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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	Case No. S167100
Samuel Zamudio Jiménez,	Related to Automatic Appeal Case No. S074414
On Habeas Corpus	Los Angeles County Superior Court Case No. VA036217

OPPOSITION TO RESPONDENT'S MOTION FOR ORDER TO SHOW

DEATH PENALTY

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I. INTRODUCTION

On September 29, 2008, Mr. Zamudio filed a Petition for Writ of Habeas Corpus (Petition) in this Court, including a request that the Court defer informal briefing until Mr. Zamudio files an amended petition within three years from the appointment of habeas corpus counsel. On October 20, 2008, respondent filed "People's Motion for Order to Show Cause" (Motion) arguing that Mr. Zamudio's request to defer briefing is improper and that the Petition should be dismissed because it fails to state a prima facie case for relief. Respondent requests that this Court order further briefing, hold oral argument, and issue a written opinion explaining why it is allegedly departing from precedent by allowing Mr. Zamudio, and other

similarly situated petitioners, to defer briefing and amend their petitions within the presumptively timely period. (Motion at 12.)

The procedure Mr. Zamudio has requested is properly sanctioned by this Court. The request for deferred briefing was made in order to preserve Mr. Zamudio's state right to habeas counsel and provide counsel with adequate time to prepare a state habeas petition, while also preserving Mr. Zamudio's right to obtain, if necessary, federal review of his conviction and sentence. Contrary to respondent's protestations, the procedure Mr. Zamudio requests promotes judicial economy and comity, and is consistent with this Court's policies and precedent. Accordingly, respondent's motion for further review of the this Court's practice allowing the filing of initial petitions, deferral of informal briefing, and amendment of petitions within the presumptively timely period should be denied as both unnecessary and without merit.

Also lacking merit is respondent's argument that Mr. Zamudio's claim that he received ineffective assistance of counsel at trial fails to state a prima facie case for relief. Accordingly, respondent's request that this Court issue an order to show cause why the Petition "should not be summarily denied and the proceedings promptly terminated" should be rejected. (Motion at 12.)

II. THE PROCEDURE REQUESTED BY MR. ZAMUDIO IS CONSISTENT WITH THIS COURT'S POLICIES AND PRECEDENTS AND PROMOTES JUDICIAL ECONOMY AND COMITY.

A. The procedure requested by Mr. Zamudio is consistent with this Court's policies and precedent.

Respondent complains that by allowing Mr. Zamudio to defer informal briefing until he amends the Petition within the presumptively

timely period, this Court is departing from its precedent mandating prompt disposition of cases and discouraging piecemeal presentation of claims. (Motion at 2, 5.) Respondent is incorrect because the procedure requested in this case not only effectuates Mr. Zamudio's statutory right to counsel, but also is consistent with this Court's policies in cases with a death judgment and this Court's precedent regarding amended, successive, and delayed petitions. Accordingly, respondent's request that this Court order further briefing and issue a written opinion to clarify an alleged departure from its policy and precedent is unnecessary and wasteful of judicial resources.

This Court's order appointing the Habeas Corpus Resource Center (HCRC) to represent Mr. Zamudio in state habeas proceedings states:

> *Any* "petition for writ of habeas corpus will be presumed to be filed without any substantial delay if it is filed . . . within 36 months" of [June 27, 2007] (Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, timeliness std. 1-1.1), and it will be presumed that *any successive petition filed within that period is justified or excused* (see *In re Clark* (1993) 5 Cal.4th 750, 774-782), in light of this court's delay in appointing habeas corpus/executive clemency counsel on behalf of appellant Samuel Jiminez [sic] Zamudio.

People v. Zamudio, No. S074414, Order filed June 27, 2007 (Appointment Order) (emphasis added).

