

PREVIEW OF FIRST THREE PAGES
OF CHAPTER SIX

DISCOVERY [6.00.0]:

A. THE RULE [6.10.0]: Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts (state prisoners), provides:

- (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. If necessary for effective discovery, the judge must appoint an attorney for a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A.
- (b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.
- (c) Deposition Expenses. If the respondent is granted leave to take a deposition, the judge may require the respondent to pay the travel expenses, subsistence expenses, and fees of the petitioner's attorney to attend the deposition.

Rule 6 of the Rules Governing Section 2255 Proceedings for the United States District Courts (federal prisoners), provides:

- (a) Leave of Court Required. A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. If necessary for effective discovery, the judge must appoint an attorney for a moving party who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

- (b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.
 - (c) Deposition Expenses. If the government is granted leave to take a deposition, the judge may require the government to pay the travel expenses, subsistence expenses, and fees of the moving party's attorney to attend the deposition.
- B. PURPOSE [6.20.0]: Aside from developing the factual basis for a petitioner's claims, discovery may also (1) enable the court to resolve habeas petitions without resorting to an evidentiary hearing, and (2) assist the court in the event that an evidentiary hearing is conducted. See, *supra*, Expansion Of The Record, Purpose, page 209.
- C. GOOD CAUSE REQUIRED [6.30.0]: "A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 903-05 (1997); *Rich v. Calderon*, 187 F.3d 1064, 1068 (9th Cir. 1999) ("A habeas petitioner does not enjoy the presumptive entitlement to discovery of a traditional civil litigant"). "Rather, discovery is available only in the discretion of the court and for good cause shown." *Rich*, 187 F.3d at 1068.
1. Specific Showing [6.31.0]: Discovery is appropriate where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief. *Bracy v. Gramley*, 520 U.S. 899, 908-909 (1997) (noting that Rule 6 is meant to be "consistent" with *Harris v. Nelson*, 394 U.S. 286, 300 (1969), where the Court stated that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry"); accord *Teti v. Bender*, 507 F.3d 50, 60 (1st Cir. 2007) (petitioner must "indicate exactly what information he seeks to obtain");

Ward v. Whitley, 21 F.3d 1355, 1367 (5th Cir. 1994) (“a federal habeas court must allow discovery . . . only where a factual dispute, if resolved in the petitioner's favor, would entitle him to relief. . . . Conclusory allegations are not enough to warrant discovery under Rule 6. . . ; the petitioner must set forth specific allegations of fact”) (cited approvingly in *Calderon v. United States Dist. Ct. (Nicholas)*, 98 F.3d 1102, 1106 (9th Cir. 1996)).

2. Not To Be Used To Conduct Fishing Expeditions [6.32.0]: “Habeas is an important safeguard whose goal is to correct real and obvious wrongs. It was never meant to be a fishing expedition for habeas petitioners to explore their case in search of its existence.” *Rich v. Calderon*, 187 F.3d 1064, 1067 (9th Cir. 1999) (quotation marks omitted); *accord Calderon v. United States Dist. Ct. (Nicolaus)*, 98 F.3d 1102, 1106 (9th Cir. 1996) (“Courts should not allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation”); *see also Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001); *Aubut v. State of Maine*, 431 F.2d 688, 689 (1st Cir. 1970).
3. Effect Of Prior State Court Ruling Denying Discovery [6.33.0]: If the state court denies production or discovery of the subject materials, that state court decision is reviewed in federal court under the highly deferential AEDPA standard. *Cf. Pham v. Terhune*, 400 F.3d 740, 741-42 (9th Cir. 2005).

D. TYPES OF DISCOVERY [6.40.0]: Although Rule 6 does not identify specific permissible methods of discovery, presumably they would, in appropriate circumstances, include those identified in the Federal Rules of Civil Procedure: Depositions (Fed. R. Civ. P. 27-32); written interrogatories (Fed. R. Civ. P. 33); production of documents or other physical materials (Fed. R. Civ. P. 34); physical and mental examinations (Fed. R. Civ. P. 35); requests for admission (Fed. R. Civ. P. 36); and permission to enter upon land or other property for inspection or other purposes (Fed. R. Civ. P. 34).