In the Supreme Court of the State of California

In re SAMUEL ZAMUDIO JIMENEZ, On Habeas Corpus.	CAPITAL CASE S167100 (Judgment Affirmed, Apr. 21, 2008, in Related Direct Appeal (S074414), 43 Cal.4th 327)

SUPREME COURT
FILED
JUL 29 2008
Frederick K. Ohlrich Clerk
Deputy

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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

Samuel Zamudio Jiménez is a convicted murderer whose death sentence for a crime committed on February 11, 1996, was affirmed by this Court on April 21, 2008. (*People v. Zamudio* (2008) 43 Cal.4th 327, cert. den. 129 S.Ct. 567 (Nov. 11, 2008).) More than a year earlier, this Court appointed the Habeas Corpus Resource Center (HCRC) to represent him in state habeas corpus proceedings. On September 29, 2008—two months before the decision affirming his judgment was even final—HCRC filed the instant shell on Zamudio's behalf. As HCRC effectively (if somewhat reluctantly) acknowledges, it did not file the shell to persuade this Court that Zamudio is entitled to relief, or even that the Court should examine whether the shell's "verified facts and allegations" (Shell at 4) set forth a

prima facie case on which relief might be granted. Indeed, HCRC has asked that the Court's consideration of those matters be "deferred" and all further proceedings be "stayed" until it files "amendments" before June 28, *2010*. (Shell at 3, 36.) Thus, the only purpose of the shell—in stark contrast to the amendments HCRC 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 2-3, citing 28 U.S.C. §§ 2244(d)(2), 2263(b)(2).)

On September 20, 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. HCRC filed opposition on November 3, and the People replied on November 28.

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 defer informal briefing on the petition filed on September 29, 2008, and to stay further proceedings in this matter until June 28, 2010, or the filing of an amended petition for writ of habeas corpus, whichever is earlier, and why the court instead should summarily deny the petition.

Our answer follows.

III. DISCUSSION

HCRC wants to have its cake and eat it too: HCRC hopes the shell will toll Zamudio'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 HCRC 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 HCRC has advanced for departing from established rules in Zamudio's case are wholly unpersuasive, as granting HCRC'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 HCRC hopes.

Accordingly, unless Zamudio 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 his counsel 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, 744 778.)

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 September 28, 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 Stayed

1. The shell HCRC filed on Zamudio'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] HCRC insists that the shell *does* set forth a prima facie case and thus "justif[ies] issuance of an order to show and the grant of relief" (Shell at 10; see also Opposition to Motion for Order to Show Cause (Opposition) at 10-18), yet asks that the Court postpone its consideration of that question and stay further proceedings. (Shell at 3, 36.) But if the shell is deemed to state a prima facie case, "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 question cannot be ignored, or the consequences of its correct resolution defeated, while the proceedings are stayed. (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.)

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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.)

2. The shell alleges that Zamudio'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.)

3.a. The shell first alleges that Zamudio's trial counsel "rendered constitutionally deficient representation in failing adequately to investigate, prepare, and present meritorious guilt and special circumstance defenses . . . ." (Shell at 11.) But the only observations offered in support of this claim are as vacuous as the claim itself: The shell merely propounds that "a thorough investigation" by defense counsel (which assertedly would have included an examination of "the prosecution's theories of guilt," "independent analysis" of evidence, a review of the investigation conducted by the police, "a thorough examination of witnesses," a review of potential defenses, and an exploration of Zamudio's background and family history,

including his physical, mental, emotional, and social "vulnerabilities" and their supposed impact on his functioning and behavior) "was essential to adequate preparation for the guilt phase of the trial." (Shell at 11-12.) This "claim" is deficient on its face. Because the shell nowhere identifies the extent of trial counsel's actual investigation, it allows no comparison with the "thorough" one now claimed to have been necessary. And because it also does not specify what evidence or testimony would have been discovered by a more "thorough" investigation, it supplies no basis for supposing that any information not presented at trial might have affected the jury's verdict if the jury had only learned about it.

