No. _____

_____ ◆ _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ ◆ _____

MIKE DU TRIEU,
PETITIONER

V.

MICHAEL MARTEL,
RESPONDENT

_____ ◆ _____

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

_____ ◆ _____

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QUESTION PRESENTED

Whether a federal court reviewing a state habeas decision must determine whether the state court erred in its application of a procedural bar when the habeas petitioner asserts that the procedural bar has been applied erroneously.

LIST OF PARTIES

All parties appear on the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears at Appendix B with the order denying petition for rehearing at Appendix A. The unpublished opinion (including the Report and Recommendation) of the United States District Court appears at Appendix C. The unpublished orders of the California Supreme Court (habeas and appeal) appear at Appendix D & G. The unpublished opinions of the California Court of Appeal (habeas and appeal) appear at Appendix E & H. The unpublished decision of the Los Angeles Superior Court (habeas) appears at Appendix F.

JURISDICTION

The district court had jurisdiction of petitioner's habeas corpus petition under 28 U.S.C. §2254. The federal court of appeals issued a Certificate of Appealability and thus had jurisdiction under 28 U.S.C. §2253(c)(1). The federal court of appeals entered judgment on March 25, 2019. App B. A timely petition for rehearing and rehearing en banc was denied on May 3, 2019. App A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254 (d):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

On July 9, 2010, a jury convicted Trieu of one count of attempted murder. The jury also found true that the attempted murder was deliberate, willful and premeditated; that Trieu personally used a knife; and that Trieu personally inflicted great bodily injury resulting in paralysis.

On July 12, 2010, the same jury found Trieu sane at the time of the offense.

The court sentenced Trieu to life for the attempted murder plus 5 years for the great bodily injury enhancement for a total sentence of 5 years plus life with the possibility of parole.

On appeal, Trieu's appointed counsel filed a no-issues brief[1/] but Trieu filed two pro per supplemental briefs raising seven claims. ER 52-53. In addition, Trieu filed a pro per habeas petition in the appellate court while his appeal was pending. That petition repeated four of the claims raised in one of the supplemental briefings that Trieu filed on appeal. ER 53. On November 17, 2011, the state appellate

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[1/] *People v. Wende*, 25 Cal.3d 436 (1979).

affirmed Trieu's conviction and sentence and denied the habeas petition. App. H. Trieu filed two identical pro per petitions for review in the California Supreme Court which were both summarily denied on January 25, 2012. App. G.

On April 18, 2012, Trieu filed a pro per habeas petition in the federal district court. On January 28, 2013, the district court found that because of Trieu's advanced age and because of issues related to his competency, the interests of justice would be served by appointing counsel to represent him. Appointed counsel, with the approval of the court, filed a first amended habeas petition and obtained a stay of the federal proceedings to exhaust the claim of ineffective assistance of counsel that is the subject of Trieu's federal habeas appeal.

On January 9, 2014, the superior court denied Trieu's habeas exhaustion petition on the merits. App. F.

On August 8, 2014, the appellate court denied Trieu's habeas exhaustion petition "for failure to state facts demonstrating entitlement to the relief requested." App. E.

On December 10, 2014, the California Supreme Court summarily denied Trieu's habeas exhaustion petition with a citation to *In re Clark*, 5 Cal.4th 750, 767-769 (1993). App. D.

The case returned to federal court and on December 14, 2016, the magistrate judge recommended that the court deny Trieu's first amended habeas petition. On February 8, 2017, the district court adopted the report and recommendation and denied the petition. App. C.

On July 14, 2017, the Court of Appeals granted a certificate of appealability on the following issue: "Whether counsel rendered ineffective assistance by failing to(a) investigate appellant's mental health to support an insanity defense, and (b) retain and present a mental health expert; including whether this claim is procedurally defaulted."

On March 25, 2019, the Court of Appeals affirmed the denial of Trieu's habeas petition in an unpublished memorandum decision. App. B.

On May 3, 2019, the Court of Appeals denied Trieu's petitions for panel rehearing or rehearing en banc in an unpublished order. App. A.

FACTUAL BACKGROUND

Guilt Phase

Petitioner Mike Trieu saw cardiologist Dr. Mohamad Latif for aortic stenosis for 14 years. (3RT 39, 43.) During those years Trieu generally saw Dr. Latif every 3-4 months for 20-30 minutes; however, sometime around 2006, the visits became monthly. (3RT 44, 46.) Latif, the sole prosecution witness, described Trieu as extremely intelligent, appropriate, and cooperative. (3RT 44, 47.) The two had a good relationship, and when Latif moved his office from Hollywood to Glendale, Trieu followed him there. (3RT 44, 46.)

