IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Samuel Zamudio Jimenez, On Habeas Corpus	Case No. S167100 Related to Automatic Appeal Case No. S034414 Los Angeles County Superior Court Case No. VA036217

PETITIONER'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUTES

CALIFORNIA STATUTES

OTHER STATE STATUTES

OTHER AUTHORITIES

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PETITIONER'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MOTION FOR ORDER TO SHOW CAUSE

I. INTRODUCTION

On September 29, 2008, Mr. Zamudio filed a Petition for Writ of Habeas Corpus 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. Mr. Zamudio filed an Opposition to respondent's motion on November 3, 2008, and respondent filed a Reply to the Opposition on

November 24, 2008.[1] On April 29, 2009, this Court ordered respondent to file a brief on or before May 29, 2009, "addressing why, under applicable principles of California law, the court should deny petitioner's requests to defer informal briefing on the petition filed on September 29, 2008, and to stay further proceedings in this matter until June 28, 2010, or the filing of an amended petition for writ of habeas corpus, whichever is earlier, and why the court instead should summarily deny the petition." (Order in Relation to the Motion for Order to Show Cause, hereinafter "Order.") Respondent filed a Supplemental Brief on May 29, 2009. This Court ordered petitioner to serve and file a response brief within 30 days of service of the Attorney General's brief. (Order.) Pursuant to California Code of Civil Procedure section 1013, this Response to Respondent's Supplemental Brief is timely filed.[2]

The procedure Mr. Zamudio requests, and which this Court has endorsed for over seven years, is a predictable, clear, and sensible manner by which to ensure that Mr. Zamudio has an adequate opportunity to fully develop and present "all potentially meritorious claims" for relief in this Court, *In re Sanders*, 21 Cal. 4th 697, 713 (1999); that this Court is able to

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[1] The dates provided for many of these filings in respondent's Supplemental Brief are incorrect. Respondent also incorrectly states that this Court appointed the HCRC to represent Mr. Zamudio "more than a year" prior to the date on which this Court affirmed Mr. Zamudio's capital conviction and sentence; the HCRC was appointed only ten months prior to this Court's decision on appeal. (Supp. Brief at 3.)

[2] California Code of Civil Procedure section 1013 provides, in relevant part, "[A]ny period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the place of address and the place of mailing is within the State of California." Cal. Civ. Proc. § 1013(a) (2006).

evaluate and rule on those claims; and that Mr. Zamudio preserves his rights to federal review in the event this Court denies him relief.[3]

It is difficult to understand respondent's outraged reaction to this reasonable approach to resolve the problems Mr. Zamudio and other capital prisoners in his position face as a result of the severe shortage of counsel available to represent them. Through vitriol and melodrama, respondent attempts to persuade this Court that Mr. Zamudio's lack of fault regarding the procedural posture of his case is irrelevant, because the public has no interest in ensuring that his conviction and sentence comport with constitutional requirements. (*See* Supp. Brief at 2 (arguing that initial petitions "provide[] no public benefit at all"); *id.* at 3 ("[s]hells . . . pose a grave threat to the interests of California citizens, and this Court should not countenance capital murderers' resort to that ploy in any manner . . .").)

Respondent's sole objective in persuading this Court to abandon the procedure it has followed in 37 cases since 2001, when the first capital prisoner in California to find himself in this predicament filed an initial petition in this Court,[4] is to obtain a strategic litigation advantage over indigent capital petitioners. Indeed, respondent seeks to use Mr. Zamudio's

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[3] In the Supplemental Brief, respondent asserts that capital prisoners are attempting to deceive the Court by concealing the "true purpose" behind the filing of initial petitions. (Supp. Brief at 23; *see also id.* at 1 and 3 (referring to Mr. Zamudio's initial petition as a "contrivance," a "ruse," and a "ploy"); *id.* at 12 n. 3 (stating that "HCRC [is] devot[ed] to hide-the-ball litigation tactics").) In fact, Mr. Zamudio, and all of the other capital petitioners who have filed initial petitions and requested that this Court defer informal briefing and resolution of their petitions until they are amended, have declared expressly that they seek to avail themselves of the time period this Court affords so that they may adequately develop their claims for review, first by this Court, *and, only if necessary*, by the federal courts.

[4] *In re Taylor*, California Supreme Court Case No. S102652.

misfortune (and that same misfortune of other similarly situated capital petitioners) of delayed appointment of habeas counsel *to achieve the complete elimination of Mr. Zamudio's right to federal review.* Respondent goes so far as to declare, "[Mr. Zamudio] does not deserve to be rescued from that fate, and this Court should not try." (Supp. Brief at 28.)

Respondent's argument that the Court should abandon this practice relies on the following flawed premises:

1. This Court has no interest whatsoever in the review by federal courts of claims of denials of capital petitioners' federal constitutional rights;
2. Review of claims of denials of state and federal rights even by this Court is unnecessary, is provided to capital prisoners only by grace, and provides a windfall to capital prisoners (*see, e.g.*, Supp. Brief at 26 n. 19 ("[H]ad the state never elected to give death row inmates collateral counsel and accord a presumption of timeliness to petitions filed within 36 months of counsel's appointment, prisoners would have not so much as an *argument* for attempting to circumvent the more generous *one*-year limitations period through the shell/defer artifice") (emphasis in original);
3. Because even state habeas review is a *bonus* to capital prisoners, federal review is a premium that should be avoided if at all possible;
4. The intent of federal legislators in enacting the Antiterrorism and Effective Death Penalty Act (AEDPA)

in 1996 was to force capital prisoners in non-Chapter 154[5] states to file fully developed habeas petitions in *state* court within the one year statute of limitations set forth in the *federal* statute, notwithstanding conflicting state timeliness rules; and

5. If capital prisoners insist upon federal review, they must be prepared to sacrifice the development and presentation of all potentially meritorious claims to both this Court and the federal courts and present only the limited claims they are able to develop, even without counsel, within the federal limitations period, regardless of the fact that this Court has recognized that three years is a more appropriate period in which to develop and present these claims.

