701 (9th Cir. 2011)  
23 (unpublished) (“to the extent Peraza seeks to expand record through discovery or an evidentiary  
24 hearing, beyond what was presented to the state court, we conclude that such relief is precluded  
25 by *Pinholster* with regard to any of his claims under § 2254(d)(1).”); *Gonzalez v. Wong*, 667 F.3d  
26 965 (9th Cir. 2011), *cert. denied sub nom. Chappell v. Gonzales*, 133 S.Ct. 155 (2012) (under  
27 *Pinholster*, court could not consider new material petitioner uncovered during habeas proceedings  
28 showing a potential *Brady* violation, but as it could not ignore it either because of strength of

1 evidence, it directed district court to stay federal proceedings to allow petitioner to return to state  
 2 court).<sup>2</sup>

3 A number of district courts have rejected the position the magistrate judge took in  
 4 this case. For example, in *Sample v. Colson*, the district court determined, “[g]iven the lack of  
 5 direct guidance from the Supreme Court or the Sixth Circuit on the breadth of *Pinholster*, the  
 6 Court will follow the plain language of *Pinholster* and limit its force to § 2254 habeas review.”  
 7 F. Supp. 2d \_\_, 2013 WL 3822072, at \*18 (W.D. Tenn. July 23, 2013) (internal citations  
 8 omitted); *see also Pike v. Johnson*, No. 1:12-cv-35, 2013 WL 2457718, at \*3 (E.D. Tenn. June 6,  
 9 2013) (stating “[w]hile *Cullen v. Pinholster* limits the scope of review under § 2254(d)(1), it says  
 10 nothing about the court’s discretion to allow discovery”). In *Conway v. Houk*, No. 2:07-cv-947,  
 11 2011 WL 2119373, at \* 4 (S.D. Ohio May 26, 2011), the court declined to apply *Pinholster* to  
 12 discovery in habeas cases, concluding that “its discretion is better exercised in not foreclosing at  
 13 this stage the possibility of discovery,” rather than waiting until it undertook the § 2254(d)(1)  
 14 analysis. *See also Ervin v. Cullen*, No. C 00-01228 CW, 2011 WL 4005389, at \*4 (N.D. Cal.  
 15 Sep. 8, 2011) (finding the heightened need for discovery in capital cases justified discovery  
 16 despite *Pinholster*).

17 On the other hand, other courts have reached the same conclusions as the  
 18 magistrate judge did in this case. For example, in *Caudill v. Conover*, the district court observed  
 19 that there was “no reason why [*Pinholster*’s] holding would not equally apply to new evidence  
 20 the Petitioner seeks to obtain by way of discovery,” because it would have no bearing on  
 21 § 2254(d)(1) review. 871 F. Supp. 2d 639, 645 (E.D. Ky. 2012). The court also rejected  
 22 petitioner’s claim that *Pinholster* was premised on an assumption of an adequate state post-  
 23 conviction process. *Id.* at 647; *see also Atkins v. Clarke*, 642 F.3d 47, 49 (1st Cir. 2011), *cert.*  
 24 *denied sub nom. Atkins v. Spencer*, 132 S.Ct. 446 (2011) (upholding denial of request for an

25 <sup>2</sup> Some district courts have read *Gonzalez* to mean that a district court could authorize discovery  
 26 or hold a hearing and then stay the federal proceedings to allow a petitioner to return to state  
 27 court. *Johnson v. Chappell*, No. 3-98-cv-4043-SI, 2013 WL 1320520, at \*1 (N.D. Cal. Mar. 29,  
 28 2013); *Hughes v. Chappell*, No. 3-3-cv-2666-JSW, 2012 WL 3542475, at \*3 (N.D. Cal. Jul. 25,  
 2012). This court need not consider whether or not these cases are correct readings of *Gonzalez*  
 and/or *Pinholster* in light of its resolution of this motion.

