No. 09-996

# In The Supreme Court of the United States

JAMES WALKER, WARDEN, ET AL.,

*Petitioners,*

v.

CHARLES W. MARTIN,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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## REPLY BRIEF

## INTRODUCTION

A. Petitioner's default under a state procedural rule is adequate to bar his claim in federal habeas corpus proceedings if the rule affords fair notice of what is required of the litigant to obtain merits review of the claim in state court and advances legitimate state interests. State procedural rules provide the requisite fair notice if they are "firmly established and regularly followed." *James* v. *Kentucky*, 466 U.S. 341, 346 (1984); *NAACP* v. *Alabama Ex Rel. Patterson*, 357 U.S. 449, 457 (1958). A petitioner's failure to comport with a state procedural rule that provided fair notice of its requirements may be deemed inadequate only when the state had no legitimate interest in the rule's enforcement. *Osborne* v. *Ohio*, 495 U.S. 103, 124 (1990); *James* v. *Kentucky*, 466 U.S., at 349; *Michigan* v. *Tyler*, 436 U.S. 499, 512, n.7 (1978). "Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law. . . ." *Lee* v. *Kemna*, 534 U.S. 362, 391-92 (2002) (Kennedy, J., Dissenting).

Comity and federalism require federal courts to presume the adequacy of state procedural rulings; the petitioner should bear the burden of rebutting the presumption. See *Lee* v. *Kemna*, 534 U.S., at 375; *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 190, 195 (1925). For "[s]tate courts are duty bound to give full effect to federal constitutional

rights and it cannot be assumed that they will be derelict in their duty." *Wade* v. *Mayo*, 334 U.S. 672, 679 (1948); see also *Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991).

An alternative presumption—that the state court imposes its procedural bars irregularly so as to defeat fair notice or fails to advance legitimate state interests—is indefensible. Presumptions should, after all, reach the correct result most of the time; and it cannot be said that state procedural rules fail to accord fair notice or advance legitimate state interests on the majority of occasions in which they are imposed. *Coleman* v. *Thompson*, 501 U.S., at 737.

B. Under this Court's "adequacy" precedents, then, California's habeas corpus timeliness rule is adequate. It affords litigants fair notice of what is required of them to obtain merits review of their federal claims in state court, and it advances legitimate state interests. Under the California rule, habeas corpus litigants must bring their state collateral challenges "as promptly as the circumstances allow," and they must explain with specificity when they learned of their claim and what reasons, if any, prevented them from raising the claim sooner. *In re Gallego*, 18 Cal.4th 825, 832-33, 959 P.2d 290, 295-96 (1998); *In re Robbins*, 18 Cal.4th 770, 795, n.16, 959 P.2d 311, 327, n.16 (1998); *In re Clark*, 5 Cal.4th 750, 765, n.5, 855 P.2d 729, 738, n.5 (1993). A finding of untimeliness in this context, then, has two components (1) unreasonable delay; and (2) inadequate justification. As reflected in this Court's precedents, such a rule of reasonableness

suffices to give fair notice. In addition, California's timeliness rule advances its legitimate interests in preserving scarce judicial resources and protecting the finality of its criminal convictions. *In re Clark*, 5 Cal.4th, at 766, 770, 855 P.2d, at 739, 742; *In re Harris*, 5 Cal.4th 813, 831, 855 P.2d 391, 399-400 (1993).

Though Martin claims confusion regarding the length of "substantial delay," he cannot credibly argue that his own delay in this case was not substantial. The claims Martin advanced in his second state high court habeas corpus challenge stemmed exclusively from his trial and direct appeal proceedings which occurred in 1995 and 1997 respectively. Despite presenting an earlier state high court collateral challenge in 1998, Martin never adequately justified why he waited until 2002 to present his additional claims which were known or knowable at the time of his trial and direct appeal. Joint Appendix (JA) 11-12.

