SUPREME COURT COPY

In the Supreme Court of the State of California

In re SAMUEL ZAMUDIO JIMENEZ, On Habeas Corpus.	CAPITAL CASE S167190 (Judgment Affirmed, Apr. 21, 2008, in Related Direct Appeal (S034414) 43 Cal.4th 327)

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PEOPLE'S SUPPLEMENTAL REPLY BRIEF

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I. OVERVIEW

If, as HCRC contends, the shell petition it filed last September actually "presented a prima facie case of ineffective assistance of counsel that entitles [Zamudio] to relief" (Response at 31), it is surprising to see HCRC warn that "immediate adjudicat[ion]" of that claim "will have catastrophic and inequitable results" (Response at 5-6). Neither of HCRC's assertions, of course, is true.

As we have explained, the shell does not remotely state a prima facie case for relief. (See People's Supplemental Brief (PSB) at 7-20.) HCRC stubbornly refuses to address the fatal deficiencies that warrant the shell's summary denial because, it insists, whether the shell states a prima facie case "is not determinative" of what this Court will do with it. (Response at 30.) By assuming the Court will not do anything HCRC does not want—that is, by assuming the Court will neither summarily deny relief nor issue an order to show cause (*ibid.* ["this Court will not reach the merits of the claim at this stage"])—HCRC concedes that the shell is not actually accomplishing any "exhaustion." But exhaustion, it seems to elude HCRC, is the *one* thing Zamudio would *need* to be doing in order to achieve statutory tolling of the federal limitations period.[1]

Under California law, whether the shell states a prima facie case is incontrovertibly "determinative" of what must happen next, and in either event the result would not be "catastrophic and inequitable." (PSB at 6.) HCRC should easily understand why that is so if, as HCRC insists, the shell

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[1] HCRC later underscores this point, further acknowledging the sham nature of the shell. (Response at 23 ["neither respondent nor the Court need do *anything* until Mr. Zamudio files his amended petition within the period of presumed timeliness" (emphasis by HCRC)].) Simply put, claims are not undergoing exhaustion within the contemplation of federal law while a state court—at the prisoner's insistence—does *nothing* with respect to them.

were to demonstrate that Zamudio is "entitle[d] to relief." (Response at 31.) HCRC also should be able to understand why that is true even if relief is summarily denied: Because such a denial would be without prejudice to Zamudio's ability to seek relief by filing a petition ("successive" or not) within 36 months of June 27, 2007, Zamudio would still be assured that he has "adequate opportunity to fully develop and present 'all potentially meritorious claims' for relief in *this Court*," and that "*this Court* is able to evaluate and rule on those claims." (*Id.* at 2-3, italics added.)

To be sure, the scope of Zamudio's opportunity for *federal* review (*id.* at 3) will likely not always meet with Zamudio's satisfaction. But it will comport fully with the natural operation of *federal* law, a state of affairs that is entirely just and proper, and in any event not within the province of this Court to attempt to alter. After all, Congress's purposes in enacting AEDPA were "to curb delays, to prevent 'retrials' on federal habeas, and *to give effect to state convictions to the extent possible under law.* (*Williams v. Taylor* (2000) 529 U.S. 362, 386 (opn. of Stevens, J.), italics added.) This Court should unequivocally reject the notion that Congress's implementation of those reforms requires this Court to countermand them, by making the "adjustment or accommodation in state law practice" (*id.* at 24) demanded by HCRC.

Many additional errors infect HCRC's arguments for thwarting congressional design. Most notably, HCRC's arguments rest largely on both unfounded predictions about the consequences of allowing AEDPA's reforms to run their natural course, and gross distortions of the People' position on the subject.

Contrary to HCRC's understanding, we never said the People of the State of California have "no interest in ensuring that [Zamudio's] conviction and sentence comport with constitutional requirements." (Response at 3.) Indeed, we stated the opposite. (PSB at 5, citing *In re*

Robbins (1998) 18 Cal.4th 770, 777; People's Reply to Opposition to Motion for Order to Show Cause at 17, citing *In re Barnett* (2003) 31 Cal.4th 466, 475.)

Just as clearly, we never "insist[ed] 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." (Response at 20, italics by HCRC.) Again, we actually stated the opposite. PSB at 27 ["federal law does not purport to dictate when state petitions are filed"]; see also *id.* at p. 22, fn.17, quoting *Ferguson v. Palmeteer* (9th Cir. 2003) 321 F.3d 820, 823.)

Nor, of course, did we ever suggest that "the People of California seek to execute dozens of death row inmates merely because" they filed shell petitions. (Response at 10 fn. 10.) Rather, in any post-affirmance case where the People "seek execution" they do so for the reasons duly recited in a judgment of death—the "truth, accuracy, and fairness" of which is presumed (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260)—respecting the exceptionally heinous crimes committed by a particular death row inmate.

We also seek no "strategic litigation advantage over indigent capital prisoners." (Response at 3.) Instead, we simply seek the faithful application of state (PSB at 5-8) and federal (PSB 24-28) law.

