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Los Angeles County Superior Court No. A445665

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE RENO,

On Habeas Corpus.

Los Angeles County Superior Court,
The Honorable John A. Torribio, Judge

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

This brief amicus curiae is filed in response to the order of the Court of May 4, 2012, authorizing any interested entity to file an amicus curiae brief by May 29, 2012, on the issue of whether sanctions may be imposed for filing an abusive habeas petition.

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Victims of crime, including the families of homicide victims, have a constitutional right to "a prompt and final conclusion of the case and any related post-judgment proceedings." (Cal. Const., art. I, § 28, subds. (b)(9), (e).) This right is routinely and egregiously violated in the needlessly protracted postconviction litigation of California capital cases. It does not

have to be that way. In Virginia, for example, the D.C. Sniper was executed less than six years after he was sentenced despite the complexity of the case, and this timeframe is not unusual in Virginia. (See Scheidegger, Mend It, Don't End It 8 (2011).)[1]

Fixing the problem will require changes at every stage of the review process. The simplest and most obvious place to begin, however, is the present wasteful and unnecessary practice of filing voluminous "exhaustion" petitions on behalf of death-sentenced murderers whose cases have already been reviewed through an appeal and a state habeas petition. This practice adds years to the process with no gain in reliability of result, and its continuation is contrary to the interests CJLF was formed to protect.

SUMMARY OF ARGUMENT

An appeal is frivolous if it is indisputably without merit, and the same is true for a collateral attack on a judgment or specific claims within such an attack. "Merit," for this purpose, has both a substantive and a procedural component. A claim is frivolous regardless of its intrinsic merit if it is clearly barred procedurally, such as by a prior adjudication.

In some circumstances, ineffective assistance of counsel can constitute good cause for assertion of an otherwise defaulted claim omitted from a previous review of the judgment. However, the omission alone does not establish ineffective assistance because counsel need not and *should not* raise all claims. Winnowing out the weak claims and concentrating on the strong ones is not only adequate representation, it is high quality representation, in capital as well as noncapital cases. (*Jones v. Barnes* (1983) 463 U.S. 745, 751-752; *Smith v. Murray* (1986) 477 U.S. 527, 535-536; *In re Robbins* (1998) 18 Cal.4th 770, 810.)

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1. http://www.cjlf.org/ deathpenalty/ConnDPReport2011.pdf (as of May 17, 2012).

The federal habeas exhaustion rule does not justify returning to state court to make a clearly defaulted claim. The claim is deemed "exhausted" for the purpose of 28 U.S.C. § 2254(b) if it is defaulted under state law and there is no presently available state remedy. The federal court is authorized, under United States Supreme Court precedent, to determine that the claim is defaulted under state law and proceed to the cause-and-prejudice analysis.

In an appropriate case, this court should reconsider the successive petition rule to make it more clear and objective so that fewer cases will need to return from federal court for a determination of whether the claims are defaulted.

ARGUMENT

From the oral argument in this case, amicus understands that the issue is not whether sanctions for a frivolous petition should be imposed in this case, but rather how this court should clarify the standards for petitions in the future. The points that follow are therefore recommendations for such clarification and not accusations that counsel in the present case have acted unethically or in ways that warrant sanctions.

I. A claim is frivolous if it is either indisputably meritless or indisputably barred.

The standard for a frivolous appeal contains both an objective and a subjective component. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649.) "Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit." (*Id*. at p. 650.) This standard applies to habeas corpus. (See *In re White* (2004) 121 Cal.App.4th 1453, 1479-1480.)

"Without merit" also has two components. A claim can be without merit because it has no basis in fact or law standing on its own, or it can be

without merit because it is barred for some reason independent of its intrinsic merits. The most important of these procedural bars for the present purpose is a prior adjudication. Indeed, the most " 'extreme examples' " (*In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 648, quoting 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 478, p. 4433) of cases warranting sanctions are repetitious filings by litigants who have already had their day in court. In the current edition, Witkin cites the same example, *Reber v. Beckloff* (1970) 6 Cal.App.3d 341, for "a particularly obnoxious class of frivolous appeals: the attempts by litigants in pro. per. to review the same point in successive proceedings." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 996, p. 1045.) In capital cases, unfortunately, these attempts are not limited to pro per litigants.

The United States Supreme Court explored this dual nature of merit in the habeas context in *Slack v. McDaniel* (2000) 529 U.S. 473. In that case, the Court was discussing whether a claim was substantial for the purpose of a certificate of appealability. (See *id*. at p. 483.) "Substantial" is a considerably higher hurdle than "not frivolous," but the difference is one of degree rather than kind. When a federal habeas petitioner seeks to appeal a claim denied on the basis of procedural default, he must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." (See *id*. at p. 484, italics added.) A similar conjunctive requirement, although at a lower standard, applies here.

