IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

RENO,

On Habeas Corpus.

CAPITAL CASE

No. S124660

(Los Angeles County Superior Court
Case Number A445665)

PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN TO THE SECOND PETITION FOR WRIT OF HABEAS CORPUS

PETER GIANNINI
California SBN 61257
1015 Gayley Avenue, #1000
Los Angeles, CA 90024.
Telephone: (310) 447-9988

JAMES S. THOMSON
California SBN 79658
Attorney & Counselor at Law
819 Delaware Street
Berkeley, California 94710
Telephone: (510) 525-9123

Attorneys for Petitioner
RENO

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re RENO, On Habeas Corpus.	)	**CAPITAL CASE** No. S124660 (Los Angeles County Superior Court Case Number A445665)

PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN TO THE SECOND PETITION FOR WRIT OF HABEAS CORPUS

PETER GIANNINI
California SBN 61257
1015 Gayley Avenue, #1000
Los Angeles, CA 90024.
Telephone: (310) 447-9988

JAMES S. THOMSON
California SBN 79658
Attorney & Counselor at Law
819 Delaware Street
Berkeley, California 94710
Telephone: (510) 525-9123

Attorneys for Petitioner
RENO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASE LAW

CALIFORNIA CASE LAW

FEDERAL COURT CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

PERSUASIVE AUTHORITIES

I. INTRODUCTION.

In this traverse to respondent's return to this Court's order to show cause, petitioner demonstrates why the filing of his second petition for writ of habeas corpus is not an abuse of the writ,[1] and indeed is necessary in order to raise "all the potentially meritorious claims" undermining his capital convictions and sentence. (*In re Clark* (1993) 5 Cal.4th 770, 775). Petitioner's second petition was filed without substantial delay, or good cause justifies the delayed filing within the timeliness framework established in *Clark, supra,* 5 Cal.4th 770. (See generally *In re Sanders* (1999) 21 Cal.4th 697, 703). Good cause justifies the filing of petitioner's fifty-six (56) repetitive claims and eighty-seven (87) non-repetitive claims of error in petitioner's case.[2] Likewise, good cause justifies the filing of petitioner's non-repetitive claims of error based on the need to avert a miscarriage of justice and to correct fundamental constitutional errors in his capital trial. In sum, the second petition should not be dismissed, each of the claims should be resolved on the merits, and petitioner's

---

[1] Petitioner admits that he is confined under a sentence of death pursuant to the judgment of the Superior Court of California in and for the County of Los Angeles, Superior Court Criminal Case No. A445665. The judgment was rendered on July 17, 1987. (Clerk's Transcript of second trial, hereinafter referred to as "CT II," at 577). Petitioner denies that he is confined under a lawful judgment of sentence.

[2] A successive petition may contain two types of claims: 1) repetitive claims that were "rejected when his initial petition was denied"; or 2) non-repetitive claims "that were not asserted in that petition." (*Clark, supra,* 5 Cal.4th at 767).

unconstitutional convictions and sentence should be reversed.

Many important aspects of petitioner's defense and social history were never presented to his capital jury due to the suppression of evidence by the state, and trial counsel's ineffective assistance. Petitioner was subject to *two capital trials* rife with state misconduct, prosecutorial misconduct, judicial bias, juror misconduct, and ineffective assistance of counsel. Within the full picture that should have been told at trial, on appeal, and in the first petition, many alternate suspects were identified but never investigated by law enforcement or trial counsel; false and perjurious "snitch" and eyewitness testimony was introduced at petitioner's capital trial; prosecutorial misconduct ran rampant through all phases of the proceedings; and trial counsel failed to present any of petitioner's then *existing* and *substantial* evidence in mitigation. Unfortunately, the claims of error resulting from petitioner's capital trials were not properly documented and filed by prior counsel on appeal and in his first habeas petition.

Despite insisting that the timeliness of petitioner's claims must be analyzed on a claim by claim basis, respondent fails to discuss the allegations contained in a single claim alleged in the second petition. Review of the many errors infecting petitioner's capital trial prove that the proceedings were fundamentally unfair and violated the California and United States Constitutions. Appellate and prior habeas counsel failed to present the claims previously, and as a result, petitioner's current counsel had to file the second petition, which includes "all potentially meritorious

claims" undermining petitioner's capital convictions and sentence. (*Clark, supra,* 5 Cal.4th at 775). (See traverse exhibit M (Declaration of Wesley Van Winkle, at 7)).

Petitioner was convicted of the 1976 homicides of Scott F. and Ralph C. The killings occurred when the boys had been night fishing at Ford Park Lake, in Bell Gardens, California. Petitioner was also convicted of the 1978 homicide of Carl C., which occurred in South Gate, California. Petitioner was arrested on October 27, 1978. He was interrogated, made an involuntary and coerced confession to the killings, and was charged with the three homicides.

In the return, respondent, does not address the exculpatory and reduced culpability evidence presented by petitioner as to all three of the killings. Regarding the 1976 killings, no physical evidence connects petitioner to the crime scene. The boys were last seen with two men, one of whom rode a motorcycle. No one identified petitioner as the man riding a motorcycle. No one identified petitioner as either one of the two men seen with the boys. Over a dozen alternative suspects were identified by authorities and were not investigated by petitioner's defense counsel.

Regarding the 1978 killing, Carl C. was reported missing from his home after last being seen with his older brother. The South Gate Police Department missing-juvenile report prepared on October 22, 1978, indicated that Carl C. was last seen near the rear of his residence at 7:00 p.m. on that date. (Second petition, exhibit S-H (Missing-juvenile report)). No one ever saw petitioner with Carl C. before the boy was reported

missing from his home.[3]

This exculpatory evidence was not provided to petitioner prior to his first trial, and was provided only months before his second trial. Importantly, petitioner could not use the exculpatory evidence to litigate significant issues during his first trial, including his motion under California Penal Code § 1538.5. Had this evidence been timely provided to petitioner, the death penalty would likely have been precluded as an option during his

---

[3] Significant evidence demonstrating petitioner's reduced culpability for the Carl C. killing was in trial counsel's possession, but never presented to the jury at petitioner's capital trial. Petitioner's Atascadero State Hospital files reflect that he was administered an electroencephalogram (EEG) in 1972. That test indicated abnormal results, particularly over the temporal-occipital areas of the brain. The files also reveal evidence of petitioner's history of multiple head traumas, which were intentionally inflicted by his physically abusive parents and suffered during childhood and adolescent accidents; organic brain damage localized in the area of the temporal and occipital lobes; petitioner's history of severe abuse and victimization as a child, in a dysfunctional family headed by violent, abusive and emotionally unstable parents, that produced life-long psychic trauma; a documented clinical history dating from petitioner's early adolescence reflecting professional observation of psychiatric symptoms including auditory hallucinations, delusional thought processes, anxiety, paranoia, severe somatic physical sensations, decompensation, schizophrenia, psychosis and disassociation warranting intervention and treatment; and a history of life-long conditioning and proneness to false confessions. None of this evidence was presented to the jury, though it reduced petitioner's legal and moral culpability for the charged offenses and provided an independent basis on which an impartial sentencer would have concluded that life imprisonment without the possibility of parole was the appropriate sentence. (See second petition, at 358 (Claim 108 - Petitioner's Rights to Due Process and Effective Assistance of Counsel at Both Guilt and Penalty Phases, and to a Reliable Determination of Penalty, Were Violated as a Result of Failure to Investigate and Present Mitigating Penalty Phase Evidence.).

second trial. Prior appellate counsel also failed to cultivate the evidence and demonstrate petitioner's actual innocence. In the second petition, petitioner has, for the first time, set forth his case of innocence and the facts cast significant doubt on petitioner's culpability for the crimes alleged.[4]

---

[4] Trial, appellate, and prior habeas counsel failed to identify, investigate, and develop claims based on petitioner's actual innocence though ample indicia of alternate suspects, exculpatory evidence, and petitioner's reduced culpability existed in and outside the record. The discovery, which serves as the basis for petitioner's *Brady* claims was not given to trial counsel until shortly before petitioner's second capital trial in 1985. (second petition, at 104 (Claim 19 - The Prosecution Violated Petitioner's Rights by Failing to Disclose Approximately 400 Pages of Discovery)) Trial counsel thus did not investigate or develop an actual innocence defense. Unfortunately, though the evidence was in their possession, and included with the first petition, prior appellate and habeas counsel entirely failed to present any claims premised on petitioner's actual innocence or reduced culpability. (See traverse exhibit L (Declaration of Thomas Nolan, at 2-3)). It was not until petitioner's second petition, in 2004, when his claims of actual innocence were first presented to this Court. (See second petition, at 298 (Claim 86 (Trial Counsel Rendered Ineffective Assistance By Failing to Investigate and Present Evidence Regarding Alternate Suspectsl)); and 299 (Claim 87 (Trial Counsel Rendered Ineffective Assistance At the Guilt Phase as a Result of the Failure to Adequately Investigate the Identity of the Actual Killer or Killers in the 1976 Offenses)). Each of these claims are premised on evidence that prior counsel had in their possession but failed to utilize and develop into potentially meritorious claims of error. (See Claim 86 (citing second petition exhibit S-A); Claim 87 (citing second petition exhibits S-A, G and H). Petitioner's trial counsel established a *prima facie* case of petitioner's innocence, but was unable to further substantiate his actual innocence claims because the funding request included within his second petition was never granted. (See second petition, at 520-21). Based on his rights following the issuance of an order to show cause in his case, and to fully present his actual innocence claims, petitioner has thus filed a funding request in conjunction with his traverse and will file discovery requests and subpoenas if necessary. (See *People v. Romero* (1994) 8 Cal.4th 728, 740).

As to both the 1976 and 1978 offenses, trial counsel failed to introduce material evidence regarding petitioner's mental state or present a mental health defense despite counsel's possession of this evidence. Files in trial counsel's possession indicated that petitioner could not form the requisite mental intent for first degree murder and that he should not have been sentenced to death. None of this evidence was presented at trial or given to the experts appointed by the Court to evaluate petitioner. Had trial counsel provided adequate information to the experts, and had the experts conducted an investigation meeting the reasonable standards of care, they would have reached the same conclusions as Dr. George Woods -- namely, that petitioner suffered from mental incompetency, Borderline Personality Disorder, and Post Traumatic Stress Disorder. (See second petition exhibit CC).

Trial, appellate, and prior habeas counsel all failed to identify, investigate, develop, and present material, exculpatory, and mitigating evidence. Petitioner's current counsel are the first attorneys to present the declarations of over ten witnesses in mitigation.[5] Had they been called at

---

Based on this investigation he will supplement his actual innocence and other claims accordingly.

[5] Due to prior appellate and habeas counsel's failure to identify triggering facts, conduct reasonable investigation into claims of error, and develop a petition consisting of all potentially meritorious claims, petitioner first presented his claims of reduced culpability in his second petition. (See second petition, at 355 (Claim 107 (Petitioner was Denied his Right to the Assistance of Counsel as a Result of Trial Counsel's Failure to Investigate and Present Mental Defenses)); 358 (Claim 108 (Petitioner's Rights to Due

petitioner's trial, these witnesses would have testified to facts material to the jury's guilt and penalty determinations. In sum, petitioner's death sentence was imposed by a sentencing authority that had such a grossly misleading profile of petitioner that, absent trial error or trial counsel's ineffectiveness, no reasonable jury would have imposed a sentence of death in this case.

In the end, the answer to this Court's eight queries is simple - petitioner has not abused the writ. Respondent fails to demonstrate that petitioner's second petition should be dismissed. Petitioner's appellate and prior habeas counsel performed ineffectively by failing to identify, investigate, develop or present all the potentially meritorious claims affecting petitioner's convictions and capital sentence. (See traverse exhibits L and M (Declaration of Thomas Nolan, at 3-4; and Van Winkle, at 5-7). As a result, petitioner can show good cause for the filing of his second petition. Indeed here, for the first time in his case, counsel has prepared and filed on behalf of petitioner a habeas corpus petition that meets this Court's standards. (See *Clark, supra,* 5 Cal.4th at 780) ("a

---

Process and Effective Assistance of Counsel at Both Guilt and Penalty Phases, and to a Reliable Determination of Penalty, Were Violated as a Result of Failure to Investigate and Present Mitigating Penalty Phase Evidence)); and 361 (Claim 109 (Trial Counsel Rendered Ineffective Assistance for Failing to Present Mitigating Evidence in the Sentencing Phase of Trial)). Each of these claims are premised on evidence that prior counsel failed to utilize and failed to develop. (See Claim 108 (citing second petition exhibits M - X); and Claim 109 (citing second petition exhibits S - AA).

petitioner who is represented by counsel when a petition for writ of habeas corpus is filed has a right to assume that counsel is competent and is presenting all potentially meritorious claims."). Thus, like in *Sanders*, the claims not previously raised due to prior counsel's ineffectiveness, are meritorious, warrant relief, and are included within the second petition. (See *Sanders, supra,* 21 Cal.4th at 713). As set forth below, this Court should review all one-hundred-forty-three (143) of the potentially meritorious claims raised in the second petition as there are no grounds by which to conclude that petitioner has abused the writ.

II. PROCEDURAL BACKGROUND.

At his first trial, petitioner was found guilty of second degree murder as to Count I, and first-degree murder as to Counts II and III. Relative to Count III, the jury found that the lewd and lascivious act special circumstance allegation was *not true*. The jury found the allegation that petitioner had committed two additional murders as alleged in Counts I and II true. (CT I 248). Petitioner was sentenced to death. (CT I 262).

On automatic appeal, this Court reversed all convictions. (*People v. Memro* (I) (1985) 38 Cal.3d 658). The remittitur was issued on August 23, 1985.

On April 1, 1987, petitioner's second capital trial began. (CT 382). On May 19, 1987, the jury found petitioner guilty of second degree murder (Count I), first degree murder (Count II), and first degree murder with a multiple murder special circumstance allegation (Count III). (CT 445).

In addition to the facts and circumstances of the crimes as presented during the guilt phase, the prosecution presented the testimony of two witnesses during the penalty phase. (See RT 2905 and 2920). The only witnesses presented by the defense were petitioner and his sister. (See RT 2942; and 2969).

On June 11, 1987, the jurors returned a death verdict. (CT 565). On July 17, 1987, after the trial court denied his motions to strike the special circumstance allegation, to reduce the penalty of death, and for a new trial, petitioner was sentenced to death. (CT 577).

On February 2, 1987, Thomas Nolan was appointed to conduct petitioner's automatic appeal and habeas corpus proceedings before this Court. This Court also authorized Andrew Parnes to work on petitioner's case.

On October 1, 1993, appellant's opening brief was filed, which raised forty-six (46) claims of error on automatic direct appeal.[6] On June 6, 1994, respondent's brief was filed. On October 27, 1994, petitioner's reply brief was filed. On December 30, 1995, this Court affirmed the judgement in its entirety. (*People v. Memro* (II) (1995) 11 Cal.4th 786 (as modified on denial of rehearing Feb. 14, 1996).

---

[6] In the second petition, the claims are numbered as Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 17, 19, 24, 27, 28, 29, 30, 31, 32, 33, 38, 39, 40, 41, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 73, 80, 81, 82, 112, 123, and 128. (See traverse exhibit A (Chart of Claims)).

On January 20, 1995, petitioner filed a petition for writ of habeas corpus in this Court (first petition). The first petition contained twelve (12) claims of error, two of which were repeated from the appeal.[7] On June 28, 1995, the petition was denied on the merits.

On June 14, 1996, Stanley Greenberg was appointed by the District Court for the Central District of California to represent petitioner in federal habeas corpus proceedings. (Reno v. Calderon (C.D.C.A. 1996) 2.96-cv-02768-CBM (USDC Doc. #8)). On January 30, 1997, Nicholas Arguimbau was appointed as second counsel. (*Id.* (USDC Doc. #15)). On August 29, 1997, Mr. Greenberg's motion to withdraw as counsel was granted. (*Id.* (USDC Doc. #43)). On December 4, 1997, the District Court appointed Michael Abzug as second counsel with Mr. Arguimbau as lead counsel. (*Id.* (USDC Doc. #57)).

On September 8, 1998, petitioner filed a petition for writ of habeas corpus with the District Court. (Reno v. Calderon (C.D.C.A. 1996) 2.96-cv-02768-CBM (USDC Doc. #95)). The petition raised seventy-four (74) claims, including the forty-six (46) claims raised in the automatic appeal and the ten (10) additional claims raised in the first petition. On May 7, 1999, the District Court struck the unexhausted claims and held the federal

---

[7] In the second petition, the claims are numbered as Claims 7, 15, 16, 18, 19, 20, 21, 25, 26, 30, 121, and 122. (See traverse exhibit A (Chart of Claims)). The first petition repeated two claims raised on direct appeal (see Claims 19 and 30). Thus, petitioner has presented fifty-six (56) repetitive claims in the second petition, not fifty-eight (58) as alleged by respondent.

petition in abeyance while petitioner exhausted his claims in this Court. (*Id.* (USDC Doc #119)).

Mr. Arguimbau sought to be appointed by this Court for the limited purpose of filing the second petition pursuant to the District Court's order. (See *People v. Memro*, (February 4, 2000) S004770 (Court Docket)). This Court denied Mr. Arguimbau's request. (*Id.* (April 26, 2000)).

On August 16, 2001, the District Court relieved Michael Abzug as counsel and appointed Peter Giannini as second counsel for petitioner. (See Reno v. Calderon, 2:96-cv-02768-CBM (Doc #166). On November 19, 2001, the District Court relieved Nicholas Arguimbau as counsel, and made Mr. Giannini lead counsel. (*Id.* (Doc. #171)). On December 18, 2001, James Thomson was appointed as second counsel by the District Court. (*Id.* (Doc. #174)).

On October 16, 2002, this Court appointed Mr. Giannini, Mr. Thomson, and Saor Stetler to represent petitioner in state habeas and clemency matters.

On May 10, 2004, Petitioner filed the second petition for writ of habeas corpus in this Court. On May 20, 2005, respondent filed the informal response to the petition. On February 3, 2006, petitioner filed the informal reply to respondent's response.

Between February 2006 and March 2010, nothing was filed by the parties and this Court took no action on the case, including petitioner's request for funding as prayed for in the second petition. (See second

petition, at 520-21).

On March 25, 2010, petitioner filed a request for the Court to act on the petition for writ of habeas corpus. This Court did not acknowledge or act on the request. On September 14, 2010, petitioner prepared and mailed a second request asking the Court to act on the second petition.

On September 15, 2010, this Court issued an order directing:

> *Petitioner Reno* ... to show cause before this court, when the matter is placed on calendar, *why* the petition for writ of habeas corpus filed in this case should not be considered an abuse of the writ for the following reasons: (listing eight reasons, briefed herein).

(Traverse exhibit B (September 15, 2010, Order to Show Cause) (citations omitted; and emphasis added)).

The next day, on September 16, 2010, this Court amended its September 15, 2010 Order to Show Cause as follows:

> *The Secretary of the Department of Corrections and Rehabilitation* is ordered to show cause before this court, when the matter is placed on calendar, *whether* the petition for writ of habeas corpus filed in this case should be considered an abuse of the writ, for the following reasons: (listing eight reasons, briefed herein) (amendment of order emphasized).

(Traverse exhibit C (September 16, 2010, Order to Show Cause) (citations omitted; and emphasis added)).

On November 16, 2010, respondent filed its return to the petition (return). Petitioner now files his traverse to respondent's return (traverse).

III. INCORPORATION.

Petitioner hereby incorporates and realleges by reference each and every paragraph alleged in the second petition filed in May 2004, and the

informal reply filed in February 2006, as if fully set forth herein. Petitioner also incorporates all exhibits appended to the petition and informal reply as if fully set forth herein. By this incorporation, petitioner also incorporates the incorporation section of his second petition. (See second petition, at 21-24).

IV. ORDER TO SHOW CAUSE.

This Court ordered respondent to show whether the petition for writ of habeas corpus filed in this case should be considered an abuse of the writ. Respondent was directed to answer eight questions as to whether the second petition should be denied for:

(1) Failure to allege sufficient facts indicating the claims in the petition are timely or fall within an exception to the rule requiring timely presentation of claims (*In re Robbins* (1998) 18 Cal.4th 770, 780-781; and *Clark, supra*, 5 Cal.4th, at 797-798);

(2) Failure to allege sufficient facts indicating certain claims in the petition are cognizable despite having been raised and rejected on appeal (*In re Waltreus* (1965) 62 Cal.2d 218, 225; and *In re Harris* (1993) 5 Cal.4th 813, 829-841);

(3) Failure to allege sufficient facts indicating certain claims in the petition are cognizable despite the fact they could have been raised on appeal but were not (*In re Dixon* (1953) 41 Cal.2d 756, 759; and *Harris, supra*, 5 Cal.4th at 829-841);

(4) Failure to allege sufficient facts indicating certain claims in the petition are cognizable despite having been raised and rejected in petitioner's first habeas corpus proceeding, *In re Memro on Habeas Corpus*, S044437, petition denied June 28, 1995 (*In re Miller* (1941) 17 Cal.2d 734, 735);

(5) Failure to allege sufficient facts indicating certain claims in the petition are cognizable despite the fact they could have been raised in the first petition (*Clark, supra*, 5 Cal.4th at 774-775; and *In re Horowitz* (1949) 33 Cal.2d 534, 546-547);

(6) Failure to allege sufficient facts indicating that claims of insufficient evidence at trial to support a conviction are cognizable in a petition for a writ of habeas corpus (*Ex parte Lindley* (1947) 29 Cal.2d 709, 723);

(7) Failure to allege sufficient facts indicating that claims based on the Fourth Amendment are cognizable in a petition for a writ of habeas corpus (*In re Sterling* (1965) 63 Cal.2d 486, 487-488; and *In re Sakarias* (2005) 35 Cal.4th 140, 169); and

(8) Raising legal issues related to petitioner's first trial, when his conviction and sentence resulting from that trial were reversed by this court (*Memro, supra,* 38 Cal.3d 658), absent any plausible explanation why such alleged errors affected the fairness of his subsequent retrial.

V. STATEMENT OF FACTS.

Current counsel are the first attorneys to prepare a single petition for writ of habeas corpus consisting of all "potentially meritorious claims" in petitioner's case. Following appointment by this Court in October 2002, counsel prepared and ultimately filed the second petition on May 10, 2004. Counsel identified, researched, investigated, developed, drafted, and presented the one-hundred-forty-three (143) potentially meritorious claims raised in the second petition within thirty (31) months of appointment by the federal court and seventeen (17) months of appointment by this Court. This work included developing eighty-seven (87) potentially meritorious claims that appellate and prior habeas counsel had failed to identify, investigate, develop, or present to this Court.[8]

Counsel prepared and filed the second petition in less time than the thirty-six (36) month period granted to newly appointed counsel to file a habeas petition under this Court's current Policies. See Supreme Court Policies Regarding Cases Arising From Judgments of Death (eff. June 6, 1989, mod. eff. December 21, 1992) std 1-1.1. Here, the second petition was filed without substantial delay and in accordance with the three phases

---

[8] The non-repetitive claims are Claims 11, 12, 13, 14, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 46, 50 51, 52, 53, 54, 55, 64, 69, 71, 72, 74, 75, 76, 77, 78, 79, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143. (See traverse exhibit A (Chart of Claims)).

outlined in this Court's Policies. (*See Sanders, supra,* 21 Cal.4th at 707).

During the preliminary phase, current counsel reviewed the record, trial counsel's case files, and the appellate briefs. (See traverse exhibit H (Declaration of Peter Giannini), at 4-9). Counsel also discussed the claims with associate counsel and Reno. (*Id.*). This required review of more than forty (40) banker boxes of materials from prior counsel, prior investigators, petitioner, law enforcement agencies, the attorney general's office, and the California Department of Corrections. (*Id.* at 9). Review of these files began within the first week of counsel's appointment and was not completed until April 23, 2003. (*Id.*, at 5). During this time, counsel first realized that prior habeas counsel had performed ineffectively by failing to identify and present potentially meritorious claims and exculpatory evidence on direct appeal or in the first petition.[9] (*Id.* at 6).

In the second, or investigative phase, counsel promptly and diligently investigated the potentially meritorious claims that had been identified based upon triggering facts inside and outside the record. (See traverse exhibit H (Declaration of Giannini, at 6)). Beginning as early as January 2002, and through April 2003, counsel began investigating claims based on

---

[9] Potentially meritorious claims, and exculpatory evidence, existed which prior counsel had failed to identify, develop, and present to this Court on direct appeal and in the first petition. These claims were based upon triggering facts that were in the record or were readily identifiable with reasonable investigation. Current counsel was thus forced to develop the repetitive and non-repetitive potentially meritorious claims, as well as, a *prima facie* case of prior counsel's ineffectiveness. (See traverse exhibit H (Declaration of Giannini, at 6).

the improper use of informants, petitioner's actual innocence, prosecutorial misconduct, *Brady violations,* trial court error and ineffective assistance of counsel. (*Id.*, at 6-7). During this time, counsel did not waste any resources or investigate non-meritorious claims. (*Id.* at 4). Counsel strictly focused on the investigation of claims with readily identifiable facts and the development of claims with supporting evidence sufficient to establish a *prima facie* claim of error. (*Id.* at 11). On April 23, 2003, the second phase was completed when Mr. Giannini's office finished and delivered a draft version of the federal petition to Mr. Thomson's office. (See *Id.*, at 11).

From April 23, 2003 to May 10, 2004, Mr. Thomson's office completed the third and final phase of preparing the second petition, ensuring that it contained all potentially meritorious claims in petitioner's case, and filing the document with this Court. (See traverse exhibits I and J (Declaration of James Thomson, at 3-4; and Declaration of Saor Stetler, at 3-4)). During this time, Mr. Stetler and Mr. Thomson reviewed the case record; analyzed the claims in the draft petition; addressed co-counsel's concerns regarding various claims; further developed the legal and factual basis of seven claims; edited the draft petition; winnowed out non-meritorious issues; refined the substantive allegations; checked and added record citations; researched and added additional case law; investigated the factual background of the claims; and finished drafting the habeas corpus claims. (See generally traverse exhibits I and J (Declarations of Thomson and Stetler)).

Between April 2003 and May 2004, Mr. Stetler also reviewed the factual and legal bases of the non-repetitive claims with Reno. (See traverse exhibit J (Declaration of Stetler, at 3)). Reno had not previously been informed about the existence of the potentially meritorious claims. (See traverse exhibit K (Declaration of Reno, at 2)). In fact, he was under the impression that prior counsel had presented all potentially meritorious claims in the 1993 opening brief and in the 1995 petition. (*Id.*). After his discussions with Mr. Stetler, Reno authorized and directed counsel to raise all one-hundred-forty-three (143) potentially meritorious claims in the second petition. (See *Id.*).

On May 10, 2004, counsel filed the second petition on behalf of petitioner. The petition was filed as soon as counsel had developed a *prima facie* case for each of the one-hundred-forty-three (143) claims of error and of prior habeas counsel's ineffectiveness. The second petition did not include any claims that lacked potential merit. (See traverse exhibits H, I, J, and M (Declaration of Giannini, at 11; Declaration of Thomson, at 4; Declaration of Stetler, at 4; and Declaration of Van Winkle, at 5-6).

Counsel did so in accordance with this Court's dictates in *Sanders, supra,* 21 Cal.4th at 707, and included only potentially meritorious claims that were supported by a *prima facie* case. (*Id.*). On December 20, 2010, Mr. Thomson contacted Mr. Nolan and informed him that this Court had issued an order to show cause in the case. (*Id.*). Mr. Thomson requested a meeting with Mr. Nolan to address the matters posed by this Court. (See

traverse exhibit I (Declaration of Thomson, at 4-5). Mr. Nolan was provided with copies of the 1993 opening Brief, 1995 petition, and each of the eighty-seven (87) non-repetitive claims included within the 2004 petition.

After review of the briefing, Mr. Nolan determined that he had not previously identified the factual or legal basis of any of the eighty-seven (87) non-repetitive claims, though the triggering facts were readily identifiable. He believed that five of the claims should not have been previously raised. He could not determine whether eleven (11) claims should have been raised earlier.[10] He determined that seventy-one (71) of the claims were potentially meritorious and *should have been raised in the 1993 opening brief or in the 1995 petition.*[11] (See traverse exhibit L (Declaration of Thomas Nolan, at 3-5).