Finally, we plainly do not seek, nor would it be within our power, "to achieve the complete elimination of Mr. Zamudio's right to federal review." (Response at 4; see also *id.* at 11 fn. 11; *id.* at 21, 25.) Zamudio will suffer *that* exceptionally unlikely fate (see PSB at 28) only if *he* fails to file a federal petition in accordance with federal law. (Compare Response at 4, misquoting what the People said about "the fate" from which Zamudio

deserves no rescue.) HCRC's regrettable penchant for exaggerating the effect of AEDPA's natural operation stems principally from two errors. The first is factual: HCRC forgets that Zamudio, like every other shell filer, has already fully exhausted a wealth of claims on direct appeal. (*People v. Zamudio* (2008) 43 Cal.4th 327, 327-374; compare Response at 5 [referring to the prospect that, without shell/defer, inmates will be forced to "present [on federal habeas] only the limited claims they are able to develop, even without counsel, within the federal limitations period"] .) The second error is legal: HCRC in effect demands that this Court presume, contrary to law, that HCRC's post-affirmance investigation will necessarily uncover meritorious claims for relief. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1260 [habeas "is not a device for investigating possible claims, but a means for vindicting actual claims"].)

Further discussion of these and other errors in HCRC's analysis follows.

II. SHELL/DEFER, WHILE DOING NOTHING TO PROMOTE STATE COLLATERAL REVIEW, UNDERMINES CONGRESS'S DESIGN FOR REFORMING FEDERAL COLLATERAL REVIEW

In a rare moment of candor, HCRC admits its true purpose in filing the shell: "to toll the federal statute of limitations." (Response at 6; see also *id.* at 16 [identifying "enactment of the AEDPA" as the event that made shell/defer "necessary"].) More commonly, however, HCRC persists in falsely asserting that shells facilitate *state* habeas review. (*Id.* at 2-3 & fn.3; *id.* at 11, 14-15, 25.) This is wasted effort.

No matter how many times HCRC asserts otherwise, the fact remains that it is the policy reflected in the Court's timeliness rules—not the filing of any shell petition—that "ensure[s] that Mr. Zamudio has an adequate opportunity to fully develop and present 'all potentially meritorious claims' for relief in this Court." Just as clearly, this Court's ability to "evaluate and

rule on those claims" is in no manner ensured, or even enhanced, by the shell HCRC filed almost two years before any petition was "due." (*Id.* at 2-3; see also *id.* at 11 [needlessly beseeching this Court to "permit sufficient time to develop and present claims in state court"]; *id.* at 14-15 [absurdly contending that the People have "fail[ed] to acknowledge that Mr. Zamudio's right [to state collateral counsel] is meaningless if counsel has insufficient time to develop and present potentially meritorious claims for relief"]; *id.* at 15 [erroneously insisting that shell/defer "provides counsel with a 'reasonably adequate opportunity' to fully develop and present the claims in this Court"]; *id.* at 25 [falsely stating that shell/defer will enable Zamudio "to develop his claims and *present them in state court*" (emphasis by HCRC].)

HCRC's bluster should not detain this Court. Not once does HCRC confront the challenge presented by the People: Identify how the shell serves Zamudio's *state* remedial needs in some respect that the amended petition he proposes to file by June 20, 2010 will not. (People's Reply to Opposition to Motion for Order to Show Cause at 11.) Instead, HCRC resorts to diversionary tactics designed to elide the crucial principles of federalism that distinguish a state court's review of its own criminal judgments from review of those same judgments by a federal court, and to convince this Court that it should welcome federal oversight that is more expansive than Congress authorized.

Thus, by lacing its discussions of state review with frequent references to federal review (Response at 2-3, 5, 11), HCRC provides a prelude to the fantastical assertion that shells "are *necessary to effectuate the goals of both state and federal law*" (*id.* at 16, emphasis added.) As we have explained, shells do absolutely nothing to promote state review (PSB at 20-23), and their intended effect on federal law is wholly subversive of congressional intent (PSB at 23-28).

Contrary to HCRC's assertions, the shell it filed on Zamudio's behalf, were it to have the effect HCRC hopes, would not "preserve" (Response at 3, 11, 28) or "protect" (*id.* at 15) Zamudio's right to federal review. To understand why that is so, one must first take stock of the actual scope of Zamudio's right—something HCRC fails to do. Zamudio's right is created—and limited—by statute. (28 U.S.C. § 2241 et seq.) Among the most important constraints on the right to seek federal review, of course, is the restriction imposed by the statute of limitations. (*Id.*, § 2244(d).) The purpose of the shell is "to toll the federal statute of limitations." (Response at 6.) But the circumstances under which Zamudio would be entitled to tolling are also defined by statute. (28 U.S.C. § 2244(d)(2).) Significantly, tolling is available to prisoners who are exhausting state remedies. (*Ibid.*) And exhaustion is achieved by actually submitting claims to state courts *for resolution,* not when they are pleaded cursorily for some other purpose, such as creating a pretext for requesting a *stay*. Significantly, Congress did not allow prisoners to secure tolling merely by "declar[ing] expressly that they seek to avail themselves of the time period [a state] Court affords" (*id.* at 3 fn.3), by "conducting ongoing, bona fide investigations, and making every effort to present only fully developed, potentially meritorious claims to [state] Court before the expiration of the presumptively timely period for filing a petition" (*id.* at 14 fn.13), or engaging in some other "affirmative act . . . indicating that [they are] requesting relief from the judgment of conviction and . . . diligently pursuing [their] rights to post-conviction review" (*id.* at 19 fn.16). The "legal landscape created by AEDPA" (*id.* at 15) must be accepted as Congress designed it, not as altered to resemble something HCRC finds more "predictable," "clear," "sensible,"