C. Martin and amici curiae supporting him argue that the State here seeks to "replace" the existing body of "adequacy" law with only a "fair notice" requirement.[1] RBOM 18, 51-52, 57; ABFCS 2-5, 9-10; ABCM 5-6, 10, 17. As explained here and in the State's merits brief (Petitioner's Brief on the

[1] Martin's Responding Brief on the Merits will be referred to as RBOM; the Amicus Brief by the Habeas Corpus Resource Center will be referred to as ABHCRC; the Amicus Brief by the Federal Defenders will be referred to as ABFD; the Amicus Brief by the Federal Courts Scholars will be referred to as ABFCS; and the Amicus Brief on behalf of Cory Maples will be referred to as ABCM.

Merits (PBOM) 9-11, 17-24), however, the State merely advocates a "fair notice and legitimate state interest" formulation of the test that is well grounded in this Court's jurisprudence. In contrast, Martin and those amici appear to advocate for consistency merely for consistency's sake. RBOM 29-36; ABFCS 14-16. Instead, inquiry into "consistency" in a rule's application is a tool suited for the purpose of the adequacy requirement. Thus the inquiry is aimed, not at ensuring consistency for consistency's sake, but at determining whether a procedural rule provides adequate notice and advances legitimate interests.

Martin and the amici supporting him also argue that the California timeliness rule is unclear because it is based upon a standard of reasonableness. RBOM 13, 15-16, 18, 37-50; ABHCRC 4-12, 15; ABFD 17-24. But this Court has endorsed similar rules of reasonableness that require diligence and promptness from litigants. Indeed, entire landscapes of American jurisprudence rely on rules requiring reasonableness in a variety of contexts.

Finally, Martin and amicus curiae Federal Defenders seek to revisit this Court's grant of certiorari in this case and to quarrel with the logical placement of the burden of proving that a facially neutral and unremarkable state procedural rule is nonetheless "inadequate." As also explained below, however, their arguments are unavailing.

## ARGUMENT

### I. Martin's Proposed Standard For Measuring Adequacy Misconstrues This Court's Precedents And Places Too Heavy An Emphasis On Second Guessing The Mere Consistency Of The State Court's Application Of Its Procedural Rule.

A. Martin argues that the State seeks to "replace" the existing body of "adequacy" law with only a "fair notice" requirement. RBOM 18, 51-52, 57. As explained here and in the State's merits brief (PBOM 9-11, 17-24), however, the State instead advances a "fair notice and legitimate state interest" formulation of the test that is firmly rooted in this Court's jurisprudence. Martin suggests that confusion would ensue from adoption of the State's argument. RBOM 18. But he provides no explanation why.

B. Aside from failing to recognize that the State's interpretation of the adequacy inquiry requires consideration of the legitimacy of the state's interest in its procedural rule, Martin's main criticism proceeds from his wooden view of this Court's concern that the state courts "consistently apply" the challenged procedural rule to the individual claim at issue. RBOM 28-36. In the context of "adequacy," consistent application of the state procedural rule is relevant only to the extent that inconsistency might be so pervasive as to defeat fair notice or to refute any suggestion that the rule advances legitimate state interests. A rule that is rarely invoked when it would normally apply, or that

is suddenly interpreted in a novel manner, likely would not provide state court litigants with sufficient notice that they must comply with the rule or risk default of their claim. When a rule is so rarely invoked, litigants might be deceived into believing that the state courts have abandoned the rule so that it need not be observed. Or, when so rarely applied, the rule might no longer serve a legitimate purpose, but perhaps only a pernicious one. Martin's slavish devotion to consistency stems from a fundamental misunderstanding of why this Court sometimes considers how the state courts have applied a procedural rule to similar claims in other cases.

C. Martin cites several of this Court's precedents as support for his view that the federal "adequacy" standard demands some high mathematical level of "consistent application" by the state courts. RBOM 28. The cited precedents instead show that this Court has been concerned with fair notice and discrimination against federal claims or claimants and certainly not with consistency in state law rulings for its own sake. Moreover, in none of the cited cases did this Court engage in the wholesale rejection of a state procedural rule rather than a rejection of the rule as applied on a specific occasion. And none was a 28 U.S.C. § 2254 case raising the special federalism and finality concerns that traditionally have limited the scope of the writ.

When this Court has undertaken a "consistency" analysis in a specific case, it has focused on the extent that published authorities from the state are inconsistent with the statement of the rule at issue.