As set forth below, these premises are demonstrably faulty. Respondent's arguments do not accurately reflect this Court's interest regarding the role of federal review in capital cases, the state of prevailing law in California regarding the presentation and resolution of habeas claims in capital cases, the value to the public of full and fair development of constitutional claims for relief on behalf of capital prisoners, or the intent of federal legislators in enacting the AEDPA.

Furthermore, the course that respondent proposes – either that this Court dismiss or petitioners withdraw initial petitions, or that the Court

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[5] The Antiterrorism and Effective Death Penalty Act of 1996 added Chapter 154 to Title 28 of the United States Code, which provides expedited procedures and limitations on federal review in states that guarantee death-sentenced prisoners the appointment of competent counsel and the litigation resources necessary to develop constitutional claims in state habeas proceedings. *See, e.g.*, *Ashmus v. Woodford*, 202 F.3d 1160 (9th Cir. 2000) (rejecting respondent's attempts to have California qualify pursuant to Chapter 154).

immediately adjudicate the initial petitions – will have catastrophic and inequitable results for Mr. Zamudio and other similarly situated capital prisoners. For these reasons, this Court should continue to permit Mr. Zamudio and others in his position to file initial petitions to toll the federal statute of limitations; defer informal briefing until these petitioners file amended petitions within the presumptively timely period, or until the timeliness period has expired, whichever is earlier; and rule that these initial petitions are properly filed under state law.

II. DRASTIC AND UNJUST CONSEQUENCES WILL RESULT IF THIS COURT ABANDONS ITS PRUDENT AND WELL-ESTABLISHED PRACTICE OF ALLOWING PETITIONERS TO FILE INITIAL PETITIONS AND DEFERRING RESOLUTION UNTIL THE PETITIONS ARE AMENDED WITHIN THE PRESUMPTIVELY TIMELY PERIOD.

This Court's abandonment of its current practice of allowing petitioners to file initial petitions with leave to amend during the timeliness period would have devastating results not only for the nearly 40 capital prisoners who have already filed initial petitions – some of whom still lack the benefit of appointed habeas corpus counsel – but also for the approximately 45 capital prisoners whose direct appeals will become final within the next year and for whom no habeas counsel has been appointed. If the Court does abandon this prudent and well-established procedure, the number of capital prisoners in this position undoubtedly will increase substantially. A greater number of attorneys will be unwilling to accept habeas appointments, considering it an ethical violation to accept appointment knowing that they will be hamstrung and unable to represent their clients effectively – as from the outset they will have insufficient time to adequately develop and present all potentially meritorious claims for

relief, as this Court's rules and precedents require.[6] Cal. Rules of Prof'l Conduct, R. 3-110 (2009) ("A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."); *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 967-69 (2003) (Guideline 6.1 and commentary thereto); ABA Model Rules of Prof'l Conduct, R. 1.1 (2009) ("Competent representation requires the legal knowledge, skill, thoroughness and *preparation* reasonably necessary for the representation." (emphasis added)).[7]

The delay resulting from creating additional disincentives for counsel to accept appointments will prove to be a substantial problem, and the consequences for capital habeas petitioners resulting from this Court's adoption of respondent's position will be catastrophic. If this Court dismisses or rules untimely the initial petitions that have been filed and disallows resolution of the petitions until after their amendment, the following will result for petitioners who have filed initial petitions, should this Court deny habeas corpus relief:

1. For petitioners in whose cases at least one year has passed since direct appeal became final, and for whom habeas counsel has not yet been appointed, including Martin Mendoza and Edward Morgan, respondent will urge the

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[6] Supreme Ct. Policies Regarding Cases Arising From Judgments of Death (hereinafter "Supreme Ct. Policies"), policy 3, timeliness std. 1-1.1; *In re Sanders*, 21 Cal. 4th at 713.

[7] Contrary to respondent's concern that the Court's current practice will further delay the appointment of state habeas counsel "beyond when that event would most likely occur if the procedure were disallowed" (People's Reply to Opposition for Motion for Order to Show Cause, *In re Morgan*, Case No. S162413, at 10 n.3), this practice ensures that qualified attorneys actually will be willing to accept appointment in these cases at all.

federal courts to preclude *entirely* any habeas corpus review of their constitutional claims.[8]

2. For petitioners in whose cases the direct appeal is already final and for whom no habeas counsel has yet been appointed – and for whom it is likely that no habeas counsel will be appointed prior to the expiration of the one-year federal statute of limitations – including Spencer Brasure, Gerardo Romero, Alfredo Valencia, Michael Whisenhunt, and Andre Wilson, respondent will urge the federal courts to preclude *entirely* any habeas corpus review of their constitutional claims.
3. For petitioners in whose cases the direct appeal became final prior to or within months following the appointment of habeas counsel, but more than one year ago, including Frank Abilez, Michael Combs, Michael Elliot, Maurice Harris, Danny Horning, Jerry Kennedy, Abelino Manriquez, Robert Maury, Martin Navarette, James Robinson, Prentice Snow, Robert Taylor, and Carmen Ward, respondent will urge the federal courts to preclude *entirely* any habeas corpus review of their constitutional claims *even though they have already filed an amended petition in this Court within the timeliness period afforded to them under state law.*
4. For petitioners in whose cases the direct appeal became

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[8] These petitioners and those identified below will be precluded from filing federal petitions within the one-year federal statute of limitations unless they can prove that "extraordinary circumstances" warrant equitable tolling of the statute. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

final prior to or within months following the appointment of habeas counsel more than one year ago, yet whose time for filing a presumptively timely amended petition has not expired, including Lamar Barnwell, Steven Bell, DeWayne Carey, Joseph Cook, Andrew Lancaster, Fermin Ledesma, Eric Leonard, Cleophus Prince, and Mark Thornton, respondent will urge the federal courts to preclude *entirely* any habeas corpus review of their constitutional claims.

5. For petitioners in whose cases the direct appeal became final less than one year ago, prior to or within months following the appointment of habeas counsel, but in whose cases the one-year period will likely expire prior to the issuance of an opinion in this case, including Mr. Zamudio, Douglas Kelly, Keith Loker, John Mungia, and Paul Watson, respondent will urge the federal courts to preclude *entirely* any habeas corpus review of their constitutional claims unless they have filed amended petitions (albeit based on incomplete investigation and development of potential claims for relief) in this Court prior to the expiration of the one-year statute of limitations.

