In the Supreme Court of the State of California

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

PEOPLE'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Shell petitions were unheard of until Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA established, among other things, a statute of limitations for filing a federal habeas corpus petition that runs for one year (generally from the date the conviction became final on direct appeal), subject to tolling while the prisoner exhausts state remedies—i.e., for the period "during which a properly filed application for State post-conviction or other collateral review . . . is pending." (28 U.S.C. § 2244(d)(2).) Shell petitions, by design, exhaust nothing: They present this Court with no claims on which relief could be granted; more significantly, shells include requests that their contents go *completely unexamined until altered by future amendment.* Thus, unlike real petitions which are designed to induce release from custody, the shell's only purpose is to defeat the natural operation of the federal limitations period by opening an artificial period of state-proceeding "pendency."

If shell petitions were dealt with as prescribed by longstanding state precedent, there would be little doubt about their fate. First, this Court would immediately determine whether the filing states a prima facie case for relief, inasmuch as the shell's inclusion of a statement purporting to reserve the right to supplement or amend it at a later date would be accorded no effect. Next, upon this Court's finding no prima facie case for relief, the shell would be summarily denied.

Shell filers seek exemption from these simple and sensible rules. That is, they demand that shell filings be allowed to go unexamined and unadjudicated for lengthy—sometimes indefinite—periods. These same individuals—death row inmates, all—argue that resort to the shell petition contrivance is "necessary" whenever their convictions are (or are about to become) final on direct review, and either (1) no state habeas counsel has

yet been appointed or (2) counsel has been appointed but the federal limitations period is expected to expire before the last day on which a state habeas filing would be presumed timely.

As the ones seeking to change the law, shell filers bear the burden of demonstrating that the prevailing rules are wrong or outmoded, and that the rules they propose in substitution would further the public's interests more effectively. As we shall explain, that burden cannot be met.

The provisions of California law requiring prompt disposition of habeas petitions and prohibiting routine amendment and supplementation serve important public interests. They vindicate the finality of judgments, ensure the timely implementation of state law, avoid adjudicating claims after vital evidence is lost or memories have faded, and bring closure to the suffering of crime victims and their survivors. These interests are no less important after enactment of AEDPA than they were when the rules that promote them were first laid down by the Legislature and this Court. Fashioning new exceptions to those rules for the benefit of certain death row inmates would disserve these moral and legal imperatives—without producing *any* offsetting public benefit.

In particular, shell petitions do absolutely nothing to protect or promote the state law regime for reviewing death-row inmates' claims for collateral relief. Indeed, the only "benefit" shell filers hope to achieve—artificially extending the period within which relief might be pursued in federal court and enlarging the potential bases on which that relief might later be sought—provides no public benefit at all.

Under the best of circumstances, federal review of state judgments "entails significant costs." (*Engle v. Isaac* (1982) 456 U.S. 107, 126.) "Among other things, ""[i]t 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.'"'" (*Wright v. West* (1992) 505 U.S. 277, 293 (opn. of Thomas, J.), quoting *Duckworth v. Eagan* (1989) 492 U.S. 195, 210 (conc. opn. of O'Connor, J.), quoting *Harris v. Reed* (1989) 489 U.S. 255, 282 (dis. opn. of Kennedy, J.).) In recognition of these facts, Congress has carefully limited the circumstances under which federal courts may consider and grant state prisoners' petitions for habeas relief. The shell petition is an attempt to circumvent one of the most important of those limitations: the federal statute of limitations. As such, shells are a ruse designed to expand—beyond the limitations imposed by Congress—the federal judiciary's opportunity to delay, and perhaps even altogether defeat, the enforcement of state judgments whose validity has been reviewed and, without exception, upheld by this Court. Shells thus pose a grave threat to the interests of California's citizens, and this Court should not countenance capital murderers' resort to that ploy in any manner, least of all by weakening the force and effect of well-established and eminently sensible state law rules.

II. BACKGROUND

Edward Patrick Morgan is a recidivist sex offender and convicted sex/mutilation-murderer whose death sentence for a crime committed on May 20, 1994, was affirmed by this Court on November 15, 2007. (*People v. Morgan* (2007) 42 Cal.4th 593, cert. den. 128 S.Ct. 1715 (Mar. 24, 2008).) This Court has yet to appoint Morgan counsel to represent him in state habeas corpus proceedings. On April 4, 2008—11 days after the decision affirming his judgment became final—the California Appellate Project (CAP) filed the instant shell on Morgan's behalf. As CAP effectively acknowledges, it did not file the shell to persuade this Court that Morgan is entitled to relief, or even that the Court should examine whether the shell's "facts and causes" (Shell at 2) set forth a prima facie case on

which relief might be granted. Indeed, CAP has asked that the Court's consideration of those matters be "defer[red]" until Morgan files "amend[ments] within three years of the appointment of [state] habeas counsel." (Shell at 3-4, 8, 14-15.) Thus, the only purpose of the shell—in stark contrast to the amendments CAP forecasts will be timely presented—is to create an artificial period of "pendency" of state proceedings and thereby toll the one-year federal limitations period. (Shell at 4, citing 28 U.S.C. §§ 2244(d)(2), 2263(b)(2).)

