In the Supreme Court of the State of California

In re **EDWARD PATRICK MORGAN,** **On Habeas Corpus.**	**CAPITAL CASE** S162413 (Judgment Affirmed, Nov. 15, 2007, in Related Direct Appeal (S055130), 42 Cal.4th 593)

PEOPLE'S SUPPLEMENTAL REPLY BRIEF

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PEOPLE'S SUPPLEMENTAL REPLY BRIEF

1. CAP begins its attempt to defend the shell/defer artifice with a non sequitur: CAP claims that systemic delays in the appointment of state collateral counsel have somehow diminished the primacy of trials as the means for determining guilt and punishment, and appeals as the means for reviewing the fairness of trials, while making habeas correspondingly less "subordinate" and "limited" than traditionally described in this Court's cases. (Response at 1-2; compare authorities cited in People's Supplemental Brief (PSB) at 5-6.) How this could possibly be so is not explained, but the fact CAP feels the need to advance a proposition this confounding only shows how utterly alien to mainstream legal understanding it would be for a state court to agree to receive, but then willfully and indefinitely fail to resolve, a patently deficient claim for relief, solely to assist death row inmates' efforts to defeat the natural operation of the federal limitations period.

And, make no mistake, shells are all about affecting the course of *federal*, not state, litigation, as CAP's own briefing implicitly acknowledges. (Response at 14-15 [effectively conceding that shells have absolutely no effect on the ultimate "full[ness]" of state habeas review or the extent of factual development resulting from it].) Indeed, the effects shells have on state habeas proceedings (which effects, much as CAP would like to pretend otherwise, offend the teachings of this Court's cases (PSB at 6-7)[1]), are largely incidental to the pernicious effects shells are

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[1] CAP cannot plausibly deny that it is "seeking to change the law" (Response at 13) while simultaneously protesting against the "mechanical" application of existing law (Response at 15). Neither can CAP dispute that it seeks on Morgan's behalf an "exemption from state law" (*id.* at 10) while criticizing the People for resisting procedures purportedly fashioned to

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calculated to have on federal habeas litigation—namely, delaying its start in district court, compounding its complexity and burdensomeness, and thus extending well into the future the point at which it can finally be drawn to a close. (Response at 7-12 [cataloguing several "obstacles" resulting from AEDPA that CAP fears could prevent death row inmates from presenting in federal court each and every one of the "full panoply of claims" they hope to present in state court].)

2. CAP does not dispute that reexamination of state convictions on federal habeas corpus """"disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."""" (PSB at 2-3, quoting authorities.) Nevertheless, CAP insists this Court must now conform its rules and procedures to death row inmates' desire to circumvent congressionally-imposed reforms limiting the scope and duration of federal habeas litigation. In urging this radical course, CAP makes the breathtaking assertion that this Court *needs* to maximize the federal judiciary's opportunities to superintend the administration of California's criminal laws—that it needs to neutralize, in effect, the AEDPA-imposed "obstacles" to open-ended federal review—in order to "*sav*[*e*] *the state* from carrying out unfair and unreliable death judgments." (Response at 2, italics added.) CAP would never advance a notion this insulting if it correctly understood the role of federal habeas corpus and the basic structure of our national system.

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"accommodate the realities of capital litigation today" (*id.* at 6). Finally, CAP cannot hope to equate the shell/defer contrivance with a "routine EOT" (*id.* at 13) while arguing that circumstances justifying its resort to that ploy are "extraordinary" (*id.* at 19).

State courts always stand on *at least* equal footing with federal courts when it comes to fulfilling "the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." (*Robb v. Connolly* (1884) 11 U.S. 624, 637; *Stone v. Powell* (1976) 428 U.S. 465, 493 fn.35 ["State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law" (citing *Martin v. Hunter's Lessee* (1816) 1 Wheat 304, 341-344)]; accord, *Schneckloth v. Bustamonte* (1972) 412 U.S. 218, 259 (conc. opn. of Powell, J.) ["It is the solemn duty of [state] courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accordance with federal law"]; see also O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge* (1981) 22 Wm. & Mary L. Rev. 801, 814-815.) Indeed, in many respects, state courts are in a decidedly *superior* position to consider and correctly resolve constitutional challenges. (E.g., *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9 [explaining that state court factfinding is preferable to federal court factfinding in that reliance on the latter "can only degrade the accuracy and efficiency of judicial proceedings"]; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 636 ["State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman* [*v. California* (1967) 386 U.S. 18], and state courts often occupy a superior vantage point from which to evaluate the effect of trial error"].)

