ORIGINAL

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

In re DAVID RIEMER

ON PETITION FOR A WRIT OF HABEAS CORPUS

United States District Court for the Central District of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF HABEAS CORPUS 28 U.S.C. § 2241

David Riemer # K96815
(Your Name)

Folsom State Prison, P.O. Box 715071
(Address)

Represa, California 95671-5071
(City, State, Zip Code)

No Telephone (prison inmate)
(Phone Number)

QUESTION(S) PRESENTED

1. Does this Court consider chronic drug addiction to be "habitual criminality" or is it a health problem requiring medical treatment?

2. If being addicted to drugs is not a crime, can the State prosecute and sentence a person as an "habitual criminal" merely because he is addicted to the use of drugs? Is petitioner's life sentence a cruel and unusual punishment?

3. Did California's "Three-Strikes" law violate petitioner's constitutional right to due process of law?

4. Does punishment of life imprisonment for a minor drug offense violate petitioner's constitutional right to equal protection of the law?

5. Can the State retroactively withdraw two vested defenses after they had already attached and eliminate a statute of limitations to enable a prosecution that the passage of time has previously barred?

6. Did the U.S. District Court violate the Magistrate's Act, Habeas Rule 8(b), Article III and the Due Process Clause of the Fifth Amendment?

7. Did the Ninth Circuit U.S. Court of Appeals commit error and abuse its discretion when it failed to issue a Certificate of Appealablity for constitutional claims of substance and constitutional claims where other coequal or higher courts have reached conflicting views?

NOTE: see **Table of Authorities,** page viii, for year 1980 and year 1986 Penal Code sections relevant to Question # 5 above.

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APPENDIX T --------NOT USED--------

NOTE: Prison rules limiting the use of photocopying machines prevents Mr. Riemer from tendering the full court record. Petitioner has filed a copy of the selected exhibits that are referenced in this petition and that are necessary to back up his claims. Petitioner hereby incorporates by reference the entire state and federal court record and requests that this Court order the U.S. District Court to file such records with this Court.

JURISDICTION

This Court's jurisdiction is invoked pursuant to this Court's authority under 28 U.S.C. §§ 2241 and 2254 to grant a writ of habeas corpus, as well as pursuant to Rule 20.2 of the Rules of this Court and the All Writs Act, 28 U.S.C. § 1651(a).

All of the claims contained in this petition are fully exhausted under 28 U.S.C. § 2254. All of the claims raised in this petition for habeas corpus relief have been presented to the U.S. District Court for the Central District of California. However, as is demonstrated in this petition, exceptional circumstances exist that warrant the exercise of this Court's discretionary powers. Without this Court's consideration of his substantial federal constitutional claims, Mr. Riemer will be deprived of full and fair adjudication of his constitutional claims.

EXCEPTIONAL CIRCUMSTANCES WARRANTING THE
COURT'S EXERCISE OF DISCRETIONARY POWERS
(SUPREME COURT RULES, RULE 20.4 (a))

As is demonstrated in this petition and its appendices, the state court's criminal proceedings were not cognizant of petitioner's Fifth, Eighth, and Fourteenth Amendment protections (Double Jeopardy, Cruel and Unusual Punishment, Due Process, Equal Protection and Ex Post Facto Clauses). In addition, the sentencing court relied upon a Probation Report that was filled with numerous factual errors and three false convictions.

On direct appeal, the state court rejected petitioner's claims under **state** law, without citing or discussing any relevant **federal** case law. Therefore, these claims were not adjudicated on the merits. The appellate court also relied upon a Probation Report filled with factual errors and false convictions.

The state courts denied petitioner's state habeas corpus petitions. The lower court argued off-point, sidestepping every issue without ever actually reaching the merits of his federal claims, and the two upper courts issued rubber-stamp denials; no answers, opinions or case citations.

While adjudicating this case, the U.S. District Court violated the Magistrate's Act, Habeas Rule 8 (b), Article III and the Due Process Clause of the Fifth Amendment. The U.S. District Court also relied upon a Probation Report filled with factual errors and **false** convictions. The U.S. District Court did not afford petitioner full, fair and adequate adjudication of his case.