Thus, in *Staub* v. *City of Baxley*, 355 U.S. 313, 318, 320 (1958), this Court considered "a long line of [state court] decisions" that had established a rule that was inconsistent with what had been imposed in that case by the state court. Similarly, in *Barr* v. *City of Columbia*, 378 U.S. 146, 149-50 (1964), this Court noted that four other published state cases decided within months had squarely contradicted the approach taken by the state. Also, in *Johnson* v. *Mississippi*, 486 U.S. 578, 588-89 (1988) and *James* v. *Kentucky*, 466 U.S., at 346-49 this Court concluded that the weight of published state authority contradicted the interpretation given in the current case. And, in *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982), this Court found that there was no mention of the pertinent rule in published state authority for two decades. In these examples, then, this Court considered prior published state court decisions in the context of evaluating the extent that the state had provided sufficient notice that the rule at issue was going to be applicable in the current case. When the current application of the rule is inconsistent with earlier decisions by the state court, then fair notice cannot be said to exist.

D. That is, mere inconsistency in state law rulings, unless it defeats fair notice or suggests invidious discrimination, does not render a neutral and reasonable state procedural rule "inadequate" to support the state judgment in the federal habeas court. As this Court recently held, discretion based procedural rules are adequate. *Beard* v. *Kindler*, 130 S.Ct. 612, 618 (2009). They cannot

become inadequate just because of the varied results that inevitably follow from exercises of discretion by different state courts and judges over time.

Martin, however, seems to insist upon consistency merely for the sake of consistency. Based on this premise, Martin presumably would require proof that state courts, in all cases and all circumstances, apply a given procedural rule in the same manner. This Court, of course, has never based a finding that a state procedural rule was inadequate upon such an exhaustive review. See *Dugger* v. *Adams*, 489 U.S. 401, 410, n.6 (1989); *Johnson* v. *Mississippi*, 486 U.S., at 587; *Hathorn* v. *Lovorn*, 457 U.S., at 263.

Martin relies on *Prihoda* v. *McCaughtry*, 910 F.2d 1379 (7th Cir. 1990), in support of his consistent application argument. RBOM 28. But the Seventh Circuit's analysis supports the State's position. In *Prihoda*, the court of appeals explained that a state rule basis for a decision may be inadequate in federal court if the rule is followed only infrequently, unexpectedly, or freakishly. *Id*., at 1383. Martin, of course, has provided no evidence that California's timeliness rule has been applied infrequently, unexpectedly, or freakishly. Further, the Seventh Circuit in *Prihoda* specifically recognized the problematic nature of searching for "consistency," explaining that federal court scouring of a state court's application of exceptions to its procedural rules plunges federal courts improperly into questions of state law. *Id*., at 1383.

E. The problems inherent in a federal court attempting to scrutinize for consistency the general

application of a state procedural rule in a myriad of cases are demonstrated, ironically, by the survey undertaken by amicus Habeas Corpus Resource Center. ABHCRC 16-36. In that survey, HCRC second guessed the consistency of the California Supreme Court's application of its timeliness rule by considering summary denials of relief by the state court in 157 habeas corpus cases decided on the same day Martin's second petition was denied. Implicit in the HCRC study and in Martin's argument, also, is the notion that an evaluation of "adequacy" must involve such a dubious yet exhaustive and intrusive inquiry. Surely, this Court should doubt the validity of any view of "adequacy" that would result in sentencing federal courts to the hard labor of undertaking such improbable scrutiny of a myriad of state court decisions. As the district court noted below, "There should be no requirement for the undersigned to review the pleadings of tens, or even hundreds of cases, every time a procedural bar motion is made in order to make a judicial speculation of what was in the mind of the state courts." Petition Appendix (Pet. App.) 16, n.6.

Not surprisingly, HCRC reports that it was unable to discern from its strange review any "guidance as to the court's criteria for imposing the timeliness bar." ABHCRC 36. Aside from the unanswered question of whether the one day sample was a representative one, HCRC's "empirical study" suffered from further unwarranted speculation and assumptions. In such a review of "timeliness" rulings in these habeas corpus cases, it cannot be gleaned from a summary ruling when the petitioner's claims became known or

knowable by the petitioners, or what justifications for any delay they might have offered. Nor may one confidently discern from a summary denial imposing a timeliness bar if the petitioner sought to invoke any of the recognized exceptions to the substantial-delay rule. See *In re Clark*, 5 Cal.4th, at 769, n.9, 855 P.2d, at 741, n.9; *In re Robbins*, 18 Cal.4th, at 814, n.34, 959 P.2d, at 340, n.34.

