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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES HAIRSTON, Petitioner-Appellant, vs. STATE OF IDAHO, Respondent-Appellee.	)	DOCKET NO. 46665-2019 Bannock County District Court No. CV-2018-1033 **CAPITAL CASE** RESPONSE TO THIRD PARTY MOTIONS TO FILE AMICUS BRIEFS

COMES NOW, Respondent-Appellee, State of Idaho ("state"), by and through its attorney of record, L. LaMont Anderson, Deputy Attorney General and Chief, Capital Litigation Unit, and does hereby respond to three different motions to file amicus briefs from separate entities. Specifically, (1) the Juvenile Law Center's motion and (2) the Concerned Psychiatrists, Psychologists, and Neuropsychologists' motions were filed

August 28, 2019, while (3) the National Association for Public Defense, Institute for Compassion in Justice, and Children's Law Center, Inc. motion was filed August 29, 2019. The state objects to all three motions, and requests that the two briefs already filed by two of the entities be stricken from the record.

BACKGROUND

In January 1996, Petitioner-Appellant ("Hairston") brutally executed two complete strangers – William and Dalma Fuhriman – by shooting Mr. Fuhriman in the head and then shooting his wife after the Fuhrimans invited Hairston into their home. State v. Hairston ("Hairston I"), 133 Idaho 496, 500, 988 P.2d 1170 (1999). Hairston was over 19½ years old at the time of the murders. (R., p.23.) In 1999, this Court affirmed Hairston's convictions for two counts of first-degree murder and robbery, imposition of the death penalty, and the denial of post-conviction relief. *See* id.

In May 2001, Hairston filed his first successive post-conviction petition raising 21 claims of ineffective assistance of appellate counsel and contending he was denied a mitigation expert that Hairston sought to hire in an attempt to show brain damage, all of which the district court dismissed pursuant to I.C. § 19-2719. Hairston v. State (Hairston II), 144 Idaho 51, 54, 156 P.3d 552 (2007). Hairston's second successive post-conviction petition was filed in August 2002, contending his death sentence was unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002) which the district court also dismissed pursuant to I.C. § 19-2719. Hairston II, 144 Idaho at 54. In a consolidated appeal, this Court affirmed the denial of post-conviction relief in both cases. Addressing the ineffective assistance of appellate counsel claims, this Court dismissed the claims because they were not timely filed under I.C. § 19-2719. Id. at 57-58. The claim regarding the mitigation

expert was also dismissed because it was raised in the first appeal and known within the statutory time limits set by I.C. § 19-2719. Id. at 58. Based upon I.C. § 19-2719, this Court dismissed Hairston's claims regarding Ring, *supra.* Id. at 58-59.[1]

On March 6, 2018, Hairston filed his third successive Petition for Post-Conviction Relief, contending his death sentence is unconstitutional under the federal and Idaho constitutions because he was under twenty-one years of age at the time he murdered the Fuhrimans, and because the district court did not give adequate consideration to the fact that he was under twenty-one when he murdered the Fuhrimans as allegedly required by Miller v. Alabama, 567 U.S. 460 (2012), and Montgomery v. Louisiana, 136 S.Ct. 718 (2016). (R., pp.8-29.) An amended petition was filed May 4, 2018, raising the same two claims. (R., pp.257-290.) On December 27, 2018, the district court denied post-conviction relief concluding there is no constitutional prohibition from imposing the death penalty against a murderer under the age of twenty-one, and the sentencing factors from Miller and Montgomery apply only to murderers under age eighteen. (R., pp.772-84.) Judgment was filed the same day. (R., p.787.) Hairston filed a timely Notice of Appeal on January 8, 2019. (R., pp.789-93.)