On June 16, 2008, the People moved the Court to issue an order to show cause why the shell should not be immediately evaluated and then summarily denied for failure to state a prima facie case. CAP filed opposition on August 15, and the People replied on September 3.

On April 29, 2009, the Court ordered the People to address the following question:

> why, under applicable principles of California law, the court should deny petitioner's requests to permit petitioner to amend the petition within 36 months after the appointment of habeas corpus counsel to include additional claims as determined by habeas corpus counsel, and to defer informal briefing on the petition filed on April [4], 2008, until 36 months after the appointment of habeas corpus counsel, and why the court instead should summarily deny the petition.

Our answer follows.

III. DISCUSSION

CAP wants Morgan to have his cake and eat it too: CAP hopes the shell will toll Morgan's federal limitations period, as would a real habeas petition filed in a genuine effort to exhaust state remedies with respect to the claims it contains, yet CAP is unwilling to have the shell's allegations scrutinized and, when found wanting, summarily rejected for failure to state a prima facie case.

State law prohibits delaying consideration of habeas claims in contemplation of promised future amendments, and it recognizes no exception for the circumstances presented here. The arguments CAP has advanced for departing from established rules in Morgan's case are wholly unpersuasive, as granting CAP's demand would serve no legitimate state interest. Indeed, shells gravely undermine the public interest—especially if they were to prove effective in the way CAP hopes.

Accordingly, unless Morgan is willing to withdraw the shell for all purposes (without prejudice to submission of a real petition within the period of presumptive timeliness), he and CAP must expect that the Court will promptly evaluate it—and then deny it—under prevailing law.

A. The Nature of Habeas Corpus; Governing Rules

"In California, as in other states and the federal system, in criminal proceedings it is *the trial* that is the main arena for determining the guilt or innocence of an accused defendant and, in a capital case, for determining whether or not the death penalty should appropriately be imposed on the defendant for the offense at issue." (*In re Robbins* (1998) 18 Cal.4th 777, 777, italics in original.) "Further, if a defendant is convicted at trial of a capital offense and is sentenced to death, California law provides for an automatic appeal of the judgment to this court, and for the appointment of competent counsel to represent the defendant on that appeal. It is *the appeal* that provides the basic and primary means for raising challenges to the fairness of the trial." (*Ibid.*, italics in original.)

Habeas corpus, by contrast, "is an extraordinary, limited remedy against a presumptively fair and valid final judgment." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) It "'was not created for the purpose of defeating or embarrassing justice, but to promote it.'" (*In re Robbins, supra,* 18 Cal.4th at 777, citing *In re Alpine* (1928) 203 Cal. 731, 744.)

Accordingly, 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. 1260, italics added.) Because "the availability of the writ properly must be tempered by the necessity of giving due consideration to the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments, . . . a variety of procedural rules have been recognized that govern [the writ's] proper use . . . ." (*In re Robbins*, *supra*, 18 Cal.4th at p. 778.) We review the most prominent of these, as they are especially pertinent to the Court's recent inquiry.

"The law mandates prompt disposition of habeas corpus petitions . . . , and the interest of the state in the finality of judgment weighs heavily against delayed disposition of pending petitions." (*In re Clark* (1993) 5 Cal.4th 750, 782, citing Pen. Code, § 1476; see generally *Teague v. Lane* (1989) 489 U.S. 288, 309 ["Without finality, the criminal law is deprived of much of its deterrent effect"].) Among other things, prompt adjudication of collateral claims "helps ensure that possibly vital evidence will not be lost through the passage of time or the fading of memories." (*In re Sanders* (1999) 21 Cal.4th 697, 703.) "In addition," the Court has observed, "we cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over." (*Ibid.*)

