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SUPREME COURT
FILED

JUN 27 2017

Jorge Navarrete Clerk

Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

ANTHONY COOK

on Habeas Corpus.

Case No. S240153

**OPPOSITION TO RESPONDENT'S REQUEST FOR
JUDICIAL NOTICE**

On June 12, 2017, coincident with the filing of his opening brief on the merits, respondent filed and served on Cook by mail a Request for Judicial Notice. Cook here enters his opposition to that request.

POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION.

A. Factual Background.

The issue respondent has presented for determination by this Court is “[w]hether the remedy of a limited trial court proceeding to preserve evidence for use at a future youth offender parole hearing, as ordered on direct appeal in *People v. Franklin* (2016) 63 Cal.4th

261, is available to a habeas corpus petitioner whose conviction is already final.” (See, e.g., Opening Brief [OB] 8.) The thesis of respondent’s argument is that courts lack habeas jurisdiction to consider Cook’s claim for *Franklin* relief. (OB 15-28.) Respondent adds that granting such relief would raise “significant practical concerns.” (OB 28-31.)

Respondent never sought judicial notice of any matter in the court below, but now requests that this Court take notice of the following matter:

1. “[T]he record in the habeas writ proceeding in *In re Wilson*, S235541, currently pending before the Court.”
2. “[T]he legislative history of Senate Bill 260, which enacted Penal Code section 3051 (Stats 2013, ch. 312 (S.B. 260)), and Senate Bill 261, which amended Penal Code section 3051 by expanding the class of qualifying offenders to include those under the age of 23 at the time of the offense (Stats 2015, ch. 471 (S.B. 261)).”

The only matter for which respondent seeks notice that he attached to his application, however, was a declaration dated October 4, 2016, from Jennifer Shaffer, the Executive Officer of the Board of Parole Hearings, which is part of the *Wilson* record. (See Request, Exh. A.)

B. Legal Argument.

1. The Application Should Be Denied for Procedural Reasons.

The Court should deny the request for procedural reasons, in that respondent has not substantially complied with California Rules of Court, rule 8.252, which prescribes the requirements for seeking judicial notice in a reviewing court. That section states in pertinent part:

(a) Judicial notice

- (1) To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order.
- (2) The motion must state:
 - (A) Why the matter to be noticed is relevant to the appeal;
 - (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court;
 - (C) If judicial notice of the matter was not taken by the trial court, why the matter is subject to judicial notice under Evidence Code section 451, 452, or 453; and
 - (D) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.
- (3) If the matter to be noticed is not in the record, the party must serve and file a copy with the motion or explain why it is not practicable to do so.

It does not appear that respondent paid any regard to this rule of court, for most of its requisites are missing from its request. Moreover, as Cook shows in the substantive argument in section 2 below, respondent falls short in the one regard in which he does comply with the rule – namely, the provision of an explanation of how the matter is relevant to these proceedings.

But overall the application is in disregard of the rule. For example, respondent failed to reveal that none of this matter was ever presented to the court below, or show cause for this procedural default. In this respect, he has failed to show that the matter was not available for presentation to the court below. Nor does he show that the matter relates to proceedings occurring after the order or judgment that is the subject of this Court's review. Nor, except for the Shaffer declaration, has he attached the material that is the subject of his notice or explained why it is impractical to do so. Finally, he also has not submitted a proposed order.

These procedural irregularities doom the request. They allow respondent to elide his procedural default. They offer no explanation for why this evidence needs to be presented in this Court when respondent deliberately bypassed its presentation in the court below. And they put Cook, who has no practical access to such material as the record in *Wilson*, at considerable disadvantage in this litigation. This Court thus should deny the request as procedurally inadequate.

2. The Request Should Be Denied for Substantive Reasons.

The issue presented for review is fundamentally a legal one: is Cook's claim of a right to *Franklin* relief cognizable on habeas corpus? The answer to that question goes to the jurisdiction and power of a habeas court, which does not depend upon assessment of the "burdens on the trial courts" (OB 29) to implement that right.

This Court has agreed to review the Court of Appeal's determination that Cook's claim is cognizable on habeas corpus.

Respondent now is seeking to interject into that determination facts that were never proffered in the court below as relevant to that determination and that are certainly extraneous to this Court's review of that determination. The single document that respondent has attached to the motion, the Shaffer declaration, illustrates the point. That declaration is untested, outdated, and may be countered by other evidence. Moreover, it appears to offer little more than a scare tactic in defense of respondent's legal position that Cook's claim of entitlement to *Franklin* relief is not cognizable on habeas corpus. As such, it is irrelevant to the Court's consideration. As the Court of Appeal stated in response to the "practical" considerations that respondent raised in that court based on the record developed in that court: "The [practical] issues identified by Respondent are inherent in the remedy afforded by *Franklin*, whether granted by direct appeal or collateral challenge." (Typ. opn. 9.)

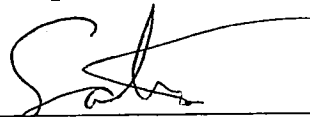
This Court thus should also deny respondent's request for judicial notice on substantive grounds.

CONCLUSION

For the foregoing reasons, this Court should deny respondent's request for judicial notice.

Dated: June 24, 2017

Respectfully submitted,



MICHAEL SATRIS
Attorney for Petitioner

Case Name:*In re Cook*
No.: S250143

PROOF OF SERVICE BY MAIL
(Cal. Rules of Court, rules 1.21, 8.50.)

I, Duncan Hopkins, declare that: I am over the age of 18 years and not a party to the case; I am employed in the County of Marin, California, where the mailing occurs; and my business address is Post Office Box 337, Bolinas, California 94924.

On June 26, 2017, I caused to be served the within **OPPOSITION TO RESPONDENT'S REQUEST FOR JUDICIAL NOTICE** by placing 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 at their mailing addresses as follows:

Mr. Anthony M. Cook
CDCR# F80581, E-4-203
P.O. Box 5242
Corcoran CA 93212
(Petitioner)

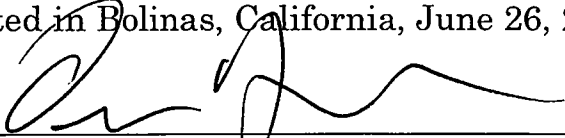
Clerk, Superior Court
San Bernardino County
247 West Third St., Second Floor
San Bernardino, CA 92415-0063

PROOF OF SERVICE BY ELECTRONIC SUBMISSION
(Cal. Rules of Court, rule 8.70.)

Additionally, I, Duncan Hopkins, declare that on March 9, 2017 I electronically served a true pdf copy of the within **ANSWER TO PETITION FOR REVIEW** using the TrueFiling service to:

Court of Appeal, Third Appellate District, Division 3
Attorney General, State of California (Respondent)
Appellate Defenders, Inc.
District Attorney, San Bernardino County

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed in Bolinas, California, June 26, 2017.



Duncan Hopkins