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In re EDWARD PATRICK MORGAN, On Habeas Corpus.	No. S162413 (Automatic Appeal No. S055130) Orange County Superior Court No. 94ZF0036

RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

Petitioner submits this response to respondent's supplemental brief. It will be short, because there is little in the supplemental brief that is new. Petitioner asks leave to incorporate by reference his Opposition to Respondent's Motion for Order to Show Cause, filed August 15, 2008.

Respondent's argument is premised in significant part on the familiar disparagement of habeas corpus compared to the trial ("the main event") (RSB 5) and to the automatic appeal ("the basic and primary means for raising challenges to the fairness of the trial") (RSB 5) -- and on employing familiar quotations about how habeas corpus ("an extraordinary, limited remedy against a presumptively fair and valid final judgment") (RSB 5) *should* be handled *if* the system were functioning properly. However, respondent makes no allowance for the reality that it is not.

Respondent fails to recognize that whatever subordinate characterization has theoretically been given to habeas corpus review, in practice it has been a major source of reversal of death judgments, in both state and federal court. Habeas corpus is a review mechanism that has served the invaluable function of saving the state from carrying out unfair and unreliable death judgments. The California Commission on the Fair Administration of Justice, in its June 30, 2008 Report and Recommendations on the Administration of the Death Penalty in California, noted that 70% of California habeas corpus petitioners in death cases achieved relief on review of their claims in the federal courts. (Report, p. 57.) In *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834, this Court explained that automatic appeals are non-waivable because the state has an interest in making sure that death judgments are reliable, noting that "The Legislature of California has taken extraordinary precaution to safeguard the rights of those upon whom the death penalty is imposed ..." (Citation omitted.) One of those precautions is the enactment, *after* enactment of AEDPA, of Government Code section 68662, which provides, "The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings . . . ." (See also, *In re Barnett* (2003) 31 Cal.4th 466, 475 [the provision of counsel in postconviction cases "promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the interests of all capital inmates by assuring that they are provided a reasonably adequate

opportunity to present us their habeas corpus claims"]; *In re Sanders* (1999) 21 Cal.4th 697, 717-19 [setting forth the multiple sources of the right to post-conviction counsel for condemned prisoners].) The State has every interest in affording a capital defendant a full opportunity to establish by extra-record evidence that his death judgment is unreliable.

In this case petitioner has asked the Court to permit him to amend his petition within 36 months after appointment of habeas corpus counsel to include additional claims as determined by counsel and to defer informal briefing and resolution of the pending petition until that time, as it has done in numerous cases in a similar procedural posture.[1]

Respondent, who writes as though the state's only interest is in carrying out its death judgments, repeatedly and insistently denies there is *any* legitimate state interest in accepting this procedure or that *any* public benefit will derive from it. (RSB 2, emphasis in RSB; see also RSB 15, "Shells Advance no State Interest".) By denying there is *any* public benefit to the procedure the Court has adopted, respondent has effectively removed itself from the discourse on how to accommodate the competing interests at issue here. The state indeed has an interest in avoiding miscarriages of justice. Particularly in capital cases, an orderly process of state habeas corpus has helped promote that interest.

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[1] See, e.g., *In re Robert Taylor*, S102652 (order filed 1/29/02, denying respondent's Motion to Strike or Dismiss Habeas Corpus Petition); *In re Maury*, S122460 (respondent unsuccessfully requested that the Court strike the petition).

Respondent's position stands in stark contrast to the opening comment of Justice Stevens in the United States Supreme Court's opinion in a recent habeas corpus case, *Cone v. Bell* (April 28, 2009) 556 U.S. ___, ___ S.Ct. ___, "The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with the sovereign obligation to ensure 'that "justice shall be done"' in all criminal prosecutions." (Citations omitted.) To the contrary, respondent provides no assurances that justice will be done in petitioner's case or the cases of persons similarly situated.