b. The shell next alleges, without any support or elaboration whatsoever, that Zamudio's trial counsel "failed to competently litigate motions relating to the exclusion and admission of evidence." (Shell at 11.) This bare assertion is patently insufficient to state any basis for relief.

c. Finally, the shell alleges that counsel was ineffective for failing to object to multiple instances of alleged prosecutorial misconduct during the prosecutor's guilt-phase opening statement and closing arguments. In a great many instances, it is apparent from HCRC's own description of events that no misconduct even occurred; in other instances, the same quickly becomes apparent upon examination of the record. In no instance is it remotely likely that an objection from trial counsel would have resulted in a different verdict. It is at that point that the required analysis comes full-circle, for experienced trial counsel have the sound judgment not to squander time, effort, and credibility complaining about utterly inconsequential matters.

"[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Maury* (2003) 30 Cal.4th 342, 419; *People v. Samayoa* (1997) 15 Cal.4th 795, 855 ["mere failure to object to prosecutorial argument . . . rarely establishes

incompetence on the part of defense counsel in the absence of some explanation on the record for counsel's action or inaction"].) Indeed, "[b]ecause many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement *is within the 'wide range' of permissible professional legal conduct.*" (*United States v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1281, italics added.)[2] Significantly, the shell includes no declaration from Zamudio's trial counsel that explains why he did not object to the comments now challenged as misconduct, notwithstanding a petitioner's obligation to include reasonably available documentary evidence to support his habeas claims. Thus, under well-established law, Zamudio could be entitled to relief only if there simply could be no explanation for his counsel's failure to object.[3]

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[2] Relying on the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, HCRC vaguely suggests that trial counsel in capital cases are obliged to interpose *every* arguably meritorious objection, without regard to any other considerations. (Opposition at 12.) That, of course, is not what the ABA Guidelines say, and it would matter very little even if they did, for they lack determinative constitutional force. (*Strickland v. Washington* (1984) 466 U.S. 668, 688 ["No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant"]; cf. *Cone v. Bell* (2009) ___ U.S. ___ [129 S.Ct.1769, 1787] (opn. of Roberts, C.J., conc. in judgment) [noting that the ABA Standards for Criminal Justice Prosecution Function and Defense Function "are wholly irrelevant to" defining the prosecution's *constitutional* duty to disclose evidence].)

[3] Almost as if HCRC were trying to underscore how much death row inmates have "an incentive to delay assertion of habeas claims that is not shared by other prisoners" (*In re Clark, supra*, 5 Cal.4th at p. 806 (conc. & dis. opn. of Kennard, J.)), it insists that "*at this stage of the proceedings*" (Opposition at 14, HCRC's italics), no one need give the slightest thought to the existence and reasonableness of trial counsel's reasons for not

(continued...)

Here, HCRC contends counsel was ineffective for not objecting to the following alleged transgressions by the prosecutor: his reference in opening statement to evidence that was not later introduced at trial; references in closing argument to facts not in evidence; misstatements of the law during closing argument; suggestions that defense counsel was presenting a "sham" and an "underhanded" defense designed to deceive the jury; argument "vouching" for the efforts and testimony of prosecution experts; and argument characterizing Zamudio's crime as a "bad one" ("[t]hey don't get any worse that this") and otherwise describing the crime in "inflammatory" terms. (Shell at 13-34.)

Zamudio's counsel would have had many valid reasons for not objecting, the most immediately obvious being that the prosecutor's comments were simply not objectionable.

For example, it was hardly misconduct for the prosecutor to observe in opening statement that Zamudio had placed his palm prints at the crime scene while he committed the crime (see Shell at 13), merely because the evidence did not conclusively rule out the possibility that Zamudio might have left those prints behind on some other occasion, the strength of these competing inferences being matters for ultimate resolution by the jury.