Petitioner does not agree with the results of the federal court's adjudication on the merits of his claims. Petitioner's claims should not have been denied nor should petitioner's claims have escaped appellate review. The failure to issue a Certificate of Appealability was an error and an abuse of discretion.

A Certificate of Appealability **must** issue when other coequal or higher courts have reached conflicting views on a matter. And a Certificate of Appealability **must** issue when a petitioner makes a substantial showing of the denial of a constitutional right. Petitioner **did make** a substantial showing, and he also made a showing that reasonable jurists could debate whether the petition should have been resolved in a different manner and that the issues presented were adequate to deserve encouragement to proceed further. This Court recently ruled that prisoners need not have winning cases, but only plausible ones, in order to be granted the right to appeal. (Miller-El v Cockrell (2003) ___U.S.___).

The "Substantial Showing" standard was defined by this Court as follows: A Certificate cannot be denied solely because the petition was denied on the merits, obviously petitioner need not show that he should prevail on the merits. He has already failed that endeavor. Rather, a Certificate must issue if petitioner presents a "question of some substance", that is debatable among jurists of reason, or a court could resolve in a different manner, or is adequate to deserve encouragement to proceed further, and has a factual basis in the record. (Barefoot v Estelle (1983) 463 U.S. 880; coupled with Tillman v Cook (10th Cir. 2000) 215 F.3d 116 ("The showing for a Certificate of Probable Cause is the same as Certificate of Appealability.")).

The claims presented to the federal courts (and supported by facts) raised

"questions of substance", making it necessary that the Application for Certificate of Appealability be granted, as to all grounds, in order for petitioner to perfect an appeal in the Ninth Circuit Court of Appeal.

Petitioner believes that this petition presents a substantial showing of constitutional violations. Petitioner submits that this Court should exercise discretionary powers in granting review because the writ will be in aid of the Court's appellate jurisdiction, and adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF REASONS FOR NOT MAKING THE APPLICATION
TO THE DISTRICT IN WHICH THE APPLICANT IS HELD
(SUPREME COURT RULES, RULE 20.4 (a))

On May 14, 2001, petitioner **did make** an application to the district court, such application having been decided by that court on August 30, 2001. (see Appendix H).

Upon petitioner's timely request, no certificate of appealability was issued under 28 U.S.C. § 2253, and the courts below have no jurisdiction to consider petitions questions therefore. (see id.) Petitioner cannot obtain adequate relief on his questions presented in any other form or from any other court, except by habeas corpus to this Court. This petition shows that an extraordinary writ will be in aid of the Court's appellate jurisdiction. In this case, exceptional circumstances warrant the exercise of this Court's jurisdiction.

PREVIOUS STATE COURT JUDGMENTS:

The issues of cruel and unusual punishment, due process of law and equal protection of the law were exhausted in the state courts through direct appeal. The California Court of Appeal, Fourth Appellate District, Division Three rejected petitioner's claims under **state** law, without discussing any relevant **federal** law. (see Appendix B). A Petition for Review was denied by the California Supreme Court.

The issues of ex post facto violation and violation of a prior plea bargain were exhausted in the state courts through petitions for writ of habeas corpus. The petitions were denied by: the Orange County Superior Court; the California Court of

STATEMENT OF THE CASE

INTRODUCTION

Petitioner, David Riemer, was convicted of possession of one gram of methamphetamine. Because he had previously suffered two or more "strikes", he was sentenced to a term of 25-years to life under California Penal Code § 667.

The facts cited to the court included the fact that all strikes were from a single criminal incident that occurred in 1979, when petitioner was a teenager. Petitioner had no other felony convictions since then.

Petitioner was released from prison in 1986, became gainfully employed, married, had two children, divorced and then relapsed into drug use after many years of being clean. After spending close to a decade free from custody, petitioner was unjustly sentenced as an "habitual criminal".

