Case No. S130263

IN THE

Supreme Court of the State of California

In re KENNETH EARL GAY on Habeas Corpus

LOS ANGELES SUPERIOR COURT
THE HONORABLE DANA SENIT HENRY, JUDGE
NO. A392702

APPLICATION OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER KENNETH EARL GAY

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*Admission *pro hac vice* requested

November 11, 2010

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APPLICATION OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER KENNETH GAY

TO THE HONORABLE ROBERT M. GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the United Kingdom of Great Britain and Northern Ireland seeks leave to file a brief as *amicus curiae* in support of Petitioner Kenneth Earl Gay.[1]

Petitioner Kenneth Earl Gay is a British national who has spent over twenty-four years on death row in California. The United Kingdom has a keen interest in seeing that its nationals receive fair judicial process when accused of crimes outside the United Kingdom and in ensuring respect for internationally protected rights. This interest is particularly strong in a case such as this one, in which a British national may face the irreversible penalty of death.

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[1] No party or counsel for a party in the pending proceeding authored the proposed *amicus* brief in whole or in part. No person made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amicus curiae* or its counsel.

The right to counsel—including the right to effective counsel—in criminal cases is a principle common to the legal systems of the United Kingdom and the United States, as well as many other countries. It also is a right protected by international treaties, including treaties to which the United States, the United Kingdom or both are parties.

Amicus curiae the United Kingdom aims to apprise the Court of standards developed by international tribunals and human rights bodies, and other non-U.S. courts and tribunals, regarding the right to effective legal representation as an integral part of the right to a fair trial and due process of law. We believe that these decisions will provide this Court a useful perspective in developing and analyzing the domestic law standards applicable to this case, both to aid in construing United States domestic law in a way that conforms with its international obligations and to provide a comparative legal perspective to illuminate the basic principles that underlie the right to counsel in the United States and elsewhere. We also believe that this perspective will help the Court in its analysis of the highly troubling failings of trial counsel that are evident from the record in this case.

The record in this case suggests that the conduct of Mr. Gay's trial counsel has effectively prevented Mr. Gay from presenting evidence relevant to his innocence for more than twenty-six years after his arrest. As a result of trial counsel's misconduct, there is evidence pertaining to innocence that has never been given substantial consideration by any court with respect to Mr. Gay's responsibility for the crime at issue. It is also clear that Mr. Gay's counsel, who procured his retention through fraud, was subject to disciplinary proceedings shortly after Mr. Gay's trial and was later disbarred for misconduct, was not willing or capable to provide the level of disinterested and zealous representation required of defense counsel. This grossly inadequate representation raises substantial concerns as to the fairness of Mr. Gay's trial and whether he received the fundamental protections to which he was entitled, both as a matter of the United States and California Constitutions and under the corresponding commitments that the United States has made to foreign nations.

Like the United States, the United Kingdom is committed to the rule of law. For the reasons stated above and because of its fundamental and abiding interest in the fairness of criminal

proceedings, particularly those in which the life of British nationals is at stake, the United Kingdom of Great Britain and Northern Ireland respectfully requests leave to file the accompanying brief as *amicus curiae* in this matter.

Dated: November 11, 2010

Respectfully submitted,

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BRIEF OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER KENNETH GAY

ARGUMENT

The decisions of the United States Supreme Court and of this Court have long recognized that the right to counsel in a criminal proceeding, guaranteed by the United States and California Constitutions, includes a right to effective assistance of counsel. This principle is not unique to the United States, but also is recognized in the United Kingdom and in numerous other countries. Indeed, the right to effective assistance of counsel is recognized under international human rights treaties, including those to which the United States is a party, as one of the necessary minimum requirements for a fair trial.

The United Kingdom is particularly concerned that, in this case, one of its nationals could face the death penalty having received legal representation that fell far short of the minimum standard for effective assistance of counsel.[2] The right to competent and effective counsel is

[2] The interest of *amicus* is more fully set forth in the accompanying application for leave to file, to which *amicus* respectfully refers the Court.

recognized by international agreement and by principles common to modern legal systems as essential to a fair trial. For the reasons stated below, *amicus curiae* the United Kingdom respectfully submits that the petition should be granted.

