

A VIEW OF STATE CRIMINAL APPEALS FROM THE FEDERAL HABEAS SIDE
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The 2010-2011 term of the United States Supreme Court was an eventful one for rulings under 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Roberts Court has significantly narrowed the scope of federal habeas review of state convictions and denials of parole to state prisoners, and it will take heightened alert on the part of state habeas and appellate practitioners to assist their clients in navigating the habeas waters to preserve their clients' federal claims. State appellate and habeas practitioners should be aware of five specific cases, and the implications of those cases for state appellate practitioners who wish to preserve their clients' rights to seek federal habeas relief.

THE AEDPA CONTEXT

To begin to place last terms decisions in context for state habeas and appellate practitioners, the analysis must necessarily begin with AEDPA itself. President Clinton signed AEDPA into law on April 24, 1996, making important changes in the statutes governing federal habeas corpus practice for state prisoners collaterally attacking their state convictions.¹ Although President Clinton declared that AEDPA's purposes was to "streamline" the federal habeas process for those convicted of capital offenses, and that

¹ This analysis will be limited to noncapital cases, as different rules apply to death penalty cases, and those cases are reviewed by the California Supreme Court on direct appeal from the trial court.

he would not have signed the bill if he thought the federal court would interpret it in such a manner as to undercut meaningful federal habeas review,² in one term the Roberts Court has done more than undercut federal habeas review. The Roberts Court has virtually foreclosed meaningful federal habeas review for most state prisoners convicted of noncapital state criminal offenses.³ There is no denying, however, that AEDPA provided the means by which the Roberts Court accomplished this.

AEDPA changed long standing federal habeas practice in several ways. First, AEDPA added a statute of limitations for filing federal habeas petitions. Generally speaking, the limitations period begins to run from the date the state conviction and sentence became final on direct review, although the statute of limitations is tolled while “properly filed” state postconviction proceedings are pending. (28 U.S.C. § 2244(d)(1)(A)-(D).) Second, AEDPA amended the rules governing exhaustion of state remedies. Even before AEDPA, a individual convicted of a state criminal offense had to exhaust his state remedies before s/he could bring a federal habeas action.

“Nonexhaustion” of state remedies is a defense to a federal habeas action that is available to the state. Rule 5(b) of the Rules Governing Section 2254 Cases in the United

² Statement of the President of the United States upon Signing the Antiterrorism Bill, LEXIS, 32 Weekly Comp. Pres. Doc. 719 (White House April 24, 1996).

³ “Although the empirical data on AEDPA’s impact on habeas corpus is as yet incomplete, recent studies provide some evidence that AEDPA has significantly reduced the availability of federal habeas corpus relief in state-prisoner and federal-prisoner cases.” 1 Hertz & Leibman, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §3.2, at p. 126 & n. 36, referring to studies published in 2005, 2007.

States District Courts (2010) imposed the burden on the state to assert this defense, but AEDPA now requires a waiver of that defense to be explicit. (28 U.S.C. § 2254(b)(2)-(3).) The exhaustion requirement is satisfied where the petitioner presents the federal claim to the appropriate state courts in the manner required by state law. In California, this can be accomplished by raising the issue in the direct appeal and seeking review in the California Supreme Court. If the issue was not raised on direct appeal, it can also be accomplished by raising the issue in a habeas petition in the California Supreme Court; however, the petitioner will have to show why the issue was not raised on a direct appeal. Exhaustion does not require appellate counsel to file a petition for a writ of certiorari to the United States Supreme Court.

The California state habeas process has its own rules, however, and if they are not satisfied, presentation of the claim may be barred. This ban, referred to as procedural default, will be treated by the federal courts as an independent and adequate state ground and will prevent the federal court from entertaining the federal claim.