As to the claims that Mr. Nolan admitted should have been raised, he confirmed had he identified or considered the legal basis for the claims, he would have certainly included them within either the 1993 opening brief or

---

[10] Mr. Nolan believed that Claims 72, 79, 84, 93, and 106 should not have been raised. (See traverse exhibit L (Declaration of Nolan, at 3). Mr. Nolan could not determine whether he would have included Claims 46, 55, 76, 95, 96, 97, 98, 102, 103, 104, and 105 in the petition. (*Id.*).

[11] These include Claims 11, 12, 13, 14, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 50 51, 52, 53, 54, 64, 69, 71, 74, 75, 77, 78, 83, 85, 86, 87, 88, 89, 90, 91, 92, 94, 99, 100, 101, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143. (See traverse exhibit L (Declaration of Thomas Nolan) at 3-4).

the 1995 petition. (*Id.*). He also confirmed that there was no strategic decision for his failure to present the claims, as he never identified, investigated, or developed the factual and legal bases for the claims. (*Id.*). Therefore, at the time he represented petitioner, he could not have reasonably concluded that the claims lacked merit. (See *Id.*, at 3-5).

VI. ARGUMENT.

The amended order to show cause issued in petitioner's case directed respondent to demonstrate why the second petition should be considered "an abuse of the writ." (See traverse exhibit C (September 16, 2010 Amended Order to Show Cause). Abuse of the writ is parlance typically reserved for procedural default adjudications in federal court. (See *McCleskey v. Zant* (1991) 499 U.S. 467). This Court, while discussing "abusive writ practices" (see *Clark, supra,* 5 Cal.4th at 775), has never created a procedural default bar based exclusively on "abuse of the writ."

Thus, there are few examples in this Court's case law demonstrating what it might consider to be an "abuse of the writ." There are, however, several examples of potentially "abusive" petitions which, instead of rebuking, this Court has sanctioned. Following issuance of *Sanders* and since 2000, this Court has denied on the merits:

1) two "comprehensive" exhaustion petitions that included all repetitive and non-repetitive claims in the petitioner's case;[12]

---

[12] See *In re Demetrulias*, (S160990) (four-hundred-twenty (420) page successive petition); and *In re Gates* (S060078) (two-hundred-sixty-

2) fifteen (15) successive petitions that are the third, fourth, fifth, or sixth successive petition filed in the petitioner's case;[13]

3) multiple successive petitions filed by three individual petitioners;[14]

4) three successive petitions alleging ineffective assistance of appellate and habeas counsel.[15]

(See traverse exhibit D (Merits Denials Of Successive Petitions Since *In re Sanders* (1999) 21 Cal.4th 697). Finally, in the case of Teofilo Medina, this Court has denied two successive petitions on the merits, two successive

---

eight (268) page sixth successive petition).

[13] See *In re Farnam* (S122414) (third successive petition); *In re Price*, (S139574) (fourth successive petition); *In re Cain* (S152288) (fourth successive petition); *In re Marlow* (S108267 and S101172) (fifth and sixth successive petitions); *In re Mattson* (S116812) (fifth successive petition); *In re McDermott* (S155331) (third successive petition); *In re Morales* (S158610) (fifth successive petition); *In re Kelly* (S143981) (sixth successive petition); *In re Turner* (S120388) (third successive petition); *In re Medina* (S116444 and S116476) (fifth and sixth successive petitions); *In re Sanders* (S094849) (third successive petition); and *In re Gates* (S060624 and S060778) (fifth and sixth successive petition).

[14] See *In re Marlow* (S108267 and S101172) (fifth and sixth successive petitions); *In re Gates* (S060624 and S060778) (fifth and sixth successive petition); and *In re Medina* (S116444 and S116476) (fifth and sixth successive petitions).

[15] See *In re Espinoza* (S116824) (second successive petition); *In re Sanders* (S094849) (third successive petition); and *In re Gates* (S060624) (fifth successive petition).

petitions as untimely, and one petition as cumulative. (*Id.*).[16] A review of this precedent thus establishes no examples of petitioner's "abus[ing] the writ," but provides several examples demonstrating why petitioner did not abuse the writ here.

Reno's petition should not be considered an "abuse of the writ" because none of his claims should be dismissed based upon any of the various procedural bars discussed in the amended order to show cause. Respondent contends that in addressing its arguments regarding procedural bars, this Court should consider paramount the state's "interest in the finality of its criminal judgments." (See return, at 4 (quoting *Harris, supra,* 5 Cal.4th at 834)). While this Court has considered the state's interest in the past, it has found that when comparing "the need for [habeas review] with the state's need for finality of judgments, the individual's need [is] the greater one." (*Id.* at 832). Thus, this Court allows for the filing of successive petitions "subject to undefined exceptions." (*Clark, supra,* 5 Cal.4th at 768).

In its return, respondent fails to note that this Court supports the use of successive petitions because it is "wise[] [to] hold open a final possibility for prisoners to prove their convictions were obtained unjustly." (*Sanders,*

---

[16] Mr. Medina's first merits petition was denied on the merits. (See S017627). The second petition was denied as untimely. (See S030938). The third petition was denied as cumulative. (See S056590). The fourth petition was denied as untimely, save a single claim alleging appellate counsel's ineffectiveness. (See S058051). The fifth petition was denied on the merits. (See S116444). Finally, the sixth petition was denied on the merits. (See S116476).

supra, 21 Cal.4th at 703 (citing U.S. Con., art. I, § 9, cl. 2; and Cal. Con, art. I, § 11)). The decision to hold open "a [final] possibility" corresponds with this Court's description of the writ as the "greatest remedy known to the law whereby one unlawfully restrained of his liberty can secure his release...." (*See Clark*, 5 Cal.4th at 763-764 (quoting *Matter of Ford* (1911) 160 Cal.334, 340)). The writ of habeas corpus is the only remedy (besides the writ of *coram nobis*) that can provide "an avenue of relief to those unjustly incarcerated when the normal method of relief - i.e., direct appeal - is inadequate." (*Harris, supra,* 5 Cal.4th at 828 (footnote omitted)). In fact, this Court has found that it would be "unprecedented" to burden the Great Writ with a statute of limitations (*Clark, supra*, 5 Cal.4th at 795 n. 30); a finding compelled by the California Constitution. (*See Id.,* at 764 n. 2 (quoting California Con. Art. I, section 11) ("Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion.")).

At the same time, petitioner recognizes that this Court has sought to place limits on the use of successive petitions. The order to show cause issued in this case supplies a survey of the case law and the many hurdles facing a petitioner when presenting a successive petition. The restraints serve legitimate state interests of finality, but "the manifest need for time limits on collateral attacks on criminal judgments [ ] must be tempered with the knowledge that mistakes in the criminal justice system are sometimes made." (*Sanders, supra,* 21 Cal.4th at 703). Indeed, "[d]espite the substantive and procedural protections afforded those accused of

committing crimes, the basic charters governing our society wisely hold open a final possibility for prisoners to prove their convictions were obtained unjustly." (*Id.* (citing U.S. Const., art. I, § 9, cl. 2 (limiting federal government's power to suspend writ of habeas corpus); Cal. Const., art. I, § 11 (limiting state government's power to suspend writ of habeas corpus)).

The result is a noticeable tension between the state's interests in finality and the constitutional mandate that habeas corpus remain open "unless required by public safety in cases of rebellion or invasion." (California Con. Art. I, section 1). The tension permeates the complex and interwoven set of discretionary procedural default laws, adopted by this Court, that govern when the merits of a successive petition may be entertained. (See *Sanders, supra,* 21 Cal.4th at 700). In capital cases, where the state seeks to extinguish a citizen's life and the writ stands as the only procedure between the petitioner and the irrevocable punishment of death, the tension is at its greatest and is causing gridlock throughout California's capital appeals system, and inconsistencies in this Court's case law regarding successive petitions.[17]

---

[17] Petitioner is aware that in *Walker v. Martin* the United States Supreme Court recently issued a narrow holding finding that there is "no inadequacy in California's timeliness rule" and that this Court's timeliness procedural default laws are "firmly established and regularly followed." *Walker v. Martin* (2011) 562 U.S.__, 7 and 13 (2011 WL 611627). There, the Supreme Court found that this Court's timeliness rubric, under *Clark, Robbins,* and *Sanders*, precluded federal court review of habeas claims dismissed as untimely even though "California courts may elect to pretermit the question whether a petition is timely and simply deny the petition, thereby signaling that the petition lacks merit." (*Id.*, at 2). The holding in

This Court has "condemned piecemeal presentation of known claims," but has also found that such presentation may be justified if "adequately explained." (*Clark, supra,* 5 Cal.4th at 774). This Court has recognized that "delayed and repetitious presentation of claims is an abuse of the writ" (*Id.* at 769), while noting that its "decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim." (*Id.* at 783 (citing *In re Swain* (1949) 34 Cal.2d 300, 304). The flexibility of this Court's approach has been deemed an asset (see *Clark, supra,* 5 Cal.4th at 780), and also earned unflattering appraisal as amorphous, "arbitrary," "capricious," and "discretionary." (See *Sanders, supra,* 21 Cal.4th at 716 and 726 (concurring opn., Mosk, J.).[18] As a result, this Court has not clearly identified what constitutes an abuse of the writ, and has instead crafted a set of procedural rules, which allow for the filing of successive, delayed, and repetitive petitions "subject to undefined

---

Walker does not affect petitioner's case and the question he poses to this Court, which is "[w]hether some action or inaction by counsel short of the abandonment that occurred here could also constitute good cause under the Supreme Court Policies Regarding Cases Arising From Judgments of Death." (*Sanders, supra,* 21 Cal.4th at 701-02 n.1).

[18] Indeed, this Court has recognized that its timeliness rules are discretionary. (See *Clark, supra,* 5 Cal.4th at 768) ("[o]n occasion, the merits of successive petitions have been considered regardless of whether the claim was raised on appeal or in a prior petition, and without consideration of whether the claim could and should have been presented in a prior petition.") (citing *In re Walker* (1974) 10 Cal.3d 764; *In re Crumpton* (1973) 9 Cal.3d 463, 467; *In re Terry* (1971) 4 Cal.3d 911; and *In re Bevill* (1968) 68 Cal.2d 854).

exceptions." (*Clark, supra,* 5 Cal.4th at 768).[19]

Before submitting a successive petition, whether due to prior ineffective assistance of counsel, an impending execution, or as a result of other state errors or misconduct, capital habeas counsel must resolve several questions with little guidance from this Court's case law. Among the questions is: 1) whether a repetitive claim should be resubmitted for exhaustion purposes; 2) if a non-repetitive, but potentially meritorious, claim should be raised for the first time; 3) whether prior counsel committed ineffective assistance by failing to identify, research, investigate, file, and competently present potentially meritorious claims;[20] and 4) if grounds excusing other applicable procedural bars are available and justified in the particular case. Without further guidance from this Court's case law, the only way that counsel can affirmatively resolve these questions in their client's favor and ensure competent and effective

---

[19] According to the Habeas Corpus Resource Center, the description of this Court's timeliness framework as "amorphous" may have spurred this Court to issue the order to show cause in this case. See *Walker v. Martin* (U.S. 2011) Brief Amicus Curiae of the Habeas Corpus Resource Center in Support of Respondent, 2010 WL 4278489, at 10 n. 6. ("Perhaps in an effort to provide some contours to the 'amorphous' terms of the timeliness rule, the California Supreme Court recently issued an Order to Show Cause in *In re Reno*, S124660, to address the application of multiple procedural bars, including the timeliness rule.").

[20] In instances where trial, appellate, or prior habeas counsel has performed ineffectively in presenting a prior appeal or petition, a capital petitioner's constitutional and statutory rights to effective assistance of counsel compel review of the merits of the claims included in the successive petition. (Cf. *Sanders, supra,* 21 Cal.4th at 719).

representation is to identify, investigate, develop, and present, in a single petition, "all potentially meritorious claims" affecting their client's conviction(s) and sentence(s). (*Clark, supra,* 5 Cal.4th at 780).

Here, to determine whether petitioner's second petition may be heard on the merits, this Court must determine whether petitioner received effective assistance from his trial, appellate, and prior habeas counsel. Unfortunately, for all, petitioner is the victim of serial ineffective assistance of counsel, and this Court has not previously been presented with an appeal and a habeas corpus petition that included "all potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780). To vindicate the violation of petitioner's constitutional rights, his current counsel - to perform effectively and in accordance with this Court's case law and state and federal constitutional mandates - had to file the second petition raising the one-hundred-forty-three (143) claims. (See traverse exhibit M (Declaration of Van Winkle, at 4).

Each of the claims presented in the second petition are meritorious and should have been identified, investigated, filed, and competently presented to this Court by prior appellate and habeas counsel in petitioner's prior direct appeal and first petition. Fifty-six (56) claims in the second petition were previously raised and are repetitive.[21] Eighty-seven (87)

---

[21] Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 17, 19, 24, 27, 28, 29, 30, 31, 32, 33, 38, 39, 40, 41, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 73, 80, 81, 82, 112, 123, and 128, were brought as claims of error on direct appeal in petitioner's second trial. Claims 7, 15, 16, 18, 19, 20, 21, 25, 26, 121, and 122 were brought as claims of error in petitioner's prior

claims have not been raised before.[22] They include several claims premised on the violation of petitioner's fundamental constitutional rights;[23] petitioner's actual innocence and reduced culpability;[24] and his trial counsel's unconstitutionally deficient failure to present a defense and evidence in mitigation despite the existence of identifiable and credible evidence.[25] As a result, there is no abuse of the writ here, and this Court may review the merits of each claim presented in petitioner's second petition. (See *Sanders*, *supra,* 21 Cal.4th at 719).

Regarding the repetitive claims, respondent first miscounts the number of claims included in the second petition, which were previously submitted to this Court on direct appeal or in the first petition. There are fifty-six (56) repetitive claims included in the second petition.[26]

---

state habeas proceedings. Claim 19 is the only claim that was raised on both direct appeal and in the first petition.

[22] In the second petition, petitioner presents the following claims to this Court for the first time: Claims 11, 12, 13, 14, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 46, 50, 51, 52, 53, 54, 55, 64, 69, 71, 72, 74, 75, 76, 77, 78, 79, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143.

[23] See Claims 11, 13, 14, 23, 36, 42, 43, 44, 45, 46, 77, 79, 83, 93, 95, 97, 99, 100, 113, 114, 115, 117, 118, 119, 140, and 143.

[24] See Claims 86, 87, 105, 107, and 110.

[25] See Claims 108, 109, and 111.

[26] Respondent counts non-repetitive claims that were never raised in a prior direct appeal or habeas petition as repetitive claims.

Respondent then erroneously argues that each repetitive claim should be dismissed or denied on the merits. In actuality, each of the repetitive claims are timely and may be considered on the merits for a variety of reasons; including the cumulative error analysis.

Respondent also miscounts the number of non-repetitive claims included in the second petition and erroneously argues that each claim should be dismissed. In actuality, eighty-seven (87) claims in the second petition have not been previously submitted to this Court,[27] and each of the non-repetitive claims may be heard by this Court on the basis of appellate and prior habeas counsel's ineffective assistance in failing to identify, investigate, develop, and present "all potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780; and *Sanders*, *supra*, 21 Cal.4th at 707). Accordingly, petitioner urges this Court to answer, in the affirmative, the question left open in *In re Sanders,* "[w]hether some action or inaction by counsel short of the abandonment that occurred here could also constitute good cause under the Supreme Court Policies Regarding Cases Arising From Judgments of Death." (*Sanders, supra,* 21 Cal.4th at 701-02 n.1). Here, the logic of *Sanders* and *Clark* should be extended and this Court may review the non-repetitive claims in the second petition based on prior counsel's ineffective assistance and the merit of the claims.

---

[27] Respondent counts repetitive claims, that were previously raised in the direct appeal or first petition, as non-repetitive claims.

In this traverse, petitioner demonstrates with specific and particularized facts, that the second petition was not filed with substantial delay, or that any delay in the filing is justifiable.[28] Current counsel were required to allege all one-hundred-forty-three (143) claims in his second petition to effectively represent petitioner in accordance with statutory, constitutional, and this Court's mandates. Moreover, all *potentially meritorious* claims were presented here in a single petition - a feat not undertaken or accomplished by petitioner's appellate and prior habeas counsel. As a result, petitioner has demonstrated good cause justifying the filing of his successive petition and the filing of his non-repetitive claims,[29]

---

[28] Petitioner's counsel recognize their mistake in not including declarations of counsel within the second petition or informal reply filed earlier. (See *Robbins, supra,* 18 Cal.4th at 789 n. 16). This mistake may be remedied with the filing of counsel's declarations with the traverse, including appellate and prior habeas counsel's declaration, acknowledging that seventy-one (71) of the claims should have been filed by him earlier. (See generally traverse exhibit L (Declaration of Nolan)). As this Court observed in *Sanders*, "mistakes in the criminal justice system are sometimes made." (*Sanders, supra,* 21 Cal.4th at 703). In both *Robbins* and *Sanders*, this Court considered the matters and resolved similar issues based on the declarations attached to the traverse. Moreover, the issuance of an order to show cause grants the petitioner the opportunity to present additional evidence in support of the truth of the allegations in the petition. (*Id.* at 480; see also *Clark*, 5 Cal.4th at 781 n. 16; *In re Hochberg* (1970) 2 Cal.3d at 876, n. 4; *In re Serrano* (1995) 10 Cal.4th 447, 456; *In re Azzarella* (1989) 207 Cal.App.3d 1240, 1246). Accordingly, in his second petition, petitioner reserved the right to supplement his allegations should an order for cause be issued in his case or should he become aware of additional claims of error. (See second petition, at 21).

[29] Before petitioner could file the second petition, counsel was forced to: wait for the full disclosure of all exculpatory evidence by the state and

and petitioner demonstrates that respondent has failed to show that the second petition was an abuse of the writ. Petitioner's second petition should be considered in its entirety and on the merits.[30]

A. PETITIONER HAS ALLEGED PARTICULARIZED FACTS SUFFICIENT TO PROVE THAT HIS CLAIMS ARE TIMELY OR ARE OTHERWISE COGNIZABLE.

***

In its return, respondent has failed to show that petitioner has abused the writ for "failure to allege sufficient facts indicating the claims in the petition are timely or fall within an exception to the rule requiring timely presentation of claims." (Order to Show Cause - Issue #1 (citing *Robbins, supra,* 18 Cal.4th at 780-781; and *Clark, supra,* 5 Cal.4th, at 797-798)).

***

Petitioner denies that his second petition is untimely and that it should be dismissed as successive. (Contra return, at 7). Petitioner admits that fifty-six (56) of the one-hundred-forty-three (143) claims raised in the

---

prior counsel; conduct a full investigation of the case; review the records of the case; develop a *prima facie* case for each claim; and develop a *prima facie* case justifying the excusal of procedural bars. This feat was accomplished within thirty (30) months of counsel's appointment in federal court and within seventeen (17) months of their appointment in this Court.

[30] After addressing the procedural bars in this case, petitioner requests that this Court promptly issue a separate order addressing the merits of each of the claims in the second petition. (See *In re Hamilton* (1999) 20 Cal.4th 273, 307; *Robbins, supra,* 18 Cal.4th at 813-814; *In re Gallego* (1998) 18 Cal.4th 825, 838).

second petition were previously raised before this Court on direct appeal or in the first petition and were rejected on the merits.[31] However, eighty-seven (87) meritorious claims, premised on fundamental constitutional errors, newly discovered evidence, and trial counsel's ineffective assistance, have not been presented to this Court before.[32]

Respondent's allegation that ninety-four (94) of petitioner's claims are repetitive is flawed,[33] as its count includes thirty-eight (38) non-

---

[31] Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 17, 19, 24, 27, 28, 29, 30, 31, 32, 33, 38, 39, 40, 41, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 73, 80, 81, 82, 112, 123, and 128, were brought as claims of error on direct appeal in petitioner's second trial. Claims 7, 15, 16, 18, 19, 20, 21, 25, 26, 30, 121, and 122 were brought as claims of error in petitioner's prior state habeas proceedings. Claim 19 and 30 are the only claims that were raised on both direct appeal and in the first petition. (See traverse exhibit A (Chart of Claims)).

[32] In the second petition, petitioner presents the following claims to this Court for the first time: Claims 11, 12, 13, 14, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 46, 50, 51, 52, 53, 54, 55, 64, 69, 71, 72, 74, 75, 76, 77, 78, 79, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 118, 119, 120, 124, 125, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143. (See traverse exhibit A (Chart of Claims)).

[33] Respondent argues that the repetitive claims include: Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 73, 77, 80, 81, 83, 84, 86, 87, 89, 90, 91, 92, 93, 94, 96, 98, 100, 101, 102, 104, 107, 108, 109, 110, 112, 113, 118, 120, 121, 122, 123, 125, 126, 127, 128, 129, 130, 135, and 140. (Return, at 7).

repetitive claims.[34] Respondent incorrectly counts claims that were not raised on appeal and not raised in the first petition. Only the eighty-seven (87) *non-repetitive* claims are subject to a timeliness analysis here.[35]

Petitioner denies that whether a petition was filed "promptly" determines the timeliness of the petition. (Contra return, at 7 (citation omitted)). The measure of timeliness is whether the petition is filed within the policy guideline range[36] or without substantial delay. (Contra *Id.*). As this Court has held, "a successive petition will be entertained on its merits [if] the petitioner [] explain[s] and justif[ies] the failure to present claims in a timely manner in his prior petition or petitions."[37] (*Clark, supra,* 5 Cal.4th at 774). And, if a petitioner cannot show proper justification, he may

---

[34] Respondent incorrectly concludes that the following claims are repetitive: Claim 12, 34, 36, 37, 44, 45, 69, 71, 77, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 96, 98, 100, 101, 102, 104, 107, 108, 110, 113, 118, 120, 125, 126, 127, 130, 135, and 140. (Return, at 7).

[35] None of petitioner's non-repetitive claims should be procedurally barred as untimely and none should be denied under *Dixon, supra,* 41 Cal.2d 756.

[36] See Supreme Court Policies Regarding Cases Arising From Judgments of Death, eff. June 6, 1989, mod. eff. December 21, 1992, stds. 1-1.1 to 1-3 [Policies].

[37] Indeed, the Court's use of the language "prior petition or petitions" shows that the court expected there to be situations in which petitioners were in Court after having already filed a second, third, or fourth habeas petition. Not so here. This is petitioner's second petition and his former counsel admits that seventy-one (71) of those claims should have been filed on appeal or in the first petition. (See traverse exhibit L (Declaration of Thomas Nolan, at 4).

nevertheless show that his case qualifies for review under one of the miscarriage of justice exceptions.

> In capital cases, a habeas corpus petitioner bears the burden of establishing the timeliness of his or her petition, which timeliness can be shown in one of four ways (in descending order):
>
> > (I) the petition is presumptively timely, having been filed within [one-hundred-eighty days] of the filing of the reply brief on appeal;
> >
> > (ii) even if not presumptively timely, the petition was filed without substantial delay;
> >
> > (iii) even if the petition was filed after a substantial delay, good cause justifies the delay; or
> >
> > (iv) even if the petition was filed after a substantial delay without good cause, the petitioner comes within one of the four *Clark* exceptions.

(*Sanders, supra,* 21 Cal.4th at 705 (emphasis omitted)). In this regard, this Court reviews the entire petition for timeliness - not each individual claim - a method which is reserved for the miscarriage of justice exceptions.

Here, petitioner filed his second petition as soon as he gathered sufficient legal and factual bases for a *prima facie* case for each of the potentially meritorious claims and a *prima facie* case for excusal of procedural bars. Further, any "delay" in the filing of the second petition is not substantial or is justified by good cause. In the second petition, petitioner set out several reasons justifying any delay. (See second petition at 20, 21, and 22; see also informal reply at 3).

Moreover, petitioner has alleged with specificity, facts demonstrating when information offered in support of the second petition

"was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time." (*Robbins, supra,* 18 Cal.4th at 780; see generally traverse exhibits H, I, and J (Declarations of Giannini, Thomson, and Stetler). Petitioner has alleged the claims in his petition that were "recently [] discovered." (*Robbins, supra,* 18 Cal.4th at 780). He has not "assert[ed] that second or successive postconviction counsel could not reasonably have discovered the information earlier." (Contra *Id.*). He has not simply produced "declaration[s] from present or former counsel to that general effect." (Contra *Id.*). He has demonstrated that prior counsel performed ineffectively by failing to identify, investigate, and develop the potentially meritorious non-repetitive claims presented in his second petition. Prior counsel has admitted that he did not identify the triggering facts, conduct investigation, or reasonably determine whether the claims had potential merit. (See traverse exhibit L (Declaration of Nolan, at 4-5). However, having now reviewed the many additional potentially meritorious claims in petitioner's case, former counsel admits that they should have been raised earlier and would have been raised had counsel identified the factual and legal bases for the claims. (*Id.*).

1. This Court Should Review the Timeliness of Petitioner's Second Petition and Should Not Conduct a Timeliness Analysis of Petitioner' Non-Repetitive Claims Based on an Individual Claim-By-Claim Basis.

Respondent tries to suggest that petitioner's counsel are "confus[ed]" regarding this Court's timeliness analysis. (See return, at 8). However, it is

respondent that expresses "confusion" by demanding that the petition be dismissed as untimely some times; while at other times, demanding that individual claims be dismissed as untimely. (*Id.*). While this Court's case law does not clearly indicate when timeliness analysis concerns an entire petition or individual claims,[38] the logic and language of its precedent goes against respondent's argument that the "timeliness bar should be analyzed and applied on a claim-by-claim basis." (*Id.*).

Before this Court's Policies regarding timeliness had been formulated in *Clark*, the Court addressed a challenge to the timeliness of a habeas petition on a case by case basis. (*Clark*, *supra*, 5 Cal.4th at 765 n. 5). This Court recognized the "legitimate concern that a habeas corpus *petition* should be filed as promptly as the circumstances of the case allow." (*In re Stankewitz* (1985) 40 Cal.3d 391, 397 n.1(emphasis added)). The Court, however, ultimately found that even an untimely petition will be reviewed on the merits where the petitioner "point[s] to particular circumstances sufficient to justify substantial delay" (*id.*), and reviewed the merits of petitioner Stankewitz's untimely petition. (*Id.*).

Following the development of this Court's Policies, in *Clark*, this Court relied upon the quoted footnote in *Stankewitz* and began formulating its procedural default rules emphasizing that "a *petition* should be filed as

---

[38] This difference points to the ongoing development of this Court's procedural rules. It also shows why the procedural rules should not be used against petitioner, who had no notice whether the Court would analyze the timeliness of his *claims* or *petition*.

promptly as the circumstances allow." (*Clark, supra,* 5 Cal.4th at 765 n. 5 (emphasis added)). In *Clark,* this Court held that it "will look to what petitioner and/or his counsel knew at the time of the appeal or the filing of the first habeas corpus *petition*, and [] that the failure to raise all issues in a single, timely *petition* be justified." (*Id.* at 779 (emphasis added)). Likewise, this Court noted, that if prior habeas counsel "failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another *petition*." (*Id.* at 780 (emphasis added)). In *Clark,* this Court found that "[t]his *petition* is not presumptively timely...[and] [t]he *petition* was not filed within a reasonable time after *In re Stankewitz, supra,* 40 Cal.3d 391." (*Clark, supra,* 5 Cal.4th at 785-86 (emphasis added)). This Court also found "that petitioner has failed to establish an absence of substantial delay in the filing of his *petition*." (*Id.* at 786 (emphasis added)).

Five years later, this Court held that counsel should not seek to file successive petitions or piecemeal presentations of claims, but instead, should submit all claims in a single successive petition. (See *Robbins, supra,* 18 Cal.4th at 780). This Court recognized that:

> [g]ood cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an *ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims.*

(*Robbins*, *supra,* 18 Cal.4th at 780 (emphasis added)).[39] Likewise in *Robbins*' companion case, *In re Gallego*, this Court found that:

> a petitioner who has only information that does not rise to the level of a prima facie claim is not required or expected to file a *petition* embodying such a claim, it cannot be said that such a petitioner reasonably should have filed a *petition* raising the undeveloped claim at that earlier time.

