

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 MICHAEL P. FARRELL
Senior Assistant Attorney General
4 JOHN G. MCLEAN
Supervising Deputy Attorney General
5 R. TODD MARSHALL
Deputy Attorney General
6 State Bar No. 155067
1300 I Street, Suite 125
7 P.O. Box 944255
Sacramento, CA 94244-2550
8 Telephone: (916) 324-5285
Fax: (916) 324-2960
9 Email: Todd.Marshall@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF CALIFORNIA

13 **CHARLES W. MARTIN,**

CIV S-99-0223 WBS GGH P

14 Petitioner,

15 v.

16 **SUZAN HUBBARD, Warden,**

17 Respondent.
18

19 **MOTION FOR SUMMARY DISMISSAL**

20 Date: November 8, 2007

21 Time: 10:00 a.m.

22 Courtroom: 24

Judge: The Honorable Gregory G. Hollows
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

PROCEDURAL HISTORY	1
STATEMENT OF FACTS	9
Prosecution	9
Defense	11
ARGUMENT	11
I. PETITIONER’S REMAINING CLAIMS ARE PROCEDURALLY DEFAULTED AND SHOULD BE DISMISSED	11
A. Background Law Regarding Imposition Of Procedural Bars	12
B. California’s Timeliness Bar	13
C. California’s Timeliness Bar Is Sufficiently Clear	14
D. California’s Timeliness Bar Is Consistently Applied	20
E. Analysis	24
CONCLUSION	29

TABLE OF AUTHORITIES

	Page
Cases	
<i>Alley v. Bell</i> , 101 F.Supp.2d 588 (W.D. Tenn. 2000)	14
<i>Bennett v. Mueller</i> , 322 F.3d 573 (9th Cir. 2003)	7, 12, 13, 21, 22
<i>Calderon v. United States District Court (Bean)</i> , 96 F.3d 1126 (9th Cir. 1996)	21
<i>Corjasso v. Ayers</i> , 278 F.3d 874 (9th Cir. 2002)	19
<i>Dugger v. Adams</i> , 489 U.S. 401 (1989)	23, 28
<i>Felix v. Mayle</i> , 379 F.3d 612 (9th Cir. 2004)	8
<i>Fields v. Calderon</i> , 125 F.3d 757 (9th Cir. 1997)	22
<i>Ford v. Georgia</i> , 498 U.S. 411 (1991)	28
<i>Griffin v. Johnson</i> , 350 F.3d 956 (9th Cir. 2003)	13
<i>Hale v. Gibson</i> , 227 F.3d 1298 (10th Cir. 2000)	23, 28
<i>In re Clark</i> , 5 Cal.4th 750 (1993)	6, 11, 13, 14, 20
<i>In re Dixon</i> (1953) 41 Cal.2d 756	4
<i>In re Gallego</i> , 18 Cal.4th 825 (1998)	14-16, 18, 26
<i>In re Robbins</i> , 18 Cal.4th 770 (1998)	6, 11, 14-16, 18, 19, 26
<i>In re Sanders</i> , 21 Cal.4th 697 (1999)	14, 17, 18, 20, 26, 27
<i>In re Swain</i> , 34 Cal.2d 300 (1949)	14
<i>In re Waltreus</i> (1965) 62 Cal.2d 218	4
<i>Jeffers v. Lewis</i> , 38 F.3d 411 (9th Cir. 1994)	18
<i>King v. LaMarque</i> , 464 F.3d 963 (9th Cir. 2006)	8, 13
<i>Lambrix v. Singletary</i> , 520 U.S. 518 (1997)	12, 28
<i>Morales v. Calderon</i> , 85 F.3d 1387 (9th Cir. 1996)	13
<i>Moran v. McDaniel</i> , 80 F.3d 1261 (9th Cir. 1996)	23, 28
<i>Powell v. Lambert</i> , 357 F.3d 871 (2004)	12, 21
<i>Shumway v. Payne</i> , 223 F.3d 982 (9th Cir. 2000)	23, 28
<i>Smith v. Duncan</i> , 297 F.3d 809 (9th Cir. 2002)	26

TABLE OF AUTHORITIES (continued)

	Page
1	
2 <i>Spitsyn v. Moore</i> , 345 F.3d 796 (9th Cir. 2003)	19
3 <i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	23
4 <i>Valerio v. Crawford</i> , 306 F.3d 742 (9th Cir. 2002)	12
5 <i>Wells v. Maas</i> , 28 F.3d 1005 (9th Cir. 1994)	12
6 <i>Whalem/Hunt v. Early</i> , 233 F.3d 1146 (9th Cir. 2000)	19
7 <i>Wood v. Hall</i> , 130 F.3d 373 (9th Cir. 1997)	20
8 <i>Yong v. I.N.S.</i> , 208 F.3d 116 (9th Cir. 2000)	13
9 <i>Zuniga v. United Can Co.</i> , 812 F.2d 443 (9th Cir. 1987)	13
10	
11 Statutes	
12 28 U.S.C. § 2244(d)(1)(D)	19
13 California Penal Code § 187(a)	2
14 California Penal Code § 190.2(a)(17)	2
15 California Penal Code § 211	2
16 California Penal Code § 12022(b)	2
17	
18 Court Rules	
19 Federal Rules of Civil Procedure, rule 15(c)(2)	8
20 Federal Rules of Civil Procedure, rule 25	1
21	
22	
23	
24	
25	
26	
27	
28	

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 DANE R. GILLETTE
Chief Assistant Attorney General
3 MICHAEL P. FARRELL
Senior Assistant Attorney General
4 JOHN G. MCLEAN
Supervising Deputy Attorney General
5 R. TODD MARSHALL
Deputy Attorney General
6 State Bar No. 155067
1300 I Street, Suite 125
7 P.O. Box 944255
Sacramento, CA 94244-2550
8 Telephone: (916) 324-5285
Fax: (916) 324-2960
9 Email: Todd.Marshall@doj.ca.gov

10 Attorneys for Respondent

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF CALIFORNIA

13 **CHARLES W. MARTIN,**

Petitioner,

14
15 v.

16 **SUZAN HUBBARD, Warden,**

17 Respondent.
18

CIV S-99-0223 WBS GGH P

**MOTION FOR SUMMARY
DISMISSAL**

Date: November 8, 2007
Time: 10:00 a.m.
Courtroom: 24
Judge: The Honorable
Gregory G. Hollows

19
20 Respondent JAMES WALKER^{1/} respectfully moves for summary dismissal of the fourth
21 amended petition for writ of habeas corpus filed in this Court on January 21, 2003, on the ground
22 that the petition (MARTIN v. HUBBARD CIV. S-99-223 WBS GGH P) contains procedurally
23 defaulted issues. As a result, Petitioner's remaining claims should be dismissed.

24 **PROCEDURAL HISTORY**

25 On December 19, 1994, amended complaint number 86F06757 was filed in Sacramento
26

27
28 1. James Walker is the warden who has custody over Petitioner and should be substituted
in as Respondent in the place of S. L. Hubbard pursuant to Federal Rules of Civil Procedure, rule
25.

1 County Superior and Municipal Court. (CT 13-15.) The complaint charged Petitioner Charles
2 Martin with murder while engaged in a robbery and personally using a knife. (Cal. Penal Code
3 §§ 187(a); 190.2(a)(17); 12022(b).) Count two of the complaint further alleged that Petitioner
4 perpetrated a robbery while personally using a knife. (Cal. Penal Code §§ 211 and 12022(b).)

5 Following the preliminary hearing on February 8, 1995, the amended complaint was
6 deemed to be an information, and Petitioner pled not guilty and denied the special allegations. (CT
7 2.)

8 Trial by jury began on July 31, 1995. (CT 5, 33.)

9 On August 8, 1995, the court conducted a California Evidence Code section 402 hearing
10 regarding Petitioner's motion to exclude the testimony of Bonnie Permenter-Haywood (Permenter).
11 (CT 64.) After the hearing, the court denied the motion. (CT 64.)

12 On August 21, 1995, the jury found Petitioner guilty of murder and robbery. The jury also
13 found that Petitioner committed the murder while engaged in the robbery and that Petitioner
14 personally used a knife during both crimes. (CT 6, 136-139.)

15 On September 18, 1995, the court sentenced Petitioner to life in prison without the
16 possibility of parole on count one plus a one-year consecutive term for the weapon use. (CT 6, 173-
17 174.) Furthermore, the court stayed Petitioner's sentence of the middle term of three years for count
18 two with an additional year for the weapon enhancement. Petitioner was awarded 489 days of pre-
19 sentence custody credit after serving 327 actual days. Also, Petitioner was ordered to pay a
20 restitution fine of \$5000. (CT 6, 173-174.)

21 Petitioner filed a timely notice of appeal on October 19, 1995. (CT 175-176.) In his
22 opening brief before the California Court of Appeal for the Third Appellate District, Petitioner
23 argued that the trial court erred by admitting Permenter's statements against him. On January 29,
24 1997, the Court of Appeal affirmed the judgment against Petitioner. (Fourth Pet. Ex. A.)