"equitable," "prudent," "reasonable," "effective," "efficient," or "orderly" (*id.* at 2, 3, 6, 10, 23, 29). [2]

III. THE RULES GOVERNING "DELAYED PRESENTATION" OF CLAIMS HAVE NO APPLICATION TO SHELL/DEFER

HCRC contends that shell/defer "is consistent with" cases authorizing "delayed presentation of claims in certain circumstances." (Response at 13-15, citing *In re Clark* (1993) 5 Cal.4th 750, 781, *In re Robbins* (1998) 18 Cal.4th 779, 806 fn.288, and *In re Sanders* (1999) 21 Cal.4th 697, 721.) But the shell HCRC filed on September 29, 2008—15 months after HCRC was appointed—was not "delayed." Indeed, given that it was concededly "incomplete" when filed, coupled with the fact that 21 more months were then remaining in the period of presumptive timeliness, the shell was senselessly *premature*. And assuming the amended petition is filed, as predicted, before June 20, 2010, it too will not be "delayed." (See also People's Reply to Opposition to Motion for Order to Show Cause at 6-7,

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[2] We have focused on the impropriety of the shell as a matter of *state* law given that HCRC's *purpose* in filing it is to thwart federal law. How well the shell might actually *effectuate* HCRC's purposes as to any federal proceedings later brought by Zamudio will present a separate question of *federal* law. (See *Welch v. Carey* (9th Cir. 2003) 350 F.3d 1079, 1080). HCRC reports that "at least one federal court has rejected" our position that shell-filings do not qualify as tolling events under 28 U.S.C. § 2244(d)(2). (Response at 30, citing Order Granting Motion to Hold Proceedings in Abeyance to Permit Exhaustion of State Remedies in *Taylor v. Ayres*, C.D. Cal. No. 07-6602-GW (Taylor Doc. 37).) We disagree. Because the question was not squarely presented by Taylor's motion for abeyance—and indeed had been explicitly reserved by the People for later presentation in a motion to dismiss (see Taylor Doc. 30 at 10 (People's Opposition to Motion for Stay))—the District Court's four-page order granting abeyance in *Taylor* did not address it (see Taylor Doc. 37), much less resolve it, even by implication. (See also Taylor Doc. 34 at 12 (Taylor's Reply to Taylor Doc. 30) [asserting that the People had "waived" all defenses relating to the timeliness of Taylor's federal petition].)

distinguishing *Sanders*.) The entire discussion appearing at pages 13 through 15 of HCRC's Response is hopelessly off-point. (See also Response at 7 [inexplicably expressing concern that the Court might rule that the shell is "untimely"]; see generally People's Reply to Opposition to Motion for Order to Show Cause at 10 fn.6 [explaining that if the People thought the shell were untimely, "we would not be insisting that it be immediately reached on the merits"].)

IV. HCRC'S PROFESSED CONCERNS FOR AVOIDING DELAY DO NOT JUSTIFY SHELL/DEFER

HCRC touts shell/defer for being "efficient"; by contrast, natural operation of the rules enacted by Congress, HCRC argues, would "likely . . . contribute to further delay." (Response at 21, 23.) HCRC's views on these matters must be taken with a grain of salt. (*In re Clark* (1993) 5 Cal.4th 750, 806 (conc. & dis. opn. of Kennard, J.) ["death row inmates have an incentive to delay assertion of habeas corpus claims that is not shared by other prisoners"]; accord, *Mayle v. Felix* (2005) 545 U.S. 644, 674 (dis. opn. of Souter, J.) [acknowledging "capital petitioners' incentive for delay"]; *Lindh v. Murphy* (1997) 521 U.S. 320, 340 (dis. opn. of Rehnquist, C.J.) [observing that capital defendants' "incentive . . . is to utilize every means possible to delay the carrying out of their sentence"].) And, not surprisingly, HCRC's views are incorrect.

To begin with, shells obviously do nothing to "avoid piecemeal litigation." (Response at 21) Quite to the contrary, shells only create the prospect of its occurrence and thus supply the pretext for requesting a stay. (*Id.* at 32.) If HCRC were genuinely interested in presenting "all claims . . . together . . . at one time" (*id.* at 29), it would have never filed a shell. Instead, it would have made the "amended" petition it promises to file by June 28, 2010 (*id.* at 32) its *first* and *only* state petition. HCRC's reason for

not following that course is manifest: HCRC hopes to defeat the natural operation of the federal limitations period by creating an artificial period of state-proceeding "pendency." It is simply inexplicable that HCRC would continue to deny this. (See *id.* at 15 ["Respondent is wrong in stating that the only purpose of the [shell] petition is to toll the federal statute"].)