The procedure requested by Mr. Zamudio is consistent with the approach approved in this Court's order. The Petition filed on September 29, 2008, as well as the amended petition Mr. Zamudio will file on or before June 28, 2010, are presumptively timely pursuant to this Court's order and in line with this Court's policies. *See* Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, timeliness std. 1-1.1. Mr. Zamudio's request to defer briefing until counsel amends

the petition within the presumptively timely period is consistent with this Court's precedent allowing amendment of pleadings to avoid "premature dismissals that would frustrate the ends of justice." *People v. Duvall,* 9 Cal. 4th 464, 482-83 (1995). By requesting that informal briefing be deferred until the Petition is amended within the presumptively timely period, Mr. Zamudio is ensuring that neither this Court nor the State is burdened with piecemeal litigation. Accordingly, the procedure Mr. Zamudio requests promotes judicial economy, notwithstanding respondent's claims to the contrary. (Motion at 2.)

Further, any delay in full presentation of the habeas claims to this Court caused by this procedure is "justified or excused" as explained by this Court by the delay in appointment of habeas and clemency counsel. (Appointment Order, *citing In re Clark*, 5 Cal. 4th 750, 774-82 (1993).) Notably, respondent makes no mention of this Court's explanation in its appointment order that the procedure employed in this case is justified by the delay in appointing counsel. This Court has devised this procedure in recognition of a systemic problem finding post-conviction counsel for capital petitioners. Agreeing with Chief Justice George that "California's death penalty system is dysfunctional," the California Commission on the Fair Administration of Justice found that there were 291 death row inmates in California in June 2008 without habeas corpus counsel who will wait "8-10 years" after being sentenced before such counsel is appointed. California Commission on the Fair Administration of Justice, Final Report p. 114, 122 (June 30, 2008), *available at* http://www.ccfaj.org. Mr. Zamudio was not appointed habeas counsel until nearly nine years after being sentenced to death. In recognition of this systemic crisis and the threat that the delay in appointing counsel poses to Mr. Zamudio's rights to federal review, this Court properly invoked its precedent allowing the filing

of successive petitions where justified.

The Court's approach in this case is also consistent with precedent excusing substantial delay in presenting a claim where, as here, the delay is "*through no fault of the petitioner.*" *In re Sanders*, 21 Cal. 4th 697, 721 (1999). "The state's interest in the finality of its criminal judgments, though strong, does not require that [this Court] accept [the] incongruous, and harsh, result" that respondent urges, and this Court must therefore allow the procedure requested by Mr. Zamudio to prevent any inequitable outcome in his case. *Id.* Because this Court's approach is consistent with the Court's policies and precedent, it is unnecessary to request further briefing and issue a written opinion as respondent requests.[1]

B. The procedure requested by Mr. Zamudio promotes comity and judicial economy, while protecting Mr. Zamudio's right to federal review.

Respondent argues that the procedure Mr. Zamudio requests – deferred informal briefing until the Petition is amended within the presumptively timely period – disserves the State's interests in promoting judicial economy, allowing full factual development of claims and full review of those claims in state court, and effectuating state statutory rights. (Motion at 10-11.) The procedure proposed by Mr. Zamudio promotes the very interests respondent claims it disserves.

The procedure Mr. Zamudio requests effectuates his statutory right to counsel. *See* Cal. Gov't Code § 68662 (2008) (stating that this Court must "offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings. . . ."). The provision of counsel in postconviction cases "promotes the state's

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[1] In addition, plenary consideration of the issue in this case is unnecessary as the issue has been fully briefed in *In re Morgan*, No. S162413, which is pending in this Court.

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 [this Court] their habeas corpus claims." *In re Barnett*, 31 Cal. 4th 466, 475 (2003). In cases such as Mr. Zamudio's in which briefing on the direct appeal has been completed prior to the appointment of state habeas counsel, the habeas petitioner is permitted a period of thirty-six months in which to file a presumptively timely state habeas petition. *See* Supreme Court Policies Regarding Cases Arising from Judgments of Death, policy 3, timeliness std. 1-1.1. By allowing Mr. Zamudio to defer informal briefing until the Petition is amended within the presumptively timely period, this Court provides counsel with a "reasonably adequate opportunity" to fully develop and present the claims in this Court. *Barnett*, 31 Cal. 4th at 475.