Respondent urges these inequitable results to penalize these individuals who have relied in good faith upon this Court's endorsement of their filing of initial petitions and continued to develop and present their claims in state court with the understanding that this Court has considered

their initial petitions properly filed.[9] *See, e.g., Schneider v. Delo*, 85 F.3d 335, 339 (8th Cir. 1996) ("The stakes in habeas cases are too high for a game of legal 'gotcha'."). These capital petitioners no longer have any avenue to seek relief in federal courts unless this Court recognizes that their initial petitions were properly filed. While respondent would welcome this disastrous outcome and the scheduling of dozens of executions by default, this Court, and the citizens and voters of California would and should not condone such an unconscionable result.[10]

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[9] The first capital prisoner to file an initial petition in this Court was Robert Taylor, on December 4, 2001. On January 29, 2002, this Court denied respondent's motion to dismiss the initial petition. *In re Taylor*, No. S102652. Mr. Taylor, and all capital prisoners filing initial petitions thereafter, have relied on this Court's prudent ruling in Mr. Taylor's case and in the many subsequent cases in which this Court has affirmatively rejected respondent's objections to these petitions. *See, e.g., In re Manriquez*, No. S141210 (motion to strike or dismiss habeas corpus petition denied, October 25, 2006); *In re Robinson*, No. S141320 (motion to strike or dismiss habeas corpus petition denied, October 25, 2006); *In re Smith*, No. S138147 ("Objection to Document Entitled 'Petition for Writ of Habeas Corpus'" deemed a motion to strike or dismiss the petition for writ of habeas corpus and denied, October 25, 2006; petitioner's motion to defer briefing granted, December 16, 2006); *In re Ward*, No. 142694 (motion to strike or dismiss habeas petition denied, October 25, 2006); *see also In re Cook*, No. S160915 (petitioner's motion to defer briefing granted by amended order, April 14, 2008).

[10] Respondent maintains that "as between (1) a prisoner consumed with avoiding (or at least delaying) execution of his state capital judgment and (2) the Office of the California Attorney General, we trust the Court will never be confused about who speaks for the People's interests." (People's Reply to Opposition to Motion for Order to Show Cause (hereinafter "Reply" at 11.) However, in none of its pleadings objecting to the practice Mr. Zamudio requests has respondent provided a shred of evidence or authority to support the contention that the People of California seek to execute dozens of death row inmates merely because they followed this Court's procedure or eliminate federal review for a large percentage of the death row population of the state.

Furthermore, abandoning the current practice would have devastating effects for unrepresented death row inmates whose convictions and sentence are not yet final on direct appeal but will become so in the near future.[11] The already limited pool of counsel qualified and willing to accept appointment in these cases will shrink appreciably if this Court does not permit sufficient time to develop and present claims in state court while preserving a capital prisoner's right to federal review. As a result, the systemic crisis that this Court has recognized and attempted to remedy will only intensify.

It would be intolerable under the California and federal Constitutions to deprive Mr. Zamudio, and other capital defendants in his position, of the same rights to develop and present potentially meritorious claims for relief in this Court and in federal court that are maintained by other capital defendants who were fortunate enough to be appointed state habeas counsel years before their convictions and sentences on direct appeal became final. The Equal Protection clauses of the California and United States Constitutions require all persons similarly situated to be treated alike. *F.S. Royster Guano Co. v. Commonwealth of Virginia*, 253 U.S. 412, 415 (1920); *In re Lemanuel C.*, 41 Cal. 4th 33, 47 (2007). As California has established a right for habeas review of capital convictions with the assistance of counsel, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *In re Arthur N.*, 36 Cal. App. 3d 935, 939 (1974) (quoting *Rinaldi*). The fact that this Court has been able to find counsel to represent some

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[11] Respondent does not specify what petitioners without state counsel prior to the expiration of the federal statute of limitations should do other than forego federal review entirely.

capital indigent prisoners but not others prior to the litigation and resolution of the direct appeal, for reasons not attributable to the prisoners, provides no basis whatsoever for treating these prisoners differently.

III. THE PROCEDURE ENDORSED BY THIS COURT AND REQUESTED BY MR. ZAMUDIO IS CONSISTENT WITH THIS COURT'S POLICIES AND PRECEDENTS AND DOES NOT REQUIRE AN "OVERHAUL" OF STATE LAW.

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

Respondent complains that Mr. Zamudio is asking this Court to "overhaul" state law and "fashion new exceptions" to California law governing the adjudication of habeas petitions. (Reply at 9 n.6; Supp. Brief at 2.) Mr. Zamudio is doing no such thing. The procedure that Mr. Zamudio requests, and that this Court has pursued for several years, is *not* a deviation from California law, but rather promotes long-standing goals and public principles reflected in this Court's case law, rules, and policies.

The law regarding timely filing and amending of habeas corpus petitions in California is very different from what respondent describes. Respondent continues to complain that by allowing Mr. Zamudio to defer informal briefing and resolution of the petition until he amends it within the period of presumptive timeliness, this Court is departing from its precedent mandating prompt disposition of cases and discouraging piecemeal presentation of claims. Respondent argues that "[n]o prospect for piecemeal litigation existed [ ] until HCRC, in contravention of state habeas procedure, divided claims between the shell and the amended real petition HCRC proposes to file in the future." (Supp. Brief at 21 n.16.) But it is the procedure that respondent requests – the immediate adjudication of Mr. Zamudio's initial petition to be followed by immediate adjudications of any

supplemental or amended petitions filed within the three-year period – not the procedure that Mr. Zamudio requests – the deferral of any briefing by respondent and consideration of the claims by this Court until the amended petition is filed – that would lead to piecemeal litigation.

