LAW OFFICES OF
MICHAEL SATRIS
POST OFFICE BOX 337
BOLINAS, CA 94924
TEL: (415) 868-9209
FAX: (415) 868-2658
EMAIL: SATRIS@SBCGLOBAL.NET

ASSOCIATE COUNSEL
MARGARET LITTLEFIELD

ASSOCIATE COUNSEL
CARRIE KOJIMOTO

December 30, 2010

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' Reply to Supplemental Letter Briefs

To the Honorable Clerk of the Court:

This letter-brief is filed in accordance with the Court's order of November 10, 2010, providing an opportunity for reply to the briefs that were filed to address the four questions that the Court there posed. Petitioners hereby reply to the briefs filed by respondent Lassen County Superior Court, real party in interest (RPI) Warden, and the California Court Commissioners Association (CCCA).

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?

Petitioners answered that a decision that summarily denies a petition for writ of habeas corpus does not come within the meaning of Code of Civil Procedure, section 259, subdivision (a), which authorizes a commissioner

to hear and determine ex parte motions. They characterized the Legislature's language as murky and ambiguous at best. When construed in para materia with the entire statute and in taking into consideration its implementation of the constitutional provision that permits a commissioner to act only on relatively minor matters, however, it became more clear that the Legislature never intended commissioners to foreclose habeas relief. The denial of a habeas corpus petition is a final judgment on the action, whereas the rest of the statute authorizes commissioners to rule only on preliminary matters that are subsidiary and incidental steps in practice and procedure, leaving to the judge the ultimate determination of the action.

Petitioners further argued that denial of a petition for writ of habeas corpus was outside the terms of "chamber business" to which the California Constitution originally restricted the arena of commissioners, and similarly is outside the more modern terminology of "subordinate duties" to which the Constitution now restricts commissioners. Denial of a habeas petition is a judgment that finally resolves the action and can be made only by a judge. The ascension of commissioners to performance of the highest office of a judge of any court – the determination whether a writ of habeas corpus should inquire into an individual's custody and free him of it -- was unheard of until this case.

CCCA confirms that the California Constitution, as originally enacted in 1849, restricted the power of commissioners to handling "chamber business of the judges." (CCAA's Brief, p. 2.) By the time the 1879

California Constitution was adopted, which carried over the restriction to "chamber business," the Legislature had given that phrase an established meaning through enactment of Code of Civil Procedure section 166 in 1872. As CCCA explained: "Code of Civil Procedure section 166 then (and now) provides in relevant part that judges may 'in chambers': *Grant* all orders and writs that are usually granted in the first instance upon an ex parte application." (CCCA's Brief, p. 2 [brackets and ellipsis in quote deleted; italics added].) That brief further explained that Code of Civil Procedure section 259 was enacted at the same time as section 166 and is "[c]onsistent with this definition of *chamber business* ...." This constitutional and legislative history empowering a commissioner to *grant* an ex parte request is consistent with petitioners' argument: "[W]hile 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." (Petitioners' Brief, p. 3.)

Respondent's submission that the words, "ex parte motion for," applies "to all phrases that follow, including orders and alternative writs and writs of habeas corpus" (Respondent's Brief, p. 2) is not inconsistent with petitioners' submission that the section may authorize a commissioner to issue incidental orders preliminary to resolution of the action by a judge, but does not authorize a commissioner to enter a judgment denying the petition. Likewise, RPI's point that that the "phrase *ex parte* generally

refers to 'preliminary appearances in court where only one side is represented" (RPI Brief, p. 2 (quoting *Smith v. Campbell & Facciolla, Inc.* (1962) 202 Cal.App.2d 134, 137)) underlines the fact that the statute here contemplates that any ruling made on a *preliminary* matter in an action will not finally dispose of that action.

Respondent's and RPI's submissions that the statute authorizes a commissioner to deny a petition overlook the fact that while the statute plainly authorizes the commissioner to make preliminary orders, it does not in any way authorize a commissioner to render a final judgment on an action or to otherwise dispose of it to a party's prejudice.