(*Gallego, supra*, 18 Cal.4th at 834 (emphasis added)).

Three years later, in *Sanders*, this Court resolved to evaluate the timeliness of an entire petition based on prior counsel's "abandonment" of his client. (*Sanders, supra,* 21 Cal.4th at 719). There, this Court found that because prior counsel's inactions affected "petitioner's ability to raise any and all of his claims, we need not in this case determine whether any individual claim raised in the petition could have been raised earlier." (*Id.* at 721 n. 13 (citations omitted)). Petitioner urges this Court to adopt a similar timeliness analysis when reviewing successive petitions alleging ineffective assistance of appellate and habeas counsel. Like in *Sanders,* this Court should thus find that petitioner has established the timeliness of his petition by showing that it "was filed *without substantial delay*," or that "even if the petition was filed after substantial delay, *good cause* justifies

---

[39] In *Gallego*, this Court noted, "[t]he *petition* is not entitled to a presumption of timeliness, because it was not filed within 90 days after the final due date for the filing of appellant's reply brief on the direct appeal. [] Accordingly, in order to avoid the bar of untimeliness, petitioner has the burden of establishing either (I) absence of substantial delay, (ii) good cause for the delay, [...] or (iii) that his claims fall within an exception to the bar of untimeliness." (*Gallego, supra,* 18 Cal.4th at 831 (citations omitted) (emphasis added)).

the delay." (*Id.* at 705 (italics in original)).

Respondent's argument to the contrary would place petitioner, and all other capital petitioners, in a significant legal quandary when determining when and whether a successive petition, containing potentially meritorious non-repetitive claims that prior counsel ineffectively failed to raise, should be filed. Resolution of the issue is critically important to petitioners who have no right to amend already-filed petitions with newly developed claims, (see *Clark*, 5 Cal.4th at 781 n.16), and who face a "successor" bar if they file a new petition containing non-repetitive claims. (*Id.* at 761). (See *Siripongs v. Calderon* (9th Cir. 1994) 35 F.3d 1308, 1318 ("the California Supreme Court, in *Clark*, announced strict new standards for determining whether successive state habeas petitions should be allowed.") (citing *Clark, supra,* 5 Cal.4th at 760)). To clearly establish a workable rule, in line with precedent, this Court must evaluate, in relation to the discovery of prior appellate and habeas counsel's ineffective assistance, the timeliness of the successor petition, not individual claims.

A timeliness analysis based on a claim-by-claim basis, as proposed by respondent, would undermine a basic principle of this Court's habeas jurisprudence - that claims should not be presented in a piecemeal fashion. (See *Clark, supra,* 5 Cal.4th at 767-68).[40] According to respondent, the

---

[40] Respondent does not quote any supporting case law for its argument that this Court evaluates the timeliness of a petition based on a claim by claim analysis. (See return, at 8 (citing *Sanders, supra,* 21 Cal.4th at 713 n. 13)). Moreover, footnote 13 in *Sanders* does not appear at page

timeliness clock would begin running as soon as counsel identified the basis for a claim (return, at 8). Thus, respondent would have counsel submit individual claims, or groups of claims, as soon as a *prima facie* showing of each claim or group is developed.

Since there are no fixed guidelines to employ and few examples in this Court's case law, under respondent's analysis, the fear of being found untimely would encourage or require petitioners to file a claim the moment it was formulated. In order to show that the individual claim was presented as quickly as possible and is exempted from dismissal as untimely, counsel would thus have to file multiple petitions immediately following the identification, investigation, and development of a *prima facie* case of a claim. If the Court were to adopt that proposal, petitioner would have been required to file - at a minimum - eighty-seven successive petitions - one for each new claim. Assuredly, this approach, would have drawn the ire of this Court, and likely lead to the dismissal of petitioner's claims solely on the successiveness bar. Nevertheless, under respondent's argument, it would be the only way counsel could have ensured the timely presentation of all "*all potentially meritorious claims.*" (*Clark, supra,* 5 Cal.4th at 780 (emphasis added)).

Respondent's argument would require: 1) the repeated filing of successive petitions; 2) the filing of claims that lack a *prima facie* basis; and 3) the filing of successive petitions when no *prima facie* case for exception

---

713, but rather, at page 719.

of the claims under procedural default laws had been developed. None of these scenarios coincide with the Court's aversion to the piecemeal representation of claims. By finding that the timeliness analysis concerns the entire petition, this Court can reinforce the notion that, when filing a successive petition, counsel should include "*all potentially meritorious claims*." (*Clark*, 5 Cal.4th at 780 (emphasis added)). Indeed, this Court has held that "the purpose of these habeas corpus rules is to enable this court...to consider all of a petitioner's claims simultaneously and expeditiously, rather than piecemeal." (*In re Morgan* (2010) 50 Cal.4th 932, 940). Adopting respondent's claim-by-claim policy will ensure that petitioners are permitted, and in fact required, "to try out [their] contentions piecemeal by successive proceedings attacking the validity of the judgment against him." (*Ex Parte Connor* (1940) 16 Cal.2d 701, 705). For these reasons, this Court should find that timeliness analysis concerns the entire petition and not each individual claim.

2. The Timeliness of Petitioner's Petition May Be Determined Based on The Information Alleged in The Petition, Informal Reply, and This Traverse.

Respondent's attack on petitioner's counsel is misguided. Petitioner's counsel have not "flouted this Court's unambiguous directive that all allegations and exhibits submitted in support of any arguments regarding the absence of substantial delay or good cause for substantial delay be included in the petition itself, not the informal reply or the traverse." (Return, at 25 (citations omitted) (emphasis omitted)). Nor has counsel

"disregarded this Court's clear instruction to provide particularized explanations as to [any delay in the presentation of] each claim and [] subclaim." (*Id.*). Counsel has acknowledged their mistake in not filing counsel's declarations with the second petition. (See, *supra,* footnote 28).

To make a *prima facie* case of absence of substantial delay, petitioner must demonstrate "due diligence" in his investigation and presentation of claims. (*Clark, supra,* 5 Cal.4th at 775). Petitioner must demonstrate that he and counsel did not earlier have "knowledge of the facts upon which he believes that he is entitled to relief." (*Id.* at 779 (citation omitted)). This Court has found that the showing rest upon "sufficiently specific allegations" and "refer[] to attached declarations that support the allegations and place them in context." (*Robbins, supra,* 18 Cal.4th at 795 n. 16).

By the petition, the informal reply and the traverse,[41] petitioner has now pled sufficient "particulars from which this Court may determine when [] counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claims." (Return,

---

[41] Petitioner's counsel recognize that it would have been better to include counsels' declarations with the second petition or informal reply. (See *Sanders, supra,* 21 Cal.4th at 714). Counsel, perhaps, was wrongly focused on the timely development of the claims in the second petition, and not on filing the declarations now filed with the traverse. While the references made in the second petition may not have reached the Court's threshold for making its timeliness determination, there was enough information to survive a preliminary denial, thus requiring the issuance of an order to show cause.

at 26 (citations and bracket omitted)). Likewise, petitioner has identified "when any triggering facts were discovered by his attorneys." He has also specified when "any purported 'ongoing' investigations actually commenced." (Compare *Id.*; with traverse exhibit H (Declaration of Giannini, at 3-8). Here, consistency and equal treatment of petitioners necessitate acceptance of the factual aversions in the declarations attached to this traverse as in *Robbins* and *Sanders*.

This Court's action in issuing an order to show cause supports this approach. (See *Clark, supra,* 5 Cal.4th at 781 n. 16 (citing *People v. Green* (1980) 27 Cal.3d 1, 43 n. 28; and *Connor, supra*, 16 Cal.2d at 711) (emphasis added)). "The issuance of...the order to show cause creates a 'cause' thereby triggering the state constitutional requirement that the cause be resolved in 'writing with reasons stated.'" (*Romero, supra,* 8 Cal.4th at 740 (quoting Cal. Const. Art. VI § 14).[42] The order is a preliminary determination that the petitioner has plead facts that, if proven, would entitle him to relief. (See *People v. Duvall* (1995) 9 Cal.4th at 477). Thus, issuance of an order to show cause anticipates additional factual

---

[42] Petitioner has all the rights that attach to the creation of a cause. Presumably, although this Court has not issued an express authority, petitioner's rights then include the power to obtain documents via subpoena duces tecum and the rights to discovery. Moreover, petitioner's rights to discovery should be broader than that provided for capital habeas petitioners under Cal. Penal Code § 1054.9. Petitioner has accordingly filed a confidential motion for ancillary funding with this traverse. Based on his investigation, petitioner will move for discovery and seek subpoenas when, where, and if necessary, then will supplement his traverse accordingly.

development in the interplay,[43] and grants the petitioner the opportunity to present additional evidence in support of the truth of the allegations in the petition. (*Id.* at 480; see also *Clark*, 5 Cal.4th at 781 n. 16; *Hochberg, supra,* 2 Cal.3d at 876, n. 4; *Serrano*, *supra*, 10 Cal.4th at 456; *Azzarella, supra,* 207 Cal.App.3d at 1246).

In *Robbins*, this Court found that the "specific allegations in the traverse ... satisf[ied] petitioner's burden with regard to the Garton subclaim of Claim I." (See *Robbins, supra,* 18 Cal.4th at 789). In *Clark*, this Court held that a traverse may "allege additional facts in support of the claim on which an order to show cause has issued...." (*Clark, supra,* 5 Cal.4th at 781 n. 16). Thus, when this Court issued an "order to show cause on procedural timeliness issues" along with factual allegations contained in the petition and informal reply, it will also "consider pertinent supplemental allegations in petitioner's traverse" so long as petitioner does not raise a new claim. (*Robbins, supra,* 18 Cal.4th at 789).

Petitioner has satisfied these requirements by including with this traverse declarations from his prior counsel, *before this Court*, and current counsel, *before this Court*. These declarations document that prior counsel

---

[43] Under Penal Code section 1484, "[t]he party brought before the Court or Judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge." Under Rule 8.386(d)(3), "[a]ny material allegation of the return not denied in the traverse is deemed admitted for purposes of the proceeding."

failed to identify, investigate, and develop potentially meritorious claims.[44] They also prove that current counsel submitted the second petition and non-repetitive claims as promptly as reasonably possible. (See generally traverse exhibits H, I, and J (Declarations of Giannini, Thomson, and Stetler)).

However, respondent erroneously asserts that in order to establish that his petition was filed without substantial delay, petitioner must also present declarations from each of his prior counsel, including his "*federal* lawyers." (Return, at 28) (citing *Gallego, supra,* 18 Cal.4th at 837-838 and *Robbins, supra,* 18 Cal.4th at 779-80, 787-88, 799, and 805) (emphasis in original)). Respondent specifically seeks declarations from petitioner's five

---

[44] The declarations also demonstrate, with more than general terms, that current counsel, upon learning of the factual and legal existence of the non-repetitive claims, after developing a *prima facie* case for each claim, immediately developed and timely submitted a petition for writ of habeas corpus. (See traverse exhibits H, I, and J (Declaration of Giannini, at 4; Declaration of Thomson, at 4; and Declaration of Stetler, at 4). Petitioner has shown when the information in support of each claim was obtained and that he was not previously aware of the information due to prior counsel's ineffectiveness. (*Robbins, supra,* 18 Cal.4th at 780). Moreover, the declarations establish that prior counsel did not fail to raise the claims based on "strategy," but because he failed to identify the factual basis for the claims and thus failed to realize that they were potentially meritorious. (See traverse exhibit L (Declaration of Nolan, at 3-4). Petitioner has thus established due diligence and competent performance by current counsel and that prior counsel's failure to raise potentially meritorious issues that "would have entitled petitioner to relief...reflects a standard of representation falling below that to be expected" of capital appellate and habeas counsel. (*Clark, supra*, 5 Cal.4th at 774). (See traverse exhibit M (Declaration of Van Winkle, at 5-6).

prior federal counsel. (Return, at 29). Nothing in respondent's citations to this Court's case law discusses the need for declarations from prior federal counsel. Moreover, if the state is asserting as a defense to petitioner's assertions that prior federal counsel unreasonably failed to timely file a successive petition, respondent should have submitted prior federal counsels' declarations as part of its return.

Petitioner has made the showing necessary to controvert the return and resolve this Court's questions by presenting declarations from his prior and current counsel before this Court. (See generally traverse exhibits H, I, J, and L (Declarations of Giannini, Thomson, Stetler, and Nolan). Nothing in respondent's cite to *Gallego, supra* 18 Cal.4th at 837, indicates that this Court requires petitioner to file declarations from "*federal* lawyers." Likewise nothing in respondent's four cites to *Robbins, supra,* 18 Cal.4th at 779-80, 787-88, 799, and 805, compels petitioner to set forth declarations from his prior "*federal* lawyers." Determining whether or not *federal* counsel performed deficiently, in preparing a *federal* petition for writ of habeas corpus, is not at issue before this Court and not necessary to resolve the eight queries in this Court's order to show cause.[45] Moreover, if needed, petitioner could demonstrate that prior federal counsel performed

---

[45] If this remains an issue then it should be addressed at an evidentiary or reference hearing with the taking of testimony from prior federal counsel. See 2011 California Rules of Court, Rule 8.386(f)(1) ("An evidentiary hearing is required if...the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.").

ineffectively in his case.[46]

In light of the order to show cause issued in this case, and counsel's diligence in filing and pursuing the potentially meritorious claims included within the second petition, this Court may consider the factual allegations included within this traverse when resolving the issues presented. These aversions should be accepted on their face. (*Sanders, supra,* 21 Cal.4th at 714 (citing *Robbins, supra*, 18 Cal.4th at 770, 798-799)). Together, the

---

[46] At this time, as to Mr. Arguimbau, petitioner is aware that in *Ross v. Woodford*, Case No. CV 96-2720 SVW (C.D.C.A. 1996), the District Court, in its "Order Discharging Habeas Counsel," held that: "The initial petition was inadequate. For the vast majority of its seventy-six claims, instead of providing an independent statement of the fact in support of the claim, the petition incorporated by reference every factual allegation included in every document and every piece of evidence ever submitted by Ross or his co-defendant, Steven Champion, to the Superior Court, the California Supreme Court and the state habeas corpus referee in connection with their trials, direct appeals, and habeas corpus petitions. The petition cited this undifferentiated mass of allegations as factual support for every one of the claims. It thus failed to clearly identify the factual bases for the claim. The statement of the legal theory underlying the claims was similarly obtuse." See (See traverse exhibit G (*Ross v. Woodford* Case No. CV 96-2720 SVW (C.D.C.A. 1996) (Doc #152, at 11-12 (November 19, 2003)). In its Conclusion, the court stated: "Habeas counsel's apparently inadequate investigation of Ross's claim of ineffective assistance of counsel at the guilt phase, which became evident to this Court only upon reviewing counsel's recent under seal filings submitted in connection with the budgeting process, is sufficient to demonstrate the poor quality of habeas counsel's representation. This conclusion is bolstered by the unfortunate record of counsel's work throughout this case. The Court has observed counsel's efforts since their appointment in 1996 and is familiar with the quality of representation provided by other capital habeas attorneys in other cases. Mr. Arguimbau has demonstrated a singular inability to navigate the difficult legal terrain of federal habeas corpus law and procedure." *Id.* at 16-17.

factual allegations in the petition, informal reply, and traverse establish that: 1) petitioner's repetitive claims are presumptively timely; 2) petitioner's non-repetitive claims were filed without substantial delay; 3) any delay in the filing of the successive petition was due to ineffective assistance of appellate and prior habeas counsel; and 4) any delay in the filing of the successive petition is justified in light of other reasons constituting good cause.

3. Petitioner's Repetitive Claims Are Timely.

Petitioner denies that he has conceded untimeliness as to any repetitive or non-repetitive claim. (See return, at 25). Petitioner's reply brief on direct appeal was submitted on October 27, 1994. His first habeas petition was timely filed on January 20, 1995. The claims were rejected on the merits in 1996 and the timeliness was thus settled by this Court in its opinions on direct appeal and in regards to the first petition. (See *Memro, supra,* 11 Cal.4th 786; and *In re Memro*, *supra,* S044437).

Respondent incorrectly argues that the fifty-six (56) repetitive claims, previously raised and rejected on the merits in the appeal, can be deemed untimely now after this Court has already determined their timeliness. Respondent offers no citation for its contention that since "this Court can deny a claim on procedural grounds and alternatively on the merits in a single proceeding, it can certainly do so in successive proceedings." (See return, at 25). This Court should reject respondent's argument for sound reasons.

Respondent tries to chastise petitioner's counsel for raising his repetitive claims and argues that if petitioner wanted to "avoid a procedural default ruling by this Court as to any repetitive claim, they should have refrained from presenting them herein." (*Id.*). Respondent does not provide case law for its argument.[47] To now find untimely, a claim that was previously adjudicated timely and is repeated for exhaustion and cumulative error purposes, would be unfair, a miscarriage of justice, and illogical.

Respondent's position would also controvert the "look through doctrine" associated with the procedural bar outlined in *Waltreus, supra,* 62 Cal.2d at 225.[48] Respondent's use of *Waltreus* seeks to unjustly stack

---

[47] Even if this Court adopts the state's reasoning, petitioner has not had prior notice of this Court's power to rule on the merits of a claim in one appeal; and then also dismiss the claim, based on timeliness, in another appeal. His repetitive claims thus should be exempt from dismissal due to lack of notice.

[48] *See* informal reply, at 3 ("The corollary of the rule in *Dixon, supra,* 41 Cal.2d 756, 264 P.2d 513, is, of course, the *Waltreus* rule, i.e., that in the absence of strong justification, any issue that was *actually* raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus. (See *Harris, supra,* 5 Cal.4th at 829). In *Ylst v. Nunnemaker* (1991) 501 U.S. 797, 805, the United States Supreme Court concluded that a *Waltreus* citation is neither a ruling on the merits nor a denial on procedural grounds. It held that, since petitioners in California are not required to go to state habeas for exhaustion purposes, 'a *Waltreus* denial on state habeas has no bearing on their ability to raise a claim in federal court.'" (*Hill v. Roe* (9th Cir. 2003) 321 F.3d 787 (emphasis added); *see also Ylst, supra,* 501 U.S. at 805; *LaCrosse v. Kernan,* 244 F.3d 702, 705 n. 11; *Calderon v. United States Dist. Court* (9th Cir.1996) 96 F.3d 1126, 1131; *Forrest v. Vasquez* (9th Cir. 1996) 75 F.3d 562, 564 (recognizing that *Waltreus* has no bearing on a petitioner's ability to raise a claim in federal court). Thus, federal courts 'look through' a denial based on *Waltreus* to

multiple procedural bars upon claims in order to prevent the federal courts from reaching the merits. Such adaptation would work a particular injustice in cases like petitioner's, where the repetitive claims have been pled based on orders from a federal court to exhaust all unexhausted claims including claims of cumulative error. (See Reno v. Calderon, 2.96-cv-02768-CBM (USDC Doc #119)).

These claims have been reasserted for several additional reasons. First, this Court may reconsider its prior denial of the claims based on its discretionary power of review. Second, this Court should re-examine its prior denial of the claims in the context of the facts and claims alleged in the second petition, which is more complete and detailed than the prior appellate and habeas pleadings filed in this Court. Third, it is necessary to present the claims of cumulative error to this Court. Fourth, it is necessary to exhaust all claims in the federal petition including claims of cumulative error. Fifth, so that this Court may better assess the prejudice stemming from the multitude of errors infecting petitioner's capital proceedings. Sixth, to provide context for this Court's determination as to whether prior appellate and habeas counsel performed ineffectively by failing to raise all potentially meritorious claims included within the second petition. Finally,

---

previous state court decisions. (See *Ylst*, *supra,* 501 U.S. at 805-06). Were respondent correct, any finding under *In re Waltreus* would necessarily result in a finding of untimeliness as well. Certainly, any time a claim was brought in an appeal and was later brought in a second habeas petition, it would not be presumptively timely. There is no hint, however, in *Waltreus* or its progeny that it encompasses a timeliness ruling as well.").

this Court should reconsider its prior denial of seventeen (17) of the repetitive claims since they have been further developed with additional case law and facts following their original submission to this Court.[49]

In sum, for current counsel to perform competently and effectively in petitioner's case it was necessary to include the fifty-six (56) repetitive claims in the second petition. This Court may reconsider its prior denial of the claims based on its inherent powers and material factual and legal changes in seventeen (17) of the claims. Alternatively, even if this Court finds that the claims lack merit, it should still consider the claims for context when determining whether prior appellate and habeas counsel performed ineffectively in petitioner's case and whether petitioner has stated a claim for relief based on cumulative error. (See generally traverse exhibit M (Declaration of Van Winkle, at 4-8).

Based on all these reasons, the fifty-six (56) repetitive claims presented in the second petition should be found to have been timely presented. They are thus exempt from timeliness analysis here.[50] Additionally, based on the strength of the other claims presented in the

---

[49] Claims 8, 9, 15, 20, 27, 28, 30, 31, 33, 40, 41, 56, 63, 73, 81, 112, and 121.

[50] As discussed herein, since this Court has denied these claims on the merits, and therefore previously found that they were presented in a timely fashion, further analysis of the timeliness of these claims is not provided. Instead, they will be analyzed under the rubric of the *Waltreus* bar - and in regard to whether they were brought on direct appeal or in habeas.

second petition, this Court should reconsider its prior denial of these claims.

4. Petitioner's Non-Repetitive Claims Have Been Filed Without Substantial Delay.

In May 2004, less than seventeen (17) months after their appointment in this case, petitioner's counsel filed the second petition. Counsel identified, developed, and presented the claims in the second petition as promptly as reasonably possible. Thus, the eighty-seven (87) non-repetitive claims not included in the first petition, but included in the second petition, have also been timely filed. While the filing does not come within the range set by this Court's policies for presumptive timeliness, the petition is nevertheless timely because it was filed without substantial delay after counsel learned of prior counsel's ineffectiveness in failing to identify, investigate, develop, and present the potentially meritorious claims. (*See Clark, supra*, 5 Cal.4th at 780; and *Sanders, supra,* 21 Cal.4th at 719). Indeed, "the complexity of capital cases and the resultant difficulty that appellate counsel appointed long after trial and conviction may have in determining if a basis for habeas corpus may exist is recognized in the Policies." (*Clark, supra,* 5 Cal.4th at 784).

a. Petitioner's Burden to Show Absence of Substantial Delay.

Petitioner recognizes that he bears the burden of showing the absence of substantial delay in the filing of his second petition. (*Robbins, supra,* 18 Cal.4th at 780). However, contrary to respondent's assertions, petitioner's showing is not subject to a "substantial" burden test. (See

return, at 10). Instead, petitioner is only required to make a *prima facie* showing that his claims were timely filed or meet an exception to the timeliness bar. (See generally, *Clark, supra,* 5 Cal.4th at 775). Petitioner accomplished that in the petition and the informal reply and reenforces those allegations in this traverse. (See *Id.* at 781 n. 16; see generally traverse exhibits H, I, J, K, L, and M (Declarations of Giannini, Thomson, Stetler, Reno, Nolan, and Van Winkle)).

Policies standard 1-1.2 governs whether petitioner has demonstrated the absence of substantial delay. The absence of substantial delay may be shown by alleging "specific[] facts showing the petition was filed within a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim and became aware, or should have become aware, of the legal basis for the claim." (*Clark, supra,* 5 Cal.4th at 784-85). Thus, "[s]ubstantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*Robbins, supra,* 18 Cal.4th at 780). "That time *may be* as early as the date of the conviction." (*Clark, supra,* 5 Cal.4th. at 765 n. 5 (emphasis added)). "*Only if and when* the petitioner obtains enough information to support what may be a *prima facie* claim ... does the time for promptly filing the claim commence." (*Gallego, supra,* 18 Cal.4th at 834 (emphasis added)). Time is not running against a petitioner who has an "undeveloped and unsubstantiated claim" because "he or she has no *prima facie* case to

present." (*Id.* at 835 (emphasis added)).[51]

In the alternative, "[w]hen the factual basis for a claim is already known, the claim must be presented promptly unless facts known to counsel suggest the existence of other potentially meritorious claims which cannot be stated without additional investigation." (*Clark, supra,* 5 Cal.4th at 784). "When a petitioner or counsel knows or should know only of triggering facts - i.e., facts sufficient to warrant further investigation, but insufficient to state a *prima facie* case for relief - the potential claim should be the subject of further investigation either to confirm or to discount the potential claim." (*Gallego, supra,* 18 Cal.4th at 833 (emphasis added));

> A petitioner who has only information that does not rise to the level of a prima facie claim is not required or expected to file a petition embodying such a claim, it cannot be said that such a petitioner reasonably should have filed a petition raising the undeveloped claim at that earlier time.

(*Gallego, supra,* 18 Cal.4th at *834*). Thus, the absence of substantial delay can be shown in two ways. First, petitioner may demonstrate that he did not have knowledge of a basis of a claim and upon gaining knowledge he presented a petition, including the claim, within a reasonable amount of time. Second, and alternatively, petitioner may show an absence of substantial delay by demonstrating that the petition was filed as promptly as reasonably possible after a *prima facie* case for all claims and a *prima facie*

---

[51] Cf. *Clark, supra,* 5 Cal.4th at 781 ("petitioner who is aware of facts adequate to state a prima facie case for habeas corpus relief should include the claim based on those facts in the petition even if the claim is not fully 'developed").

case for excusal of procedural default laws had been developed. Petitioner did not previously know of the non-repetitive claims. He has filed the second petition within a reasonable amount of time after the development of the non-repetitive claims, and only after developing a *prima facie* case for each of the non-repetitive claims and excusal of procedural default laws.

b. Petitioner Has Shown An Absence of Substantial Delay In the Filing of His Second Petition.

On December 18, 2001, present counsel were appointed to represent petitioner in his federal habeas corpus action before the District Court for the Central District of California. Counsel filed a request to be appointed to represent Mr. Reno before this Court on September 23, 2002. This Court granted the motion on October 16, 2002.

As quickly as reasonably possible, and to avoid the piecemeal representation of claims, petitioner prepared and filed the second petition within seventeen months of being appointed by this Court. Petitioner's counsel made clear that they included all possibly meritorious and "known claims of constitutional error related to his trial, convictions, sentence and imprisonment for the sake of clear presentation and *so this Court can assess the cumulative effect and determine that a miscarriage of justice occurred. This includes claims that have been previously presented.*" (Second petition, at 23 (emphasis added)). Thus, petitioner has carried his burden of "establishing with specificity when the information offered in support of [his petition] was obtained and that the information was neither known nor

reasonably should have been known at an earlier time." (Contra return, at 26).

Moreover, based on the information provided in this case, it is not impossible to identify "[when] the factual and legal bases for his claims" arose. (Contra *Id.*). None of the non-repetitive claims raised for the first time in the second petition were raised an unreasonable "time after [petitioner] became aware of [] the claim []." To the extent any claims include "facts that were known at the time of the trial" (*id.*), the untimely presentation of these claims are justified by appellate and prior habeas counsel's ineffectiveness. All the claims in the second petition were filed as promptly as possible following the development of a *prima facie* basis for each claim and a *prima facie* case for excusal of applicable procedural bars. (See traverse exhibit H (Declaration of Giannini, at 4 and 10-11).

Respondent erroneously argues that many of the non-repetitive grounds asserted in petitioner's petition "are but restatements or reformulations of arguments made and rejected on appeal in the 1995 habeas petition." (*Id.* at 23). Respondent errs in saying that petitioner has failed to show that grounds not previously raised on appeal or habeas proceedings "could not have been asserted in the prior petition ... [or] in conjunction with the appeal." (*Id.*). Petitioner's claims could not have been previously raised due to the ineffective assistance of appellate and prior habeas counsel. Petitioner denies that "every single one of the claims [raised in the second petition] are based primarily on facts known or

discoverable at the time of trial and included in the appellate record." (Return, at 24). Respondent errs in the assumption that any claim with a citation to the record proves that petitioner knew about the basis for the claim and failed to raise it earlier without substantial delay. (See return, at 34).