Accordingly, "[w]hen presented with a petition for a writ of habeas corpus, a court must first determine whether the petition states a prima facie case for relief" (*People v. Romero* (1994) 8 Cal.4th 728, 737, italics added), and "[i]f no prima facie case for relief is stated, the court *will summarily deny* the petition" (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475, italics added). "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction; *defendant* must undertake the

burden of overturning them." (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1260 italics in original; *ibid.* ["Society's interest in the finality of criminal proceedings so demands"].) "'Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief.'" (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474, quoting *People v. Karis* (1988) 46 Cal.3d 612, 656.) Rather, a prima facie claim "must 'state fully and with particularity the facts on which relief is sought' and 'include copies of reasonably available documentary evidence supporting the claim.'" (*In re Hawthorne* (2005) 35 Cal.4th 40, 48, quoting *Duvall*, *supra*, 9 Cal.4th at p. 474.) This Court "must and will assume" that a filed habeas petition "includes all claims then known to the petitioner," and will not "routinely delay action on a filed petition to permit amendment and supplementation of the petition." (*In re Clark*, *supra*, 5 Cal.4th at pp. 780-781.) Thus, "[t]he inclusion in a habeas corpus petition of a statement purporting to reserve the right to supplement or amend the petition at a later date *has no effect*." (*Id.* at p. 781, fn. 16, italics added.) "Summary disposition of a petition which does not state a prima facie case for relief *is the rule*." (*Id.* at pp. 780-781; accord, *People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1258-1259 [any petition that fails to state a prima facie case for relief "must be summarily denied"].)

B. Because The Shell Filed on April 4, 2008 Fails to State a Prima Facie Case for Relief, it Must Be Summarily Denied; If the Court Concludes Otherwise, an Order to Show Cause Must Issue Without Delay; In No Event Should Evaluation of the Shell Be Deferred and the Course of Proceedings Delayed

1. The shell CAP filed on Morgan's behalf fails to state a prima facie case for relief. We shall explain why this is so in substantially the manner we would if the Court had sought the People's views in an informal

response. (Cal. Rules of Court, rule 8.385(b); see *People v. Romero*, *supra*, 8 Cal.4th at p. 737 ["To assist the court in determining the petition's sufficiency, the court may request an informal response from the petitioner's custodian or the real party in interest"].)[1] CAP does not expressly concede that the shell fails to set forth a prima facie case. But neither does CAP appear to dispute the point. (See Shell at 14; compare Opposition to Motion for Order to Show Cause (Opposition) at 2-12 with Motion for Order to Show Cause at 5-9.) Instead, CAP asks that the Court indefinitely postpone its inquiry into that matter. (Shell at 4, 14.)

But the shell either sets forth a prima facie case for relief, or it does not. If it does not, then relief must be summarily denied and the proceedings terminated. (See *ante*, at pp. 6-7.) By contrast, if the shell is deemed to state a prima facie case, then "the court is obliged *by statute* to issue the writ of habeas corpus" (or an order to show cause in its place)—and, more significantly, it would be obliged to do so "'*without delay*.'" (*People v. Romero*, *supra*, 8 Cal.4th at pp. 737-738, quoting Pen. Code, § 1476; italics added.) In either case, it is manifest that this threshold

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[1] As this Court went on to explain in *Romero*:

> Through the informal response, the custodian or real party in interest may demonstrate, by citation of legal authority and by submission of factual materials, that the claims asserted in the habeas corpus petition lack merit and that the court therefore may reject them summarily, without requiring formal pleadings (the return and traverse) or conducting an evidentiary hearing. If the petitioner successfully controverts the factual materials submitted with the informal response, or if for any other reason the informal response does not persuade the court that the petition's claims are lacking in merit, then the court must proceed to the next stage by issuing an order to show cause or the now rarely used writ of habeas corpus.

(*Id.* at p. 742, fn. omitted.)

question cannot be ignored, or the consequences of its correct resolution defeated, while further proceedings are deferred. (Accord, *id.*, at p. 737; *In re Clark*, *supra*, 5 Cal.4th at pp. 780-782 and fn. 16; *People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1258-1259.)

2. The shell alleges that Morgan's trial counsel provided ineffective assistance in a variety of respects. To prevail on a claim of ineffective assistance, it must first be shown that counsel's conduct was deficient, i.e., that the representation provided "fell below an objective standard of reasonableness . . . under prevailing professional norms." (*In re Hardy* (2007) 41 Cal.4th 977, 1018, internal quotation marks omitted.) When the record sheds no light on why counsel acted or failed to act in the manner challenged, a claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Salcido* (2008) 44 Cal.4th 93, 170.)

Second, prejudice must be demonstrated. "Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Hardy, supra,* 41 Cal.4th at p. 1018, internal quotation marks omitted.) Prejudice must appear "as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