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?

Petitioners reported that commissioners never ever took any actions with regard to habeas petitions prior to 1966. Indeed, until respondent and perhaps one other court very recently permitted its commissioners to take *all* actions in a habeas proceeding, up to and including final adjudication granting or denying relief on those petitions, no court ever permitted its commissioners to rule on habeas corpus petitions.

Petitioner' report was confirmed by the answers to this question in all the other briefs. Respondent acknowledged it may be the case "that a commissioner did not exercise this authority prior to 1996 ...." (Respondent's Brief, section B, p. 2.[1]) Likewise, RPI had *no* information that "commissioners were summarily denying habeas petitions before 1966." (RPI's Brief, p. 3.) CCCA, too, had no information that commissioners had ever acted on habeas petitions prior to 1966. (CCCA's Brief, p. 4.)

CCCA did report that "few courts have currently assigned habeas petitions to commissioners for determination." (CCCA's Brief, p. 4.) Significantly, to this day Los Angeles County has not authorized its commissioners to act on habeas petitions, though "[t]he first express statutory authority for commissioners to hear habeas petitions came in 1929 when the Legislature added section 259 [which] allowed the courts in Los Angeles County ... to assign certain duties to court commissioners beyond those [then] specified in section 259." (CCCA's Brief, p. 2). As CCAA reported:

> For example in Los Angeles County, which receives an average of 1200 habeas petitions ... a year, research attorneys and commissioners work up reports on habeas petitions which are then referred to a judge to review and for ruling. This practice has apparently been in place for many decades, and there is no memory of commissioners handling such petitions

[1] Respondent's brief was not paginated, but was divided into alphabetized sections; the page numbers listed here were counted by hand.

> themselves. This experience in Los Angeles County is significant in that nearly all habeas petitions are written by unrepresented inmates and more than 90% result in a summary denial or denial with explanation. The same appears true for other large counties such as Alameda and small counties such as Butte.

(CCCA's Brief, p. 4.)

Tradition, including California's tradition of individual liberty that lies at the heart of our constitutional democracy, counsels against a reading of the statute that would permit such a dramatic change of practice in the administration of the Great Writ – a veritable change in the decision-maker, from a judge to a functionary who serves at will.

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?

Petitioners answered, "Yes." They argued that *Rooney* is neither dispositive nor controlling on the question whether denial of a habeas corpus petition comes within the constitutional prescription that limits the authority of a commissioner to subordinate duties. *Rooney* concerned an entirely different question; as CCCA put it — "the question of whether a commissioner could issue a judgment based upon a settlement stipulation as an uncontested matter." (CCCA's Brief, p. 4.) Performance of such a

routine, bureaucratic duty with no prejudice to either party was patently a subordinate judicial duty within the meaning of the Constitution. Even so, the Court's finding of such was dicta, for its holding was that the commissioner's actions in that case went beyond the performance of such a subordinate duty. Thus, the Court's statements and holdings in *Rooney* do not necessarily transfer to control this case, which concerns an entirely different duty and set of issues.

CCCA's brief does not suggest otherwise, but simply submits that "*Rooney* ... does not impose any restriction that would affect the ability of courts to assign the determination of habeas petitions to commissioners." (CCCA's Brief, p. 4.) RPI likewise recognized that "the Court in *Rooney* only specifically held that the powers of commissioners with respect to uncontested matters were a subordinate judicial duty ...." (RPI's Brief, p. 4.)

RPI nevertheless submits that "[a]ssuming section 259, subdivision (a) grants commissioners the power to summarily deny a petition, this Court in *Rooney* has already determined such authority is a subordinate judicial duty." (RPI's Brief, p. 4.) In a similar vein, respondent submits that "*Rooney* ... settled" the question of the commissioner's authority to deny a petition for writ of habeas corpus. (Respondent's Brief, p. 3; see also *id.* at p. 2.) Those submissions are overstated.