Mr. Zamudio has requested this procedure to resolve the potential conflict between the statute of limitations in federal court and this Court's timeliness policies. In federal court, Mr. Zamudio is subject to the statute of limitations imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) for filing his federal habeas corpus petition. Under AEDPA, Mr. Zamudio must file his federal habeas corpus petition either (1) within one year following the date on which judgment on the direct appeal becomes final, *see* 28 U.S.C. § 2244(d)(1) (2008), or (2) within 180 days after final state court affirmance of the conviction and sentence on direct review if the state successfully argues that Chapter 154 of the AEDPA applies to his case, *see id.* § 2263(a). The limitations period is tolled for the period "during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

In Mr. Zamudio's case, the federal statute of limitations will begin to

run upon the conclusion of the direct appeal unless this Court finds that the Petition Mr. Zamudio filed on September 29, 2008, was properly filed and defers informal briefing until the Petition is amended within the presumptively timely period. If this Court instead dismisses the Petition and disallows informal briefing and amendment of the Petition, as respondent requests, one of three improper results would obtain:

- If Mr. Zamudio chooses to avail himself of his state rights to counsel and to at least three years in which to prepare his state habeas corpus petition, the federal statute of limitations would run before he could file an exhausted federal petition, and he would be denied the right to review of his claims in federal court. *See id.* §§ 2244(d)(1), 2263(a); or
- If Mr. Zamudio chooses to avail himself of his right to federal review of his claims by exhausting his state claims within the federal limitations period, he would be deprived both of his right to counsel and his right to at least three years in which to prepare his state habeas corpus petition. *See In re Sanders*, 21 Cal. 4th 697, 717-19 (1999); or
- If Mr. Zamudio chooses to avail himself of his right to federal review of his claims before exhausting his state claims, he would be forced to enter federal court before his habeas claims had been presented to this Court, in violation of the federal policy favoring the consideration of constitutional claims in the first instance by the state courts. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) (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").

To address this dilemma, and to afford Mr. Zamudio and others in a similar procedural posture their statutory right to counsel in state court and a reasonable opportunity to develop claims without endangering their right to federal review, this Court has permitted such petitioners to file an initial petition and defer informal briefing until the petition is amended within the presumptively timely period.[2] This Court aptly explained the rationale for doing so in one such case as follows:

> The April 12, 2006, order, and the present one, are made 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).

In re Carmen Lee Ward, No. S142694 (order filed 7/03/2007). Respondent's argument that these interests are not served by the process Mr. Zamudio requests thus has no merit.

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[2] Respondent is mistaken in arguing that the procedure Mr. Zamudio requests will not preserve his rights to federal review. (Motion at 3.) This Court's clear and explicit indication presuming the timeliness of any petition or successive petition filed by Mr. Zamudio within the thirty-six month period after appointment of habeas counsel establishes that Mr. Zamudio's initial petition will toll the federal statute of limitations. *See Carey v. Saffold*, 536 U.S. 214, 226 (2002) (California Supreme Court's clear ruling as to the timeliness of an application for review is the "end of the matter", i.e. governs the interpretation of the tolling provision of the federal statute); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 413-16 (2005) (same); *cf. Evans v. Chavis*, 546 U.S. 126, 198 (2006) (stating that the federal courts must determine what the California Supreme Court would have held with respect to timeliness "in the absence of (1) clear direction or explanation . . . or clear indication that a particular request for appellate review was timely or untimely . . . ").