Respondent's argument for default actually proves that prior counsel performed ineffectively in failing to identify, investigate, develop, file, and competently present potentially meritorious claims that were based on "facts known or discoverable at the time of trial and included in the appellate record." (Return, at 24). A fact admitted to by appellate and prior habeas counsel. (See traverse exhibit L (Declaration of Nolan, at 4). Respondent fails to distinguish between the non-repetitive appellate versus non-repetitive habeas claims. Respondent is utterly silent as to the evidence, not based on facts in the record, raised in the second petition to corroborate the non-repetitive habeas claims.

A non-repetitive appellate claim *should have been brought on appeal* in that it is based primarily on facts in the record and is a claim that would typically be addressed on direct appeal where that issue was raised at trial. A non-repetitive habeas claim *should have been brought in a habeas petition* in that it is based primarily on facts from outside the trial record and is based on claims typically brought in habeas petitions. What determines whether a claim is a non-repetitive habeas versus appellate claim is whether: 1) the claim includes facts from outside the record; and 2)

the claim is premised on a legal theory that is typically raised in appeal or on an issue that was not part of the record at petitioner's trial. While both types of non-repetitive claims may include citations to the record, far from proving that all are appellate in nature, the record citation proves that the errors alleged had a material and relative effect on petitioner's trial. By arguing that all the claims have been delayed, since they can be found in the appellate record, respondent is attempting to divert this Court's timeliness analysis, which must evaluate when either petitioner or his counsel learned of and developed the factual and legal basis for a non-repetitive claim.

Respondent also errs in failing to acknowledge the exhibits included with the second petition that support the non-repetitive claims of error. (See second petition, exhibits A - DD). These thirty (30) exhibits contain material facts not adduced at trial, which corroborate the legal theories and factual allegations raised in the non-repetitive habeas claims and included in the second petition. These claims could not have been presented until counsel identified the legal issues and the factual basis for the claim based on evidence not reflected in the appellate record. The fact that counsel located thirty (30) exhibits not previously identified and submitted by appellate and prior habeas counsel further demonstrates prior counsel's ineffective assistance.

c. Counsels' Declarations Show That the Non-Repetitive Claims In the Second Petition Have Been Timely Presented.

Petitioner denies that he has "utterly fail[ed] to establish that the information previously was unknown by any of his previous attorneys or by petitioner himself and that it could not have been discovered by them in the exercise of due diligence." (Return, at 28 (emphasis omitted)). Petitioner has supplied more than "bare allegations" that prior counsel were "unaware of certain, predicate triggering facts or potentially meritorious claims...." (Contra *Id.*). By this traverse, and attached declarations, petitioner has supplied "a detailed, particularized examination of when those facts reasonably could have been ascertained [] through the exercise of due diligence and [has] show[n] that they could not have been discovered any earlier." (*Id.* (citation omitted)). Thus, the pleadings are not fatally silent as to when prior counsel and petitioner learned of triggering or predicate facts for each of the claims. (Contra *Id.*).

First, seventeen (17) of petitioner's claims rest upon exhibits not previously found by appellate and prior habeas counsel.[52] (See traverse

---

[52] See second petition, at 88 (Claim 15 (citing second petition exhibits B-K)); 104 (Claim 19 (citing second petition exhibits G and H)); 117 (Claim 20 (citing second petition exhibits C and D); 251 (Claim 68 (citing second petition exhibit CC)); 256 (Claim 71 (citing second petition exhibits F-K)); 309 (Claim 90 (citing second petition exhibit K)); 313 (Claim 91 (citing second petition exhibits D and F)); 331 (Claim 98 (citing second petition exhibit BB)); 361 (Claim 102 (citing second petition exhibit P)); 371 (Claim 108 (citing second petition exhibits M - X)); 417 (Claim 109 (citing second petition exhibits S - AA)); 371 (Claim 112 (citing second petition exhibit Q)); 417 (Claim 118 (citing second petition exhibit CC));

exhibit H (Declaration of Giannini, at 11)). The exhibits provide material evidence of petitioner's incompetence, mental health problems, and life story, all evidence critical to a reliable determination of his guilt and the appropriate sentence.

Petitioner agrees that most, if not all, of the facts underlying the non-repetitive claims were available to prior counsel after thorough review of the record or reasonable investigation. (Return, at 29). Respondent fails to note that, if true, prior counsel performed ineffectively by failing to develop potentially meritorious claims despite their possession of triggering facts to support the claims. Since appointment, petitioner's counsel have diligently pursued investigation in anticipation of supplementing and amending his petition,[53] demonstrating that counsel presented the petition, and claims, at a time when he could make a *prima facie* case as to all allegations of error and for excusal of procedural default bars. In fact, counsel indicated that he withheld some claims that had not been fully developed in light of their request for "further investigation [] in connection with the present petition for writ of habeas corpus." (Second petition, at 24). Likewise, counsel has

---

422 (Claim 119 (citing second petition exhibit CC)); Claim 120 (citing second petition exhibit AA); 430 (Claim 121 (citing second petition exhibit G, H, and M)); and 449 (Claim 125 (citing second petition exhibit DD)).

[53] *See* second petition, at 21 ("After petitioner has been afforded discovery and the disclosure of material evidence by the prosecution, the use of this Court's subpoena power, [ ] fund[ing] and an opportunity to investigate fully, counsel requests an opportunity to supplement or amend this petition.").

indicated that upon completing investigation of the claims in April 2003 (see traverse exhibit H (Declaration of Giannini, at 10), the claims were immediately submitted following their drafting and the completion of a *prima facie* case for each claim. (See traverse exhibit I (Declaration of Thomson, at 3-4).

Importantly, prior counsel has indicated that he was not previously aware of the legal or factual basis for *any* of the non-repetitive claims. (See traverse exhibit L (Declaration of Nolan, at 3-4). As a result, he failed to conduct adequate investigation to determine whether the claims possessed potential merit. (*Id.*). Upon review of the claims, prior counsel has admitted that seventy-one (71) claims are "potentially meritorious," should have been previously raised, and would have been submitted in the 1993 opening brief or the 1995 petition had counsel been aware of their factual basis. (*Id.*). Moreover, expert attorney Wesley Van Winkle opines that all one-hundred-forty-three (143) claims should have been filed by petitioner's current counsel. (See traverse exhibit M (Declaration of Van Winkle, at 8-9).

Accordingly, petitioner has alleged more than "general terms" and "generic allegations" showing that the claims were raised without substantial delay. (Contra return, at 27 (emphasis omitted) (citation omitted)), and has done more than "'incorporate by reference' all the allegations set forth in each of the 143 claims and merely proffer[ed] general, across-the-board assertions of lack of delay that are wholly vague

and conclusionary." (Contra *Id.* at 30-31 (citation omitted)). Petitioner previously alleged that his claims and the second petition were "filed as soon as practicable after all of the facts alleged as grounds herein became known to undersigned counsel, and counsel could reasonably have discovered the facts." (Second petition, at 13). "As stated above, counsel only learned of these new claims as he was in the process of preparing Mr. Reno's federal petition for a writ of habeas corpus." (Second petition, at 19).

From December 2001 to April 2003, counsel diligently identified, investigated, and developed each of the non-repetitive claims. (See traverse exhibit H (Declaration of Giannini, at 3-8). Petitioner was informed of the legal and factual basis of these claims, for the first time, after April 2003. (See traverse exhibit K (Declaration of Reno, at 1-2). A *prima facie* case for each claim, including cumulative error claims, was not developed until the petition was submitted in May 2004. (See traverse exhibits I (Declaration of Thomson, at 3-4).

Further, this Court's findings in *Gallego* are distinguishable from this case. (See return, at 27). Contrary to *Gallego*, counsel here has demonstrated, with specificity, when they and petitioner Reno became aware of the basis for the non-repetitive claims. (Contra *Gallego, supra,* 18 Cal.4th at 838; but see *Robbins*, *supra,* 18 Cal.4th at 789). Unlike counsel in *Gallego*, immediately after appointment, and up until the presentation of claims to this Court, petitioner's counsel were conducting an ongoing

investigation of petitioner's case and perfecting claims of error. (Contra *Gallego, supra,* 18 Cal.4th at 838 n. 13). Likewise, contrary to counsel in *Gallego*, petitioner's counsel developed a *prima facie* case for the final claims in the petition immediately before the filing of the second petition. (Contra *Id.*). (See traverse exhibit I (Declaration of Thomson, at 3-4).

This case is more comparable to *Robbins* and *Sanders* than *Gallego*. Petitioner's counsel, like counsel in *Robbins,* have "not only [] alleged, with specificity, facts showing the timeliness of [his claims], but also has referred to attached declaration[s] that support the allegations and place them in context." (*Robbins, supra,* 18 Cal.4th at 795 n.16). (See generally traverse exhibits H, I, J, K, L, and M (Declarations of Giannini, Thomson, Stetler, Reno, Nolan, and Van Winkle). Moreover, petitioner's counsel has asserted that he withheld the presentation of claims that "did not state a prima facie case," that all the claims were "perfected and then delayed for good cause pending his completion of an ongoing investigation into [] other matters," and that he withheld all claims as component parts of the cumulative error claims. (Contra *Robbins, supra,* 18 Cal.4th at 807 n. 29; see generally traverse exhibits I (Declaration of Thomson, at 3-4; Declaration of Stetler, at 3-4).

Further, respondent's timeliness analysis and interpretation of *Robbins* and *Gallego* ignores the fact that this Court does not determine whether a claim is timely solely based on the time that the petition was filed. (See return, at 27). Instead, this Court long ago opted to determine

timeliness, and whether a substantial delay has occurred, on a case by case basis. (*Clark, supra,* 5 Cal.4th at 765 (citing *Swain, supra,* 34 Cal.2d at 302)). Thus, contrary to respondent's assertions, petitioner has established an absence of substantial delay as to all claims included within the *second petition*. (Contra return, at 25). This includes all of the non-repetitive claims which were raised as promptly as reasonably possible by petitioner's current counsel, after developing a *prima facie* case for each claim and concluding investigation into relevant matters.

5. Alternatively, Petitioner Has Alleged, with Particularity, Facts Constituting Good Cause and Justifying the Delayed Filing of His Petition.

If this Court finds that petitioner has filed his petition with substantial delay, then petitioner alternatively asserts that he had good cause and was justified in filing the second petition in May 2004.

At petitioner's capital trial, his counsel ineffectively failed to present evidence of alternate suspects; evidence of petitioner's actual innocence; evidence of petitioner's reduced culpability; evidence of petitioner's mental health problems; substantial evidence in mitigation; and at least eleven discoverable witnesses in mitigation. During petitioner's appeals, his appellate and prior habeas counsel failed to identify record-based and extrinsic triggering facts; failed to adequately investigate potentially meritorious claims of error; and failed to present many other meritorious claims that undermine petitioner's capital convictions and sentence. (See traverse exhibit L (Declaration of Nolan, at 3-4). In doing so, appellate and

prior habeas counsel failed petitioner, performed incompetently and rendered ineffective assistance of counsel. (*Sanders*, *supra,* 21 Cal.4th at 719).

Here, for the first time, petitioner has been granted the benefit of effective capital counsel who, after conducting "investigation into specific facts known to counsel which could reasonably lead to a potentially meritorious habeas corpus claim...." have competently presented to this Court "*all potentially meritorious claims.*" (*Clark*, *supra,* 5 Cal.4th at 780, 784 (citations omitted; and emphasis added)).[54] (See traverse exhibit M (Declaration of Van Winkle, at 8-9). Respondent incorrectly argues that petitioner has not "sufficiently explicated his failure to include them in his

---

[54] Petitioner's counsel's submission of all one-hundred-forty-three (143) claims, whether repetitive or non-repetitive, is supported by the Supreme Court Policies language. All appellate and habeas counsel are required to "investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus.... [A]ll petitions for writs of habeas corpus should be filed without substantial delay... [in] all petitions for writs of habeas corpus arising from judgments of death, whether the appeals therefrom are pending or previously resolved, are governed by these standards." (Supreme Ct. Policies, supra, policy 3, former std. 1-1, see now std. 1-1, 2d par.) (Italics added). From this language, this Court has determined that it "is clear" that "appellate counsel [are] on notice that [they are] required to investigate the grounds for a petition for a writ of habeas corpus and, if potentially meritorious grounds were uncovered, to prepare and file a petition without substantial delay." (*Sanders, supra,* 21 Cal.4th at 710 (citing *Robbins, supra*, 18 Cal.4th at 808)). Thus, when current counsel discovered that there existed a *prima facie* basis for one-hundred-forty-three (143) claims of error in petitioner's case, they were required to submit all one-hundred-forty-three (143) claims in a single petition. (See traverse exhibit M (Declaration of Van Winkle, at 3 and 8-9).

prior state petition." (Return, at 32).[55] Petitioner has demonstrated good cause and a *prima facie* case for excusal of the timeliness bar to all the non-repetitive claims.[56] Petitioner's appellate and prior habeas counsel provided ineffective assistance in not raising all "potentially meritorious claims" in the second petition. (Contra *Id.*, at 34; see generally traverse exhibit H, L, and M (Declaration of Giannini, Nolan, and Van Winkle).

---

[55] Respondent argues that petitioner has not "adequately explained his failure to include all of his present claims in his prior federal petition (filed by other attorneys)...." (Return, at 31-32). Petitioner is not required to demonstrate the ineffective assistance of his prior federal attorneys here, but if he was so required to do so at an evidentiary hearing, petitioner could demonstrate that his prior federal attorneys, despite their possession of triggering facts, also performed ineffectively by failing to identify, investigate, and develop the potentially meritorious claims not included within his first federal petition.

[56] Petitioner has not set out the justification for the "delay[ed]" presentation of the repetitive claims in the second petition because these claims have previously been found timely. (See *Memro, supra,* 11 Cal.4th at 786; and *In re Memro*, S044437). Collectively, however, these claims compose part of the cumulative error claims (see second petition 517-19 (Claims 140-143)), and therefore also qualify as a non-repetitive claim. If this Court finds that the repetitive claims were not timely presented, then petitioner asserts that they have been filed without substantial delay, or that any delay in their presentation is justified due to the ineffective assistance of prior capital counsel in failing to present the claims to this Court in combination with the non-repetitive meritorious claims presented in the second petition.

a. Petitioner Has Carried His Burden to Show Good Cause And Has Justified The Presentation of His Claims After Substantial Delay.

This Court requires petitioners to "explain and justify any substantial delay in presenting a claim." (*Clark, supra,* 5 Cal.4th at 783 (quoting *Swain, supra,* 34 Cal.2d at 304). This requirement predated this Court's policies, which have imposed the presumption of timeliness and absence of substantial delay standards. (*See Clark, supra,* 5 Cal.4th at 784). In this regard, this Court's case law regarding good cause for the delayed presentation of habeas petitions is more developed than this Court's case law under the policies regarding the absence of substantial delay. (See *Swain, supra,* 34 Cal.2d at 302) (cases cited therein)).

There is no single justification that will constitute good cause for substantial delay. Indeed, this Court has recognized that "[w]e cannot anticipate what claims of this nature might be made notwithstanding the exacting nature of the appeal process in a capital case." (*Clark, supra,* 5 Cal.4th at 798 n. 32). Instead, this Court has opted to review each case for good cause and has made relief dependent upon specific and particularized allegations in the moving party's pleadings, (see *In re Shipp* (1965) 62 Cal.2d 547, 553) - allegations that should preferably be embodied in declarations from counsel. (See *Robbins, supra,* 18 Cal.4th at 795 n. 16). Thus, although a petitioner has no way of knowing what facts will justify the delayed filing of a particular petition or claim therein through specific and particularized allegations, he may demonstrate good cause for the delay.

> Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other claims in order to avoid piecemeal presentation of claims . . . .

(*Robbins, supra,* 18 Cal.4th at 780 (emphasis omitted)).

Respondent does acknowledge that this Court will consider "whether the facts on which the claim is based, although only recently discovered could and should have been discovered earlier," before refusing to consider the merits of a substantially delayed claim. (See *Clark, supra,* 5 Cal.4th at 775). But, respondent errs in trying to limit this Court's good cause analysis to just one or two factual scenarios. (*See* return, at 16-17). This Court's case law has outlined several scenarios that may constitute good cause and justify the untimely presentation of a habeas petition, including when:

1. At the time the prior petition was filed "the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made." (*Clark, supra,* 5 Cal.4th at 775);

2. At the time the prior petition was filed, petitioner was "unable to present the claim...if asserted as promptly as reasonably possible." (*Clark, supra,* 5 Cal.4th at 775);

3. The new claim is based on "a change in the law which is retroactively applicable to final judgements...promptly asserted and if application of the former rule is shown to have been prejudicial." (*Clark, supra,* 5 Cal.4th at 775);

4. The delay is attributable to "inadequate presentation of an issue or omission of any issue [by prior] incompetence of counsel." (*Clark, supra,* 5 Cal.4th at 780);

5. The petitioner "reasonably failed to discover earlier the information offered in support of that claim because he or she timely requested but was denied funding to investigate that claim." (*Gallego, supra,* 18 Cal.4th at 834-35);

6. The "petitioner can demonstrate that (1) he had good reason to believe other meritorious claims existed, and (2) the existence of facts supporting those claims could not with due diligence have been confirmed at an earlier time." (*Clark, supra,* 5 Cal.4th at 781); and

7. The delay is due to a petitioner's inability to make use of legal information due to his education, when, on learning of the law, the prisoner immediately sought the assistance of counsel. (*Clark, supra*, 5 Cal.4th at 786 (citing *In re Saunders* (1970) 2 Cal.3d 1033, 1040; and *In re Perez* (1966) 65 Cal.2d 224, 228).

Petitioner has demonstrated good cause justifying the delayed presentation of all the claims included within his second petition. Prior counsel's ineffective assistance is but just one of the impediments external to petitioner that have delayed the presentation of his claims to this Court. In sum, respondent has failed to substantiate its assertion that petitioner has abused the writ and presented untimely claims without sufficient justifications. (Contra return, at 16-17).

b. The Serial Ineffective Assistance of Prior Trial, Appellate, and Habeas Counsel Justifies the Delayed Filing of Petitioner's Petition.

Petitioner stands by his assertion that "he cannot be held responsible for the multiple counsel" who have ineffectually represented him in his capital appeals and writs. (See return, at 29 (citing informal reply, at 8)).[57] Far from attempting to capitalize from a "tag-team artifice of chain substitutions of attorneys," (return, at 29), petitioner has received serial ineffective assistance, which has adversely affected the presentation of his claims. Moreover, "[r]espondent's arguments are premised on an erroneous understanding of our habeas corpus procedural rules and the scope of counsel's dut[ies] when conduct[ing] a habeas corpus investigation in a capital case." (*Robbins, supra,* 18 Cal.4th at 791).

Respondent acknowledges that this Court has previously found that ineffective assistance of appellate or habeas counsel constitutes good cause

---

[57] Petitioner has timely submitted his claims of ineffective assistance of appellate and prior habeas counsel. (Contra return, at 30). Petitioner has previously asserted that his right to effective assistance of counsel was violated by the materially deficient performance of his prior habeas counsel. (See second petition, at 21 ("To the extent that the error or deficiency alleged was due to trial counsels' failure to investigate and/or litigate in a reasonably effective manner on petitioner's behalf, petitioner was deprived of his federal and state constitutional rights to the effective assistance of counsel. To the extent that meritorious claims were not raised in petitioner's appeal and initial habeas petition, petitioner was deprived of his federal and state constitutional rights to effective assistance of appellate and habeas counsel.")).

and justifies the delayed presentation of a habeas petition. (See return, at 30 (citing *Sanders, supra,* 5 Cal.4th at 719)). This Court has previously found instances of serial ineffective assistance of counsel "instructive" as to the facts likely to justify substantial delay. (*See Clark, supra,* 5 Cal.4th at 792 (citing and discussing *Com. v. Watlington* (1980) 491 Pa. 241, 245 ("Since appellant has alleged the ineffectiveness of all prior counsel for failing to raise the issues contained in the instant petition, the P.C.H.A. Court's ruling that said issues had been waived was erroneous."). Petitioner received ineffective assistance of counsel, and can justify the delayed presentation of his claims accordingly. (See traverse exhibits L and M (Declaration of Nolan, at 3-4; and Declaration of Van Winkle, at 5-7).

Present counsel are the first counsel to file a state petition containing "all potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 778). Petitioner has demonstrated that prior counsel performed deficiently and failed to include claims which would have entitled him to relief. (See e.g., *Id.* at 780). All the claims included in the second petition may be considered by this Court based on prior counsel's failure to identify triggering facts, reasonably investigate claims of error, and competently present "all the potentially meritorious claims" in petitioner's case, both individually and cumulatively, on direct appeal or in the first petition. Moreover, the claims may be reviewed because they would "have entitled the petitioner to relief had it been raised and adequately presented in the

initial petition." (*Id.*).[58]

I. Habeas Counsel's Duties in a Capital Case.

This Court has found that its prior case law, Internal Operating Practices, Supreme Court Policies, and Cal. Gov. Code § 68662, grant capital defendants the right to effective assistance of habeas counsel. (*See Sanders, supra,* 21 Cal.4th at 719).[59] In this regard, respondent recognizes that "it is true 'that petitioner should not be penalized for prior counsel's ineffective assistance and that their failings' should not be held against him." (See return, at 30 (quoting informal reply, at 29-30)). However, respondent fails to note the many duties, as outlined in this Court's case law, shouldered by capital counsel when *competently* conducting appellate

---

[58] To prove that appellate and prior habeas counsel performed deficiently, petitioner recognizes that he must "allege with specificity the facts underlying the claim that the inadequate presentation of an issue or omission of any issue reflects incompetence of counsel, i.e., that the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition, and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants." (*Clark, supra*, 5 Cal.4th at 780).

[59] "In sum, although the federal Constitution does not require this state to appoint counsel to represent indigent death row prisoners in state habeas corpus proceedings, (I) *In re Anderson* (1968) 69 Cal.2d 613, (ii) this court's own Internal Operating Practices, (iii) policy 3 of the Supreme Court Policies, and now (iv) Government Code section 68662 all require such appointment." (*See Sanders, supra,* 21 Cal.4th at 719).

and habeas corpus litigation.[60] (See traverse exhibits E and F (Supreme Court Policies Regarding Cases Arising from Judgments of Death; and California Supreme Court Memorandum - Appendix of Appointed Counsel's Duties). As summarized in the case, these duties include, but are not limited to:

1. The diligent and thorough review of trial counsel's files, the trial record, the appellate briefs, and any other matter relative to their client's capital trial and appeals. (*Sanders, supra,* 21 Cal.4th at 708);

2. The reasoned conclusion that there are, or are not, triggering facts that would lead to potentially meritorious appellate claims. (*Sanders, supra,* 21 Cal.4th at 708);

3. Reasonable investigation into claims of error premised on triggering facts identified in the appellate record. (*Sanders, supra,* 21 Cal.4th at 708);

4. The duty to present all potentially meritorious appellate claims known to counsel. (*Sanders, supra,* 21 Cal.4th at 707);

5. The reasoned conclusion that there are, or are not, triggering facts that would lead to potentially meritorious habeas claims. (*Sanders, supra,* 21 Cal.4th at 708);

---

[60] See generally, See also Supreme Court of California, *Memorandum: Appendix of Appointed Counsel's Duties*, available at: www.courtinfo.ca.gov/courts/supreme/documents/applica9b.pdf (last visited February 4, 2011). (Traverse exhibit F (California Supreme Court Memorandum - Appendix of Appointed Counsel's Duties).

6. Reasonable investigation into habeas claims premised on triggering facts outside the appellate record. (*Sanders, supra,* 21 Cal.4th at 708);

7. The duty to timely present all potentially meritorious habeas claims known to counsel. (*Sanders, supra,* 21 Cal.4th at 707);

8. The duty to adequately present all potentially meritorious claims known to counsel. (*Clark, supra*, 5 Cal.4th at 775);

9. The duty to recognize controlling law and changes in law, which could lead to a "potentially meritorious claim." (*Sanders, supra,* 21 Cal.4th at 707); and

10. The duty not to waste resources and conduct "fishing expedition[]" investigations into claims not premised on triggering facts. (*Clark, supra,* 5 Cal.4th at 784).

The heightened competency needed to provide effective counsel is recognized in this Court's appointment policies. (See 2011 California. Rules of Court, rule 8.605(e)).[61] Likewise, this Court has recognized that:

---

[61] "'An attorney appointed as lead or associate counsel to represent a person in death penalty related habeas corpus proceedings must have at least the following qualifications and experience: [¶] (1) Active practice of law in California for at least four years. [¶] (2) Either: [¶] (A) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings, including one murder case, and service as counsel of record for a defendant in three jury trials or three habeas corpus proceedings involving serious felonies; or [¶] (B) Service as counsel of record for a defendant in five completed felony appeals or writ proceedings and service as supervised counsel in two death penalty related habeas corpus proceedings in which the petition has been filed.... [¶] (3) Familiarity with

> Quite few in number are the attorneys who meet this court's standards for representation and are willing to represent capital inmates in habeas corpus proceedings. The reasons are these: First, work on a capital habeas petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both.

(*Morgan, supra,* 50 Cal.4th at 938). The problem is further exacerbated by the odd fact that, despite the extreme demand and limited supply of qualified capital counsel in California, such attorneys "are compensated well below market rates." (Judge Arthur L. Alarcón, *Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697, 716). As a result, this Court "has encountered great difficulty in finding counsel who are willing to accept appointment to represent such inmates." (*Id.*).

As a general matter then, to perform effectively in a capital case habeas counsel must fulfill ten (10) separate duties, possess necessary

---

the practices and procedures of the California Supreme Court and the federal courts in death penalty related habeas corpus proceedings. [¶] (4) Within three years before appointment, completion of at least nine hours of Supreme Court approved appellate criminal defense or habeas corpus defense training, continuing education, or course of study, at least six hours of which address death penalty habeas corpus proceedings.... [¶] (5) Proficiency in issue identification, research, analysis, writing, investigation, and advocacy....' (Cal. Rules of Court, rule 8.605(e).) This Court may appoint an attorney who does not meet certain of these requirements if we find that the attorney has other equivalent experience and the attorney can consult with an attorney designated by the court. (2011 Cal. Rules of Court, rule 8.605(f).)" (as appearing in *Morgan, supra,* 50 Cal.4th at 938 n. 4).

qualifications, and be willing to work without adequate compensation. This Court's rules, which drastically limit the amount of time, funding, and resources capital counsel may seek prior to filing a habeas petition, make matters worse. As in petitioner's case, the result is often petitions that fail to conform to the rigorous demands for capital habeas petitions required by this Court and fail to include "all potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780).

Within this backdrop, respondent incorrectly argues that prior ineffective assistance of counsel will constitute good cause only when the "prior counsel essentially abandon[s] his client."[62] (Return, at 20). Instead, and as respondent later concedes, ineffective assistance of habeas counsel may occur when counsel ineffectively decides "which claims to present and which [claims] to weed out." (*Id.* at 20 (citing *Sanders, supra*, 21 Cal.4th at 705)). While abandonment constituted the good cause that justified consideration of the merits of the untimely claims in *Sanders*, this Court did not go as far as to hold that untimely claims will only be justified if prior

---

[62] Respondent's test actually goes much further and would require petitioner to show: 1) that prior counsel abandoned his client; 2) that prior counsel failed to conduct any reasonable follow up investigation; 3) that prior counsel was aware of known triggering facts; 4) that prior counsel determined the non-existence of potentially meritorious claims; 5) that prior counsel cite the press of work as cause of substantial delay; and 6) that subsequent habeas counsel eventually presents the claim to this Court. (See return, at 15). Respondent's novel ineffective assistance of counsel test has no basis in the law. Moreover, since respondent's assertion that good cause is only shown in cases involving abandonment is legally wrong, respondent's six-part ineffective assistance of counsel test is patently wrong.

counsel abandons their client. Instead, this Court issued a "narrow[]" ruling (*Sanders, supra,* 21 Cal.4th at 706), which addressed only whether "ineffective assistance of counsel may explain or excuse delay in presentation of a claim on habeas corpus...." (*Id.* at 705 (emphasis omitted)). *Sanders* thus followed *Clark's* reasoning that if "counsel failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another petition." (*Clark, supra,* 5 Cal.4th at 780). This Court should thus expand upon its reasoning in *Sanders* and answer in the affirmative that "some action or inaction by counsel short of [] abandonment [can] constitute good cause under the Supreme Court Policies Regarding Cases Arising From Judgments of Death." (*Sanders, supra,* 21 Cal.4th at 702 n.1).

ii. Petitioner's Trial Counsel Provided Ineffective Assistance of Counsel.