25 On March 10, 1997, Petitioner filed a petition for review with the California Supreme
26 Court. (Fourth Pet. Ex. B.) Petitioner presented the following issue: "Whether the Court of Appeal
27 erred in upholding the trial court's admission of a witness's taped statement as past recollection
28 recorded under Evidence Code section 1237, when the witness testified that she did not remember

1 the underlying events and could not say affirmatively that her prior statements were true.” Petitioner
2 failed to include any reference to the federal constitution or federal authority. Review was denied
3 on April 16, 1997, and became final on July 15, 1997. (Fourth Pet. Ex. C.)

4 On February 19, 1998, Petitioner filed a petition for writ of habeas corpus with the
5 Sacramento County Superior Court. Petitioner argued that he received ineffective assistance from
6 both his trial and appellate attorneys. In addition, Petitioner claimed that the trial court abused its
7 discretion by dismissing the first jury pool. Moreover, Petitioner asserted that the trial court erred
8 by not instructing the jury regarding accomplice liability resulting from Permenter's conduct.
9 (Respondent's July 18, 2000, motion to dismiss Ex. C.)

10 On May 19, 1998, the Sacramento County Superior Court denied Petitioner's petition
11 because his direct appeal was not then final, and he had not shown his appellate remedy was
12 inadequate. (Respondent's July 18, 2000, motion to dismiss Ex. C.)

13 On June 19, 1998, Petitioner filed a petition for writ of habeas corpus with the California
14 Court of Appeal for the Third Appellate District. This petition closely mirrored the petition filed
15 with the superior court and was denied on June 25, 1998. (Respondent's July 18, 2000, motion to
16 dismiss Ex. D.)

17 On July 17, 1998, Petitioner filed a petition for writ of habeas corpus with the California
18 Supreme Court. Petitioner continued to claim that his trial and appellate attorneys represented him
19 deficiently. Specifically, Petitioner claimed: “This case was based on a 1986 statement made by
20 Bonnie Permenter. Had counsel researched and developed her case, this statement would have been
21 excluded during the 402 hearing. . . . Counsel Huff failed to lay a foundation for exclusion of
22 statement.” (*Sic.*) Petitioner further suggested that his attorney did not object to the statement at the
23 402 hearing. Petitioner also complained that his attorney only objected twice during the trial despite
24 misconduct by the prosecution including: badgering and leading witnesses, engaging in ex parte
25 communications with the judge, misrepresenting facts to the jury, and meeting with a defense
26 witness during the lunch break. Petitioner explained, “[t]he prosecution had a field day of hearsay
27 and leading statements.” Petitioner continued to deride his counsel for her failure to move for
28 exclusion of the wallet he dropped at the site where the victim's body was found. Petitioner

1 intimated that further investigation regarding palm and finger prints should have been conducted by
2 the police, and that since it was not done, Huff should have objected. Petitioner expressed concern
3 that his attorney did not seem to care that Bobby Austin was never arrested. Petitioner bemoaned
4 the loss of three defense motions, claiming that his attorney failed to lay a foundation. Moreover,
5 Petitioner asserted that he gave his counsel a list of potential witnesses that were not called.
6 Petitioner claimed that his appellate counsel, “. . . failed to demonstrate Constitutional deprivations,
7 Court error (except pertaining to the 1237 issue), prosecutorial misconduct, and abuse of discretion
8 by the court.” (*Sic.*) Petitioner averred that these various errors prejudiced his trial, and “[w]ithout
9 the illegal statement made by Permenter there would be no evidence to sustain the conviction.”
10 Petitioner contended that the evidence not adduced at trial implicated Bobby Austin. Petitioner
11 further claimed that the trial court abused its discretion by: (1) admitting an unauthenticated
12 recording into evidence; (2) allowing a chart prepared by the prosecution into jury deliberations; and
13 (3) allowing the jury to use an unauthenticated recording. Petitioner also reiterated his claim that
14 it was error for the trial court to omit instruction regarding accomplice liability. (Fourth Pet. Ex. D.)

15 On July 27, 1998, Petitioner filed a motion seeking to add an additional ground to his
16 habeas petition. Petitioner renewed his claim that the trial court erred by dismissing the first jury
17 pool. (Fourth Pet. Ex. E.)

18 On January 27, 1999, the California Supreme Court denied the petition citing, *In re*
19 *Waltreus*, 62 Cal.2d 218, 225 (1965) and *In re Dixon*, 41 Cal.2d 756, 759 (1953). (Fourth Pet. Ex.
20 F.)

21 On February 4, 1999, Petitioner filed his first petition for writ of habeas corpus with this
22 Court. Petitioner continued to attack the admissibility of Permenter's statements, his representation
23 by both his trial and appellate counsel, and the fact that no instruction on accomplice liability was
24 given. However, Petitioner gave no specific examples of how appellate counsel failed him other
25 than to claim that she raised only one issue and ignored errors. Petitioner raised an additional claim
26 that had not been presented to the California Supreme Court. Petitioner claimed for the first time
27 that the trial court failed to dismiss the robbery allegation. Petitioner also argued that it was error
28 for the trial court to dismiss the first jury pool. In addition, Petitioner made no mention of any claim

1 that his right to personal presence at a critical stage of the proceedings was abridged.

2 On January 31, 2000, Petitioner filed a first amended petition. This petition raised seven
3 claims: ineffective assistance of trial and appellate counsel; erroneous dismissal of the first jury
4 pool; denial of the right to confront witnesses because trial counsel waived Petitioner's right to be
5 present; due process violations because his robbery and murder convictions were based upon
6 insufficient evidence; and denial of the right to a fair trial because the trial court failed to give
7 accomplice instructions. However, Petitioner acknowledged that certain claims might not be
8 exhausted. (See p. 15, fn. 1, and p. 18, fn. 2.) Petitioner requested that he be allowed to file a second
9 amended petition which contained greater factual specificity and a points and authorities following
10 resolution of the exhaustion issue.

11 On March 1, 2000, this Court directed Petitioner to file a second amended petition
12 containing only exhausted claims. This Court warned Petitioner that if the second amended petition
13 contained unexhausted claims, dismissal would be recommended.

14 On March 24, 2000, Petitioner filed a second amended petition, notice of unexhausted
15 claims, and another motion to stay proceedings.

16 On February 1, 2001, this Court issued findings and recommendations indicating that only
17 Petitioner's claims that it was error to dismiss the first jury pool and that it was error to omit a jury
18 instruction on accomplice testimony were exhausted. Thus, this Court directed Petitioner to file a
19 third amended petition containing only those two exhausted claims. (Fourth Pet. Ex. G.)

20 On March 14, 2001, Petitioner complied by filing a third amended petition which
21 contained only the two previously exhausted issues. (Fourth Pet. Ex. H.) On July 9, 2001, this Court
22 ordered Petitioner's federal habeas proceedings held in abeyance so that he could go back to the
23 California Supreme Court and seek exhaustion of his other issues. (Fourth Pet. Ex. J.)

24 Petitioner filed his second California Supreme Court petition for writ of habeas corpus on
25 March 18, 2002. Petitioner claimed that his trial counsel was ineffective for failing to investigate
26 witnesses and third-party culpability. Petitioner also attacked trial counsel for failing to stop the
27 admission of Permenter's taped statement. Petitioner claimed that counsel should have presented
28 the testimony of his trial expert, Dr. Swain, at the admissibility hearing. Petitioner also faulted

1 counsel for failing to point out obvious lies by Permenter at the admissibility hearing. Moreover,
2 Petitioner chastised counsel for failing to object to the admission of the transcript of Permenter's
3 taped interview. In addition, Petitioner claimed that his right to personal presence at a critical stage
4 was abridged. Next, Petitioner attacked the effectiveness of his state appellate counsel. Specifically,
5 Petitioner claimed that she failed to raise an issue, complaining that the prosecutor argued
6 contradictory points related to the admission of the tape. Petitioner also argued that appellate
7 counsel failed to raise a claim that he was denied his right to confront Permenter due to her stated
8 memory loss. Petitioner asserted further that appellate counsel failed to raise a claim of insufficient
9 evidence in the California Supreme Court upon direct review. (Fourth Pet. Ex. K.^{2/})

10 The California Supreme Court denied this petition on September 11, 2002, with citation
11 to *In re Clark*, 5 Cal.4th 750 (1993) and *In re Robbins*, 18 Cal.4th 770, 780 (1998). (Fourth Pet. Ex.
12 L.)