Nor do shells do anything to enhance the efficiency of federal litigation. Indeed, the contrary is plain, as we have already noted. (See PSB at 21 fn.15, citing Cal. Rules of Court, rule 8.605(k) and *Rhines v. Weber* (2005) 544 U.S. 269, 277, citing 28 U.S.C. § 2254(b)(2).) Of course, the greatest efficiencies to be gained by natural application of the federal limitations period are achieved when belatedly presented claims are not permitted to make the federal proceeding more protracted and complicated than Congress permitted, and it is precisely *that* limitation which shell/defer is designed to circumvent.

HCRC hopes to cast doubt on whether prisoners' timely resort to the procedures prescribed by AEDPA will actually expedite the course of postconviction review, noting that "the appointment [of federal counsel] may not occur until months after the prisoner's request." (Response at 22.)[3] But such delays, even if they were to actually occur, would negate only minimally, if at all, the principal benefit achieved by a filing deadline. At any rate, our experience in at least three of the four Federal Districts in California (including the Central District, where any federal habeas

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[3] See 18 U.S.C. § 3599(a)(2) [indigents "shall be entitled to the appointment of one or more attorneys . . . ."]; see also *McFarland v. Scott* (1994) 512 U.S. 849, 857 fn.3 [noting that the federal statutory right to counsel enjoyed by capital habeas petitioners is "mandatory," and includes "a right to preapplication legal assistance"]; compare Response at 22 [hypothesizing that inmates whose automatic appeals are final in this Court might "arrive in federal court without having presented any claims to this Court," and be refused appointment of counsel on that ground].)

proceedings arising from Zamudio's Los Angeles County death judgment would be heard) shows that federal counsel is commonly appointed relatively shortly after a prisoner so requests.

Finally, HCRC need not worry that natural application of federal law will "lead to significantly more collateral litigation in federal court over whether the federal courts should get involved prior to state adjudication of claims." (Response at 24.) A formidable body of law exists for dealing with that question (e.g., 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, *supra*, 544 U.S. at pp. 275-277; *Pace v. DiGuglielmo* (2005) 544 U.S. 408, 418; *Sherwood v. Tomkins* (9th Cir. 1983) 716 F.3d 632, 634), and we have ample confidence that the federal courts will apply that law correctly.[4]

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[4] HCRC is apparently less confident, and laments the "uncertainty" and lack of "guarantee" about how events will unfold in federal court. (Response at 21, 22.) HCRC's feelings are wholly irremediable. (*Calderon v. Ashmus* (1998) 523 U.S. 740, 746; *id.* at p. 748 [any risk associated with resolving procedural uncertainties surrounding the adjudication of federal habeas claim in the ordinary course—as they actually present themselves, rather than before—"is no different from risks associated with choices commonly faced by litigants"].) Oddly, HCRC manifests more concern over what the People "will urge" in federal court (Response at 7-9) than how the federal courts will *rule*. Ideally, of course, there should be little difference between the two. Once HCRC comes to understand this, it likely will also realize that the outcomes we seek are not the product of "outrage," " melodrama," or "vitriol" (*id.* at 3), but simply natural application of the long-overdue reforms finally provided in AEDPA. HCRC should also take considerable comfort in knowing that federal law deals very sensibly and charitably with litigants who "have relied in good faith" (*id.* at 9) on the mistaken belief that they had followed proper procedures. (E.g., *Harris v. Carter* (9th Cir. 2008) 515 F.3d 1051, 1056, discussing *Pliler v. Ford* (2004) 542 U.S. 225.) But the availability of equitable relief to those who may have innocently erred *in the past* (see generally Response at 7-9) provides no justification for failing to correct and prevent *continuing* error.

V. HCRC'S PROFESSED REVERENCE FOR THE EXHAUSTION REQUIREMENT AND COMITY DO NOT JUSTIFY SHELL/DEFER

To be sure, there can be some tension between imposing a federal filing deadline and promoting exhaustion of state remedies. But, we emphasize again, it fell to *Congress*—not HCRC—to strike the proper balance between these aims, and Congress did not shrink from that task, as the high court has explained:

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

(PSB at 24, quoting *Duncan v. Walker* (2001) 533 U.S. 167, 179, italics added.) And, as we previously explained, it is significant that Congress has accorded

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

(PSB at 19, italics in original.)

The question on which our briefing focuses, of course, is not whether "this Court is entitled to set its own ground rules for the orderly presentation and adjudication of claims before it" (Response at 27) inasmuch as shell/defer has no such purpose or effect. And, as for promoting exhaustion of state remedies (see *id.* at 17-18), Congress plainly

foreclosed "re-balancing" the considerations discussed in *Duncan v. Walker* any differently than as plainly reflected in section 2244(d). The unmistakable import of that provision—that tolling is available to only those prisoners who actively pursue state collateral relief, not to those who merely wish to, or are planning to, do so in the future (be it with counsel or without, and regardless of whether state law provides for such appointments)—cannot be disregarded on the ground that HCRC dislikes "the legal landscape created by the AEDPA" (*id.* at 5).