It is not correct, as respondent asserts (RSB 17), that petitioner's later efforts to challenge his state judgment on federal habeas corpus "would severely undermine the state's interests by expanding the scope, complexity, and duration of federal habeas litigation, [which] no organ of state government has any legitimate interest in furthering . . ." (RSB 17.) To the contrary, the procedure petitioner asks this Court to follow will produce an orderly process in both state court and federal court, which very definitely is in this Court's interest, and California's interest, to promote.

It also is not correct that the petition's purpose is to defeat Congress's judgment. (RSB 19, 21.) The procedure requested secures an orderly process in both state and federal court. Nor is it correct that the petition's purpose is to secure tolling in precisely the circumstances that Congress refused to confer it. (RSB 19.) One cannot conclude from the provisions of Chapter 154 that

because Congress chose to confer an extra benefit on states that have qualifying mechanisms for appointing counsel and providing them reasonable funding to conduct state collateral litigation, Congress intended to preclude a state's highest court from fashioning a procedure to protect a capital defendant's statutory right to state habeas corpus counsel and the interests of both the defendant and the state in state post-judgment review before initiating federal habeas corpus review.

One cannot discern such intent from a statute that was so inartfully drafted and has spawned endless litigation attempting to clarify its meaning in the 13 years since its enactment. As Justice Souter commented about AEDPA, "All we can say is that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting." *Lindh v. Murphy* (1997) 521 U.S. 320, 336, 117 S. Ct. 2059.

Respondent makes no effort to address the underlying problem that led to establishing the procedure that petitioner asks the Court to follow in his case: (a) there are no habeas corpus counsel for more than 280 people under judgment of death in California; (b) the entire system is dysfunctional and collapsing under the weight of too many cases (with more than 680 people under death judgments, California has the largest death row in the country); and (c) there is no control over the exercise of prosecutorial charging discretion, resulting in far more death judgments entering the system than the system is equipped to handle. When it comes to acknowledging and

addressing the sources of the current problem, to which petitioner is merely responding, respondent is remarkably silent.

Respondent's unrelenting oppositional response stands in sharp contrast to its office's approach in 1987, when, as California death judgments began to enter the federal courts, the Attorney General, the defense bar, and the courts worked together to create federal rules providing an orderly transition from state to federal court without endless, frantic, last-minute litigation to stay improvidently-set execution dates.

Contrary to Respondent's assertion (RSB 17), the procedure that petitioner asks this Court to follow, and which it has followed in numerous other cases,[2] is very much in the state's interest. It is entirely legitimate for California to adopt procedures that reasonably accommodate the realities of capital litigation today. A further benefit of this approach is that it avoids piecemeal review in state court that would result if the Court were, for example, to issue an OSC on one claim now and then had to litigate other claims years later when presented by appointed habeas corpus counsel. The current process, which enables counsel to prepare a single, comprehensive petition and provides an orderly process, is precisely what California needs to protect its interests and the

[2] The petition, including petitioner's request to defer briefing, was filed, in the words of this Court's July 03, 2007 order in *In re Carmen Lee Ward*, S142694, "to promote judicial economy, to effectuate petitioner's right to counsel under section 68662 of the Government Code, to allow 'the full factual development in state court' of petitioner's claims (*Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9), and to permit the completion of 'one full round of [state collateral] review' (*Carey v. Saffold* (2002) 536 U.S. 214, 222)."

interests of capital defendants, and relieves the Court of the burden of multiple litigation of habeas corpus claims.