I. THE RIGHT TO EFFECTIVE LEGAL COUNSEL IS INTERNATIONALLY RECOGNIZED AS AN ESSENTIAL COMPONENT OF DUE PROCESS OF LAW

A. The Court Should Take into Account International Practice and Precedent in Considering Whether Petitioner Was Afforded Effective Assistance of Counsel

The decisions of foreign and international courts and tribunals, though not binding on the courts of the United States and its states, can inform the interpretation of U.S. law, particularly in addressing basic principles of human rights that are common to modern democracies. *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions").[3] Specifically, the U.S. Supreme Court has recognized that "[t]he United Kingdom's experience bears particular relevance"

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[3] *See also, e.g., Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003) (taking into account foreign courts' and international human rights courts' decisions as reflecting viewpoint of "wider civilization"); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting consensus of world community as documented in European Union's *amicus* brief).

to decisions interpreting the United States Constitution in part because of "the historic ties between our countries." *Roper*, 543 U.S. at 577. The Supreme Court also has recognized that decisions of international courts, interpreting treaties to which the United States is a party, are entitled to "respectful consideration." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006); *cf., e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.") (quoting and following *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).

As Justice Breyer has remarked, the decision of "a judge in a different country dealing with a similar problem" may well contain insights that a U.S. court could benefit from considering, just as a U.S. court might take into consideration a law review article or a decision from another U.S. state. Scalia & Breyer, Discussion, *The Relevance of Foreign Law for American Constitutional Adjudication* (Jan. 13, 2005), *transcript available at* http://www.wcl.american.edu/secle/founders/2005/050113.cfm. For these reasons, the Court should consider the views of foreign and international courts and human

rights bodies to the extent they may shed light on the application of the right to counsel to Mr. Gay's circumstances.

B. International Human Rights Jurisprudence, Like U.S. Case Law, Recognizes That Effective Legal Counsel Is an Essential Guarantee of the Fairness of the Legal Process, Especially in Capital Cases

The right to present a defense through the assistance of competent and effective legal counsel is an essential guarantee of the fairness of a criminal trial. This guarantee is reflected in numerous international human rights instruments and precedents, as well as in laws and precedents governing the conduct of legal counsel in criminal trials under the law of many jurisdictions, including the United Kingdom and the United States.

International jurisprudence interpreting international human rights treaties closely parallels the law of the United States and California in this regard. Like the Sixth Amendment to the U.S. Constitution and Article I, § 15 of the California Constitution, global and regional human rights treaties, including those to which the United States is a party, guarantee persons accused of crimes the right to legal counsel. The case law interpreting and giving effect to these treaties makes clear that they impose on states not just a formal

requirement that defendants have *any* counsel, but an affirmative obligation to ensure that counsel must be adequate and competent.

For example, article 14 of the International Covenant on Civil and Political Rights ("ICCPR")—a treaty which both the United States and the United Kingdom have ratified—provides that a criminal defendant has a right "to defend himself in person or through legal assistance of his own choosing" and "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing." International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, art. 14 (ratified by U.S. June 8, 1992). Several regional human-rights conventions contain similar provisions, also guaranteeing the right to counsel.[4]

These treaty provisions hark back to a principle enunciated in the Universal Declaration of Human Rights, the founding document of modern international human rights law by which the Western allies brought their vision of human rights to the world community in the

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[4] *See* American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, art. 8 (United States has signed); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Nov. 4, 1950, 213 U.N.T.S. 221, art. 6(3)(b)-(c) (United Kingdom has ratified); African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217, art. 7(1)(c).

aftermath of World War II. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, art. 11 (1948). The Declaration makes clear that "[e]veryone charged with a penal offence has the right to . . . a public trial at which he has had all the guarantees necessary for his defence." *Id.* art. 11. As the later treaties make clear, the right to counsel is an integral part of these guarantees.

As with the corresponding guarantees of the Sixth Amendment and its California counterpart, courts interpreting international human rights treaties have made clear that the *pro forma* presence of counsel for the defense does not, by itself, satisfy the right to assistance of counsel. Rather, the state is responsible for ensuring that defense counsel is competent and effective. For example, the European Court of Human Rights has held that "in view of the prominent place held in a democratic society by the right to a fair trial," it is important to ensure that the defendant is able to exercise the right to legal representation in a manner that is "practical and effective." *Artico v. Italy*, 3 Eur. H.R. Rep. 1, ¶ 33 (Eur. Ct. H.R. May 13, 1980). Thus, the European Court has recognized, "assigning a counsel does not in itself ensure the effectiveness of the assistance he may afford an

accused." *Öcalan v. Turkey*, 41 Eur. H.R. Rep. 45, ¶ 135 (Eur. Ct. H.R. May 12, 2005) (Grand Chamber) (citing *Artico*).

