

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**

—◆—
**BRIEF OF AMICI CURIAE FEDERAL DEFENDERS
FOR THE CENTRAL, EASTERN, NORTHERN
DISTRICTS OF CALIFORNIA AND FEDERAL
DEFENDERS OF SAN DIEGO INC.
IN SUPPORT OF RESPONDENT**

—◆—
SEAN K. KENNEDY
Federal Defender
for the Central District
of California
DANIEL J. BRODERICK
Federal Defender
for the Eastern District
of California
BARRY J. PORTMAN
Federal Defender
for the Northern District
of California
REUBEN C. CAHN
Executive Director
FEDERAL DEFENDERS OF
SAN DIEGO INC.

JOSEPH SCHLESINGER*
Assistant Federal Defender
TIVON SCHARDL
Trial & Habeas Counsel
HILARY SHEARD
Assistant Federal Defender
CAROLYN WIGGIN
Assistant Federal Defender
OFFICE OF THE FEDERAL
DEFENDER FOR THE EASTERN
DISTRICT OF CALIFORNIA
801 I Street, Third Floor
Sacramento, California 95814
(916) 498-5700
Joe_Schlesinger@fd.org
Counsel for Amici Curiae

**Counsel of Record*

QUESTIONS PRESENTED

1. In 2002, appointed counsel filed on Respondent Martin's behalf a second application for habeas corpus relief in the California Supreme Court. The claims raised in that petition were virtually identical to Martin's prior, timely state petition. The second petition was summarily denied in an order that cited *In re Clark*, 5 Cal. 4th 750, and *In re Robbins*, 18 Cal. 4th 770, 780 (1998), ambiguously signifying some or all of the claims were untimely. *Clark* discusses a variety of California habeas procedural bars, including a general on the reconsideration of claims raised and rejected in a prior habeas petition, which may be deemed untimely. Where relief is denied under such circumstances, is the state-court ruling adequate to bar federal review?
2. Whether a state-court practice of determining the timeliness of non-capital habeas petitions on a case-by-case, claim-by-claim basis, with no established rule or principle for deciding either when a petition is untimely or whether its untimeliness will be ignored – a practice that has resulted in inconsistent treatment of similarly situated habeas petitioners – constitutes an “adequate” state procedural ground for extinguishing a federal constitutional claim.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT	1
ARGUMENT.....	3
A. For Reasons the State Does Not Challenge, the Procedural Bar Applied to Martin’s Claims is Not Adequate	3
1. Respondent’s Second State Habeas Pe- tition Was Duplicative.....	5
2. Barring Federal Review Would Not Further a Legitimate State Interest.....	10
3. The State-Court’s Ambiguous Timeli- ness Ruling Is Not Broad Enough to Support the Rejection of any Federal Claim.....	11
B. California’s Timeliness Framework Cannot Be Reduced to a Mere Requirement that Claims be Filed “Reasonably Promptly” and Even If It Could, Its Requirements Would Still Be Unclear	13
1. California Has a Timeliness “Frame- work,” Not a Timeliness Rule	14
2. A Requirement of “Reasonable Prompt- ness” Does Not Constitute a Clearly Established Rule	17

TABLE OF CONTENTS – Continued

	Page
C. This Court’s Jurisprudence Requires an Inquiry into Consistency; <i>Beard v. Kindler</i> Neither Renders Such An Inquiry “Untenable” Nor Does It Establish The Adequacy of California’s “Discretionary” Timeliness Framework.....	25
1. The State’s Criticisms of the Ninth Circuit’s Approach Are Unfounded	26
a. The Ninth Circuit has Expressly Held California’s Timeliness Rule is Not Inadequate because it is Discretionary; California’s Timeliness Policies for Habeas Corpus Petitions Simply Do Not Fulfill Baseline Adequacy Requirements	26
b. The Ninth Circuit’s Examination of State Cases to Determine Whether a State Bar is Adequate is an Entirely Appropriate Method of Determining Whether, as a Matter of Federal Law, the Bar is Adequate ...	28
c. The Ninth Circuit’s Consistency Analysis as An Adjunct to Assessing Vagueness Does Not Fail to Presume that Judges Follow the Law.....	30
2. <i>Beard v. Kindler</i> Does Not Establish that California’s “Discretionary” Timeliness Framework is Adequate Nor that Consistency Is Irrelevant	32

TABLE OF CONTENTS – Continued

	Page
a. <i>Beard</i> Involved a Discretionary Process of Reasoned Elaboration Regarding the Consequences of Violating a Clear, Objective Requirement of Submitting to the Court’s Authority	33
b. The Discretionary Process of Reasoned Elaboration Does Not Include Ad Hoc Decision-Making.....	35
c. The Unexplained, Ad Hoc Decisions Required by California’s Timeliness Framework Are Not Equivalent to the Discretion Pennsylvania Courts Possess to Overlook a Fugitive Waiver.....	38
CONCLUSION	39

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>Abie State Bank v. Bryan</i> , 282 U.S. 765 (1931)	11
<i>Bandini Co. v. Superior Court</i> , 284 U.S. 8 (1931).....	22
<i>Bargas v. Burns</i> , 179 F.3d 1207 (9th Cir. 1999)	27
<i>Barr v. City of Columbia</i> , 378 U.S. 146 (1964)	28
<i>Beard v. Kindler</i> , 130 S. Ct. 612 (2009)	<i>passim</i>
<i>Bennett v. Whitley</i> , 41 F.3d 1581 (5th Cir. 1994)	11
<i>Bracy v. Gramley</i> , 520 U.S. 889 (1997)	30, 31
<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	31
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)	10
<i>California v. Green</i> , 399 U.S. 149 (1970)	9
<i>Caperton v. A.T. Massey Coal Co., Inc.</i> , 129 S. Ct. 2252 (2009).....	31
<i>Cline v. Frink Dairy Co.</i> , 274 U.S. 445 (1927).....	19, 20, 22
<i>Coleman v. Thompson</i> , 501 U.S. 722 (1991)	5, 12
<i>Cone v. Bell</i> , 129 S. Ct. 1769 (2009)	4, 5
<i>County of Riverside v. McLaughlin</i> , 500 U.S. 44 (1991).....	21
<i>Dugger v. Adams</i> , 489 U.S. 401 (1989)	25
<i>Edgar A. Levy Leasing Co. v. Siegel</i> , 258 U.S. 242 (1922)	20
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991)	8

