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December 8, 2010

Supreme Court Copy

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

RE: *Gomez v. Superior Court of Lassen County (Felker)*
Case No. S179176 and consolidated case
Petitioners' Supplemental Letter Brief

To the Honorable Clerk of the Court:

On November 10, 2010, the Court issued an order directing the parties and inviting the Lassen County Superior Court and the California Court Commissioners Association to submit by December 10, 2010 supplemental letter briefing addressing four questions. Petitioner submits this letter brief in accordance with that order, addressing the Court's questions in the order it posed them.

QUESTION #1

AS A MATTER OF STATUTORY INTERPRETATION, DOES A DECISION TO SUMMARILY DENY A PETITION FOR WRIT OF HABEAS CORPUS OR TO ISSUE AN ORDER TO SHOW CAUSE CONSTITUTE AN "EX PARTE" MATTER WITHIN THE MEANING OF CODE OF CIVIL PROCEDURE, SECTION 259, SUBDIVISION (a)? IF NOT, TO WHAT MATTERS DOES THE STATUTE APPLY?

Answer: No. The statute applies to motions on ex parte matters for orders that are preliminary and incidental to a determination of the action, distinguished from a judgment on a habeas corpus petition that finally disposes of the action.

Analysis:

Analysis:

A decision to summarily deny a petition for writ of habeas corpus does not constitute an order on an ex parte matter within the meaning of Code of Civil Procedure, section 259, subdivision (a). That subdivision authorizes a commissioner to act on "ex parte motions." Writs of habeas corpus are sought not by motions, but by petition. That has always been the case. (See, e.g., Pen. Code, § 1474 ["Application for the writ is made by petition"].) The Legislature's intent in this subdivision regarding habeas petitions is murky at best. As real party of interest noted in the court below: "This subdivision is ambiguous on its face. Section 259, subdivision (a) could be read as having 'ex parte motions' modify "writs of habeas corpus,' and thus would only permit commissioners to rule on ex parte motions filed in habeas proceedings, such as requests for continuances or the appointment of counsel." (RPI Return, p. 5.)

Even if a petition were deemed a motion, the statutory provision that a commissioner may hear and determine ex parte motions for orders does not authorize a commissioner to deny a petition, for such a denial is a judgment on the action that finally resolves the rights of the parties in the proceeding, rather than an order that is preliminary in nature. Code of Civil Procedure section 1003 provides: "Every direction of a court or judge, made or entered in writing, *and not included in a judgment*, is denominated an order. An application for an order is a motion." (Italics added.) Code of Civil Procedure, section 577 defines a judgment: "A

judgment is the final determination of the rights of the parties in an action or proceeding." "All dismissals [of an action] ... shall constitute judgments." (Code Civil Pro., § 581d.) Likewise, Code of Civil Procedure section 1064 gives the same meaning to motions, orders and judgments in special proceedings: "A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding."

As one court noted in explaining that the power of a commissioner to allow a probate claim was within the statutory power of a commissioner to issue an order upon an ex parte motion, the statute must be read in light of the original constitutional grant of power of court commissioners to conduct "chamber business": "[T]he common law understanding of 'chamber business' as stated in *Von Schmidt v. Widber* (1893), 99 Cal. 511, 513 [34 P. 109], ... was 'limited to the subsidiary and incidental steps in practice and procedure, leaving to the court the judicial determination of the issues presented by the pleadings.'" (*Estate of Roberts* (1942) 49 Cal.App.2d 71, 77.) Thus, while issuance of an order to show cause may be an order preliminary in nature, and subsidiary and incidental to a judicial determination of the issues presented in the proceeding, a denial of a petition is not such a subordinate duty; rather, it is a final determination of the issues that can be made only by a judge.

Courts consistently have interpreted the statutory language, "to hear and determine ex parte motions for orders," as pertaining to orders that are

preliminary or ministerial in nature, as distinguished from rulings that are final determinations of the merits and thus constitute a judgment on an action. (See, e.g., *Lewis v. Nesbitt* (1961) 188 Cal.App.2d 290 [an order requiring an administrator of an estate to appear as a judgment debtor and appointing a referee to hear the matter is within the statutory ambit empowering a commissioner to issue an order upon ex parte motion]; *People v. Valentine* (1975) 48 Cal.App.3d 123 [commissioner empowered to record unexcused non-appearance of defendant and order forfeiture of bail].)