Furthermore, well-established state habeas procedure recognizes the need for the delayed presentation of claims in certain circumstances, despite respondent's argument to the contrary. (Reply at 3.) This Court has held that "[i]f the petition is delayed because the petitioner is not able to state a prima facie case for relief on all of the bases believed to exist, the delay in seeking habeas corpus relief may be justified when the petition is ultimately filed if the petitioner can demonstrate that (1) he had good reason to believe other meritorious claims existed, and (2) the existence of facts supporting those claims could not with due diligence have been confirmed at an earlier time." *In re Clark*, 5 Cal. 4th 750, 781 (1993); *In re Robbins*, 18 Cal. 4th 779, 806 n.28 (1998). In such a situation, "good cause for delayed presentation of claims can be established [ ] if, during the delay, the petitioner [is] *conducting an ongoing, bona fide investigation* of another claim or claims." *In re Robbins*, 18 Cal. 4th at 806 n.28 (emphasis in original). Such is the situation here where this Court has determined that any delay in presenting Mr. Zamudio's claims within three years of appointment of counsel is justified or excused by this Court's delay in appointing counsel. (*See* Appointment Order, June 27, 2007.)[12] Because

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[12] This Court's Appointment Order expressly permits the filing of successive petitions within the presumptive timeliness period, explaining that this Court's delay in appointing counsel justifies or excuses the delay in the filing of these petitions. This reasoning applies equally to the filing of an amended petition, rather than a successive petition. "The goal [] of the procedures that govern habeas corpus is to provide a framework in which a court can discover the truth and do justice in timely fashion." *People v. Duvall*, 9 Cal. 4th 464, 482 (1995). One reason to permit the filing of an

Mr. Zamudio, and others similarly situated, are diligently conducting an ongoing and bona fide investigation of the claims during those three years, this Court's endorsement of the initial petition and deferred briefing procedure is consistent with its precedent.[13]

Though respondent asserts that the procedure Mr. Zamudio requests does nothing to effectuate his statutory right to counsel pursuant to California Government Code section 68662, because Mr. Zamudio's right to counsel was effectuated with this Court's appointment order (Supp. Brief at 20), respondent fails to acknowledge that Mr. Zamudio's right is

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amended petition is that the provisions of Chapter 154 permit tolling only during the pendency of the first state habeas corpus petition. 28 U.S.C. § 2263(b)(2) (2006).

[13] Respondent repeatedly urges this Court to reject Mr. Zamudio's proposed procedure on the ground that Mr. Zamudio and others in his procedural posture should not be able to reap the benefits of federal tolling because they are not engaged in "genuine and bona fide efforts to exhaust." (*See, e.g.*, Motion at 3; *id.* at 10 ("To secure tolling, however, a prisoner must actively exhaust: the general federal limitations statute confers no tolling for those who merely express their desire to exhaust in the future"); Respondent's Motion for Order to Show Cause at 12, *In re Mendoza*, No. S162563, at 12 (arguing that this procedure "pretend[s] petitioner is exhausting state remedies when he is actually doing *nothing*").) This contention is simply wrong. As this Court has recognized in amending its policies several times to extend the time in which a petition will be presumed to be timely filed, the delay in the appointment of habeas counsel, the large trial and appellate records common to these cases, and their complex nature necessitate significant time and effort. Contrary to respondent's suggestion that these capital prisoners and their counsel are sitting on their hands during the period between the filing of the initial and amended petitions, all are conducting ongoing, bona fide investigations, and making every effort to present only fully developed, potentially meritorious claims to this Court before the expiration of the presumptively timely period for filing a petition. *See In re Sanders*, 21 Cal. 4th at 714 n.9 ("As a result of the adoption of the Supreme Court Policies and the decision in *Clark* [5 Cal. 4th 750], we now find habeas corpus petitions generally are filed in timely fashion in this court.").

meaningless if counsel has insufficient time to develop and present potentially meritorious claims for relief. *See, e.g., People v. Murphy*, 59 Cal. 2d 818, 825 (1963) ("That counsel for a defendant has the right to reasonable opportunity to prepare . . . is as fundamental as is the right to counsel."). By allowing Mr. Zamudio to defer informal briefing and resolution of the petition until it 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. *In re Barnett*, 31 Cal. 4th 466, 475 (2003).

This 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 prisoner.*" *In re Sanders*, 21 Cal. 4th at 721 (emphasis in original). "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.*

B. The procedure endorsed by this Court and requested by Mr. Zamudio protects Mr. Zamudio's right to federal review in the legal landscape created by the AEDPA without creating additional burdens for this Court or respondent.

Respondent argues that this Court should not allow Mr. Zamudio to file an initial petition and defer its resolution until the petition is amended because "the only purpose of the shell" is to toll the federal statute of limitations (Supp. Brief at 4), which, according to respondent, is not a legitimate purpose. Respondent is wrong in stating that the only purpose of the initial petition is to toll the federal statute, and respondent's contention that tolling is not a legitimate purpose is incorrect.

This Court has established a predictable, routine, and prudent

practice to address the inequities in state and federal capital habeas litigation that arise from the combination of the operation of the one-year federal statute of limitations, the dearth of qualified counsel to represent capital defendants in state habeas proceedings, and the increasingly efficient resolution of capital direct appeals. As explained above, this practice does not "change the law" as respondent contends. (Supp. Brief at 2.) That the practice was not necessary until the enactment of the AEDPA (as respondent explicitly recognizes, *see* Supp. Brief at 1), does not bar its adoption following the enactment of the federal statute – when it became necessary to effectuate the goals of both state and federal law.

IV. THE PROCEDURE THIS COURT HAS ENDORSED AND MR. ZAMUDIO HAS REQUESTED IS CONSISTENT WITH, AND PROMOTES, CONGRESS'S INTENT IN ENACTING THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA).

A. Allowing initial petitions and deferred briefing advances Congress's purpose in enacting the AEDPA to promote the efficient development and resolution of constitutional claims in state and federal court.