TABLE OF AUTHORITIES – Continued

	Page
<i>Eustis v. Bolles</i> , 150 U.S. 361 (1893)	4, 5, 11
<i>FW/PBS, Inc. v. Dallas</i> , 493 U.S. 215 (1990).....	25, 26
<i>Feit v. Leasco Data Processing Equipment Corp.</i> , 332 F. Supp. 544 (E.D.N.Y. 1971)	23
<i>Ford v. Georgia</i> , 498 U.S. 411 (1991)	5, 29, 30
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975)	20, 21
<i>Harris v. Reed</i> , 489 U.S. 255 (1988).....	12
<i>Hathorn v. Lovorn</i> , 457 U.S. 255 (1982)	28
<i>Henry v. Mississippi</i> , 379 U.S. 443 (1965)	5, 10
<i>Hygrade Provision Co. v. Sherman</i> , 266 U.S. 497 (1925).....	21
<i>Illinois v. Fisher</i> , 540 U.S. 544 (2004)	5
<i>International Harvester Co. v. Kentucky</i> , 234 U.S. 216 (1914).....	20
<i>James v. Kentucky</i> , 466 U.S. 341 (1984).....	29, 30
<i>Johnson v. Champion</i> , 288 F.3d 1215 (10th Cir. 2002)	11
<i>Johnson v. Mississippi</i> , 486 U.S. 578 (1988)	28, 30
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983)	31
<i>Lee v. Kemna</i> , 534 U.S. 362 (2002).....	10
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983).....	5, 12
<i>Miller v. Oregon</i> , 273 U.S. 657 (1927).....	22
<i>Miller v. Strahl</i> , 239 U.S. 426 (1915).....	21

TABLE OF AUTHORITIES – Continued

	Page
<i>Morales v. Calderon</i> , 85 F.3d 1387 (9th Cir. 1996)	28
<i>Moran v. McDaniel</i> , 80 F.3d 1261 (9th Cir. 1996)	25
<i>Murdock v. Memphis</i> , 20 Wall. 590 (1875).....	4, 5, 11
<i>Nash v. United States</i> , 229 U.S. 373 (1913).....	20, 21
<i>Omaechevarria v. Idaho</i> , 246 U.S. 343 (1918).....	21
<i>Rutland R.R. v. Central V. R.R.</i> , 159 U.S. 630 (1895).....	11
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995).....	10
<i>Shumway v. Payne</i> , 223 F.3d 982 (9th Cir. 2000)	27
<i>Sproles v. Binford</i> , 286 U.S. 374 (1932).....	21
<i>Staub v. Baxley</i> , 355 U.S. 313 (1958).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	6, 7, 8, 30
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	31
<i>Sullivan v. Little Hunting Park, Inc.</i> , 396 U.S. 229 (1969).....	36
<i>Teague v. Lane</i> , 489 U.S. 288 (1989)	10
<i>United States v. Burr</i> , 25 F. Cas. 30 (No. 14,692d) (CC Va. 1807)	37
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1 (1926).....	30

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. L. Cohen Grocery Co.</i> , 255 U.S. 81 (1921).....	18, 19
<i>United States v. Williams</i> , 504 U.S. 36 (1992).....	26
<i>Vang v. Nevada</i> , 329 F.3d 1069 (9th Cir. 2003).....	27
<i>Waters-Pierce Oil Co. v. Texas (No. 1)</i> , 212 U.S. 86 (1909).....	21
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975).....	31
<i>Ylst v. Nunnemaker</i> , 501 U.S. 797 (1991).....	4

STATE CASES

<i>American Motorcycle Association v. Superior Court</i> , 20 Cal. 3d 578, 578 P.2d 899 (1978).....	23, 24
<i>In re Clark</i> , 5 Cal. 4th 750 (1993).....	<i>passim</i>
<i>Commonwealth v. Kindler</i> , 536 Pa. 228, 639 A.2d 1 (Pa. 1994).....	33
<i>Commonwealth v. Kindler</i> , 554 Pa. 513, 722 A.2d 143 (1999).....	34
<i>In re Dixon</i> , 41 Cal. 2d 756 (1953).....	5
<i>In re Huddleston</i> , 71 Cal. 2d 1031 (1969).....	14
<i>In re Martin</i> , 44 Cal. 3d 1 (1987).....	13
<i>In re Miller</i> , 17 Cal. 2d 734 (1941).....	13
<i>People v. Blakeley</i> , 23 Cal. 4th 82, 999 P.2d 675 (2000).....	23, 24
<i>People v. Nguyen</i> , 22 Cal. 4th 872, 997 P.2d 493 (2000).....	23, 24

TABLE OF AUTHORITIES – Continued

	Page
<i>In re Robbins</i> , 18 Cal. 4th 770 (1998)	6, 13, 16, 39
<i>In re Sodersten</i> , 146 Cal. App. 4th 1163 (2007)	14, 23
<i>In re Waltreus</i> , 62 Cal. 2d 218 (1965).....	5

DOCKETED CASES/UNPUBLISHED

<i>Covert v. Hubbard</i> , 116 Fed.Appx. 871, 2004 WL 2625088 (9th Cir. 2004).....	26
<i>Hurtado v . Kirkland</i> , 281 Fed.Appx. 724, 2008 WL 2330983 (9th Cir. 2008).....	26

MISCELLANEOUS

3 W. Blackstone, <i>Commentaries on the Laws of England</i> (1768).....	36
A. Hill, <i>The Forfeiture of Constitutional Rights in Criminal Cases</i> , 78 Colum. L. Rev. 1050 (1965).....	36
H. Hart & A. Sacks, <i>The Legal Process: Basic Problems in the Making and Application of Law</i> (W. Eskridge Jr. & P. Frickey eds., 1994).....	35
D. Meltzer, <i>State Court Forfeitures of Federal Rights</i> , 99 Harv. L. Rev. 1128 (1986)	34, 35
T. Sandalow, <i>Henry v. Mississippi and the Adequate State Ground: Proposals for a Re- vised Doctrine</i> , 1965 Sup. Ct. Rev. 187 (1965)	36

INTEREST OF AMICI CURIAE¹

Amici are the federal defender organizations for the four federal districts within the State of California. Amici are often appointed as counsel in federal habeas corpus proceedings brought on behalf of indigent prisoners in California State custody. Amici have a central common interest in the proper interpretation and application of the procedural default doctrine in federal habeas corpus proceedings initiated by those in state custody and, specifically, in ensuring that California habeas petitioners are not denied federal habeas corpus relief as a result of the State's invocation of a procedural bar that is neither clearly defined nor consistently applied.

**SUMMARY OF ARGUMENT**

The California Supreme Court summarily denied Respondent Charles W. Martin's second state-court petition for writ of habeas corpus by citing cases discussing California's framework for assessing the timeliness of petitions for writs of habeas corpus including when second or successive applications will be entertained. The federal grounds raised in

¹ No part of this brief was authored in whole or in part by counsel for any party. No party, counsel for a party or other person made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

Martin's second petition were duplicative of an earlier timely petition. Accordingly, Martin complied with state-court requirements intended to promote the finality of criminal convictions, and the "timeliness" bar is not clearly of the type or scope considered adequate to preclude federal habeas review.

Should the Court inquire further into questions of adequacy, it should reject the State's argument that the timeliness framework provides adequate notice of what state-court petitioners must do in order to avoid defaulting their claims. Notwithstanding the State's inaccurate recasting of the timeliness framework as a requirement to file "reasonably promptly," the requirements remain vague and ill-defined. This Court's decisions hold that "reasonableness" conveys meaning only by reference to an express or understood class of comparison, something California courts have chosen not to provide.

The State conceded below that this Court has stated repeatedly that only "firmly established and regularly followed" are adequate to support a procedural default. It now impermissibly shifts positions, and asserts that consistency in application has never been a criterion for adequacy, and erroneously contends the lower courts have misconstrued this Court's holdings to permit an "untenable" review of discretionary state procedures. On the contrary, the Court of Appeals has honored procedural rules that admit of discretionary exceptions, and, in its review of timeliness, has respected the difference between disparities reflecting an exercise of discretion and

unexplainable inconsistencies indicative of ad hoc decision-making.

