IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

OPPOSITION TO RESPONDENT'S MOTION FOR ORDER TO SHOW CAUSE

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	)	(Automatic Appeal
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	)	
On Habeas Corpus.	)	Orange County
	)	Superior Court
	)	No. 94ZF0036
	)	

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I. INTRODUCTION

On April 4, 2008, petitioner filed a Petition for Writ of Habeas Corpus in this Court, including a request that the Court defer informal briefing until petitioner files an amended state habeas corpus petition, within three years from the appointment of habeas corpus counsel.[1] On

[1] Respondent appears to question the propriety of the California Appellate Project's (CAP's) filing of this petition, without actually contesting it: "Although petitioner has not yet had habeas corpus counsel appointed, the California Appellate Project, proclaiming 'authority' to act on his behalf (Petition at 16), has filed a petition for Writ of Habeas Corpus alleging that petitioner's trial counsel provided ineffective assistance in four respects." (Motion at 3.) Petitioner Edward Morgan has authorized Michael Millman, the Executive Director of CAP, to file the Petition for Writ of Habeas Corpus on his behalf to protect his statutory and constitutional rights to postconviction review.

June 16, 2008, respondent filed a pleading denominated "Respondent's Motion for Order to Show Cause," (Motion) in which respondent argues that petitioner's request to defer briefing is improper and that the petition should be dismissed. Respondent requests that the Court "issue an Order to Show Cause why the petition should not be summarily denied and the proceedings promptly terminated." (Motion at 1.) On July 16, 2008, the Court requested that petitioner file a response by August 15, 2008.

The petition, including petitioner's request to defer briefing, was filed, in the words of this Court's July 30, 2007 order in *In re Carmen Lee Ward*, S142694, "to promote judicial economy, to effectuate petitioner's right to counsel under section 68662 of the Government Code, to allow 'the full factual development in state court' of petitioner's claims (*Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9), and to permit the completion of 'one full round of [state collateral] review' (*Carey v. Saffold* (2002) 536 U.S. 214, 222)." Accordingly, respondent's motion should be denied as both unnecessary and without merit.

II. THE PROCEDURE REQUESTED BY PETITIONER EFFECTUATES PETITIONER'S RIGHT TO POSTCONVICTION COUNSEL AS REQUIRED BY STATE LAW, AND IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH EQUITY

A. If the Procedure Requested by Petitioner Is Not Followed, the Requirement of Government Code Section 68662 and the Policy Favoring Full Factual Development of Claims in State Court Will Be Thwarted

Government Code section 68662 provides, "The Supreme Court shall offer to appoint counsel to represent all state prisoners subject to a capital sentence for purposes of state postconviction proceedings . . . ." (See also, *In re Barnett* (2003) 31 Cal.4th 466, 475 [the provision of counsel in postconviction cases "promotes the state's interest in the fair and efficient administration of justice and, at the same time, protects the

interests of all capital inmates by assuring that they are provided a reasonably adequate opportunity to present us their habeas corpus claims"]; *In re Sanders* (1999) 21 Cal.4th 697, 717-19 [setting forth the multiple sources of the right to post-conviction counsel for condemned prisoners].) The problem addressed by petitioner's initial petition and request for deferral of informal briefing is the fact that petitioner has not yet been afforded his right to counsel to represent him in his habeas corpus proceedings. This fact places petitioner in a procedural bind, in which his ability to exercise his state rights to habeas corpus counsel and to file his state habeas corpus petition within three years of counsel's appointment are pitted against his right to pursue habeas corpus relief in federal court.

Petitioner's reply brief on direct appeal was filed on August 1, 2006. As noted, this Court has not yet appointed an attorney to litigate state post-conviction proceedings on behalf of petitioner. Thus, petitioner's state habeas corpus petition will be timely if it is filed on or before 36 months from the date upon which habeas corpus counsel is appointed by this Court. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3.1-1.1.)

In federal court, petitioner is subject to the statute of limitations imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) for filing his federal habeas corpus petition. Under the AEDPA, petitioner must file his federal habeas corpus petition either (1) within one year following the date on which judgment on the direct appeal becomes final (28 U.S.C. § 2244(d)(1)), or (2) within 180 days after final State court affirmance of the conviction and sentence on direct review if the State successfully argues that Chapter 154 of the AEDPA applies to petitioner's case (28 U.S.C. § 2263(a).) The judgment on direct appeal in this case became final on March 24, 2008 (see *Morgan v. California* (2008) 128 S. Ct. 1715), and habeas corpus counsel has not yet been appointed.