CAP complains that Morgan's trial counsel (1) requested "an inapplicable and detrimental jury instruction, CALJIC No. 4.20 [voluntary intoxication not a defense to general intent crimes], and/or fail[ed] to request an explanatory instruction that CALJIC No. 4.21 [voluntary intoxication when relevant to specific intent] is an exception to the general rule stated in CALJIC No. 4.20" (Shell at 10, para. A); (2) failed "to

adequately investigate and present additional evidence at the guilt phase in support of the partial defense of intoxication" (Shell at 12, para. B); (3) failed "to present expert testimony at the guilt phase regarding the intoxicating effects of alcohol, cocaine, and steroids, and their potential effect on an intoxicated person's ability to form the requisite specific intent for violating Penal Code section 289" (Shell at 13, para. C); and (4) failed "to adequately investigate and present" at the penalty phase the same testimony and other evidence he faults counsel for failing to present at the guilt phase (Shell at 13, para. D). In no respect has CAP stated a prima facie case for relief; therefore, the petition must be summarily denied. (See *In re Clark*, *supra*, 5 Cal.4th at p. 791; see also *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1260 [habeas corpus is "not a device for investigating possible claims, but a means for vindicating actual claims."].)

a. CALJIC Nos. 4.20 And 4.21

Morgan's jury was instructed at his trial counsel's request in accordance with CALJIC Nos. 4.20, 4.21, and 4.22. CAP contends that CALJIC No. 4.20 "should not be given when specific intent crimes are charged." (Shell at 11.) Here, however, *both general intent and specific intent crimes* were charged, and the court's instructions clearly informed the jury that intoxication could be considered in connection with the explicitly enumerated specific intent crimes, but not the explicitly enumerated general intent crimes.[2] Instructions, of course, must be read

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[2] The trial court instructed pursuant to CALJIC No. 4.20 as follows:

> The law provides that no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition.
>
> In the crime charged in Count 1, kidnapping, or the crimes of false imprisonment, assault with a deadly weapon or with intent to inflict great bodily injury, and involuntary manslaughter,

(continued...)

together and understood in context as presented to the jury. Whether a jury has been correctly instructed depends upon the entire charge of the court. (*People v. Martin* (1983) 150 Cal.App.3d 148, 158; see *People v. Galloway* (1979) 100 Cal.App.3d 551, 567-568; *People v. Burgener* (1986) 41 Cal.3d 505, 538-539.) Here, because the jury was correctly instructed, CAP's attack on Morgan's trial counsel for requesting an "inapplicable" instruction necessarily fails.

Relying on *People v. Rivera* (1984) 162 Cal.App.3d 141, 145, CAP argues that CALJIC No. 4.21 "did not correct the erroneous provision of

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(...continued)

> which are lesser crimes, the fact that the defendant was voluntarily intoxicated is not a defense and does not relieve him of responsibility for the crime.

(VIII RT 1421; II CT 563.)

> The court continued with CALJIC No. 4.21, instructing:
>
> In the crimes of unlawful penetration with a foreign object and murder, of which the defendant is accused in Counts 2 and 3, or that of attempted unlawful penetration with a foreign object, or voluntary manslaughter, which are lesser crimes thereto, a necessary element is the existence in the mind of the defendant of the specific intent to cause sexual arousal, gratification or abuse, the intent to kill, and the mental state of malice aforethought.
>
> If the evidence shows that the defendant was intoxicated at the time of the alleged crimes, you should consider that fact in determining whether the defendant had such specific intent and/or mental state.
>
> If from all the evidence you have a reasonable doubt whether the defendant formed such specific intent and/or mental state, you must find that he did not have such specific intent or mental state.

(VIII RT 1422; II CT 564.)

CALJIC No. 4.20 in a case involving specific intent crimes absent an additional explanatory instruction." (Shell at 12.) But the defendant in *Rivera* was charged with *only* a specific intent crime, burglary; thus, instructing first in accordance with CALJIC No. 4.21 and then in accordance with CALJIC No. 4.20 to the effect that voluntary intoxication was no defense and would not relieve the defendant of responsibility for the crime, was error. (*Ibid.*)

No comparable instructional conflict or "danger of confusion" was created here. (See *Rivera, supra*, 162 Cal. App. 3d at p. 145 ["whether the giving of the instruction confuses the jury depends upon the manner and context in which it is given"]; see also *People v. Kozel* (1982)133 Cal.App.3d 507, 522-523 [if jury has been informed regarding effect of intoxication upon capacity to form specific intent, there is no reversible error in giving CALJIC No. 4.20].) Accordingly, CAP's attack on counsel again fails in its premise.