Moreover, HCRC apparently assumed that the California Supreme Court, when simply announcing that it was denying a petition on the merits or on an alternative procedural ground, necessarily found that the petition was "timely." Nothing in California Supreme Court practice supports such an assumption. To the contrary, it would be an appropriate and efficient use of scarce judicial resources for the court to deny a petition on the most expeditious ground without undertaking a potentially more difficult inquiry into timeliness.

F. Martin unjustifiably accuses the State of arguing that it is simply untenable for federal courts ever to "review" a state court's use of its procedural rules. RBOM 31, 33. The State, however, agrees that federal review of state procedural rules, for fair notice and legitimate state interest, is wholly appropriate. What should not be permitted is for federal courts to second guess a state's interpretation of reasonable state procedural rules that afford federal litigants fair notice and do not discriminate against them. Cf. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975); *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991). But the Ninth Circuit undertakes such improper second guessing

in invalidating California procedural rules across the board. See PBOM at 35, n.3, citing *King* v. *LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006).

Finally, Martin argues that the Ninth Circuit recognizes the adequacy of discretion based rules and that the court of appeals is not mandating "a level of mathematical precision that is inherently inconsistent with the exercise of discretion." RBOM 17, 32, 34. However, the Ninth Circuit's ruling here shows otherwise. It faults California for choosing "to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines." Pet. App. 3; *Townsend* v. *Knowles*, 562 F.3d 1200, 1207 (9th Cir. 2009), citing *King* v. *LaMarque*, 464 F.3d, at 966 (impugning California's timeliness rule for being too vague).

## II. This Court Should Reject Martin's Argument That The Burden Of Proving Adequacy Should Be Imposed On The State.

Martin recommends that this Court adopt the burden of proof allocation as articulated by the Ninth Circuit in *Bennett* v. *Mueller*, 322 F.3d 573 (9th Cir. 2003), and the Tenth Circuit in *Hooks* v. *Ward*, 184 F.3d 1206 (10th Cir. 1999). RBOM 13, 17, 21-24. But these decisions are ill conceived. The Ninth Circuit took its rule, imposing upon the state the burden of proving adequacy, from the Tenth Circuit. *Bennett* v. *Mueller*, 322 F.3d, at 584-85 (citing *Hooks* v. *Ward*, 184 F.3d, at 1217). In turn, the Tenth Circuit gleaned

its *Hooks* burden allocation rule from two California federal district court opinions: *Karis* v. *Vasquez*, 828 F.Supp. 1449, 1463, n.21 (E.D. Cal. 1993) and *Coleman* v. *Calderon*, No. C-89-1906-RMW, 1996 WL 83882, at *3 (N.D.Cal. Feb. 20, 1996) (Unpublished Order), aff'd on other grounds by 150 F.3d 1105 (9th Cir. 1998), rev'd on other grounds by 525 U.S. 141 (1998). *Hooks* v. *Ward*, 184 F.3d, at 1216. Both of these district court opinions, however, are based upon the faulty reasoning that discretionary state rules are necessarily infirm. *Karis* v. *Vasquez*, 828 F.Supp., at 1461, 1463; *Coleman* v. *Calderon*, 1996 WL 83882, at *2; see also *Beard* v. *Kindler*, 130 S.Ct., at 618. Martin ultimately relies upon this discredited notion too. RBOM 30.