13 Petitioner filed his fourth amended petition for writ of habeas corpus on January 21, 2003.
14 Petitioner claimed that the trial court erred by dismissing the first jury pool (claim one). Petitioner
15 also faulted the trial court for failing to instruct the jury on accomplice testimony (claim two).
16 Petitioner claimed that he received ineffective assistance from trial counsel because she failed to
17 investigate witnesses or present evidence of third-party culpability (claim three). Petitioner also
18 attacked trial counsel for failing to effectively object to the admission of Permenter's taped interview
19 (claim four). Petitioner argued that it was ineffective not to present the testimony of Dr. Swain at
20 the admissibility hearing. In addition, Petitioner asserted that it was ineffective not to object to the
21 admission of the transcript of the taped Permenter interview. Petitioner argued further that he was
22 deprived of his right to personal presence during a critical stage of the proceedings (claim five).
23 Petitioner alleged three bases of state appellate counsel's ineffectiveness. Petitioner argued that
24 appellate counsel failed to argue that the prosecutor raised contradictory points (claim six, subpart
25 one). Petitioner also slighted appellate counsel for failing to raise a claim that his trial was
26 fundamentally unfair because he was "absolutely unable to confront" Permenter (claim six, subpart

27
28 2. Respondent has a file stamped version of Petitioner's second California Supreme Court
habeas petition (Case No. S105308) which can be forwarded upon request.

1 two). Finally, Petitioner challenged appellate counsel's failure to argue insufficient evidence before
2 the California Supreme Court upon direct review (claim six, subpart three).

3 On October 27, 2003, Respondent moved for summary dismissal in this Court.
4 Respondent argued that Petitioner's claim regarding his lack of presence at a critical stage (claim
5 five) and his claims of ineffective assistance by appellate counsel (claim six) did not relate back to
6 claims in the original federal petition and were therefore outside the AEDPA's one-year statute of
7 limitations. Respondent argued further that Petitioner's substantial delay in exhausting his additional
8 claims via a second state high court habeas corpus petition should preclude federal review.
9 Respondent also argued that all six of Petitioner's claims were procedurally defaulted and should
10 be dismissed. (Motion to Dismiss, October 27, 2003.)

11 On August 6, 2004, this Court issued Findings and Recommendations recommending
12 dismissal of Petitioner's entire petition. This Court concluded that only Petitioner's original
13 February 4, 1999, petition was timely under the AEDPA and that the claims in the fourth amended
14 petition must relate back to those original claims in order to be timely. Next, this Court found that
15 two claims from the fourth amended petition did not relate back to the original petition, namely:
16 claim five regarding Petitioner's presence during the tape replay for the jury and claim six sub-theory
17 one involving Petitioner's claim that his appellate counsel was deficient for failing to argue error as
18 a result of the prosecutor's use of inconsistent theories of admissibility for the Permenter statement.
19 This Court rejected the delay during exhaustion argument. However, this Court found that all six
20 of Petitioner's fourth amended petition claims were procedurally barred. This Court found that
21 claims one and two were barred because they could have been raised before the state high court on
22 direct appeal but were not. Next, this Court concluded that Petitioner's remaining claims, three
23 through six, were procedurally barred because they were not presented to the state high court in a
24 timely fashion. The gist of this Court's findings regarding the procedural bars was that Petitioner
25 had not made a sufficient specific factual allegation showing the state procedural bar was
26 inconsistently applied as required by *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003) to shift the
27 burden back to Respondent.

28 Following the opinion by the United States Court of Appeals for the Ninth Circuit (Ninth

1 Circuit) in *Felix v. Mayle*, 379 F.3d 612 (9th Cir. 2004), this Court requested additional briefing on
2 the relation back and statute of limitations question. Respondent acknowledged that the district court
3 was bound to follow the precedent from its own circuit. However, Respondent posited that the *Felix*
4 decision was wrongly decided.

5 On November 8, 2004, this Court issued supplemental Findings and Recommendations.
6 This Court withdrew its finding that claim five and claim six, sub-theory one, of the fourth amended
7 petition should be time barred pursuant to Federal Rules of Civil Procedure, rule 15(c)(2). This
8 Court concluded that the other procedural impediments remained valid and that Petitioner's claims
9 should all be dismissed as a result.

10 Petitioner never challenged the procedural bar that was applied to dismiss claims one and
11 two in his opposition to the motion for summary dismissal or his objections to this Court's Findings
12 and Recommendations. As a result, the oral argument held on March 7, 2005, was limited to a
13 discussion of whether Petitioner had challenged the adequacy of the timeliness bar that was applied
14 to claims three through six sufficiently to shift the burden back to Respondent and the AEDPA
15 statute of limitations issue.

16 On March 8, 2005, this Court ordered the motion for summary dismissal granted after
17 finding that Petitioner failed to assert specific factual allegations showing that the state procedure
18 was inadequate.

19 On March 23, 2005, this Court issued a certificate of appealability to the Ninth Circuit.

20 On July 26, 2006, the Ninth Circuit decided the appeal following briefing and oral
21 argument. The appellate court ruled that the question of whether claims three through six were
22 procedurally barred by California's timeliness rule was controlled by *King v. LaMarque*, 464 F.3d
23 963 (9th Cir. 2006). In the memorandum opinion issued by the Ninth Circuit in this case, the court
24 stated, "[o]n remand, in order to be able to maintain its affirmative defense of procedural default,
25 the government must show that cases after *In re Clark*, 855 P.2d 729 (Cal. 1993) had sufficiently
26 clarified the rule and that it had been consistently applied." The appellate court also ruled that claims
27 five and six subpart one were barred by the AEDPA statute of limitations because they did not relate
28 back to the original timely federal petition. The procedural bar applied to claims one and two was

1 not a part of the appeal.

2 Now, Respondent moves this Court to dismiss Petitioner's remaining claims (claims three,
3 four, and six subparts two and three) because they are procedurally defaulted. Respondent
4 specifically avers that California's timeliness rule is independent and adequate. The rule has been
5 clarified by the California Supreme Court in cases filed after 1993, and the rule has been consistently
6 applied.

7 STATEMENT OF FACTS

8 Prosecution

9 In approximately late November 1986, Petitioner had a conversation with his live-in
10 girlfriend, Bonnie Permenter (RT 55-56), during which Petitioner mentioned that he and his friend
11 Bobby Austin had discussed killing a man who had money and drugs. (Corr. CT 2, 16-19, 36, 163.)

12 Approximately two weeks later Petitioner showed up at his Isleton home (RT 56-57) with
13 about \$1,000 and one-half ounce of methamphetamine. (Corr. CT 17-20, 36, 41; RT 164.) While
14 Permenter was unsure of the exact dates and times, she believed that Petitioner returned with the
15 money and drugs on Friday, December 5, 1986. (Corr. CT 20, 21, 22, 31, 42; RT 158.) Petitioner
16 told Permenter that all he did was hit the guy in the back of the head and rob him. (Corr. CT 20-21,
17 36; RT 158.) Petitioner also told Permenter that he split the money and drugs with Austin. (RT
18 164.)

19 On Saturday, December 6, 1986, at about 9:00 a.m., Petitioner told Permenter he was
20 going to Austin's residence. (RT 159.) That afternoon Petitioner returned, and Permenter noticed
21 a five or five and one-half foot box in the back of Petitioner's vehicle. (RT 76, 159.) He told her it
22 contained tools, but Permenter suspected that a body was in the box. (Corr. CT 27, 31, 42.)

23 That evening at approximately 11:00 p.m., Petitioner went fishing on the Sacramento River
24 Delta near his home. (Corr. CT 3.) Early the next morning Petitioner phoned Permenter and
25 explained that he had gotten his car stuck in the sand at the river. (Corr. CT 3; RT 160.) Permenter
26 drove out to the river and tried to help Petitioner free the stuck vehicle. (Corr. CT 23; RT 161.)
27 They tried roping the bumper of the stuck car to the car Permenter was driving, and Petitioner tried
28 kicking wood under the tires, however, they were not successful in freeing the vehicle. (Corr. CT

1 25, 38; RT 161.) Petitioner told Permenter that the box had broken, and he explained that there were
2 things in there that he needed to get rid of. (Corr. CT 37.) Next, Petitioner and Permenter drove
3 home to summon a tow truck. (Corr. CT 25; RT 161.)

4 Petitioner was panicky and fidgety while they waited for the tow truck. (Corr. CT 31, 38;
5 RT 161.) At approximately 5:30 a.m. Permenter took Petitioner back out to his car where the tow
6 truck was waiting. (Corr. CT 5-6.) She dropped Petitioner off and ran errands the remainder of the
7 day. (Corr. CT 6, 8, 11.) Permenter saw Petitioner various times on Sunday (Corr. CT 10; RT 161),
8 however, Petitioner subsequently disappeared. Permenter did not see him again until they met up
9 in Illinois several months later. (Corr. CT 12; RT 84-86, 162.)

10 On December 7, 1986, Nathan Hall was playing near the Sacramento River Delta with
11 some friends. (RT 194-198.) Hall found appellant's wallet. (RT 121, 178, 199, 217, 229-230, 252,
12 422-423.) He also saw a plywood box that resembled a coffin, and a large plastic bag, in the same
13 area. (RT 139, 201-205, 222.) The bag contained the corpse of Charles Stapleton. (RT 93, 118,
14 151, 206-207, 239, 421.)