In short, it is anathema to Our Federalism to "regard[] state courts as second-rate instruments for the vindication of federal rights" (*Withrow v. Williams* (1993) 507 U.S. 680, 723 (conc. & diss. opn. of Scalia, J.)), and the People of the State of California emphatically reject CAP's suggestion—as well as any similar suggestions advanced by others—to the

contrary. (E.g., *Coleman v. McCormick* (9th Cir. 1989) 874 F.2d 1280, 1295 fn.8 (conc. opn. of Reinhardt, J.) [theorizing that "federal courts stand in a better position [than state courts] to adjudicate constitutional rights" due to the federal judiciary's "greater receptivity . . . to Supreme Court dictates, insulation from majoritarian pressures, and even superior technical competence"].)[2]

Apart from "degrad[ing] the prominence of the trial itself" (*Engle v. Isaac* (1981) 456 U.S. 107, 127), expansive federal oversight of state criminal process "render[s] the actions of state court courts a serious disrespect in derogation of the constitutional balance between the two systems." (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 263.) Thus, the insult extends not merely to a particular state judge or state court, but to the state as a whole, its core sovereignty, and its People's confidence in the efficacy and integrity of cherished public institutions. (*Sumner v. Mata* (1981) 449 U.S. 539, 550 ["A writ issued at the behest of a petitioner under 28 U.S.C. § 2254 is in effect overturning either the factual or legal conclusions reached by the state-court system under the judgment of which

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[2] Despite what CAP thinks (Response at 2), the rate at which "California habeas corpus petitioners in death penalty cases achieve[] relief on review of their claims in federal courts" does not remotely demonstrate that federal habeas litigation serves an "invaluable function" for this Court or for the State of California in general, nor would such a statistic shed even the slightest light on the frequency at which lower federal courts decide the cases before them correctly. More instructive, perhaps, would be data reflecting the outcomes in California death penalty cases that are considered and decided on the merits by the Supreme Court of the United States following either direct or federal review, but CAP does not favor us with those statistics. (See generally, e.g., *Ayers v. Belmontes* (2006) 546 U.S. 212; *Brown v. Sanders* (2006) 546 U.S. 212; *Brown v. Payton* (2005) 544 U.S. 133; *Woodford v. Visciotti* (2002) 537 U.S. 19; *Pulley v. Harris* (1984) 465 U.S. 37; *Boyde v. California* (1990) 494 U.S. 370; *Tuilaepa v. California* (1994) 512 U.S. 967.)

the petitioner stands convicted, and friction is a likely result"]; *Engle v. Isaac*, *supra*, 456 U.S. at p. 126-127 ["Collateral review of a conviction extends the ordeal of trial for both society and the accused"]; *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at pp. 260-261 ["To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection[;] [a]fter all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication"]; *id.* at p. 274 ["Perhaps the single most disquieting consequence of open-ended habeas review is reflected in the prescience of Mr. Justice Jackson's warning that '[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones"]); *id.* at p. 275 ["it is difficult to explain why a system of criminal justice deserves respect which allows repetitive reviews of convictions long since held to have been final at the end of the normal process of trial and appeal where the basis for re-examination is not even that the convicted defendant was innocent[;] [t]here has been a halo about the 'Great Writ' that no one would wish to dim[,] [y]et one must wonder whether the stretching of its use far beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality"].)

Most critically, "broad federal habeas corpus powers encourage . . . the 'growing denigration of the State courts and their functions in the public mind.'" (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 264, quoting Justice Paul C. Reardon, Address at the annual dinner of the Section of Judicial Administration, American Bar Association, San Francisco, Aug. 14, 1972.) As one leading habeas corpus scholar has put it:

> "I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."

(Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners* (1963) 76 Harv. L. Rev. 441, 451, quoted in *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at pp. 264-265.)

3. This Court, of course, fulfills *its* obligation "'to ensure "that 'justice shall be done'"'" (Response at 4) by reviewing capital judgments automatically on appeal, and again on state habeas, using procedures that guarantee inmates ample funding, the assistance of well-trained and experienced counsel, and a window of opportunity to prepare a presumptively timely state petition that extends for no less than three years following counsel's appointment.[3] Under these circumstances, CAP needs no additional "assurances on that score." (See *ibid.* ["respondent provides no assurances that justice will be done in petitioner's case or the cases of persons similarly situated"]; *id.* at 10 ["It will be most instructive to see what assurances will be forthcoming in respondent's reply to this response"].) Nevertheless, CAP may rest easy knowing that the People fully endorse what this Court has said about state collateral review:

> [It] 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.

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[3] CAP apparently disagrees, and thinks the People are incompetent to opine on the point. (Response at 7-8.) But if there is another jurisdiction that displays more patience and commits more resources than does California to assisting death row inmates' efforts to raise collateral challenges, CAP does not identify it, a failing that tends to validate our view of this Court's superlative willingness to accord death row inmates every reasonable opportunity to demonstrate some reason for overturning their sentences. At any rate, why CAP thinks it is somehow "disparaging" (*id.* at 7) to acknowledge the extent of California's unparalleled commitment to fair process is a bit baffling.

(*In re Barnett* (2003)31 Cal.4th 466, 475, quoted in People's Reply to Opposition to Motion for Order to Show Cause at 13.)

Nor do we "disparage" federal habeas, *provided its reach is not stretched beyond what has been duly authorized.* Our position on this point is informed by Supreme Court teaching:

> As the Court noted in a historic decision on the conflicting realms of state and federal judicial power:
>
> > "[T]he constitution of the United States . . . recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938), quoting Mr. Justice Field in *Baltimore & O. R. Co. v. Baugh*, 149 U.S. 368, 401 (1893)."

(*Schneckloth v. Bustamonte, supra*, 412 U.S. at p. 264 fn. 20.)

In sum, the extent to which federal review must be "comprehensive" (Response at 10) is defined by congressional judgment, not CAP's preferences. And when, as here, the effect of recent reforms are implicated, it is imperative to bear in mind that Congress's purpose in enacting was "to curb delays, to prevent 'retrials' on federal habeas, and *to give effect to state convictions to the extent possible under law.* (*Williams v. Taylor* (2000) 529 U.S. 362, 386 (opn. of Stevens, J.), italics added.)

4. Indeed, it is precisely because shells are designed to *circumvent* an explicit *limitation* on federal habeas power that they are so intolerably offensive to the state's interests. CAP finds it "hard to fathom" why this Court "would *want* to manipulate state law for the purpose of making the federal limitations period operate more disadvantageously to California's

interests" than Congress intended. (Response at 13 fn.3, italics in original.) We share CAP's bewilderment.

The federal statute of limitations, like other crucial reforms instituted under AEDPA, is vitally protective of the state's interests. As such, its natural operation cannot be thwarted just because CAP or anyone else thinks it makes collateral litigation less "orderly." (Response at 2, 3, 6, 15.) Nor can professed reverence for the exhaustion doctrine (*id.* at 8, 16) justify subverting congressional reforms and the important state interests they were implemented to protect. To be sure, there can be some tension between imposing a federal filing deadline and promoting exhaustion of state remedies. But, we emphasize again, it fell to *Congress*—not CAP—to strike the proper balance between these aims, and Congress did not shrink from that task, as the high court has explained:

> "The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect *only* to 'properly filed application[s] for State post-conviction or other collateral review.'"