As explained in the State's opening brief, the burden of establishing inadequacy should be placed upon habeas corpus petitioners. Federal courts certainly should not assume that state procedural rulings are infirm and inadequate. Such a presumption would be improper for it would reach the wrong result the majority of the time, see *Coleman* v. *Thompson*, 501 U.S., at 737; would offend comity and federalism, see *Wade* v. *Mayo*, 334 U.S., at 679; and could thwart Congress' reform of habeas corpus in AEDPA, see PBOM 28-33. To the contrary, this Court refused to engage in a presumption that all state law grounds invoked to support a judgment are dependent upon federal law and inadequate. *Coleman* v. *Thompson*, 501 U.S., at 737-38. "Adequacy" logically should be treated the same way. *Central*

*Union Telephone Co.* v. *City of Edwardsville*, 269 U.S., at 195 (state court's declaration of its procedural rule "should bind us" unless unfair or unreasonable). Similarly, habeas corpus petitioners bear the burden of proving "cause and prejudice" to lift a procedural bar. *Wainwright* v. *Sykes*, 433 U.S. 72, 90-91 (1977). There is no good reason to treat "adequacy" differently.

Of course, procedural default defenses must be raised or they can be lost, see *Gray* v. *Netherland*, 518 U.S. 152, 165-66 (1996); and statute of limitations and procedural bar defenses are analogous in this respect. See RBOM 13, 20. But it should be enough for the state to assert the state procedural default ruling as a defense; the burden to demonstrate inadequacy should be petitioner's. Such a rule is similar to the one in the analogous area of the federal bar against successive petitions. That is, once a state pleads that a petitioner has filed a second federal habeas corpus petition, the petitioner has the burden of showing that he should be excused. *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991). Similarly, in the federal statute of limitations context (see 28 U.S.C. § 2244), once the state shows that a federal habeas corpus petitioner has filed his federal petition beyond the applicable one year statute, the petitioner bears the burden of showing statutory tolling, *Smith* v. *Duncan*, 297 F.3d 809, 814 (9th Cir. 2002), abrogated on other grounds in *Moreno* v. *Harrison*, 245 Fed. App'x 606, 608 (9th Cir. 2007), and equitable tolling, *Pace* v. *DiGuglielmo*, 544 U.S. 408, 415 (2005);

*Miranda* v. *Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002); *Alexander* v. *Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002).

The propriety of placing the burden of showing inadequacy upon petitioners—and in also mandating that proof depend upon published rules and explained judicial decisions—is demonstrated by Martin's reliance on *Dennis* v. *Brown*, 361 F.Supp.2d 1124 (N.D. Cal. 2005). RBOM 35. In that case, the district court found inadequacy without requiring the petitioner to prove anything; all he had to do was merely allege that the state procedural ruling was inadequate.[2] *Id*., at 1130-32, 1134. The court reached this decision disrespecting California's timeliness bar without any concrete evidence, certainly none from explicated published decisions, that there was anything irregular or discriminatory about California's practice. Acknowledging that seemingly divergent unexplained decisions may indeed have represented consistent exercises of discretion rather than random applications of or exceptions to the timeliness rule, the court nonetheless relied on the conclusion that "we have no way of knowing whether that is the case." *Id*., at 1134. In other words, the court merely presumed that California courts had acted arbitrarily or

[2] Petitioner cited 200 cases, but, virtually all of these cases were denied by unexplained rulings. Entirely too much speculation is necessary to glean anything about adequacy from these summary denials.

discriminatory just as the Ninth Circuit did in this case. RBOM 14; Pet. App. 1-3.

## III. California's Habeas Corpus Timeliness Rule Is Adequate To Support A Federal Bar Because It Provides Fair Notice And Serves Legitimate State Interests.

A. Measuring it against the adequacy standard he proffers, Martin asserts that California's timeliness rule is inadequate to bar federal review. In essence, Martin bemoans the fact that California's rule, rather than setting out a rigid and mechanical deadline, is flexible and admits of discretionary judgment. RBOM 37-50. This Court's precedents, however, do not demand calendar deadlines in state procedural rules.

Despite Martin's view, California's rule provides sufficient notice because it informs prisoners of the simple steps to follow in order to properly file a claim. Rather than imposing a hard deadline, California has chosen to articulate its timeliness rule, as discussed in the opening brief (PBOM 33-41), in terms of reasonable conduct by the petitioner. He must diligently develop his claims, present those claims as promptly as circumstances permit, and explain when the claims were discovered and any reasons for delay in presenting them. A prisoner who follows these steps will be in compliance with California's timeliness rule. In contrast to the views of Martin and the Ninth Circuit, a California habeas petitioner

can successfully follow California's timeliness rule without being provided a clear "deadline" to meet.