15 Police officers responded to the scene and found a depression in the sand which contained
16 boards similar to those used for the box. (RT 111, 141.) The officers thought that the depression
17 was either a partial grave or a mark from a car tire. (RT 113.) The plywood box had blood stains
18 in it. (RT 117, 146-147, 425, 442.) Even though the victim was known to carry large sums of
19 money (RT 100, 572-573), no wallet or cash was discovered on the victim. (RT 238, 297.)

20 On December 8, 1996, pathologist Dr. Gary Stuart conducted an autopsy on the victim.
21 (RT 287-288.) Stuart was of the opinion that the victim had been dead approximately one to two
22 days. (RT 298-301.) Stapleton suffered numerous wounds which would have been fatal by
23 themselves, including: a very forceful skull fracture (RT 307), a stab wound to the jugular vein (RT
24 312), a stab wound to the aorta (RT 319-320), and a stab wound which damaged the left lung (RT
25 320).

26 Later, officers discovered two Cadillacs belonging to the victim at Austin's home. (RT
27 170.)

28 The officers were unable to locate Petitioner until he was arrested in Hernando County

1 Florida on October 24, 1994. (RT 449, 452.) On November 3, 1994, Petitioner was brought back
2 to Sacramento County. (RT 449.)

3 **Defense**

4 Dr. Susan Garcia-Swain testified that long-term methamphetamine and alcohol use such
5 as that reported by Permenter could affect one's memory. (RT 478-479, 481, 483-484.)

6 Paulette LaMontague, a friend of Petitioner, testified that she and Permenter drank alcohol
7 and used drugs together in 1986. (RT 525-530.)

8 Charise McGill testified that she was a friend of the victim, and she believed that the
9 victim called her on December 5, 1986, at 11:08 p.m. (RT 544, 572-573.)

10 **ARGUMENT**

11 **I.**

12 **PETITIONER'S REMAINING CLAIMS ARE PROCEDURALLY**
13 **DEFAULTED AND SHOULD BE DISMISSED**

14 Petitioner's remaining claims (three, four, and six subparts two and three) are procedurally
15 barred because Petitioner failed to present them to the California Supreme Court in a timely fashion.
16 Petitioner failed to adequately justify his delay or establish other good cause. Petitioner also did not
17 apply for any exception to the timeliness requirement. Petitioner claimed in his second petition for
18 writ of habeas corpus before the California Supreme Court that his trial counsel was ineffective for
19 failing to investigate witnesses and present third-party culpability evidence, failing to prepare for and
20 exclude the Permenter tape and transcript, failing to present the testimony of Dr. Swain at the
21 admissibility hearing, and failing to point out alleged lies by Permenter. Petitioner also raised the
22 issue regarding his right to presence during the tape playback and three specific instances of
23 appellate counsel's ineffectiveness. These issues were raised on March 18, 2002, in habeas case
24 number S105308. On September 11, 2002, the California Supreme Court denied these claims as
25 time-barred, citing *In re Clark*, 5 Cal.4th 750 and *In re Robbins*, 18 Cal.4th at 780. (Fourth Pet. Ex.
26 L.) As such, Petitioner's remaining federal claims are procedurally defaulted and should be
27 dismissed.

28 ///

1 **A. Background Law Regarding Imposition Of Procedural Bars**

2 State procedural rules “are of vital importance to the orderly administration of its criminal
3 courts; when a federal court permits them to be readily evaded, it undermines the criminal justice
4 system.” *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). Procedural default questions are
5 generally the preliminary issue before a federal court considers the merits of a claim. *Id.* at 524.

6 “The principles of a state-court procedural default in federal habeas corpus are well-
7 established. A federal habeas court cannot review a claimed denial of a federal
8 constitutional right if the petitioner has failed to present the claim to the state court
9 because of a procedural default in that court. A default under an independent and adequate
10 state procedural rule operates as a bar in federal court unless the petitioner can show cause
11 for and prejudice from the default.” *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497,
12 53 L.Ed.2d 594 (1977); *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994) (“[T]he
13 procedural default doctrine is a specific application of the general adequate and
14 independent state grounds doctrine.”). In order for a state procedural rule to serve as an
15 adequate state ground, it must be regularly followed by the state courts. “[A] state
16 procedural ground is not ‘adequate’ unless the procedural rule is ‘strictly or regularly
17 followed’” *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575
18 (1988) (citation omitted); *see also Poland v. Stewart*, 169 F.3d 573, 585 (9th Cir. 1999)
19 (“A state court procedural rule constitutes an adequate bar to federal court review if it was
20 ‘firmly established and regularly followed’ at the time it was applied by the state court.”
21 (quoting *Ford v. Georgia*, 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991))).
22 The rule must also be actually relied on in the particular case in question. “In habeas, if
23 the decision of the last state court to which the petitioner presented his federal claims ...
24 did not clearly and expressly rely on an independent and adequate state ground, a federal
25 court may address the petition.” *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S.Ct.
26 2546, 115 L.Ed.2d 640 (1991). “[A] procedural default based on an ambiguous order that
27 does not clearly rest on independent and adequate state grounds is not sufficient to
28 preclude federal collateral review. *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir.
1996).”

19 *Valerio v. Crawford*, 306 F.3d 742, 773-74 (9th Cir. 2002) (en banc).

20 The Ninth Circuit has established that California’s timeliness bar is now independent of
21 federal law. *Bennett v. Mueller*, 322 F.3d at 582-583.

22 To be adequate, a procedural rule that acts as the basis for default is required to be “‘clear,
23 consistently applied, and well established at the time of petitioner’s purported default.’” *Powell v.*
24 *Lambert*, 357 F.3d 871, 872 (2004) (quoting *Wells v. Maas*, 28 F.3d 1005, 1010 (9th Cir. 1994).)

25 The claim of procedural default is an affirmative defense. “Once the state has adequately
26 pled the existence of an independent and adequate state procedural ground as an affirmative defense,
27 the burden to place that defense in issue shifts to the petitioner. The petitioner may satisfy this
28 burden by asserting specific factual allegations that demonstrate the inadequacy of the state

1 procedure, including citation to authority demonstrating inconsistent application of the rule. Once
2 having done so, however, the ultimate burden is the state's." *Bennett v. Mueller*, 322 F.3d at 573,
3 586.

4 Alternatively, a petitioner may place the defense in issue by merely contesting the
5 adequacy of the state rule if previous circuit authority has held that the rule was too uncertain and
6 inconsistent. Thus, "the government must show on remand that the rule has since been clarified for
7 noncapital cases and that the clarified rule has since been consistently applied." *King v. LaMarque*,
8 464 F.3d at 966-967.^{3/}

9 A petitioner can escape imposition of a procedural default by showing cause and prejudice
10 or actual innocence. *Griffin v. Johnson*, 350 F.3d 956, 960-961 (9th Cir. 2003). To date, Petitioner
11 has not attempted to establish either.

12 **B. California's Timeliness Bar**

13 On July 29, 1993, the California Supreme Court in *In re Clark*, 5 Cal.4th 750 set specific
14 standards to govern the exercise of discretion by California courts when applying the bar of
15

16 3. While Respondent acknowledges that this Court is required to follow the law of its own
17 circuit, *Yong v. I.N.S.*, 208 F.3d 116, 119 n.2 (9th Cir. 2000); *Zuniga v. United Can Co.*, 812 F.2d
18 443, 450 (9th Cir. 1987), Respondent posits that the Ninth Circuit's opinion in *King* is wrongly
19 decided. Since *Morales* merely addressed the adequacy of the state's timeliness rules *before* the
20 California Supreme Court recognized and corrected the previous inconsistent application in *In re*
Clark, 5 Cal.4th 750, Respondent does not believe that *Morales v. Calderon*, 85 F.3d 1387, 1392
(9th Cir. 1996) can be stretched to reach a finding of inadequacy post-*Clark*.

21 *Clark* clearly tells state habeas litigants that they must explain and justify any
22 significant delay. *In re Clark*, 5 Cal.4th at 765. The state high court gives examples of delay
23 requiring justification ranging from 3 years to 11 years. *In re Clark*, 5 Cal.4th at 765, 782-783.
24 *Clark* also informs litigants that an explanation of delay is particularly necessary where the state
25 habeas petition is a second or successive petition. Petitioners who file successive state petitions are
26 clearly told that they must explain why they did not include the new claims in their previous habeas
27 challenge. *In re Clark*, 5 Cal.4th at 765, 774-775. The state high court also makes it clear that the
28 requirement to justify delay applies to all habeas petitioners (both capital and non-capital litigants).
In re Clark, 5 Cal.4th at 782. The state high court advises litigants to raise their claims as promptly
as possible after the factual and legal bases for the claims are known. *In re Clark*, 5 Cal.4th at 784.
Simply put, state habeas litigants must explain when they learned about their claims and explain why
they have not been presented sooner. Any other rule infringes upon the state's right to finality of
judgments and prejudices the People by forcing possible retrials many years after the crime which
can be very difficult due to the loss of memory and the disappearance of witnesses. *In re Clark*, 5
Cal.4th at 786-787.