At sentencing, the focus was on petitioner's remote history of violence and his addiction to methamphetamine. Petitioner was denied basic justice because of his disability of drug addiction. The judge sentenced petitioner to life imprisonment, stating that "Mr. Riemer has had 22 years of drug abuse. I don't see that that's going to stop."

Mr. Riemer's life sentence rests upon two unconstitutionally imposed aggravating factors: the unconstitutionality of punishing a person for an illness or disease; and the fact that, at some point, a prior conviction becomes too aged to merit enhancement. In this case, it is clear that petitioner is being punished a second time for the crimes he committed in 1979.

For over 75 years, this Supreme Court has held that persons addicted to drugs "are diseased and proper subjects for medical treatment." (Linder v. United States (1925) 268 U.S. 5), and in 1962 the Court held that the "status" of drug addiction is not a criminal offense. (Robinson v California (1962) 8 L.Ed.2d 758). But here, the sentencing court claims that petitioner's "status" as a drug addict equates to

crimes) and then deprived petitioner of two affirmative defenses previously available to him against having to suffer additional punishment for remote prior offenses - the "wash-out-period" defense and the "brought-and-tried-separately" defense. Petitioner would not have entered into that plea agreement had he known that the State would alter the terms of the agreement later on and violate his right to due process. The Due Process Clause was intended to prevent government from abusing its power in this way. Aside from all else, "due process" means fundamental fairness; but petitioner's treatment has been unfair and unjust. Petitioner remained free from custody long enough to "wash-out" of any further liability from his priors. Petitioner was a drug addict, but he was **NOT** an habitual criminal.

It is a cruel irony that had Mr. Riemer been arrested for drug possession just a few months later, he would have received mandatory treatment, rather than life imprisonment, under California's newly enacted "Proposition-36". (Because PROP-36 has **REINSTATED** the 5-year "wash-out-period".)

While adjudicating this case, the U.S. District Court violated the Magistrate's Act, Habeas Rule 8(b), Article III and the Due Process Clause of the Fifth Amendment. (And the Ninth Circuit Court of Appeals just ignored the numerous violations and errors.)

The Ninth Circuit U.S. Court of Appeals abused its discretion when it failed to issue a Certificate of Appealability for constitutional claims of substance and constitutional claims of substance where other coequal or higher courts have reached conflicting views.

PROCEDURAL HISTORY

1. Petitioner David Riemer, prison number K96815, is currently imprisoned in Folsom State Prison at Represa, California.

2. Petitioner was charged by Information with one count ofpossession of methamphetamine (Health & Safety Code, § 11377, subd. (a)). It was further alleged that petitioner suffered six prior serious and/or violent felony convictions, all

stemming from a single incident that occurred in 1979.

3. On 3-10-98, a jury found petitioner guilty of the charges and the court found true six prior felony conviction allegations.

4. On 5-8-98, petitioner was sentenced to 25-years-to-life imprisonment. (see Appendix A).

5. At sentencing, the court relied upon a Probation Report that was filled with numerous factual errors and three false "convictions"(three cases that actually had been dismissed).

6. Petitioner timely pursued his appeals in state court. The state Court of Appeals rejected petitioner's claims under state law, without citing or discussing any relevant federal case law. The state Court of Appeal also relied upon a Probation Report that was filled with errors and false "convictions". The judgment was affirmed by the Court of Appeal. (see Appendix B). After appellate counsel filed a Petition for Rehearing in the Court of Appeal, the Opinion was modified as to some (but not all) of the factual misstatements contained in the original Opinion. On 11-9-99 an Order Modifying Opinion and Denying Rehearing -- No Change in Judgment was issued by the Court of Appeal.

7. On 1-13-00 a state Petition for Review was denied by the California Supreme Court.

8. Petitioner timely filed a state Petition for Writ of Habeas Corpus and the petition was denied by the Orange County Superior Court on 10-10-00 (Appendix C). Petitioner refiled the petition in the California Court of Appeals and the petition was denied on 12-21-00 (Appendix D). Petitioner refiled the petition in the California Supreme Court and the petition was denied on 4-25-01 (Appendix E).