1 evidentiary hearing despite petitioner's argument that *Pinholster* presupposed the state had  
2 provided a full and fair evidentiary hearing); *Kyle v. Gansheimer*, No. 5:11CV1395, 2011 WL  
3 4566363, at \*2 (N.D. Ohio Sep 29, 2011) (applying *Pinholster* to habeas discovery); *Lynch v.*  
4 *Hudson*, No. 2:07-cv-948, 2011 WL 4537890, at \*4 (S.D. Ohio Sep. 28, 2011) (rejecting  
5 petitioner's claim that *Pinholster* does not apply when the state's fact-finding procedure is  
6 truncated and finding court was precluded from expanding the record to consider material not  
7 presented to the state court). In addition, in *Trimble v. Bobby*, No. 5:10-CV-1527323, 2011 WL  
8 1527323 at \*2-3 (N.D. Ohio Apr. 19, 2011), the court overturned its order directing that  
9 petitioner be transported for a PET scan the trial court had refused to give him, reasoning  
10 discovery was not appropriate under *Pinholster* until the court had undertaken the § 2254(d)(1)  
11 analysis. *See also Ahmed v. Houk*, No. 2:07-cv-658, 2011 WL 4005328, at \*2 (S.D. Ohio Sep. 8,  
12 2011) ("there is no good reason to gather evidence which one will not be permitted to present").

13 Here, given the potential implications of *Pinholster*'s holding for the habeas  
14 discovery process, the lack of Ninth Circuit interpretation, and the stark divisions in the emerging  
15 case law, it is difficult to conclude the magistrate judge's determination was contrary to law.  
16 Even without adopting his analysis of *Pinholster*, this court cannot say the magistrate judge's  
17 ultimate decision, to defer deciding whether discovery should be allowed until a later time, is  
18 contrary to law. Petitioner has pointed to nothing compelling approval of discovery at any  
19 particular point in the proceedings: Rule 6 itself says only that "[a] judge may, for good cause,  
20 authorize a party to conduct discovery . . ." The Advisory Committee Notes to Rule 6 discuss the  
21 timing of discovery, noting that "[w]hile requests for discovery in habeas proceedings normally  
22 follow the granting of an evidentiary hearing, there may be instances in which discovery would

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1 be appropriate beforehand.” The Committee cites the Supreme Court decision to *Harris v.*  
2 *Nelson*, which says that

3 [a]t any time in the proceedings, when the court considers that it is  
4 necessary to do so in order that a fair and meaningful evidentiary  
5 hearing may be held so that the court may properly ‘dispose of the  
6 matter as law and justice require,’ either on its own motion or upon  
7 cause shown by the petitioner, it may issue such writs and take or  
8 authorize such proceedings with respect to development, before or  
9 in conjunction with the hearing of the facts relevant to the claims  
10 advanced by the parties, as may be ‘necessary or appropriate in aid  
11 of (its jurisdiction) . . . .

12 394 U.S. 286, 300 (1969); *see also Bracy*, 520 U.S. at 909 (“Rule 6(a) makes it clear that the  
13 scope and extent of . . . discovery is a matter confided to the discretion of the District Court.”).  
14 These authorities do not say that a district court must authorize discovery at any particular point  
15 in the proceedings. While it may make sense to permit the parties to undertake discovery early in  
16 the proceedings, it may also make sense to defer discovery until it appears that the undertaking  
17 will not be futile. Whatever the ultimate impact of *Pinholster* on discovery in federal habeas  
18 proceedings, this court cannot conclude that the magistrate judge’s decision to postpone any  
19 discovery is contrary to law. Given this division’s practice of referring capital habeas matters to  
20 magistrate judges for pre-dispositive proceedings, the court declines to override the magistrate  
21 judge’s application of the law in this territory, only now being charted.

22 IT IS THEREFORE ORDERED that the motion for reconsideration is denied.

23 DATED: September 30, 2013.

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UNITED STATES DISTRICT JUDGE