The State’s argument that upholding California’s timeliness framework would require only a straightforward application of *Beard v. Kindler* elides the factual and legal differences between excusing a violation of a determinate rule and unconstrained discretion whether to find a rule applies from one claim to the next. *Beard* neither holds nor suggests that all discretionary rules are adequate. The discretionary power of reasoned elaboration involved in *Beard* is the antithesis of the unexplained, silent, and good-for-this-case-only invocations of California’s timeliness bars that epitomize the “power of continuing discretion.”

The judgment of the Court of Appeals should be affirmed.



ARGUMENT

A. For Reasons the State Does Not Challenge, the Procedural Bar Applied to Martin’s Claims is Not Adequate

The State’s arguments for reversal, and for revising the adequate state ground doctrine are academic. The State concedes that under any version of the adequate state ground doctrine, where a state procedural default does not further a legitimate state interest “a federal court’s refusal to respect the rule does not offend comity or federalism.” Pet. Br. at 11;

see also id. at 22-24.² The State also does not take issue with this Court's long held rule that a state law ground for decision is inadequate to preclude federal court review where the state law ground is not broad enough to sustain the judgment denying relief. *See, e.g., Murdock v. Memphis*, 20 Wall. 590, 636 (1887); *Eustis v. Bolles*, 150 U.S. 361, 370 (1893). Review of the claims rejected as untimely in Martin's second state habeas corpus petition shows they are repetitive of the grounds for relief Martin timely presented in his first state petition. In light of the overlap between the two petitions the state-court's timeliness "defaults" must be deemed inadequate because they do not serve a legitimate state interest, and are not broad enough to preclude federal merits review.

The three federal claims deemed untimely had previously been presented in a state habeas corpus petition that was deemed timely. The commonality between the factual and legal grounds Martin presented in his two state habeas corpus petitions constitutes grounds to reject the State's arguments for any of the following reasons: (a) the California Supreme Court deemed the claims untimely because they were repetitive, *see In re Clark*, 5 Cal. 4th 750, 774 (1993), and relitigation bars do not preclude federal merits review, *Cone v. Bell*, 129 S. Ct. 1769, 1781 (2009); *Ylst v. Nunnemaker*, 501 U.S. 797, 804 n.3 (1991);

² "Pet. Br." refers to the Petitioner's Brief on the Merits. Amici will use "CR" to refer to the district court docket entries and "JA" to refer to the Joint Appendix.

(b) Martin actually complied with the requirements of California law and the application of the bar serves no state interest that precludes federal review, *Cone, op. cit.*; *Ford v. Georgia*, 498 U.S. 411, 418-19 (1991); *Henry v. Mississippi*, 379 U.S. 443, 448 (1965); (c) delay unrelated to repetitiveness is too narrow a ground to support the state-court's judgment, and the ruling is therefore inadequate for reasons the State does not challenge, *Murdock*, 20 Wall. at 636; *Eustis, supra*, 150 U.S. at 370. The ambiguity of the state-court's decision in light of the repetitiveness of the claims constitutes grounds for finding the state court did not "clearly and expressly rely on an . . . adequate state ground," *Coleman v. Thompson*, 501 U.S. 722, 735 (1991), *i.e.*, a rule of the type or breadth that precludes federal merits review. *Illinois v. Fisher*, 540 U.S. 544, 547 n.* (2004) (Court may review state-court decision on federal question even where possible adequate state law ground supported decision) (*citing Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983)).

1. Respondent's Second State Habeas Petition Was Duplicative

Martin initially exhausted state-court remedies in a petition for writ of habeas corpus he filed pro se with the California Supreme Court on July 17, 1998. Exh. D, Fourth Amended Pet. (CR 45). That petition was deemed timely, and was denied in an order that cited *In re Waltreus*, 62 Cal. 2d 218, 225 (1965), and *In re Dixon*, 41 Cal. 2d 756, 759 (1953), procedural rules

that the State has conceded do not apply to the claims currently before this Court.

Later, Martin's appointed counsel filed a second petition for writ of habeas corpus in the California Supreme Court. Exh. H, Fourth Amended Pet. (CR 45). Three grounds for relief raised in that second petition are now before this Court because the state court denied those claims in an order that cited *Clark, supra*, and *In re Robbins*, 18 Cal. 4th 770, 780 (1998), and Martin's counsel repeated those three grounds for relief in Claims 3, 4, and 6 of an amended federal habeas corpus petition. CR 45. The bases for relief raised in Claims 3, 4, and 6 and Ground 1 of the timely pro se petition are fundamentally the same.

In Claim 3 of the operative federal habeas corpus petition, Martin alleges a violation of the Sixth Amendment under *Strickland v. Washington*, 466 U.S. 668 (1984), due to his trial counsel's "failure to develop or present evidence of alibi or that some other person was involved" in the robbery and murder of Charles Stapleton. Fourth Amended Pet. (CR 45) at 8. Martin alleges his trial counsel should have pursued evidence such as a fingerprint and statements of witness Bonnie Permenter that implicate Bobby Austin in the crime. *Ibid.*

In Ground 1 of his timely pro se petition, Martin alleged "[i]neffective assistance of counsel in violation of petitioner's rights as bestowed upon him by the 6th and 14th amendments U.S.C." and cited *Strickland*. Exh. D (CR 45) at 3, 6. Martin alleged, *inter alia*, his

trial counsel had been ineffective for failing to investigate unidentified fingerprints and a palm print and other evidence implicating Bobby Austin. *Id.* at 4-5.

In Claim 4 of the operative federal petition, Martin alleges ineffective assistance of trial counsel “due to counsel’s failure to affectively [*sic*] object to the admissibility into evidence” of tape-recorded statements by witness Bonnie Permenter which were “admitted pursuant to Evidence Code Section 1237.” CR 45 at 9. Martin alleges his trial counsel failed to prepare for a hearing on the admissibility of the tape, and failed to raise a timely objection to its admittance at trial. *Ibid.* In his supporting points and authorities, Martin asserts that trial counsel should have relied at the admissibility hearing upon an expert witness who would have explained that Permenter’s drug and alcohol abuse could have caused her to forget having made her statement to police. *Id.* at 27-30. Martin alleges that if counsel had adequately challenged the admissibility of the statement it would have been excluded and “the result would have been either a not guilty verdict, or even a dismissal.” *Id.* at 32.

In Ground 1 of his timely pro se petition in state court, Martin alleged ineffective assistance under *Strickland* due to his trial counsel’s failure to show at the admissibility hearing that the “guidelines and law pursuant to Evidence Code 1237 were not met” because Permenter “could not attest to the truth of her statements.” Exh. D (CR 45) at 3. He asserted that his counsel “failed to lay a foundation for exclusion of

statement [*sic*].” *Id.* at 4. Among the facts Martin pointed to was that “Permenter was severely addicted to methamphetamine and alcohol,” *id.* at 3, and “did not remember talking to the police or giving the statement.” *Id.* at 6. Martin alleged the case against him “was based on a 1986 statement made by Bonnie Permenter,” *id.* at 3, and “[a]bsent the statement . . . the evidence would have been insufficient to convict petitioner,” *id.* at 6.