Respondent asserts that Mr. Zamudio and other capital petitioners in his position "hope[] to defeat the natural operation of the federal statute of limitations for seeking relief in federal court; that is, [they] seek to enlarge, far beyond Congress's design, the time frame within which – and thus the bases on which – [they] might later challenge [their] state judgment[s] on federal habeas corpus." (Supp. Brief at 23.) Respondent's assertion has no merit because the procedure this Court has endorsed does not "enlarge" the time frame for filing a federal petition following the adjudication of a timely-filed petition in state court, and is entirely consistent with Congressional intent. If this Court denies him relief on the claims in his

amended petition, Mr. Zamudio will have to file a federal petition within a year, just as all other capital petitioners in California must do if and when their state petitions are denied by this Court.

Respondent's gloss of the AEPDA focuses exclusively on the one-year statute of limitations period. Respondent insists that the statute of limitations is "one of the most important" restrictions on federal review imposed by the AEDPA. (Supp. Brief at 3; *see also* Reply at 9 ("Congress's overarching purpose in enacting the Antiterrorism and Effective Death Penalty Act of 1996 was to reduce delay throughout the federal habeas process.").) Respondent entirely fails to acknowledge another important restriction on federal review – just as, if not more, central to the purpose of the AEDPA, and at times competing with the goals of the timeliness period[14] – limiting federal review until states have the "opportunity to complete one full round of review, free of federal interference." *Carey v. Saffold*, 536 U.S. 214, 222 (2002).[15]

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[14] *See, e.g.*, Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 Cornell L. Rev. 541, 551 (2006) ("On the one hand, we want to discourage prisoners from rushing into federal court before state courts have had an opportunity to correct their own federal mistakes. To that end, the exhaustion doctrine requires prisoners to pursue available state avenues for litigating federal claims in advance of federal habeas litigation. On the other hand, we want to encourage prisoners to initiate federal actions as soon as they can to ensure that issues are adjudicated before the record becomes colder than it already is, and, into the bargain, compress the time required to bring matters to a conclusion. These two policies run into each other. The one contemplates slowing things down, the other speeding things up.") But the tension between these two goals does not lead to the result respondent urges – especially when this Court considers the equal protection implication of a system that precludes some capital prisoners, but not others, from federal review, due to no fault of their own. *In re Sanders*, 21 Cal. 4th at 721.

[15] *See, e.g.*, 142 Cong. Rec. 4,813 (1996) (statement of Rep. Vucanovich) (explaining that the legislation "includes very strong States'

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) (internal citations excluded). 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).

While respondent is adamant that the procedure Mr. Zamudio

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rights provision [sic] that lessen the amount of Federal intrusion caused by expansive reviews of State court convictions and sentences, particularly in capital cases"); 142 Cong. Rec. 4,612 (1996) (statement of Rep. Hyde) (noting that the problem with one case that Congress is seeking to avoid was "not that it took 14 years from the sentencing to his execution, but [rather that] 46 different judges considered his case and it went to the U.S. Supreme Court five different times").

requests will "defeat Congress's judgment" by "secur[ing] tolling in precisely the circumstances that Congress refused to confer it" (Supp. Brief at 24), respondent has cited no provision of the statute that supports this argument. Furthermore, there is no indication in the legislative history of the AEDPA that Congress in fact considered the possibility that a state might confer more time to file a state petition than the federal statute does to file a federal petition, or that a state might demonstrate a serious commitment to appointing counsel to represent prisoners in habeas proceedings, but be unable to fulfill this commitment in a timely manner.[16] Respondent argues that the fact that Chapter 154 of the AEDPA explicitly refers to the appointment of counsel while Chapter 153 does not renders any consideration or accommodation of state procedures for the delay in appointment of counsel under Chapter 153 contrary to Congress's intent. (Supp. Brief at 24-26.) But this conclusion does not logically follow, particularly because it is inconsistent with the overall goals of the AEDPA (which apply to Chapters 153 and 154 alike) – "promoting 'comity, finality, and federalism,'" *Carey v. Saffold*, 536 U.S. at 220, by encouraging the thorough development and presentation of claims in state court – a project that is greatly expedited by the appointment of counsel.

Respondent's reading of the effect of the federal statute of

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[16] Respondent cites federal cases from the Eighth and Ninth Circuits holding that the AEDPA does not *require* tolling of the federal statutory period to accommodate longer state statutory periods. (Supp. Brief at 22.) These cases actually support this Court's continued endorsement of the procedure Mr. Zamudio requests. Because federal courts likely will not consider the federal clock *automatically* tolled by California's longer presumptively timely period for filing capital petitions, an affirmative act by the petitioner indicating that he is requesting relief from the judgment of conviction and is diligently pursuing his rights to post-conviction review, and endorsed by this Court, is necessary to toll the federal statute.

limitations on state procedural practice is backward. Respondent insists that Congress intended, through the enactment of the one-year period in which to file a federal habeas petition, to impose upon state prisoners a one-year statute of limitations for the filing of habeas petitions *in state court* as well, notwithstanding any state court law, rules, or practices that allow more or less time for filing habeas petitions. This is unsupported. There is no language in the text of the AEDPA itself, or in its legislative history, that suggests that Congress intended to impose restrictions on state court filings. Furthermore, even if this had been Congress's intent, such intent conflicts with principles of federalism. As the United States Supreme Court held in *Howlett v. Rose*, 496 U.S. 356, 372 (1990):

> The general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.' [Citations.] The States thus have great latitude to establish the structure and jurisdiction of their own courts. . . . [¶] These principles are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.

Furthermore, the United States Supreme Court recently made clear that any outcomes must be taken into account in the interpretation of the AEDPA. *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842, 2854 (2007) ("the practical effects of our holdings[] should be considered when interpreting AEDPA. This is particularly so when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their un-exhausted claims.'" (quoting *Rhines v. Weber*, 544 U.S. at 275)).[17] In enacting the AEDPA, Congress did not

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[17] The Congressional debates leading to the enactment of the AEDPA make clear that Congress did not seek to eliminate federal review of petitions brought by state prisoners, and in fact sought to strengthen federal

consider, much less intend, that state capital prisoners would "forever los[e] their opportunity of any federal review" because of a systemic crisis of lack of counsel in California, and this Court should not reach a conclusion that would dictate this result.

B. The procedure that this Court has endorsed and that Mr. Zamudio proposes is more effective and efficient at achieving these compelling state and federal goals than the alternative proposed by respondent.