(PSB at 18, quoting *Duncan v. Walker* (2001) 533 U.S. 167, 179, italics added.) And, as we previously explained, it is significant that Congress has accorded

> no "tolling effect" to any *other* events or circumstances, such as a state court's delay in fulfilling the prisoner's state-law right to assistance of counsel in state collateral proceedings, or the fact that the period allowed under state law to file an application for state post-conviction relief has not yet expired—the very circumstances that, according to the proponents of shell petitions, justify their resort to them. Thus, the only purpose of any shell is to defeat Congress's judgment; more precisely, its purpose is to secure tolling in precisely the circumstances that Congress refused to confer it.

(PSB at 19, italics in original.)

The question on which our briefing focuses, of course, is not whether "Congress intended to preclude a state's highest court from fashioning a procedure to protect a capital defendant's statutory right to state habeas counsel" (Response at 5) inasmuch as the shell/defer contrivance has no such purpose or effect. And, as for "protect[ing] the interests of both the defendant and the state" in promoting exhaustion of state remedies (*id.* at 5), Congress most certainly *did* foreclose "re-balancing" the considerations discussed in *Duncan v. Walker* any differently than as plainly reflected in section 2244(d). The unmistakable import of that provision—that tolling is available to only those prisoners who actively pursue state collateral relief, not to those who merely wish to do so in the future (be it with counsel or without, and regardless of whether state law provides for such appointments)—cannot be disregarded on the ground that AEDPA lacks the beauty of a "silk purse" (*id.* at 5) in some other, wholly unrelated respect.

5. CAP's enduring efforts to invoke "comity" to justify the shell/defer contrivance are singularly disingenuous. Exhaustion is not an i-dotting/t-crossing ritual observed to "prep" claims for consideration by the federal judiciary. Although the requirement surely directs that state courts be afforded a fair opportunity to consider claims (and to grant relief on account of them, as appropriate), there are no "comity" implications to the *timing* of state review unless some prospect of federal review actually looms and *threatens to usurp state review.* (See PSB at 22 fn.7.) When that prospect is limited, or altogether eliminated, by some *other* feature of law (such as the federal statute of limitations—which bars belatedly-presented claims altogether), it hardly advances comity to attempt to thwart the natural operation of those other provisions, for such a course only regenerates state-federal friction, and triggers tiresome, insincere, and

entirely unwarranted handwringing by death row inmates over the "need" for exhaustion.

At bottom, this is CAP's argument: The shell is needed to defeat expiration of the federal limitations period in order that later federal review may include as many claims as will be rejected on state review, and this Court's consideration and disposition of the shell must be deferred to allow the amendments needed to "avoid" exhaustion "problems" that would never arise in the first place if the federal limitations period had simply been allowed to expire naturally. The only principle that would appear to support this position is the principle that state and federal collateral review must always consume, in combination, as much time as possible.

6. CAP's views on how to achieve "orderly" and efficient adjudication of capital cases must be taken with a grain of salt, of course. (*In re Clark* (1993) 5 Cal.4th 750, 806 (conc. & dis. opn. of Kennard, J.) ["death row inmates have an incentive to delay assertion of habeas corpus claims that is not shared by other prisoners"]; accord, *Mayle v. Felix* (2005) 545 U.S. 644, 674 (dis. opn. of Souter, J.) [acknowledging "capital petitioners' incentive for delay"]; *Lindh v. Murphy* (1997) 521 U.S. 320, 340 (dis. opn. of Rehnquist, C.J.) [observing that capital defendants' "incentive . . . is to utilize every means possible to delay the carrying out of their sentence"].) And when it comes to assessing the utility of shells, CAP's views are incorrect.

To begin with, shells obviously do nothing to "avoid piecemeal review." (Response at 6.) Quite to the contrary, shells only create the prospect of its occurrence and thus supply the pretext for requesting both a stay and what CAP calls an "EOT to complete" the shell. (*Id.* at 13.)[4] As

[4] CAP protests (Response at 12 fn.3) use of the term "shell" in reference to the pleading it asks this Court not to examine for prima facie (continued...)