b. Evidence Of Cocaine And Steroid Use

CAP claims Morgan's trial counsel "was aware of additional evidence that [Morgan] had consumed large amounts of cocaine and steroids before the charged crimes," and failed to "investigate" and "present" that evidence. (Shell at 12.) No one, of course, better knows what trial counsel "was aware of" and "investigated" than counsel himself. The shell, we note, is verified by CAP's Executive Director. (Shell at 16.) If, in fact, the Executive Director is "informed and believes" (Shell at 16) what CAP has alleged about trial counsel's knowledge and conduct, that presumably is so because the Executive Director learned this information from trial counsel. In that event, CAP's failure to supply a declaration from trial counsel is striking. Because trial counsel has both a duty of loyalty to Morgan and a duty of candor to the courts, it is reasonable to assume that if counsel could give any *truthful* account of his state of knowledge and course of conduct

that tended to *sustain* CAP's allegations, counsel would supply that account to CAP upon request, and be willing to subscribe to it under penalty of perjury. Thus, CAP's failure to provide such reasonably available documentation or explain its absence (such as by describing its unsuccessful efforts to secure a declaration from counsel, or the reasons CAP refrained from even trying) amply supports the inference that trial counsel *cannot* support CAP's allegations, *and CAP knows it.* (Cf. *People v. Webster* (1991) 54 Cal.3d 411, 457.) This alone requires that CAP's attack be summarily rejected. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; see also *People v. Karis* (1988) 46 Cal.3d 612, 656.)

The claim is also fatally vague, for evidence that Morgan might have merely used some "large" but otherwise unspecified amount of cocaine and steroids at some unspecified time "before" his crimes wholly lacks any probative force. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474 [claims must be pleaded with particularity, and specific facts must be set forth].) Moreover, because Morgan cannot demonstrate that further "investigation" would have yielded any actual evidence worthy of "presentation," he necessarily fails to demonstrate that his counsel's performance was prejudicial, a failing that disentitles Morgan to relief as a matter of law. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; see also VI RT 959, 972, 976 [testimony establishing that petitioner did not appear intoxicated].)

c. Testimony From Intoxication Expert

"At the time of [Morgan's] 1996 trial," CAP observes, "expert testimony was admissible, and often necessary, to explain the intoxicating effects of controlled substances to lay jurors." Further observing that Morgan's trial attorney "failed to present the testimony of such an expert," CAP argues that his counsel performed substandardly. (Shell at 13.)

As noted, CAP has utterly failed to provide the required specificity and evidentiary support for its drug-ingestion allegations. Accordingly, no "predictable pharmacological effects" (*People v. Kaurish* (1990) 52 Cal.3d 648, 696, cited in Shell at 13) are ascertainable, and CAP has failed to demonstrate that there actually exists an expert willing to opine that such matters supply a "plausible explanation" (*In re Sixto* (1989) 48 Cal.3d 1247, 1262, cited in Shell at 13) for Morgan's conduct. Manifestly, CAP "must do more than surmise that defense experts *might* have provided more favorable testimony." (*People v. Lucas* (1995) 12 Cal.4 415, 448, fn. 5, citing *People v. Kaurish*, *supra*, 52 Cal.3d at p. 689; see *Strickland v. Washington, supra*, 466 U.S. at pp. 691- 692, 694, 697; *People v. Avena, supra*, 13 Cal. 4th at p. 418.)

d. Penalty Phase

Finally, CAP faults Morgan's counsel for failing to present the same drug-use evidence and expert testimony at the penalty phase. (Shell at 13.) As we have explained, however, CAP's assertions are fatally vague and wholly unsubstantiated. Equally deficient are CAP's assertions that Morgan was, at some unspecified time, "dependent on, or addicted to" some unspecified "controlled substances." (Shell at 14.) CAP has again failed to state a prima facie case of either substandard performance or prejudice.

e. Conclusion

Because the shell petition fails to state a prima facie case of ineffective assistance of counsel, it must summarily be denied. But should CAP somehow persuade the Court that the shell *does* state a prima facie case for relief, an order to show cause must issue without delay.

C. Shells Advance No State Interest

CAP has argued that filing a shell is necessary "to permit the investigation and presentation of potentially meritorious claims before this Court within the time frame permitted by state law, and to afford [Morgan] the benefit of counsel's assistance." (Shell at 2-3.) The shell does nothing of the sort, and its filing is completely unnecessary to the purposes CAP identifies.

Morgan will receive "the benefit of counsel's assistance" when this Court appoints him counsel, and that benefit will continue until the appointment is terminated by order of this Court. The shell filed on April 4, 2008 does nothing to implement that right in any way that will not be achieved by the required appointment order and the filing of a *real* petition within three years thereafter. Nor, of course, does the shell otherwise "effectuate" (Opposition at 2, 6) Morgan's right to state habeas counsel. CAP's assertion to the contrary rests on the premise that Congress, by enacting a federal limitations period, has "thwarted" (Opposition at 2) Morgan's state law right to counsel. The assertion is patently incorrect: A federal statute of limitations defeats no rights secured by state law.