Claims in successive habeas petition cases necessarily involve the procedural question of the successive petition rule (see *In re Clark* (1993) 5 Cal.4th 750, 774-775 (*Clark*)) and frequently involve issues of delay and prior adjudication as well. A claim is frivolous if it fails the *Flaherty* test on *any* of the prerequisites for relief. If no reasonable attorney would believe the claim is not procedurally barred, then the claim is frivolous even though it may have arguable intrinsic merit.

II. Winnowing out weak claims is quality advocacy, not ineffective assistance constituting cause for default.

In *Clark*, *supra*, this court held that a successive petition must be justified, and one of the justifications deemed adequate was ineffective assistance of prior habeas counsel. (See 5 Cal.4th at pp. 774-775, 780; but see *In re Robbins* (1998) 18 Cal.4th 770, 810 (implying the latter question is open)). At oral argument in this case, petitioner's argument implied that counsel in a capital case *must* present every known claim, and winnowing out the weak ones is impermissible. (See also Declaration of Wesley Van Winkle, Petitioner's Exhibit M, pp. 8-9.) In this view, then, the mere showing that a claim was omitted from a prior petition would be sufficient to establish that prior counsel was ineffective. Acceptance of such a view would effectively abolish the successive petition rule for capital cases.

The premise of this argument is wrong and should be emphatically rejected. The United States Supreme Court noted nearly three decades ago, "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." (*Jones v. Barnes* (1983) 463 U. S. 745, 751-752). Later writers are in accord. (See B. Clary, S. Paulsen, & M. Vanselow, Advocacy on Appeal (2d ed. 2004) p. 35; A. Scalia & B. Garner, Making Your Case: The Art of Persuading Judges (2008) pp. 22-23.)

Regrettably, the capital defense bar has developed a culture that is diametrically opposed to the wisdom of *Jones*. Lawyers are exhorted to bury courts in paper, to file motions "just to make trouble," (Lyon, Defending the Death Penalty Case: What Makes Death Different (1991) 42 Mercer L.Rev. 695, 700), and to make every conceivable argument, frivolous or not. (See Freedman, The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases (2003) 31 Hofstra L.Rev. 1167.) These exhortations are contrary to long-established norms of ethical advocacy. "Ethical considerations and rules of court prevent counsel from making dilatory motions . . .

or advancing frivolous or improper arguments . . . . Neither paid nor appointed counsel may . . . consume the time and the energies of the court or the opposing party by advancing frivolous arguments. " (*McCoy v. Court of Appeals of Wis., Dist. 1* (1988) 486 U.S. 429, 435-436.)

Amicus CJLF respectfully asks this court to reaffirm that the principles of *Jones* and *McCoy* apply fully to capital cases. Appellate and postconviction counsel do *not* have an obligation to make every conceivable argument, as Freedman suggests they do (see Freedman, *supra*, 31 Hofstra L.Rev. at p. 1179), but rather they have an obligation not to. As explained by the United States Supreme Court in *Jones* and by analogy to Justice Jackson's insights in *Brown v. Allen* (1953) 344 U. S. 443, 537 (conc. opn.), burying the arguably meritorious claim in a flood of worthless ones reduces rather than enhances the possibility of obtaining relief in the state court.

At one time, when the procedural default rule was the primary limitation on federal habeas corpus, making every conceivable argument in state court was arguably defensible. Some believed that the goal was not to actually win there so much as to preserve arguments for the "real" battle in federal court. (But see *Barefoot v. Estelle* (1983) 463 U. S. 880, 887 ("secondary and limited").) The theory was that even an argument clearly precluded by the United States Supreme Court's precedents needed to be preserved in the hope that the "annually improvised Eighth Amendment, 'death is different' jurisprudence" (see *Morgan v. Illinois* (1992) 504 U. S. 719, 751 (dis. opn. of Scalia, J.)) might sprout a new branch between state and federal review. That was a realistic expectation during a time of chaotic jurisprudence and full retroactivity. For example, few could have expected, when the United States Supreme Court was focused on curbing arbitrariness in capital sentencing and requiring that "discretion must be suitably directed and limited" (see *Gregg v. Georgia* (1976) 428 U. S. 153, 189) (lead opn.)), that it would someday hold that a state *must* allow each individual juror to decide what is mitigating. But it did just that in *Mills* v. *Maryland* (1988) 486 U. S. 367.