The doctrine of “total exhaustion of state remedies” is a comity-based principle designed to protect the state courts’ role in the enforcement of federal law. It requires federal habeas corpus petitioners to adequately present their claims to state courts before seeking relief in federal court. (*Rose v. Lundy* (1982) 455 U.S. 509; 71 L.Ed.2d 379.) The “total exhaustion rule” requires dismissal of a “mixed petition” (a petition including exhausted and unexhausted claims), without prejudice pending exhaustion of the unexhausted claims. (*Id.* at pp. 520, 522.) That rule contemplates the petitioner returning

to federal court with a “perfected petition” after exhausting the claims in state court. (*Slack v. McDaniel* (2000) 529 U.S. 473, 486 [146 L.Ed.2d 542, 556], and *Rhines v. Weber* (2005) 544 U.S. 269, 272 [161 L.Ed.2d 440, 448].)

There are a number of ways this may be accomplished. Where the AEDPA limitations period has not expired, a petitioner may delay filing the federal petition while s/he exhausts the issues that were not raised on direct appeal by filing in the California Supreme Court. Where a petitioner is close to the AEDPA limitations period expiration date, s/he can file the “mixed” federal petition and make a motion in the federal court to stay and hold the federal petition in abeyance while s/he exhausts the unexhausted claims in the California Supreme Court. The U.S. Supreme Court has held that a district court has discretion to stay a mixed petition to allow a habeas petitioner to present his or her unexhausted claims to the state court in the first instance, and then return to federal to seek review of the now-perfected petition. (*Rhines v. Weber, supra*, 544 U.S. at 278-279.) The AEDPA limitations period does not run during the time the state habeas petition is pending in the California Supreme Court, so that those claims can be exhausted without running afoul of the AEDPA limitations period. The filing of the federal habeas petition as to the exhausted claims, before the expiration of the AEDPA limitations period, makes the exhausted claims timely. Accordingly, the “mixed petition” problems can be avoided.

The mixed petition scenario most frequently occurs where there was an ineffective assistance of counsel claim that could not be raised on direct appeal because it was not

litigated in the trial court, and it appears on the record on appeal that trial counsel may have had tactical reasons justifying his or her action or inaction. In that case, raising the ineffective assistance claim on direct appeal is prohibited by the California Supreme Court's decision in *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.

It is in the context of exhaustion, particularly with regard to ineffective assistance of counsel claims, where the impact of the first three cases is being felt.

UNTIMELINESS AS AN ADEQUATE AND INDEPENDENT STATE GROUND BARRING FEDERAL HABEAS ACTIONS: THE *MARTIN* DECISION

In *Walker v. Martin* (2011) — U.S. — [179 L.Ed.2d 62, 67], the high court resolved two California procedural issues that had been heavily litigated in section 2254 cases in which the state had raised nonexhaustion as a defense: (1) whether California's timeliness requirement qualifies as an independent state ground adequate to bar habeas corpus relief in federal court; and (2) whether a denial that does not include an explicit finding of untimeliness can constitute such a bar. The high court concluded that untimeliness is an adequate and independent state ground, and that a citation to two particular cases,⁴ even without an explicit finding of untimeliness, is sufficient to constitute an untimeliness finding. In so holding, the high court set to rest the long-unresolved question of whether a finding of untimeliness by the California Supreme Court must be explicit, and concluded not only that California's "code" (citations to

⁴ *In re Clark* (1993) 5 Cal.4th 750, and *In re Robbins* (1998) 18 Cal.4th 770.

Clark and *Robbins*), was sufficient, but also that if the “code” was not used, a federal court could presume that the summary denial was a decision on the merits.

California is different from most states in that it has no bright line rule on when a habeas petition must be filed in order to be considered timely. The high court recognized this and explained that:

California does not employ fixed statutory deadlines to determine the timeliness of a state prisoner's petition for habeas corpus. Instead, California directs petitioners to file known claims "as promptly as the circumstances allow." *In re Clark*, 5 Cal.4th 750, 765, n. 5, 21 Cal.Rptr.2d 509, 855 P.2d 729, 738, n. 5 (1993). Petitioners are further instructed to state when they first learned of the asserted claims and to explain why they did not seek postconviction relief sooner. *In re Robbins*, 18 Cal.4th 770, 780, 77 Cal. Rptr. 2d 153, 959 P.2d 311, 317-318 (1998). Claims substantially delayed without justification may be denied as untimely. *Ibid.*; *Clark*, 5 Cal.4th, at 765, n. 5, 855 P. 2d, at 738, n. 5.