Mr. Zamudio and others similarly situated are not resorting to "ploys," as respondent terms their efforts to raise meritorious claims in a timely fashion, but are simply attempting to allow the system to work the way it is supposed to work, that is, affording the petitioner state counsel to investigate and prepare a habeas corpus petition to be filed and resolved in state court, so petitioner can proceed to federal court after he has had the benefit of the state court review to which he is entitled and only if the state court, having fairly been presented with an opportunity to address his claims, has rejected them.

The 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." *Saffold*, 536 U.S. at 220, 222. Under the doctrine of comity between state and federal courts, state court proceedings are to be concluded before a petitioner proceeds to federal court. As the United States Supreme Court observed in *Rhines v. Weber*,

> We noted [in *Rose v. Lundy*, 455 U.S. 509 (1982),] 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.

544 U.S. 269, 273-74 (2005). As *Rhines* 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, 102 S.Ct. 1198.

Id. at 276-77 (emphasis added).

Mr. Zamudio did not create the procedural dilemma that his request to defer informal briefing addresses. There is no basis for blaming Mr. Zamudio for "ploys" to evade state law and delay the process where he merely seeks to implement his statutory rights to counsel and an opportunity for one full round of state postconviction review so he can move forward, if necessary, litigating his federal habeas corpus claims in an orderly manner. This problem is absolutely not of Mr. Zamudio's own making, and it would be manifestly unjust to penalize him for it. The procedure requested by Mr. Zamudio serves the interests of this Court and those of Congress and hence should be sanctioned by this Court.

III. MR. ZAMUDIO HAS ESTABLISHED A PRIMA FACIE CASE THAT HE WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND THE SPECIAL CIRCUMSTANCE FINDING BY TRIAL COUNSEL'S PREJUDICIALLY DEFICIENT PERFORMANCE.

In addition to challenging Mr. Zamudio's entitlement to file his initial Petition, respondent complains that Mr. Zamudio's "claims of ineffective assistance [of counsel] are plainly meritless." (Motion at 6.) Respondent's argument in support of this contention ignores this Court's pleading requirements at this stage of the litigation, well-established state and federal law on ineffective assistance of counsel, and the specific facts alleged by Mr. Zamudio in the Petition.

A. Applicable legal standards.

The Sixth Amendment to the United States Constitution and article I,

section 15 of the California Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *In re Fields*, 51 Cal. 3d 1063, 1069 (1990). The right is "not to some bare assistance but rather to *effective* assistance." *People v. Ledesma*, 43 Cal. 3d 171, 215 (1987). A defendant is entitled to the reasonably competent assistance of an attorney acting as a diligent and conscientious advocate. *Id.*; *In re Cordero*, 46 Cal. 3d 161, 180 (1988).

Under the Sixth Amendment, "a defendant can reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." *Ledesma*, 43 Cal. 3d at 215. Thus, "if counsel fails to make such a decision, his action - no matter how unobjectionable in the abstract - is professionally deficient." *Id.* (citing *In re Hall*, 30 Cal. 3d 408, 426 (1980), and *People v. Frierson*, 25 Cal. 3d 142, 166).

"[D]eferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. '[D]eference is not abdication' [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions." *Cordero*, 46 Cal. 3d at 180 (quoting *Ledesma*, 43 Cal. 3d at 217). A tactical yet unreasonable decision by counsel falls below the standard of performance mandated by the Sixth Amendment. *U.S. v. Tucker*, 716 F.2d 576, 586 (9th Cir. 1983). An attorney's performance is not immune from judicial scrutiny simply because it is labeled "strategy." "Certain defense strategies may be so ill-chosen that they may render counsel's overall representation constitutionally defective." *Id.*