Therefore, under either provision of the AEDPA, the statute of limitations will run before the three-year period permitted by this Court's rules for filing a state habeas corpus petition has elapsed.

Under these circumstances, if the Court does not follow the procedure that petitioner seeks (allowing petitioner to amend his initial petition within three years of the appointment of state habeas corpus counsel and deferring informal briefing until the amended petition is filed), one of three improper results will obtain:

- If petitioner chooses to avail himself of his state rights to counsel and to at least three years in which to prepare his State habeas corpus petition, the federal statute of limitations will run before he can file an exhausted federal petition, and he will be denied the right to review of his claims in federal court (see 28 U.S.C. § 2244(d)(1) and 28 U.S.C. § 2263(a)); or
- If petitioner chooses to avail himself of his right to federal review of his claims by exhausting his state claims within the federal limitations period, petitioner will be deprived both of his right to counsel and his right to at least three years in which to prepare his state habeas corpus petition, in violation of this Court's obligation to provide representation to capital defendants in their state habeas corpus proceedings (and consequently, consistent with its other policies, to afford such counsel sufficient time with which to prepare a state habeas corpus petition) (see *In re Sanders* (1999) 21 Cal.4th 697, 717-719); or
- If petitioner chooses to avail himself of his right to federal review of his claims before exhausting his state claims, petitioner will be forced to enter federal court before his

> habeas corpus claims have been presented to this Court, in violation of the federal policy favoring the consideration of constitutional claims in the first instance by state courts, (see *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9 [encouraging the full factual development in state court of a claim that state courts committed constitutional error advances comity by allowing a coordinate jurisdiction to correct its own errors in the first instance"].)

It is this Hobson's choice that petitioner wishes to avoid where, "through no fault" of his own, he has yet to "have his . . . substantive claims considered on their merits." (*In re Sanders*, 21 Cal. 4th at 721.)

B. An Order to Show Cause Is Unnecessary Because the Procedure Requested by Petitioner Is Well Established by this Court and Supported by State Law.

By adopting in numerous cases the procedure pursued by petitioner, this Court has established an eminently reasonable and equitable solution to the above dilemma. Respondent's contention that the Court has not already "fully inform[ed] itself of the reasons for petitioner's demand and the merits of the People's opposition thereto" (Motion at 3-4) is inaccurate. The Order to Show Cause sought by respondent is unnecessary because the procedure sought by petitioner has been expressly approved by this Court, after extensive briefing by respondent, in a long line of cases.

One recent example is *In re Carmen Lee Ward*, S142694, *supra*, in which the Court granted the petitioner's Application to Defer Informal Briefing on Amended Petition for Writ of Habeas Corpus, succinctly and with "transparency" (Motion at 4), stating its reasoning, in part, as follows:

> Further briefing is deferred until the earlier of: 1) petitioner files all reasonably available documentary evidence in support of the allegations in the Amended Petition, and any additional allegations or claims for relief about which he may become aware as the result of further investigation and discovery; or 2) the date the period of

presumptive timeliness under this Court's order of April 12, 2006, expires.

> The April 12, 2006, order, and the present one, are made to promote judicial economy, to effectuate petitioner's right to counsel under section 68662 of the Government Code, to allow "the full factual development in state court" of petitioner's claims (*Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9), and to permit the completion of "one full round of [state collateral] review" (*Carey v. Saffold* (2002) 536 U.S. 214, 222).

(*In re Carmen Lee Ward*, order filed 7/03/2007.)