California courts signal that a habeas petition is denied as untimely by citing the controlling decisions, *i.e.*, *Clark* and *Robbins*. A spare order denying a petition without explanation or citation ordinarily ranks as a disposition on the merits.

(*Walker v. Martin, supra*, 179 L.Ed.2d at p. 67.)

In making these findings, the high court overruled the Ninth Circuit, which had held that California's timeliness standard lacked the clarity and certainty necessary to constitute an adequate independent state bar.

California's rule barring review of habeas claims filed after "substantial delay" is inadequate and, therefore, does not bar federal review of his claim. To be adequate, the state's legal grounds for its decision must be firmly established and consistently applied. *Bennett v. Mueller*, 322 F.3d 573, 583 (9th Cir. 2003).

To be firmly established or consistently applied, a rule must be clear and

certain. See *Melendez v. Warden*, 288 F.3d 1120, 1124 (9th Cir. 2002) (citing *Morales v. Calderon*, 85 F.3d 1387, 1390-92 (9th Cir. 1996)); see also *Wells v. Maass*, 28 F.3d 1005, 1010 (1994) ("a state rule must be clear, consistently applied, and well-established").

(*King v. LaMarque* (9th Cir. 2006) 464 F.3d 963, 965-966.)

In overturning the Ninth Circuit's decision in *King*, and holding that an untimeliness finding signaled through "code" is an adequate and independent state ground for the California Supreme Court's denial of a state habeas petition, the U.S. Supreme Court has lauded the effect of its decision, because it preserves California's "flexible" rule on untimeliness without undermining the finality of state court judgments:

. . . that California is not put to the choice of imposing a specific deadline for habeas petitions (which would almost certainly rule out Martin's nearly five-year delay) or preserving the flexibility of current practice, "but only at the cost of undermining the finality of state court judgments." *Id.*, at ____, 130 S.Ct. 612, 175 L.Ed.2d 417, 420. In so ruling, we stress that Martin has not alleged that California's time bar, either by design or in operation, discriminates against federal claims or claimants.

(*Walker v. Martin, supra*, 179 L.Ed.2d. at p. 68.)

In holding that California's timeliness rule, although discretionary, was firmly established, clear, and regularly followed, even if only communicated in "code," the high court has made unreviewable in federal court all summary denials by California courts that use the "code:" a simple citation to *Robbins* and *Clark*. The high court's previously expressed objective, that untimeliness under state law would be fatal to any federal habeas relief, would appear to have been achieved. "What we intimated in *Saffold* we now hold: When a postconviction petition is untimely under state law, 'that [is] the end

of the matter' for purposes of §2244(d)(2).” (*Pace v. DiGuglielmo* (2005) 544 U.S. 408, 414; 161 L.Ed.2d 669, 676.)

But *Walker* may also have left open an escape hatch. (*Walker v. Martin, supra*, 179 L.Ed.2d at 71, n.4.) In *Walker* the high court recognized, citing *Lee v. Kemna* (2002) 534 U.S. 362, 276; 151 L.Ed.2d 820, a "limited category" of "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration.” In *Lee*, the high court had held a state appellate court’s application of a rule that was not even mentioned by the trial court was inadequate to bar federal review where the defendant had substantially complied with the rule’s key requirement, and flawless compliance would have made no difference in light of the trial court’s reason for denying the motion. (*Id.* at 381-382.)