1 untimeliness. The decision was intended to reestablish California's procedural rules governing state
2 habeas petitions and clearly define and limit the applicable exceptions. The state high court
3 explained that a petitioner must either establish the absence of substantial delay or provide good
4 cause justifying the delay. *Clark*, at 783. In addition, the duty to explain and justify delay is
5 particularly necessary where the petitioner is filing a second habeas corpus petition. *Clark*, at 765;
6 *In re Swain*, 34 Cal.2d 300, 302 (1949). If a petitioner fails to justify a substantial delay, a California
7 court will still hear the merits of a claim in a state habeas petition, if the court finds one of four
8 exceptions which revolve around a finding of a fundamental miscarriage of justice. These
9 exceptions are: "(1) that error of constitutional magnitude led to a trial that was so fundamentally
10 unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) that
11 the petitioner is actually innocent of the crime or crimes of which the petitioner was convicted; (3)
12 that the death penalty was imposed by a sentencing authority which had such a grossly misleading
13 profile of the petitioner before it that absent the trial error or omission no reasonable judge or jury
14 would have imposed a sentence of death; (4) that the petitioner was convicted or sentenced under
15 an invalid statute." *Clark*, at 797-798. After *In re Clark*, California's timeliness rule in habeas cases
16 is well established. This fact is supported by several state supreme court cases which extensively
17 focus on the importance of this rule. *In re Robbins*, 18 Cal.4th 770, 780 (1998); *In re Gallego*, 18
18 Cal.4th 825 (1998); *In re Sanders*, 21 Cal.4th 697, 701 (1999).

19 **C. California's Timeliness Bar Is Sufficiently Clear**

20 Turning now to the clarity of the rule since *Clark*, the California Supreme Court has
21 sufficiently clarified the rule in *In re Robbins*, 18 Cal.4th 770, *In re Gallego*, 18 Cal.4th 825, and *In*
22 *re Sanders*, 21 Cal.4th 697. The rule has been made especially clear for persons in the same position
23 as Petitioner, namely those petitioners who are filing second California Supreme Court habeas
24 petitions after more than three years of delay since their high court direct appeals became final. State
25 courts are free to clarify their procedural rules, and such clarification does not change the bar but
26 merely propounds it more cogently. The fact that previous explanations of a bar were less succinct
27 does not mean the bar was not previously upheld. *Alley v. Bell*, 101 F.Supp.2d 588, 626 (W.D. Tenn.
28 2000).

1 The California Supreme Court has gone to lengths to clarify the untimeliness rule. Claims
2 in a habeas petition must be timely filed. *In re Robbins*, 18 Cal.4th at 778. A petitioner can avoid
3 the untimeliness bar by showing: (1) absence of substantial delay; (2) good cause for the delay; or
4 (3) the claim falls within an exception to the untimeliness bar. *Id.* at 780. A petitioner cannot meet
5 his burden of establishing an absence of “substantial delay” by allegations in general terms that
6 information was recently discovered. *In re Gallego*, 18 Cal.4th at 832-833. This sort of deficiency
7 is not cured by a declaration from present or former counsel to the same general effect. *Id.* at 832-
8 833.

9 The absence of substantial delay must be alleged “with specificity, facts showing when
10 information offered in support of the claim was obtained, and that the information was neither
11 known, nor reasonably should have been known, at an earlier time. . . .” *In re Gallego*, 18 Cal.4th
12 at 833; *In re Robbins*, 18 Cal.4th at 780, 787-788, n.10. Relevant exhibits should be proffered in
13 support of the specific allegations in order to establish the absence of substantial delay. *In re*
14 *Robbins*, 18 Cal.4th at 795 n.16. The requirement of specificity is not met merely by generally
15 incorporating by reference all of the facts set forth in exhibits accompanying the petition. Petitioners
16 must clearly present, with appropriate references to, and descriptions of, any supporting exhibits,
17 concerning when information offered in support of each claim and subclaim was obtained, was
18 known, and reasonably should have been known. *In re Gallego*, 18 Cal.4th at 832-833; *In re*
19 *Robbins*, 18 Cal.4th at 795 n.16.

20 Claims relying exclusively on the appellate record reasonably should have been known to
21 counsel. *In re Gallego*, 18 Cal.4th at 838; *In re Robbins*, 18 Cal.4th at 814. It is not incumbent upon
22 respondent to allege in its opposition what petitioner and his counsel knew with respect to a
23 particular claim, or when they should have known it. It is the petitioner who “must ‘get down to
24 details.’” *In re Gallego*, 18 Cal.4th at 837.

25 A petition must be filed “as promptly as the circumstances allow.” Delay in seeking
26 habeas relief is measured from the time a petitioner or his or her counsel knew, or reasonably should
27 have known, of the information offered in support of the claim and the legal basis for the claim. *In*
28 *re Robbins*, 18 Cal.4th at 780, 787.

1 If a petitioner is conducting a bona fide ongoing investigation, based on triggering facts,
2 into a claim or claims, other completed claims can be withheld in order to avoid piecemeal
3 presentation of claims. *In re Gallego*, 18 Cal.4th at 838 n.13; *In re Robbins*, 18 Cal.4th at 805-806
4 n.28. However, when there is no “bona fide investigation into other potentially meritorious claims,”
5 then a petition advancing the known claims must be presented promptly. *In re Gallego*, 18 Cal.4th
6 at 834; *In re Robbins*, 18 Cal.4th at 805-806.

7 An exception will be made for an unjustifiably delayed petition if the petitioner can show
8 that the conviction and/or sentence being challenged constitutes a fundamental miscarriage of justice.
9 A fundamental miscarriage of justice is shown by establishing one of the following: (1) an error of
10 constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no
11 reasonable judge or jury would have convicted the petitioner; (2) the petitioner is actually innocent
12 of the crime or crimes of which he or she was convicted; (3) the death penalty was imposed by a
13 sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent
14 the trial error or omission, no reasonable judge or juror would have imposed the sentence of death;
15 or (4) the petitioner was convicted or sentenced under an invalid statute. *In re Robbins*, 18 Cal.4th
16 at 780-781. The first three exceptions are determined exclusively by an application of state law.
17 Federal law is applied to the fourth exception whenever a federal constitutional claim is being
18 resolved. *In re Robbins*, 18 Cal.4th at 812, n. 32.

19 For purposes of determining whether the first exception relating to an error of
20 constitutional magnitude (which may obviously include federal constitutional claims), the standard
21 practice of the California Supreme Court is to assume for purposes of addressing the procedural issue
22 that a federal constitutional error is stated. The exception will then be found inapposite if, based
23 upon application of state law, it cannot be said that the asserted error “led to a trial that was so
24 fundamentally unfair that absent the error no reasonable judge or jury would have convicted the
25 petitioner.” *In re Robbins*, 18 Cal.4th at 811.

26 Actual innocence is shown by evidence that undermines the entire prosecution’s case and
27 points unerringly to innocence or reduced culpability. *In re Robbins*, 18 Cal.4th at 812. The
28 determination of actual innocence is determined exclusively by reference to state law. *In re Robbins*,

1 18 Cal.4th at 812 n.32.

2 The California Supreme Court further clarified the timeliness bar in *In re Sanders*, 21
3 Cal.4th 697. The state high court stated that *Robbins* and *Gallego* explained many of the aspects of
4 the timeliness rule applicable to habeas petitioners. The high court reiterated the general rule
5 applicable to all habeas petitioners, namely, petitions should be filed without substantial delay or
6 good cause must be shown. *In re Sanders*, 21 Cal.4th at 701-702, 705. The state high court further
7 made it clear that, once the presumption of timeliness for capital litigants passes, all petitions are
8 treated the same and the court asks whether “petitioner has satisfied his burden of demonstrating his
9 legal claims in the petition [] were filed without substantial delay.” *In re Sanders*, 21 Cal.4th at 705.
10 The equality of treatment between capital litigants after the expiration of the 90-day presumption and
11 non-capital litigants was made painfully clear, “. . . we enforce time limits on the filing of petitions
12 for writs of habeas corpus in noncapital cases (*see, e.g., In re Swain* (1949) 34 Cal.2d 300, 304), as
13 well as in cases in which the death penalty has been imposed (*Robbins, supra*, 18 Cal.4th 770;
14 *Gallego, supra*, 18 Cal.4th 825; *In re Clark* (1993) 5 Cal.4th 750....” *In re Sanders*, 21 Cal.4th at
15 703, parallel citations omitted. The state high court reiterated that substantial delay was to be
16 measured from the time a petitioner or his attorney knew or reasonably should have known of the
17 information supporting the claim and its legal basis. *In re Sanders*, 21 Cal.4th at 704.

18 The state high court also reiterated the exceptions that allow consideration of substantially
19 delayed claims for which good cause has not been stated. These four exceptions have been exactly
20 the same since they were first stated in 1993. *In re Sanders*, 21 Cal.4th at 704.