The adequacy of California's timeliness rule is illuminated by this Court's decision in *Johnson* v. *United States*, 544 U.S. 295 (2005). In *Johnson*, this Court announced a rule of "due diligence" in the context of federal habeas corpus that is virtually identical to California's timeliness standard. To be timely under 28 U.S.C. § 2255, this Court held, a federal prisoner whose sentence was based in part on an invalid prior state conviction must act with "due diligence in discovering" that the state conviction was invalid. *Id*., at 308. This Court clarified that "diligence can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later sentence." *Id*., at 308. In announcing this rule, this Court acknowledged that "'due diligence' is an inexact measure of how much delay is too much. But the imprecision here is no greater than elsewhere in the law when diligence must be shown, and the statute's use of an imprecise standard is no justification for depriving the statutory language of any meaning independent of corresponding state law, as the dissent would have us do." *Id*., at 309, n.7. If the rule announced in *Johnson* is sufficiently clear to provide notice to federal habeas petitioners, then California's timeliness rule, which requires a similar exercise of diligence and promptness, is also sufficiently clear.

Relying on a series of cases involving the distant fields of restraint of trade and price fixing (ABFD 18-20), Amicus Federal Defender suggests that this Court somehow deems "reasonableness" standards to be unconstitutionally vague. Certainly, in the specific context of price fixing statutes, this Court has held that laws criminalizing the charging of "unreasonable" prices or earning "unreasonable" profits are unconstitutionally vague. However, in *Nash* v. *United States*, 229 U.S. 373, 377 (1913), this Court observed that, outside of the restraint of trade laws, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." Given the specific nature of restraint of trade law and this Court's observation that the law is "full of instances" in which reasonableness standards apply, this Court should endorse California's timeliness rule, especially in light of its similarity to the standard this Court adopted in a closely analogous setting in *Johnson* v. *United States*.

B. Rather than consider California's timeliness rule as a whole and in the context in which it is applied, Martin instead attempts to manufacture a lack of clarity by dissecting the rule and arguing that specific parts of the rule are uncertain. Martin's attempt at creating uncertainty in California's rule is not successful.

Martin first professes to be confused about the triggering date for measuring substantial delay under the state rule. RBOM 36-37, 43-44. But the California Supreme Court has made it abundantly clear. Delay in seeking habeas relief is measured from the time a petitioner knew, or reasonably should have known, of the information and legal basis offered in support of the claim. *In re Robbins*, 18 Cal.4th, at 780, 787, 959 P.2d, at 317, 323. This is a triggering date nearly identical to one from AEDPA's statute of limitations: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Thus, as the district court observed below, "If this principle of requiring due diligence is clear enough for federal practice, [ ] it is clear enough for state practice as well." Pet. App. 12.

Martin argues that inmates in California are unable to proceed diligently due to factors beyond their control. RBOM 47, n.31. Claims are substantially delayed when they are not advanced within a reasonable time, and circumstances beyond an inmate's control are exactly the sort of justifications that the California Supreme Court has recognized. *In re Sanders*, 21 Cal.4th 697, 705, 981 P.2d 1038, 1043 (1999); *In re Robbins*, 18 Cal.4th, at 787-88, 959 P.2d, at 322. This discretion and flexibility only make the California rule more fair—not suspect.

Martin complains, similarly, that convicted prisoners are unable to balance the requirements of

investigating claims and timely presentation. RBOM 44-45. However, the California Supreme Court has explained that a petitioner may temporarily withhold presentation of completed claims until the investigation concludes rather than presenting claims in piecemeal fashion in successive petitions. *In re Gallego*, 18 Cal.4th, at 838, n.13, 959 P.2d, at 299, n.13; *In re Robbins*, 18 Cal.4th, at 805-06, n.28, 959 P.2d, at 335, n.28. Martin argues that there are no standards to guide how long the investigation and presentation of claims is supposed to take. RBOM 45. But all petitioners have to do is present as promptly as circumstances allow and explain and justify their process. California's flexible standard is perfectly suited to the reality that some types of claims take longer to develop than others.