If petitioner were to proceed to federal court now, without filing a state petition because of the lack of state counsel -- as respondent suggests -- it is likely he will encounter a series of insurmountable obstacles to obtaining full federal and state review of his legitimate claims. First, it may be months, or years, before federal habeas corpus counsel is appointed to represent petitioner -- because the difficulties in obtaining habeas corpus counsel in state court also exist in federal court. Indeed, it is now a common occurrence in the Northern District of California for federal counsel not to be appointed until *after* the federal statute of limitations has run. Once federal counsel is appointed, how much time will federal counsel have to prepare and file a federal petition? Unless federal counsel is granted equitable tolling for the time that elapsed between petitioner's request for federal counsel and the appointment of federal counsel, federal counsel will have substantially less time than even the one year statute of limitations. As a result, it is likely federal counsel will have to file an incomplete federal petition. Although respondent disparagingly characterizes this Court's 36-month period for filing a presumptively timely petition as "leisurely paced" and "exceedingly accommodating" (RSB 15, 16), respondent has no experience actually preparing habeas corpus petitions and typically thinks the claims in them are utterly without substance. As a result, respondent has little appreciation of the difficulties of investigating and

preparing a comprehensive habeas corpus petition. Doing so in one year when there has been *no* state petition previously filed is a severe challenge; doing so in eight, six, or even four months borders on the impossible. Even in the best of circumstances the task is complicated by the amount of time that typically will have passed since the crime and the trial. That challenge is compounded by the reluctance of some federal courts to fund full review of the defense trial files by petitioner's counsel, investigation, and experts before filing the federal petition. (See the February 2, 2009 order of the district court in *Smith v. Wong*, Northern California District Court Case No. 3-04-cv-03436 CRB, in which the court states it is not the practice of the Northern District to fund such efforts to prepare the petition.) The entire federal habeas corpus scheme is premised on the expectation that before the case reaches the federal courts full factual development of habeas corpus claims will have occurred in state court. "The state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of fact-finding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings." *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9. Respondent wants this Court to create not merely *incentives* for deferral of fact-development and fact-finding to the federal courts but a *necessity* for doing so. Next, since some claims in the federal petition will not have been exhausted in state court, petitioner likely will have to seek "stay-abeyance" from the federal court. (*Rhines v. Weber* (2005) 544 U.S. 269.) *If* it is granted, petitioner faces

the likelihood the district court will then cut off all further funding because the case is no longer active in federal court, as is now the policy in the Central District of California. When petitioner returns to federal court after exhaustion, petitioner will have to seek to amend the first federal petition but will face the obstacle that the proposed amendments may not "relate back" to the claims in the first petition. (See *Mayle v. Felix* (2005) 545 U.S. 644.)

All of these obstacles threaten to deny petitioner the counsel, the time, and the resources he needs to develop fully his habeas corpus claims -- which this Court has determined requires the appointment of qualified counsel, three years, and $50,000. As *McFarland v. Scott* (1994) 512 U.S. 849, recognized, "An attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial, because '[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without assistance of persons learned in the law.'" (Citation omitted.)

Although respondent suggests that petitioner's rights in both state and federal court will be fully protected if he will just follow the rules, petitioner has every reason to believe that in federal court respondent will oppose his efforts to obtain a fair opportunity to develop and present his claims. Respondent's position just asserted in the case of *Jurado v. Wong*, Southern District Case No. 3:08-cv-1400, suggests that respondent will assume an oppositional stance at every turn in federal court, just as it is now opposing

petitioner's efforts to preserve his rights in this Court. If respondent prevails, petitioner will indeed be seriously short-changed.

In *Jurado*, the state petition was denied on July 23, 2008. Eight days later Mr. Jurado filed a request for federal counsel in the district court. After the Selection Board identified and recommended counsel, a pre-appointment conference was held before the district court, at which the Deputy Attorney General refused to enter into *any* stipulation regarding equitable tolling based on the lack of federal counsel to represent petitioner, and made clear her office's policy is *never* to do so (characterizing the occasions on which it had previously stipulated as "aberrations"). Without firm assurances that respondent will not oppose his efforts in federal court to obtain a fair opportunity to develop and present his claims, petitioner has no reason to believe he will ever receive the comprehensive review of his death judgment to which he is entitled under state and federal law. It will be most instructive to see what assurances will be forthcoming in respondent's reply to this response.