THE PRESUMPTIONS TRIGGERED BY A STATE COURT’S SUMMARY DENIAL AND THE SHOWINGS NOW REQUIRED: *MARTIN, RICHTER AND MOORE*

Once a potential federal habeas petitioner has avoided the adequate and independent state bar of untimeliness, and has obtained a summary denial of his or her claim, the next step is to decode the meaning of the summary denial, and to identify the showing a federal habeas petitioner is required to make under AEDPA after obtaining a summary denial. Two cases decided last term by the high court have addressed that issue in two different contests: where the conviction follows a jury trial (*Harrington v. Richter* (2011) — U.S. — [178 L.Ed.2d 624]) and where the conviction arises out of a negotiated no-contest plea (*Premo v. Moore* (2011) – U.S. – [178 L.Ed.2d 649]). *Richter* involved

the California Supreme Court's summary denial of a habeas claim of ineffective assistance of counsel claim, and *Moore* involved a claim for postconviction relief based on an ineffective assistance of counsel claim which was denied by a state court that made specific findings on the merits. The high court's opinions in these cases have raised the bar for what a petitioner claiming ineffective assistance of counsel must show.

Where a federal claim of ineffective assistance of counsel was summarily denied by the California Supreme Court, the Ninth Circuit had held that the claim should be reviewed in the federal courts de novo. That does not appear to have changed. What has changed, however, is that the deference required under 28 U.S.C. §2254, subdivision (d),⁵ now has been clearly held to apply to a state court order that is unaccompanied by an

⁵ The statutory authority of federal courts, which governs the granting of habeas corpus relief to persons in state custody, is 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

The text of section 2254, subdivision (d), states:

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

(2) 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.

opinion explaining the reasons relief has been denied:

Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.”

(*Harrington v. Richter*, *supra*, 178 L.Ed.2d at p. 638.)

The opinion of the Ninth Circuit, reviewed by the high court in *Richter*, had questioned whether the deference required under section 2254, subdivision (d), applied where the California Supreme Court had issued a summary denial. (*Id.* at p. 637.) In scolding the Ninth Circuit for the “judicial disregard” it found “inherent in the opinion” under review, Justice Kennedy, writing for the majority, declared the appellate court to have committed “clear error.”

The high court presumed the California Supreme Court’s summary dismissal to be on the merits, holding that:

. . . it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Cf. *Harris v. Reed*, 489 U.S. 255, 265, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) (presumption of a merits determination when it is unclear whether a decision appearing to rest on federal grounds was decided on another basis).

(*Id.* at p. 639.)

Richter does leave intact the California Supreme Court’s discretion to consider a federal claim that it might otherwise deem to be untimely. Unfortunately, the state courts rarely exercise this discretion to advance a federal habeas claim. Moreover, while the

presumption of untimeliness triggered by a citation to *Clark* and *Robbins* appears to be irrebuttable, the presumption that a summary disposition is a merits determination appears to be rebuttable where a state-law procedural rule might also explain a reason for the denial. In that case, the pre-*Richter* and *Martin* approach would be required: the federal habeas court will have to determine what a state habeas court would have decided.

For state appellate practitioners, the implications of *Martin* and *Richter* are two-fold: first, in a California state habeas petition, it is critical to make an affirmative showing alleging when the petitioner first learned of the asserted claims and explaining why the petitioner did not seek postconviction relief sooner; second, it is also necessary for the state appellate practitioner to instruct his or her client on how to read “code.” If the order denying the petition is a summary one, and does not cite *Robbins* or *Clark*, then s/he “most likely” obtained a summary denial on the merits, unless the application of a state procedural rule could explain the denial. If, however, the court summarily denies the writ petition, and the order cites *Robbins* or *Clark*, then the state habeas petition will be deemed to have been denied on an adequate and independent state ground, and ala *Pace*, that should be “the end of it.”