ARGUMENT

The filing of amicus briefs is governed by I.A.R. 8, which states in relevant part:

> An attorney, or person or entity through an attorney, may appear as amicus curiae in any proceeding by request of the Supreme Court; or by

[1] In light of Danforth v. Minnesota, 552 U.S. 264 (2008), the Supreme Court subsequently vacated and remanded Hairston II, but only as to the Ring claim. Hairston v. Idaho, 552 U.S. 1227 (2008). Upon reconsideration, Hairston's case was consolidated with several others, and this Court affirmed the district court concluding that Ring is not retroactive. Rhoades et al. v. State, 149 Idaho 130, 233 P.3d 61 (2010).

> leave of the Supreme Court upon written application served upon all parties, setting forth the particular employment, if any, the interest of the applicant in the appeal or proceeding and the name of the party in whose support the amicus curiae would appear.

In State v. U.S., 134 Idaho 106, 111, 996 P.2d 806 (2000), a special master did not permit a third party to intervene under I.C.R.P. 24(b), but, to minimize delay, allowed the third party to participate as amicus curiae. This Court concluded the special master did not abuse its discretion by allowing "limited participation by the [third party]." Id. Presumably, the same abuse of discretion standard applies under Rule 8. However, with the exception that this Court will not consider arguments from an amici that were not raised by the parties or passed on by the lower courts, Schweitzer Basin Water Co. v. Schweitzer Fire Dist., 163 Idaho 186, 191, 408 P.3d 1258 (2017) (adopting F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 266 n.4 (2013)), the state is unaware of this Court having discussed the parameters of discretion that allow the filing of an amicus brief.

However, the federal courts have provided general guidance. Like Idaho, the courts have broad discretion to permit the appearance of amici. Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982), *overruled on other grounds by* Sandin v. Conner, 515 U.S. 472 (1995). Of course, "[a]n amicus curiae is not a party to litigation." Miller-Wohl Co., Inc. v. Comm. Of Labor and Industry, 694 F.2d 203, 204 (9th Cir. 1982). "Historically, amicus curiae is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and advises the Court in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another." Community Ass. For Restoration of Environment ("CARE") v. DeRuyter Brothers Dairy, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999); *see also* U.S. v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991) ("Its purpose was to provide *impartial* information on matters of law about

which there was doubt, especially in matters of public interest.") (emphasis in original). "There is not a rule, however, that amici must be totally disinterested." Hoptowit, 682 F.2d at 1260.

"Over the years, however, some courts have departed from the orthodoxy of amicus curiae as an impartial friend of the court and have recognized a *very limited* adversary support of given issues through brief and/or oral argument." Michigan, 940 F.2d at 165 (emphasis in original) (citing Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n, 801 F.2d 1120, 1124-25 (9th Cir. 1986)). While there are "no strict prerequisites that must be established prior to qualifying for amicus status," the entity seeking to file an amicus brief must "make a showing that [its] participation is useful or otherwise desirable to the court." California v. U.S. Dept. of the Interior, 381 F. Supp. 3d 1153, 1164 (N.D. Cal. 2019). "An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case, or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." CARE, 54 F. Supp. 2d at 975.

However, as recognized in Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997), Posner, J., while the tendency of many courts has been to grant motions to file amicus curiae briefs, "[t]he vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' brief, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse."

In this case, Hairston is competently represented by the Federal Defender Services of Idaho, a national organization that is apparently governed only by the parameters of 18 U.S.C. § 3599. *Cf.* Harbison v. Bell, 556 U.S. 180, 183-94 (2009). As explained in Harbison, at 190 n.7, "a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim [in the state courts] in the course of [his] federal representation." None of the third parties contend they have an interest in some other case that may be affected by the decision in Hairston's case. Rather, each argues that it is somehow uniquely situated to provide relevant information or perspective beyond what the parties can provide regarding the merits of Hairston's claims.