In the early afternoon of November 4, 2006, 70-year-old Trieu had an appointment with 68-year-old Latif. (3RT 49, 50.) When Latif went into Trieu's exam room that day, Trieu asked Latif, as he often did, to look at his recent blood test results. (3RT 54, 56.) When Latif turned his back to review the lab result slips

which were sitting on an EKG machine, he suddenly felt a terrible pain in the back of his right shoulder. (3RT 54, 55, 57, 60.) Latif turned around and saw Trieu silently coming at him with a knife. (3RT 57, 58.) As Latif turned, he tripped on his treadmill machine. (3RT 58.) Trieu stabbed Latif in the front of his left shoulder and Latif fell. (3RT 59.) Although Latif could not move his right arm, he used his left hand to grab Trieu's right hand which was holding the knife. Trieu moved the knife to his left hand and slashed Latif in the chin, lip, and eye. (3RT 60, 61.) Latif finally got the knife away from Trieu cutting himself in the process. (3RT 63.) The 1½-2 minute attack ended when two of Latif's colleagues entered the room. (3RT 61, 62.) As a result of the attack, Latif's use of his right arm was severely impaired and he had no feeling in his left thumb. (3RT 46, 61, 70.)

According to Latif, Trieu never said a word during the incident but his face looked like hate. (3RT 62, 80.) Before Latif was taken away in an ambulance, he heard Trieu say "This is my knife," and that Latif had killed his mother. (3RT 64.) Trieu had never before mentioned his mother or any other family member and Latif was never able to determine if he had ever treated Trieu's mother. (3RT 53, 64, 79, 80.)

The jury convicted Trieu of premeditated attempted murder after less than two hours of deliberation. ER 71-73.

Sanity Phase

Trieu pled not guilty by reason of insanity. Prior to the start of the sanity trial, Trieu asked to fire his attorney and represent himself because his attorney

had conceded Trieu's intent to kill at the guilt phase against Trieu's stated desire. The court denied both requests. (3RT 155-159.)

Trieu's attorney called just one witness at Trieu's sanity trial: Jeffrey Liu, a convicted felon who befriended Trieu in the LA County jail when they were both on the pro per unit. (3RT 168, 169.) Counsel met Liu, a Taiwanese native, at the jail and asked him his opinion about whether a Chinese person who believed an enemy had killed his parent would believe he was morally right to avenge the death. (3RT 169, 185.)

Liu testified that although he moved to the United States when he was 13, he was familiar with Chinese philosophy. (3RT 168, 169.) According to Liu, Chinese children learn that it is a moral imperative to avenge wrongdoing to a parent. (3RT 169-170.) Although a person has a choice whether to act, a Chinese person would be driven by his learning and would feel morally obligated to avenge wrongdoing done to a parent. (3RT 171.)

Liu described Trieu as stubborn and very focused in his beliefs. Trieu strongly believed that Latif had killed his mother in the 1990s so he tried to kill Latif with a knife to avenge her death. Trieu further believed he did the right thing by avenging her death. (3RT 172, 177, 189, 193, 194, 196.) Trieu spoke often about this to Liu and other inmates in the unit. (3RT 173, 190.) Trieu was the oldest and

least healthy[2/] of the inmates so he received a lot of attention. (3RT 178.)

Trieu's attorney proved Liu with Trieu's case file, including Trieu's psychiatric reports, for his review. (3RT 178.) From this, Liu learned about Trieu's life. Trieu was born in Bejing. In the 1930's his father, who was in the Chinese Army, took him to Vietnam and then later back to China. (3RT 179.) At some point Trieu's father, in a practice common in China, took a second wife and withdrew from the family. (3RT 179.) Trieu served in the Taiwanese Army and later with the US Armed Forces during the Vietnam War. (3RT 179, 190.) Trieu suffered from post traumatic distress disorder (sic) and lost a finger during the war. (3RT 190.)

Trieu was close to his mother, especially after his father left the family. (3RT 197.) After Trieu moved to the United States, his mother came over and lived with him. Trieu had no wife or children, just his mother. (3RT 197.) According to Liu, the attempted killing of Latif was prompted by a pharmacist telling Trieu that medication he was taking could kill him. This pharmacist also saw Trieu's mother and she took the same medication. Trieu believed his doctor had killed his mother and was going to kill him. (3RT 195-196.)

The jury found Trieu sane after less than two hours of deliberation. ER 74-75.

[2/] Trieu had heart surgery while in jail pretrial, and he took a lot of medication. (3RT 177, 190.)

REASONS FOR GRANTING THE PETITION

I.