The Inter-American Commission on Human Rights likewise has held that "the right to legal representation must be guaranteed in a manner that renders it effective and therefore requires not only that counsel be provided, but that defense counsel be competent in representing the defendant." *Myrie v. Jamaica*, Case 12.417, Inter-Am. Comm'n H.R., Report No. 41/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 ¶ 62 (Oct. 12, 2004). In the words of the United Nations Human Rights Committee, "it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings [and] steps must be taken to ensure that counsel, once assigned, provides effective representation in the interest[s] of justice." *Saidova v. Tajikistan*, U.N. H.R. Comm., Communication No. 964/2001, U.N. Doc. CCPR/C/81/D/964/2001, ¶ 6.8 (2004).

This recognition parallels the established principle of American jurisprudence that "[t]he right of a criminal defendant to counsel 'entitled the defendant not to some bare assistance but rather to *effective* assistance.'" *In re Gay*, 19 Cal. 4th 771, 789 (1998) (quoting *In re Cordero*, 46 Cal. 3d 161, 180 (1988)). Other countries,

including the United Kingdom and other nations sharing its legal tradition, also vigorously enforce the same principle. *Boodram v. Trinidad & Tobago*, [2002] 1 Cr. App. R. 12, ¶ 34 (P.C. 2001) (U.K. Privy Council decision, on appeal from Trinidad and Tobago, quashing a conviction for capital murder for counsel's failure to provide adequate representation).

In capital cases, the state has a heightened obligation to ensure that the accused receives the rights necessary to fair legal proceedings, particularly the right to competent counsel. As stated by the Inter-American Commission on Human Rights,

> the irrevocable and irreversible nature of the death penalty renders it a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.

Graham (Sankofa) v. United States, Case 11.193, Report No. 97/03, Inter-Am. Comm'n H.R., OEA/Ser./L/V/II.114 Doc. 70 rev. 1, ¶ 27 (Dec. 29, 2003).

As the Inter-American Commission has noted, there is

> an internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise

> the most rigorous control for observance of judicial guarantees in these cases, such that [i]f the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.

Moreno Ramos v. United States, Case 12.430, Report No. 1/05, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.124 Doc. 5, ¶ 47 (Jan. 28, 2005) (internal quotation marks omitted); *accord, e.g., Hilaire v. Trinidad & Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 148 (June 21, 2002). Again, this parallels the recognition in U.S. law that capital cases require heightened attention to the requirements of due process. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that '[d]eath is different.'").

II. TRIAL COUNSEL'S MISCONDUCT COMPROMISED THE BASIC FAIRNESS OF THE PROCEEDINGS AGAINST MR. GAY

Evidence in the record in the present case suggests that Mr. Gay's trial counsel was unwilling or unable to provide the type of disinterested, competent, and thorough representation that the right to a fair trial and due process in a capital case demand.

Mr. Gay's trial counsel, Daye Shinn, clearly fell below the standard of competence required of any attorney—let alone a capital defense lawyer. It is recognized not just in the United States but internationally that defense counsel must have "experience and competence commensurate with the nature of the offense" in order to provide "effective legal assistance." Eighth U.N. Conf. on Prevention of Crime & Treatment of Offenders, *Basic Principles on the Role of Lawyers*, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990); *see also, e.g., Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (highlighting heightened expectations for effective counsel in capital cases); *Collins v. Jamaica*, U.N. H.R. Comm., Communication No. 350/1987, U.N. Doc. No. CCPR/C/43/D/240/1987, ¶ 7(6) (1991) (in cases of capital punishment, legal aid should not merely be available, but defense counsel should be able to prepare his client's case under circumstances that will guarantee justice); American Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 5.1(B)(2) (rev. ed. 2003) (counsel must have "substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases."). Mr. Shinn's lack of understanding of the

basic role of a capital defense lawyer led to his failure to introduce admissible witness evidence that would have been favorable to Mr. Gay's case. *See In re Gay*, 19 Cal. 4th at 813.