The Court has ruled similarly in other cases in which an initial petition (termed a "shell" or "quasi-shell" petition by respondent, Motion at 10) was filed by petitioner and deemed by the Court to be properly filed. (See, e.g., *In re Gregory Scott Smith*, No. S138147 [Order filed 12/13/06, granting Petitioner's Motion to Defer Informal Briefing on First Amended Petition for Writ of Habeas Corpus until petitioner files a Second Amended Petition, or the period of presumptive timeliness expires]; *In re Robert Taylor*, S102652 [Order filed 1/29/02, denying respondent's Motion to Dismiss Habeas Corpus Petition]; *In re James R. Robinson*, S141320 [Order filed 10/25/06, denying respondent's Motion to Strike or Dismiss Habeas Corpus Petition]; cf. *People v. Dwayne Michael Carey*, S058489 [Order filed 10/24/07, granting petitioner's Emergency Application for Stay of Execution Date-Setting Hearing Calendared for October 26, 2007 and staying execution of judgment pending final determination of pending (1) petition for writ of certiorari, and (2) initial petition for writ of habeas corpus (S157242), thus necessarily concluding the initial petition was properly filed for purposes of staying the execution-setting hearing.].)[2]

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[2] In a number of additional cases, respondent objected in its Informal Responses to initial petitions that contained only general allegations about the illegality of petitioner's confinement. In such cases this Court filed the petitioners' amended petitions under the same docket number as the initial

Respondent's assertion that "[s]tate law plainly does not allow what petitioner seeks from this Court," (Motion at 3), lacks merit. California Penal Code section 1474 requires that a petition for writ of habeas corpus must specify only:

> 1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known;
>
> 2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists;
>
> 3. The petition must be verified by the oath or affirmation of the party making the application.

More elaborate pleading is not required if doing so would cause an inequitable result. As the Court held in *People v. Duvall* (1995) 9 Cal.4th 464, 485, in cases "where access to critical information is limited or denied to one party, where it is unreasonable to expect a party to obtain information at the pleading stage, or where the proper resolution of a case hinges on the credibility of witnesses, the general rule requiring the pleading of facts should not be enforced in such a draconian fashion so as to defeat the ends of justice." (See also, *In re Sanders*, *supra*, 21 Cal.4th at 721 ["the state's interest in the finality of its criminal judgments, though strong," does not require the Court to accept an "incongruous, and harsh, result" such as the forfeiture of meritorious claims or the opportunity to

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petitions, and initiated the informal briefing process, thus implicitly acknowledging that both petitions were properly filed. (See, e.g., *In re Gurule*, S115250 [respondent unsuccessfully urged dismissal of petition]; *In re Snow*, S121365 [respondent unsuccessfully sought summary denial of petition]; *In re Maury*, S122460 [respondent unsuccessfully requested that the Court strike the petition].)

obtain an order to show cause, evidentiary hearing, and relief in this Court.].)

As it would "defeat the ends of justice" and be "incongruous" and "harsh" to require petitioner to choose between his right to state habeas corpus counsel and his right to federal habeas corpus review, this Court's approach to the problem, as illustrated by the proceedings in *Ward*, *Smith*, *Taylor*, *Robinson*, *Carey*, *Gurule*, *Snow*, *Maury* and other cases, is both appropriate and just.

C. Respondent's Argument Ignores the Principle of Comity and Would Work an Inequitable Result.

Respondent quotes the Chief Justice on the dysfunctionality of the existing system. (Motion at 1.) Respondent then suggests that petitioner seeks exemption from the commands of state law. (Motion at 2, 9.) Respondent further notes that the condition in which petitioner finds himself is hardly extraordinary, indicating there are now 201 condemned inmates lacking habeas corpus counsel who may "resort to these ploys." (Motion at 10, n.3.)

Respondent's focus is myopic and his censure misdirected. The system is dysfunctional not because of petitioner's actions, but because no counsel has been appointed to represent petitioner. Petitioner does not seek exemption from state law, but compliance with state law that requires that he be afforded counsel. He and others similarly situated are not resorting to "ploys," but are simply attempting to allow the system to work the way it is supposed to work, that is, affording petitioner state counsel to investigate and prepare a habeas corpus petition to be filed and resolved in state court, so petitioner can proceed to federal court after he has had the benefit of the state court review to which he is entitled and only if the state court, having fairly been presented with an opportunity to address his claims, has rejected them.