In Claim 6 of the operative federal petition, Martin alleges ineffective assistance of his appellate counsel under the *Strickland* standard resulted in constitutional grounds for relief not being preserved for federal review. CR 45 at 11. The question before this Court includes whether federal merits review is available for subsections B and C of Claim 6. In B, Martin alleges his appellate counsel was ineffective because “even though petitioner was absolutely unable to confront and cross-examine Permenter, appellate counsel failed to argue that the appellate court’s application of state law, [*sic*] rendered the trial fundamentally unfair in violation of the Due Process Clause.” *Id.* at 12 (*citing Estelle v. McGuire*, 502 U.S. 62 (1991)). In section C, Martin alleges his appellate counsel was ineffective for failing to raise in a petition for review in the California Supreme Court “that the admissible evidence was insufficient to support petitioner’s conviction for murder and for robbery.” *Id.* at 13.

In Ground 1 of his timely, pro se petition Martin alleged ineffective assistance on grounds that

“[a]ppellate counsel failed to incorporate constitutional deprivations [*sic*] on direct appeal or review, in violation of federal and state constitutions.” Exh. D (CR 45) at 3. Martin alleged that due to appellate counsel’s omission of constitutional bases for reversal, he “was subjected to 6th, 7th, and 14th Constitutional deprivations [*sic*], that have not been redressed by any *court*.” *Id.* at 5 (emphasis in original). After referring “to the 1237 issue,” Martin alleged “that had a true and meaningful appeal been filed, the conviction would have been reversed. . . . Without the illegal statement made by Permenter there would be no evidence to sustain the conviction.” *Id.* at 5. As legal authorities supporting his claim, in addition to the Sixth and Fourteenth Amendment references, Martin cited *California v. Green*, 399 U.S. 149 (1970). *Id.* at 6.

Regardless of the reasons Martin’s first and second state petitions were repetitive, it is clear the district court considered whether Martin’s first state petition called into question the timeliness bar. The Magistrate Judge applied the timeliness bar to Claim 4 in part based on the erroneous belief that Martin had attacked the trial court’s admission of the Permenter tape “as a ‘straight’ error claim (not associated with ineffective assistance), and then only on state law grounds.” Findings & Recommendations (CR 52) at 21-22 (“The court cannot find that any timely federal claim was ever presented to the state supreme court on the Permenter tapes, and certainly not the present ineffective assistance claim.”). In its brief to

the Court of Appeals for the Ninth Circuit, the State described Martin's timely pro se allegations with greater detail and specificity than the quotations appearing *supra*. JA 69-70.

2. Barring Federal Review Would Not Further a Legitimate State Interest

The State correctly asserts that rules promoting the finality of criminal convictions generally serve legitimate state interests. Pet. Br. at 42 (*citing Teague v. Lane*, 489 U.S. 288, 309 (1989); *Schlup v. Delo*, 513 U.S. 298, 322-24 (1995); and *Calderon v. Thompson*, 523 U.S. 538, 555-56 (1998)). As to the claims currently in dispute, Martin's first petition for habeas corpus relief in the California Supreme Court complied with all state policies regarding timeliness. Martin's repetitive second state petition was an arid ritual that served no legitimate state or federal interest. *See Henry v. Mississippi, supra*, 379 U.S. at 448 (noting that purpose of contemporaneous objection rule had been "substantially served" by petitioner's motion for directed verdict); *Staub v. Baxley*, 355 U.S. 313, 319-20 (1958) (failure to challenge "specific sections" of ordinance not adequate state ground barring review of federal claim when party challenged constitutionality of entire ordinance and all sections were "interdependent"); *Lee v. Kemna*, 534 U.S. 362, 385 (2002) ("The [state] Rule's essential requirements . . . were substantially met in this case. . . . [N]othing would [have] be[en] gained by requiring Lee's counsel to recapitulate in (a), (b),

(c), (d) order the showings the Rule requires.”) (internal quotes and citations omitted).

The Tenth Circuit addressed a similar situation in *Johnson v. Champion*, 288 F.3d 1215, 226 (10th Cir. 2002), and concluded that because the state court “had a full and fair opportunity to address the merits of the ineffective assistance claim in the course of Johnson’s first application for postconviction relief, it does not matter that a procedural default may have occurred when Johnson again attempted to assert that claim in state court.” *Accord, Bennett v. Whitley*, 41 F.3d 1581, 1583 (5th Cir. 1994) (although state postconviction court ruled that claims were “barred by procedural default” because they were previously rejected on direct appeal, state rule in question “is not a procedural bar in the traditional sense,” and federal habeas corpus review was available).

3. The State-Court’s Ambiguous Timeliness Ruling Is Not Broad Enough to Support the Rejection of any Federal Claim

Few principles are better established than the principle that a state-court’s reliance on state laws for decision that are not “broad enough” to support its judgment will not bar federal review. *See, e.g., Murdock v. Memphis, supra; Eustis v. Bolles, supra; Rutland R.R. v. Central V. R.R.*, 159 U.S. 630, 641 (1895); *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931). The state-court’s reference to *In re Clark* in this case is ambiguous, at best, and could indicate the

claims presented in Martin's second petition were rejected in part or in whole on the ground that they were repetitive of those rejected in the prior petition. In *Clark*, the California Supreme Court explained that it considers repetitive claims to be untimely claims. 5 Cal. 4th at 769-70 (equating repetitive and piecemeal claims with untimely claims). The general rule is that ambiguity concerning state-court grounds for decision will render a state procedural bar inadequate to extinguish the federal right. See *Harris v. Reed*, 489 U.S. 255 (1988); *Michigan v. Long*, 463 U.S. 1032 (1983). It is the job of federal courts to "ascertain for themselves if the petitioner is in custody pursuant to a state-court judgment that rests on independent and adequate state grounds." *Coleman v. Thompson*, 501 U.S. 722, 736 (1991).

Taken in the light most favorable to the State, the California Supreme Court deemed the legal bases for relief Martin raised in his second petition untimely because they were repetitive, and rejected any truly new factual basis for relief as untimely due to delay or a failure to justify "substantial" delay. The only new factual material in the second petition was the allegation that trial counsel should have relied upon an expert witness to show that witness Permenter's prior out-of-court statements were inadmissible because her drug use rendered her unable to vouch for their veracity. Martin had alleged in his initial state habeas petition that Permenter's drug use rendered her unable to recall her prior statements. A refusal to consider on timeliness

grounds the additional allegation regarding the expert is not broad enough to support the complete denial of relief. Under California law a petition for writ of habeas corpus based on grounds raised in a previously denied petition will be denied when “there has been no change in the facts or law substantially affecting the rights of the petitioner.” *In re Martin*, 44 Cal. 3d 1, 27 n.3 (1987) (citing *In re Miller*, 17 Cal. 2d 734, 735 (1941)). The citations to *Clark* and *Robbins*, 18 Cal. 4th at 780, signifying untimeliness are therefore of insufficient breadth to support the judgment. The State has never questioned inadequacy of this type. The Court should deem the bar inadequate and should decline to reach the question upon which *certiorari* was granted. In the event that the Court deems it appropriate to proceed beyond the issues discussed above, amici curiae will proceed to the reasons, in addition to those presented by Respondent, that defaults imposed under California’s timeliness framework are inadequate to bar federal review.