A. California Authorities Have Found That Mr. Gay's Trial Counsel Was Unfit to Practice Law

The record shows that Mr. Shinn was subject to various disciplinary proceedings, eventually leading to his disqualification from the practice of law altogether. In 1987, shortly after Mr. Gay's trial, Mr. Shinn was suspended from the practice of law for three months. *In re Gay*, 19 Cal. 4th at 780 n.5 (citing *In the Matter of Shinn*, 2 Cal. State Bar Ct. Rptr. 96 (Review Dep't 1992), and Bar Misc. No. 5444). During Mr. Gay's trial itself, Mr. Shinn was under investigation for potential involvement in an arson and for misappropriation of client funds, investigations which threatened his livelihood. 19 Cal. 4th at 828. Mr. Shinn was later disbarred. *Id.*

In his disciplinary case, the State Bar Court found that Mr. Shinn "lacks basic understanding of the most fundamental responsibilities of an attorney." *Id.* at 780 n.5 (citing *Shinn*, 2 Cal. State Bar Ct. Rptr. at 107). And in Mr. Gay's case, this Court found that trial counsel "engineered both his initial retention and subsequent appointment by fraudulent means," failing in his duties to act in the

interests of his client and to ensure the administration of justice and sorely compromising his "commitment to act as a zealous advocate" for Mr. Gay. *In re Gay*, 19 Cal. 4th at 795. In doing so, Mr. Shinn defrauded both his client and the Court, which appointed him as counsel.

An individual who resorted to outright fraud to procure his retention by a defendant facing the death penalty, and who has been excluded from the practice of law for misappropriating other clients' money, can hardly be entrusted with the zealous and disinterested defense of his client's life. As this Court observed, "[w]hen Shinn fraudulently and unethically maneuvered his own appointment to defend petitioner, petitioner lost any possibility of a fully developed penalty phase defense." *In re Gay*, 19 Cal. 4th at 828. But Mr. Shinn's deceitfulness meant that the possibility of effective representation of the defendant "was doomed to failure from the start," *id.*, not only at the penalty phase but also at the guilt or innocence phase. Mr. Shinn's readiness to defraud both the Court and his client at the outset of a representation that threatened his client's life shows a complete disdain for the interests of justice, the interests of his client and the role of defense counsel. The objectives of the

right to effective legal representation, both as guaranteed in U.S. law and as recognized internationally, were clearly beyond the reach of Mr. Gay's trial counsel. *See In re Gay*, 19 Cal. 4th at 828 (trial counsel's various "conflicts [of interest] contribute to our lack of confidence in the verdict when considered with [his] other failings.").

B. The Record Evidences Multiple Instances of Misconduct by Trial Counsel During Mr. Gay's Trial

The record further shows that Mr. Gay's capital defense counsel not only lacked an elementary understanding of what the interests of justice require, but further compromised Mr. Gay's actual defense through grave misconduct during trial. Such misconduct is of extreme concern to *amicus* to the extent that it affected the overall fairness of Mr. Gay's trial and prevented the objectives of the right to effective legal representation from being achieved in Mr. Gay's case.

First, trial counsel's belief that Mr. Gay would inevitably be sentenced to death is inconsistent with the zealous representation required in a capital case. *See In re Gay*, 19 Cal. 4th at 799. This Court has also found that Mr. Gay's trial counsel "acted as a second prosecutor" in advising Mr. Gay to confess to his alleged involvement in certain robberies, and falsely telling Mr. Gay that the statement could not be used against him at trial. *Id.* at 793. Mr. Shinn offered

no plausible explanation for his reckless advice. As would be expected, the statement was introduced against him at the guilt or innocence phase of his trial, and this Court found that it prejudiced Mr. Gay at the penalty stage of the trial. *Id.*

This evidence, *amicus* submits, was prejudicial not only at the penalty stage, and not only as to the robbery convictions, but also as to the murder convictions, where it was likely to have a direct bearing on the jury's consideration of motive for the alleged murder. *Amicus* further notes with concern that trial counsel admitted that he himself introduced further testimony implicating Mr. Gay, but "could not recall any tactical reason" for doing so other than unspecified "trial tactics." *In re Gay*, 19 Cal. 4th at 784, 822.