21 The court also provided a concrete example of what constitutes substantial delay. In
22 *Sanders*, the petitioner’s direct appeal became final on May 28, 1991. Petitioner filed a petition for
23 writ of habeas corpus in the state high court three years and five months later, on November 7, 1994.
24 The high court declared in no uncertain terms that this delay was substantial. *In re Sanders*, 21
25 Cal.4th at 702, 705.

26 Thus, Petitioner Martin had been plainly informed that three years and five months was
27 substantial delay which required an explanation of good cause for the delay. By way of review,
28 Petitioner Martin’s direct appeal became final on July 15, 1997. He filed his first state high court

1 habeas petition on July 17, 1998, and he filed his second state high court habeas petition on March
2 18, 2002. Thus, Petitioner filed his untimely state high court petition more than four years and six
3 months after his direct review became final. It is important to note that the claims Petitioner raised
4 in his second state high court petition pertained to matters stemming from his 1995 trial and his 1997
5 petition for direct review in the state high court. As such, Petitioner could not claim on March 18,
6 2002, that his claims were newly discovered.

7 That Petitioner understood his duty to explain his substantial delay is evidenced by his
8 effort to explain his delay in his second high court petition. Petitioner posited that he acted with
9 diligence in preparing the writ petition and that the People would not suffer any prejudice. (Fourth
10 Amend. Federal Pet., Ex. K, at 11-13.) However, Petitioner was clearly informed by *Gallego* and
11 *Robbins* that general statements of diligence were inadequate to explain substantial delay. *In re*
12 *Gallego*, 18 Cal.4th at 832-833; *In re Robbins*, 18 Cal.4th at 780, 787-788 n.10, 795 n.16.

13 The remainder of the *Sanders* opinion focuses on the concept that abandonment by counsel
14 constituted good cause for the delayed presentation of claims in that case. *In re Sanders*, 21 Cal.4th
15 at 707-723. To date, Petitioner Martin has never claimed that the delay in presenting his second state
16 high court habeas petition was caused by his counsel abandoning him.

17 The state high court concluded by adding, “. . . this court will remain vigilant in enforcing
18 our timeliness rules, taking appropriate corrective action when faced with abusive writ practices.”
19 *In re Sanders*, 21 Cal.4th at 723. The California Supreme Court has repeatedly articulated its
20 timeliness rules and steadfastly articulated that it has regularly applied them. “[I]n this circuit
21 [federal courts] presume [that] state courts follow the law even when they fail to so indicate.” *Jeffers*
22 *v. Lewis*, 38 F.3d 411, 415 (9th Cir. 1994). Petitioner has presented no evidence to rebut this
23 presumption.

24 Thus, for persons filing their state high court habeas petitions more than three years and
25 five months after the direct review has become final, it has been made abundantly clear by the
26 California Supreme that such a delay is substantial and requires a statement of good cause, or
27 application for an exception.

28 It may be suggested that such a timeliness rule is unjust because it is inexact. Respondent

1 posits that exactly the opposite is true. A fixed timeliness rule may have the effect of precluding
2 review unjustly. California has fairly chosen an individualized, case-by-case assessment of the
3 claim, the evidence supporting the claim, and the timing and circumstances of the discovery of the
4 factual basis for each claim. Thus, the safest answer to the question of when to file is that given by
5 the California Supreme Court: “All petitions for writs of habeas corpus should be filed without
6 substantial delay.” *In re Robbins*, 18 Cal.4th at 792 n.13. It is hard to fathom how many more times
7 the California Supreme Court should be required to reiterate the rule before it will be clear.

8 Admittedly, whether a particular claim will be considered untimely depends on the
9 particular nature of the claim and the investigation leading to discovery of the claim. But any
10 claimed ambiguity necessarily stems from a flexible rule along with the very honest realization by
11 the California Supreme Court that some claims take longer to develop than others, and that some
12 cases are impacted by individualized circumstances to varying degrees. Respondent posits that a
13 flexible timeliness rule is more fair than a set time limit.

14 Furthermore, the flexibility of California’s timeliness rule substantially mirrors federal law.
15 The AEDPA one-year statute of limitations does not start until “the date on which the factual
16 predicate of the claim or claims presented could have been discovered through the exercise of due
17 diligence.” 28 U.S.C. § 2244(d)(1)(D). In the same vein, a state habeas corpus claim is timely if the
18 petitioner files within a reasonable time after he or his attorney learns about or should have learned
19 about the facts and legal basis for the claim. Thus, the federal and state timeliness standards are
20 nearly identical.

21 In addition, the federal timeliness rules have an exception similar to the state’s good cause
22 exception embodied in the principles of equitable tolling. Whether federal equitable tolling or state
23 good cause exists cannot be predetermined. Instead, the standards for both systems are increasingly
24 clarified as further reasoned opinions are issued. The federal limitations period may not bar a
25 petitioner if the prison library lacked AEDPA materials, *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th
26 Cir. 2000), or a clerical error precluded filing on time, *Corjasso v. Ayers*, 278 F.3d 874, 878 (9th Cir.
27 2002), or an attorney was grossly negligent during his representation of a federal habeas petitioner,
28 *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003). Since the federal timeliness rule is allowed to

1 embody discretion, the state court should be permitted the same latitude. *Wood v. Hall*, 130 F.3d
2 373, 377 (9th Cir. 1997) (a procedural bar which permits discretion is not invalid). This Court
3 should find that California's timeliness rules are clear and certain.

4 Simply put, California state habeas litigants must act in the manner expected of every other
5 legal movant, that is they must glean the requirements from the reasoned opinions or other explained
6 case law.

7 Petitioner filed his first state high court habeas petition on July 17, 1998. At that time, all
8 of the claims contained in his second state high court petition were known to him, since they
9 stemmed from his 1995 trial and his 1997 direct appeal. However, Petitioner has never offered any
10 explanation of why he failed to include the claims from his second petition when he filed his first.
11 Respondent asserts that Petitioner was in continuous default from the time of his first petition
12 through the time he filed his second petition on March 18, 2002.

13 Petitioner may argue that California cases addressing capital litigants are not instructive
14 for non-capital litigants. Respondent answers that this is not so. *In re Sanders*, at 703, makes it clear
15 that timeliness rules apply equally to capital and non-capital defendants. This sameness of treatment
16 has been consistent since the 1993 *Clark* decision when the state high court explained,

17 [t]he Policies [applicable to capital litigants] did not create or modify the timeliness
18 requirements applicable to **all** habeas corpus petitions except insofar as they (1) establish
19 a presumption of timeliness if a petition by a capital defendant is filed within 90 days of
20 the final due date for the filing of an appellant's reply brief ([Supreme Court Policies
21 Regarding Cases Arising From Judgments of Death, eff. June 6, 1989, mod. eff. December
22 21, 1992, stds.] Policies, std. 1-1.1); and (2) take into account this court's decision in *In
23 re Stankewitz, supra*, 40 Cal.3d 391, when evaluating the timeliness of a habeas corpus
24 petition in a capital case (Policies, std. 1-1.3).

22 *Clark*, at 783, emphasis added. Thus, Respondent contends that after the initial 90-day presumption
23 of timeliness for capital litigants has passed, both capital and non-capital litigants are treated the
24 same with regard to the requirement that they explain any substantial delay.

25
26 **D. California's Timeliness Bar Is Consistently Applied**

27 Once saddled with the ultimate burden of establishing the consistency of application of
28 California's timeliness rule, the state may proffer both published and unpublished opinions. *Powell*

1 *v. Lambert*, 357 F.3d at 872. A state may also proffer the pleadings by the respective parties. This
2 is so because no review of the consistency of the application of the bars can ever be meaningful
3 without a substantive review of the pleadings in the case. Otherwise, there would be no way of
4 knowing if a petitioner justified his delay or applied for one of the California timeliness exceptions.
5 The Ninth Circuit has not specifically precluded such an examination:

6 . . . the *Deere* [*v. Calderon*, 890 F.Supp. 893 (C.D. Cal. 1995)] district Court
7 followed a procedure in analyzing the question that is inconsistent with our precedent; it
8 analyzed the basis for the state Court decisions denying post-conviction relief based on a
9 post hoc examination of the pleadings and record rather than the text of the state Court
10 opinions. While we have not decided, and do not decide this precise issue in this context,
11 our precedent suggests any review should be limited to the language of the state Court
12 opinions. See, e.g., *Valerio v. Crawford*, 306 F.3d 742, 774-75 (9th Cir. 2002) (en banc);
13 [*Calderon v. United States District Court*] *Bean*, 96 F.3d [1126] at 1131 [(9th Cir. 1996)].

14 *Bennett v. Mueller*, 322 F.3d at 583-584. Thus, the Ninth Circuit “has not decided” the issue of the
15 propriety of looking at pleadings.