THIS COURT SHOULD GRANT THIS PETITION BECAUSE THE COURT OF APPEAL'S RULING THAT A FEDERAL COURT REVIEWING A STATE HABEAS DECISION CANNOT DETERMINE WHETHER THE STATE COURT ERRED IN ITS APPLICATION OF A PROCEDURAL BAR CONTRAVENES LAW FROM THIS COURT AND OTHER COURTS OF APPEALS

The California Supreme Court denied Trieu's state habeas petition as an "abuse of the writ" even though that petition was Trieu's first true habeas petition because his earlier pro per pleading which he labeled a habeas petition simply repeated the same record-based claims that Trieu raised in his pro per appeal. This case presents the question of whether the federal court errs when it honors a procedural bar and precludes federal court review of the underlying claim without examining the petitioner's contention that the state court's assertion of the procedural bar was erroneous.

A. Trieu Argued in the Court of Appeals that the State Court's Application of a Procedural Bar was Erroneous Given the Circumstances Present in this Case

In 2010, petitioner Mike Du Trieu was sentenced to life in prison with the possibility of parole for willful, deliberate, and premeditated attempted murder. At the time of the crime, Trieu was an elderly man in his 70's who had multiple health problems. He had no prior criminal history. Yet, one day, with no

provocation and with no warning, he stabbed his long-time cardiologist at the beginning of a routine check up.

Trieu's mental health was questionable. Before trial, Trieu's criminal proceedings were suspended twice because two different attorneys expressed doubts about Trieu's competency. Trieu's behavior both in court and out of court was often inappropriate and a cause for concern and discussion by the court, the prosecutor and defense counsel. When Trieu filed a pro se federal habeas petition in the district court, that court was concerned enough about Trieu's mental functioning that it appointed counsel for Trieu for his federal habeas proceedings.

The underlying issue in Trieu's habeas case was whether Trieu's trial counsel rendered ineffective assistance of counsel when, after having Trieu plead not guilty by reason of insanity, counsel did not have any mental health experts evaluate Trieu to determine if he was legally insane at the time of the offense. Instead, counsel proceeded to the sanity trial with just one witness, Trieu's fellow jail inmate, a convicted felon, who discussed a possible cultural defense while simultaneously providing testimony prejudicial to Trieu.

The Court of Appeals granted a certificate of appealability on this ineffective assistance of counsel claim along with a second issue asking whether this claim was procedurally barred. The district court opted to decide the ineffective assistance of counsel claim on the merits rather than engage in a procedural default analysis. App. C at 19, n.2. The district court found counsel's performance constitutionally deficient, but denied Trieu's habeas petition without holding an evidentiary hearing

citing a lack of proof of prejudice.[3] App C at 23-24.

This ineffective assistance of counsel claim was first presented to the state court in a state habeas petition filed by counsel appointed by the district court. Prior to federal counsel filing that state habeas petition on Trieu's behalf, Trieu had filed a pro per habeas petition in the appellate court and later in the California Supreme Court. ER 150-189, 208-225. Both of those pro per petitions were filed concurrent with Trieu's direct appeal.

The California Supreme Court summarily denied Trieu's second state habeas petition, the one filed by counsel and containing the claim at issue in these habeas proceedings, with a citation to *In re Clark*, 5 Cal.4th 750, 767-769 (1993). App D. That citation to *Clark* generally refers to the state's bar on second or successive habeas petitions which is termed an "abuse of the writ." *Clark*, 5 Cal.4th at 767-769. That designation, however, does not apply in Trieu's situation. Trieu's second petition, the one filed by counsel, was really his first true habeas petition. His "first" habeas petition, filed pro per, contained four record-based claims that were duplicative of four claims Trieu raised in his pro per supplemental briefs in his direct appeal after his appointed counsel filed a no-issues brief on appeal.[4]

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[3] Respondent did not contest the performance prong of this ineffective assistance of counsel claim in its briefing before the Court of Appeals and conceded at oral argument that trial counsel's performance was constitutionally deficient.

[4] In California, if appellate counsel reviews the record and finds no issues to raise on appeal, counsel files a no-issues brief. The appellate court then grants the appellant an opportunity to file a pro per supplemental brief identifying any issues (continued...)

Compare ER 150-189 with ER 145-149. Trieu's pro per habeas petition was superfluous; the appellate court would have ruled on those same claims as part of its ruling on appeal. In fact, the appellate court decision was a combined ruling on Trieu's appeal and habeas.[5/] App. H.

Following the appellate court ruling, Trieu filed two identical petitions for review on the same day in the California Supreme Court. Both petitions raised all seven issues decided in the appellate decision. *Compare* ER 190-207 with ER 208-225. The California Supreme Court treated one petition as a petition for review from the appeal and treated the other as a petition for review from the habeas petition. App. G. The court summarily denied both petitions without citation to any case law. App. G.

[4/](...continued)
the appellant believes should be raised. *See People v. Wende*, 25 Cal.3d 436 (1979). Trieu availed himself of this opportunity and filed two pro per supplemental briefs as well as the duplicative pro per habeas petition.