Likewise, the shell does nothing to "permit the investigation and presentation of potentially meritorious claims before this Court within the time frame permitted by state law." The "investigation and presentation of claims" to this Court will be "permitted" and otherwise facilitated by the forthcoming appointment order and by the state's exceedingly generous funding provisions. And that Morgan will be allowed a leisurely paced 36-month period following counsel's appointment to get a real petition on file is a benefit conferred not by the shell CAP filed last year, but by the

Court's exceedingly accommodating timeliness rules.[3] Thus, CAP's assertion that it needs to file a shell to ensure that Morgan not be "deprived of the presumptive timeliness period" (Shell at 4) is manifestly untrue: that period will expire neither sooner nor later than 36 months following appointment of state habeas counsel, regardless of whether CAP files a shell before that period expires. Just as plainly, CAP's filing of the shell achieves no "economies" in the progress of state collateral review[4], nor will

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[3] By presuming to be timely any petition filed within three years of counsel's appointment, this Court confers on capital prisoners no "right" to consume the entire period, as CAP asserts (Opposition at 3). Every prisoner is at all times obligated to file the petition "without substantial delay." (Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, timeliness std. 1-1.)

[4] By contrast, as we have explained, summary *denial* of the shell in accordance with this Court's precedent likely would have accelerated (and could still accelerate) appointment of Morgan's state habeas counsel:

> Faced with the need to file a federal petition by March 25, 2009 (i.e., one year from the denial of certiorari following the Court's affirmance on direct review), petitioner would no doubt seek appointment of federal counsel. (See 18 U.S.C. § 3599(a)(2).) Experience teaches that such an appointment will occur with little or no delay. If federal counsel determines that it would be appropriate for petitioner to seek federal review of claims other than, or in addition to, those presented on direct review, counsel may promptly seek appointment by this Court to pursue those claims (see Cal. Rules of Court, rule 8.605(k)), a course that would vindicate the public's interest in the orderly and prompt implementation of its laws and judgments.

(Motion for Order to Show Cause at 13-14.) Other economies achievable through the natural application of federal statutory law suggest themselves as well, such as affording the federal judiciary the opportunity to promptly screen out all "plainly meritless" claims. (*Rhines v. Weber* (2005) 544 U.S. 269, 277, citing 28 U.S.C. § 2254(b)(2) ["An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State"].)

it have the slightest effect on the ultimate "fullness" of the "review" afforded under state law or the extent of "factual development" resulting from it (Opposition at 2, 6.)

Equally meritless is CAP's suggestion that the shell it filed on Morgan's behalf will "promote comity." (Opposition at 8-9.) The opposite is true: Comity is *defeated* when the opportunity for federal interference with state judgments that have already been reviewed *and upheld by this Court* is expanded beyond the contemplation of federal law itself. We next turn to this subject.

D. Shells Undermine Important State Interests

Because Morgan's shell plainly will have absolutely no effect on his opportunity to secure relief from *this Court*, CAP's true purpose in filing it concerns an entirely different matter: Simply put, CAP hopes to defeat the natural operation of the federal statute of limitations for seeking relief in *federal court*; that is, it seeks to enlarge, far beyond Congress's design, the time frame within which—and thus the bases on which—Morgan might later challenge his state judgment on federal habeas corpus. (See Opposition at 11.) Because such an effort would severely undermine the state's interests by expanding the scope, complexity, and duration of federal habeas litigation, no organ of state government has any legitimate interest in furthering it.

Federal habeas corpus is costly, disruptive, and counter-effective to the enforcement of state law. (*Engle v. Isaac*, *supra*, 456 U.S. at p. 126; *Wright v. West*, *supra*, 505 U.S. at p. 293.)[5] Accordingly, Congress has

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[5] Everything said about any proceedings that delay finality of state criminal judgments is true of federal habeas corpus litigation: it undermines the criminal law's deterrent effect, increases the risk that the adjudicative

(continued...)

acted to "reduce[] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." (*Duncan v. Walker* (2001) 533 U.S. 167, 179; *ibid.* ["The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments"]; see also *Woodford v. Garceau* (2003) 538 U.S. 202, 206 ["Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases"]; *Mayle v. Felix* (2005) 545 U.S. 644, 657 [limitations period reflects "'Congress' decision to expedite collateral attacks by placing stringent restrictions on [them]'"], quoting *United States v. Hicks* (D.C. Cir. 2002) 283 F.3d 380, 388.) Any necessary "balancing" of the exhaustion requirement and states' interest in reducing delay was for Congress to perform, and it did so:

> 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."

(*Duncan v. Walker*, *supra*, 533 U.S. at p. 179, italics added.)

(...continued)
process will come to rely on evidentiary sources impaired by the passage of time, and deprives victims and their survivors of the psychological comfort attainable through closure. But there are additional attributes, unique to federal habeas, that make it especially disruptive. For one, there is the "inevitable friction" generated whenever the judiciary of one sovereign reviews the product of a co-equal and coordinate state judiciary. (*Sumner v. Mata* (1981) 449 U.S. 539, 550.) For another, there is the fact that state court, not federal court, is "the most appropriate forum" for resolving claims brought by state prisoners. (*Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 9.)