Today the habeas landscape is dramatically different. The procedural default rule is one of the lesser restrictions on federal habeas corpus for state prisoners, with relatively broad exceptions. Newer limitations have assumed greater importance. New rules of constitutional criminal procedure are no longer retroactive on habeas corpus under the rule of *Teague v. Lane* (1989) 489 U.S. 288, 310 (plur. opn.).[2] *Mills v. Maryland*, *supra*, was held not retroactive on habeas (see *Beard v. Banks* (2004) 542 U.S. 406, 408), so it makes no difference whether a habeas petitioner preserved that objection in a pre-*Mills* appeal. At oral argument in the present case, counsel for petitioner cited the case of *Hitchcock v. Dugger* (1987) 481 U.S. 393 as an example of a case where a claim must be preserved in case the Supreme Court changes the law. But *Hitchcock* predates *Teague*. If the issue had arisen after *Teague*, the *Hitchcock* rule would not have applied to any case final on direct review, and the rule could not have been made in *Hitchcock* itself. (See *Teague v. Lane*, *supra*, 489 U.S. at p. 316 (rule cannot be made in case to which it would not apply).) Freedman, *supra*, 31 Hofstra L.Rev. at pages 1174-1175 offers the example of *Ring v. Arizona* (2002) 536 U.S. 584, but *Ring* also was not retroactive. (See *Schriro v. Summerlin* (2004) 542 U.S. 384, 358.)

In addition, Congress has abolished the rule of de novo review that prevailed from 1953 to 1996. (See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power (1998) 98 Colum. L.Rev. 888, 888-889, 945-953.) Now, a weak claim rejected on the merits by the state court cannot

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2. New substantive rules, such as *Atkins v. Virginia* (2002) 536 U.S. 304 are retroactive on habeas (see *Beard v. Banks*, *supra*, 542 U.S. at pp. 416-417 & fn. 7), but California law permits a successive petition in these circumstances. (See *In re Hawthorne* (2005) 35 Cal.4th 40, 43-44 (fourth petition, considered on the merits after *Atkins*).) *Teague* recognizes in theory an additional exception for truly fundamental new rules of procedure, but this exception is effectively dead as there are no rules of the requisite magnitude remaining to be made. (See *Whorton v. Bockting* (2007) 549 U.S. 406, 417-418.)

produce a grant of relief in federal court under 28 U.S.C. § 2254(d), because a decision rejecting a weak claim is necessarily reasonable. "Preserving" a claim that is certain to be barred by § 2254(d) is pointless. The only claims resolved on the merits in state court that can later be grounds for federal habeas relief are those so strong on *existing* Supreme Court precedent that the state court's rejection would be unreasonable. (See *Harrington v. Richter* (2011) 131 S.Ct. 770, 786-787, 178 L. Ed. 2d 624, 641.) Few, if any, cases have more such claims than can be counted on one hand.

Effective and ethical advocacy in capital cases is the same as in other cases in this regard. Counsel should focus on the strong claims and let the weak ones go. In this respect, death is not different. Counsel need not make every argument and must not make frivolous ones.

The Supreme Court rejected the notion that there is a "death is different" exception to the *Jones* principle in *Smith v. Murray* (1986) 477 U.S. 527. In this capital case, the habeas petitioner contended that appellate counsel's omission of a claim from direct appeal was ineffective assistance and therefore cause for default, allowing the claim to be considered on federal habeas. (See *id*. at p. 535.) The Court rejected the argument, vigorously reaffirming *Jones* and applying it to a capital case. (See *id*. at pp. 535-536.)

The American Bar Association does not agree with the controlling precedent of the United States Supreme Court. (See Van Winkle Declaration pp. 8-9.) That conflict need not concern this court.

> "The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to

> meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination." (*Bobby v. Van Hook* (2009) 130 S.Ct. 13, 20, 175 L.Ed.2d 255, 262-263 (conc. opn. of Alito, J.).)

Even if the ABA position is given some weight on matters that are otherwise close calls, this is not such a matter. With United States Supreme Court precedent on point saying that winnowing weak claims is not only adequate but preferable, the contrary position of the ABA is irrelevant.

Certainly an attorney is within the " 'wide range of professionally competent assistance' required under the Sixth Amendment" (*Smith v. Murray*, *supra*, 477 U.S. at p. 536) if he does what the United States Supreme Court says he should do and winnows out the weak claims to focus on the stronger ones. "As the high court has observed, appellate counsel (and, by analogy, habeas corpus counsel as well) performs *properly* and *competently* when he or she exercises discretion and presents *only* the strongest claims instead of every conceivable claim." (*In re Robbins* (1998) 18 Cal.4th 770, 810, italics in original, citing *Jones* and *Smith*.)[3]

Assessment of the relative strength of claims is the kind of "judgment call," without a clear right or wrong answer, calling for the highest degree of deference. An attack on that judgment will rarely meet the "rigorous standard" required for an ineffective assistance claim. (See *Smith v. Murray*, *supra*, 477 U.S. at p. 535.)