But there are two options left: making a *Lee* showing that adherence to the rule was “substantial” or that the timeliness rule was being applied in such a way as to evidence a purpose or pattern of evading constitutional guarantees. The latter showing will be a difficult one to make. The *Lee* showing may be able to gain some traction in

those cases where the state habeas action was filed reasonably quickly, but was nonetheless denied with a citation to *Robbins* or *Clark*. Of course, what constitutes a “reasonably quick” filing will undoubtedly be intensely fact specific, and state appellate counsel may have difficulty determining what this duration might be in any particular fact setting. For that reason, as CCAP has always cautioned, state appellate practitioners should urge their clients to immediately file their federal habeas petitions as soon as the state process is complete, so that unexhausted federal claims can be exhausted as soon as it practicable through the stay and abey procedure.⁶

The state appellate practitioner’s goal should not be “to squeek” in under the AEDPA one-year limitations wire. Federal habeas counsel will be of greatest assistance to the section 2254 habeas petitioner if s/he has sufficient time to review the record from the state appeal to determine whether there are additional unexhausted claims that should be added to the federal habeas petition before the limitations period runs. In a large record case, this means counsel will need several months to conduct this review and amend the habeas petition. If this can be accomplished before the AEDPA limitations period runs, federal habeas counsel can then seek to stay the federal habeas action and have the federal court hold it in abeyance while the petitioner returns to state court to

⁶ If a petition for review has been filed and denied, and no certiorari petition has been filed in the U.S. Supreme Court, the one-year AEDPA limitations period will start to run as of the last date when the certiorari petition could have been filed, which will be 90 days after the date the California Supreme Court denied the petition for review. (See 28 U.S.C. § 2244, subd. (d)(1)(A) and *Clay v. United States* (2003) 537 U.S. 522, 528; 155 L.Ed.2d 88, 95.)

exhaust his claims. That stay can then be lifted, and the federal habeas petition can go forward, after the state claim has been exhausted and is included in the federal habeas petition.

The question *Richter* does not answer is whether the ineffective assistance of counsel showing it requires (that there was no reasonable basis for the state court to have denied relief) must be made in state court to avoid a federal bar for failure to exhaust. Prudence suggests that state appellate practitioners who raise claims of ineffective assistance of counsel for the first time on a state writ petition filed in the California Supreme Court should consider setting the claim up to meet the standard which will apply in the federal litigation if a summary denial is issued: the petitioner must show that there is no reasonable basis on which the state habeas court could deny relief. And for state appellate practitioners who have included an ineffective assistance of counsel claim on direct appeal that was not considered on the merits by the appellate court under *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267-268, they will still have to file a state habeas petition to make this showing and to exhaust the claim.

Post *Richter*, the Ninth Circuit has explained how it proceeds where the state court denial is mixed, but the order fails to differentiated the untimely claims from the timely claim that were denied on the merits:

We review "the state court's last reasoned decision." *Maxwell*, 606 F.3d at 568. The California Supreme Court denied Stanley's habeas petition, stating only that some claims "are procedurally barred as untimely," and all other claims "are denied on the merits." The only other decisions from California courts on the issues certified for this appeal are rulings from the trial judges

at the time of the trial. To the extent we can ascertain the trial judges' reasoning from the trial transcript, we review the reasoning of the trial court. Where the state court "reaches a decision on the merits but provides no reasoning to support its conclusion," we "independently review the record." *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002). In such instances "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 562 U.S. , , 2011 U.S. LEXIS 912 (2011). "When it is clear . . . that the state court has not decided an issue, we review that question de novo." *Reynoso v. Giurbino*, 462 F.3d 1099, 1109 (9th Cir. 2006) (citation omitted).

(*Stanley v. Cullen* (9th Cir. 2011) 633 F.3d 852, 860.)

Post *Richter*, it therefore appears that the district court's denial of a habeas petition will still be reviewed de novo, and the district court's findings of fact will still be reviewed for clear error. (*Id.* at 859; see also *Wilson v. Knowles* (9th Cir. 2011) 638 F.3d 1213 .)