Until the decision under review, no published decision had ever found that the statute authorizes a commissioner to enter a final order – a judgment – in a habeas corpus proceeding. Rather, this Court and others have consistently found in related contexts that determinations of an individual's custody and entitlement to liberty are not subordinate judicial duties within the meaning of the Constitution; rather, they are determinations a judge must make. (See, e.g., *People v. Tijerina* (1969) 1 Cal.3d 41, 49 [commissioner not empowered to order revocation of probation]; *In re Edgar M.* (1975) 14 Cal.3d 727, 729-730 [juvenile court referee not empowered to issue orders that include removing a minor from his home in light of the constitutional restriction on court "officers such as commissioners to perform subordinate judicial duties"]; *In re Plotkin* (1976) 54 Cal. App. 3d 1014, 1017 ["issuance of an order which can have the effect of placing the violator thereof in jail is not a 'subordinate judicial

duty.'"]; compare *People v. Lucas* (1978), 82 Cal.App.3d 47, 58-59 [adjudication of a traffic infraction is a subordinate judicial duty because it does not carry imprisonment as a penalty but only a relatively insubstantial fine].)

QUESTION #2

ASSUMING THAT SECTION 259, SUBDIVISION (a) GRANTS COMMISSIONERS THE AUTHORITY TO SUMMARILY DENY A HABEAS CORPUS PETITION OR TO ISSUE AN ORDER TO SHOW CAUSE, DID COMMISSIONERS ACTUALLY EXERCISE SUCH AUTHORITY PRIOR TO THE ADOPTION OF ARTICLE VII, SECTION 22 OF THE CALIFORNIA CONSTITUTION IN 1966?

Answer: No

Analysis:

There is no evidence commissioners ever actually exercised any authority to deny a habeas corpus petition or to issue an order to show cause prior to 1966. Rather, this appears to be a recent and unprecedented phenomenon, where two superior courts, San Luis Obispo County and Lassen County (the latter being the respondent here), granted commissioners the power not only to summarily deny a habeas corpus petition or to issue an order to show cause, but also to adjudicate habeas petition to conclusion, including entry of final disposition and judgment. Counsel has uncovered no evidence that commissioners otherwise have historically played any role in the consideration of habeas corpus petitions.

QUESTION #3

IF COMMISSIONERS DID HAVE THE AUTHORITY TO SUMMARILY DENY HABEAS PETITIONS PRIOR TO 1966, CAN IT STILL BE ARGUED IN LIGHT OF *ROONEY V. VERMONT INVESTMENT CORP.* (1973) 10 CAL.3D 351 THAT SUCH AUTHORITY DOES NOT CONSTITUTE A SUBORDINATE JUDICIAL DUTY WITHIN THE MEANING OF ARTICLE VI, SECTION 22 OF THE CALIFORNIA CONSTITUTION?

Answer: Yes.

Analysis:

This Court in *Rooney* stated, "The scope of the subordinate judicial duties which may be constitutionally assigned to court commissioners should be examined in the context of the powers that court commissioner had *and were exercising in 1966*, when the present constitutional provision was adopted." (*Rooney v. Vermont Investment Corp., supra*, 10 Cal.3d at p. 362; italics added.) As set forth above, commissioners were not exercising any power to deny habeas corpus petitions at the time the constitutional provision was enacted.

Ultimately, *Rooney*'s observations about whether the constitutional provision limiting a commissioner to the performance of subordinate judicial duties constituted an endorsement of the statutory powers that commissioners were then exercising was dicta, for the Court held that "[t]he judgment before us is void not only because the commissioner attempted to exercise authority not conferred upon him but also" for other reasons. (*Rooney v. Vermont Investment Corp., supra*, 10 Cal.3d at pp. 367-368.) Moreover, at issue in *Rooney* was Code of Civil Procedure,

section 259a, subdivision 6, concerning the hearing and determination of uncontested matters. The determination of such routine matters that neither party had an interest in opposing comes within the traditional subordinate role of a magistrate, as *Rooney* noted. Moreover, such a determination involves very different considerations than a determination of the custody of an individual challenged by a petition for writs of habeas corpus, a matter that typically implicates competing interests of dueling parties. Thus, *Rooney* does not control here. (See also Petitioners' Opening Brief on the Merits, pp. 22-24, where petitioners discussed the implications of *Rooney* for the question presented.)