Petitioner's trial counsel was materially ineffective at every stage of the trial proceedings. Trial counsel had a conflict of interest that materially affected his performance.[63] Counsel failed to adequately litigate pretrial

---

[63] See second petition, at 332 (Claim 99: Petitioner was Denied his Right to the Assistance of Counsel Under the Sixth Amendment by the Trial Court's Denial of his Request to be Represented by Counsel to Litigate the Critical Proceedings Challenging the Inadequate Representation by his Appointed Trial Counsel, Prior to and After the Guilt Phase of the Trial)); 336 (Claim 100: Petitioner's Rights were Violated as a Result of Counsels' Conflict of Interest in Being Essential Witnesses in the Case)); and 337 (Claim 101: The Trial Court Failed To Conduct The Constitutionally

issues, including petitioner's involuntary and incriminating confessions.[64] Trial counsel failed to identify and investigate discoverable evidence demonstrating petitioner's actual innocence and reduced culpability, or argue for petitioner's innocence or reduced culpability to the jury.[65] Trial

---

Required Inquiry Into the Conflict of Interest)).

[64] See second petition, at 289 (Claim 85: Defense Counsel's Failure to Examine Officer Carter's Contemporaneous Notes of the Confession Constituted Ineffective Assistance); 303 (Claim 88: Trial Counsel Rendered Ineffective Assistance by Failing to Attack the Credibility of the Police Officers)); 305 (Claim 89: Trial counsel was Ineffective for Failing to Raise Issues Concerning the Missing-Juvenile Report)); 309 (Claim 90: Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Scientific Evidence or to Cross-Examine the Coroner Regarding the Alleged Penal Code § 288 Violation)); 313 (Claim 91: Trial Counsel Rendered Ineffective Assistance When He Failed to Impeach Cornejo Based on Favors Regularly Conferred upon Him in Exchange for His Testimony)); 314 (Claim 92: Trial Counsel Rendered Ineffective Assistance by Failing to Bring the Order from the First Trial to the Court's Attention)); 317 (Claim 93: Trial Counsel's Ineffectiveness Denied Petitioner His Right to a Speedy Trial)); 319 (Claim 94: Trial Counsel Rendered Ineffective Assistance by Failing to Use the Police Missing-Juvenile Report to Impeach Key Prosecution Testimony and Otherwise Undermine the Legality of Petitioner's Arrest)); and 289 (Claim 85: Defense Counsel's Failure to Examine Officer Carter's Contemporaneous Notes of the Confession Constituted Ineffective Assistance)).

[65] See second petition, at 298 (Claim 86: Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Evidence Regarding Alternate Suspects)); 299 (Claim 87: Trial Counsel Rendered Ineffective Assistance at the Guilt Phase as a Result of the Failure to Adequately Investigate the Identity of the Actual Killer or Killers in the 1976 Offenses)); 350 (Claim 105: Trial Counsel Rendered Ineffective Assistance by Failing to Argue Effectively to the Jury During the Guilt Phase the Applicability of the Second Degree Murder Maximum on Count One)); 355 (Claim 107: Petitioner was Denied his Right to the Assistance

counsel failed to effectively select petitioner's jury.[66]

Despite the trial court's finding that there was no felony to support a felony-murder special circumstance, trial counsel did nothing to challenge the felony-murder claim at the second trial. Trial counsel did nothing to protect petitioner from double jeopardy.[67] Trial counsel failed to protect

---

of Counsel as a Result of Trial Counsel's Failure to Investigate and Present Mental Defenses)); and 368 (Claim 110: Trial Counsel Rendered Ineffective Assistance in Failing to Argue the Concept of Lingering Doubt)).

[66] See second petition, at 319 (Claim 95: Trial Counsel Rendered Ineffective Assistance during Voir Dire)); 323 (Claim 96: Failure to Conduct an Effective Voir Dire to Ascertain Juror's Attitudes and Biases Regarding the Death Penalty Constituted Ineffective Assistance)); 328 (Claim 97 (Trial Counsel Rendered Ineffective Assistance for Failing to Excuse a Juror Who Knew One of the Witnesses)); and 331 (Claim 98 (Petitioner's Right to Effective Assistance of Counsel was Violated as a Result of Counsel's Failure to Conduct an Adequate Voir Dire)).

[67] See second petition, at 58 (Claim 8 (Petitioner's Prosecution for First-Degree Murder on Count III Violated the Prohibition against Double Jeopardy under the State and Federal Constitution)); 63 (Claim 9: Petitioner's Prosecution on Count III Violated Petitioner's Rights Under the Fifth, Sixth, Eighth and Fourteenth Amendments)); 66 (Claim 10: Petitioner was acquitted of felony-murder on Count III and retrying him under that theory violated Double Jeopardy Principles)); 71 (Claim 11: Petitioner's Constitutional Rights Were Violated by the Failure to Follow Statutory Requirements Regarding Charges of Felony-Murder)); 74 (Claim 12: Petitioner was Acquitted of Premeditated Murder in Count III and Retrying him Under that Theory Violated Double Jeopardy Principles)); 77 (Claim 13 (Trying Petitioner Under a Felony-Murder Theory for Count I Violated Double Jeopardy Since Petitioner Was Acquitted Under That Theory at the First Trial)); and 78 (Claim 14: Denial of Petitioner's Right to Counsel at the Penalty Phase of the First Trial Deprived Petitioner of Due Process at the Retrial)).

petitioner from references, before the jury, to his prior trial by both the prosecutor and trial court.[68]

Trial counsel failed to effectively represent petitioner during the guilt phase of his trial.[69] As to the 1976 murders, counsel should have challenged and impeached Jose Feliciano's testimony. Mr. Feliciano was the primary eyewitness relied upon by the prosecution and refutation of his testimony was critical to petitioner's defense. Within counsel's possession was significant evidence and inconsistent statements made by Mr. Feliciano proving that his testimony was unreliable. Within one month of the crime, Mr. Feliciano had identified at least four different men as one of the two men who he saw that night - none of whom were petitioner. (Second petition, exhibit S-A, Bell Gardens Police Report by Det. Bowers, dated 9/13/76). None of this evidence was presented at trial or developed by trial counsel. Likewise, trial counsel failed to introduce, though the evidence was in their possession, testimony indicating that the police had developed

---

[68] See second petition at 280 (Claim 79 (The Prosecutor Committed Misconduct in Commenting on Retrials)).

[69] See second petition, at 337 (Claim 102: Trial Counsel Rendered Ineffective Assistance By Failing to Impeach Dr. Choi with his Preliminary Hearing Testimony)); 340 (Claim 103: Trial Counsel Rendered Ineffective Assistance By Failing to Challenge the Statements Based on Contradictory Witness Testimony and Inconsistencies Between the Two Confessions)); 346 (Claim 104 (Trial Counsel Rendered Ineffective Assistance for Failing to Impeach Witness Jose Feliciano After He Erroneously Identified Petitioner's Photograph on Redirect at Trial)); and 354 (Claim 106: Trial Court Rendered Ineffective Assistance by Failing to Inform the Jury That the Word 'Both' in CALJIC 8.75 Should Be Understood as 'Either Or')).

leads on fourteen (14) suspects other than petitioner. (*Id.*).

As to the 1978 murder, trial counsel should have challenged the prosecution's evidence and should have introduced mental health evidence showing that it was not premeditated. Dr. Choi's testimony was inconsistent, based on faulty scientific evidence and testing, and premised on erroneous conclusions. (See second petition, exhibit P (Declaration of Thomas Rogers, M.D.)). Dr. Choi testified that the result of an anal swab test was negative for sperm, spermatozoa and two plus for acid phosphatase. Trial counsel failed to challenge the coroner's testimony that a sexual assault occurred despite the lack of material evidence. (See RT 2430). Moreover, Dr. Choi's testimony was inconsistent with his testimony during the preliminary hearing; yet, petitioner's trial counsel failed to challenge any of Dr. Choi's testimony or introduce any inconsistencies. (Second petition, at 337 (Claim 102: Trial Counsel Rendered Ineffective Assistance By Failing to Impeach Dr. Choi with his Preliminary Hearing Testimony).

As to all three murders, trial counsel should have presented readily available evidence material to mental health defenses and evidence in mitigation.[70] Petitioner has a long history of mental illness, including a

---

[70] "The evidence reasonably available to petitioner's trial counsel at both trials would have negated the *mens rea* elements of the murder charges and special circumstance allegations alleged against petitioner. Said evidence included, but was not limited to, evidence of petitioner's history of multiple head traumas, which were intentionally inflicted by his physically abusive parents and suffered during childhood and adolescent accidents;

three year hospitalization at Atascadero State Mental Hospital. Trial counsel had obtained petitioner's file from Atascadero. This evidence would have negated premeditation and deliberation. But trial counsel failed to present this readily available evidence, which was materially relevant at both the guilt and penalty phases.

Worse, trial counsel failed to obtain a full psychological evaluation of petitioner, including neuropsychological testing, based on the evidence in counsel's possession of petitioner's mental health problems. There was no tactical reason not to have such evaluations conducted as part of the preparation of this case in light of petitioner's mental health background. The absence of this information led the mental health experts to erroneously and prejudicially believe that the results of any brain examination were normal. Moreover, such evidence could have reduced petitioner's legal and moral culpability for the charged offenses and provided an independent basis on which an impartial sentencer would have concluded that the death penalty was not the appropriate sentence.

---

organic brain damage localized in the area of the temporal and occipital lobes; petitioner's history of severe abuse and victimization as a child, in a dysfunctional family headed by violent, abusive and emotionally unstable parents, that produced life-long psychic trauma; a documented clinical history dating from petitioner's early adolescence reflecting professional observation of psychiatric symptoms including auditory hallucinations, delusional thought processes, anxiety, paranoia, severe somatic physical sensations, decompensation, schizophrenia, psychosis and disassociation warranting intervention and treatment; and a history of life-long conditioning and proneness to false confessions." (See second petition, at 365).

Trial counsel failed to prepare for the penalty phase though substantial evidence in mitigation was available.[71] Trial counsel failed to locate, investigate, and present valuable evidence in mitigation.[72] Instead, trial counsel called one penalty phase witness who provided a small and inadequate glimpse of petitioner's troubled family history. Petitioner also testified and asked for the death penalty.

Presenting one witness' testimony in mitigation and petitioner's request to be executed did nothing to tell the client's story during the penalty phase. Instead, this type of testimony appears as "a strange blip" at the end of a case. (See *Hendricks v. Vasquez* (9th Cir. 1992) 974 F.2d 1099, 1110;[73] see also *Ainsworth v. Woodford* (9th Cir. 2001) 268 F.3d 868, 874

---

[71] This substantial evidence included the fact that petitioner was prematurely released from Atascadero State Hospital where he had been receiving valuable treatment; the fact that Atascadero State Hospital would not readmit him though he felt he needed further treatment; evidence of a horrific childhood; evidence of his sexual abuse as a child at the hands of trusted authority figures in his life; evidence of life-long mental illness; and evidence of mental illness at the time of the offenses.

[72] See second petition, at 358 (Claim 108 (Petitioner's Rights to Due Process and Effective Assistance of Counsel at Both Guilt and Penalty Phases, and to a Reliable Determination of Penalty, Were Violated as a Result of Failure to Investigate and Present Mitigating Penalty Phase Evidence)); second petition, at 361 (Claim 109 (Trial Counsel Rendered Ineffective Assistance for Failing to Present Mitigating Evidence in the Sentencing Phase of Trial)); and second petition, at 370 (Claim 111 (Petitioner was Denied Effective Assistance of Counsel with Respect to David Schroeder's Testimony)).

[73] In *Hendricks,* the district court found counsel to have been ineffective for putting on such a scant case for life. *Id.* The Ninth Circuit

(counsel was ineffective because the jurors "saw only glimmers of (the defendant's) history, and received no evidence about its significance vis-a-vis mitigating circumstances.")). In sum, petitioner's death sentence was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death and petitioner's trial counsel performed ineffectively in each and every facet of his capital trial.[74]

iii. Petitioner's Appellate Counsel Provided Ineffective Assistance of Counsel.

An indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court. (See *Douglas v. California* (1963) 372 U.S. 353). This right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 396; see also *Coleman v. Thompson* (1991) 501 U.S. 722, 755). As this Court noted in *Sanders*:

> If a state provides convicted criminals a first appeal of right, the federal constitutional guarantees of due process (fair procedure) and equal protection (equality among litigants) require that state to provide appellate counsel for indigent defendants. Under such circumstances, due process requires that an appellate attorney appointed by the state provide constitutionally effective legal assistance. Our Legislature has provided generally for the

---

affirmed on appeal. *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1045.

[74] See second petition, at 517 (Claim 140: Trial Counsel Rendered Ineffective Assistance).

> appointment of appellate counsel for indigents, and we have, in the past, held a criminal defendant is guaranteed the right to effective legal representation on appeal.

(*Sanders, supra,* 21 Cal.4th at 715 (citing *People v. Lang* (1974) 11 Cal.3d 134, 142; and *In re Smith* (1970) 3 Cal.3d 192, 202-203) (other citations and footnotes omitted).

In *Clark* and *Sanders*, this Court recognized that appellate and habeas counsel's failure to present all meritorious claims on appeal and in a habeas petition can constitute ineffective assistance warranting excusal of procedural default bars. (See *Clark, supra,* 5 Cal.4th at 780 ("If, therefore, counsel failed to afford adequate representation in a prior habeas corpus application, that failure may be offered in explanation and justification of the need to file another petition."); and *Sanders, supra,* 21 Cal.4th at 719 ("counsel's actions (or inactions) may be relevant to the proper application of the procedural rules that affect the availability of relief on habeas corpus.").

Here, it was constitutionally ineffective assistance for prior counsel not to bring all potentially meritorious claims during prior proceedings. (See e.g., *Murray v. Carrier* (1986) 477 U.S. 478, 496 ("right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error [] if that error is sufficiently egregious and prejudicial.")). (See traverse exhibit L (Declaration of Nolan, 3-5; and Declaration of Van Winkle, at 5-7). If prior counsel fails to perform any of the duties prescribed by this Court in capital cases on appeal and counsel's failure materially affects petitioner's chance of relief, *or presentation of a*

meritorious issue undermining his capital conviction or sentence, then a case for ineffective assistance of counsel has been made. (See *Clark, supra,* 5 Cal.4th at 780; see also *Sanders, supra,* 21 Cal.4th at 719; and *Robbins, supra,* 18 Cal.4th at 810).

> Irrespective of the ultimate success of the petition in any given case, habeas corpus counsel (or, as here, appellate counsel acting as habeas corpus counsel), as explained, ante, has the duty to conduct a reasonable investigation and to present not just actually meritorious claims (an imponderable before adjudication), but all potentially meritorious claims.

(*Sanders, supra,* 21 Cal.4th at 713 (emphasis omitted)).

Ultimately, prior appellate counsel failed to identify twenty-nine (29) potentially meritorious appellate claims for relief and include them within the opening brief on direct appeal.[75] (See traverse exhibit L (Declaration of Nolan, at 4). Prior counsel failed to present the claims because he failed to review the appellate record in detail; failed to identify triggering facts in the trial record;[76] and failed to investigate the legal basis for the claims. (*Id.*).

---

[75] Claims 11, 12, 13, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 50, 51, 52, 53, 54, 64, 74, 75, 77, 78, 83, 101, 116, 117, 124, and 125. (See traverse exhibit L (Declaration of Nolan, at 4).

[76] Each of the non-repetitive appellate claims are based on triggering facts in prior appellate counsel's possession at the time of petitioner's direct appeal in 1993. (See second petition, at 71(Claim 11 (citing the information filed by the prosecution)); 74 (Claim 12 (citing this Court's finding in *Memro I* that there was insufficient evidence of premeditated and deliberated murder)); 77 (Claim 13 (citing CT 482 and CT 486)); 122 (Claim 22 (citing RT A-294)); 123 (Claim 23 (citing RT 2439, 2457, 2459, 2872, 2875, 2963, 2964, 2965, and 2967)); 168 (Claim 34 (citing CT 322; RT A-312-3, A-312-4, A-312-5, 69, 70, 98, 996, and 998)); 172 (Claim 35 (citing RT A-312-7, RT A-312-8, RT A320, RT 76; RT 290, RT 371)); 174

In doing so, prior appellate counsel failed to fulfill their duties under this Court's policies. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, eff. June 6, 1989, mod. eff. December 21, 1992, stds).

Importantly, appellate counsel ceased investigation and development of the claims without a reasonable basis by which to determine the claims potential merit and without having earned petitioner's permission not to raise the claim. Respondent recognizes as much by repeatedly asserting that many non-repetitive appellate claims "could and should have been raised on appeal." (Return at 23 and 26). Petitioner agrees. His prior appellate counsel performed ineffectively by not including the non-repetitive appellate claims in the opening brief on direct appeal.

Petitioner recognizes that in order to establish ineffective assistance of appellate counsel, he must allege:

(Claim 36 (citing and discussing Anthony Cornejo's testimony)); 176 (Claim 37 (citing and discussing Anthony Cornejo's testimony)); 190 (Claim 42 (citing RT 2538-39; and RT 2545-48)); 194 (Claim 43 (citing RT 60, 2893-96, and 2926)); 197 (Claim 44 (citing RT 2457, 2463, 2725, 2439, and 2786)); 203 (Claim 45 (citing RT 2746 and discussing the admission of magazines)); 265 (Claim 72 (citing RT 2847)); 268 (Claim 74 (citing RT 2783-84)); 269 (Claim 75 (citing RT 2786)); 271 (Claim 76 (citing RT 2785)); 274 (Claim 77 (citing RT 2786-90, 2846-47, and 2850-51)); 278 (Claim 78 (citing RT 2791-94 and 2857)); 280 (Claim 79 (citing RT 2829)); 287 (Claim 83 (citing RT 2980)); 288 (Claim 84 (citing RT 2981-82)); 337 (Claim 101 (citing RT 378-84)); 407 (Claim 116 (citing RT 558-576, 896-903, 1032-33, and 1540-42)); 413 (Claim 117 (citing RT 2357-60, 2487, and 2827)); 441 (Claim 124 (citing RT A41, A207-A276, 101A, 7, 27, 97, 100, 110, and 298)); and 449 (Claim 125 (citing and discussing *Memro I*)).

> with specificity the facts underlying the claim that the inadequate presentation of an issue or omission of any issue reflects incompetence of counsel, i.e., that the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented ... and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants.

(*Clark, supra,* 5 Cal.4th at 780; see also *Sanders*, 21 Cal.4th at 719; and *Robbins*, 18 Cal.4th at 810). Petitioner has raised claims based on the violation of his rights arising from his retrial in violation of double jeopardy principles.[77] Petitioner has brought non-repetitive appellate claims based on the violation of his due process rights.[78] Petitioner has brought several non-repetitive appellate claims based on prosecutorial misconduct

---

[77] See second petition, at 71 (Claim 11 (Petitioner's Constitutional Rights Were Violated by the Failure to Follow Statutory Requirements Regarding Charges of Felony-Murder)); 74 (Claim 12 (Petitioner was Acquitted of Premeditated Murder in Count III and Retrying him Under that Theory Violated Double Jeopardy Principles)); and 77 (Claim 13 (Trying Petitioner Under a Felony-Murder Theory for Count I Violated Double Jeopardy Since Petitioner Was Acquitted Under That Theory at the First Trial)).

[78] See second petition, at 190 (Claim 42 (Confining Defendant to a Marked Squad Car in Full Sight of the Jury While the Jury Viewed the Crime Scene Was a Deprivation of Petitioner's Fifth Amendment, Sixth and Fourteenth Amendment Rights)); 194 (Claim 43: Shackling Petitioner in Court Deprived Him of His Fifth, Sixth, Eighth and Fourteenth Amendment Rights)); 203 (Claim 45 (Allowing the Admission of the Magazines, Photographs and Books Violated Petitioner's Eighth and Fourteenth Amendment Rights)); and 441 (Claim 124 (By Failing to Preserve a Complete Record on Appeal, the Court Deprived Petitioner's Due Process Rights and State Created Liberty Interests under the Fourteenth Amendment)).

committed in violation of his constitutional rights.[79] Several non-repetitive appellate claims are premised on errors stemming from the biased jury that served in petitioner's case.[80] Petitioner has demonstrated that several claims "would have entitled the petitioner to relief had [they] been raised and adequately presented" on direct appeal. (*Clark, supra,* 5 Cal.4th at 780).

Appellate counsel's representation fell below the generally recognized standard of care and prejudiced petitioner. (See traverse exhibit M (Declaration of Van Winkle, at 5-7). It is reasonably probable that, but

---

[79] See second petition, at 265 (Claim 72 (The Prosecutor Committed Misconduct By Misstating the Law During Argument)); 268 (Claim 74 (The Prosecutor Committed Misconduct During Guilt Phase Argument When He Took Advantage of Erroneous Instructions Regarding Count 1)); 269 (Claim 75 (The Prosecutor Committed Misconduct by Commenting on Petitioner's Sexuality and Potential Punishment)); 271 (Claim 76 (The Prosecutor Committed Misconduct by Arguing Erroneous Definitions of Second Degree Murder)); Claim 77 (The Prosecutor Committed Misconduct by Arguing Two Theories of First-Degree Murder in Count 3, in Violation of Double Jeopardy Principles)); 278 (Claim 78 (The Prosecutor Committed Misconduct by Unconstitutionally Shifting the Burden of Proof Onto Petitioner and His Trial Attorney)); 280 (Claim 79 (The Prosecutor Committed Misconduct in Commenting on Retrials)); 287 (Claim 83 (The Prosecutor Committed Prosecutorial Misconduct in Penalty Phase Argument When He Argued Both the Felony-Murder Theory and the Premeditated and Deliberated Murder Theory); and 288 (Claim 84 (The Prosecutor Committed Prosecutorial Misconduct in Penalty Phase Argument With His Comments About Petitioner's Testimony)).

[80] See second petition, at 407 (Claim 116 (The Trial Court Was Partial in its Treatment of Potential Jurors During Jury Selection. The Jury Selected Was Biased in Favor of the Death Penalty and Violated Petitioner's Sixth and Fourteenth Amendment Rights to a Fair and Unbiased Jury)); and 413 (Claim 117 (Informing The Jury That There Had Been a Previous Trial Violated Petitioner's Right to a Fair Trial)).

for the foregoing deficient performance by appellate counsel, this Court's previous holdings with regard to petitioner's prior claims would have been different. As a result, petitioner was denied his rights to due process, effective assistance of counsel and a fair and reliable sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. In addition, petitioner should not be penalized for court-appointed counsel's ineffective assistance and each of the claims contained herein should be resolved on its merits.

iv. Petitioner's Prior Habeas Counsel Provided Ineffective Assistance of Counsel.

This Court has repeatedly recognized that habeas counsel in a capital case have a host of duties to perform in their representation of petitioner. (See *Clark, supra,* 5 Cal.4th at 780; *Robbins, supra,* 18 Cal.4th at 775; *Gallego, supra,* 18 Cal.4th at 835; and *Sanders, supra,* 21 Cal.4th at 719). This Court has also found that due process principles compel the conclusion that capital habeas counsel's failure to perform competently excuses the application of procedural default laws to successive and delayed petitions. (See *Id.* at 719). In *Sanders*, this Court outlined the situations where habeas counsel can be deemed ineffective:

1. Counsel fails to conduct diligent review of trial counsel's files, the trial record and the appellate briefs;

2. Counsel fails to reasonably conclude there are no triggering facts that would lead one to suspect the existence of issues of potential

merit;

3. Counsel illegally and unethically ceases his or her efforts at the wrong time;

4. Counsel fails to investigate existing triggering facts;

5. Counsel terminates his or her efforts, without a diligent and thorough investigation;

6. Counsel unreasonably concludes no potentially meritorious grounds exist for collateral relief;

7. Counsel prepares and files a petition raising claims that are not potentially meritorious; and

8. Counsel uncovers grounds to support a potentially meritorious claim for relief, but he or she does not prepare and timely file a petition for a writ of habeas corpus.

(*Sanders, supra,* 21 Cal. 4th at 708 (citations and footnotes omitted)).

If the failure of prior counsel to perform any of these duties materially affects petitioner's chance of relief, *or presentation of a meritorious issue undermining his capital conviction or sentence,* then a case for ineffective assistance of counsel has been made. (See *Clark, supra,* 5 Cal.4th at 780; see also *Sanders*, 21 Cal.4th at 719; and *Robbins*, *supra*, 18 Cal.4th at 810).

> Irrespective of the ultimate success of the petition in any given case, habeas corpus counsel (or, as here, appellate counsel acting as habeas corpus counsel), as explained, *ante*, has the duty to conduct a reasonable investigation and to present not just actually meritorious claims (an imponderable before adjudication), but all potentially meritorious claims.

(*Sanders, supra,* 21 Cal.4th at 713 (italics in original)).

Here, petitioner's prior habeas counsel failed to present forty-nine (49) potentially meritorious claims in the first petition.[81] (See traverse exhibit L (Declaration of Nolan, at 4). Petitioner's prior habeas counsel failed to conduct a diligent review of the appellate record, case files indicating the existence of extrinsic evidence, and failed to identify triggering facts for habeas claims of error.[82] In doing so, prior habeas

---

[81] The non-repetitive habeas claims include: Claims 14, 69, 71, 85, 86, 87, 88, 89, 90, 91, 92, 94, 99, 100, 107, 108, 109, 110, 111, 113, 114, 115, 118, 119, 120, 126, 127, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143.

[82] Claim 14 (citing (1979 RT 894-941); Claim 46 (citing RT 2504-14); Claim 69 (citing second petition exhibit S-H); Claim 71 (citing second petition exhibits F, H, I, J, K); Claim 85 (citing second petition, exhibit S-B); Claim 86 (second petition exhibit S-A); Claim 87 (citing second petition exhibits S-A, G and H); Claim 88 (citing RT 304-54, 2143, and 2464); Claim 89 (second petition exhibits S-H and S-I); Claim 90 (citing second petition exhibit K); Claim 91 (citing second petition exhibits D and F); Claim 93 (citing CT 126-128, 190, 195-96, 288-289; and RT 2); Claim 94 (citing second petition exhibits S-H and S-I; Claim 95 (citing CT 384; RT 569, 609, 636, 652, 673, 734, 762, 797, 829, 890, 901, 910, 946, 958, 963, 987, 1027, 1055, 1079, 1092, 1152, 1171, 1194, 1211, 1231, 1255, 1356, 1370, 1380, 1404, 1432, 1445, 1454, 1465, 1491, 1514, 1536, 1546, and 1577); Claim 96 (citing RT 801, 804, 1031, 1135, 1173, 1288, 1542, and 1654); Claim 97 (citing RT 2339-50, 2948, 2504, and 2521); Claim 98 (citing second petition exhibit BB); Claim 99 (citing 1979 RT 894-949); Claim 100 (citing Jose Feliciano's testimony and counsel's interview with Mr. Feliciano); Claim 102 (citing Preliminary Hearing Transcript 9-10, RT 2430, 2786, and 2845-51); Claim 103 (citing second petition exhibit S-A); and RT 2314-29); Claim 104 (citing second petition exhibit S-A (Bell Gardens Police Report by Det. Bowers, dated 9/13/76; RT 2320-31, and 2807); Claim 105 (citing RT 2766, 2798-800, and 2824);

counsel failed to fulfill their duties under this Court's policies. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death

---

Claim 106 (citing RT 2722 and 2768); Claim 107 (citing second petition exhibits M-X); Claim 108 (citing second petition exhibits M-X); Claim 109 (citing RT 2942, 2969, and second petition exhibits S - AA); Claim 110 (RT 2941, 2969, and 2985); Claim 111 (citing Claim 81); Claim 112 (citing second petition exhibit Q); CTS I 41-44, RT 315-35, 472, 513, and 524-559); Claim 113 (citing Claim 112); Claim 114 (citing Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process* (1984) 8 Law & Hum. Behav. 121, 128; and Haney, *Examining Death Qualification: Further Analysis of the Process Effect* (1984) 8 Law & Hum. Behav. 133, 151); Claim 115 (citing CT 397, RT 217-18, 2107, and 2339-50); Claim 119 (citing second petition exhibit CC); Claim 120 (citing second petition exhibits AA and CC; Claim 126 (discussing ex-Chief Justice Malcolm Lucas' and Attorney General Daniel Lungren's relationship); Claim 127 (discussing the lack of procedures employed by this Court for review of capital convictions); Claim 128 (citing and discussing the lack of procedures employed under Cal. Pen. Code section 190.3); Claim 129 (citing RT 2903-2904); Claim 130 (citing Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U.L. Rev. 1283, 1288); Claim 131 (citing Cal. Penal Code §3604 and *Fierro v. Gomez* (N.D. Cal. 1994) 865 F.Supp. 1387); Claim 132 (citing *Lackey v. Texas* (1995) 514 U.S. 1045); Claim 133 (citing Article VI, Section 1 of the ICCPR); Claim 134 (citing Customary International Law); Claim 135 (citing Universal Declaration on Human Rights, GA Res. 217A (III), U.N. GAOR, 3d Sess. art. 3, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174-75 (entered into force Mar. 23, 1976); ICCPR, art. 6; American Convention on Human Rights, art. 4, 1144 U.N.T.S. 123; and African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4); Claim 136 (citing Article 7 of the ICCPR); Claim 137 (citing Article 14 of the ICCPR); Claim 138 (citing Article 14(1)(1) of the ICCPR); Claim 139 (citing American Convention on Human Rights, Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3; and Thomas Buergental, *International Human Rights in a Nutshell* (2d ed. 1995) 220); Claims 140-143 (adopting and incorporating by reference all facts and claims set forth elsewhere in this petition).