In *Knowles*, the petitioner's claim was that his sentence violated *Apprendi v. New Jersey* (2000) 530 U.S. 466, 174 L.Ed.2d 435. The Ninth Circuit agreed because the trial judge, in imposing sentence in 2000, found three facts pertaining to a 1993 conviction that were not essential to the conviction and that there was no purpose in challenging:

The trial judge in this case in 2000 found three additional facts about the 1993 accident that increased Wilson's sentence to 25 years to life: First, that Wilson personally inflicted bodily injury on Horvat; second, that the injury was great; and third, that the victim was not an accomplice. These facts weren't necessary to Wilson's 1993 conviction, and there was no purpose in his challenging them at the time of that conviction in 1993. The issue is whether these findings made in 2000 fell within the prior conviction exception.

(*Wilson v. Knowles, supra*, 638 F.3d at p. 1215.)

The Ninth Circuit rejected any claim that these were the kind of facts that could be

judicially noticed as historical:

These are not historical, judicially notice-able facts. The judge in 2000 speculated as to how a jury in 1993 might have evaluated the evidence if the evidence had been offered and if a jury had been impaneled to evaluate it. See *United States v. Brown*, 417 F.3d 1077, 1079-80 (9th Cir. 2005) (per curiam). Wilson did not have any reason to contest these alleged facts when he was convicted in 1993. See *Apprendi*, 530 U.S. at 488 (emphasizing importance of procedural safeguards during earlier proceeding). The judge's fact-finding seven years after the 1993 conviction extended beyond any reasonable interpretation of the prior conviction exception. See *DeWeaver v. Runnels*, 556 F.3d 995, 997 (9th Cir. 2009) (explaining that the state court violates the "unreasonable application" prong when it "extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable") (citation and internal quotations marks omitted). It is utterly unreasonable to hold that what a judge in 2000 imagines might have happened in 1993 is the same as a conviction in 1993.

(*Id.* at pp. 1215-1216.)

The Ninth Circuit applied the *Richter* standard of review, and concluded, even though this was a due process claim, rather than the claim of ineffective assistance of counsel considered in *Richter*, that there were three possible bases on which the sentence could be upheld, but that no reasonable judge could rely on any of them:

The state's petition for rehearing has afforded opportunity to take into account the Supreme Court's summary of its habeas jurisprudence in *Harrington v. Richter*, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). No reasonable judge could rule that a conviction of causing bodily injury was the same as a conviction of causing great bodily injury. No reasonable judge could hold that a charge that might have been made and proved is equivalent to an actual conviction. No reasonable judge could hold that the *Apprendi* exception was satisfied by a California court, 7 years after the criminal proceedings were completed, making a guess as to what could have been proved if the 1993 prosecution of Wilson had been different.

(*Id.* at p. 1216.)

In *Moore*, the petitioner made an ineffective assistance of counsel claim based on trial counsel's failure to make a motion to suppress Moore's confession before advising Moore regarding a plea. The state postconviction court concluded that Moore had not received ineffective assistance because filing a motion to suppress would have been fruitless. The state court did not specify whether this was because trial counsel's performance was not deficient, or because Moore suffered no prejudice, or both. Under these circumstances, the Court of Appeals would have had to conclude that both findings involved an unreasonable application of clearly established federal law. (*Premo v. Moore, supra*, 178 L.Ed.2d at p. 660.) The high court found the state court would not have been unreasonable to accept trial counsel's explanation for not filing the suppression motion. The explanation was that Moore had made a second fully admissible confession to which two witnesses could testify. The Supreme Court held it was therefore unnecessary to consider whether trial counsel's second justification, that the motion would have failed, was reasonable. Moreover, the high court concluded that Moore had failed to make the showing required under *Hill v. Lockhart* (1985) 474 U.S. 52, 59 [88 L.Ed.2d 203]: a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