As numerous courts and bodies around the world have recognized, such reckless or incompetent disregard of the prejudice that such statements can exert on the finder of fact is completely inconsistent with defense counsel's duty to act as a "diligent and conscientious advocate" of his client's interests—particularly in a capital case, where the client's life is at stake. *In re Gay*, 19 Cal. 4th at 771 (quoting *In re Cordero*, 46 Cal. 3d at 180); *see, e.g., R v. G*, [2008] EWCA Crim 241, ¶ 27 (C.A.) (Eng.) (reversing conviction

based on errors of trial counsel; counsel's "decision to allow in without objection the hearsay evidence . . . was a highly dangerous one. That evidence is likely to have had a powerful effect upon the jury."); *R v. Clinton*, [1993] 1 W.L.R. 1181, 1187-88 (C.A.) (Eng.) (conviction may be overturned as a result of counsel's incompetence if counsel's decisions were "taken either in defiance of or without proper instructions, or when all the promptings of reason and good sense pointed the other way."); *Myrie v. Jamaica*, *supra*, ¶ 63 (Article 8 of American Convention was violated where counsel acted "contrary to established jurisprudence and with no apparent justification" in allowing jury to hear voir dire on admissibility of prejudicial statement).

Mr. Shinn also failed to present any ballistics evidence at trial.[5] The record in this case, however, suggests that ballistics evidence would have been of vital assistance to Mr. Gay's case at the guilt or innocence phase. The expert ballistics evidence made available to the penalty retrial court showed that the trajectory, timing, and impact of

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[5] Indeed, the only expert that Mr. Shinn called was a psychiatrist at the penalty stage, who was told by Mr. Shinn that the trial was an "open-and-shut case" and that he should only "go through the motions" rather than put in any real effort. *In re Gay*, 19 Cal. 4th at 797, 780.

the bullets were such that it was statistically extremely unlikely that Mr. Gay could have shot the victim. *People v. Gay*, 42 Cal. 4th 1195, 1211 (2008). The American Bar Association has recognized that "quality representation cannot be rendered" without recourse to supporting expert services such as "ballistics specialists" and "mental health experts." ABA Guidelines, *supra*, at 30. The Guidelines also make clear that defense counsel in a capital case must possess "skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including . . . ballistics." *Id.*, Guideline 5.1(B)(2).

The record also suggests that counsel's investigation of witnesses was generally inadequate. Mr. Shinn admitted that he could not recall having even spoken to defense witnesses in advance of the trial. *In re Gay*, 19 Cal. 4th at 816. Consistent with his professed belief that Mr. Gay would inevitably be convicted and sentenced to death, and that his conviction would not be reversed, Mr. Shinn stated that he destroyed his file on Mr. Gay's case. *Id.* at 783, n.8. That "file" appears to have consisted of only a handful of "scraps of paper" of notes taken during trial. *Id.* at 811.

This Court has also found that trial counsel did not call relevant witnesses, in spite of the instructions given by Mr. Gay. *Id.* at 821-22. Failure to heed client instructions compromises the right to effective legal representation by impairing the ability to present a defense. *See, e.g., Boodram, supra,* ¶ 39 (counsel's failure to take instructions from his client would constitute "misconduct . . . so extreme as to result in a denial of due process to his client."); *Sankar v. Trinidad & Tobago*, [1993] 1 W.L.R. 194, ¶ 20 (P.C.) ("counsel may not take it upon himself to disregard [his client's] instructions and to then conduct the case as he himself thinks best. It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury."). In addition, several other witnesses would have testified at the guilt or innocence phase to the circumstances of the crime and shed doubt on the prosecution witnesses' identification of Mr. Gay as the shooter, but Mr. Shinn made no attempt to call them. *People v. Gay*, 42 Cal. 4th 1195, 1209-11 (2008); *see also, e.g., Brown v. Jamaica*, U.N. H.R. Comm., Communication No. 775/1997, U.N. Doc. No. CCPR/C/65/D/775/1997, ¶ 6.8 (1999) (failure to call defense

witnesses, among other misconduct, established that defense counsel failed to provide effective representation).