(eff. June 6, 1989; mod. eff. December 21, 1992, stds)).

Prior habeas counsel failed to reasonably investigate petitioner's case. Petitioner's prior habeas counsel failed to include all potentially meritorious habeas claims for relief in his first petition. (See traverse exhibits H, L, and M (Declarations of Giannini, Nolan, and Van Winkle)). Prior counsel also failed to develop thirty (30) exhibits included within the second petition underlying several claims of error.[83] Respondent recognizes as much by asserting that "nearly all" petitioner's non-repetitive claims are based on facts that "were available and discoverable by him or his attorneys, at the time of his earlier habeas petition." (Return at 49). Respondent fails to understand that prior counsel's failure to develop the non-repetitive claims, despite possession of the factual and legal bases for the claim, proves that prior counsel performed ineffectively. (See *Sanders, supra,* 21 Cal.4th at 708).

Petitioner has shown that his prior habeas counsel performed

---

[83] See Claim 15 (citing second petition exhibits B-K); Claim 19 (Citing second petition exhibits G and H); Claim 20 (citing second petition exhibits C and D); Claim 68 (citing second petition exhibit CC); Claim 71 (citing second petition exhibits F-K); Claim 90 (citing second petition exhibit K); Claim 91 (citing second petition exhibits D and F); Claim 98 (citing second petition exhibit BB); Claim 102 (citing second petition exhibit P); Claim 108 (citing second petition exhibits M - X); Claim 109 (citing second petition exhibits S - AA); Claim 112 (citing second petition exhibit Q); Claim 118 (citing second petition exhibit CC); Claim 119 (citing second petition exhibit CC); Claim 120 (citing second petition exhibit AA); Claim 121 (citing second petition exhibit G, H, and M); and Claim 125 (citing second petition exhibit DD).

deficiently by failing to present eighty-seven (87) non-repetitive claims, seventy-one (71) of which he concedes should have been raised. (See traverse exhibit L and M (Declaration of Nolan, at 4; and Declaration of Van Winkle, at 5-7). Petitioner recognizes that in order to establish ineffective assistance of habeas counsel, he must allege that the inadequate presentation of an issue or omission of any issue and "that the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition." (*Clark, supra,* 5 Cal.4th at 780; see also *Sanders*, 21 Cal.4th at 719; and *Robbins*, 18 Cal.4th at 810). He has done so. Petitioner's non-repetitive claims are premised on: 1) state misconduct committed in violation of the due process clause of the Fifth Amendment, in the form of withheld or destroyed evidence;[84] 2) violations of petitioner's Sixth Amendment right to effective assistance of counsel;[85]

---

[84] See second petition, at 205 (Claim 46 (The Trial Court Erred by Overruling Trial Counsel's Objection for a Failure to Comply with a Discovery Order by the Bell Gardens Police Department and for Allowing it to Be Introduced as Surprise Testimony, in Violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment Rights by Depriving Him of a Fair Trial)); 253 (Claim 69 (The Prosecution's Presentation of Facts was Directly Contrary to Those Contained in the Missing-Juvenile Report)); and 256 (Claim 71 (The Prosecutor Committed Misconduct in Violation of Petitioner's Constitutional Rights in Failing to Disclose Impeachment Evidence Regarding Jailhouse Snitch Anthony Cornejo)).

[85] See second petition, at 78 (Claim 14 (Denial of Petitioner's Right to Counsel at the Penalty Phase of the First Trial Deprived Petitioner of Due Process at the Retrial); 289 (Claim 85 (Defense Counsel's Failure to Examine Officer Carter's Contemporaneous Notes of the Confession Constituted Ineffective Assistance)); 298 (Claim 86 (Trial Counsel

Rendered Ineffective Assistance by Failing to Investigate and Present Evidence Regarding Alternate Suspects); 299 (Claim 87 (Trial Counsel Rendered Ineffective Assistance at the Guilt Phase as a Result of the Failure to Adequately Investigate the Identity of the Actual Killer or Killers in the 1976 Offenses)); 303 (Claim 88 (Trial Counsel Rendered Ineffective Assistance by Failing to Attack the Credibility of the Police Officers)); 305 (Claim 89 (Trial counsel was Ineffective for Failing to Raise Issues Concerning the Missing-Juvenile Report)); 309 (Claim 90 (Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Scientific Evidence or to Cross-Examine the Coroner Regarding the Alleged Penal Code § 288 Violation)); 313 (Claim 91 (Trial Counsel Rendered Ineffective Assistance When He Failed to Impeach Cornejo Based on Favors Regularly Conferred upon Him in Exchange for His Testimony)); 317 (Claim 93 (Trial Counsel's Ineffectiveness Denied Petitioner His Right to a Speedy Trial)); 319 (Claim 94 (Trial Counsel Rendered Ineffective Assistance by Failing to Use the Police Missing-Juvenile Report to Impeach Key Prosecution Testimony and Otherwise Undermine the Legality of Petitioner's Arrest)); 320 (Claim 95 (Trial Counsel Rendered Ineffective Assistance during Voir Dire)); 323 (Claim 96 (Failure to Conduct an Effective Voir Dire to Ascertain Juror's Attitudes and Biases Regarding the Death Penalty Constituted Ineffective Assistance)); 328 (Claim 97 (Trial Counsel Rendered Ineffective Assistance for Failing to Excuse a Juror Who Knew One of the Witnesses)); 331 (Claim 98 (Petitioner's Right to Effective Assistance of Counsel was Violated as a Result of Counsel's Failure to Conduct an Adequate Voir Dire)); 332 (Claim 99 (Petitioner was Denied his Right to the Assistance of Counsel Under the Sixth Amendment by the Trial Court's Denial of his Request to be Represented by Counsel to Litigate the Critical Proceedings Challenging the Inadequate Representation by his Appointed Trial Counsel, Prior to and After the Guilt Phase of the Trial)); 336 (Claim 100 (Petitioner's Rights were Violated as a Result of Counsels' Conflict of Interest in Being Essential Witnesses in the Case); 337 (Claim 102 (Trial Counsel Rendered Ineffective Assistance By Failing to Impeach Dr. Choi with his Preliminary Hearing Testimony)); 340 (Claim 103 (Trial Counsel Rendered Ineffective Assistance By Failing to Challenge the Statements Based on Contradictory Witness Testimony and Inconsistencies Between the Two Confessions)); 346 (Claim 104 (Trial Counsel Rendered Ineffective Assistance for Failing to Impeach Witness Jose Feliciano After

3) violations of petitioner's right to an impartial jury; 4) juror misconduct committed in violation of the Sixth and Fourteenth Amendments;[86] 5) petitioner's incompetence to stand trial;[87] and 6) violation of petitioner's

---

He Erroneously Identified Petitioner's Photograph on Redirect at Trial)); 350 (Claim 105 (Trial Counsel Rendered Ineffective Assistance by Failing to Argue Effectively to the Jury During the Guilt Phase the Applicability of the Second Degree Murder Maximum on Count One)); 354 (Claim 106 (Trial Court Rendered Ineffective Assistance by Failing to Inform the Jury That the Word 'Both' in CALJIC 8.75 Should Be Understood as 'Either Or')); 355 (Claim 107 (Petitioner was Denied his Right to the Assistance of Counsel as a Result of Trial Counsel's Failure to Investigate and Present Mental Defenses); 358 (Claim 108 (Petitioner's Rights to Due Process and Effective Assistance of Counsel at Both Guilt and Penalty Phases, and to a Reliable Determination of Penalty, Were Violated as a Result of Failure to Investigate and Present Mitigating Penalty Phase Evidence)); 361 (Claim 109 (Trial Counsel Rendered Ineffective Assistance for Failing to Present Mitigating Evidence in the Sentencing Phase of Trial)); 368 (Claim 110 (Trial Counsel Rendered Ineffective Assistance in Failing to Argue the Concept of Lingering Doubt)); and 370 (Claim 111 (Petitioner was Denied Effective Assistance of Counsel with Respect to David Schroeder's Testimony)).

[86] See second petition, at 371 (Claim 112 (Petitioner was Denied an Impartial Jury Drawn from a Fair Cross-Section of the Community)); 401 (Claim 113 (Petitioner's Rights were Violated as a Result of Extreme Under Representation of Hispanics and African-Americans in the Jury Pool)); 401 (Claim 114: The Denial of A Fair Cross-Section of Jurors in the Guilt Phase Violated Petitioner's Constitutional Rights)); and 404 (Claim 115 (Juror Zinn Committed Juror Misconduct in Violation of Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment Rights).

[87] See second petition, at 417 (Claim 119 (Petitioner was Mentally Incompetent to Stand Trial)); and 422 (Claim 120 (Petitioner Was Deprived of His Right of Access to and Assistance of Competent Mental Health Experts, in Violation of *Ake v. Oklahoma*)).

rights under the international law and the United States Constitution.[88] In sum, these claims detail the multitude of errors that, cumulatively, rendered petitioner's capital proceedings fundamentally unfair.[89]

Prior habeas counsel's performance fell below the generally recognized standard of care and prejudiced petitioner. (See traverse exhibit M (Declaration of Van Winkle, at 5-7). As a result, petitioner was denied his rights to due process, effective assistance of counsel and a fair and reliable sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. In addition, petitioner should not be penalized for court-appointed counsel's ineffective assistance and each of the claims contained herein should be resolved on its merits. To the extent any of petitioner's claims were previously available, it was constitutionally ineffective assistance of counsel not to bring these claims during prior proceedings. (*See, e.g., Murray v. Carrier* (1986) 477 U.S. 478, 496 ("right to effective assistance of counsel . . . may in a particular case be violated by

---

[88] See second petition, at 450 (Claim 127 (This Court Failed to Conduct a Constitutionally Adequate Review of Petitioner's Case and Institutionally Does Not Conduct Such Review in Capital Cases)); 490 (Claim 132 (Execution of Petitioner after Prolonged Confinement Violates the Eighth Amendment Prohibition of Cruel and Unusual Punishment)); and 510 (Claim 137 (Petitioner's Conviction and Sentence Violate His Right to Due Process)).

[89] See second petition, at 517 (Claim 141 (Appellate Counsel Rendered Ineffective Assistance)); 518 (Claim 142 (Habeas Counsel Rendered Ineffective Assistance)); and 519 (Claim 143 (Cumulative Constitutional Error Requires a Reversal of the Convictions and Death Sentence)).

even an isolated error [] if that error is sufficiently egregious and prejudicial"). Accordingly, the ineffective assistance of prior court appointed counsel in this case justifies the delayed presentation of the second petition.

v. Petitioner Has Suffered From The Serial Ineffective Assistance of Trial, Appellate, and Prior Habeas Counsel.

Respondent wrongly asserts that Petitioner's case for good cause is "[s]everely lacking in specificity...." (Return, at 33). Petitioner has in fact, "included the necessary allegations [and] made the proper showing" and has not proffered inadequate justifications. (Contra *id.* at 34). In his second petition, petitioner attributed "any delay [] to the ineffectiveness of prior appellate and habeas counsel appointed by this Court to represent Mr. Reno." (Second petition, at 13). Petitioner noted: "To the extent that claims should have been raised on direct appeal or in the initial habeas petition, petitioner was denied the effective assistance of appellate and habeas counsel appointed by this Court." (*Id.*). In the second petition, petitioner also asserted:

> Present counsel learned of the bases for relief alleged in this petition during this time period and the claims have been presented as quickly as possible after the legal and factual bases for them became known. Petitioner was unable to raise issues contained in this petition at an earlier date because former counsel, appointed by this Court, failed to raise these issues on direct appeal or in the previous state habeas corpus action....The only reason these claims were not raised on appeal or in the first habeas petition is because of the ineffectiveness of prior counsel appointed by this Court.

(Second petition, at 18-19).

Respondent incorrectly argues that petitioner has not proven that prior appellate and habeas counsel's decision not to include the eighty-seven (87) non repetitive and potentially meritorious claims on direct appeal, or in the first petition, was premised on their "reasonabl[e] conclu[sion] that they were lacking [] potential merit or had been forfeited or waived." (Return, at 32). Respondent also errs in arguing that prior counsel's decision not to bring these claims was not premised on a "strategic choice." (Contra *id.*, at 32).[90] Prior counsel failed to identify the factual and legal basis of the non-repetitive claims, and admitted that, had he identified the claims, they would have been raised in the first petition. (See traverse exhibit L (Declaration of Nolan, at 3-4). Prior counsel is clear that the omission of the claims was not a "strategic choice." (*Id.*).

By this traverse, petitioner has shown that, in failing to raise all the non-repetitive claims, prior counsel failed to:

1. Conduct a diligent and thorough review of trial counsel's files,

---

[90] The fact that petitioner's appellate and prior habeas counsel was the same attorney further substantiates his claim that prior counsel performed ineffectively. Appellate counsel failed to include potentially meritorious appellate claims in his opening brief. He likewise failed to include those claims in his first petition. Similarly, since prior appellate counsel failed to identify on direct appeal triggering facts leading to potentially meritorious claims, he failed to conduct investigation into those claims while composing the first petition. Thus, here, because prior appellate and habeas counsel was one in the same, petitioner never received the benefit, until current counsel's appointment, of an independent review of his case and the claims of error affecting his convictions and sentence from separate appellate and habeas counsel.

the trial record, the appellate briefs, and other matters relative to petitioner's capital trial and appeals. (*Sanders, supra,* 21 Cal.4th at 708);

2. Identify triggering facts that would lead to potentially meritorious appellate claims. (*Sanders, supra,* 21 Cal.4th at 708);

3. Conduct reasonable investigation into claims of error premised on triggering facts available in the appellate record. (*Sanders, supra,* 21 Cal.4th at 708);

4. Present all potentially meritorious appellate claims. (*Sanders, supra,* 21 Cal.4th at 707);

5. Identify triggering facts that would lead to potentially meritorious habeas claims. (*Sanders, supra,* 21 Cal.4th at 708);

6. Conduct reasonable investigation into habeas claims premised on triggering facts outside the appellate record. (*Sanders, supra,* 21 Cal.4th at 708);

7. Timely present all potentially meritorious habeas claims. (*Sanders, supra,* 21 Cal.4th at 707);

8. Adequately present all potentially meritorious appellate and habeas claims. (*Clark, supra,* 5 Cal.4th at 775);

9. Seek funding to investigate claims premised on triggering facts in the record. (*Gallego, supra,* 18 Cal.4th at 624); and

10. Failed to fulfill their duties under this Court's policies. (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, eff. June 6, 1989, mod. eff. December 21, 1992, stds.).

There was no strategic purpose for appellate and habeas counsel's ineffective decisions, and petitioner was prejudiced by prior counsel's failings. Counsel's performance fell below any objective standard of reasonableness under prevailing professional norms. (See traverse exhibit M (Declaration of Van Winkle, at 5-7). Moreover, because petitioner's current petition includes meritorious claims that undermine his capital convictions and death sentence, particularly claims based on trial counsel's deficient performance, prior appellate and habeas counsel performed ineffectively and materially prejudiced petitioner's chances of earning relief. But for counsel's failings, petitioner would never have been sentenced to death or would have had his convictions and sentence reversed on appeal or in habeas.

The failure to file meritorious claims in prior pleadings, constitutes a violation of the petitioner's right to "assume that counsel is competent and is presenting all meritorious claims," (*Clark, supra,* 5 Cal.4th at 780), and acts as "good cause for delayed presentation of claims." (*Sanders, supra,* 21 Cal.4th at 709). Petitioner has demonstrated good cause based on the ineffective assistance of his appellate and prior habeas counsel. Petitioner has shown that prior counsel failed to identify triggering facts, failed to investigate potentially meritorious claims and failed to timely include several meritorious claims within the prior petition all required by this Court in its appointment policies. (See generally traverse exhibits H and L (Declarations of Giannini, and Nolan)). As such, this Court need not

conduct timeliness review of each claim, but instead may review all the non-repetitive claims included within Petitioner's second petition. (*Sanders, supra,* 21 Cal.4th at 721 n. 13).

c. Petitioner Has Shown Other Grounds, in Addition to Ineffective Assistance of Prior Habeas Counsel, Constituting Good Cause And Warranting the Delayed Filing of His Petition.

Even if this Court finds that prior counsel was not ineffective, petitioner can establish other grounds constituting good cause and justifying the delayed presentation of his claims to this Court. Petitioner has supplied specific and particularized details meeting this Court's requirement, which "explain and justify any substantial delay in presenting a claim." (*Clark, supra,* 5 Cal.4th at 783 (citing *Swain, supra,* 34 Cal.2d at 304)).

First, as to all non-repetitive claims "the factual basis for a claim was unknown to the petitioner and he had no reason to believe that the claim might be made." (*Clark, supra,* 5 Cal.4th at 775; see traverse exhibit K (Declaration of Reno, at 1-2). Petitioner's current counsel learned of the factual and legal basis of each claim after completing the first and second phases in the development of the petition and reading all the case materials and investigating triggering facts. (Compare *Sanders, supra,* 21 Cal.4th at 709; with traverse exhibit H (Declaration of Giannini, at 3-8). Petitioner learned of the factual basis of the claims following reasonable investigation and completion of the draft of the petition in April 2003. (See traverse exhibits I and K (Declaration of Stetler, at 3-4; and Declaration of Reno, at

1-2). Petitioner's claims here are not "patently deficient" and petitioner has proffered more than general allegations. (*See* return, at 34).

Second, through no fault of his own, petitioner was unable to present several claims and has now asserted those claims as promptly as reasonably possible. (*Clark, supra,* 5 Cal.4th at 775). Petitioner received ineffective assistance from court-appointed counsel and can justify the delayed presentation of his claims accordingly. (*See Id.* at 792 (citing and discussing *Watlington, supra,* 491 Pa. at 245)). Neither petitioner or his prior counsel were previously aware of the factual and legal basis of all eighty-seven of the non-repetitive claims prior to current counsel's preparation of the second petition. (See traverse exhibits L and K (Declaration of Nolan, at 3-4; and Declaration of Reno, at 1-2). As soon as petitioner became aware of the claims, he directed current counsel to file a second petition for writ of habeas corpus (see *Id.*), which counsel did after perfecting a *prima facie* case for each claim. (See traverse exhibit L (Declaration of Thomson, at 3-4).

Third, petitioner delayed the presentation of his petition until a *prima facie* case for all his potentially meritorious claims could be presented. (See traverse exhibits I (Declaration of Thomson, at 3-4). Thus, petitioner's case is not "patently deficient." (Return, at 34). Upon completion of the first and second phases of petition development, research and investigation, on April 23, 2003 Mr. Giannini delivered to Mr. Thomson a draft federal petition. (See traverse exhibits H (Declaration of Giannini, at 3-11). Mr.

Thomson and Mr. Stetler then developed and prepared the draft state exhaustion petition, completing the third phase of petition development, and submitted the final version to this Court on May 10, 2004. (See traverse exhibits I and J (Declaration of Thomson, 2-5; and Declaration of Stetler, at 2-5).

Respondent alleges that petitioner waited to present his second petition until he "could conduct a federally funded plenary investigation in conjunction with his preparation of the federal habeas." (Return, at 34). Without a basis, respondent says that petitioner has been conducting ongoing "federally funded [] investigation." (*Id.*). Respondent tries to fault petitioner for not asserting "that certain claims were perfected and then delayed for good cause pending his completion of an ongoing investigation into any other matter." (*Id.*, at 35 (citation omitted)). Contrary to respondent's assertions, petitioner did not use "[the] preparation of the federal habeas [petition] [to] explain[] []or justif[y] the failure to include the claims in the prior [state] habeas corpus petition." (*Id.*, at 34 (citations omitted)).

Instead, as petitioner has explained, current counsel's preparation revealed prior appellate and habeas counsel's failure to conduct reasonable investigation and raise "all potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780). The second petition was filed as soon as reasonably possible, and any delay is attributable to the development of *a prima facie* case for each of the one-hundred-forty-three (143) claims in the petition and

the time necessary to compose and file a petition according to this Court's rules. Respondent's conflicting assertions cannot stand in the face of proof, from counsels' declarations, that up until submission of the second petition, petitioner was investigating and developing a *prima facie* case for claims of error premised on triggering facts in and outside the record that undermined his capital conviction and sentence. Like in *Sanders*, this Court should:

> resolve this issue on the pleadings and simply accept the assertions in counsel's sworn declaration. Our resolution of this issue on the pleadings is consistent with our decision in *Robbins, supra*, 18 Cal.4th 770, in which, faced with conflicting allegations in the respondent's return and the petitioner's traverse regarding when the petitioner learned of the factual basis of a claim, we resolved the issue on the pleadings and accepted the petitioner's sworn statements. (*Id.* at 798-799.).

(*Sanders, supra,* 21 Cal.4th at 714).

Respondent wrongly accuses petitioner of conducting "a fishing expedition." (See return at 35). Present counsel has not done so and has only focused on the claims in petitioner's case that are potentially meritorious. Nor have counsel wasted resources. Petitioner recognizes that, in the past, this Court has suggested that counsel should "judiciously narrow" the set of claims presented in a petition. (*Sanders, supra*, 21 Cal.4th at 709). Petitioner recognizes that this Court will not:

> consider on the merits successive petitions attacking the competence of trial or prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages.

(*Clark, supra,* 5 Cal.4th at 780). To put it conversely, petitioner recognizes that "[c]ounsel has no obligation to prepare and file a petition for a writ of habeas corpus raising claims that are not even potentially meritorious." (*Sanders, supra,* 21 Cal.4th at 708 (emphasis omitted)).

Here, however, current counsel has only presented claims of "potential[] merit[]" that prior counsel failed to raise on direct appeal or in the first petition. (See traverse exhibits H, I, and M (Declaration of Giannini, at 4; Declaration of Thomson, at 4; and Declaration of Van Winkle, at 5-6). Indeed, had they been raised earlier, this Court would have already decided them on appeal and in habeas. Similarly, petitioner has identified the triggering facts and laws underlying each potentially meritorious claim that prior counsel failed to identify. Moreover, petitioner's non-repetitive claims do not lack "potential[] merit[]." (Contra return, at 35). Petitioner's prior habeas counsel failed to identify the legal basis for the claims or ceased investigation and development of the claims before determining their potential merit.

Third, petitioner has not taken any "unexplained delays or intervals between investigations." (Contra return, at 34 (citation omitted)). This is tacitly proven by the fact that respondent's conclusory allegation fails to specify any particular delay. Since their appointment, petitioner's counsel have investigated potentially meritorious claims of error. There has been no delay in the investigation and counsel filed the second petition as soon as reasonably and practically possible. In light of petitioner's diligence, he has

justified the delayed presentation of these claims and good cause for exemption of his petition from this Court's procedural default laws has been shown.

6. The Procedural Dismissal of Petitioner's Claims Will Result in a Miscarriage of Justice in His Case.

Even if a petition is filed with substantial delay and without justification for the delay, this Court will reach the merits of a claim if it qualifies under one of four "miscarriage of justice" exceptions listed in *Clark, supra,* 5 Cal.4th 797-98. A case is said to be premised on a miscarriage of justice if the petitioner demonstrates:

> (I) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner;
>
> (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted;
>
> (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or
>
> (iv) that the petitioner was convicted or sentenced under an invalid statute.

(*Robbins, supra,* 18 Cal.4th at 780-781 (quoting *Clark, supra,* 5 Cal.4th at 797-98)).[91]

---

[91] When assessing the first three exceptions, it is assumed that a federal constitutional error is stated. (*Robbins, supra,* 18 Cal.4th at 811-12). However, this Court "will not decide whether the alleged error actually constitutes a federal constitutional violation. Instead, we shall assume, for the purpose of addressing the procedural issue, that a federal constitutional

In his second petition, petitioner alleged that his claims for relief came within several miscarriage of justice exceptions.[92] Prior appellate and habeas counsel failed to present potentially meritorious claims premised on fundamental constitutional error. Trial counsel's ineffective assistance led to a grossly inadequate portrait of petitioner during the penalty phase.[93] Moreover, petitioner was sentenced to death under several invalid statutes

---

error is stated, and we shall find the exception inapposite if, based upon our application of state law, it cannot be said that the asserted error "led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner." (*Id.* (citing *Clark, supra*, 5 Cal.4th at 797)).

[92] *See* second petition, at 20 ("Even if this Court finds there has been unjustified delay in filing this second petition, this case fits within several exceptions to the general rule against delayed or successive petitions as set forth in *Clark, supra,* 5 Cal 4th at 750. First, petitioner's claims demonstrate that a fundamental miscarriage of justice occurred. These errors of constitutional magnitude led to a trial so fundamentally unfair that no reasonable juror would have convicted or sentenced petitioner to death in the absence of these errors.").

[93] *See* second petition, at 20 ("Second, because of these errors, [petitioner] was sentenced to death by a jury that had such a "grossly misleading profile" of him that, absent the errors and omissions raised here, "no reasonable judge or jury would have imposed a sentence of death." (*Clark, supra,* 5 Cal.4th at 798). Here, it can be said: "the picture of the defendant painted by the evidence at trial . . . differ[s] so greatly from his actual characteristics that . . . no reasonable judge or jury would have imposed the death penalty had it been aware of defendant's true personality or characteristics." (*Id.* at n. 34). Thus, the claims presented should "be considered on their merits even though presented for the first time in a successive petition." (*Id.*)).

under the California and United States Constitutions.[94] Petitioner's claims should be heard because refusal to do so would constitute a miscarriage of justice.

a. Several of Petitioner's Claims Are Premised on Error of Sufficient Constitutional Magnitude to Create a Fundamentally Unfair Trial And Absent Those Errors No Reasonable Judge or Jury Would Have Convicted Petitioner.