However, it is unlikely this Court will address the merits of Hairston's claims. This appeal is from the denial of a successive post-conviction petition in a capital case. Therefore, it is governed by I.C. § 19-2719, which acts as a modifier to the Uniform Post-Conviction Procedures Act ("UPCPA"), and "supersedes the UPCPA to the extent that their provisions conflict. For capital cases, '[a]ny remedy available by post-conviction procedure, habeas corpus or any other provision of state law must be pursued according to the procedures set forth in this section and within the time limitations of subsection (3) of this section.' I.C. § 19-2719(4)." McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144 (1999). In this case, the district court did not address the parameters of I.C. § 19-2719 and misapplied the standards of the UPCPA. Because this case should be decided based upon the strict requirements of I.C. § 19-2719, particularly since Hairston failed to establish the claims were not known and reasonably could not have been known when he filed his first post-conviction petition, *see* State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991), or were not filed within 42 days after they were known or reasonably could have been

known, *see* Pizzuto v. State, 146 Idaho 720, 727, 202 P.3d 642 (2008), there is no need for additional briefing from third parties addressing the merits of Hairston's claims.

However, even if this Court addresses the merits, there is no need for briefing from third parties because their respective briefs merely duplicate the arguments made by Hairston's federal attorneys. For example, after citing Roper v. Simmons, 543 U.S. 551 (2005), and contending it applies "with equal force to young adults," the Juvenile Law Center merely contends it "is familiar with the distinct attributes of young adults and the criminal justice process, [making it] uniquely well-suited to explain these various consequences of the Court's opinion." (Motion, p.2.) However, even though I.A.R. 8 does not permit the filing of the amicus brief until permission is received by this Court, the Juvenile Justice Center's brief focuses upon research that allegedly indicates the brain function associated with youth and allegedly relied upon by the Supreme Court in Roper, also applies to individuals under the age of 21. But Hairston's opening brief spends several pages discussing "emerging medical and scientific consensus across the country, based on recent studies of brain development in eighteen to twenty-one year olds," as well as the evidence supporting his argument that was presented to the district court in his post-conviction petition. (Brief, pp.5-7.) Indeed, many of the citations used by Hairston, including various articles, are also cited by the Juvenile Justice Center. (*Compare* Brief, pp.ii-vii *with* Juvenile Justice Center Brief, pp.ii-iv.)

The same is true regarding the Concerned Psychiatrists, et al., whose brief also focuses upon "trends in psychiatry, psychology, and neuropsychology." (Motion, p.2.) Moreover, not only does this group fail to identify exactly who constitutes the "concerned psychiatrists, psychologists, and neuropsychologists," but it is clear that the focus is also

upon brain development, something that is aptly addressed in Hairston's opening brief and is nothing more than duplication of the Juvenile Justice Center's focus.

The request from the National Association for Public Defense, et al. suffers from the same deficit. The National Association for Public Defense contends it is "particularly suited to provide insight into relevant national law and data not fully addressed by the parties." (Motion, p.2.) However, Hairston spends a majority of his opening brief addressing national law as well as the national data. (Brief, pp.4-18.) While the National Association of Public Defense contends it can provide "medical and social science data related to youths 18-20 to highlight the ways in which they are different than members of the traditional 21-and-over adult population" and its brief "is unique and largely distinct from the neurobiological and adolescent development data more fully addressed by the parties and other Amici" (Motion, p.3) they fail to explain exactly how it will be any different from the parties' respective briefs or the briefs of the two other amici.

Based upon the specific facts of this case, particularly that Hairston is already represented by federal counsel and this is an appeal from the denial of successive post-conviction filed more than 17 years after Hairston filed his first post-conviction petition, the third party motions to file amicus briefs should be denied.

CONCLUSION

The state respectfully requests that the motions of the Juvenile Law Center, Concerned Psychiatrists, Psychologists, and Neuropsychologists, and the National Association for Public Defense, Institute for Compassion in Justice, and Children's Law Center, Inc. to file amicus briefs be denied. The state further requests that the two briefs already filed be stricken from the record, particularly since the two entities that filed the

briefs did not comply with I.A.R. 8 and wait for permission from this Court before filing the briefs.

DATED this 10th day of September, 2019.

/s/ L. LaMont Anderson
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Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 10th day of September, 2019, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

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