16 Furthermore, the two cited cases, *Valerio* and *Calderon v. United States District Court*
17 (*Bean*), 96 F.3d 1126 (9th Cir. 1996), do not support the proposition that for analyzing adequacy,
18 inquiry should be limited to the text of the California Supreme Court orders. In both of those cases,
19 the order imposing the bars did so in an ambiguous manner by listing a series of claims, and a series
20 of bars, but not specifying which bar applied to which claim. In such a case, it might be reasonable
21 to look only to the face of the California Supreme Court’s order, because no amount of reference to
22 the pleadings will clarify which bar(s) were imposed on which claims. At best, it may be possible
23 to discern which bars were *likely* imposed on which claims, but in the procedural default context,
24 a threshold requirement is that the federal courts be able to discern *with certainty* the precise bar that
25 has been applied. But the inquiry into whether the timeliness bars have been consistently and
26 regularly applied is not so black and white. It is a more complex question than simply, “Can we tell
27 with certainty which bars were applied?” Rather, it requires a look at *how* they were applied.

28 In fact, because the California Supreme Court’s timeliness test itself requires an
examination of the pleadings (for, inter alia, good cause for any delay or application for an
exception), any analysis of the consistency of the application of the timeliness bar must include, at
a minimum, an analysis of the proffered bases for delay. Thus, logic compels the conclusion that

1 any analysis must take into consideration the pleadings and record as well as the orders.

2 This position finds support in *Bennett*. The Ninth Circuit has explained, “Although the
3 burden of proving an affirmative defense is generally on the party asserting it, in this context, this
4 placement is also the most just. It is the state, not the petitioner, often appearing pro se, who has at
5 its hands the records and authorities to prove whether its courts have regularly and consistently
6 applied the procedural bar.” *Bennett v. Mueller*, 322 F.3d at 585. There would have been no reason
7 for the Ninth Circuit to discuss “records” and “authorities” unless they anticipated the state using the
8 records and pleadings of a case to explain the application of the timeliness bar and any offered
9 justifications by a petitioner for a given delay.

10 In order to prove that the California Supreme Court was consistently applying the
11 timeliness bar to state habeas litigants, Respondent has elected to take a 60-day snapshot of
12 California State Supreme Court habeas rulings during the two months proceeding the filing of
13 Petitioner’s second state habeas petition.^{4/}

14 It may be argued that an earlier period is the relevant time frame for measuring the
15 consistent application of the default. *See e.g., Fields v. Calderon*, 125 F.3d 757, 760-761 (9th Cir.
16 1997). In *Fields*, the Ninth Circuit ruled that the operative time to measure the consistent application
17 of the state’s *Dixon* bar (claims should have been brought on direct appeal rather than on habeas
18 corpus) was the date of the direct appeal. *Id.* at 760-761. However, the *Dixon* bar and the *Clark* bar
19 do not operate in the same way. The *Dixon* bar results in a forfeiture of all claims that should have
20 been raised upon direct appeal. By contrast, the time bar is not so precise. A petitioner may be able
21 to present some claims shortly after discovery. This same petitioner may have good cause for delay
22 in the presentation of other claims based upon an attorney who abandons him. Alternatively, some
23 other good cause impediment may preclude raising claims earlier. From this analysis, it can be seen
24 that some claims will become untimely at different times than others and that some circumstances
25 will excuse delay no matter how long it is. Thus, in analyzing consistency of application, it is
26

27 4. To the extent this Court deems any other time period relevant for purposes of
28 determining the consistency of application of the state’s time bar, Respondent respectfully seeks
leave to offer additional statistical data.

1 preferable to look at the state's time bar in terms of continuous default.

2 A procedural default will be found to have been consistently applied if the actual
3 application of the default rule to all similar claims has been even-handed "in the vast majority of
4 cases." *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996); *Dugger v. Adams*, 489 U.S. 401,
5 410-412 n.6 (1989). Failure to impose a bar in a given case does not mean that the bar is not invoked
6 in the vast majority of cases. *Shumway v. Payne*, 223 F.3d 982, 989 (9th Cir. 2000). Furthermore,
7 application of set exceptions to a bar does not make it irregularly imposed. *Hale v. Gibson*, 227 F.3d
8 1298, 1330, 1331 n.15 (10th Cir. 2000).

9 Respondent asserts that the use of a silent denial with respect to a petition which is both
10 untimely and patently meritless does not advance that case for inconsistent application. Indeed, a
11 silent denial is particularly appropriate if the timeliness question is complex and the meritless nature
12 of the petition is plain. Such a conclusion has long been supported by the analogous proposition that
13 courts may address a claim of ineffective assistance of counsel by resolving the prejudice issue when
14 the question of deficient performance is complicated. The United States Supreme Court has held,
15 there is no reason for a court deciding an ineffective assistance claim to approach the
16 inquiry in the same order or even to address both components of the inquiry if the
17 defendant makes an insufficient showing on one. In particular, a court need not determine
18 whether counsel's performance was deficient before examining the prejudice suffered by
19 the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim
20 is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim
21 on the ground of lack of sufficient prejudice, which we expect will often be so, that course
22 should be followed.

23 *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Likewise, when the state high court is faced
24 with a petition that is both patently meritless and potentially untimely, but the untimeliness question
25 is complicated, the court should be permitted to deny the petition on the easier basis without
26 suffering a finding of inconsistency.

27 Based upon this analysis, Respondent argues that the only factual scenario which would
28 support a finding of inconsistent application of the state's time bar would be for the state high court
to grant relief upon a habeas petition that was filed after substantial unexplained delay. Respondent
is unaware of any habeas corpus petition that was presented after substantial delay in which relief
has been granted.

1 **E. Analysis**

2 Respondent will analyze the California Supreme Court's habeas rulings from January 18,
3 2002, through March 18, 2002, the date Petitioner filed his second state habeas petition. Respondent
4 asserts that this sample is large enough to clearly establish the point without needlessly compelling
5 this Court to wade through a larger sample.

6 Respondent obtained a list of 370 habeas corpus cases from the California Supreme Court
7 that were decided during the above referenced period. (Attachment A.) From this list, Respondent
8 prepared a list of 100 habeas corpus petitioners to analyze the time frame between finality of direct
9 review and the filing of the habeas petition, and to determine which of these decisions cited
10 timeliness, *Clark*, or *Robbins*.⁵ (Attachment B.) These 100 petitioner's filed 107 habeas corpus
11 petitions that were resolved by the state high court during the relevant period. The California
12 Supreme Court cited timeliness, *Clark*, and/or *Robbins*, 27 times. Furthermore, there were only eight
13 habeas corpus petitions which were filed more than three years and five months after the finality of
14 direct review and did not receive a citation to timeliness, *Clark*, and/or *Robbins*. (Attachment B,
15 numbers 34, 36, 58, 89, 93, 95, 98, 99.) Portions of these habeas corpus petitions are attached and
16 will be analyzed to determine if the petitioners offered justifications for their delay or otherwise
17 applied for a timeliness exception. Nine habeas corpus Petitioners who filed their petitions more
18 than three years and five months after finality received a timeliness citation. (Attachment B,
19 numbers 37, 45, 65, 72, 85, 88, 97.)

20 The eight petitioners who filed after substantial delay and did not receive a timeliness
21 citation are now discussed in turn.

22 1. Lawrence Patrick Trenier (Attachment B, number 34) filed habeas corpus petition
23 number S101319 with the state high court 13 years and 10 months after his direct review was final
24 in case number S001499. However, Petitioner Trenier's delay was justified because his habeas
25 petition addressed newly discovered facts which could not have been discovered earlier.
26 (Attachment D at 3, 10-11.) At the conclusion of Petitioner Trenier's confinement period, sexually

27
28 5. In the attached declaration, Respondent outlines how the list of 100 habeas petitioners
was derived from the list of decisions received from the state high court. (Attachment C.)

1 violent predator (SVP) proceedings pursuant to California Welfare and Institutions Code section
2 6600 et seq. were initiated in an effort to civilly commit Petitioner Trenier. Petitioner Trenier's
3 habeas corpus petition number S101319 addresses his confinement pursuant to these civil
4 proceedings. Petitioner Trenier states that his parole release date was scheduled for November 12,
5 1999. Petitioner Trenier filed his state high court habeas petition less than two years later. Since
6 Petitioner Trenier had no way of knowing that SVP proceedings would be initiated after his prison
7 term, the basis for the habeas corpus petition could not have been known earlier. (Attachment D at
8 3, 10-11.) Petitioners who are attacking SVP proceedings are timely. SVP proceedings are renewed
9 every two years pursuant to California Welfare and Institutions Code section 6600 et seq. As such,
10 such a petitioner can never be three years and five months late.

11 2. Eduardo Antonio Escoto (Attachment B, number 36) filed habeas corpus petition
12 number S101243 with the state high court seven years and seven months after his direct review was
13 final in case number S035689. One of Petitioner Escoto's claims involved newly discovered
14 evidence. Petitioner Escoto argued that it was error for the Riverside County Superior Court to deny
15 his habeas corpus petition on September 4, 2001, without a statement of reasons. (Attachment E,
16 at 3.) Petitioner Escoto could not have known about this claim until the decision was issued.
17 Petitioner Escoto filed his state high court petition approximately one month after the superior court
18 denied relief.