B. California’s Timeliness Framework Cannot Be Reduced to a Mere Requirement that Claims be Filed “Reasonably Promptly” and Even If It Could, Its Requirements Would Still Be Unclear

The State attempts to bootstrap its arguments regarding fair notice by asserting that California’s timeliness framework passably can be reduced to a requirement of “reasonable promptness.” *See, e.g.*,

Pet. Br. at 14, 37, 38. That attempt to eliminate the complexities that deprive California habeas petitioners of notice when to file should not be countenanced.

1. California Has a Timeliness “Framework,” Not a Timeliness Rule

“The state Supreme Court has not established a time limit for the presentation of claims in a habeas petition.” *In re Sodersten*, 146 Cal. App. 4th 1163, 1221 (2007) (citing *In re Huddleston*, 71 Cal. 2d 1031, 1034 (1969)). There is, however, an equitable procedural bar for lack of diligence that was discussed at length in *In re Clark*, 5 Cal. 4th 750, 765 (1993).

Clark discusses many of the procedural doctrines upon which a California court may summarily deny habeas relief, but it is frequently cited for its discussion of the interrelated policies against repetitious, successive and delayed claims for relief. With respect to successive and repetitive applications for relief, *Clark* noted that the California Supreme Court’s

past decisions have . . . suggested that the rules against piecemeal presentation of claims and repetitious petitions are subject to undefined exceptions and that the court may be willing to entertain multiple

collateral attacks on a judgment notwithstanding the potential for abusive writ practice.

5 Cal. 4th at 768. In an effort to provide greater certainty, the court stated, in relevant part, that henceforth,

[b]efore considering the merits of a second or successive petition, a California court will first ask whether the failure to present the claims underlying the new petition in a prior petition has been adequately explained, and whether that explanation justifies the piecemeal presentation of the petitioner's claims. This requirement is reasonable in view of the interest of the state in carrying out its judgments, the interest of the respondent in having the ability to respond to the petition and to retry the case should the judgment be invalidated, and the burden on the judicial system.

In assessing a petitioner's explanation and justification for delayed presentations of claims in the future, the court will also consider whether the facts on which the claim is based, although only recently discovered, could and should have been discovered earlier. A petitioner will be expected to demonstrate due diligence in pursuing potential claims. If a petitioner had reason to suspect that a basis for habeas corpus relief was available, but did nothing to promptly confirm those suspicions, that failure must be justified.

However, where the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made, or where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible. And, as in the past, claims which are based on a change in the law which is retroactively applicable to final judgments will be considered if promptly asserted and if application of the former rule is shown to have been prejudicial.

With the exception of petitions which allege facts demonstrating that a fundamental miscarriage of justice has occurred, an exception to be addressed below, unjustified successive petitions will not be entertained on their merits.

5 Cal. 4th at 774-75. Not surprisingly, this lengthy description of “timeliness” is rarely set forth in full. On the very page cited in the order denying Martin’s second petition, the state court described its approach as a timeliness “framework,” *In re Robbins*, 18 Cal. 4th 770, 780 (1998) (“basic analytical framework governing our timeliness determination”). The framework is typically paraphrased in terms of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, eff. June 6, 1989, from which much of *Clark*’s discussion drew:

All petitions for writs of habeas corpus should be filed without substantial delay.

A petition . . . may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim *and* (b) became aware, or should have become aware, of the legal basis for the claim.

If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3 (“Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel In Relation to Such Petitions”), Part 1 (“Timeliness Standards”), Standards 1-1.1-3.

The State presents a false debate by claiming that the requirement of filing “as promptly as circumstances allow” is clear and unambiguous. Even if this phrase accurately captures the essence of the framework, the requirements of fair notice would not be satisfied.

2. A Requirement of “Reasonable Promptness” Does Not Constitute a Clearly Established Rule

This Court’s decisions in various areas of activity stand for the proposition that “reasonableness” conveys

meaning only by reference to an express or understood class of comparison, something California courts have chosen not to provide. For example, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), considered the specificity of a statute proscribing any “unjust or unreasonable” rate in the handling of any necessities. In deciding whether the charges against the defendant were within the reach of the statute, this Court focused on

the certainty or uncertainty of the text in question, that is, whether the words “That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities,” constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them.

Id. at 89. The Court found a lack of notice “so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary,” but observed

that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of

which no one can foreshadow or adequately guard against.

Ibid. *Cohen Grocery* specifically distinguished cases in which regulations phrased in general terms were upheld by saying that they “all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.” *Id.* at 92.

Cline v. Frink Dairy Co., 274 U.S. 445 (1927), involved a vagueness challenge to a Colorado anti-trust statute that permitted certain trade combinations or agreements that would otherwise be unlawful provided that the purpose of the agreement was only to insure a “reasonable” profit. The Court stated,

it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury’s decision. A legislature must fix the standard more

simply and more definitely before a person must conform or a jury can act.

Id. at 465.

In contrast, the Court has upheld restrictions on unreasonable restraints or prices when “reasonableness” had an adequate denotation in context. For example, *Nash v. United States*, 229 U.S. 373 (1913), relied on the notion that there was a well-developed common-law understanding of what constitutes an unreasonable restraint of trade. 229 U.S. at 376-77. Similarly, in *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922), the subject of the inquiry into reasonableness was the amount of the rent fixed by a lease for a dwelling. In that context, the rates charged for the rental of similar dwellings would obviously be available as comparators, see *International Harvester Co. v. Kentucky*, 234 U.S. 216, 222 (1914) (“Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain.”).

This Court has first-hand experience with the impossibility of implementing standards as seemingly simple as “promptly,” absent determinate standards. *Gerstein v. Pugh*, 420 U.S. 103 (1975), held that the Fourth Amendment requires a “prompt” judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. Sixteen years later, the Court was forced to revisit the issue:

Unfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable cause determinations must be “prompt.” This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations.

County of Riverside v. McLaughlin, 500 U.S. 44, 55-56 (1991) (citing illustrative cases). In order to end the disruptive consequences of “how prompt is prompt?” the Court recognized it was “important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds.” *Id.* at 56. The Court balanced the “competing interests articulated in *Gerstein*,” and held “that . . . judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.” *Id.* at 56.³

³ *Sproles v. Binford*, 286 U.S. 374, 393 (1932), further underscores the importance of an ascertainable common understanding:

The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 109; *Nash v. United States*, 229 U.S. 373, 377; *Miller v. Strahl*, 239 U.S. 426, 434; *Omaechevarria v. Idaho*, 246 U.S. 343, 348; *Hygrade Provision Co. v.*

(Continued on following page)

This Court's cases accept "reasonableness" as a requirement when it is set in the context of commonly understood norms. Without a comparison class of understood expectations, "reasonable" is a meaningless concept. The requirement that operators of motor vehicles drive at reasonable speeds may seem simple enough. *Cf. Miller v. Oregon*, 273 U.S. 657 (1927) (per curiam) (*explained by Cline, supra*, as upholding vehicular manslaughter conviction based on violating speeding statute requiring that drivers proceed "in a careful and prudent manner, not to exceed thirty miles per hour. . . . and in no case at a rate of speed that will endanger the property of another, or the life or limb of any person"). But what speed is reasonable varies with context and understood expectations. Reasonable speeds near schools, on expressways, or among competitors at the Indianapolis Speedway are entirely different.