Deficient performance is demonstrated by a showing that "counsel's

representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The United States Supreme Court has "long referred" to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines) as "guides to determining what is reasonable." *Strickland*, 466 U.S. at 688; *see also Rompilla v. Beard*, 545 U.S. 374, 387 and n.7 (2005) (referring to ABA Guidelines as a measure of reasonableness); *In re Lucas*, 33 Cal. 4th 682, 723 (2004) (same). The ABA Guidelines specifically provide that "[c]ounsel should consider, when deciding whether to object to legal error and whether to assert on the record a position regarding any procedure or ruling, that post judgment review in the event of conviction and sentence is likely, and counsel should take steps where appropriate to preserve, on all applicable state and Federal grounds, any given question for review." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.7.3 (1989); *see also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.8, 31 Hofstra L. Rev. 913, 1028-29 (2003) ("[c]ounsel . . . should 1) present [a] claim as forcefully as possible . . . and 2) ensure that a full record is made of all legal proceedings in connection with the claim"; commentary notes that "this Guideline is based . . . on Guideline 11.7.3 ('Objection to Error and Preservation of Issues for Post Judgment Review')").

A defendant is prejudiced by his counsel's negligent performance if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *In re Marquez*, 1 Cal. 4th 584, 603 (1992); *People v. Valencia*, 146 Cal. App. 4th 92, 101 (6th Dist. 2006). Under this standard, "[t]he result of a proceeding can be rendered

unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 694.

In his Petition, Mr. Zamudio pled facts sufficient to demonstrate that counsel's representation during pretrial proceedings and the guilt phase of his trial "fell below an objective standard of reasonableness," to his prejudice. *Strickland*, 466 U.S. at 688. But for the many instances of counsel's deficient performance, assessed alone or cumulatively, there is a "reasonable probability" Mr. Zamudio would not have been convicted of first degree murder and that the special circumstances would not have been found true. *Williams v. Taylor*, 529 U.S. 362, 394-95 (2000); *Alcala v. Woodford*, 334 F.3d 862, 872 (9th Cir. 2003). Counsel's errors in the guilt phase also prejudiced Mr. Zamudio in the penalty phase by predisposing the jury to sentence Mr. Zamudio to death.

B. No reasonable tactical purpose justifies trial counsel's errors and omissions.

Respondent contends that Mr. Zamudio has failed to state a prima facie case of ineffective assistance of counsel because he "fails to provide a declaration from counsel that explains why he did not object to the allegedly improper comments." (Motion at 7.) Respondent's contention is defective for several reasons.

First, respondent has not cited, and cannot cite, authority for the proposition that Mr. Zamudio is required either to plead or to prove the absence of strategic decision-making on the part of trial counsel, because such a requirement does not exist. In order to make a prima facie case of ineffective assistance of counsel a petitioner need only plead facts demonstrating that counsel's representation fell below an objective standard of reasonableness. As explained by the United States Supreme Court, "A

convicted defendant making a claim of ineffective assistance must identify the *acts or omissions of counsel* that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *See Strickland*, 466 U.S. at 690 (emphasis added).

Second, respondent cites no authority for the novel proposition that Mr. Zamudio is required *at this stage of the proceedings* to submit a declaration from trial counsel detailing his reasons for every decision he made in the case. At this stage of the proceedings, Mr. Zamudio is required only to plead a prima facie case for his ineffective assistance of counsel claims and produce reasonably available documentary evidence in support thereof. *See People v. Duvall*, 9 Cal. 4th 464, 474-75 (1995). Mr. Zamudio is not required at this stage to *prove* his detailed factual allegations, or to prove the thought processes behind every decision (or non-decision) that counsel made at trial. *See People v. Pope*, 23 Cal. 3d 412, 426 (1979) ("in habeas corpus proceedings, there is an opportunity *in an evidentiary hearing* to have trial counsel fully describe his or her reasons for acting or failing to act in the manner complained of") (emphasis added).