Ultimately, Martin's arguments suggest a self serving misunderstanding of California's timeliness rule. In California, a finding of untimeliness has two components: substantial delay and inadequate justification. *In re Robbins*, 18 Cal.4th, at 780, 959 P.2d, at 318. Martin's erroneous analysis focuses upon the length of delay in various cases but ignores the justification element of the rule. RBOM 15, 34-35. Thus, in Martin's cited example of *In re Saunders*, 2 Cal.3d 1033, 1040, 472 P.2d 921, 925-26 (1970), the state supreme court found that the delay was sufficiently explained by petitioner's limited education, total lack of legal experience, and lack of access to pertinent records. Similarly, in *In re*

*Huddleston*, 71 Cal.2d 1031, 1034, 458 P.2d 507, 508 (1969), the court concluded that the delay was not unreasonable under the "present circumstances." Also, in *In re Mitchell*, 68 Cal.2d 258, 263, 437 P.2d 289, 292 (1968), the court observed that petitioner's ignorance of the law provided sufficient justification for his delay. In *In re Spears*, 157 Cal.App.3d 1203, 1208, 204 Cal.Rptr. 333, 335 (Cal.Ct.App. 1984), the court ruled that the delay was adequately explained by petitioner's lack of capacity to represent himself. And in *In re Jones*, 265 Cal.App.2d 376, 378, 71 Cal.Rptr. 172, 174 (Cal.Ct.App. 1968), the court noted that the delay was sufficiently justified by ignorance of the law. As these cases show, varying lengths of delay were adequately justified so that the petitions were deemed timely. Accordingly, a petitioner who might feel uncertain whether his petition is substantially delayed should avail himself of the easy safeguard of taking advantage of his opportunity to explain the specific reasons behind any delay.

C. Aligning with the Ninth Circuit, Martin maintains that the timeliness rule is different for capital and noncapital litigants in California so that the guidelines articulated in *In re Clark*, 5 Cal.4th 750, 855 P.2d 729; *In re Gallego*, 18 Cal.4th 825, 959 P.2d 290; *In re Robbins*, 18 Cal.4th 770, 959 P.2d 311; and *In re Sanders*, 21 Cal.4th 697, 981 P.2d 1038 (1999), did not apply to him and provide guidance for his conduct. RBOM 12, 15, 40, 43. But the California Supreme Court has clearly stated that California's

capital case policies did not create or modify the timeliness requirements applicable to all habeas corpus petitions, except to establish a presumption of timeliness specific to capital cases. *In re Clark*, 5 Cal.4th, at 783, 855 P.2d, at 751. The Ninth Circuit's and Martin's failure to accept the State's interpretation of its own laws in this respect, *King* v. *LaMarque*, 464 F.3d, at 966, is untenable. See *Mullaney* v. *Wilbur*, 421 U.S., at 691; *Estelle* v. *McGuire*, 502 U.S., at 67. In addition, the California Supreme Court routinely cites *Clark* and *Robbins* (both capital cases) in the untimeliness dispositions of noncapital cases (Pet. App. 17-18), just as it did in this case. Thus, there is no validity to any claim that California treats delay and justification differently for capital and noncapital litigants.

D. It is curious that Martin spends considerable time invoking this Court's decisions in *Evans* v. *Chavis*, 546 U.S. 189 (2006), and *Carey* v. *Saffold*, 536 U.S. 214 (2002), in support of his arguments against California's timeliness rule. RBOM 36, 40-42, 45, n.31, 57. In those cases, this Court observed that California's collateral review system, including its indeterminate timeliness standard, is not so different from those of other states to warrant treating it differently in the context of the statute of limitations and tolling provisions of 28 U.S.C. § 2244(d), and that federal courts must respect and apply California's timeliness standard when determining statutory tolling. *Evans* v. *Chavis*, 546 U.S., at 192-93; *Carey* v. *Saffold*, 536 U.S., at 222.

More particularly, in *Saffold*, this Court examined California's collateral review system and noted that timeliness is determined under a "general 'reasonableness' standard." *Carey* v. *Saffold*, 536 U.S., at 222. This Court explained further that this did not justify treating California differently: "The upshot is that California's collateral review process functions very much like that of other States, but for the fact that its timeliness rule is indeterminate." *Id*. This Court never suggested that there was anything improper in California's choice to offer prisoners a flexible standard or that California did not have a right to do so.