THE LIMITED FEDERAL HABEAS REVIEW NOW AVAILABLE FOR STATE PAROLE DENIALS: COOKE

In another brutal scolding of the Ninth Circuit, the U.S. Supreme Court has limited federal review of state parole denial decisions to minimal procedural due process,

such as an opportunity to be heard and to be provided with a statement of reasons:

There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners. *Id.*, at 7, 99 S.Ct. 2100, 60 L.Ed.2d 668. When, however, a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication -- and federal courts will review the application of those constitutionally required procedures. In the context of parole, we have held that the procedures required are minimal. In *Greenholtz*, we found that a prisoner subject to a parole statute similar to California's received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied. 442 U.S. at 16, 99 S.Ct. 2100, 60 L.Ed.2d 668. "The Constitution," we held, "does not require more." *Ibid.* Cooke and Clay received at least this amount of process: They were allowed to speak at their parole hearings and to contest the evidence against them, were afforded access to their records in advance, and were notified as to the reasons why parole was denied. 606 F.3d at 1208-1212; App. to Pet. for Cert. 69a-80a; Cal. Penal Code Ann. §§ 3041, 3041.5 (West Supp. 2010).

That should have been the beginning and the end of the federal habeas courts' inquiry into whether Cooke and Clay received due process.

(*Swarthout v. Cooke* (2011) — U.S. —, 178 L.Ed.2d 732, 736.)

The high court held that the scope of this inquiry does not include a substantive due process right to federal review of whether the “some evidence” standard has been satisfied: “No opinion of ours supports converting California's "some evidence" rule into a substantive federal requirement. (*Id.* at p. 737.)

In language that should not be applied in federal habeas to the “substantial evidence” standard of review of state criminal convictions, the Supreme Court seemed to suggest that this limitation would apply to the sufficiency of evidence determinations frequently reviewed in federal habeas cases:

It will not do to pronounce California's "some evidence" rule to be "a component" of the liberty interest, 606 F.3d at 1213. Such reasoning would subject to federal-court merits review the application of all state-prescribed procedures in cases involving liberty or property interests, including (of course) those in criminal prosecutions. That has never been the law. To the contrary, we have long recognized that "a 'mere error of state law' is not a denial of due process." *Engle v. Isaac*, 456 U.S. 107, 121, n. 21, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); see also *Estelle*, 502 U.S., at 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385. Because the only federal right at issue is procedural, the relevant inquiry is what process Cooke and Clay received, not whether the state court decided the case correctly.

(*Id.* at p. 737.)

MISCELLANEOUS PROCEDURAL MATTERS: *PINHOLSTER*

In addition to the AEDPA implications *Richter*, *Moore*, *Martin* and *Cooke* have for state appellate practitioners, there are some problems federal habeas counsel encounters in litigating section 2254 habeas claims in federal court that state appellate counsel can address in the state post-trial litigation, and which have become more important after the high court's decision in *Cullen v. Pinholster* (2011) — U.S. —, 179 L.Ed.2d 557. In *Pinholster*, the high court held:

We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that “resulted in” a decision that was contrary to, or “involved” an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time—i.e., the record before the state court.

(*Id.* at p. 570.)

In *Pinholster*, the high court considered the scope of habeas review under section 2254, subdivision (d)(1). The State had argued that federal habeas review was limited to “the record that was before the state court that adjudicated the claim on the merits.” Pinholster had contended that evidence presented to the federal habeas court could also be considered. The U.S. Supreme Court agreed with the State. (*Id.* at p. 569.) Noting that: “It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court, ” Justice Thomas, writing for the majority, explained:

What makes the consideration of new evidence strange is not how "different" the task would be, but rather the notion that a state court can be deemed to have unreasonably applied federal law to evidence it did not even know existed. We cannot comprehend how exactly a state court would have any control over its application of law to matters beyond its knowledge.

(*Id.* at p. 570, including n. 3.)