HCRC's enduring efforts to invoke "comity" (Response at 18-19) to justify the shell/defer contrivance are singularly disingenuous. Exhaustion is not an i-dotting/t-crossing ritual observed to "prep" claims for consideration by the federal judiciary. Although the requirement surely directs that state courts be afforded a fair opportunity to consider claims (and to grant relief on account of them, as appropriate), there are no "comity" implications to the *timing* of state review unless some prospect of federal review actually looms and *threatens to usurp state review.* (See PSB at 26-27 fn.20.) When that prospect is limited, or altogether eliminated, by some *other* feature of law (such as the federal statute of limitations—which bars belatedly-presented claims altogether), it hardly advances comity to attempt to thwart the natural operation of those other provisions, for such a course only regenerates state-federal friction, and triggers tiresome, insincere, and entirely unwarranted handwringing by death row inmates over the "need" for exhaustion.

At bottom, this is HCRC's argument: The shell is needed to defeat expiration of the federal limitations period in order that later federal review may include as many claims as will be rejected on state review, and this Court's consideration and disposition of the shell must be deferred to allow the amendments needed to "avoid" exhaustion "problems" that would never arise in the first place if the federal limitations period had simply been

allowed to expire naturally. The only principle that would appear to support this position is the principle that state and federal collateral review must always consume, in combination, as much time as possible.

VI. "THIS COURT'S INTEREST REGARDING THE ROLES OF FEDERAL REVIEW IN CAPITAL CASES" PROVIDES NO JUSTIFICATION FOR SHELL/DEFER

HCRC argues that the People fail to grasp "this Court's interest regarding the roles of federal review in capital cases." (Response at 5.) HCRC purports to have divined "the true position of the Court" on this subject. (*Id.* at 25.) According to HCRC, this Court "values the role that federal courts play in ensuring the preservation of federal rights." (*Ibid.*) But which role? The limited role prescribed by Congress? Or the expanded one HCRC would hope to engineer through the use of shells?

Nothing in the sources HCRC identifies—*People v. Schmeck* (2005) 37 Cal.4th 240, 304 (discouraging bloated briefing in support of legal arguments roundly rejected on multiple prior occasions), Resolution 16 of the Conferences of Chief Justices and State Court Administrators (recommending that amendments to AEDPA (since enacted, but then pending) receive more study), or the Chief Justice's interview in the September 2003 issue of "The Third Branch" newsletter (in which the subject of federal habeas corpus is mentioned only once in passing)—remotely supports HCRC's supposition that this Court is welcoming of intrusive federal superintendence, much less that it favors defeating congressional reforms or otherwise expanding the scope, complexity, and duration of federal habeas corpus litigation. (See Response at 25-26 & fn.22.) For this reason (and others, next explained), we are skeptical that HCRC has correctly discerned "the true position of the Court."

HCRC does not dispute that reexamination of state convictions on federal habeas corpus "'"'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'"'" (PSB at 2-3, quoting authorities.) But clearly unhappy with "the legal landscape created by the AEDPA" (Response at 15), HCRC insists that the "adjustment or accommodation in state law practice" represented by the shell/defer artifice is "require[d]" (*id.* at 24; see also *id.* at 16 [identifying "enactment of the AEDPA" as the event that made shell/defer "necessary"]).

In urging this radical course, HCRC apparently indulges (but dares not state expressly) a breathtaking assumption: that this Court needs to maximize the federal judiciary's opportunities to superintend the administration of California's criminal laws—that it needs to neutralize, in effect, the AEDPA-imposed limitations on open-ended federal review of state judgments—in order to deter or correct unconstitutional behavior by this Court. By making such an assumption, HCRC betrays a fundamental misunderstanding of the role of federal habeas corpus and, more generally, the basic structure of our national system.

State courts always stand on *at least* equal footing with federal courts when it comes to fulfilling "the obligation to guard, enforce, and protect every right granted or secured by the constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." (*Robb v. Connolly* (1884) 11 U.S. 624, 637; *Stone v. Powell* (1976) 428 U.S. 465, 493 fn.35 ["State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law" (citing *Martin v. Hunter's Lessee* (1816) 1 Wheat 304, 341-344)]; accord, *Schneckloth v. Bustamonte* (1972) 412 U.S. 218, 259 (conc. opn. of Powell, J.) ["It is the solemn duty of

[state] courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accordance with federal law"]; see also O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge* (1981) 22 Wm. & Mary L. Rev. 801, 814-815.) Indeed, in many respects, state courts are in a decidedly *superior* position to consider and correctly resolve constitutional challenges. (E.g., *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9 [explaining that state court factfinding is preferable to federal court factfinding in that reliance on the latter "can only degrade the accuracy and efficiency of judicial proceedings"]; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 636 ["State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman* [*v. California* (1967) 386 U.S. 18], and state courts often occupy a superior vantage point from which to evaluate the effect of trial error"].)