It must be emphasized that all of the difficulties petitioner faces in the current system, in both state and federal court, are entirely *not* of his own making. Petitioner has asked for counsel to prepare a timely habeas corpus petition on his behalf. Respondent's focus is myopic and his censure misdirected. The system is dysfunctional not because of petitioner's actions, but because no counsel has been appointed to represent petitioner. Petitioner does not seek exemption from state law, but compliance with state law

requiring that he be afforded counsel. It would be a grave injustice to deny petitioner the review to which he clearly is entitled because of circumstances completely beyond his control.

Denial of the opportunity to prepare a full state habeas corpus petition before going to federal court would violate not only petitioner's due process rights but his right to equal protection as well. Capital defendants who have had counsel timely appointed to represent them on habeas corpus, e.g., defendants for whom counsel is appointed for both appeal and habeas corpus, are much better situated than petitioner. There is no legitimate factual or legal basis for disadvantaging petitioner compared to these other defendants, and this result -- not in any way attributable to petitioner -- constitutes a denial of equal protection.

If respondent has any concern about such untoward results, it cannot be gleaned from the Supplemental Brief or respondent's numerous other pleadings on this issue. Although respondent purports to assure the Court and petitioner that petitioner will receive all that he is entitled to in due course (RB 15-17), respondent's position appears to be an elaborate exercise in "gotcha," in which petitioner ultimately will find each potential door to relief blocked by respondent. Now at state door, petitioner is told to go directly to the federal door. Once at federal door, he will be told he has limited time and money to prepare and file his petition, and when he does, he must go back to state court to exhaust, but if he then develops any new claims in the time he is given in

state court, he will be barred from filing them in federal court because -- respondent will undoubtedly assert (unless respondent stipulates otherwise) -- they do not "relate back" to the claims petitioner originally filed in federal court, even though, of course, he was in no position to know and assert them when he filed his first federal petition. Bottom line: petitioner likely will never obtain review of the full panoply of claims that he is entitled to present to the state and federal courts. This unseemly exercise not only puts the petitioner's life at risk but also disrespects and burdens federal courts.

It is not correct that the petition presents no claims on which relief could be granted. (RSB 1.) Petitioner has presented a claim of ineffective assistance of trial counsel, which he seeks to augment when he is provided counsel and the resources to do so. It is true respondent does not think the claim has merit (RSB 10), but then, respondent rarely thinks claims in capital habeas corpus petitions have merit.[3]

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[3] Curiously, respondent notes that CAP (presumably petitioner) does not expressly concede that the "shell" fails to set forth a prima facie case, but "neither does CAP appear to dispute the point" (RSB 8) -- suggesting that perhaps future petitions should contain an affirmative averment that petitioner does not concede that his petition lacks merit. Respondent repeatedly refers to the petition as "the shell" (RSB, *passim*), undoubtedly to disparage it. Petitioner's pleading is denominated as a petition for writ of habeas corpus and should be referred to as such. Respondent's brief continues in the same strident mode as its previous briefs in this and other similarly-situated cases, using disparaging phrases to characterize petitioner's efforts to preserve his state and federal rights: "circumvent"(RSB 3); "ruse"(RSB 3); a "ploy" resorted to by capital murderers (RSB 3); "to have cake and eat it too"(RSB 4); "pretext for thwarting the one-year limitations period" (RSB 20); "through the shell/defer artifice. No irony this sad (sic) will likely go unnoticed."(RSB 20);