(...continued)
objecting. HCRC's reasoning is confounding. On the one hand, HCRC argues that this is that rare case in which there simply could be no reasonable tactical justification for counsel's conduct (Opposition at 15)—a state of affairs that, assuming it actually existed and further assuming Zamudio were prejudiced (as HCRC also insists), would not merely create a "prima facie case" for relief, but would conclusively establish Zamudio's entitlement to it. On the other hand, HCRC proposes that counsel's reasons go unexamined—indeed, that they go wholly unmentioned in the parties' pleadings—until the Court holds "*an evidentiary hearing.*" (Opposition at 14, HCRC's italics.) As much as this presumptuous suggestion might appear to raise questions about HCRC's grasp of state habeas procedure, it leaves little doubt about HCRC's devotion to hide-the-ball litigation tactics.

"The function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Gurule* (2002) 28 Cal.4th 557, 610; see also *People v. Dennis* (1998) 17 Cal.4th 468, 518-519.) Nor was it misconduct to observe that bloody shoe prints at the scene were "made by [Zamudio's] shoes and no other shoes" (see Shell at 13), when a criminalist would later testify "that two of the bloody shoe prints were made by [Zamudio's] left shoe 'to the exclusion of all other shoes'" (43 Cal.4th at p. 336). (*People v. Cook* (2006) 39 Cal.4th 566, 606 ["The prosecutor's opening argument did no more than outline what the evidence would, and did, show"]; *People v. Dennis*, *supra*, 17 Cal.4th at pp. 518-519 ["the testimony eventually admitted at trial substantially supported the prosecutor's comments and inferences"].)[4] Likewise, observing in closing argument that one of the victims had hesitated to make a loan to Zamudio because "she did not trust him" was

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[4] And while it is one thing for an expert to testify that shoe prints matched Zamudio's left shoe "to the exclusion of all other shoes," it would have been quite another for the same expert to opine on the actual value of his opinion relative to the conclusions jurors might reach based on their lay observations of the same shoe impressions. Thus, although prudence might suggest that an expert not be permitted to opine on the latter point, nothing prohibited the prosecutor from suggesting that the jurors' own naked-eye examination of the shoe-print evidence would allow them to discern (consistently with, but independently of, the expert's opinion) a match to Zamudio's shoes. (Shell at pp. 18-19.) Morever, there being "blood on 'a lot of areas of'" Zamudio's shoes (43 Cal.4th at 337), it is virtually certain that Zamudio—who, of course, knew of his own responsibility for murdering the victims in their home—appreciated that his shoes constituted inculpatory evidence. These circumstance fully warranted argument that Zamudio "'knew' he was caught" when the police seized his shoes. Such an argument in no manner suggested that Zamudio had "confessed" to the crimes or otherwise "expressed any consciousness of guilt," as HCRC fancifully suggests. (Shell at 23-24.)

hardly inconsistent with earlier testimony that she delayed making the loan "because she wanted him to provide her with collateral" (Shell at 15), given what most people understand the purpose of collateral to be. Similarly, inasmuch as Zamudio was the victims' neighbor, had borrowed money from them, and claimed to be "good friends with, and close to" them (43 Cal.4th at p. 335), the prosecutor committed no misconduct (see Shell at 16) when urging the jury to infer that Zamudio would have known the victims kept cash in their home. (*People v. Welch* (1999) 20 Cal.4th 701, 752-753 [prosecution may vigorously argue its case and has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom].)

Where, as here, the murderer inflicted "multiple stab wounds" on his victims, and the defendant was found to have blood over "a lot of areas" of his shoes as well as on his socks and jewelry (43 Cal.4th at pp. 337-338), it was fair to infer that if no additional blood was detected on the other clothing he was wearing at the time of his arrest, that was because the defendant had, in the interim, changed his clothing and otherwise "cleaned up." (Shell at 17-18.)[5] Likewise, where it was determined that blood on Zamudio's shoe and watch matched the genetic profile of one of his victims, it was not improper to urge the inference that blood recovered from Zamudio's sock came from the same source. (Shell at 21.)[6]

Nothing prohibited the prosecutor from arguing that Zamudio would have acquired from his previous service as a police officer in Mexico a

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[5] Relatedly, the reasonableness of that inference in this case does not depend on whether Zamudio "did not have 'that many' changes of clothes" or had "a lot of changes of clothes" (Shell at 17), since he only needed to have a single change of clothes to replace his bloodied ones.