In short, it is anathema to Our Federalism to "regard[] state courts as second-rate instruments for the vindication of federal rights" (*Withrow v. Williams* (1993) 507 U.S. 680, 723 (conc. & diss. opn. of Scalia, J.)), and the People of the State of California[5] emphatically reject HCRC's apparent assumption—which others have sometimes made explicitly—to the contrary. (E.g., *Coleman v. McCormick* (9th Cir. 1989) 874 F.2d 1280, 1295 fn.8 (conc. opn. of Reinhardt, J.) [theorizing that "federal courts stand in a better position [than state courts] to adjudicate constitutional rights" due to the federal judiciary's "greater receptivity . . . to Supreme Court

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[5] HCRC questions the Attorney General's capacity to speak for the People's interests, and appears to demand that we produce "evidence" on the point. (Response at 10 fn.10.) The People find it very difficult to take arguments like this seriously. (Cal. Const., art. 5, §§ 11, 13; Gov. Code, §§ 12511, 12512.)

dictates, insulation from majoritarian pressures, and even superior technical competence"].)

Apart from "degrad[ing] the prominence of the trial itself" (*Engle v. Isaac* (1982) 456 U.S. 107, 127), expansive federal oversight of state criminal process "render[s] the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems." (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 263.)[6] Thus, the insult extends not merely to a particular state judge or state court, but to the state as a whole, its core sovereignty, and its People's confidence in the efficacy and integrity of cherished public institutions. As the Supreme Court noted in *McCleskey v. Zant*:

> Finality has special importance in the context of a federal attack on a state conviction. . . . Reexamination of state convictions on federal habeas "frustrate[s] . . . 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' ". . . . Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them.

(*McCleskey v. Zant*, *supra*, 499 U.S. at p. 491, citing and quoting *Murray v. Carrier* (1986) 477 U.S. 478, 487 and *Engle v. Isaac*, *supra*, 456 U.S. at p. 128; see also *Sumner v. Mata* (1981) 449 U.S. 539, 550 ["A writ issued at the behest of a petitioner under 28 U.S.C. § 2254 is in effect overturning either the factual or legal conclusions reached by the state-court system under the judgment of which the petitioner stands convicted, and friction is a likely result"]; *Engle v. Isaac*, *supra*, 456 U.S. at pp. 126-127 ["Collateral

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[6] "[T]he writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect.'" (*McCleskey v. Zant* (1991) 499 U.S. 467, 491, quoting *Teague v. Lane* (1989) 489 U.S. 288, 309.)

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

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

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

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

We, of course, will not presume to tell this Court its "true position" (Response at 25) on federal habeas corpus. But the Court's own jurisprudence gives us no reason to believe its views would differ materially from the sentiments expressed in the authorities quoted above. (See *In re Clark* (1993) 5 Cal.4th 750, 776, quoting *McCleskey v. Zant*, *supra*, 499 U.S. at p. 491, quoting *Teague v. Lane*, *supra*, 489 U.S. at p. 309 ["[T]he writ strikes at finality. One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. 'Without finality, the criminal law is deprived of much of its deterrent effect'"]; *In re Clark*, *supra*, 5 Cal.4th at p. 776, quoting *McCleskey v. Zant*, *supra*, 499 U.S. at p. 492, quoting *Engle v. Isaac*, *supra*, 456 U.S. at pp. 126-127 [""[c]ollateral review of a conviction extends the ordeal of trial for both society and the accused""]; *In re Clark*, *supra*, 5 Cal.4th at p. 805 (conc. and dis. opn of Kennard, J.), quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, *supra*, at pp. 452-453 ["A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands [punishing criminal acts]. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility"].)

VII. SHELL/DEFER IS NOT CONSTITUTIONALLY COMPELLED

HCRC briefly argues, for the first time, that the shell/defer artifice is not merely an attractive solution to the problem of delayed counsel appointments (Response at 2, 3, 6, 10, 23, 29), but something to which prisoners are *constitutionally entitled*. HCRC writes:

> 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 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.

(*Id.* at 11-12.)

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

To begin with, under this Court's timeliness standards, *all* California death row inmates have *exactly* "the same rights to develop and present potentially meritorious claims for relief in this Court." More specifically, because the period of presumptive timeliness can expire no sooner than 36 months after collateral counsel's appointment, a prisoner's opportunity to

file a timely state petition is wholly unaffected by whether that prisoner was "fortunate enough to be appointed state habeas counsel years before the[] conviction[] and sentence[] on direct appeal became final."