QUESTION #4

HAVE THE LEGAL CONSEQUENCES OF A SUMMARY DENIAL OF A HABEAS CORPUS PETITION, OR THE LEGAL DETERMINATIONS INVOLVED, CHANGED SINCE THE ADOPTION OF ARTICLE VI, SECTION 22, IN SUCH A MANNER AS TO SUPPORT A CONCLUSION THAT A SUMMARY DENIAL OF A HABEAS CORPUS PETITION NO LONGER CONSTITUTES A SUBORDINATE JUDICIAL DUTY?

Answer: Yes.

Analysis:

Since the adoption in 1966 of California Constitution, article VI, section 22, both the legal consequences of a summary denial of a habeas corpus petition and the legal determinations involved in consideration of such petitions have changed – markedly -- in ways that support the

conclusion that a summary denial of a habeas corpus petition at this time is not a subordinate judicial duty.

Since 1966, this Court has tightened and given teeth to "the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark* (1993) 5 Cal.4th 756, 767.) In *Clark*, the Court specifically rejected the submission that Penal Code "section 1475 ... and sound policy mandate that the court consider successive petitions on their merits ... in *any* case in which no order to show cause issued on a prior petition or petitions." (*Id.* at p. 769; italics in original.) In doing so, it held that the rule restricting the filing of a second or successive petition applies even when the first petition was summarily denied.[1]

Until *Clark*, the rule against successive petitions was often honored in the breach, with the bar to successive petitions deemed "discretionary" and merely a "policy," such that "[o]n occasion, the merits of successive petitioners have been considered regardless of whether the claim was raised ... in a prior petition ...." (*In re Clark, supra*, 5 Cal.4th at p. 768.) In *Clark*, however, the Court announced a strict rule for consideration of successive petitions: "With the exception of petitions which alleged facts demonstrating that a fundamental miscarriage of justice has occurred, ...

[1] "The denial of a habeas corpus petition without issuance of an order to show cause [is] often referred to as a 'summary denial' ...." (*In re Clark, supra*, 5 Cal.4th at p. 769, fn. 1.)

unjustified successive petitions will not be entertained on their merits." (*Id.* at p. 775.) Thus, the summary denial of a petition for writ of habeas corpus has become inestimably more consequential since 1966 for the prisoner seeking state habeas corpus relief from wrongful confinement.

Likewise, the state bar on consideration of successive petitions has become considerably more consequential for a California prisoner seeking federal habeas corpus relief from wrongful confinement. As formulated in *Fay v. Noia* (1963) 372 U.S. 391, the doctrine of "independent and adequate state procedural grounds" that precludes consideration on federal habeas corpus of a claim that the state denied for a procedural default applied only if there was a "deliberate by-passing of state procedures," and only if such was by the "considered choice of the petitioner" himself as opposed to his counsel. (*Id.* at p. 439.) During the 1970s, however, the Supreme Court steadily expanded the doctrine, culminating in *Coleman v. Thompson* (1991) 501 U.S. 478, which overruled *Fay* and applied the doctrine in all cases in which a prisoner or his counsel defaulted a claim in state court by inexcusably failing to follow a state procedural rule. (See 2 Hertz & Liebman, Federal Habeas Corpus Practice and Procedure (5th ed. 2005) ch. § 26.1, pp. 1249-1253.) Thus, a summary denial of a petition for writ of habeas corpus at this time has profoundly more prejudicial consequences for a prisoner seeking federal habeas corpus relief than such a denial would have had in 1966.

In sum, the legal consequences of a summary denial of a petition at this time, compared to those consequences in 1966, make such a denial by a commissioner incompatible with the California Constitution's restriction of commissioners to the performance of "subordinate judicial duties."