Mr. Shinn's clearly inadequate preparation for trial and his failure to present elementary aspects of Mr. Gay's defense substantially impaired the effectiveness of Mr. Gay's right to a fair trial and constituted a failure to comply with professional duties incumbent on defense counsel. Ultimately, defense counsel's failure to adequately present evidence of innocence constitutes dereliction of his "most elementary professional duties." *Boodram, supra,* ¶ 40; *see also Sealey v. Trinidad & Tobago*, [2002] U.K.P.C. 52, ¶ 30 ("[T]he failure of defence counsel to discharge a duty . . . which lies on counsel can lead to the conclusion that a conviction is unsafe and that there has been a miscarriage of justice."); *id.* ¶¶ 35-36 (counsel's failure to raise an issue which was "fundamental to the question of the guilt or innocence of the accused" constituted ineffective representation).

C. Counsel's Misconduct Rendered Petitioner's Conviction Unreliable

The misconduct of Mr. Gay's trial counsel, as well as the instances of constitutional ineffectiveness which this Court has already recognized, raise grave concerns as to the fundamental

reliability of the conviction as a result of such incompetent and unethical representation. As this Court has found, "[w]hile we cannot say with certainty that the result would have been more favorable to petitioner had he been represented by competent counsel, neither can we have confidence in a penalty verdict rendered after a trial in which counsel for defendant defrauded both the court and his client and ill served his client in the manner demonstrated by this record." *In re Gay*, 19 Cal. 4th at 780. This observation also rings acutely true in relation to trial counsel's conduct during the guilt or innocence phase of the trial, which was equally affected by Mr. Shinn's fraud and woeful lack of diligence.

As this Court has held, the test for prejudice in these circumstances is not whether the Court concludes that the outcome would have been different, but rather whether the violation of petitioner's rights "undermines confidence in the verdict." *Id.* at 790; *see also Sealey*, *supra*, ¶ 36 (even if "it appears probable that the jury would have convicted" defendant with competent counsel, defendant is entitled to retrial unless court could conclude that "the jury would inevitably have convicted"). In this case, given the substantial exculpatory evidence that Mr. Shinn failed to present to the jury,

including witness testimony and ballistics evidence casting doubt on the prosecution's identification of him as the shooter, it is clear that Mr. Gay's conviction is unreliable. Upholding a capital conviction based on a trial that failed to meet one of the most elementary requirements of due process of law—representation by counsel acting diligently in the defendant's own interests—would be inconsistent with the human rights standards that the United States, the United Kingdom and other Western democracies have championed to the world.

Having been denied fundamental due process, Mr. Gay is entitled to an effective remedy, including at a minimum a retrial on the issues of guilt or innocence. *See* Universal Declaration of Human Rights, *supra*, art. 8 (right to effective remedy for violation of fundamental rights); *Martinez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. Comm'n H.R., Doc. 5 rev. 1, ¶ 86 (Oct. 10, 2002) (right to retrial where trial fails to satisfy minimum requirements of due process). The extraordinary length of time that Mr. Gay has spent in incarceration in this case—including over twenty-four years on death row—further militates in favor of granting

all appropriate relief to ensure that his internationally protected due process rights are not frustrated.[6]

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[6] *Cf. Pratt v. Att'y Gen. for Jamaica*, [1994] 2 A.C. 1, 29 (P.C. 1993) (commuting sentence to life imprisonment rather than remand for reconsideration of death sentence, where petitioners had spent more than five years on death row); *Boodram*, *supra*, ¶ 42 (retrial for murder would be "inappropriate" where 13 years had elapsed since defendant's arrest).

CONCLUSION

For the reasons stated above, *amicus curiae* the United Kingdom of Great Britain and Northern Ireland respectfully urges the Court to grant Mr. Gay's petition for habeas corpus and order any other appropriate relief.

Dated: November 11, 2010

Respectfully submitted,

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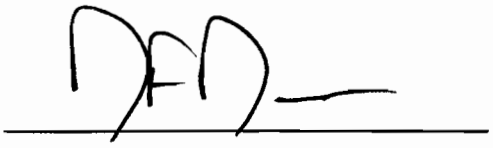
* Admission *pro hac vice* requested

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that, as counted by our word-processing system, this brief contains a total of 5,014 words, including the Application for Leave to File a Brief as *Amicus Curiae* and footnotes, but excluding the tables of contents and authorities and this certificate.

Dated: November 11, 2010



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