A successive petition contending that a claim is justified under *Clark* because of ineffective assistance of prior counsel in omitting it must make a showing that the omission was outside the range of competent assistance as defined in *Smith* and adopted in *Robbins*. Without a colorable argument to that effect, the contention is frivolous.

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3. To the extent that the discussion in *Clark*, 5 Cal.4th at page 780 is contrary, it did not survive *Robbins*.

III. A federal habeas petitioner with a claim defaulted in state court need not return to state court.

This court has been presented with an incomplete statement of the federal habeas law of exhaustion that may lead to an incorrect conclusion. (See Van Winkle Declaration pp. 3-4.) A brief statement is in order here to fill in the gap.

It is generally true that a state prisoner must exhaust available state remedies before turning to the federal courts. (See 28 U.S.C. § 2254(b)(1)(A).) This requirement refers only to presently available state remedies, however. "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." (*Coleman v. Thompson* (1991) 501 U.S. 722, 732.)[4] This technical satisfaction of the exhaustion rule does not mean that the federal court can proceed to the merits, however, because it raises the bar of the procedural default rule.[5] (See *Gray v. Netherland* (1996) 518 U.S. 152, 161-162.)

If a claim has never been presented to the state courts, it is "unexhausted" for the purpose of federal habeas if *and only if* it is not procedurally

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4. *Coleman* is still good law for the point cited and in its entirety for California. The Supreme Court recently made a very narrow exception to *Coleman*'s main holding for states such as Arizona that "bar defendants from raising ineffective-assistance claims on direct appeal," but otherwise "the rule of *Coleman* governs." (See *Martinez v. Ryan* (2012) 132 S.Ct. 1309, 1320, 182 L.Ed.2d 272, 287.)

5. The procedural default rule as applied to defaults on appeal and state habeas had little application in California until recently because the Ninth Circuit routinely brushed California's default rules aside as "inadequate." The Supreme Court finally, unanimously corrected that long-standing error last term in *Walker v. Martin* (2011) 131 S.Ct. 1120, 1131, 179 L.Ed.2d 62, 74.

defaulted in state court, that is, if the state remedy remains available. "Of course, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." (*Harris v. Reed* (1989) 489 U.S. 255, 263, fn. 9.) The high court noted in *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 847-848:

> "nothing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable. Section 2254(c), in fact, directs federal courts to consider whether a habeas petitioner has 'the right *under the law of the State to raise, by any available procedure*, the question presented.' (Emphasis added.) The exhaustion doctrine, in other words, turns on an inquiry into what procedures are 'available' under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available."

If the claim is clearly defaulted under state law, the federal court makes that determination itself and then proceeds to the question of whether "the petitioner can demonstrate cause and prejudice for the default." (*Gray v. Netherland*, *supra*, 518 U.S. at p. 162.) The status of a claim as defaulted under state law is not always clear, however. The more specific and objective a state's default rules are, the more often the federal court will be able to proceed directly to the cause-and-prejudice analysis without a return to state court.[6] Amicus submits that in an appropriate case, and soon, this Court should reconsider the rule of *Clark* and *Robbins*, at least as applied to successive petitions in capital cases, and adopt a rule somewhere between the present rule and 28 U.S.C. § 2244(b). That issue is beyond the scope of the briefing order in this case, however, so we will not address it here.

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6. Often, as in *Gray*, the same findings that resolve the state default question also resolve the federal cause-and-prejudice question.

CONCLUSION

The court should make clear for future cases that (1) a claim in a successive petition is frivolous if it is obviously barred; and (2) an argument that ineffective assistance of prior counsel is cause justifying a successive claim is frivolous unless a substantial argument can be made that the claim is one of the few, strong claims that counsel must make under *Jones v. Barnes* and *Smith v. Murray*.

May 29, 2012

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court,
Rule 8.520, Subd. (c)(1)

I, Kent S. Scheidegger, hereby certify that the attached brief amicus curiae of the Criminal Justice Legal Foundation contains 3683 words, as indicated by the computer program used to prepare the brief.

Dated: May 29, 2012

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816. On the date below I served the attached document by depositing true copies of it enclosed in sealed envelopes with postage fully prepaid, in the United States mail in the County of Sacramento, California, addressed as follows:

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Executed on May 29, 2012, at Sacramento, California.

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