9. A Petition for Writ of Habeas Corpus was timely filed in the U.S. District Court for the Central District of California, number SACV-010491-FMC(E), on 5-14-01. Respondent filed an Answer on 7-3-01 and petitioner filed a Traverse to the Answer. Petitioner's 39-page Traverse was received and filed by the U.S. District Court Clerk

on 8-15-01. The very next day, on 8-16-01, a 34-page Magistrate Judge's Report and Recommendation was filed and sent to petitioner. Petitioner is certain that Magistrate Judge Eick had prepared his Report and Recommendation in advance and did not read petitioner's Traverse. The Magistrate Judge recommended that judgment be entered denying and dismissing the Petition with prejudice (Appendix F). On 8-30-01, petitioner filed Objections to the Magistrate's Report and Recommendation (Appendix G). That same day, on 8-30-01, U.S. District Judge Florence-Marie Cooper adopted the findings, conclusions and recommendations of the U.S. Magistrate Judge, and ordered that judgment be entered denying and dismissing the Petition with prejudice (Appendix H).

10. On 9-21-01 a Notice of Change of Address was filed by petitioner because he was transferred to another prison facility. Petitioner requested enlargement of time to file a Notice of Appeal and an Application for Certificate of Appealability (hereinafter called an "Application for C.O.A."). On 9-28-01, the court granted an extension of 30 days in which to file these documents.

11. Petitioner timely filed a Notice of Appeal and an Application for C.O.A. in the U.S. District Court for the Central District of California. The U.S. District Court denied the Application for C.O.A. (Appendix I).

12. Petitioner timely filed an Application for C.O.A. in the Ninth Circuit U.S. Court of Appeals. On 11-7-01, the U.S. Court of Appeals acknowledged receipt of the Application for C.O.A. and assigned docket number 01-56926 to the case (Appendix J). Over the next few months, petitioner filed four Supplemental Briefs in Support of the Application for C.O.A. These Supplemental Briefs were filed during the time that C.O.A. was pending.

13. On 4-30-02, the Ninth Circuit U.S. Court of Appeals ordered that proceedings in case number 01-56926 shall be held in abeyance pending further order of the court (Appendix K).

14. On 4-23-03, petitioner filed an Application for Leave to File a Second or Successive Petition Under U.S.C. §2254. This Successive Petition claimed that

California's newly enacted "Proposition-36" was unconstitutional because it is not being applied retroactively to persons already convicted of drug possession. The Ninth Circuit Court of Appeals assigned docket number 03-71785 to this case (see Appendix L).

15. On 4-24-03 the Ninth Circuit U.S. Court of Appeals denied petitioner's request for a Certificate of Appealability in case number 01-56926 (Appendix M).

16. On 5-19-03, the Ninth Circuit U.S. Court of Appeals denied the Application for Authorization to File a Second or Successive 28 U.S.C. §2254 Habeas Corpus Petition (Appendix N).

INTRODUCTORY FACTS

17. On June 28, 1997, at approximately 2:30 A.M., Orange County Sheriff's Deputy Dominic Montalbano was on patrol in a marked Sheriff's car in the City of San Clemente. Montalbano claims he saw petitioner make a left turn without signaling. When Montalbano stopped petitioner for the traffic violation, petitioner appeared nervous. Petitioner appeared to be fumbling with something in his lap. Petitioner ignored the officer's request to place his hands on the steering wheel. Montalbano believed that petitioner was attempting to conceal drugs in his lap, so he and another officer reached inside the car, grabbed hold of petitioner, and removed him from the vehicle. Petitioner was thrown face-down onto the street. Other back-up officers quickly arrived and petitioner was handcuffed. After petitioner was lifted onto his feet, Montalbano found a small baggie of methamphetamine on the ground where petitioner had been lying.

18. In Montalbano's opinion, the amount of methamphetamine in the bag was a usable amount to ingest. The substance was later found to weigh 1.34 grams, and to contain methamphetamine.