Significantly, section 2244(d)(2) accords 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.

Congress, it is important to note, plainly understood that some states might create for some prisoners a right to counsel's assistance in collateral proceedings, and it provided—to the extent it deemed appropriate—for the eventuality that the state law right might not be realized by the time the federal limitations period is triggered or expires. Thus, in a different provision of AEDPA—Chapter 154 of Title 28—Congress established a six-month statute of limitations for capital cases arising in states that have created mechanisms for appointing counsel and providing them reasonable funding to conduct state collateral litigation. (28 U.S.C. § 2263.) Significantly, however, Congress also directed that none of the provisions of Chapter 154 (including the shorter filing deadline) will apply unless counsel had actually been appointed pursuant to the state's qualifying mechanism, i.e., unless the prisoner had actually realized the benefits which qualified the state's judgments for expedited federal review. (28 U.S.C. § 2261.) Had Congress also wanted delayed counsel appointments or unexpired state collateral filing periods to defeat operation of either the one-year or the six-month federal limitations period under additional circumstances, it would have so provided. Congress having rejected that course, it is not the province of any state court to manipulate state law for

the purpose of making the federal limitations period operate more disadvantageously to the state's interests than Congress intended.[6]

CAP cannot hope to persuade this Court to assist its efforts to defeat the federal limitations period by arguing that federal law is "mutually incompatible" (Petition at 3) with Morgan's "right" (Shell at 3; but see *ante*, fn. 3, at p. 16) to consume as much as three years following appointment of state counsel to seek collateral relief in state court. To

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[6] Although there can be no dispute that the state legislature has attempted to qualify California death judgments under Chapter 154 (compare *Ashmus v. Calderon* (9th Cir. 1997) 123 F.3d 1199, 1207-1208 [construing former 28 U.S.C. §§ 2261, 2265], rev'd on jurisdictional grounds sub nom. *Calderon v. Ashmus* (1998) 523 U.S. 740, with Gov. Code §§ 68662, 68663, 68665, 68666, added by Stats. 1997. ch. 869, § 3), determining the success of that effort cannot occur until, at a minimum, the United States Department of Justice promulgates regulations governing the state-certification process and the California Attorney General exercises his discretion in favor of seeking certification. Under these circumstances, any observations beyond the following would be premature:

First, if California were to qualify under Chapter 154, prisoners with capital judgments otherwise covered thereby would not have the "need" identified by CAP to file shells, for the six-month limitations period will not apply to cases in which counsel-assisted state collateral review had not actually been provided.

Second, if California were not to be certified for any reason, not only would the state not receive the benefit of Chapter 154's six-month limitations period, but the fact the state had *tried* to qualify—by, among other things, extending to capital prisoners a statutory right to counsel that might not necessarily always be effectuated before the one-year limitations period is triggered—will continue to be invoked by death row prisoners as a pretext for thwarting the one-year limitations period. Put another way, had 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. No irony this sad will likely go unnoticed.

begin with, to the extent the exhaustion requirement (Opposition at 8-9) is to have any bearing on the matter, Congress has struck the necessary "balance." (*Duncan v. Walker*, *supra*, 533 U.S. at p. 179; see *ante*, at pp. 18-19.) Thus, the "results" that flow from the natural application of state and federal law are not "improper," as CAP contends (Opposition at 4); they are, rather, exactly what Congress intended. (See *Painter v. Iowa* (8th Cir. 2001) 247 F.3d 1255, 1256 [rejecting claim "that equity requires us to construe section 2244(d)(2) to toll the statute of limitations during the entire three years allowed under Iowa law to apply for post-conviction relief because exhaustion of state remedies is a prerequisite for federal habeas relief and because principles of comity so demand"].) As the Ninth Circuit explained when rejecting a claim that the one-year federal limitations period, in combination with Oregon's two-year limitations period for state collateral review, "creates a 'trap' for Oregon prisoners who avail themselves of state remedies in a timely fashion, only to find themselves barred from federal court":

> First, there is no "trap." It is unreasonable for a federal habeas petitioner to rely on a state statute of limitations rather than the AEDPA's statute of limitations. *See Green,* 223 F.3d at 1003 (unreasonable reliance on distinguishable case does not justify equitable tolling). Second, 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. The federal statute of limitations does not diminish the right of Oregon prisoners to get state relief; it only affects their right to secure federal relief. Third, Ferguson's argument, if accepted, would create substantial problems. How would it be fair if Oregon prisoners got more time to file federal petitions than other state prisoners? What if a state had no statute of limitations? Could the prisoner bring a federal habeas petition fifty years after his conviction? A hundred years? What of federal interests in finality?