Contrary to respondent's characterization, petitioner is not "seeking to change the law." (RSB 2.) All petitioner is seeking is an extension of time in which to amend his petition and a stay of further proceedings until he has done so. Neither represents a change in the law. In essence, the Court has granted petitioner an EOT to complete his petition, based on a showing of good cause, i.e., the absence of counsel to represent him. Granting an extension of time and/or a stay of proceedings upon a showing of good cause is a routine matter within the discretion of a state court. Federal courts routinely accept such state court rulings in deference to state court procedure. Just because the *defense* asks for more time does not thereby convert the request into a "ruse" to subvert federal review. Indeed, *respondent* routinely asks for EOTs related to state habeas corpus proceedings. In 31 cases since 2000, respondent has taken a full year or more to file its Informal Response to the State Habeas Corpus Petition. In almost half of those cases, respondent has taken a year and 5 months or more to file, in one case it took 2 years and 8 months, and in another

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"it simply makes no sense for CAP to argue" (RSB 22). Respondent also disparages the federal judiciary ("a ruse to expand . . . the federal judiciary's opportunity to delay, and perhaps even altogether defeat, the enforcement of state judgments whose validity has been reviewed and . . . been upheld by this Court") (RSB 3), as well as this Court ("it is not the province of any state court to manipulate state law for the purposes of making the federal limitations period operate more disadvantageously to the state's interests than Congress intended.") (RSB 19-20.) Why this Court, or a federal court, would *want* to manipulate state law to cause the federal limitations period to operate more disadvantageously to California's interests is hard to fathom, unless respondent really believes that, save respondent, all of the participants in the process -- petitioner, the state courts, and the federal courts -- are attempting to thwart California's interests.

it took a total of 3 years and 6 months. Typically respondent has explained that the limited availability of attorney resources in its office and the other case burdens imposed upon its limited staff necessitated additional time to prepare the Informal Response. No one would suggest these delays were taken to subvert federal review or to defeat Congress's intent. Any such suggestion here would also be inappropriate. To the contrary, just as respondent has established good cause for needing more time to prepare its pleadings, so too here the defense has needed, and been granted, more time to prepare its petition, either because this Court has recognized that appointed counsel has not had enough time to do what this Court has determined needs to be done or, as in this case, *a fortiori*, because there simply is no attorney appointed to do it. As Chief Justice Roberts stated in *District Attorney's Office for the Third Judicial District v. Osborne* (June 18, 2009) ___ U.S. ___, "Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided." (Slip Op., p. 16.) It is not the province of federal courts to upset California's postconviction procedures that are *solicitous* of petitioner's rights.

The public interests identified by respondent as being served by rules designed to promote prompt resolution of habeas corpus claims (RSB 2, 6-7) have no application to cases in the posture of this case or *In re Zamudio*, S167100 -- at least not insofar as state habeas corpus litigation is concerned. In these cases no petition is really "due," and no litigation due to commence, until

three years after habeas corpus counsel is appointed. If the Court were to abandon the practice at issue in this proceeding, which respondent characterizes as a "ruse," this would not "vindicate the finality of judgments, ensure timely implementation of state law, avoid adjudicating claims after vital evidence is lost or memories faded," or "bring closure" to the victims' survivors. (RSB 2.) Under the Court's policies providing that a state habeas corpus petition is presumed timely if filed within three years of the appointment of counsel, state litigation would still proceed according to the same theoretical timetable. A full petition would be filed within three years of counsel's appointment and informal briefing could then be ordered. Continuation of the current practice does not contravene the adjudicatory rules this Court has established for litigating state habeas corpus petitions in capital cases. To the contrary, it promotes an orderly process of briefing and review.

It would be most inappropriate to apply mechanically the adjudicatory rules promoting prompt resolution of claims upon which respondent relies to petitioners who are statutorily entitled to, but have not yet (or have only recently) been provided with, habeas corpus counsel. Those state rules presume counsel will have had time and resources to prepare a petition.