Respondent challenges Mr. Zamudio's contention that the procedure he proposes will avoid piecemeal litigation and conserve state and federal resources, arguing that Mr. Zamudio created a situation of piecemeal litigation by filing his initial petition. (Supp. Brief at 21 n.16.) Respondent's assertion is patently wrong, especially when taken together with the alternative proposal by which respondent urges Mr. Zamudio to seek to preserve federal review of his claims. Respondent's proposed alternative guarantees far more piecemeal litigation and will not only create uncertainty for capital prisoners but also will result in increased waste of judicial and attorney resources in both state and federal courts.

As explained earlier, if respondent's position is accepted, Mr. Zamudio and others in his position who have relied upon this Court's endorsement of the initial petition/deferred briefing procedure may be unable to file petitions in federal court because the tolling measure they

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habeas procedures by limiting criminal petitioners to "one bite at the [federal habeas] apple." 142 Cong. Rec. 4,806 (1996) (statement of Rep. McCollum). *See also* 142 Cong. Rec. 4,612 (1996) (statement of Rep. Hyde) ("I respect the writ of habeas corpus. It is a great writ. I want to preserve it. I want it to be strong. I do not want it to be weakened."); 142 Cong. Rec. 7,564 (1996) (statement of Sen. Thurmond) ("The habeas reform provisions in this legislation will significantly reduce the delays in carrying out executions without unduly limiting the right of access to the Federal courts.").

relied upon would no longer apply. There is no indication that future capital prisoners who find themselves in the same procedural posture will fare any better. Respondent asserts, however, that capital prisoners will simply move in federal court for appointment of counsel and will promptly be provided with counsel who will immediately move (successfully) to stay the federal proceedings to allow for exhaustion in state court and then move for appointment in state court where they will represent these prisoners in state proceedings. (Respondent's Reply to Opposition to Motion for Order to Show Cause at 12-13, *In re Morgan*, No. S162413.) Respondent's suggestion is flawed for a number of reasons.

There is no guarantee that the federal court will appoint counsel for these capital prisoners who arrive in federal court without having presented any claims to this Court.[18] Even if the federal court does appoint counsel, the appointment may not occur until months after the prisoner's request, especially because it is almost guaranteed that the federal court will be bombarded with requests for counsel from most or all of the state prisoners whose direct appeals are or are likely to become final prior to appointment of state counsel. As detailed above, if this Court reverses course by ruling that the initial petitions are not properly filed, nearly 100 capital petitioners could flood federal courts with requests for counsel. The increased number of requests for counsel will be an unprecedented and substantial burden on the federal courts and likely impossible to accommodate; in effect, this will simply shift the problems arising from the shortage of counsel from this

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[18] Federal courts may take the position that such appointments are not appropriate because the "AEDPA [ ] encourages petitioners to seek relief from state courts in the first instance . . . [and] 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. [Citation.]" *Rhines v. Weber*, 544 U.S. at 276-77.

Court to the federal courts. Not surprisingly, respondent provides no reasons to believe that the federal courts are better situated than this Court to address the acute shortage of qualified counsel in capital cases.

Moreover, the increased burden will not merely add to the sheer number of cases with which federal counsel must contend but also to the workload of each case. Federal counsel will no longer be responsible only for litigating claims that have been fully exhausted in state court (and in some cases, limited numbers of claims that may not have been fully exhausted in state court and require some state court exhaustion), but, under this Court's policies and federal case law regarding the filing of successor petitions, will be responsible for investigating, developing, and presenting all potentially meritorious claims in this Court as well as in federal court. Supreme Ct. Policies, policy 3, timeliness std. 1-1.1; *In re Sanders*, 21 Cal. 4th at 713; 28 U.S.C. § 2244 (2006) (limiting the filing of successor claims and successive petitions).

Even if respondent's proposal worked as respondent claims it will, such an approach is much less efficient and orderly than that proposed by Mr. Zamudio, will result in significantly increased use of judicial and attorney resources, and is likely to contribute to further delay. The practice of filing initial petitions in this Court and deferring briefing until an amended petition is filed creates no additional burden on this Court or on respondent. Pursuant to this procedure, neither respondent nor the Court need do *anything* until Mr. Zamudio files his amended petition within the period of presumed timeliness, just as neither respondent nor the Court would need to do anything had Mr. Zamudio not filed the initial petition. Respondent's proposal, by contrast, requires the involvement of both federal and state courts, as well as respondent, long before a fully developed

petition is presented to any court.[19] Furthermore, respondent's alternative is likely to lead to significantly more collateral litigation in federal court over whether federal courts should get involved prior to state adjudication of claims.[20]

Respondent does not merely insist that the change in federal law arising from the enactment of the AEPDA does not require any adjustment or accommodation in state law practice; respondent goes so far as to argue both that 1) this Court has every reason to preclude Mr. Zamudio from seeking federal review of his claims should this Court deny Mr. Zamudio relief, and 2) it would frustrate the purpose of the AEDPA for this Court to permit Mr. Zamudio first to fully develop and present his claims in state court and later to bring his claims to federal court if this Court denies him relief. Neither of these arguments has any merit, and, as explained above, the second argument in fact demonstrates a fundamental misunderstanding of the doctrine of federalism.

The cases respondent cites describing the tension that can arise between state and federal courts as a result of federal review of state court judgments are inapposite to this situation and to the procedure Mr. Zamudio requests. (Motion at 11; Supp. Brief at 23-27.) They all describe the

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[19] Moreover, given that crisis will result immediately upon this Court's adoption of respondent's position, this Court likely will be inundated with dozens of state petitions within a short time frame, within months of the announcement of this Court's decision. Such an extraordinary surge of filings will quickly overwhelm respondent's ability to respond to, and this Court's ability to review, these cases, thus delaying ultimate resolution for years.