CAP elsewhere acknowledges, shells are typically filed when "no petition is really 'due,' and no litigation due to commence, until three years after habeas corpus counsel is appointed." (*Id.* at 14-15.) Thus, if CAP were genuinely interested avoiding piecemeal litigation, it would *never* file a shell. Instead, it would simply allow appointed counsel to prepare and file that vaunted "single, comprehensive petition" (*id.* at 6) after one is prepared within the period of presumptive timeliness.

Nor do shells do anything to enhance the efficiency of federal litigation. Indeed, the contrary is plain, as we have already noted. (See PSB at 16 fn.4, citing People's Motion for Order to Show Cause at 13-14; see also People's Reply to Opposition to Motion for Order to Show Cause at 12-13, citing Cal. Rules of Court, rule 8.605(k) and *Rhines v. Weber*

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sufficiency and concedes it wants to see amended following a stay of indefinite duration (*id.* at 3, 13, 19). The term is perfectly apt, however, and thus widely used (as CAP surely knows) by criminal defense lawyers, as well as judicial staff and officers. "Shell/defer" is certainly preferable to the cumbersome and self-conscious euphemisms coined by CAP on the occasion of its latest briefing. (*Id.* at 4 ["the procedure petitioner asks this Court to follow"]; *id.* at 15 ["the procedure that petitioner asks this Court to follow]; *ibid.* [contrasting "the practice at issue in this proceeding" with "[a] full petition"].) Nevertheless, because the shell it filed "is denominated as a petition for writ of habeas corpus," CAP demands that it "be referred to as such." (*Id.* at 12.) But such harrumphing cannot be taken seriously until CAP agrees that its "petition" should be *adjudicated* "as such." (See PSB at 1 ["If shell petitions were dealt with as prescribed by longstanding state precedent, there would be little doubt about their fate"].) The shell filed in this case does not come within a country mile of stating a prima facie case for relief (PSB at 7-14), a state of affairs that is only underscored by CAP's feeble observation (Response at 12) that it "present[s] a claim of ineffective assistance of counsel" which CAP hopes—on what basis we cannot begin to guess since habeas "is not a device for investigating possible claims but a means for vindicating actual claims" (*People v. Gonzalez* (1990) 51 Cal.3d 1260, 1179)—will later be "augmented."

(2005) 544 U.S. 269, 277, citing 28 U.S.C. § 2254(b)(2).) Of course, the greatest efficiencies to be gained by natural application of the federal limitations period are achieved when belatedly presented claims are not permitted to make the federal proceeding more protracted and complicated than Congress permitted.[5]

7. CAP briefly argues, for the first time, that the shell/defer artifice is not just a "reasonabl[e]" solution to the problem of delayed counsel appointments (Response at 5-6), but something to which prisoners are *constitutionally entitled*. CAP writes:

> 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 [before the federal limitations period begins to run] 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.

(*Id.* at 11.)

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[5] CAP hopes to cast doubt on whether prisoners' timely resort to the procedures prescribed by AEDPA will actually expedite the course of postconviction review, noting that "it may be months, or years, before federal habeas corpus counsel is appointed to represent petitioner." (Response at 7.) But such delays, even if they were to actually occur, would negate only minimally, if at all, the principal benefit achieved by a filing deadline. At any rate, our experience in at least three of the four Federal Districts in California shows that federal counsel is typically appointed shortly after a prisoner so requests; indeed, in the Central District (which covers Orange County, where Morgan's conviction arose), appointments are most commonly made within just a few days. To be sure, appointments are generally made far less speedily in the Northern District (the only District where, as we understand it, CAP continues to have any significant role in the counsel-selection process), but why CAP thinks it instructive to focus on this peculiarity is unclear.

This theory fails, as any prospect of error is completely speculative, and that of prejudice altogether impossible.

According to CAP's description of events, it is the *federal statute of limitations*—a restriction on federal litigation imposed not by this Court, but by Congress—that (except as to those cases governed by Chapter 154[6]) "disadvantages" prisoners who will have failed to file a counsel-assisted state petition before finding themselves compelled by the federal statute of limitations to file in federal court. Because the "injury" CAP hypothesizes—the relatively "disadvantageous" application of the federal limitations period—will be inflicted, if at all, by a future ruling of a federal court applying a federal statute, it is to the *federal* courts that CAP's constitutional concerns must be addressed if and when the supposed injury ever actually occurs. (See generally *Ferguson v. Palmeteer* (9th Cir. 2003) 321 F.3d 820, 823, cited and quoted at length in PSB at 21, but ignored in CAP's Response.)