Attorneys, much less pro se petitioners in non-capital cases in California, cannot reasonably be presumed to have a shared understanding of what

Sherman, 266 U.S. 497, 502; *Bandini Co. v. Superior Court*, 284 U.S. 8, 18. The use of common experience as a glossary is necessary to meet the practical demands of legislation. In this instance, to insist upon carriage by the shortest possible route, without taking the practicability of the route into consideration, would be but an arbitrary requirement, and the expression of that which otherwise would necessarily be implied, in order to make the provision workable, does not destroy it.

constitutes acting as “promptly as circumstances allow.” The state courts have not articulated expectations for different circumstances, and have not published reasoned decisions that could serve as a shared set of benchmarks. The only determinate guideline for promptness – the presumptive timeliness date established by the Policies applicable to capital cases – has been held not to apply to non-capital cases. *In re Sodersten*, 146 Cal. App. 4th 1163, 1221 (2007) (“these precise standards do not apply in petitioner’s case, since he was not sentenced to death”).

When contrasted with this Court’s cases on reasonableness, there is an inevitable hollowness to the State’s contention that “reasonable promptness” has a meaning specific enough to inform petitioners what they need to do to preserve a federal claim. The threat that they risk default if they proceed in a manner that a court may later deem to have been unreasonable, or if they explain their conduct in a manner a court may later deem an insufficient justification, can only be viewed by petitioners as hopelessly capricious.

The State’s oblique references to opinions on diverse topics ranging from comparative negligence to robbery fails to support its position. The State cites *American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 586, 578 P.2d 899, 904 (1978); *Feit v. Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 568 (E.D.N.Y. 1971); *People v. Blakeley*, 23 Cal. 4th 82, 87-88, 999 P.2d 675, 678 (2000); *People v. Nguyen*, 22 Cal. 4th 872, 885-86, 997 P.2d 493, 501

(2000), as a kind of empirical evidence that the terms like “reasonable,” “unreasonable” or “substantial” are commonly used to describe some aspect of conduct for which criminal or civil liability could be imposed.⁴ None of the cited cases involve a challenge based on lack of notice to any provision proscribing “unreasonable” conduct.⁵

The California Supreme Court has chosen not to adopt a time limit on habeas corpus petitions, not to provide determinate guidelines for non-capital petitioners, and not to define “reasonable promptness” even by providing illustrative example or explanation from time to time. The state-court’s preference for the flexibility and variability of its timeliness “framework” does not demand the blind obeisance of the federal courts that the Attorney General desires.

⁴ According to the State, *American Motorcycle* is about a doctrine of “‘unreasonable’ negligence.” Pet. Br. at 38. In fact, the case is about the doctrine of comparative negligence, and the word “unreasonable” appears only in the dissent, in a comment that one of the majority’s conclusions was “not unreasonable.” 20 Cal. 3d at 611 (Clark, J., dissenting).

⁵ Ironically, *Nguyen*’s reference to “substantial” involved a prior holding of the California Supreme Court to add a requirement that the asportation of a robbery victim be “substantial” in order to *narrow* a statute that enhanced criminal liability for *any* asportation of such victim. *Blakely* manifestly involved no issue of notice. Under California law, use of fatal force in self defense is justified if the defendant, under an objective standard of reasonableness, believed himself to be in imminent danger of death or great bodily injury. A subjective good faith belief that is objectively unreasonable is sufficient only to reduce murder to manslaughter.

C. This Court’s Jurisprudence Requires an Inquiry into Consistency; *Beard v. Kindler* Neither Renders Such An Inquiry “Untenable” Nor Does It Establish The Adequacy of California’s “Discretionary” Timeliness Framework

A considerable portion of the State’s Brief on the Merits is devoted to arguing that this Court’s repeated use of “firmly established and regularly followed” to describe adequate state rules does not require similarly situated petitioners to receive evenhanded treatment under those rules. In its brief to the Ninth Circuit, however, the State affirmatively asserted that consistent application was required, and did not assert that the lower court had misunderstood the import of this Court’s decisions referring to a “firmly established” requirement. *See* JA 95 (Appellee’s Brief at 40) (“A procedural default will be found to have been consistently applied if the actual application of the default rule to all similar claims has been even-handed ‘in the vast majority of cases.’ *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996); *Dugger v. Adams*, 489 U.S. 401, 410-412 n.6 (1989).”); *see also* JA 78 (“The District Court correctly concluded that California’s timeliness bar has been established as sufficiently clarified and consistently applied since the California Supreme Court decided *Clark* in 1993”).

“It is this Court’s practice to decline to review those issues neither pressed nor passed upon below.” *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990); *see*

also *United States v. Williams*, 504 U.S. 36, 42-43 (1992) (party may not urge one position in the court below and after losing reverse its position in this Court). The Court should reject the State's request to hold the Ninth Circuit misunderstood, or should not have applied, decisions from this Court that the State relied upon below. *FW/PBS, Inc. v. Dallas*, 493 U.S. at 224.

1. The State's Criticisms of the Ninth Circuit's Approach Are Unfounded

a. The Ninth Circuit has Expressly Held California's Timeliness Rule is Not Inadequate because it is Discretionary; California's Timeliness Policies for Habeas Corpus Petitions Simply Do Not Fulfill Baseline Adequacy Requirements

Relying upon *Beard v. Kindler*, 130 S. Ct. 612 (2009), the State complains that "discretionary" state procedural rules can never be adequate in the eyes of the Ninth Circuit because that court erroneously insists state procedural bars be consistently applied. Pet. Br. at 25-26. On the contrary, the Ninth Circuit has honored procedural rules that admit of discretionary exceptions. *See, e.g., Hurtado v. Kirkland*, 281 Fed.Appx. 724, 2008 WL 2330983 (9th Cir. 2008) (rejecting petitioner's argument that discretion of California Supreme Court Chief Justice to overlook late filing of petition for review rendered California Rule of Court 28(e) inadequate); *Covert v. Hubbard*,

116 Fed.Appx. 871, 872, 2004 WL 2625088 (9th Cir. 2004) (rejecting petitioner’s argument “that California’s contemporaneous objection rule is not an adequate procedural bar because it requires the exercise of judicial discretion”); *Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000) (honoring Washington’s 1-year limit on personal restraint petitions “[e]ven assuming that the Washington Supreme Court simply chose to disregard their procedural rule to reach the merits in [a] particular death penalty case”); *Vang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir. 2003) (honoring Nevada timeliness rule in noncapital case despite earlier finding that state supreme court exercised discretion not to impose rule in capital cases); *Bargas v. Burns*, 179 F.3d 1207, 1212 (9th Cir. 1999) (honoring Nevada rule against piecemeal presentation of claims although no prior decision of state courts had applied it to present claim).⁶ The difference, as we discuss below, is due to California’s timeliness framework which has distinguished itself from rules with verifiable grounds for application. The inscrutable and unbridled discretion it confers on state judges cannot be deemed “firmly established or