Respondent fails to recognize that both petitioner and the State of California have an interest in having any extra-record claims adjudicated in California before petitioner seeks relief on those claims in federal court. Petitioner has a right to seek habeas corpus relief from a sentence of death in

both state and federal court, and to the assistance of counsel in doing so. Petitioner should not have to go to federal court unless and until this Court has first considered and rejected his claims for relief. Federal courts generally will not consider or grant relief upon a claim until this Court has first had an opportunity to review it. Respondent does not make clear what respondent thinks the federal courts should do if presented with a claim which this Court has not had an opportunity to review. In theory a federal court could (1) stay federal proceedings and permit federal counsel to exhaust the claim by filing a petition with this Court, (2) refuse to stay federal proceedings, adjudicate the exhausted claims and refuse to consider the unexhausted claim, thereby forever precluding federal review of that claim, or (3) refuse to stay federal proceedings but rule on the unexhausted claim without benefit of this Court's prior review, after concluding that because appointment of state counsel was made too late to file a state petition early enough to have exhausted the claim before the running of the federal statute, "there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." (28 U.S.C. §2254 (b)(1)(B)(i) and (ii).) Which course a federal court will choose is unknown. Petitioner should not have to forgo federal review of potential claims for relief, nor would it be appropriate or in California's interests to have the federal court rule on their merits -- and perhaps grant relief -- without this Court having had an opportunity to rule on the claim. Respondent appears to agree on this point:

"State court, not federal court, is 'the most appropriate forum' for resolving claims brought by state prisoners." (RSB 18, n. 5, quoting *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9 ["encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance"].) As noted, *supra* at 7, *Keeney* did not foster but *opposed* deferral of fact-development and fact-finding to the federal proceedings. However, respondent fails to recognize this may well be the consequence of its position. It makes much more sense, and is in the interests of both petitioner and the state, to have state proceedings conclude before petitioner must initiate federal review.

Nor is there any reason to believe this would be inconsistent with Congress's intent, to the extent it can be discerned. As respondent notes, Congress has provided for the tolling of the federal statute of limitations during the pendency of a properly filed state court application for post-conviction review. (28 U.S.C. § 2244 (d)(2).) This suggests Congress did not want to interfere with properly initiated state court habeas proceedings and preferred to have challenges to state court criminal judgments adjudicated in state court *before* resorting to federal review. As previously noted, it is unlikely Congress considered the possibility that a state like California, which has statutorily mandated the provision of counsel and funding for state habeas corpus litigation in capital cases, would encounter such difficulty in providing death-

sentenced inmates with counsel. In *Lindh*, *supra*, at 334, the United States Supreme Court noted "the Act's apparent general purpose [is] to enhance the States' capacities to control their own adjudications." Had Congress considered the matter, it is unlikely it would have wished to compel pursuit of federal habeas corpus relief before California has a chance to conduct the post-conviction review it has mandated for itself. Ensuring access to that state-mandated review before seeking federal relief is all that petitioner seeks. There is nothing improper about the steps this Court has taken in this and similar cases to make such review possible.

As the United States Supreme Court observed in *Rhines v. Weber* (2005) 544 U.S. 269, 273-274, "We noted [in *Rose v. Lundy* (1982) 455 U.S. 509] that '[b]ecause "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity. . . . That doctrine '"teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."' 455 U.S. at 518." It later noted, "AEDPA thus encourages petitioners to seek relief from state courts in the first instance by tolling the 1-year limitations period while a 'properly filed application for State post-conviction or other collateral review' is pending. 28 U.S.C. § 2244(d)(2). This scheme reinforces the importance of *Lundy's*

'simple and clear instruction to potential litigants: *before you bring any claims to federal court, be sure that you first have taken each one to state court.'* 455 U.S. at 520." (*Id.* at 276-277, emphasis added; see also *Carey v. Saffold* (2002) 536 U.S. 214, 220, 222 [exhaustion of state remedies "serves AEDPA's goal of promoting 'comity, finality and federalism'" and provides states with the "opportunity to complete one full round of review, free of federal interference."].)

CONCLUSION

For the above reasons, respondent's request that the Court immediately and summarily deny the petition, as well as his previous Motion for Order to Show Cause, should be denied.