RPI relies on *Rooney's* reasoning that "[s]ince *all* the judicial powers that section 259 and 259a authorized commissioners to exercise pursuant

to the former constitutional provision can fairly be described as 'subordinate,' the constitutional revision was fully consistent with an intent to validate preexisting powers." (RPI's Brief (quoting *Rooney, supra*, 10 Cal.3d at p. 364); italics added by RPI; brackets and ellipsis in quote deleted.) But that statement of the Court was dictum upon dicta. The Court in *Rooney* did not consider the statutory duty here at issue, or actions like the ones taken by the commissioner here in purported conformance with that duty. *Rooney* did not address or determine if actions by a commissioner like those challenged here came within the statutory authorization or otherwise can fairly be described as the performance of a subordinate duty within the meaning of the Constitution, and thus had no need to scrutinize and carefully consider the critical statutory language at issue here, as the Court is now doing in this case. The need for considered decision-making is precisely why cases are not authority for issues not then before it.

Petitioners' case is the first one where any court in a published decision has addressed in any manner the statutory language at issue here concerning the power of a commissioner to act on ex parte matters that may include petitions for writs of habeas corpus. It is also the first one to consider the relationship of that statutory power to the constitutional provisions that both restrict a commissioner to consideration of subordinate matters and restrict suspension of the writ of habeas corpus. The unprecedented nature of the delegation of judicial power to commissioners here speaks against acceptance of respondent's submission

that statutory and constitutional provisions dating back to our statehood have authorized commissioners to deny habeas petitions. If commissioners have been authorized for so long to so act, why then have they never so acted before. One or two courts' sudden departure from a status quo that dates back to our statehood speaks against respondent's submission that these powers have been authorized since then. Rather, measured by the actions of the courts for more than 150 years, or more accurately their inaction, the courts — until respondent court just now — never construed the statute to permit a commissioner to act in any manner on a habeas corpus petition, never mind deny one.

Respondent finds insignificant this longstanding historical "non-use" of its asserted power to assign a commissioner to adjudicate habeas petitions. (Respondent's Brief, p. 2.) The rule in favor of contemporary administrative construction of a statute as a good indicator of its meaning, however, makes that non-use the proverbial elephant in the courtroom. *Rooney*, as well, understood that contemporary administrative practice is an aid to statutory interpretation here: "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." (Petitioners' Brief, p. 6, (quoting *Rooney v. Vermont Investment Corp., supra*, 10 Cal.3d at p. 362) (italics added in brief); see also Respondent's Brief, p. 3 [quoting *Rooney's* same language].)

In sum, this Court's dicta in *Rooney* about the statute as a whole has no application here. Here, the specific language of the statute in controversy never had been addressed prior to 1966. In addition, courts had never acted as if commissioners had the power to deny petitions for writs of habeas corpus prior to 1966 – or, indeed, until just now. Commissioners for 150 years had never purported to assume any habeas power under the statute or constitution, and left adjudication of petitions for writs of habeas corpus to judges. Conduct speaks much louder than words, and here administrative inaction for more than a century and a half speaks volumes louder than the words in respondent's brief about the appropriate interpretation of the statute here.

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?

Petitioners argued that 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 in significant ways that support the conclusion that a summary denial of a habeas corpus petition is not now a subordinate judicial duty, if it ever was one. They

pointed out that the tightening of the state bar to successive petitions[2] and of the federal doctrine of independent state grounds, as well as the establishment of a statute of limitations for filing a federal petition, have made a summary denial considerably more consequential for a petitioner than it was in 1966. They further explained that the question whether a petition should be summarily denied had been transformed since 1966 from an ex parte to a contested proceeding through introduction of the "informal" opposition procedure, and that the range of the writ also had greatly expanded since 1966. They argued that these changes made outdated any delegation of the power to deny a habeas corpus petition to a commissioner. This conclusion was confirmed by taking into account that habeas corpus denials may constitute determinations of momentous constitutional questions affecting entire classes of prisoners, and of life and death questions in challenges to capital judgments that are of untold complexity.