[20] Federal courts have discretion to stay petitions to allow for exhaustion of claims in state court "only in limited circumstances" where petitioners can show good cause for failure to exhaust claims first in state court. *Rhines v. Weber*, 544 U.S. at 277.

potential "friction" between state and federal courts in the context of cases in which federal courts sought to review state court judgments *without first providing the state courts a meaningful opportunity to review the petitioner's claims*. The cases, decided both prior to and following the enactment of the AEDPA, seek to limit federal review prior to the state court's full adjudication of the claims. None of these cases urges that a petitioner be deprived of federal review entirely, which is disfavored by the United States Supreme Court. *Panetti v. Quarterman*, 127 S.Ct. at 2854 (reiterating its commitment to "resist[] an interpretation of the statute [the AEDPA] that would 'produce troublesome results,' 'create procedural anomalies,' and 'close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent.'") The procedure Mr. Zamudio requests, in which he will be able to use the full three years afforded him by this Court to develop his claims and *present them in state court*, advances the goals endorsed by these decisions and reduces tensions between the state and federal courts.

Moreover, respondent's assertions that this Court has little if any interest in facilitating Mr. Zamudio's access to federal courts[21] do not accurately reflect the true position of this Court. This Court and its Justices have demonstrated through written opinions and public statements that the Court not only is committed to reviewing claims of federal constitutional violations thoroughly, but also values the role that federal courts play in ensuring the preservation of petitioners' federal rights. *People v. Schmeck*, 37 Cal. 4th 240, 304 (2005) (providing guidance to petitioners and to the

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[21] *See, e.g.*, Reply at 1 ("Petitioner could not seriously hope to mount a plausible defense of the shell/deferral contrivance without demonstrating how some legitimate interest of the state of California is actually furthered by maximizing the federal judiciary's opportunity to confer capital murderers relief on grounds the state judiciary finds wanting.").

federal courts regarding what the Court considers to be claims fairly presented in state court for preservation in federal court: "We take this opportunity to clarify that routine or generic claims that we repeatedly have rejected, and which are presented to this court primarily to preserve them for review by the federal courts, have been and will be deemed by this court to be fairly presented so long as the claim is stated in a straightforward manner accompanied by a brief argument.").[22]

Other states have developed mechanisms to ensure that state capital petitioners retain their rights to federal review following their investigation and presentation of habeas petitions in state courts. In Texas, following the enactment of the AEDPA, the Texas Attorney General entered into a stipulation to prevent state petitioners from losing their right to federal review due to a delay in appointment of state counsel. In the stipulation, the Texas Attorney General recognized that the Texas Legislature clearly envisioned that death-sentenced inmates would have the assistance of counsel in pursuing state habeas review. The Texas Attorney General stipulated to a process by which the one-year federal statute of limitations would be tolled from the date of a petitioner's request for counsel or the

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[22] *See also Resolution 16 In Support of Gathering Further Information Concerning the Effects of the Anti-Terrorism and Effective Death Penalty Act of 1996 to Determine Whether Amendments Are Needed*, Conference of Chief Justices and Conference of State Court Administrators, August 3, 2005 (observing that "federal habeas corpus review of both capital and non-capital convictions is an established part of the legal structure of our nation" and urging further study before amending the AEDPA because "changes contemplated in these measures may preclude state defendants in both capital and non-capital matters from seeking habeas corpus relief in the federal courts, and may deprive the federal courts of jurisdiction in the vast majority of these matters"); *Chief Justice Sees Ties, Differences with Federal Courts*, The Third Branch (Newsletter of the Federal Courts), Vol. 35, No. 9, Sept. 2003 (Chief Justice George notes the cooperation and collaboration between state and federal courts in California).

state court's entering the findings necessary for appointment of counsel until and including the date of the actual appointment of habeas counsel by the Texas Court of Criminal Appeals. *See Lookingbill v. Cockrell*, 293 F.3d 256, 260 (5th Cir. 2002) (citing to the Texas Attorney General's stipulation in *Pyles v. Morales*, No. 396-CV-2838-D, 1996 U.S. Dist. LEXIS 22357, at *3 (N.D. Tex. Dec. 2, 1996)); *Cantu-Tzin v. Johnson*, 162 F.3d 295, 298 (5th Cir. 1998) (same).[23] It is clear from respondent's arguments that this solution is not available to capital petitioners in California.

Like California, Arizona guarantees state habeas petitioners a right to counsel and provides for the appointment of counsel to indigent petitioners. In Arizona, post-conviction proceedings are commenced with the timely filing by the petitioner of a Notice of Post-Conviction Relief, which includes a request for relief and alerts the court to the need to appoint counsel. Ariz. R. Crim. P. 32.4(a), (c). The Ninth Circuit has expressly held that the timely filing of a Notice for Post-Conviction Relief by a habeas petitioner tolls the federal statute of limitations, rejecting arguments by the State of Arizona that only the filing of a habeas *petition* tolls the federal statute. *Isley v. Arizona Dep't of Corr.*, 383 F.3d 1054 (9th Cir. 2004).

Most importantly, this Court is entitled to set its own ground rules for the orderly presentation and adjudication of claims before it. This Court and the voters of California have determined that the state has an interest in providing qualified counsel to capital habeas petitioners, not only to protect the constitutional rights of the petitioners themselves, but also to ensure thorough and methodical litigation of issues. This Court has further

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[23] Texas later altered its appellate and habeas proceedings so they run nearly parallel, and state habeas counsel is generally appointed immediately following sentencing. Tex. Code Crim. Proc. Ann. art. 11.071 § 2 (2007).

determined that counsel requires at least three years to perform this task adequately, and that the preservation of claims for federal review is an important interest. No federal law precludes California from making these determinations.[24] Respondent's request that the Court abandon this procedure should therefore be denied.

V. THE PROCEDURE ENDORSED BY THIS COURT AND REQUESTED BY MR. ZAMUDIO WILL PROMOTE CLARITY AND PRESERVE HIS RIGHT TO FEDERAL REVIEW.