Petitioner will not withdraw his petition. Rather, petitioner requests that the Court appoint habeas corpus counsel, provide appointed counsel with three years to prepare an amended state habeas corpus petition, and defer briefing and resolution of the petition until the amended petition is filed.

Moreover, petitioner asks this Court to issue a clear statement that it has adopted this procedure to promote justice, that it is a reasonable response to the serious systemic problem California faces, that it is not intended to promote delay but, to the contrary, is intended to provide for an orderly and as expeditious a process of review as is possible under these extraordinary circumstances, and that the federal courts are asked to respect this process and

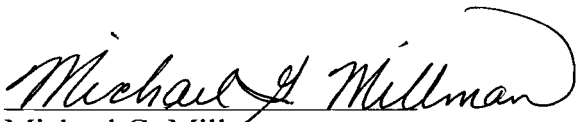
to accord petitioner his full measure of federal review, if need be, when full state review has been completed.

Dated: June 29, 2009

Respectfully submitted,

California Appellate Project

By:



Michael G. Millman
Executive Director
Attorney for Petitioner Edward Patrick Morgan

DECLARATION OF SERVICE BY MAIL

In re Edward Patrick Morgan, No. S162413

I, Betsy Field, declare that I am over the age of 18 years and not a party to the within cause; my business address is 101 Second Street, Sixth Floor, San Francisco, California, 94105. I served a true copy of the attached:

RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

On each of the following by placing same in an envelope (or envelopes) addressed as follows:

Randall D. Einhorn
Deputy Attorney General
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Mr. Edward Patrick Morgan
Post Office Box K-17000
San Quentin, CA 94974

Each said envelope was then on June 30, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Pursuant to California Code of Civil Procedure §1013 (a), this brief is timely filed within 30 days of service of the People's Supplemental Brief, which was mailed to the California Appellate Project on May 29, 2009, via the United States Postal Service.

I declare under penalty that the foregoing is true and correct.

Executed on June 30, 2009, at San Francisco, California.

Betsy Field
Declarant

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Attorney for Petitioner
EDWARD PATRICK MORGAN

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CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE

I certify that the RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF, filed on June 30, 2009, uses a 13-point Times New Roman font and contains 5,210 words.

Dated: July 1, 2009

Michael G. Millman

MICHAEL G. MILLMAN
Executive Director
Attorney for Petitioner
Edward Patrick Morgan

DECLARATION OF SERVICE BY U.S. MAIL

In re Edward Patrick Morgan, No. S162413

I, Betsy Field, declare that I am over the age of 18 years and not a party to the within cause; my business address is 101 Second Street, Sixth Floor, San Francisco, California, 94105. I served a true copy of the attached:

CERTIFICATE OF COMPLIANCE FOR RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

On each of the following by placing same in an envelope (or envelopes) addressed as follows:

Ronald S. Matthias
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San Francisco, CA 94105

Mr. Edward Patrick Morgan
Post Office Box K-17000
San Quentin, CA 94974

Each said envelope was then on July 1, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed on July 1, 2009, at San Francisco, California.

Betsy Field
Declarant

SUPPLEMENTAL DECLARATION OF SERVICE BY U.S. MAIL

In re Edward Patrick Morgan, No. S162413

I, Betsy Field, declare that I am over the age of 18 years and not a party to the within cause; my business address is 101 Second Street, Sixth Floor, San Francisco, California, 94105. I served a true copy of the attached:

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San Francisco, CA 94102

Each said envelope was then on July 1, 2009, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

Pursuant to California Code of Civil Procedure §1013 (a), this brief is timely filed within 30 days of service of the People's Supplemental Brief, which was mailed to the California Appellate Project on May 29, 2009, via the United States Postal Service.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

Executed on July 1, 2009, at San Francisco, California.

Betsy Field
Declarant