Third, respondent's argument is flawed to the extent that it suggests that a declaration from trial counsel specifically stating counsel's "reasons for acting or failing to act" is the only proper method of establishing whether counsel's conduct was *objectively* reasonable under the circumstances. The United States Supreme Court and this Court often discount a trial counsel's stated, subjective reasons for his or her conduct where circumstances indicate that such conduct was objectively unreasonable. *See, e.g., Burns v. Gammon*, 260 F.3d 892, 897 (8th Cir. 2001) ("No sound trial strategy could include failing to make a

constitutional objection to a prosecutor's improper comment concerning [petitioner's] rights to a jury trial and to confront witnesses"); *Mason v. Scully*, 16 F.3d 38, 44 (2d Cir. 1994) (rejecting trial counsel's statement that his failure to object to improper hearsay testimony was tactical because counsel never offered any explanation to support his contention). In Mr. Zamudio's case, counsel's failure to object to the multiple instances of prosecutorial misconduct was objectively unreasonable notwithstanding any subjective reasons that counsel may or may not have had for failing to do so.

Fourth, in many instances, including many instances in this case, no explanation of strategic decision-making may be offered by counsel for the simple reason that no decision-making process preceded the offending act or omission. *See, e.g., Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001) ("[i]t is difficult to imagine, nor could counsel provide at his deposition, a tactical reason for failing to investigate and present the substantial mitigating evidence available").

As noted above, Mr. Zamudio's burden at this stage of the proceedings is to present factual allegations, and this Court's responsibility is to "ask[] whether, assuming the petition's factual allegations are true, [Mr. Zamudio] would be entitled to relief." *People v. Duvall*, 9 Cal. 4th at 474-75. Respondent argues that Mr. Zamudio has not met his burden, suggesting that "the record sheds no light on why counsel acted or failed to act in the manner challenged" (Motion at 6, citing *People v. Salcido*, 44 Cal. 4th 93, 170 (2008)), and then contradictorily presenting this Court with a laundry list of speculative, hypothetical rationales trial counsel "*may* have had" (Motion at 8, emphasis added) for failing to object to the numerous instances of misconduct by the prosecutor.

It is impermissible for respondent or this Court to make up reasons

for counsel's actions and omissions. *People v. Lewis*, 25 Cal. 4th 610, 674-75 (2001) ("it is inappropriate for a reviewing court to speculate about the tactical bases for counsel's conduct at trial"); *People v. Wilson*, 3 Cal. 4th 926, 936 (1992) ("in general, it is inappropriate for an appellate court to speculate as to the existence or nonexistence of a tactical basis for a defense attorney's course of conduct when the record on appeal does not illuminate the basis for the attorney's challenged acts or omissions"); *Alcala v. Woodford*, 334 F.3d at 871 ("We will not assume facts not in the record in order to manufacture a reasonable strategic decision for [petitioner's] trial counsel."); *U.S. v. Kizzee*, 150 F.3d 497, 502-03 (5th Cir. 1998) (court declines to "speculate as to [counsel's] alleged acts and omissions"); *Adams v. Bradshaw*, 484 F. Supp. 2d 753, 772-73 (2007) ("To ascertain whether counsel's performance prejudiced a criminal proceeding, a reviewing court does not speculate whether a different strategy might have been more successful, but a court must 'focus on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'") (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)).

Respondent provides this Court with its speculative list of "reasons" in order to persuade the Court that *some* satisfactory purpose could have been behind trial counsel's failures. (*See* Motion at 8.) But the rationales proposed by respondent are neither satisfactory nor reasonable, even if they could be credibly imputed to trial counsel, which, as noted above, they cannot. The "reasons" postulated by respondent are not *reasonable* in light of the evidence presented against Mr. Zamudio and the fact that trial counsel's failures to object to the prosecutor's misconduct escalated the likelihood that the jury would misconstrue the evidence and the law. The fact that these "reasons" may have justified the rejection of ineffective

assistance of counsel claims in other cases has no bearing on the ultimate conclusions to be drawn in Mr. Zamudio's case.