For present purposes, it is sufficient to note that CAP's theory is fatally speculative. First of all, because habeas "is not a device for investigating possible claims but a means for vindicating actual claims" (*People v. Gonzalez* , *supra*, 51 Cal.3d at p. 1179), there is no basis for assuming that any efforts Morgan's future counsel expends on state collateral "investigation" will "develop" any claims at all, let alone any suitable for inclusion in a later-filed federal petition. Thus, there is no basis for assuming Morgan currently lacks, or will lack as the applicable deadline

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[6] As we have noted (PSB at 20 fn.6), the limitations period prescribed in Chapter 154 (unlike the general limitations period currently applicable to Morgan) will not apply to cases, even in Chapter 154-qualified jurisdictions, if counsel-assisted state collateral review had not actually been provided.

approaches, the ability to present the "fullest" federal petition appropriate to his circumstances. After all, Morgan has already had an appeal in which his counsel filed a 264-page opening brief. Moreover, because the federal limitations period runs for one year "from the latest of" four different dates (one of which is the date on which the judgment became final on direct review (28 U.S.C. § 2244(d)(1)(A) - (D)), it is not possible to assess which, if any, future claims will be timely until those claims themselves, as well as the circumstances surrounding the timing of their presentation in federal court, are revealed. Furthermore, the limitations period is subject to tolling not only for legitimate exhaustion efforts pursuant to statute (28 U.S.C. § 2244(d)(2)), but also, it is widely assumed, for equitable reasons (*Lawrence v. Florida* (2007) 549 U.S. 327, 335-336). Morgan having not yet pursued either avenue, it is simply impossible to know precisely when the federal limitations period will expire. In short, the federal limitations period has assuredly inflicted no "injury" to Morgan up to this point, and there is no reason to assume that it will ever actually operate to his "disadvantage" in the manner he hypothesizes. In all events, neither CAP nor Morgan himself is entitled to explore and resolve these uncertainties "in anticipation of seeking habeas so that he will be better able to know, for example, the time limits that govern the habeas action." (*Calderon v. Ashmus* (1998) 523 U.S. 740, 746; *id.* at p. 748 [any risk associated with resolving procedural uncertainties surrounding the adjudication of federal habeas claim in the ordinary course—as they actually present themselves—"is no different from risks associated with choices commonly faced by litigants"].)[7]

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[7] CAP expresses concern over the "stance" the People will take in federal court. (Response at 9-12, 16.) Ideally, of course, there should be little difference between our "stance" and what the law provides. Once CAP comes to understand this, it likely will also realize there is nothing "myopic" about our focus (*id.* at 10), or "untoward" (*id.* at 11) and

(continued...)

To the extent CAP might be understood to argue that this Court must overhaul state habeas practice in order to "pre-empt" a constitutional violation by the federal judicial officers, the theory, no less than the one examined above, rests on multiple unfounded factual assumptions about the course of future events. This leaves CAP's argument even less amenable to present adjudication in this Court than it would be in federal court. In that regard, we note how CAP's most outlandish notions—which have state and federal judiciaries "saving" *each other* from unconstitutional behavior—are nothing if not rigorously symmetrical, and therefore equally incongruent with comity. In all events, the critical *legal* assumption underlying every variant of CAP's argument—that state and federal law are "incompatible" unless construed to require serial delays of maximum duration—is wholly meritless. (See generally *Ferguson v. Palmeteer*, *supra*, 321 F.3d at p. 823 ["[E]every Oregon prisoner is free to use the full two years of Oregon's longer statute of limitations. If, however, he also seeks federal relief, he must conform his petition to the federal rules."].)