Respondent incorrectly argues that "petitioner has alleged no facts demonstrating a fundamental miscarriage of justice." (Return, at 36). Respondent is the one who is "conclusory" in asserting that petitioner's claims of error do not rest on violations of his constitutional rights and did

---

[94] See second petition, 22- 23 ("Petitioner's confinement is unlawful, unconstitutional and void, in that his conviction and death sentence were unlawfully and unconstitutionally imposed in violation of his rights to: notice, due process, liberty, fair trial, present a defense, unbiased jury, jury trial, effective assistance of counsel, heightened capital case due process, reliable and reviewable guilt determination, individualized, reliable and reviewable penalty determination, fairness in capital case sentencing, the prohibition against cruel and unusual punishments, and the prohibition against death biased proceedings, all constituting arbitrary and unreasonable decision making. Abrogation of these rights is in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, Article I, §§1, 7, 13, 15, 16 and 17 of the California Constitution, and statutory and decisional law of the State of California and the Supreme Court. (See e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Drope v. Missouri* (1975) 420 U.S. 162, 172, 181; *Pate v. Robinson* (1966) 383 U.S. 375, 387; *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084; *People v. Laudermilk* (1967) 67 Cal.2d 272, 282; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Duncan v. Louisiana* (1968) 391 U.S. 145, 147-158; *Strickland v. Washington* (1984) 466 U.S. 688, 694; *Coy v. Iowa* (1988) 487 U.S. 1012, 1015-1020; *Ake v. Oklahoma* (1985) 470 U.S. 68, 83; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.").

not lead to a fundamentally unfair trial. A review of the second petition demonstrates the necessary facts and non-conclusory allegations to substantively review petitioner's claims. Petitioner has demonstrated that his trial was rife with constitutional error "of such magnitude as to lead to a trial that was so fundamentally unfair that no reasonable juror would have convicted him in the absence of the error." (Contra *id.* at 37).

In the second petition, petitioner included eighteen (18) non-repetitive appellate claims premised on fundamental constitutional error that strikes at the heart of the trial process.[95] (See *Harris, supra*, 5 Cal.4th at 826-836). Additionally, when all of petitioner's non-repetitive appellate claims are viewed cumulatively, the errors likewise strike at the heart of the trial. In addition, petitioner has presented forty-two (42) non-repetitive habeas claims that include constitutional errors that are fundamental in nature.[96] Petitioner has thus made a sufficient showing demonstrating that errors occurring at his trial struck at the core of the trial process and that, in their absence, no reasonable juror would have convicted him or voted for a sentence of death. When all of petitioner's non-repetitive habeas claims are viewed cumulatively, the errors fundamentally upset the trial process. In

---

[95] See Claims 11, 12, 13, 42, 43, 45, 72, 74, 75, 76, 77, 78, 79, 83, 84, 116, 117, and 124.

[96] The non-repetitive habeas claims that are premised on fundamental errors include: Claims 14, 46, 69, 71, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 119, 120, 127, 132, 137, 141, 142, and 143.

the absence of these errors, no reasonable jury would have convicted petitioner of the capital homicides, special circumstance, or sentenced him to death.

b. Petitioner is Actually Innocent of the Crimes of Which He Has Been Convicted.

Petitioner is actually innocent of the 1976 killings and has demonstrated his reduced culpability as to the 1978 killing.[97] Petitioner has submitted evidence of his actual innocence and reduced culpability based on newly discovered evidence that points to his innocence, undermines the prosecution's assertion that the 1978 killing constituted a first-degree murder, and points to the fact that, if petitioner committed the crime, he had a reduced culpability.[98] As such, petitioner's actual innocence claims should

---

[97] *See Schlup v. Delo* (1995) 513 U.S. 298 (distinguishing stand-alone actual innocence claims under *Herrera v. Collins* (1993) 506 U.S. 390 from *Schlup* actual innocence accompanied by constitutional error claim; holding that actual innocence standard in the latter case is whether the constitutional violation probably resulted in the conviction of one who is actually innocent).

[98] At the filing of his second petition, counsel had established a *prima facie* case of petitioner's innocence. (See *Gallego, supra,* 18 Cal.4th at 834). The claim, however, was not fully developed due to a lack of funding and time. In conjunction with this traverse, petitioner has filed a motion for funding for investigative services to further develop his actual innocence claims. Likewise, because the issuance of an order to show cause in his case has granted petitioner all the rights attached to the cause, petitioner also expects to move for discovery and seek subpoenas where needed. In sum, petitioner will seek to develop his actual innocence claims while his second petition is being resolved and will supplement his traverse accordingly.

be considered by this Court.[99]

This Court has articulated a standard of review of claims of actual innocence: the evidence supporting such claims should be "conclusive" and "'point unerringly to innocence.'" (*In re Hall* (1981) 30 Cal.3d 408, 423 (relying on *In re Weber* (1974) 11 Cal.3d 703)). The Court rejected, however, the suggestion that this standard imposes:

> either the hypertechnical requirement that each bit of prosecutorial evidence be specifically refuted, or the virtually impossible burden of proving there is no conceivable basis on which the prosecution might have succeeded. It would be unconscionable to deny relief if a petitioner conclusively established his innocence without directly refuting every minute item of the prosecution's proof, or if a petitioner utterly destroyed the theory on which the People relied without rebutting all other possible scenarios which, *if* they had been presented at trial, might have tended to support a verdict of guilt.

(*Hall, supra*, 30 Cal.3d at 423; see also *Gonzalez, supra,* 51 Cal.3d at 1246 (italics in original).

Thus, petitioner need not show that each independent piece of evidence was unreliable or otherwise unconstitutionally admitted. Instead,

---

[99] See second petition, at 298 (Claim 86: Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Evidence Regarding Alternate Suspects); second petition, at 299 (Claim 87: Trial Counsel Rendered Ineffective Assistance at the Guilt Phase as a Result of the Failure to Adequately Investigate the Identity of the Actual Killer or Killers in the 1976 Offenses); second petition, at 350 (Claim 105: Trial Counsel Rendered Ineffective Assistance by Failing to Argue Effectively to the Jury During the Guilt Phase the Applicability of the Second Degree Murder Maximum on Count One); second petition, at 355 (Claim 107: Petitioner was Denied his Right to the Assistance of Counsel as a Result of Trial Counsel's Failure to Investigate and Present Mental Defenses); and second petition, at 368 (Claim 110: Trial Counsel Rendered Ineffective Assistance in Failing to Argue the Concept of Lingering Doubt).

he must simply show that the verdict is unreasonable. The petition demonstrates the unreasonableness of the verdict and sentence.

> A petition in this category might offer newly discovered, *irrefutable evidence of innocence of the offense or degree of offense of which the petitioner was convicted.* Although the evidence could and should have been discovered earlier, the delay in making the claim would not be a bar to consideration of the merits of the petition if the petitioner satisfied the court that the evidence was such that it would 'undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'

(*Clark, supra*, 5 Cal.4th at 798 n. 33 (quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246) (emphasis added)).[100]

Respondent asserts that petitioner's "claims do not suggest, much less establish, that he is actually innocent of the crime of which he was convicted." (Return, at 37). Respondent asserts that the evidence of petitioner's guilt was "overwhelming." (*Id.*). Respondent is wrong.

The thirty (30) exhibits submitted with the second petition undermine the "entire prosecution case or point unerringly to innocence or reduced culpability." (*Robbins, supra*, 18 Cal.4th at 812 (citation omitted)). The exhibits paint a picture of petitioner not seen by his jury at trial. They

---

[100] In *Clark,* this Court discussed the *Lindley* standard in the context of this miscarriage of justice exception to the timeliness bar. (See *Clark, supra*, 5 Cal.4th at 798 n 33). Thus, the *Lindley* standard applies to proof of actual innocence as to both procedural default and substantive claims of innocence. (*In re Lawley* (2008) 42 Cal.4th 1231, 1239). (See second petition, at 298 (Claim 86: Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Evidence Regarding Alternate Suspects); second petition, at 299 (Claim 87: Trial Counsel Rendered Ineffective Assistance at the Guilt Phase as a Result of the Failure to Adequately Investigate the Identity of the Actual Killer or Killers in the 1976 Offenses)).

include exhibits detailing petitioner's incompetence to stand trial[101] and proving that the 1978 homicide was not committed during the course of a felony.[102] Likewise, the exhibits contain invaluable exculpatory and impeachment evidence that would have undermined the prosecution's use of false and perjurious informant testimony.[103] (See generally, Alexandra Natapoff, *Beyond Unreliable*: *How Snitches Contribute to Wrongful Convictions* (2006) 37 Golden Gate U. L. Rev. 107). The evidence petitioner now offers could not be "easily refute[d]" by the prosecution and would not be rejected by "any reasonable juror." (Contra return, at 37). Had trial counsel located and developed the evidence, it would have "completely undermine[d] the entire structure of the case presented by the prosecution at the time of the conviction" and sentence imposed upon petitioner. (*Lindley, supra,* 29 Cal.2d at 723).

The 1976 homicides involved the killing of Scott F. and Ralph C. The boys had been night fishing at Ford Park Lake, in Bell Gardens,

---

[101] See second petition, exhibit AA (Declaration of Gretchen White); and CC (Declaration of George Woods).

[102] See second petition exhibit P (Declaration of Thomas Rogers, M.D.).

[103] See second petition exhibits D (Correspondence - Cornejo-Folsom to San Diego); E (Letter from David Freeman); F (Memorandum from DA's office-Stephen Kay); G (Investigator's Report); H (Memorandum from DA's office - Kathy Cedy); I (Memorandum from DA's office - Christopher Darden); J (People v. Daniels Disposition Report); K (Memorandum from DA's office - Michael Shultz); L (Declaration of Scott Bushea); M (Declaration of Jose Feliciano); N (DA internal memo - White); and O (Two Internal DA memos concerning phone calls from Storch).

California. They were last seen with two men, one of whom rode a motorcycle. No one identified petitioner as being either one of these two men. (See second petition exhibit S-A (Police Report by Det. Bowers, dated 9/13/76)).

The 1978 homicide involved the killing of Carl C. He was reported missing from his home in South Gate, California. Carl C. was last seen by his older brother. (See second petition exhibit S-A (Police Report by Det. Bowers, dated 9/13/76)).

In the two years following the 1976 killings, the police developed considerable evidence supporting the "two-killer" theory and pointing to a number of possible suspects. However, the police never charged any persons on these murder charges. Petitioner was never considered a suspect in these killings. This "two-killer" or "alternative suspect" evidence included:

1. the "positive identification" of Charles Lohman as one of the killers;

2. statements of witnesses to whom potential suspects had confessed;

3. Scott F.'s brother's statement that the killings could not have been committed by a single killer, and his offer to testify against Nick Allikas, an older man who had had sexual relations with the boys and who had been with them on the day of the killings; and

4. evidence of sightings at the park of a motorcycle very different from petitioner's. (See second petition exhibit S-A).

However, the Bell Gardens Police withheld over 400 pages of exculpatory evidence concerning the 1976 homicides from the defense until six years after the first trial and just two months before the second trial.[104] This is true even though the evidence regarded witnesses, other suspects, and basic factual information critical to solving the 1976 homicides. Had the exculpatory evidence been provided earlier, defense counsel would have been able to investigate the many other suspects and challenged the prosecution's case.[105]

---

[104] To this day, the state has failed to release all of the exculpatory evidence concerning the 1976 homicides since much of the evidence was destroyed. The state's misconduct was not limited to withholding exculpatory evidence. The arresting officers did not entertain a subjective belief that petitioner was guilty of an offense and, even if they had, the circumstances known to the officers failed to establish probable cause to arrest petitioner. This Court's first decision reversed petitioner's conviction and sentence based on police and prosecutor misconduct at trial, including the withholding of relevant evidence on whether petitioner's confessions were coerced. The material withheld was evidence as to the records of misconduct of the investigating officers. This Court concluded that withholding that evidence was prejudicial both as to the admissibility of the confessions and as to their reliability, assuming they were admitted. (*Memro I, supra,* 38 Cal.3d at 684). Shortly before this Court's decision reversing the conviction, the City of South Gate destroyed the evidence that was the subject of the court's pending decision. Consequently, petitioner was unable to obtain the evidence on which the court had reversed his conviction and sentence of death. Thus, Mr. Reno was not able to use this evidence to prove that his arrest was unconstitutional or that his confession was involuntary. (See second petition, at 104 (Claim 19 (The Prosecution Violated Petitioner's Rights by Failing to Disclose Approximately 400 Pages of Discovery)).

[105] Moreover, given that lingering doubt was an important mitigation issue, a more thorough and timely investigation of the information in the discovery materials would have provided the jury the necessary evidence to

For example, trial counsel would have learned that Suspect One, of whom a composite sketch was created and circulated, had been seen at the park on the night of the killings by witnesses Jose Feliciano, Scott Bushea and Mary Bushea. They all saw Suspect One at the park in the week prior to the night of the murder. Jose Feliciano and Scott Bushea saw both suspects fishing at the park earlier that week. Audie Cullison was fishing with Scott F. on the Wednesday before the murders. At that time, Suspect One approached, spoke to them, and then stood and stared at Scott F. for about five minutes before finally walking away. Suspect One was described as having sandy blond, shoulder length hair, with a conspicuous scar across his right cheek. He was seen wearing an army jacket on the night of the killing. (See second petition, exhibit S-A, Interview of Jose Feliciano by Det. Gossett, dated 7/26/76). When Jose Feliciano and his friend Scott Bushea were at the park earlier that week they saw both suspects.

Trial counsel also would have learned that Suspect Two arrived at the park wearing a brown jacket and riding a motorcycle. Suspect Two spoke with Scott Bushea. Suspect Two was described as having brown and wavy hair, being slightly chubby and possibly Hispanic. (See second petition, exhibit S-A, Police Report by Det. Bowers, dated 9/13/76).

---

make a fair and reliable determination of penalty. (See second petition, at 239 (Claim 63 (The Trial Court Erred in Refusing a Lingering Doubt Instruction at the Penalty Phase); and 368 (Claim 110 (Trial Counsel Rendered Ineffective Assistance in Failing to Argue Lingering Doubt)).

Neither suspects' description resemble petitioner. Petitioner has dark hair and no scars on either cheek. His police booking slip in 1978 stated that no scars were visible. "Marks, scars and deformities: n/v". A 1972 arrest report only lists "Fu Man Chu mustache" and nothing under 'marks and scars.' Moreover, unlike Suspect Two, petitioner is not Hispanic. (See second petition, at 298). However, despite possession of some of the evidence, trial counsel never attempted to show the jury that petitioner was actually innocent.

Here, trial counsel's ineffectiveness and the trial court's errors carry immense "risk of convicting an innocent person. " (*Sterling, supra,* 63 Cal.2d at 487). This is especially true, where the murder of three boys is alleged, and the pressures to convict and obtain a death sentence are dramatically increased. (See Samuel Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases* (1996) 44 Buff. L. Rev. 469; and Hugo Bedau and Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L. Rev. 21). The "refusal to consider a claim of factual innocence based on newly discovered evidence would be constitutionally suspect in [this] capital case." (*Clark, supra,* 5 Cal.4th at 796). This Court should consider petitioner's claims of actual innocence, as well as, the other claims in his petition in order to avert a miscarriage of justice.

c. Petitioner's Death Sentence Was Imposed by a Sentencing Authority That Had Such a Grossly Misleading Profile of the Petitioner Before it That, Absent the Trial Error or Omission, No Reasonable Judge or Jury Would Have Imposed a Sentence of Death.

To qualify a claim under this exception, petitioner must show that the picture painted by the evidence at trial "differ[s] so greatly from his or her actual characteristics that [ ] no reasonable judge or jury would have imposed the death penalty had it been aware of the defendant's true personality and characteristics." (*Clark, supra,* 5 Cal.4th at 798 n. 34). Here, petitioner demonstrates that counsel performed deficiently by failing to present mitigation evidence despite the wealth of readily available evidence in petitioner's case. (See second petition exhibits S - CC). Had trial counsel performed effectively, "no reasonable judge or jury would have imposed the death penalty had it been aware of the defendant's true personality and characteristics." (*Clark, supra,* 5 Cal.4th at 798 n. 34).

When it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigation information be unearthed for consideration." (*Caro v. Calderon* (9th Cir. 1999) 165 F.3d 1223, 1227). A criminal defendant may expect not just that his counsel will undertake those actions that a reasonably competent attorney would undertake, "but [as well] that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (citing *Hall, supra,* 30 Cal.3d at 426; *People v. Frierson* (1979) 25 Cal.3d 142, 166; and

Strickland, supra, 466 U.S. at 690-691).[106] "[C]ounsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client." (*Sanders v. Ratelle* (9th Cir. 1994) 21 F.3d 1446, 1456-57 (emphasis omitted); *see also Jennings v. Woodford* (9th Cir. 2002) 290 F.3d 1006, 1014 (emphasis omitted) ("[A]ttorneys have considerable latitude to make strategic decisions ... once they have gathered sufficient evidence upon which to base their tactical choices."). "Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert." (*Caro, supra,* 165 F.3d at 1226).

Respondent incorrectly argues that the profile portrayed of petitioner at the penalty phase was not "so grossly misleading and inaccurate that absent the error or omission no reasonable judge or jury would have imposed a sentence of death." (Return, at 38 (citation omitted). Respondent errs in concluding that the fact that the prosecutor relied upon the "circumstances surrounding petitioner's commission of the instant

---

[106] Counsel's first duty is to investigate the facts of his client's case and to research the law applicable to those facts. Generally, the Sixth Amendment and article I, section 15 require counsel's 'diligence and active participation in the full and effective preparation of his client's case.' Criminal defense attorneys have a "'duty to investigate carefully all defenses of fact and of law that may be available to the defendant....'" (*Ledesma, supra,* 43 Cal.3d at 222 (citing *People v. Pope* (1979) 23 Cal.3d 412, 424-425)).

offenses, as well as evidence of [the] prior violent incident to which petitioner has confessed" determines this issue. (*Id.*) Trial counsel utterly failed to present any possible evidence in mitigation to rebut the prosecutions's case or present a case in mitigation for petitioner during the penalty phase. Substantial evidence in mitigation was available and should have been presented.

Petitioner lacked any adequate parental or familial role models. (Second petition, exhibit X, at 10). Petitioner's father was chronically drunk and addicted to pills. (See generally, second petition, exhibit S). Sadly, petitioner was physically, mentally, and sexually abused as a child. His father would routinely beat him. (See generally second Petition, exhibit X). At the age of nine, petitioner was molested by a teacher, and then by a priest. (Second petition exhibit AA, at 12). In a desperate time, petitioner was forced to sell sexual favors for food. (See *Id.*). As an escape mechanism, Reno began using drugs in his teens and continued using drugs into adulthood. (*Id.*, at 1).

Consequently, petitioner's behavior reflected his dysfunctional surroundings. In 1972, at age 27, petitioner was confined to Atascadero State Hospital for an indefinite period of time after assaulting a young male acquaintance. At Atascadero, petitioner was diagnosed as having a sexual deviation. (See Diagnostic and Statistical Manual, Second Edition [DSM II], Sexual Deviations 302.0). Petitioner underwent treatment and rehabilitation for his disorder. When he was released three years later, the state determined that he did not pose a harm to others. Petitioner later

sought readmission to Atascadero, which was denied. He tried to control his sexual impulses, but without professional help he relapsed. (Second petition exhibit X, at 23).

At trial, none of this information was revealed to petitioner's capital jury. Instead, trial counsel only presented the testimony of petitioner's youngest sister, Kathy Klabunde. Her testimony did not give the jury an adequate picture of petitioner's life. She was the youngest of the Memro siblings - so young in fact that she could not remember the violent clashes petitioner and his brothers had with their father Earl. (RT 2956). Also troubling was her testimony that her father was a "good man" who was not physically abusive- statements contrary to all the known evidence. (RT 2945). Effective counsel would have presented testimony demonstrating the true nature of petitioner's social history and abusive childhood. (See second petition, exhibits R-Z).

Several witnesses would have testified in petitioner's defense. The witnesses were capable of disclosing much evidence in mitigation, which was not presented to the jury. Each witness was available to testify at trial, but was not contacted by trial counsel. The witnesses were not contacted by prior appellate or state habeas counsel. They were contacted for the first time by current counsel, and their declarations were included, for the first time, with the second petition. The critical witnesses, whose testimony was not adduced at petitioner's penalty phase include:

1) Mary Memro, petitioner's aunt, would have testified to the cruelty Earl, petitioner's father, inflicted on his family, as well as Alvina's

(petitioner's mother) cold relationship with her children. She described Earl as an alcoholic pill addict who could not hold a job. (Second petition exhibit S).

2) Floyd Ziolkowski, petitioner's maternal uncle, would have testified to petitioner's dysfunctional extended family and Earl's extreme alcohol addiction. (Second petition exhibit T).

3) Pam (Memro) Davis, petitioner's cousin, would have testified that Earl was a violent alcoholic who drank six to twelve beers a day. She also would testify to the savage beatings Earl used to give to his dogs, many of which had to be put to sleep because they had become vicious. (Second petition exhibit W).

4) Donald Memro, petitioner's younger brother, would have testified to the beatings Earl used to inflict on his children. Earl beat all of his children. He beat petitioner most severely. (Second petition exhibit X). Earl used to make petitioner fight him in view of the rest of the family. The children were routinely pummeled into submission. (Second petition exhibit X at 13). Donald was also prepared to testify that he witnessed petitioner fall 15-18 feet from a tree, hit his head on a rock and lose consciousness, at the age of 12. Petitioner's parents refused to seek medical treatment for the injury and petitioner's frequent and severe migraine headaches began after that injury. (Second petition exhibit X).

5) Dr. Gretchen White was prepared to testify regarding petitioner's behavioral changes following his head injury. Dr. White opined that Mr. Reno's loss of self control throughout his life was reasonably

attributable to the head injury resulting from the fall. In 1964, Mr. Reno received another head injury in a motorcycle accident. He developed extreme migraine headaches, which continued throughout his life, sometimes confining him to the darkness of the basement for extended periods of time. (Second petition exhibit AA, at 12 and 23).

6) Jack Brunette, petitioner's cousin, would have testified to the cruelty he witnessed Earl inflict on his wife in front of the young children. Earl would berate, taunt and "prey on her fears." (Second petition exhibit Y). Earl would psychologically terrorize petitioner's mother in front of the children, who as toddlers, would be subjected to her screams of terror. (Second petition exhibit X at 8).

7) Nancy Brunette, Jack Brunette's wife, would have testified that she could remember "wondering if Earl and Alvina loved their children." (See second petition exhibit Z);

8) Dr. George Woods would have testified to petitioner's suicidal ideations and that as a result of petitioner's mental conditions he was not competent. (See second petition exhibit CC); and

9) Marjorie Hoisington, a family friend, would have testified about the severe abuse perpetrated by Earl Memro on his family. (See second petition, at 361 (Claim 109 (Trial Counsel Rendered Ineffective Assistance for Failing to Present Mitigating Evidence in the Sentencing Phase of Trial)).

The evidence presented in mitigation was woefully inadequate, and left the jury with an unfair and wholly negative view of petitioner. Had

counsel presented adequate mitigation, no reasonable judge or jury would have sentenced petitioner to death. (*Clark, supra,* 5 Cal. 4th at 759; see also *Sawyer v. Whitley* (1992) 505 U.S. 333 (discussing actual innocence in the context of a death sentence)). Moreover, this negative view of petitioner prejudiced him in the jury's eyes, and allowed the jury to find that petitioner harbored the required mental states of the charged offenses. Had the jury not received this distorted view, they would not have found the required mental state, and petitioner would have been found guilty, at most, of lesser-included offenses. Petitioner's claims satisfy these standards and should be heard on their merits.[107]

"[W]here the record shows that counsel has failed to research the law or investigate the facts in the manner of a diligent and conscientious advocate, the conviction should be reversed since the defendant has been deprived of adequate assistance of counsel." (*Pope, supra*, 23 Cal.3d at 425-26 (citing *People v. McDowell* (1968) 69 Cal.2d 737). Here, trial

---

[107] See second petition, at 355 (Claim 107: Petitioner was Denied his Right to the Assistance of Counsel as a Result of Trial Counsel's Failure to Investigate and Present Mental Defenses); second petition, at 358 (Claim 108: Petitioner's Rights to Due Process and Effective Assistance of Counsel at Both Guilt and Penalty Phases, and to a Reliable Determination of Penalty, Were Violated as a Result of Failure to Investigate and Present Mitigating Penalty Phase Evidence); second petition, at 361 (Claim 109: Trial Counsel Rendered Ineffective Assistance for Failing to Present Mitigating Evidence in the Sentencing Phase of Trial); second petition, at 368 (Claim 110: Trial Counsel Rendered Ineffective Assistance in Failing to Argue the Concept of Lingering Doubt); and second petition, at 370 (Claim 111: Petitioner was Denied Effective Assistance of Counsel with Respect to David Schroeder's Testimony).

counsel "could not make a reasoned tactical decision about the trial precisely because 'counsel did not even know what evidence was available.'" (*Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 847 (quoting *Deutscher v. Whitley* (9th Cir. 1989) 884 F.2d 1152, 1160 (vacated and remanded on other grounds); and *California v. Salgado* (1991) 500 U.S. 901). Moreover, "[t]he Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy." (*Hendricks, supra*, 70 F.3d at 1044 (quoting *Deutscher, supra*, 884 F.2d at 1161); see also *Penry v. Lynaugh* (1989) 492 U.S. 302, 319). Here, counsel presented a single penalty phase mitigation witness who provided contradictory and hollow testimony. Counsel then presented petitioner's testimony wherein he asked the jury to sentence him to death. (RT 2969). That is not a meaningful, nor constitutional, penalty phase. Accordingly, this Court may consider the merits of petitioner's penalty phase claims.[108]

Had trial counsel conducted reasonable investigation and submitted all evidence in mitigation at petitioner's capital trial, the profile painted of

---

[108] Additionally, this Court may consider the claims premised on failure to present mitigating evidence as independent claims of error and is able to review them for their merit. (See *Clark,* 5 Cal.4th at 797 ("Since this court is not limited, as the federal courts are, to granting relief only on the basis of constitutional error, we may also entertain claims that mitigating evidence that was not presented to the jury warrants relief from a judgment imposing the death penalty. Therefore, if the petitioner can demonstrate that the evidence would have so radically altered the profile of the petitioner that no reasonable judge or jury would have sentenced the petitioner to death, this claim too will be considered notwithstanding the petitioner's failure to justify delay or presentation in a successive petition.")).

petitioner would have "differed so greatly from his actual characteristics that the [C]ourt would be satisfied that no reasonable judge or jury would have imposed the death penalty had it been aware of the defendant's true personality and characteristics." (*Clark, supra*, 5 Cal.4th at 798 n. 34). Based on the entire record, the evidence presented by petitioner here demonstrates that he fits "within this exception." (Contra return, at 38). This Court should consider all of the claims related to ineffective assistance of counsel in petitioner's case.

d. Petitioner's Capital Convictions and Death Sentence Were imposed Under Several Invalid Statutes.

Respondent wrongly concludes that none of petitioner's claims "implicate the exception for conviction or sentencing under an invalid statute." (Return at 38 (citations omitted)). Respondent also errs in claiming that this Court already has decided petitioner's constitutional challenges during his direct appeal. (*Id.*).

Challenges to the validity of a statute may be raised at any time. (*Clark, supra*, 5 Cal.4th at 765 (citing *Ex Parte Bell* (1942) 19 Cal.2d 488, 493)). "The importance of securing a correct determination on the question of constitutionality" of a statute warrants departure from the usual procedural limits. (*Clark, supra,* 5 Cal.4th at 765, n. 4 ("For that reason these claims have not been subject to either the rules requiring justification for delay or exhaustion of appellate remedies.") (citing *In re Berry* (1968) 68 Cal.2d 137, 145; *In re Zerbe* (1964) 60 Cal.2d 666, 667-668; and *Dixon, supra*, 41 Cal.2d at 762)). In fact, often habeas corpus is the only remedy

available by which challenges to statutes may be raised.

Petitioner has raised twelve (12) non-repetitive claims challenging the validity of the California death penalty statutes.[109] These claims may be considered on the merits despite having been raised for the first time in the second petition and despite a finding of untimely filing. Together, these claims make clear that petitioner's capital convictions and capital sentence were imposed under several statutes that are invalid and violate the state and federal Constitutions or International Law and Custom.