[6] Not that it could possibly matter to the outcome whether the victims' blood had been recovered from Zamudio's shoes, watch, and sock, rather than from just his shoes and watch.

"passing familiarity with violence" and a capacity for dealing with "*other* violent people." (Shell at 21-22, HCRC's italics.) The inference that he did so is an eminently reasonable one, and the characterization of Zamudio as a violent person himself is supported by abundant evidence. (See 43 Cal.4th at pp. 337-338.)

There is no merit to HCRC's contention that the prosecutor "misstated the law," thereby leaving the jurors "free" to err in their deliberations. (Shell at 25-30.) First of all, fairly read in context, the prosecutor's comments did not misstate the law. "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647.) More importantly (and no doubt well appreciated by trial counsel if not by HCRC), "arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter . . . are viewed as definitive and binding statements of the law." (*Boyde v. California* (1990) 494 U.S. 370, 384.)[7]

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[7] Apparently sensing the ultimate futility of harping on anything the prosecutor said, HCRC turns its attack on the trial court, arguing that it erred in providing any instruction on premeditated murder. (Shell at 29.) We note, however, that HCRC does not contest the trial court's determination that the premeditated murder instruction remained necessary to provide essential context to the second degree murder instruction requested by defense counsel. (Shell at 28, citing 19 RT 2932-2935.) At any rate, assuming purely for the sake of argument that there truly was "no evidence of premeditation and deliberation" (Shell at 28; but see 19 RT 2935:6-7), any argument or instruction on the point was assuredly harmless. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131, applying *Griffin v. United*

(continued...)

Nor would it have done trial counsel any good to object when the prosecutor soberly observed that the defense theory had a "problem" in that it required the jurors to "speculate," and otherwise "denigrated" the defense. (Shell at 30-32.) Comments of this nature were entirely proper. (*People v. Medina* (1995) 11 Cal.4th 694, 759; *People v. Cunningham* (2001) 25 Cal.4th 926, 1002; *People v. Taylor* (2001) 26 Cal.4th 1155, 1166; *People v. Stanley* (2006) 39 Cal.4th 913, 951-954.)

By crediting the forensics experts for having done "good work" on this case, the prosecutor did not engage in impermissible "vouching." Contrary to HCRC's imaginative reading (Shell at 32-33), none of the prosecutor's challenged comments implied that the prosecutor had "independent knowledge" concerning the quality of the experts' work, nor did any comments "inappropriately bolster[] the prosecution's evidence by arguing that he himself was credible and forthcoming." As this Court explained in *People v. Huggins* (2006) 38 Cal.4th 175

> . . . misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence. Closing argument in a criminal trial is nothing more than a request, albeit usually lengthy and presented in narrative form, to believe each party's interpretation, proved or logically inferred from the evidence, of the events that led to the trial. It is not misconduct for a party to make explicit what is implicit in every closing argument, and that is essentially what the prosecutor did here. Thus, counsel were not ineffective for failing to object to the comment.

Id. at p. 207; see also *People v. Anderson* (1990) 52 Cal.3d 453, 478.)

The prosecutor also committed no error when noting either the general severity of Zamudio's crime ("bad," "[t]hey don't get any worse") or the extent of injury he inflicted on his victims ("carv[ing]," "killing

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(...continued)
States (1991) 502 U.S. 46; *People v. Atkins* (1982) 128 Cal.App.3d 564, 568-569; see also *People v. Rowland* (1992) 4 Cal.4th 238, 282.)

wounds"). (43 Cal.4th at p. 337 [summarizing the victims' "multiple stab wounds," many of them described in trial testimony as "fatal"]; see also *People v. Harrison* (2005) 35 Cal.4th 208, 245; *People v. Stanley*, *supra*, 39 Cal.4th at pp. 951-954; see *People v. Maury*, *supra*, 30 Cal.4th at p. 419; cf. *People v. Benson* (1990) 52 Cal.3d 754, 794.)