[5/] In its decision, the appellate court wrote:

> On April 26, 2011, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. On June 23, 2011, appellant filed a supplemental brief, raising four issues: ... . On June 28, 2011, appellant filed a first amended supplemental brief, raising three additional issues: ... . ***On July 11, 2011, appellant filed a petition for writ of habeas corpus, raising the same four claims raised in his initial supplemental brief on appeal***. We address his claims seriatim. App. H at 54-55 (emphasis added).

B. The Court of Appeals Ruling That It Could Not Consider Whether the State Court's Application of the Procedural Bar in This Case was Erroneous was Directly Contrary to Law From This Court

Trieu argued in the Court of Appeals that notwithstanding the California Supreme Court's citation to *Clark*, the court should not find his claim procedurally barred because, in actuality, Trieu had only one true state habeas proceeding: the round of petitions containing the ineffective assistance of counsel claim that were filed by counsel. The duplicative pro per filings which were labeled as habeas petitions by Trieu, whose competency was questioned in both the trial court and the district court, should not have been considered as true habeas filings in assessing whether Trieu abused the writ. In short, the California Supreme Court should not have cited *Clark* when it summarily denied Trieu's habeas petition because Trieu did not abuse the writ.

Despite this argument, and despite the district court's decision to sidestep the procedural bar issue and rule on the merits, the Court of Appeals found Trieu's claim procedurally barred. App. B at 2. The Court of Appeals refused to consider Trieu's argument that the state court had wrongly applied the procedural bar to his case because "we may not review the legitimacy of that decision. *See Wood v. Hall*, 130 F.3d 373, 379 (9th Cir. 1997) ("'[a] federal court may not re-examine a state court's interpretation and application of state law.'") (quoting *Schleeper v. Groose*, 36 F.3d 735, 737 (8th Cir. 1994))." App. B at 2.

The Court of Appeals ruling is legally incorrect. Indeed, both this Court and

another Ninth Circuit panel have held the exact opposite. This Court has said that a federal court reviewing a state habeas petition must ascertain whether a state court's purported procedural bar has been correctly applied. *See Cone v. Bell*, 556 U.S. 449, 465-466 (2009). This Court explained:

> [W]e have held that when a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review. [Citation omitted.] That does not mean, however, that federal habeas review is barred every time a state court invokes a procedural rule to limit its review of a state prisoner's claims. We have recognized that "'[t]he adequacy of state procedural bars to the assertion of federal questions' ... is not within the State's prerogative finally to decide; rather, adequacy 'is itself a federal question.'"

Id., quoting *Lee v. Kemna*, 534 U.S. 362, 375 (2002). This Court recognized in *Lee v. Kemna* that there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376.

The Ninth Circuit subsequently recognized that *Cone* empowered it to "examine the application of state rules that bar review of federal claims." *Johnson v. Montgomery*, 899 F.3d 1052, 1060 (9th Cir. 2018). Although another panel observed that "it is unusual to reject a state court's use of a procedural bar on the ground that it was erroneously applied," the Court of Appeals found that "an erroneously applied procedural rule does not bar federal habeas review." *Sivak v.*

Hardison, 658 F.3d 898, 907 (9th Cir. 2011). The court in *Sivak* explained that the procedural default doctrine is limited to cases in which the habeas petitioner actually violated the applicable state procedural rule. *Id.*; *see also Fulton v. Graham,* 802 F.3d 257, 262 (2d Cir. 2015) (discussing circumstances in which an asserted procedural bar might not apply); *LeBere v. Abbott,* 732 F.3d 1224, 1230 (10th Cir. 2013) (discussing when a state court's assertion of a procedural bar rests on a false premise); *Amos v. Renico*, 683 F.3d 720, 727 (6th Cir. 2012) (finding a state court's procedural bar ruling to be incorrect).

In this case, the Court of Appeals erred in finding Trieu's ineffective assistance of counsel claim procedurally barred without addressing his argument that the California Supreme Court erroneously applied the abuse of the writ doctrine to the state habeas petition filed by counsel. Significantly, the case upon which the Court of Appeals relied pre-dated the United States Supreme Court decision in *Cone* by 12 years. *See* App. B at 2 (citing *Wood v. Hall*, 130 F.3d 373 (9th Cir. 1997)). Accordingly, Trieu respectfully requests that this Court grant certiorari and hold that when a habeas petitioner asserts that the state court erroneously applied a procedural bar, the Court of Appeals must address that claim and determine the adequacy of the procedural bar.

CONCLUSION

For the reasons set forth above, this Court should grant certiorari on this claim.

Dated: June _____, 2019

Respectfully submitted,

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