⁶ In *Bargas*, the court explained, “We do not read decisions from this Court or the Supreme Court as requiring a state court to locate a case law citation that speaks to the very same factual scenario as the one before it prior to invoking the rule of procedural default. Instead, we follow the Supreme Court’s dictate that where a rule is sufficiently clear as to put a petitioner on notice that he must raise all claims or risk default, that petitioner must raise all claims.”

regularly followed” under *Beard* or any of this Court’s precedent.

b. The Ninth Circuit’s Examination of State Cases to Determine Whether a State Bar is an Adequate is Entirely Appropriate Method of Determining Whether, as a Matter of Federal Law, the Bar is Adequate

Contrary to the position it took in the Ninth Circuit, the State faults the lower court for looking to the state-court’s practices “in enforcing a procedural rule in cases other than the petitioner’s [which] is almost always misplaced and untenable.” Pet. Br. at 25. According to the State, the Ninth Circuit erred long ago in *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996), when it wrote that this Court “has stated that ‘a state procedural ground is not “adequate” unless the procedural rule is “strictly or regularly followed.”’ *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149, 12 L. Ed. 2d 766, 84 S. Ct. 1734 (1964)).” The State contends the Ninth Circuit should not have taken *Hathorn* and *Barr* literally, but should have limited its inquiry to a more deferential interpretation of “regular” application. The State’s criticisms notwithstanding, the Ninth Circuit has engaged in the same methods of consistency review this Court has itself conducted.

For example, in *Dugger v. Adams*, *supra*, 489 U.S. 401, defense counsel had failed to object to an

instruction that the jury was not responsible for the sentence to be imposed because sentencing was the judge's decision. Adams argued that Florida's procedural bar against claims that should have been, but were not, raised on direct appeal was inadequate because it had not been "consistently or regularly applied." *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988), and the Eleventh Circuit agreed that it was "doubtful" that an adequate and independent state law ground existed in the case. *Dugger*, 489 U.S. at 410 n.6. This Court upheld the bar, first noting cases in which the rule had been "faithfully" applied, and then examining those cases where the rule was claimed to have been ignored. *Id.* at 445 n.6. Based on its examination of the state-court decisions, this Court was unconvinced that the Florida Supreme Court had failed to follow its own rule.

In *James v. Kentucky*, 466 U.S. 341 (1984), this Court reviewed a dozen state-court decisions to determine that the Kentucky Supreme Court had a history of inconsistency in distinguishing jury "instructions" from "admonitions." *Id.*, 466 U.S. at 346. Although *Ford v. Georgia*, 498 U.S. 411 (1991), is most commonly remembered for its holding that a state court may not, consistent with the requirements of the adequate state grounds doctrine, apply a newly-announced rule procedure retroactively, the *Ford* decision was also based on this Court's observation that the state-court's invocation of the alleged waiver rule "fail[ed] the second *James [v. Kentucky]*

requirement that the state practice [has] been regularly followed.” *Id.*, 498 U.S. at 425.

c. The Ninth Circuit’s Consistency Analysis as An Adjunct to Assessing Vagueness Does Not Fail to Presume that Judges Follow the Law

The State contends the empirical review for consistency demonstrated in *Johnson*, *Dugger*, *James*, and *Ford* violates the presumption that state-court judges, like federal judges, respect their duty to uphold the law. This Court’s cases show such review is consistent with comity. Many legal actions are presumed to be correct, but those presumptions can – indeed, must – cede when evidence to the contrary is presented, or our legal system would be incapable of correcting errors.

In criminal cases, reviewing courts “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” and require the defendant to overcome the presumption that counsel’s actions resulted from “sound trial strategy.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Judges are presumed to act in good faith and to be impartial arbiters of the law, because as public officials they are presumed to have “properly discharged their official duties.” *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926), *quoted in Bracy v. Gramley*, 520 U.S. 899, 909 (1997). That presumption will not sustain a judgment

in circumstances “in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable.” *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)); *Bracy*, 520 U.S. at 908-09 (discovery, not frequently available to habeas petitioners, allowed on showing that trial judge had accepted bribes to “fix” other cases). Similarly, prosecutors, also public officials presumed to properly discharge their official duties, are bound by that duty to disclose evidence favorable to the defense, *Brady v. Maryland*, 373 U.S. 83 (1963), but that does not prevent a petitioner from pleading and proving that the prosecutor violated that duty. See *Strickler v. Greene*, 527 U.S. 263, 286-87 (1999).

The State fundamentally misunderstands the role of Martin’s showing of inconsistency. This Court’s vagueness jurisprudence stresses the importance of the *dual* goals of ensuring that “ordinary people can understand what conduct is prohibited” and discouraging “arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). For the same reasons California’s promptness principle fails adequately to guide petitioners seeking to avoid default – *viz.* its indeterminacy, open-ended scope, and the opacity of decisions applying it – the principle fails to guide judicial discretion and, predictably, produces arbitrary and disparate outcomes. The State’s real complaint is that showing similarly-situated petitioners receive disparate treatment is

not a showing that the law has been *violated*, but rather that the law has been *followed*. This Court's consistency review should not be abandoned to resolve the tension between the California Supreme Court's desire for indeterminacy, and the state Attorney General's desire to prevent merits review of constitutional claims.

2. *Beard v. Kindler* Does Not Establish that California's "Discretionary" Timeliness Framework is Adequate Nor that Consistency Is Irrelevant

The State finds much in *Beard's* observation "a discretionary rule can be 'firmly established' and 'regularly followed' – even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." 130 S. Ct. at 618. The State contends that decisions involving California's timeliness framework are no more "discretionary" than decisions by Pennsylvania courts whether to hear postconviction challenges from those who have escaped from custody.

More fidelity to the facts and holding of *Beard*, and the authorities upon which *Beard* relies, show the ad hoc decision-making required by California's timeliness framework is inadequate. The discretionary decision not to *overlook* the objectively identifiable default-event that occurred in *Beard* – a decision that was guided by standards, fully explained, and subject to appellate court and federal

court scrutiny – is the polar opposite of a California court’s “discretion” to make individualized claim-by-claim, ad hoc determinations regarding whether the bar should be applied in the first instance.

a. *Beard* Involved a Discretionary Process of Reasoned Elaboration Regarding the Consequences of Violating a Clear, Objective Requirement of Submitting to the Court’s Authority

Beard v. Kindler involved claims for post-conviction relief that had been forfeited under the state law “fugitive waiver” doctrine. Kindler was convicted of capital murder, but escaped prior to sentencing. He was eventually returned for sentencing, and moved to reinstate motions that had been dismissed while he was on escape status. 130 S. Ct. at 615-16.

The Pennsylvania Supreme Court affirmed the trial court’s refusal to reinstate Kindler’s motions in an opinion that included an eight-paragraph analysis of the lower court’s decision to enforce the fugitive waiver. *Commonwealth v. Kindler*, 536 Pa. 228, 232-34, 639 A.2d 1, 2-4 (Pa. 1994). Kindler’s application for state habeas relief was rejected on the ground that by escaping he had forfeited not only the right to pursue motions that were pending at the time, but motions that would otherwise have been properly filed upon his return as well. That decision was affirmed, again in a detailed, reasoned decision.