Under the doctrine of comity between state and federal courts, state court proceedings are to be concluded before petitioner proceeds to federal court. As the United States Supreme Court observed in *Rhines v. Weber* (2005) 544 U.S. 269, 273-274, "We noted [in *Rose v. Lundy* (1982) 455 U.S. 509] that '[b]ecause "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity. . . . That doctrine '"teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."' 455 U.S. at 518." 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." (Id. at 276-277, emphasis added; see also *Carey v. Saffold* (2002) 536 U.S. 214, 220, 222 [exhaustion of state remedies "serves AEDPA's goal of promoting 'comity, finality and federalism'" and provides states with the "opportunity to complete one full round of review, free of federal interference."].)

Respondent's analysis of the interface between state and federal proceedings ignores the source of the current problem and the likely prejudicial consequences to petitioner if it is not addressed in the manner that petitioner has suggested and that the Court has followed in numerous other cases. Respondent characterizes state and federal law as not being "mutually incompatible." (Motion at 11.) State deadlines do not dictate

federal filing time limits. Federal deadlines do not dictate state federal filing time limits. (Ibid.) Any interactive effects are simply "the natural consequence of the simple fact that the opportunity for federal collateral review exists at all." (Ibid.) The expiration of the federal statute of limitations – or, presumably, the federal proceedings themselves – "will have absolutely no effect on the 'fullness' of the factual development once it actually takes place in state court." (Motion at 13, n.6.) Whether delay in appointing state counsel might ever justify adjusting the federal statute of limitations is a federal question for the federal courts. (Motion at 12, n.5.)

Respondent recognizes that the procedural ruling at issue at this juncture of the case – deferring informal briefing until habeas corpus counsel is appointed and files an amended petition – will have absolutely no effect on the time limits governing disposition of petitioner's *state* habeas corpus proceedings. As respondent notes, the "time frame" for filing a state petition "has not even started to run" and will not start to run until after the appointment of state habeas corpus counsel. (Motion at 10.) There can be no disposition of state habeas corpus proceedings until appointed counsel, in accordance with that time frame, files a petition, respondent files a response (informal or formal), and the Court issues its ruling. Therefore, granting petitioner's request is in no sense a "retreat" from state rules designed to ensure timely disposition of state habeas corpus proceedings.

Respondent does not address what will happen if federal proceedings commence, or even conclude, before state habeas corpus counsel is appointed. Respondent apparently assumes federal courts will invariably authorize and fund federal counsel to investigate unexhausted habeas corpus claims, issue stays of federal proceedings to permit exhaustion of state remedies, and in effect, recruit the attorneys who eventually will serve as state habeas corpus counsel. While federal district courts may have

discretion to fund such investigation and issue such stays, they may not necessarily do so. Where they do not, petitioners may be denied the benefit of federal habeas corpus review of extra-record challenges to their death sentences, review which on numerous occasions has proved crucial in establishing the unreliability of a California capital judgment.

Moreover, respondent gives no indication that he will not oppose such a course of action in federal court. Petitioner can hardly assume that respondent, who here opposes deferral of briefing notwithstanding the lack of habeas corpus counsel to prepare it on petitioner's behalf, will not subsequently argue that other procedures also must not be deferred or modified simply because petitioner did not earlier have the benefit of state habeas corpus counsel.

Petitioner did not create the procedural dilemma that his request to defer informal briefing addresses. There is no basis for blaming petitioner for "ploys" to evade state law and delay the system where petitioner merely seeks to implement his statutory right to counsel so he can move forward litigating his habeas corpus claims in an orderly manner. This problem is absolutely not of petitioner's own making, and it would be manifestly unjust to penalize him for it.

Although respondent observes that "the only way to ensure completion of 'one full round' of state collateral review is to appoint an attorney who might file 'one full state petition" (Motion at 13, n.6.), respondent offers no suggestion of how or when that is to be accomplished, and not the slightest solicitude for the consequences to petitioner if it is not. An order to show cause is not needed to contemplate such an unjust and unprecedented result.

III. CONCLUSION

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

Dated: August 14, 2008

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

By: Michael G. Millman

Michael G. Millman
Attorney For Petitioner
Edward Patrick Morgan

DECLARATION OF SERVICE BY MAIL

In re Edward Patrick Morgan, No. S162413

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

OPPOSITION TO RESPONDENT'S MOTION FOR ORDER TO SHOW CAUSE

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

Edmund G. Brown Jr.
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Each said envelope was then on August 14, 2008, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on August 14, 2008, at San Francisco, California.

Kursten Hogard,
Declarant