A. Mr. Zamudio's proposal avoids piecemeal litigation and promotes clarity.

Respondent urges this Court to immediately adjudicate the initial petitions filed by Mr. Zamudio and other capital prisoners in similar procedural postures. As explained above, this Court is not required by its own policies or by case law to adjudicate the initial petitions before they are amended. As respondent concedes, the Court's immediate adjudication of the initial petitions would not prevent the filing of additional petitions in the future, each of which would likely elicit responses from respondent, and then require action by this Court. Proceeding this way would involve a tremendous waste of time by this Court and respondent, as with each successive petition this Court and respondent would have to reacquaint themselves with the record and the relevant facts. Any ensuing federal litigation of claims presented in each of these separate petitions would be unnecessarily confusing and time-consuming for the federal judiciary as well as for the parties.

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[24] Alternative means of resolving this problem – such as delaying the scheduling of oral argument on direct appeal or staying the mandate of the decision on direct appeal until habeas counsel is appointed – would create unnecessary delays in the direct appeal process.

Mr. Zamudio's proposal is eminently more reasonable and efficient. It promotes economy by postponing the review of claims by this Court and by respondent until all claims are presented together, after facts supporting the claims have been fully developed. It promotes efficiency because facts that support multiple claims for relief will be presented at one time, and respondent and this Court will not be required to review the same set of facts on multiple occasions. It promotes clarity by providing the federal court with a single petition and date upon which the claims were rejected, in the event that this Court denies relief.

Moreover, as a practical matter, given this Court's tremendous caseload and backlog in its review of many fully-pleaded capital petitions,[25] it is unlikely that this Court would be able to adjudicate an initial petition before the amended petition is filed.

B. The practice endorsed by this Court and requested by Mr. Zamudio preserves the state and federal constitutional rights of capital defendants while incurring no additional delay.

Respondent is mistaken in arguing that the procedure Mr. Zamudio requests will not preserve his rights to federal review. (Motion at 3; Reply at 10 n.6.) A clear and explicit indication by this Court that the initial petition and any amendments to it filed within the thirty-six month period after appointment of habeas counsel is "properly filed" establishes that Mr. Zamudio's initial petition will toll the federal statute of limitations. *Carey*

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[25] Currently, the average delay between the filing of a habeas petition and the issuance of an order by this Court disposing of the petition is approximately three and one-half years. *See also* Judge Arthur L. Alarcon, *Remedies for California's Death Row Gridlock*, 80 S. Cal. L. Rev. 697, 741 (2007) (noting that, in 2007, taking into consideration both capital and non-capital cases, which are resolved more quickly, the average delay between the filing of a state petition and the issuance of this Court's decision was twenty-two months).

v. Saffold, 536 U.S. at 226 (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. at 413-16 (same); 28 U.S.C. § 2244(d)(2) (providing tolling of the one-year statute of limitations during the pendency of any "properly filed" petition in state court); *cf. Evans v. Chavis*, 546 U.S. 126, 198 (2006) (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 . . . ").

No federal courts have adopted the argument that these initial petitions do not toll the federal statute of limitations, and at least one federal district court has rejected it. *Taylor v. Ayres*, No. CV-07-6602-GW (C.D. Cal.) (granting Mr. Taylor's motion to hold in abeyance his federal petition while he exhausts his claims in state court and rejecting respondent's objections that there are no claims to abey because Mr. Taylor's initial petition in this Court did not toll the federal statute of limitations).

VI. MR. ZAMUDIO HAS ESTABLISHED A PRIMA FACIE CASE THAT HE WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent argues at great length that Mr. Zamudio's initial petition fails to establish a prima facie case that Mr. Zamudio's trial counsel was prejudicially ineffective. If this Court grants Mr. Zamudio's request for deferred briefing in accordance with its well-established practice, this Court will not reach the merits of the claim at this stage. For all of the compelling reasons set forth above, the question of whether a petitioner has established a prima facie case for relief in the initial petition is not determinative of whether this Court continues to follow the practice Mr. Zamudio requests

and that the Court has endorsed for the past several years. This Court should deem properly filed a petition filed by a petitioner in Mr. Zamudio's position that requests relief from judgment and deferral of informal briefing and resolution until the petition is amended.

Although Mr. Zamudio has presented a prima facie case of ineffective assistance of counsel that entitles him to relief (*see* Opposition to Respondent's Motion for Order to Show Cause at 10-18, Nov. 3, 2008), he has requested deferral of briefing and resolution of the petition to allow him to develop this claim, as well as other claims, and present them fully in an amended petition.

VII. CONCLUSION

For the reasons presented above, Mr. Zamudio requests that this Court rule that his initial petition was properly and timely filed under the laws of California and the rules and policies of this Court; clarify that an initial petition that requests relief from the conviction and judgment of death is properly filed by this Court; clarify that this Court's order appointing HCRC to represent Mr. Zamudio permits Mr. Zamudio to amend his initial petition as well as file successive petitions within three years of June 27, 2007, the date of HCRC's appointment; and defer informal briefing and stay further proceedings on the petition until June 28, 2010, or the filing of an amended petition for writ of habeas corpus, whichever is earlier, so that Mr. Zamudio may file reasonably available documentation in support of the petition as well as any additional claims that may become known to him during that time.

Dated: June 30, 2009

Respectfully Submitted,

Habeas Corpus Resource Center

By: SARA COHBRA

Counsel for Samuel Zamudio Jiménez

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITIONER'S RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MOTION FOR ORDER TO SHOW CAUSE uses 13-point Times New Roman font and contains 9,660 words.

Dated: June 30, 2009

SARA COHBRA
Counsel for Samuel Zamudio Jiménez

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 June 30, 2009, I served true copies of the following document:

Petitioner's Response to Respondent's Supplemental Brief

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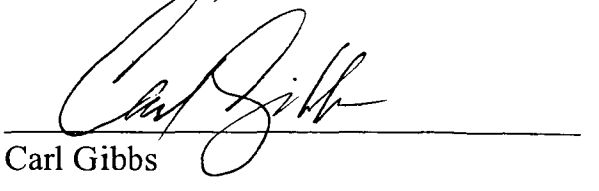
Service for Samuel Jimenez Zamudio (P-14700) will be completed by utilizing the 30-day post-filing period within which we will hand deliver a copy to him at San Quentin State Prison.

I declare under penalty of perjury that the foregoing is true and correct. Executed in San Francisco, California on June 30, 2009.



Carl Gibbs