19 In addition, Petitioner Escoto provided a lengthy justification for his delay. Petitioner
20 Escoto began by correctly stating California's timeliness rules. Petitioner Escoto explained that,
21 after his appeal, he searched for legal assistance. Petitioner Escoto stated that the attorneys he
22 contacted were very expensive. Finally, Petitioner Escoto found an attorney in Mexico in 1997 who
23 was willing to help him. In 1998, Petitioner was advised to seek further review of his case in the
24 federal court. Petitioner Escoto contacted several additional attorneys. According to Petitioner
25 Escoto, there was a two-year delay while he waited for one attorney to send the court transcripts to
26 the other. Petitioner Escoto became impatient and began to search for someone else to help him.
27 Petitioner Escoto stated that he did not receive the court transcripts until 1999. He claimed that the
28 original transcripts were lost in transit. Petitioner Escoto explained that he is not from the United

1 States, and did not know the law here. Also, he relied upon the attorney in Mexico; however, the
2 attorney in Mexico failed to help him. (Attachment E, at 17-18.) Petitioner Escoto offered
3 numerous justifications for his delay, including a claim that his lawyer abandoned him. The
4 California Supreme Court has explained that detrimental reliance upon an attorney who abandons
5 his client is good cause for delay. *In re Sanders*, 21 Cal.4th at 707-723.

6 3. At first it appeared that Nassrollah Alavi (Attachment B, number 58) filed habeas
7 corpus petition number S100834 with the state high court eight years and ten months after his direct
8 review was final in case number S027618. However, Petitioner Alavi explained that his case was
9 reversed in a state habeas corpus proceeding on June 15, 1995, and that in February 1996 and
10 November 1996 the proceedings against him were suspended to evaluate his competence pursuant
11 to California Penal Code section 1368. On both occasions, Petitioner Alavi was found competent.
12 Ultimately, he was re-sentenced on June 1, 2000. Petitioner Alavi filed for direct review in the state
13 court of appeal and the matter was remanded to the trial court on July 12, 2001, for a recalculation
14 of his pre-sentence custody credits. (Attachment F, at 3-4.) Thus, Petitioner's direct review became
15 final on August 21, 2001. *Smith v. Duncan*, 297 F.3d 809, 813 (9th Cir. 2002) (California state
16 direct review becomes final 40 days after the court of appeals decision if no high court review is
17 sought). Therefore, Petitioner Alavi delayed only one month before filing the instant state high court
18 petition. Furthermore, Petitioner Alavi stated that any delay was justified because he only speaks
19 Farsi. (Attachment F at 22.)

20 4. Frederick Lee Jackson (Attachment B, number 89) filed habeas corpus petition number
21 S100118 with the state high court three years and eleven months after his direct review was final in
22 case number S060541. It appears that Petitioner Jackson was sentenced to a term of 28 years in case
23 number CR30148 on March 8, 1993. In addition, Petitioner Jackson was sentenced to life without
24 the possibility of parole in case number CR34092 on October 13, 1995. At that time, the trial court
25 confirmed Petitioner Jackson's earlier sentence. (Attachment G, at 29-33.) The only explanation
26 that Petitioner Jackson offered for his delay was his life sentence. (Attachment G, at 6.)

27 As explained above, general statements about delay are inadequate. *In re Gallego*, 18
28 Cal.4th at 832-833; *In re Robbins*, 18 Cal.4th at 780, 787-788, n. 10, 795, n. 16. However, Petitioner

1 Jackson's delay was seven months shorter than Petitioner Martin's delay. In addition, it appears as
2 though Petitioner Jackson was representing himself. By contrast, Petitioner Martin has had
3 appointed counsel since February 16, 1999, when the Federal Defender's Office was appointed to
4 represent him in this federal habeas proceeding. Thus, Petitioner had been represented by counsel
5 for nearly three years by the time he filed his untimely state high court habeas petition. In any event,
6 this lone example of unexplained substantial delay without a timeliness citation does not support a
7 finding of inconsistency.

8 5. William Merritt (Attachment B, number 93) filed habeas corpus petition number
9 S100036 with the state high court three years and six months after his direct review was final in case
10 number S064274. Petitioner Merritt explained that his delay was caused by abandonment by both
11 trial and appellate counsel. Petitioner Merritt also asserted that it took him four years to obtain the
12 exhibits for his habeas corpus petition. (Attachment H, at 6.) As noted above, the California
13 Supreme Court has explained that detrimental reliance upon an attorney who abandons his client is
14 good cause for delay. *In re Sanders*, 21 Cal.4th at 707-723.

15 6. Robert A. Von Villas (Attachment B, number 95) filed habeas corpus petition number
16 S099967 with the state high court five years and six months after his direct review was final in case
17 number S048559. Petitioner Von Villas based his state high court habeas corpus challenge upon a
18 claim that the state's "star" witness recanted her trial testimony. According to Petitioner Von Villas,
19 he first learned about the witness's false testimony in August 1999. Petitioner Von Villas also
20 claimed that the witness admitted being "drugged" during all of her testimony. These psychotropic
21 drugs gave her false memories and led to Petitioner Von Villas's wrongful conviction. (Attachment
22 I, at 3-7, 9-10.) Therefore, Petitioner Von Villas filed his state high court habeas petition two years
23 after first learning about the alleged false testimony.

24 7. Robert J. Wenzel (Attachment B, number 98) filed habeas corpus petition number
25 S099920 with the state high court three years and seven months after his direct review was final in
26 case number S067258. Petitioner Wenzel did not attack his underlying criminal conviction but
27 rather his on going civil commitment pursuant to California Welfare and Institutions Code section
28 6600 et seq. Petitioner Wenzel explained that "There has been no delay in presenting these issues.

1 Petitioner is a layperson at law and has only recently discovered these issues.” (Attachment J, at 6.)
2 Petitioner Wenzel had no way of knowing in advance that he would be civilly committed at the
3 conclusion of his prison term. Thus, the facts upon which his state high court habeas corpus petition
4 were based were newly discovered.

5 8. Refugio Garcia Reyes (Attachment B, number 99) filed habeas corpus petition number
6 S099894 with the state high court four years and three months after his direct review was final in
7 case number S057625. Petitioner Reyes argued that his petition “meets the exception” to the bar
8 against delayed petitions. (Attachment K, at 13.) Petitioner also stated that he filed the petition as
9 soon as possible and that he was ignorant of the law. (Attachment K at 13.) Petitioner further
10 claimed that he is factually innocent. (Attachment K, at 14.) Petitioner stated further that he is a
11 Mexican national and does not speak or write English. (Attachment K at 15-16.) Therefore
12 Petitioner Reyes offered substantial justification for his delay and applied for one of the four *Clark*
13 exceptions.

14 The only petitioner who failed to offer a significant justification for his delay was
15 Petitioner Jackson. However, this lone instance of delayed presentation of claims without
16 justification does not support a finding of inconsistent application of the state’s timeliness rules. The
17 state’s procedural rules are of vital importance to the orderly administration of justice, and the state’s
18 time bar should be upheld so long as it was firmly established and regularly followed at the time of
19 its imposition. *Lambrix v. Singletary*, 520 U.S. at 525; *Ford v. Georgia*, 498 U.S. 411, 424 (1991).
20 The single example of a petition which was filed more than three years and five months after finality
21 of direct review without a time bar citation is not fatal to the state’s time bar because the statistical
22 data shows that the time bar was applied in an even-handed manner in the vast majority of the cases.
23 *Moran v. McDaniel*, 80 F.3d at 1270; *Dugger v. Adams*, 489 U.S. at 410-412 n.60. Failure to impose
24 a bar in a given case does not mean that the bar is not invoked in the vast majority of cases.
25 *Shumway v. Payne*, 223 F.3d at 989. Furthermore, application of set exceptions to a bar does not
26 make it irregularly imposed. *Hale v. Gibson*, 227 F.3d at 1330, 1331 n.15. The statistical data
27 presented here supports the conclusion that California’s time bar is consistently applied.

28 ///

1 **CONCLUSION**

2 This Court should find that Respondent has carried his ultimate burden of showing that
3 the California time bar is an independent and adequate state procedural rule because the time bar is
4 clear and was consistently applied at the time Petitioner Martin defaulted his claims. Petitioner's
5 remaining claims in his fourth amended petition for writ of habeas corpus should be dismissed with
6 prejudice for the reasons stated above. Petitioner is not entitled to any relief or an evidentiary
7 hearing.

8
9 Dated: August 29, 2007

10 Respectfully submitted,

11 EDMUND G. BROWN JR.
Attorney General of the State of California

12 DANE R. GILLETTE
Chief Assistant Attorney General

13 MICHAEL P. FARRELL
Senior Assistant Attorney General

14 JOHN G. MCLEAN
Supervising Deputy Attorney General

15
16
17 /s/ R. Todd Marshall
18 R. TODD MARSHALL
Deputy Attorney General
19 Attorneys for Respondent

20 drb
21 SA1999FH0036
30321324.wpd
22
23
24
25
26
27
28