(*Ferguson v. Palmateer* (9th Cir. 2003) 321 F.3d 820, 823; see *Bingham v. Anderson* (S.D. Miss. 1998) 21 F.Supp.2d 639.) Accordingly, state and

federal law create no "procedural bind" (Opposition at 3), no "Hobson's choice" (Opposition at 5), and no "dilemma" that requires Morgan to "choose between his right to state habeas corpus counsel and his right to federal habeas corpus review" (Opposition at 8, 11). Likewise, it simply makes no sense for CAP to argue that "the [*federal*] limitations period does not provide the time necessary for [Morgan's] yet-to-be appointed habeas corpus counsel to investigate and draft the *state* petition. (Shell at 3, italics added.)[7]

Indeed, because federal law does not purport to dictate when state petitions are filed, and state law does not purport to dictate when federal petitions must be filed, the "results" of each sovereign's rules will be, as a factual matter, nothing like CAP describes. More specifically, if Morgan's federal limitations period should ever operate to "den[y] [him] the right to review of his claims in federal court," that will *not* be because he "avail[ed] himself of his state rights to counsel and to at least three years in which to

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[7] To be sure, whenever a prisoner's window of opportunity to seek state collateral review extends beyond the expiration of the federal limitations period, there is some risk that the prisoner will attempt to present claims to the federal court before presenting them to state court. But inasmuch as the federal court—whatever else it might do—will not resolve such claims (let alone grant relief), at least not before the state court completes its review, comity is not thereby offended. (See *Pace v. DiGuglielmgo* (2005) 544 U.S. 408, 416-417.) Indeed, comity is *served* whenever a *federal* court "'defer[s] action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers [such as the courts of a state], and already cognizant of the litigation, have had an opportunity to pass upon the matter.'" (*Rhines v. Weber*, *supra*, 544 U.S. at p. 274, quoting *Rose v. Lundy* (1982) 455 U.S. 509, 518.) By contrast, comity is gravely *disserved* when a *state* court defers *its* adjudication of a prisoner's claims just to enhance the prospects that relief will be granted in later proceedings of a type that "intrude[] on state sovereignty to a degree matched by few exercises of federal judicial authority." (*Wright v. West, supra*, 505 U.S. at p. 293.)

prepare his State habeas corpus petition" (Opposition at 4), but only because he *failed* to file a federal petition within one year following finality of this Court's decision on direct appeal. Conversely, if Morgan had filed a timely federal petition, he would in no way have been "deprived both of his right to counsel and his right to at least three years in which to prepare his state habeas corpus petition" (Opposition at 4). Rather, regardless of when, if ever, Morgan files a federal petition, his right to state counsel will be continuously preserved until such time that this Court chooses to vacate the order appointing counsel; likewise, his "right" to consume as much as three years after counsel's appointment to file a state petition will be guaranteed by this Court's timeliness standards.

When state and federal law operate according to their terms, the only "deprivation" Morgan will suffer is the disappointment associated with having to conduct federal habeas litigation that is no more complex and protracted than Congress allows. He does not deserve to be rescued from that fate, and this Court should not try.

IV. CONCLUSION

For the foregoing reasons, the People respectfully request that the Court invite CAP to withdraw the shell it filed on April 4, 2008, without prejudice to Morgan's opportunity to file a real petition within the period of presumptive timeliness. If CAP refuses the Court's invitation, the Court should immediately and summarily deny relief on the merits; alternatively, if the Court concludes that the shell states a prima facie case for relief on any ground, the Court should, without delay, order respondent and real party to show cause why relief should not be granted.

Dated: May 29, 2009

Respectfully submitted,

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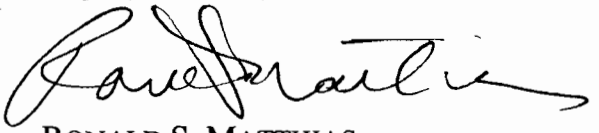

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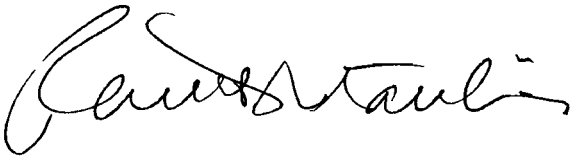
CERTIFICATE OF COMPLIANCE

I certify that the attached PEOPLE'S SUPPLEMENTAL BRIEF uses a 13-point Times New Roman font and contains 6,017 words.

Dated: May 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 Edward Patrick Morgan on Habeas Corpus**
No.: **S162413**

I declare:

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

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

Michael Millman
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101 Second Street, #600
San Francisco, CA 94105
Phone: (415) 495-5000
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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 May 29, 2009, at San Francisco, California.

Nelly Guerrero
Declarant

N. Guerrero
Signature

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