With respect to opportunities for federal review, AEDPA imposes an identical one-year statute of limitations on all prisoners (except to the extent Chapter 154 is applicable[7]), making no distinction between prisoners who pursue state collateral review with counsel's assistance and those who pursue it without. To be sure, at any given moment some prisoners will, for any number of reasons, including but not limited to the nature and extent of any earlier assistance provided by counsel at trial, on appeal, or in state collateral review, have a greater or lesser number of claims "perfected" for federal review. To the extent any earlier "lag" in the appointment of state collateral counsel might affect that number, the "injury" HCRC hypothesizes—having fewer claims available before the federal deadline expires than would be the case if the deadline expired at some later point or if (as was the case before AEDPA) no deadline existed at all—will occur by virtue of the *federal statute of limitations*. But the federal limitations period is a restriction on federal litigation imposed not by this Court, but by Congress. Because the "intolerable" constitutional error HCRC hypothesizes will be inflicted, if at all, by a future ruling of a federal court applying a federal statute, it is to the *federal* courts that HCRC's constitutional concerns must be addressed if and when the supposed

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[7] As we have noted (PSB at 254-25 fn.19), the limitations period prescribed in Chapter 154 (unlike the general limitations period currently applicable to Zamudio) will not apply to cases, even in Chapter 154-qualified jurisdictions, if counsel-assisted state collateral review had not actually been provided. (See generally Response at 13-14 fn.12 [acknowledging potential application of Chapter 154 to California death judgments].)

discriminatory treatment ever actually occurs. (See generally *Ferguson v. Palmeteer* (9th Cir. 2003) 321 F.3d 820, 823.)

For present purposes, it is sufficient to note that HCRC's theory is fatally speculative. First of all, because habeas "is not a device for investigating possible claims but a means for vindicating actual claims" (*People v. Gonzalez , supra*, 51 Cal.3d at p. 1179), there is no basis for assuming that any of HCRC's "ongoing bona fide" efforts to conduct "investigation" will actually "develop" (Response at 14 fn.13) any claims at all, let alone any suitable for inclusion in a later-filed federal petition. Thus, there is no basis for assuming Zamudio currently lacks, or will lack as the applicable deadline approaches, the ability to present the "fullest" federal petition appropriate to his circumstances. After all, Zamudio has already had an appeal in which his counsel filed a 219-page opening brief. Moreover, because the federal limitations period runs for one year "from the latest of" four different dates (one of which is the date on which the judgment became final on direct review (28 U.S.C. § 2244(d)(1)(A) - (D)), it is not possible to assess which, if any, future claims will be timely until those claims themselves, as well as the circumstances surrounding the timing of their presentation in federal court, are revealed. Furthermore, the limitations period is subject to tolling not only for legitimate exhaustion efforts pursuant to statute (28 U.S.C. § 2244(d)(2)), but also, it is widely assumed, for equitable reasons (*Lawrence v. Florida* (2007) 549 U.S. 327, 335-336). Zamudio having not yet pursued either avenue, it is simply impossible to know precisely when the federal limitations period will expire.

In short, the federal limitations period has assuredly inflicted no constitutional "injury" to Zamudio up to this point, and there is no reason to assume that it will ever actually operate to his disadvantage in the manner he hypothesizes. In all events, neither HCRC nor Zamudio himself is

entitled to explore and resolve these uncertainties "in anticipation of seeking habeas so that he will be better able to know, for example, the time limits that govern the habeas action." (*Calderon v. Ashmus*, *supra*, 523 U.S. 740, 746; *id.* at p. 748, quoted *ante*, fn. 2.)

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

Finally, no inmates will ever suffer any constitutionally cognizable form of prejudice because they were not "fortunate enough to be appointed state habeas counsel years before their convictions and sentences on direct appeal became final." (Response at 11.) To be sure, the timing of state habeas counsel's appointment could very well affect the number and complexity of claims that might be "developed" before the federal deadline expires, and any claims not "developed" until thereafter might well be time-barred in federal court. But regardless of when appointment of state counsel occurs, this Court, we note again, will have an unencumbered

opportunity to consider every claim that any inmate could ever hope to present to a federal court. If any such claim is meritorious, this Court will grant relief, in which event it would be academic whether that same claim could have been considered in federal court. On the other hand, any claim on which this Court were to deny relief would be, by definition, meritless, in which event the "lost opportunity" to present such a claim later to a federal court could not be "prejudicial." One can conclude otherwise only by assuming that this Court's will have erred in its disposition. We reject, as we must, any such assumption. (See *ante*, at pp. 14-16.)

VIII. HCRC'S "PRACTICAL" CONCERNS DO NOT JUSTIFY SHELL/DEFER

Almost as if recognizing that shell/defer cannot really be defended, either as a matter of state procedural law or for its intended effect on federal law, HCRC resorts to raising some purely "practical" arguments. HCRC insists that by endorsing shell/defer, the Court would avert "devastating results not only for the nearly 40 capital prisoners who have already filed" shells, "but also for the approximately 45 capital prisoners whose direct appeals will become final in the next year and for whom no habeas counsel has been appointed." (Response at 6.) Without shell/defer, HCRC tells us, the number of unrepresented prisoners in California will soar. Under these circumstances, HCRC continues,

> A great number of attorneys will be unwilling to accept appointments knowing that they will be hamstrung and unable to represent their client effectively—as from the outset they will have insufficient time to adequately develop and present meritorious claims for relief, as this Court's rules and precedents require.
>
> The delay resulting from creating additional disincentives for counsel to accept appointments will prove to be a substantial problem, and the consequences for capital petitioners resulting from this Court's

adoption of respondent's position will be catastrophic.