The legal determinations involved in a summary denial of a habeas corpus petition have also changed since 1966 in ways that put denial of a petition beyond the ambit of the "subordinate legal duties" to which a commissioner is restricted. For example, a respondent now may make an informal appearance to oppose issuance of an order to show cause and to argue in favor of summary denial of a petition. (See Cal. Rules of Court, rules 4. 551 (b) and 8.385 (b).) In contrast, "[b]efore 1984, there was no authority for the 'informal response' procedure." (*People v. Romero* (1994) 8 Cal.4th 728, 741.) "Through the informal response, the custodian or real party in interest may demonstrate, by citation of legal authority and by submission of factual materials, that the claims asserted in the habeas corpus petition lack merit and that the court therefore may reject them summarily, without requiring formal pleadings (the return and traverse) or conducting an evidentiary hearing." (*People v. Romero, supra,* 8 Cal. 4th at p. 742.) Thus, consideration of a petition for writ of habeas corpus now is routinely a contested proceeding that involves both parties.

In addition, the writ of habeas corpus covers a much broader area of disputes than in 1966, and continues to expand in ways that make outdated delegation of consideration of a habeas corpus petition to a commissioner

as a subordinate judicial duty. As noted in *People v. Duvall* (1995) 9 Cal. 4th 464, 475-476:

> [A]s originally conceived, relief on habeas corpus was limited to a claim that the petitioner was confined pursuant to the judgment of a court that lacked jurisdiction. [Citations.] "[T]his strict jurisdictional view ... has changed over the years" [citation], and the function of habeas corpus has evolved to permit judicial inquiry into a variety of constitutional and jurisdictional issues. (See generally, 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Extraordinary Writs, § 3331(a), p. 4125 [hereafter Witkin & Epstein] ["the functions of habeas corpus have been changed in recent years by decisions substituting the test of fundamental unfairness for the jurisdictional test"].)

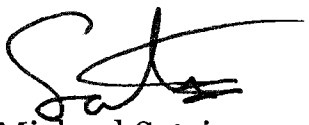
Rather than being limited to the narrow question of jurisdiction, habeas corpus petitions now often involve matters of great complexity and systemic importance. For example, in 1986 this Court recognized that a habeas corpus petition may present a claim "of such a nature that it might have been presented in a purely civil proceeding — by petition for writ of mandate or action for declaratory relief ...." (*In re Head* (1986) 42 Cal. 3d 223, 226.) Indeed, very recently a court permitted "a habeas corpus class action ...." (*In re Lugo* (2008) 164 Cal. App. 4th 1522, 1528.) These developments reflect the reality that petitions for writs of habeas corpus can be exceedingly complex, involve momentous constitutional issues, carry the gravest of consequences for the petitioner, and are of abiding interest to the public.

This Court is well aware of that reality from its consideration of habeas corpus petitions in death penalty cases. It recently has considered the advisability of requiring capital habeas petitions in capital cases to be heard initially by the superior court. It is inconceivable that such complex petitions, which ordinarily involve numerous constitutional claims, hundreds of pages of briefing, thousands of pages of supporting exhibits, and informal responses to them and replies thereto, could be denied by commissioners. Under the Court of Appeal's decision and the position of the Lassen County Superior concerning the meaning of Code of Civil Procedure section 259, subdivision (a), however, commissioners would be authorized to do so. This cannot be the law, for the denial of habeas petitions in this day and age is the antithesis of a subordinate judicial duty that the Constitution allows a commissioner to perform.

The ambiguities of Code of Civil Procedures, section 259, subdivision (a) should not be construed to countenance such a startling result. Rather, as both the Attorney General and petitioners argued below, those ambiguities should be resolved in a way that avoids the tension with constitutional mandates engendered by an interpretation of the statute that would permit commissioners to enter final orders disposing of habeas petitions. (See, e.g., RPI Return, p. 6 (quoting *Cal. Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594) ["When possible, courts 'will interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statutes.'"]; Petitioners' Replication,

pp. 8-9 ["The biggest problem with the court's" argument "that its commissioner had jurisdiction to adjudicate and deny the petitions for extraordinary relief at issue here pursuant to this statutory provision" was "the constitutional tension" created by its statutory interpretation].)

Respectfully submitted,



Michael Satris
Attorney for Petitioners

California Supreme Court Case No. S179176
Court of Appeal, Third Appellate District Case Nos. C060773 & C060710
Gomez v. The Superior Court of Lassen County

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Marin County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 337, Bolinas CA.

On December 8, 2010, I served the within **PETITIONERS' SUPPLEMENTAL LETTER BRIEF** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on December 8, 2010.

Sabine Jordan