The first problem a state appellate practitioner can resolve, which is made all the more important by the Pinholster decision, deals with the existence of recordings of the percipient events constituting the state criminal offense. In the appellate court, when an exhibit is introduced at trial that purports to have recorded the commission of the offense, appellate counsel should have the videotape, DVD, audiotape, or CD made part of the record on appeal. If the recording is an audiotape or CD, or the video has sound, the sound recording is considered to be part of the normal record on appeal. (Rules of Court, rule 8.320(b)(11).) Counsel can then use rule 8.340 procedures to obtain the transcript of

the sound recording and make it part of the record on appeal, if it was not initially included.

Rule 2.1040(a) also requires the moving party to provide a transcript of the recording if the recording has been introduced into evidence, and if the moving party has not done so, appellate counsel should obtain an order from the appellate court requiring compliance, so that the transcript will be part of the record on appeal.

If, however, the recording does not have sound, as surveillance cameras normally do not, the recording will not be part of the normal record on appeal unless it has been introduced into evidence. (Rules of Court, rule 8.320(e).) If the recording has been introduced into evidence, it will be “deemed” to be part of the record, but it may be transmitted to the reviewing court only as provided in rule 8.224, unless the exhibit is properly part of the clerk’s transcript on appeal under rule 8.320(b)(11) or can be transmitted to the appellate court under rule 8.320 (e) . (*Ibid.*) This latter method of transmitting an exhibit does not, however, physically get the recording into the record on appeal, so appellate counsel will have to obtain his or her own copy of the recording for use in preparing the briefing, and make it available to habeas counsel.

It has been argued in habeas litigation now pending in the Ninth Circuit, that it is an unreasonable determination of fact, within the meaning of AEDPA, for an appellate court to fail to view a recording of the percipient events constituting the offense in making a prejudice assessment under *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674]. This was done as a means of dealing with the fact that the recording was

not before the appellate court when it issued the “last reasoned decision” of the state court.

The importance of appellate counsel reviewing the recording and making the recording part of the record on appeal is three-fold. First, appellate counsel should review the recording of the percipient event to evaluate possible issues for appeal. Appellate counsel can miss a meritorious issue if s/he does not review the recording. For example, in a petty theft case involving shoplifting, the theft detection staff may testify as to what the recording shows, even though they did not see the event in person as it occurred, but merely watched the recording itself being made in real time, and saw no more than what the recording itself shows. This can be a violation of the best evidence rule, because the recording speaks for itself, and the witness has no source to testify from, other than his or her viewing of the recording. Under those circumstances, the testimony as to what the recording shows invades the province of the jury.

Even if the evidence is sufficient to support the conviction, the recording of the percipient events may be necessary to the evaluation the prejudice component of any claim of error, and to make the prejudice showing itself. If the recording is not before the state court on direct appeal or on habeas, the federal court will not be permitted to consider it under *Pinholster*.

As an appellant in a non-capital case does not have a right to appointed counsel on habeas unless the state court issues an order to show cause, appellate counsel will serve his or her client’s interest best by getting the exhibit put into the record. One can argue

that if it was before the trial court, it is “before” the state court; however, under AEDPA, the federal habeas court will look to the “last reasoned decision” of the state court, and where the “last reasoned decision” of the state court is that of the state appellate court, the safer practice is for appellate counsel to make sure to get the exhibit in the record on appeal.

While the Rule of Court authorizing transmission of the exhibits to the appellate court may technically satisfy the requirement that the evidence be “before” the state court, it will not satisfy the logistical problem of having it in the physical record on appeal. For that reason, an application for augmentation should be used. While this would appear to conflict with court policy, in light of the *Pinholster* decision, it should be done.

CONCLUSION

As the scope of federal habeas review of state criminal convictions and parole denials narrows, the role of state appellate and habeas counsel becomes increasingly important. For that reason, it is even more pressing for state appellate and habeas counsel to be familiar with recent U.S. Supreme Court decision impacting federal habeas practice, and to recognize the implications of those cases, in order to assist their clients in preserving their rights to federal habeas review.