In the end, no inmates will ever suffer any constitutionally cognizable form of prejudice because they were not appointed state habeas counsel until after the federal limitations period started to run, or even until after it expired. To be sure, the timing of state habeas counsel's appointment could very well affect the number and complexity of claims

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"unseemly" (*id.* at 12) about the natural application of federal law. CAP should also take considerable comfort in knowing that federal law deals very sensibly and charitably with litigants who have comported themselves mistakenly, but while believing in good faith that they were following proper procedures. (E.g., *Harris v. Carter* (9th Cir. 2008) 515 F.3d 1051, 1056, discussing *Pliler v. Ford* (2004) 542 U.S. 225.) The availability of equitable relief to those who may have innocently erred *in the past*, however, provides no justification for failing to correct and prevent *continuing* error.

that might be "developed" before the federal deadline expires, and any claims not "developed" until thereafter might well be time-barred in federal court. But regardless of when appointment of state counsel occurs, this Court, we note again, will have an unencumbered opportunity to consider every claim that any inmate could ever hope to present to a federal court. If any such claim is meritorious, this Court will grant relief, in which event it would be academic whether that same claim could have been considered in federal court. On the other hand, any claim on which this Court were to deny relief would be, by definition, meritless, in which event the "lost opportunity" to present such a claim later to a federal court could not be "prejudicial." One can conclude otherwise only by assuming that this Court's will have erred in its disposition. We reject, as we must, any such assumption. (See *ante*, at pp. 2-4.)

8. Finally, we must respond to CAP's suggestion that the People should not be heard to complain about the shell ruse because we failed to "work together" with "the defense bar and the courts" to fashion some alternative solution to the problem that shells were purportedly invented to cure. (Response at 5-6.) By expressing the depth of our opposition now, CAP also argues, the People have "effectively removed" themselves "from the discourse on how to accommodate the competing interests at issue here." (Response at 3.)

As CAP well knows, however, the People were never invited to participate in whatever "discourse" might have convinced CAP and others to resort to shells, although we certainly registered our disapproval of them as soon as they started appearing in 2002. The People's efforts to "engage" immediately on the matter were, as CAP delights in recounting (Response at 3 fn.1), summarily rebuffed. While we remain profoundly disappointed that the dysfunctional situation continued to deteriorate so severely over the ensuing seven years, we are both grateful for the opportunity created by the

Court's order of April 29, 2009, and confident the Court has not directed us to state our views on a matter we have forfeited our right to address.

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Dated: July 29, 2009

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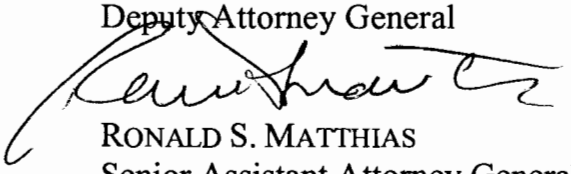

RONALD S. MATTHIAS
Senior Assistant Attorney General
Attorneys for Respondent and People of the State of California, Real Party in Interest

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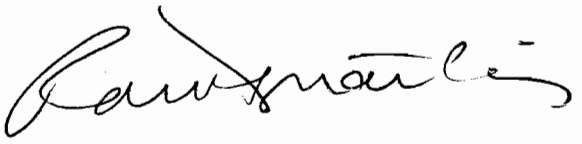
CERTIFICATE OF COMPLIANCE

I certify that the attached **PEOPLE'S SUPPLEMENTAL REPLY BRIEF** uses a 13-point Times New Roman font and contains 4290 words.

Dated: July 29, 2009

EDMUND G. BROWN JR.
Attorney General of California



RONALD S. MATTHIAS
Senior Assistant Attorney General
Attorneys for Respondent and People of the State of California, Real Party in Interest

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Edward Patrick Morgan on Habeas Corpus**
No.: **S162413**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 29, 2009, I served the attached **PEOPLE'S SUPPLEMENTAL REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Michael Millman
Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105
Phone: (415) 495-0500
(*2 copies*)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 29, 2009, at San Francisco, California.

Nelly Guerrero
Declarant

N. Guerrero
Signature

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