In *Chavis*, similarly, this Court reiterated that the federal courts must respect California's choice in the context of the tolling provision of 28 U.S.C. § 2244(d)(2). "'The fact that California's timeliness standard is general rather than precise may make it more difficult for federal courts to determine just when a review application (i.e., a filing in a higher court) comes too late.' [*Carey* v. *Saffold*, 536 U.S.,] at 223 [ ]. Nonetheless, the federal courts must undertake that task." *Evans* v. *Chavis*, 546 U.S., at 223.

*Chavis* and *Saffold* undermine Martin's argument and strongly suggest that this Court recognizes that California has every right to employ an equitable and flexible standard such as the federal system did prior to the AEDPA. *Day* v. *McDonough*, 547 U.S. 198, 215 (2006); former Habeas Rule 9(a).

## IV. This Case Is The Appropriate Vehicle To Address The Adequacy Standard.

Martin and amici argue that this case is not the appropriate vehicle to address the adequacy standard. RBOM 57-59; ACFD 3-10. But these arguments merely seek to reopen this Court's decision to grant certiorari. This case presents an appropriate opportunity to address the adequacy standard because it involves a flexible rule of broad application. Moreover, any suggestion that the timeliness default was not actually imposed by the California Supreme Court is incorrect.

A. California's timeliness rule is an appropriate state procedural rule to clarify this Court's adequacy jurisprudence because it "is a typical procedural default." *Beard* v. *Kindler*, 130 S.Ct., at 619 (declining the invitation to "undertake '[a] new effort to state a standard for inadequacy'" because the rule at issue in that case was a unique procedural rule). In contrast to the rule at issue in *Kindler*, a timeliness rule for habeas petitions is a rule that exists in all or virtually all states.

Martin argues that California's flexible timeliness rule is too unique and outside of the mainstream of other state timeliness rules to be a good vehicle for addressing adequacy. RBOM 57-59. However, Martin raised this issue in his original brief in opposition to certiorari. Respondent's Brief in Opposition 2-3. Accordingly, when this Court granted certiorari, it "necessarily considered and rejected

that contention as a basis for denying review." *United States* v. *Williams*, 504 U.S. 36, 40 (1992). Martin has presented no basis for revisiting this already rejected argument.

Moreover, this Court's evaluation of the adequacy of California's flexible and indeterminate timeliness rule will provide necessary guidance to lower federal courts evaluating similar rules. Indeed, many state timeliness rules, like the federal habeas statute of limitations, employ exceptions to default that are necessarily flexible and fact specific. In other words, beyond an initial deadline, many states, and the federal courts, employ equitable exceptions that permit timely filing at some indeterminate point beyond the initial deadline. See, e.g., *Holland* v. *Florida*, 130 S.Ct. 2549, 2562 (2010) (adopting equitable tolling for circumstances involving "diligence" and "extraordinary circumstances"). This Court's evaluation of California's equitable timeliness rule for adequacy will be relevant when federal courts are evaluating the adequacy of timeliness rules from other states that employ flexible exceptions outside of their deadlines.

Finally, amicus Federal Defenders argue incorrectly (ABFD 3-13) that the California ruling was unclear and could be interpreted as a finding that Martin's second state petition was merely repetitive of his first. But the California Supreme Court's ruling denying Martin's second petition cited to *In re Robbins*, 18 Cal.4th, at 780, 959 P.2d, at 317-18, with the point page applicable specifically

to untimeliness. Pet. App. 60. Further, a comparison of the claims from the two state petitions demonstrates that they were not repetitive. In the second state habeas petition, Martin argued for the first time that trial counsel was incompetent for failing to call an expert witness to testify at the suppression of evidence hearing. Further, Martin's claim of ineffective appellate counsel contained no specific examples of incompetence in his first pleading, a deficiency he corrected in his second filing with new allegations of incompetence. Indeed, Martin's counsel filed the second state petition to exhaust claims that had not been exhausted by the first. JA 24, 69-70, 72-73; Dist. Ct. Doc. 45, Exhs. D, E, G, K.

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## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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