CCCA concurred that "habeas petitions may present important questions affecting the petitioner's liberty ...." (CCCA's Brief, p. 5.) It also noted as an "important change[] ... the federal legislation shortening the time and opportunity to seek relief by way of habeas petitions in capital cases." (CCCA's Brief, p. 5.) As it noted regarding the latter, "federal law has

[2] Respondent's claim that "[p]rocedural bars to habeas claims after the adoption of article VI, section 22, of the California Constitution, have ... remained unchanged" (Respondent's Brief, p. 4) overlooks the tightened enforcement of those bars since then.

increased the gravity and need for processing such petitions in state court in a just and expeditious manner." (CCCA's Brief, p. 6.)[3]

RPI concurred that there has been a "modern expansion of the availability of relief on habeas corpus." (RPI's Brief, p 5 (quoting *People v. Duvall* (1995) 9 Cal. 4th 464, 470); *ibid.* [noting "the expanding scope of habeas review"].) He also found "[n]otabl[e]" the fact that the informal response procedure was adopted in 1984, meaning that "the matter is no longer 'ex parte' because the court is considering the positions of both parties." (RPI's Brief, p. 2.) He also pointed out that if the challenged practice is allowed, the practical reality is that the commissioner in most cases will have not only the first but also the final say on entitlement to relief: "a commissioner's findings will be the decision reviewed by federal courts." (RPI's Brief, p. 5.) The reported statistics concerning petitions filed in Los Angeles, that "more than 90% result in a summary denial" (CCCA's Brief, p. 4), bear out RPI's point here.

RPI suggests that the times have changed since 1966 such that this Court may want to permit commissioners to administer petitions for writs

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[3] The other change CCCA noted was a "trend to professionalize the court commissioners in California." (CCCA's Brief, p. 5.) Any such trend does not bear on the question before the Court, however, for whatever gains commissioners may have attained in their professionalism do not make them equivalent to judges. "There are, of course, significant differences between commissioners and judges....[C]ommissioners ... do not have the qualifications, responsibilities, independence and protections of judges." (*In re Horton* (1991) 54 Cal.3d 82, 103-104 (dis. opn. of Mosk, J.).)

of habeas corpus as an expediency for overburdened courts. (RPI's Brief, p. 5.) Expedience to accommodate an overflowing prison population that causes and promotes unconstitutional confinement, however, should never be at the expense of the writ, for the Great Writ of Liberty is the instrument of our freedom from wrongful imprisonment.

Conclusion

For these reasons, the Court should reverse the judgment of the Court of Appeal. It should remand the matter to that court with instructions to order respondent to vacate the judgments of the commissioner denying petitioners' petitions for extraordinary relief, and to process those petitions and any other petitions for extraordinary relief that may be filed in that court in a manner that ensures that a judge of the court – not a commissioner – renders final judgment in such actions.

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 30, 2010, I served the within **PETITIONERS' REPLY TO SUPPLEMENTAL LETTER BRIEFS** 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:

Christopher Rench
Deputy Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550
(Real Party in Interest) (2 copies)

Jon A. Nakanishi
Superior Court of Lassen County
220 South Lassen Street
Susanville, CA 96130
Case Nos. CHW-2530 & 47543
(Respondent) (2 copies)

Mr. David Gunn, President
California Court Commissioners Association
Butte Superior Court
One Court Street
Oroville, CA 95965

W. Z. Jefferson Brown
Price & Brown
466 Vallombrosa Avenue
Chico, CA 95926
(Counsel for California Court Commissioners Association)

Clerk, Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814
Case Nos. C060773 & C060710
(2 copies)

Mr. Alfredo Gomez, T-68620
HDSP
P.O. Box 3030
Susanville, CA 96127
(Petitioner)

CCAP
2407 "J" Street, Suite 301
Sacramento, CA 95816

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, on December 30, 2010.

Sabine Jordan