For example, respondent's conjecture that trial counsel "*might have believed* that the defense would be benefitted [sic] by the prosecutor's *inability* to prove facts that he relied upon in his opening statement" (Motion at 8, first emphasis added), is not only not supported with citation to authority, but also is wholly unexplained. Respondent's supposition that counsel "*might have believed* that it was a more effective strategy to address any misstatements of the evidence or law during his own argument rather than objecting during the prosecutor's argument" (*id.*, citing to *People v. Morales*, 5 Cal. App. 4th 917, 929 (1992), emphasis added) has no application to Mr. Zamudio's case because counsel did not in fact clarify the law and evidence during his own argument. Respondent's citation to *People v. Welch*, 20 Cal. 4th 701, 753-54 (1999), to support the argument that "counsel *might have believed* that objections to any inflammatory remarks would not have been well-received by the jurors" (Motion at 8, emphasis added), is also inapposite. In *Welch*, this Court accepted defense counsel's express representation that his failure to object to the prosecutor's reference about the victims' family in closing argument to a statement made by defense counsel himself was "a matter of trial strategy." *Welch*, 20 Cal. 4th at 753-54. The misleading and inflammatory statements the prosecutor made in Mr. Zamudio's case to which defense counsel failed to object ranged from gross exaggerations of the inculpatory nature of multiple items of physical evidence to flagrant mischaracterizations of law that could not have but misled the jury to conclude that the prosecution's burden of proof of the elements of the crimes charged was significantly less than that legally required. Given the magnitude of the misconduct, it was objectively unreasonable for counsel to forego objection.

Respondent also complains that Mr. Zamudio has failed to demonstrate that trial counsel's deficient performance was prejudicial to him. In his Petition, Mr. Zamudio presented abundant factual allegations documenting the manner in which trial counsel's failures to object to the prosecutor's misconduct during pretrial and guilt phase proceedings rendered the proceedings unfair. *Strickland*, 466 U.S. at 694. Respondent's recitation of "compelling evidence of [Mr. Zamudio's] guilt" (Motion at 9) is itself misleading, as it includes demonstrably false information, such as that Mr. Zamudio's pink slip was missing from the Bensons' home after they were killed. Irrespective of respondent's reference to false information and considering only the evidence presented at trial, respondent's conclusion that Mr. Zamudio has "failed to state a prima facie case of prejudice" (*id.*) due to this evidence has no merit. Mr. Zamudio has demonstrated here and in the Petition that "[t]he result of [his] proceeding [was] rendered unreliable, and hence the proceeding itself unfair," *Strickland*, 466 U.S. at 694, because there is a reasonable probability that absent counsel's unreasonable failure to object to the prosecutor's misconduct "the factfinder would have had a reasonable doubt respecting guilt," *id.* at 695.

IV. CONCLUSION

There being neither need nor justification for respondent's motion, it should be denied.

Dated: November 3, 2008

Respectfully Submitted,

Habeas Corpus Resource Center

By: CRISTINA BORDÉ

Counsel for Samuel Zamudio Jimenez

PROOF OF SERVICE

I, Carl Gibbs, declare that I am a citizen of the United States, employed in the City and County of San Francisco, I am over the age of 18 years and not a party to this action or cause. My current business address is 303 Second Street, Suite 400 South Tower, San Francisco, California 94107.

On November 3, 2008, I served true copies of the following document:

Opposition to Respondent's Motion for Order to Show Cause

by enclosing such document in an envelope and depositing the sealed envelope with the United States Postal Service with postage fully prepaid, and addressed as follows:

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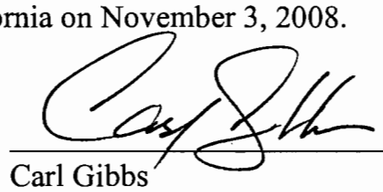
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Service for Samuel Jimenez Zamudio (P-14700) will be completed by utilizing the 30-day post-filing period within which we will hand deliver a copy to him at San Quentin State Prison.

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on November 3, 2008.



Carl Gibbs