Of course, whatever the technical merits of any objections that might arguably have been available, it is easy to understand why experienced trial counsel would not have interposed them.[8] As we have seen, none of the events about which HCRC complains could have been of any moment to

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[8] HCRC thinks our discussion of this point constitutes improper "speculation." (Opposition at 15-17.) Quite to the contrary, we are merely performing the analysis required when "the record 'sheds no light on why counsel acted or failed to act in the matter challenged'" and when, as here, counsel has *not* been "asked for an explanation and failed to provide one." That is, we examine whether "*there simply could be no satisfactory explanation.*" (*People v. Salcido*, *supra*, 44 Cal.4th at p. 170.) Because our analysis plainly shows that *many* satisfactory explanations could exist for counsel's conduct, the "presum[ption] that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy" (*ibid.*) *remains unrebutted.* Thus, Zamudio cannot establish a prima facie case for relief without, at a minimum, *identifying* trial counsel's actual reasons for the challenged conduct and *explaining* why those reasons are not satisfactory. Under these circumstances, a declaration from Zamudio's own counsel addressing these matters constitutes "reasonably available documentary evidence" that should have accompanied the petition. (*People v. Duvall*, *supra*, 9 Cal.4th at p. 474; see also Reply to Opposition to Motion for order to Show Cause (Reply) at 19, fn. 12 ["Because counsel has both a duty of loyalty to [Zamudio] and a duty of candor to the courts, it is reasonable to assume if counsel could give any *truthful* account of his conduct that tended to *sustain [HCRC's] allegations*, counsel would supply that account . . . upon request, and be willing to subscribe to it under penalty of perjury"].) The conspicuous absence of a statement from Zamudio's trial counsel—or even any indication that HCRC tried, but failed, to secure one—is inexcusable, and highlights yet another fatal defect in HCRC's attempted prima facie showing.

the jury's eventual verdicts.[9] Moreover, even if, for example, trial counsel had concluded that the prosecutor overstated any evidence in opening statement (see Shell at 13-14), counsel reasonably could have concluded that any later failure by the prosecutor to live up to his forecast might redound to the benefit of the defense.[10] Counsel also could have believed that he might more effectively address any perceived misstatements of the evidence or law, however disconnected they might actually be from the bases upon which he hoped to defend Zamudio, during his own argument (e.g., 20 RT 3038-3039) rather than object during the prosecutor's argument. (See *People v. Morales* (1992) 5 Cal.App.4th 917, 929 ["We cannot fault counsel for electing to respond to the prosecutor's argument rather than making an objection"].) In addition, counsel might have believed that objections to any arguably "inflammatory" remarks would not have been well-received by the jurors. (See *People v. Welch* (1999) 20 Cal.4th 701, 753-754 [counsel's strategic decision not to object to the prosecutor's allegedly inflammatory statements was reasonable because counsel could have determined that the risks of offending or annoying the

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[9] To provide yet one more example, it is wholly inconceivable that the jury's verdict turned on the jury's belief that Zamudio filed his tax return after, rather than before, his arrest. (Shell at 25.)

[10] Far more likely, counsel simply concluded that any difference between the prosecutor's preview of the evidence and the versions later supplied by witnesses was too trivial to bother attempting to exploit. For example, it hardly made any difference to the prosecution's point that Zamudio "took [Officer] Scott to the kitchen, showed him a calendar with a big 'X' on February 21, and said the 'X' was a reminder that the loan [he owed to the victims] was due by February 22" (43 Cal.4th at p. 335), rather than "dragged [Officer] Scott over into his house" (Shell at 14) for that same purpose. (See generally *People v. Coddington* (2000) 23 Cal.4th 529, 587; *People v. Harris* (1989) 47 Cal.3d 1047, 1079-1080.)

jury with an objection outweighed any benefit].)[11] Or, counsel might have chosen to withhold some objections simply to avoid unduly focusing the jury's attention on the matter. (See *People v. Huggins* (2006) 38 Cal.4th 175, 206; *People v. Harris* (2008) 43 Cal.4th 1269, 1290.)[12] In sum, HCRC has utterly failed to demonstrate that counsel lacked a valid tactical reason for not objecting, and the shell fails to state a prima facie case of deficient performance.