(*Id.* at 6-7, citations and footnote omitted.)

Moreover, HCRC suggests, the propriety of allowing shells to sit unexamined and unadjudicated for as long as petitioners take to file real petitions is an academic point, because

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

(Response at 29.)

To take HCRC's last point first, disposing of shell petitions promptly, as required by this Court's precedents, will actually consume relatively few resources. Shells are almost always very short pleadings; they are never accompanied by any documentary support; and their prima facie deficiencies are unfailingly glaring. Moreover, "as a practical matter," the Court would actually need to dispose of, at most, only a handful of shells before prisoners *would stop filing them altogether*, for prisoners (and the defense bar) would then soon realize that the federal limitations period is not to be trifled with. This Court would thereafter begin to see only *real* petitions, one per prisoner, "comprehensive" in scope, filed within the period of presumptive timeliness, and quite likely prepared by an attorney recruited and appointed by a Federal District Court within one year following the finality of direct review. And most importantly, the only tolling of the federal limitations period to which prisoners would lay claim will be that to which they are actually entitled under federal law. No wonder HCRC hates the idea.

HCRC's dire predictions about the willingness of attorneys to accept state habeas appointments merit very close examination. There are over 217,000 attorneys in California, more than 160,000 of them actively

practicing law. We are perplexed by the notion that the pace of death penalty litigation in California must be stemmed until it satisfies the defense bar's sensibilities. We are equally perplexed how any attorney who thinks compliance with the procedural rules governing state and federal habeas litigation cannot be squared with the duty to provide competent representation would conclude that the most ethical course is to withhold legal assistance altogether.

We agree that "'California's death penalty system is dysfunctional'" (Opposition to Motion for Order to Show Cause at 4), and desperately in need of reform. But shell/defer does not advance that effort, nor will any other feature that depends exclusively on the willingness of the defense bar to make the system work. (See Response at 7 fn.7 [insisting that shell/defer "ensures that qualified attorneys actually will be willing to accept appointment in these cases at all"]).

IX. MUST GOOD DEEDS BE PUNISHED?

The latest statutory iteration of the state-law right to state collateral counsel was adopted by the legislature in contemplation of qualifying California death penalty judgments for review in federal court under the "fast-track" rules—including the six-month filing deadline—provided in Chapter 154. In other words, California has "done its part to promote sound resolution of prisoners' petitions in just the way Congress sought to encourage." (*Lindh v. Murphy* (1977) 521 U.S. 320, 331.) But if California had never created the state-law right to collateral counsel (and the associated "right" to have counsel consume as much as three years following appointment to file a state petition), the argument HCRC makes to this Court for thwarting the one-year federal limitations period by shell/defer would fail in its premise. (See Response at 2-3.)

When earlier urging this Court to give plenary consideration to the propriety of shell/defer, we made the following observation:

> Because creation of the HCRC was integral to California's efforts to qualify under Chapter 154 (see Gov. Code, § 68661), it is especially fitting that HCRC be afforded the opportunity to explain why [Zamudio] should receive the assistance of counsel provided under an upgraded appointment mechanism, and yet be allowed to end-run even the modest one-year federal limitations period that would surely apply if the state had provided him no counsel at all.

(Reply to Opposition to Motion for Order to Show Cause at 18 fn. 11.)

In response, HCRC referenced the sad irony we had identified (Response at 4), and promised to show that our observation was "demonstrably faulty" (*id.* at 5). But then HCRC never returned to the subject. For that failure there can be only one explanation.

* * * * * * *

Dated: July 29, 2009

Respectfully submitted,

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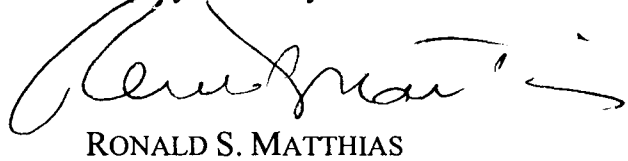

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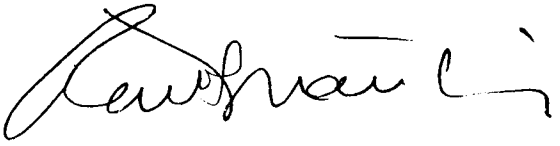
CERTIFICATE OF COMPLIANCE

I certify that the attached PEOPLE'S SUPPLEMENTAL REPLY BRIEF uses a 13-point Times New Roman font and contains 8144 words.

Dated: July 29, 2009

EDMUND G. BROWN JR.
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Samuel Zamudio Jimenez**
No.: **S167100**

I declare:

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

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

Michael Laurence
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(*2 copies*)

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

Nelly Guerrero
Declarant

N. Guerrero
Signature

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