Commonwealth v. Kindler, 554 Pa. 513, 520-23, 722 A.2d 143, 146-48 (1999).

After the Third Circuit held the discretionary refusal to entertain Kindler's claims inadequate to bar review, this Court granted *certiorari* to "decide the following question: 'Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?'" *Beard*, 130 S. Ct. at 615. Kindler conceded that the answer was "no," and this Court consequently vacated the judgment of the Court of Appeals. *Ibid.* In particular, the Court stated:

We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine. To the contrary, a discretionary rule can be "firmly established" and "regularly followed" – even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others.

Id. at 618. So uncontroversial was this conclusion that the Court cited only a single authority in support, D. Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1140 (1986) (*cited ibid.*, with explanatory parenthetical "[R]efusals to exercise discretion do not form an important independent

category under the inadequate state ground doctrine”).

b. The Discretionary Process of Reasoned Elaboration Does Not Include Standardless Ad Hoc Decision-Making

The reference to Professor Meltzer’s article informs an understanding of the narrowness of the Court’s holding as well as its reference to “appropriate exercise[s] of discretion.” First, Meltzer’s discussion was limited to cases like *Beard*, where the issue is “whether a state procedural ruling is inadequate simply because the state court possessed but did not exercise discretion to *excuse* the procedural default.” 99 Harv. L. Rev. at 1139-40 (emphasis added). Second, Meltzer notes that the “power of reasoned elaboration,” see H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 144 (W. Eskridge Jr. & P. Frickey eds., 1994), which the inadequate state ground doctrine should not be used to obstruct, must be distinguished from the “wholly ad hoc” decision-making,⁷ which, in the opinion of scholars, is not adequate to defeat federal

⁷ Hart & Sacks refer to such ad hoc decision-making as the “power of continuing discretion” in which the decision-maker has the authority to make decisions “without obligation to relate in any formally reasoned manner the grounds upon which he acts in one instance with those upon which he acts in another.” See H. Hart & A. Sacks, *supra*, at 144.

review. *See op. cit.*; T. Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 226 (1965); A. Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050, 1084 (1965) (“if a hearing has been denied to a constitutional claim because the state court determined, arbitrarily, that there was no compliance with a state procedural rule, it is inconceivable that the arbitrary action of the state court should be binding on the federal district court.”). *See also Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 243 (1969) (Harlan, J., dissenting) (suggesting that simple ad hoc exercises of power not to entertain federal questions would be inadequate to bar federal review, in contrast to “the kind of ‘discretion’ that is . . . ‘the judicial formulation of law,’ [where] a court has an obligation to be reasonably consistent and ‘to explain the decision, including the reason for according different treatment to the instant case.’” (*citing* Sandalow, 1965 Sup. Ct. Rev. at 226).)⁸

⁸ These notions of courts’ discretion to elaborate can be traced back to Blackstone. Throughout his discussion of the courts of equity, famous for their flexibility, Blackstone emphasized that even they must be governed by rules and precedents no less than the courts of law. “If a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every particular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible.” 3 W. Blackstone, *Commentaries on the Laws of England* 440 (1768). Had their
(Continued on following page)

That *Beard* was about the “power of reasoned elaboration” in contrast to the power to decide arbitrarily, ad hoc, is clear not only in the Court’s citation to Meltzer’s discussion of the distinction, but also from Justice Kennedy’s concurrence, in which he wrote:

The process of elaborating, defining, and then shaping a State’s decisional law after considering the competing arguments in a specific case rests on this premise: Novel facts and circumstances may disclose principles that, while consistent with the logic and rationality the law seeks and in that sense predictable, still have not yet been defined with precision in earlier cases. This is the dynamic of the case system we rely upon to explain the law. [¶] The adequate state ground doctrine ought not to foreclose the case process in the separate States.

Beard, 130 S. Ct. at 620 (Kennedy, J., concurring).

discretion not been channeled, equity courts would have undermined the rule of law and produced arbitrary government. “[The judiciary’s] powers would have become too arbitrary to have been endured in a country like this, which boasts of being governed in all respects by law and not by will.” *Ibid.* (footnote omitted). To be properly deemed “discretionary” a court’s choices must not be left to “inclination but to its judgment; and its judgment is to be guided by sound legal principles.” *United States v. Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.).

c. The Unexplained, Ad Hoc Decisions Required by California’s Timeliness Framework Are Not Equivalent to the Discretion Pennsylvania Courts Possess to Overlook a Fugitive Waiver

The State is looking through the wrong end of the telescope when it equates the ad hoc decision-making involved in applying California’s timeliness framework with the explicated, reasoned elaboration that went into the Pennsylvania court’s decision whether to apply the fugitive waiver rule to bar prospective as well as pending claims for relief. The discretion whether, for equitable reasons, to forgive a clear default is entirely different from the “discretion” to determine *ex post facto* what conduct the rule requires for the petitioner’s circumstances. The discretionary power of reasoned elaboration involved in *Beard* is the antithesis of the unexplained, silent, and good-for-this-case-only invocations of California’s timeliness bars that epitomize the “power of continuing discretion.”⁹ This Court’s holding that the discretionary rule in *Beard* was adequate to support the judgment does not entail a conclusion that California’s unique ad hoc decision-making must be accepted

⁹ When a California court elects not to publish an explanation for its decision, it signifies that the decision cannot be viewed as a guide to the law’s meaning or how it is to be applied in other cases. Cal. R. Ct. 8.1105(c) (listing factors to be considered when deciding whether to publish a decision).

as adequate regardless of the results it produces. In fact, *Beard's ratio decidendi* establishes just the opposite.



CONCLUSION

The judgment in the Court of Appeals should be affirmed. The California Supreme Court's ambiguous reference to *In re Clark* and *In re Robbins*, if construed as a timeliness default is not broad enough to support the judgment. The state-courts' oft-repeated descriptions of the timeliness framework does not provide adequate notice of the time by which state habeas petitions must seek relief else suffer forfeiture of their claims. The ad hoc decision-making required by the timeliness framework does not reflect the type of discretionary judgments that were deemed adequate by *Beard*.

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Respectfully submitted,

SEAN K. KENNEDY
Federal Defender
for the Central District
of California

DANIEL J. BRODERICK
Federal Defender
for the Eastern District
of California

BARRY J. PORTMAN
Federal Defender
for the Northern District
of California

REUBEN C. CAHN
Executive Director
FEDERAL DEFENDERS OF
SAN DIEGO INC.

JOSEPH SCHLESINGER*
Assistant Federal Defender

TIVON SCHARDL
Trial & Habeas Counsel

HILARY SHEARD
Assistant Federal Defender

CAROLYN WIGGIN
Assistant Federal Defender

OFFICE OF THE FEDERAL
DEFENDER FOR THE EASTERN
DISTRICT OF CALIFORNIA
801 I Street, Third Floor
Sacramento, California 95814
(916) 498-5700

Joe_Schlesinger@fd.org
Counsel for Amici Curiae

**Counsel of Record*