HCRC has also failed to state a prima case of prejudice. HCRC recites merely that the prosecutor's allegedly inappropriate comments "inflated the strength" of the prosecution evidence, "inflamed the passions of the jury," and "misled the jurors." But HCRC does not acknowledge the compelling evidence of Zamudio's guilt—i.e., his bloody shoe prints, along with his palm- and fingerprints at the crime scene; the presence of Mrs. Benson's blood on his shoes and watch; his possession of old coins like those his victims collected; or the mysterious disappearance from the victim's home of an the envelope labeled "pink slips" or "DMV"[13]—much

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[11] It is impossible, for example, to imagine what benefit counsel could have hoped to gain for Zamudio by complaining about references to his victim's age, his use of a wheelchair, and the ordeal he assuredly endured at Zamudio's hands. (Shell at 34.)

[12] That would surely have been counsel's prudent course when it came to engaging the court on the "reason" Zamudio's sock had not been placed in evidence. (Shell 19 [arguing the sock was unavailable not because it "was 'still at the defense lab,'" but "because the court banned introduction of exhibits with blood"].)

[13] Only three days before the Bensons were killed, Zamudio gave his victims the pink slip to his car as collateral for a $100 loan. As HCRC correctly points out (Opposition at 18), the pink slip to Zamudio's car was *not* among the pink slips in the envelope removed from the victims' home after they were murdered. No matter. The evidence strongly supported the conclusion that Zamudio "took the envelope containing the other pink slips because he *assumed*, based on its markings, it contained *his* pink slip." (43 Cal.4th at p. 359, italics added.)

less plausibly explain how the prosecutor's comments could have affected the verdict in light of such evidence.

Because the shell petition fails to state a prima facie case of ineffective assistance of counsel, it must summarily be denied. But should HCRC 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 Neither Protect Nor "Preserve" Any State Interest

HCRC has argued that filing a shell is necessary to

> effectuate this Court's order appointing Mr. Zamudio's habeas corpus counsel on June 27, 2007, permit the investigation and presentation of potentially meritorious claims before this Court within the time frame permitted by state law, and afford Mr. Zamudio the benefit of counsel's assistance.

(Shell at 2, 3.) The shell does nothing of the sort, and its filing is completely unnecessary to any of the listed purposes.

Zamudio immediately received "the benefit of counsel's assistance" when this Court appointed him counsel 23 months ago, and that benefit will continue until the appointment is terminated by order of this Court. The shell filed on September 28, 2008 does nothing further to "effectuate" that right in any way that will not be achieved by the filing of a *real* petition on or before June 28, 2010 alone. Nor, of course, does the shell "preserve" (Opposition at 2) his right to state habeas counsel. Indeed, the shell could have that effect only if Congress, by enacting a federal limitations period, had "impaired" his state law right to counsel, a proposition so absurd that not even HCRC has advanced it.

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" is "permitted" by the appointment order and by the state's exceedingly generous funding provisions. And that Zamudio effectively will be allowed a leisurely paced 36-month period to get a real petition on file is a benefit conferred not by the shell HCRC filed last year, but by the Court's exceedingly accommodating timeliness rules.[14] Thus, HCRC's assertion that it needs to file a shell to ensure that Zamudio not be "deprived of the presumptive timeliness period" (Shell at 3) is manifestly untrue: that period will expire neither sooner nor later than June 28, 2010, regardless of whether HCRC files a shell in the interim. Just as plainly, HCRC's filing of the shell achieves no "economies"[15] in the progress of state collateral review[16], nor will it have the slightest effect on the ultimate

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[14] 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 HCRC asserts (Opposition at 7). 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.)

[15] By contrast, summary *denial* of the shell in accordance with this Court's precedent likely will accelerate the course of state *and* federal habeas litigation: Reacquainted with the need to file a federal petition by November 11, 2009 (i.e., one year from the denial of certiorari following the Court's affirmance on direct review), Zamudio would no doubt do so, thereby 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"].)

[16] HCRC has argued that a stay of informal briefing on the shell will avoid "piecemeal litigation." No prospect for piecemeal litigation existed, however, until HCRC, in contravention of state habeas procedure, divided claims between the shell and the amended real petition HCRC proposes to file in the future. As we have explained (Reply at 11), HCRC cannot hope to justify its transgression of state law, or demand that the Court adopt HCRC's preferred response to it, by pointing to the fact of its commission.

"fullness" of the "review" afforded under state law or the extent of "factual development" resulting from it (Opposition at 8.)[17]

Equally meritless is HCRC's suggestion that Zamudio's shell will "promote comity." The opposite is true: Comity is *defeated* when the opportunity for federal interference with state judgments that have already

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[17] Relatedly, there is no merit to HCRC's suggestion that the statute of limitations Congress enacted in 1996 "conflicts" with (Opposition at 6) this Court's timeliness policies. (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.)

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 Zamudio's shell plainly will have absolutely no effect on his opportunity to secure relief from *this Court*, HCRC's true purpose in filing it concerns an entirely different matter: Simply put, HCRC 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—Zamudio might later challenge his state judgment on federal habeas corpus. 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.)[18/] Accordingly, Congress has 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

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[18] 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 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.)

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.)

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.[19/]

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[19] Although there can be no dispute that the state legislature attempted to qualify California death judgments under Chapter 154 by, among other things, creating HCRC, 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 HCRC to file shells, for the six-month limitations period will

(continued...)

HCRC cannot hope to persuade this Court to assist its efforts to defeat the federal limitations period by arguing that federal law is "mutually incompatible" (Shell at 2) with Zamudio's "right" (Opposition at 7; but see *ante*, fn. 14, at p. 21) to consume as much as three years following appointment of state counsel to seek collateral relief in state court. To begin with, to the extent "the federal policy favoring the consideration of constitutional claims in the first instance by the state courts" (Opposition at 7) 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 p. 24.) Thus, the "results" that flow from the natural application of state and federal law are not "improper," as HCRC contends (Opposition at 7); they are, rather, exactly what Congress intended (see *ante*, fn. 17 at p. 22).[20/]

(...continued)
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.

[20] 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.*

(continued...)

In all events, because state law does not purport to dictate when federal petitions must be filed, and federal law does not purport to dictate when state petitions are filed, the "results" of each sovereign's rules will be, as a factual matter, nothing like HCRC describes. More specifically, if Zamudio'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 prepare his state habeas corpus petition" (Opposition at 7), but only because he will have *failed* to file a federal petition on or before November 10, 2009. Conversely, by filing a timely federal petition, Zamudio will in no way "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" (Opposition at 7). Rather, regardless of whether Zamudio files any federal petition at all, timely or not, 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.

(...continued)
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.)

When state and federal law operate according to their terms, the only "deprivation" Zamudio 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 HCRC to withdraw the shell it filed on September 29, 2008, without prejudice to Zamudio's opportunity to file a real petition within the period of presumptive timeliness. If HCRC 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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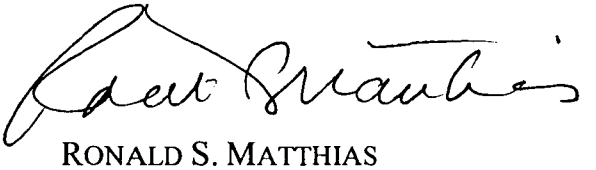
CERTIFICATE OF COMPLIANCE

I certify that the attached PEOPLE' SUPPLEMENTAL BRIEF uses a 13-point Times New Roman font and contains 6,564 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 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 May 29, 2009, I served the attached **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:

Cristina Bordé
Sara Cohbra
Mónica Othón
Habeas Corpus Resource Center
303 Second Street, Suite 400 South
San Francisco, CA 94107
Phone: (415) 348-3800
Fax: (415) 348-3873
(*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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