---

[109] See second petition, at 452 (Claim 128: The 1977 Death Penalty Statute, on its Face and as Applied, is Unconstitutionally Vague Arbitrary, and Capricious); second petition at 453 (Claim 129: Many Features of the California Capital Sentencing Scheme as Interpreted by the State Courts and Applied at Petitioner's Trial Violate the Federal Constitution); second petition, at 458 (Claim 130: Failure to Narrow the Class of Offenders Eligible for the Death Penalty and Imposition of Death in a Capricious and Arbitrary Manner); second petition, at 480 (Claim 131: The Unconstitutional Use of Lethal Injection Renders Petitioner's Death Sentence Illegal); second petition, at 490 (Claim 132: Execution of Petitioner after Prolonged Confinement Violates the Eighth Amendment Prohibition of Cruel and Unusual Punishment); second petition, at 494 (Claim 133: Application of the Death Penalty Violates International Law Under the United States's Treaty Obligations); second petition, at 502 (Claim 134: Application of the Death Penalty Violates Customary International Law); second petition, at 505 (Claim 135: Petitioner's Death Sentence is Arbitrary Under International Law); second petition, at 507 (Claim 136: Petitioner Has A Right To Be Free From Cruel, Inhuman or Degrading Treatment); second petition, at 510 (Claim 137: Petitioner's Conviction and Sentence Violate His Right to Due Process); second petition, at 513 (Claim 138: Petitioner's Right to be Tried Before an Impartial Tribunal was Violated by Death Qualification Procedures); and second petition, at 515 (Claim 139: Petitioner Has a Right to Litigate Violations of His Rights Before International Tribunals).

7. Petitioner's Petition and All of Petitioner's Claims Are not Barred As Untimely And May Be Reviewed By This Court.

Petitioner has demonstrated that all of the claims in the second petition are timely and should not be dismissed pursuant to *Clark, supra,* 5 Cal.4th at 775. The repetitive claims are presumptively timely. The non-repetitive claims were filed in the absence of substantial delay, or their delayed filing was justified by prior appellate and habeas counsel's ineffective assistance or other factors beyond petitioner's control. Moreover, each of the claims may be heard in order to avert a miscarriage of justice in this case.

B. PETITIONER HAS ALLEGED SPECIFIC AND SUFFICIENT FACTS PROVING THAT HIS REPETITIVE APPELLATE CLAIMS ARE COGNIZABLE.

***

Respondent has failed to show that petitioner has abused the writ for "failure to allege sufficient facts indicating certain claims in the petition are cognizable despite having been raised and rejected on appeal." (Order To Show Cause - Issue #2) (citing *Waltreus, supra,* 62 Cal.2d at 225; and *Harris, supra,* 5 Cal.4th at 829-841).

***

Respondent alleges that petitioner has raised seventy (70) claims that were previously raised on direct appeal.[110] Respondent is wrong; only forty-six (46) claims were raised in the opening brief on direct appeal.[111] Respondent includes non-repetitive appellate claims and repetitive habeas claims in its count here, instead of addressing those claims as directed by

---

[110] Respondent asserts that the following claims were previously raised on direct appeal: Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 15, 16 , 17, 18, 19, 24, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 71, 73, 77, 80, 81, 83, 84, 91, 93, 96, 98, 112, 113, 131, 123, 125, 126, 127, 128, 129, 130, and 135. (Return, at 39).

[111] Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 17, 19, 24, 27, 28, 29, 30, 31, 32, 33, 38, 39, 40, 41, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 73, 80, 81, 82, 112, 123, and 128, were brought as claims of error on direct appeal in petitioner's second trial.

this Court.[112]

This Court has noted that "arguments [] rejected on appeal and habeas corpus ordinarily cannot serve as a second appeal." *Waltreus, supra,* 62 Cal.2d at 225 (citation omitted).

> Accordingly, when a criminal defendant raises in a petition for a writ of habeas corpus an issue that was raised and rejected on direct appeal, this court usually has denied the petition summarily, citing *Waltreus, supra,* 62 Cal.2d 218.

(*Harris, supra,* 5 Cal.4th at 825). However,

> where a habeas corpus petitioner's claim depends on facts that were not, and could not have been, placed in the record, the *Waltreus* rule does not apply, since the petitioner could not have raised the issue on direct appeal.

(*Harris, supra,* 5 Cal.4th at 835 n. 8). Thus, "a defendant [] acts reasonably" by renewing an issue, previously denied on appeal, in a timely fashion on habeas corpus if the claim meets an exception to the *Waltreus* bar. (*Id.* at 829 n. 7).

Respondent agrees that this Court has noted several exceptions to the *Waltreus* bar. (See return, at 39). Respondent fails to note all of the possible exceptions. A claim previously raised and rejected on direct appeal will be reviewed again by this Court when the petitioner has shown any one of the following facts:

---

[112] Respondent incorrectly declares that the following twenty-five claims were previously raised on rejected on direct appeal in petitioner's case: Claims 12, 15, 16, 18, 36, 37, 44, 45, 71, 77, 83, 84, 91, 93, 96, 98, 113, 131, 123, 125, 126, 127, 129, 130, and 135. Respondent also fails to note that claim 82 was previously raised in petitioner's direct appeal.

1. sufficient justification for the issue's renewal on habeas corpus;

2. the claim is premised on newly discovered or additional information that was not in the appellate record but casts new light on the issue;

3. the claim collaterally attacks a judgment of conviction which has been obtained in violation of fundamental constitutional rights;

4. the judgment and sentence was rendered by a court wholly lacking jurisdiction over the case;

5. the defendant has been sentenced to an illegal sentence and the judgment may be corrected without redetermination of any facts; or

6. the claim is premised on a change in the law affecting the petitioner's case.

(See *Harris, supra,* 5 Cal.4th at 825-841; and *Robbins, supra,* 18 Cal.4th at 815 n. 34; and *In re Winchester* (1960) 53 Cal.2d 528, 532);

Respondent incorrectly argues that petitioner "bears a heavy burden to demonstrate sufficient justification warranting review on habeas corpus of a claim that was already rejected on direct appeal." (Return, at 40 (no citation)). Respondent seeks to improperly "narrow" the cases that qualify under the *Waltreus* exceptions. (*Id.* (citation omitted)). Respondent also erroneously alleges that petitioner has only "aver[ed] in conclusionary terms - but does not establish - that he qualifies under [the] [] *Harris* exceptions." (*Id.* at 41 (citation omitted)).[113]

---

[113] Petitioner is not "unjustifiably attempting to rework old issues already decided by this Court on direct appeal." (Contra return, at 41). Nor is he putting "new clothes on claims that previously wore appellate garments." (Contra *id.*). He is asserting new potentially meritorious claims triggered by counsel's review of the entire record. Thus, none of

As with all other procedural default exceptions, petitioner has the burden of establishing a *prima facie* case that the *Waltreus* bar does not apply. While petitioner agrees that the exception applies in a few cases, respondent has failed to show that petitioner's case is not one of those cases. In his petition, informal reply, and herein this traverse, petitioner has done much more than aver, in conclusory terms, that his repetitive appellate claims meet an exception under *Waltreus*. Petitioner has provided a factual basis establishing the exceptions under *Waltreus*. Respondent's rhetoric aside, it is the state that has failed to provide any specifics showing why and how petitioner's repetitive appellate claims do not meet a *Waltreus* exception.

1. Many Repetitive Appellate Claims Are Premised on New Legal Theories And Are Exempt from the *Waltreaus* Bar.

Waltreus will not bar review of "an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner." (*Harris, supra*, 5 Cal.4th at 841 (citing *Terry, supra*, 4 Cal.3d at 916; *In re King* (1970) 3 Cal.3d 226, 229 n. 2; and *In re Jackson* (1964) 61 Cal.2d 500)). Here, petitioner substantially altered fourteen (14) claims[114] that were previously raised and rejected on direct appeal in his

---

petitioner's repetitive appellate claims should be denied under *Waltreus*. (Contra *id.*).

[114] Repetitive appellate claims that have been factually or legally altered since submission on direct appeal include: Claims 8, 9, 27, 28, 30, 31, 33, 40, 41, 56, 63, 73, 81, and 112. (See traverse exhibit H (Declaration of Giannini, at 4).

case.[115] This Court should accordingly review

---

[115] See Claim 8 (citing *Benton v. Maryland* (1969) 395 U.S. 784; *Blockburger v. United States* (1932) 284 U.S. 299; *Ashe v. Swenson* (1970) 397 U.S. 436; *United States v. Dixon* (1993) 509 U.S. 688, 705; *Brown v. Ohio* (1977) 432 U.S. 161, 166-67 n. 6; *People v. Asbury* (1985) 173 Cal.App.3d 362; *People v. McDonald* (1984) 37 Cal.3d 384; *Richardson v. United States* (1984) 468 U.S. 317, 325; *Smallis v. Pennsylvania* (1986) 478 U.S. 140, 142; *United States v. Morrison* (1976) 429 U.S. 1, 3; *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797, 803; and *Bullington v. Missouri* (1981) 451 U.S. 430, 439); Claim 9 (citing *Presnell v. Georgia* (1978) 439 U.S. 15; and *Ring v. Arizona* (2002) 536 U.S. 584); Claim 27 (citing *Williamson v. United States* (9th Cir. 1962) 310 F.2d 192; *Charles v. United States* (9th Cir. 1954) 215 F.2d 825; *Witt v. United States* (9th Cir. 1952) 196 F.2d 285; and *United States v. Postma* (1957) 242 F.2d 488); Claim 28 (citing CT I 264, RT 302, and 386); Claim 30 (citing *Kimmelman v. Morrison* (1986) 477 U.S. 365) Claim 31 (citing *Williams v. Superior Court* (1984) 63 Cal.3d 441; *People v. Thompson* (1980) 27 Cal.3d 303; *People v. Tassel* (1984) 36 Cal.3d 77, 86; *People v. Matson* (1974) 13 Cal.3d 35, 41; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084; and *United States v. Bagley* (9th Cir. 1985) 772 F.2d 482, 488); Claim 33 (*Holloway v. Arkansas* (1978) 435 U.S. 475; *Geders v. United States* (1976) 425 U.S. 80; *Herring v. New York* (1975) 422 U.S. 853; *Argersinger v. Hamlin* (1972) 407 U.S. 25; *Gideon v. Wainwright* (1963); 372 U.S. 335; *Chandler v. Fretag* (1954) 348 U.S. 3; *Glasser v. United States* (1942) 315 U.S. 60; *Powell v. Alabama* (1932) 287 U.S. 45; *People v. Crandell* (1988) 46 Cal. 3d 833; *Crandell v. Bunnell* (9th Cir. 1998) 144 F.3d 1213, 1216; *Brown v. Craven* (9th Cir. 1970) 424 F.2d 1166, 1170; *Schell v. Witek* (9th Cir. 2000) 218 F.3d 1017; *Hudson v. Rushen*, 686 F.2d 826; *Wolff v. McDonnell* (1974) 418 U.S. 539; *Brown v. Vasquez* (9th Cir. 1991) 952 F.2d 1164, 1167; *People v. Stewart* (1985) 171 Cal.App.3d 883; *People v. Garcia* (1991) 227 Cal.App.3d 1369; and *People v. Walker* (1993) 14 Cal.App.4th 1615); Claim 40 (citing *People v. Boyd* (1979) 95 Cal.App.3d 577, 589; *People v. Cavanaugh* (1955) 44 Cal.2d 252, 268-269; and *People v. Smith* (1973) 33 Cal.App.3d 51, 69); Claim 41 (citing *People v. Thomas* (1978) 20 Cal.3d 457, 464; *Tassel, supra,* 36 Cal.3d at 83; *Thompson, supra,* 27 Cal.3d 303; *Estelle v. McGuire* (1991) 502 U.S. 62; *Jamal v. VanDeKamp* (9th Cir. 1991) 926 F.2d 918, 919; *Henry v. Estelle* (9th Cir. 1993) 399 F.2d 3241; and 2 Jefferson, Cal. Evidence Bench Book (2d ed.

the merits of these claims and reconsider its prior denial given the material changes in law; effective representation of the claims by current counsel; and the merits of the claims within the factual and legal context of all the claims included within the second petition.

1982), § 33.6, 1211); Claim 56 (citing *Ring, supra*, 536 U.S. at 609; *Spaziano, supra*, 468 U.S. at 465; *People v. Robertson* (1989) 49 Cal.3d 18, 36; *Hicks, supra,* 447 U.S. at 346; and *Singer v. United States* (1965) 380 U.S. 24); Claim 63 (citing *Lockett v. Ohio* (1978) 438 U.S. 586; *Skipper v. South Carolina* (1986) 476 U.S. 4; *Gregg v. Georgia,* 428 U.S. 153,189-190 (1976); *People v. Thompson* (1988) 45 Cal.3d 86; *People v. Cox* (1991) 53 Cal.3d 618; *Wolff v. McDonnell* (1974) 418 U.S. 539; *Vitek v. Jones* (1980) 445 U.S. 480; *Hewitt v. Helms* (1983) 459 U.S. 460; *Hicks, supra,* 447 U.S. 343; and *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295); Claim 73 (citing *Spano v. New York* (1959) 360 U.S. 315, 320-321; *Berger v. United States,* 295 U.S. 78, 85-88 (1935); *People v. Bolton* (1979) 23 Cal.3d 208, 213; *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399; *Darden v. Wainwright* (1986) 477 U.S. 168, 181; and A.B.A. Standards for Criminal Justice, 2d Ed. (1982) §§3-1.1(b)©); Claim 81 (citing *Lankford v. Idaho* (1991) 500 U.S. 110, 127; *Gardner v. Florida* (1977) 430 U.S. 349, 362; and *United States v. Chenaur* (9th Cir. 1977) 552 F.2d 294); and Claim 112 (citing *People v. Mattson* (1990) 50 Cal.3d 826; *People v. Harris* (1984) 63 Cal.3d 63, 64; *Duran v. Missouri* (1979) 439 U.S. 357, 364; *People v. Buford* (1982) 132 Cal.App.3d 288, 299; and Kairys, et al., *Jury Representativeness: A Mandate for Multiple Source Lists* (1977) 56 Ca. L.Rev. 776, 790).

2. This Court should Reconsider the Denial of Petitioner's Record Based Claims of Error and the Procedural Dismissal of Petitioner's Claims Will Result in a Miscarriage of Justice.

a. The Ineffective Assistance of Petitioner's Prior Appellate Counsel Provides Sufficient Justification for Excusal of the *Waltreus* Bar In Light of the Additional Information Supplied in the Second Petition that Casts New Light on the Claims.

This Court has previously found that a petitioner's right to effective assistance of counsel may be violated by the inadequate presentation of claims of error on appeal. (See *Harris, supra*, 5 Cal.4th at 834; *Clark, supra,* 5 Cal.4th at 780; see also *Sanders*, *supra,* 21 Cal.4th at 719; and *Robbins*, *supra,* 18 Cal.4th at 810). Under *Douglas*, *supra*, 372 U.S. 353 and *Evitts, supra*, 469 U.S. 387, 396, petitioner has a right to appointed counsel in his automatic appeal. (*See also Coleman, supra,* 501 U.S. at 755). Under *Clark,* petitioner has a right to assume that his appellate counsel was "competent and [] present[ed] all potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780).

Here, petitioner's appellate counsel provided ineffective assistance by failing to: 1) conduct a diligent review of the appellate record; 2) identify triggering facts in the trial record; 3) identify claims of error governed by controlling law; 4) investigate claims of error premised on triggering facts outside the record; and 5) include potentially meritorious appellate claims for relief within the opening brief on direct appeal. To the extent that the claims were previously available, it was constitutionally ineffective not to bring these claims during the appeal before this Court.

Evaluating petitioner's claims of ineffective assistance of appellate counsel under *Clark*, it is reasonably probable that, but for the inadequate presentation of issues and omission of issues by prior counsel, petitioner would have been entitled to relief. (*Clark, supra,* 5 Cal.4th at 780). Counsel's failure to raise the many potentially meritorious claims "reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants." (*Id.*; see traverse exhibit M (Declaration of Van Winkle, at 8-9). Petitioner was consequently denied his rights to due process, effective assistance of counsel and a fair and reliable sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. In addition, petitioner should not be penalized for court-appointed counsel's ineffective assistance and each of the claims contained herein should be resolved on the merits.

Here, appellate counsel wholly failed to include other potentially meritorious claims of error in the direct appeal, including a claim premised on cumulative error. These claims would have provided essential context to petitioner' case and would have amplified and multiplied the claims of error affecting his convictions and capital sentence. As a result, appellate counsel failed to conduct sufficient legal and factual research to raise the omitted claims. (*Harris, supra,* 5 Cal.4th at 825). Several of petitioner's claims are premised on additional information that was not in the appellate record but casts new light on the issue. (Compare *Robbins, supra,* 18

Cal.4th at 815 n. 34).[116] Thus, each of the repetitive claims included in the second petition may now be heard by this Court. Accordingly, petitioner has demonstrated good cause and justified renewal of the appellate claims in this second petition for writ of habeas corpus.

b. Petitioner's Repetitive Appellate Claims Are Premised on Fundamental Constitutional Error.

Also, petitioner is permitted to "renew a claim of fundamental constitutional error that has previously been rejected on appeal." (*Harris, supra,* 5 Cal.4th at 830). "Only where the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process, is an opportunity for a third chance at judicial review (trial, appeal, postappeal habeas corpus) justified." (*Id.* at 834 (citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309)). "The denial of a fair and impartial trial amounts to a denial of due process of law [citation] and is a miscarriage of justice within the meaning of that phrase as used in section 4, article VI, of the Constitution of this state." (*Winchester, supra*, 53 Cal.2d at 531 (citation omitted)). The petition must show that "the defect so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice." (*Id.* at 532 (citation omitted).

In the second petition, petitioner has raised fifteen (15) repetitive

---

[116] See Claim 19 (Citing second petition exhibits G and H); Claim 68 (citing second petition exhibits CC and AA); and Claim 121 (citing second petition exhibits G, H, and M).

appellate claims premised on fundamental constitutional errors.[117] Petitioner's was illegally arrested, coerced into confessing to the crimes, and the police exacted an illegal search of his property in violation of his rights under the Fourth and Fifth Amendments.[118] The repeated prosecutions of petitioner violated his rights to be free from double jeopardy under the Fifth Amendment.[119] Petitioner's jury was partial and did not represent a fair cross-section of the community in violation of the Sixth and Fourteenth Amendments.[120] Trial court errors violated petitioner's constitutional rights to a speedy trial, cross-examine witnesses, utilize compulsory process, and to be found guilty, beyond a reasonable doubt, by an

---

[117] See Claims: 1, 2, 3, 8, 9, 10, 17, 24, 28, 38, 62, 73, 80, 82, and 112.

[118] See second petition, at 23 (Claim 1 (Petitioner's Arrest Was Unlawful)); 36 (Claim 2 (Petitioner's Alleged Confession to the South Gate Police was Coerced)); 49 (Claim 3 (The Search of Petitioner's Residence was unlawful)); and 138 (Claim 28 (The Trial Court Erred in Failing to Dismiss the Information based Upon the Unlawful Seizure of Petitioner's Privileged and Confidential Legal Materials)).

[119] See second petition, at 58 (Claim 8 (Petitioner's Prosecution for First-Degree Murder on Count III Violated the Prohibition against Double Jeopardy under the State and Federal Constitutions)); 63 (Claim 9 (Petitioner's Prosecution on Count III Violated Petitioner's Rights Under the Fifth, Sixth, Eighth and Fourteenth Amendments)); and 66 (Claim 10 (Petitioner was acquitted of felony-murder on Count III and retrying him under that theory violated Double Jeopardy Principles)).

[120] See second petition, at 371 (Claim 112 (Petitioner was Denied an Impartial Jury Drawn from a Fair Cross-Section of the Community)).

unanimous jury.[121] Prosecutorial and state misconduct was also rampant throughout petitioner's trial and violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.[122] These claims are premised on errors and constitutional violations that struck at the heart of petitioner's capital trial and rendered the proceedings fundamentally unfair.

Additionally, petitioner has raised thirty-one (31) errors previously rejected on appeal that, when viewed cumulatively, also strike at the heart of petitioner's capital trial and rendered the proceedings fundamentally unfair.[123] Together and individually these "defect[s] so fatally infected the regularity of the trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice." (*Winchester, supra*, 53 Cal.2d at 532).

---

[121] See second petition, at 128 (Claim 24 (The Trial Court Violated Petitioner's Right to a Speedy Trial and Due Process)); 180 (Claim 38 (The Trial Court Denied Petitioner his Right of Cross-Examination and to Present a Defense)); and 237 (Claim 62 (The Trial Court Erred in Instructing the Jury that there Must be Unanimous Agreement as to Penalty)).

[122] See second petition, at 93 (Claim 17 (Failure to Provide Discovery of the Prior Citizen Complaints Against the Police Officers Denied Petitioner a Fundamentally Fair Trial)); 281 (Claim 80 (The Prosecutor Committed Misconduct by Cross-Examining Petitioner Regarding the Appellate Process)); and 286 (Claim 82 (The Prosecutor Committed Prosecutorial Misconduct in Penalty Phase Argument)).

[123] See Claims 4, 5, 6, 19, 27, 29, 30, 31, 32, 33, 39, 40, 41, 47, 48, 49, 56, 57, 58, 59, 60, 61, 63, 65, 66, 67, 68, 70, 81, 123, and 128.

3. Inclusion of Petitioner's Repetitive Appellate Claims in the Second Petition Is Necessary To Present Petitioner's Claims of Cumulative Error and to Exhaust All of Petitioner's Claims For Relief.

Petitioner has brought all the repetitive appellate claims in the second petition in order to help this Court review the totality of the circumstances affecting petitioner's case when assessing his claims. It is well settled that claims cannot be evaluated in a vacuum, and must be assessed in the full context of a trial. (See e.g., *Kyles v. Whitley* (1995) 514 U.S. 419; *United States v. Ortega* (9th Cir. 1977) 561 F.2d 803; and *United States v. McLister* (9th Cir. 1979) 608 F.2d 785); and *Garcia v. Superior Court* (1984) 163 Cal.App.3d 148, 151 (citation omitted)) ("it is inappropriate to evaluate the quality or quantity of prejudice in a vacuum.").

Moreover, cumulative error, and particularly claims of prosecutorial misconduct, *Brady* violations, and ineffective assistance of counsel, should be assessed together when determining the reliability of a capital verdict. (See generally John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error* (2010) 95:4 Journal of Criminal Law & Criminology 1153). Likewise, even if this Court finds that none of the repetitive claims meet an exception under the *Waltreus* bar, it should nevertheless find that no abuse of the writ occurred here as the inclusion of the repetitive claims was necessary to present Claims 140 - 143 and to ensure that all claims are exhausted in order to later prepare for his federal litigation should that be necessary.

Additionally, the inclusion of the repetitive appellate claims is justified. These claims have been reasserted for several additional reasons. First, this Court may reconsider its prior denial of the claims based on its discretionary power of review. Second, this Court should re-examine its prior denial of the claims in the context of the facts and claims alleged in the second petition, which is more complete and detailed than the prior appellate and habeas pleadings filed in this Court. Third, the forty-six (46) claims have been brought to exhaust and present the cumulative error claims to this Court. Fourth, it is necessary to exhaust all claims in the federal petition including claims of cumulative error. Fifth, the forty-six (46) claims have been raised to provide context so that this Court may better assess the prejudice stemming from the multitude of errors infecting petitioner's capital proceedings. Sixth, to provide context for this Court's determination as to whether prior appellate and habeas counsel performed ineffectively by failing to raise all potentially meritorious claims included within the second petition. Finally, fourteen (14) of the claims have been developed with additional case law since their prior denial.[124] (See traverse exhibit M (Declaration of Van Winkle, at 7).

---

[124] Claims 8, 9, 15, 20, 27, 28, 30, 31, 33, 40, 41, 56, 63, 73, 81, 112, and 121.

C. PETITIONER HAS ALLEGED SPECIFIC AND SUFFICIENT FACTS PROVING THAT HIS NON-REPETITIVE APPELLATE CLAIMS ARE COGNIZABLE UNDER *IN RE DIXON.*

***

Respondent has failed to show that petitioner has abused the writ for "failure to allege sufficient facts indicating certain claims in the petition are cognizable despite the fact they could have been raised on appeal but were not." (Order to Show Cause - Issue #3) (citing *Dixon, supra,* 41 Cal.2d at 759; and *Harris, supra,* 5 Cal.4th at 829-841)

***

Respondent incorrectly argues that the *Dixon* bar applies here and urges dismissal of forty-seven (47) of petitioner's claims. (See return, at 42).[125] Both respondent's argument and count are flawed. Respondent incorrectly includes twenty (20) claims[126] in their count by adding repetitive appellate claims and habeas claims.[127]

---

[125] Respondent argues that the following claims are barred under *Dixon*: Claims 7, 11, 13, 14, 22, 23, 25, 26, 34, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69, 72, 74, 75, 76, 78, 79, 82, 85, 88, 89, 90, 92, 95, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 111, 114, 115, 116, 117, 122, 124, 131, 133, 134, 140, and 143.

[126] Respondent incorrectly includes within their count the following claims: Claim 7, 14, 25, 26, 46, 50, 51, 52, 53, 54, 55, 64, 69, 82, 88, 89, 90, 92, 95, 97, 99, 100, 102, 103, 104, 105, 106, 107, 110, 111, 114, 115, 122, 131, 133, 134, 140, and 143. Respondent fails to count the following claims that are appellate in nature but were not previously raised: Claims 12, 36, 37, 44, 45, 77, 83, 84, 125.

[127] Per this Court's Order, non-repetitive habeas claims should be discussed in Order to Show Cause Issue number five and not here.

Petitioner has actually presented twenty-seven (27) non-repetitive appellate claims.[128] None of the claims should be barred when evaluated under the corollary to the *Waltreus* bar - the *Dixon* bar. (See *Harris, supra*, 5 Cal.4th at 825 n. 3):

> The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.

(*Dixon, supra*, 41 Cal.2d at 759 (citations omitted)). The *Dixon* bar, however, is not absolute. Moreover, respondent fails to note all of its exceptions. A claim will not be dismissed under *Dixon* when:

1. there are special circumstances constituting an excuse for failure to employ that remedy;[129]

2. the disputed claim is not based on a challenge to the validity of a statute;[130]

3. the disputed claim is not based on ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the

---

[128] Claims 11, 12, 13, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 72, 74, 75, 76, 77, 78, 79, 83, 84, 101, 116, 117, 124, and 125 are claims premised on the record and were not raised in a prior direct appeal.

[129] See *Dixon, supra*, 41 Cal.2d at 759; see also *Harris, supra*, 5 Cal.4th at 829; *In re Newbern* (1960) 53 Cal.2d 786, 789-790; *In re Osslo* (1958) 51 Cal.2d 371, 376-377; *In re Bine* (1957) 47 Cal.2d 814, 817-18; *In re Seeley* (1946) 29 Cal.2d 294, 296.

[130] See *Clark, supra*, 5 Cal.4th at 765 n.4 (citing *Dixon, supra*, 41 Cal.2d at 762).

appellate record;[131] or

4. the disputed claim meets any of the four exceptions to the *Waltreus* bar as outlined in *Harris, supra*, 5 Cal.4th at 825 n. 3.[132]

Additionally, when the *Dixon* bar is applied and, "[w]here the facts could have been, but were not, placed on the record, a potential claim for ineffective assistance of counsel may exist." (*Harris, supra*, 5 Cal.4th at 835 n. 8; see also *Douglas*, *supra*, 372 U.S. 353; *Evitts, supra*, 469 U.S. at 396; *Coleman, supra,* 501 U.S. at 755; and *Murray*, *supra,* 477 U.S. at 496). Effective assistance of appellate counsel requires competent counsel who, after conducting "investigation into specific facts known to counsel which could reasonably lead to a potentially meritorious [appellate] claim....", to present "*all potentially meritorious claims*." (*Clark*, 5 Cal.4th at 780, 784 (citations omitted) (emphasis added)). Ineffective assistance of appellate counsel may be shown where counsel inadequately presents or fails to present an issue that is:

> one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition, and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants.

(*Clark, supra,* 5 Cal.4th at 780).

Not one of petitioner's non-repetitive appellate claims should be

---

[131] See *Robbins, supra*, 18 Cal.4th at 814 n. 34 (citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267).

[132] See also *Robbins, supra*, 18 Cal.4th at 814 n. 34.

barred under *Dixon, supra,* 41 Cal.2d at 756.[133] Alternatively, if this Court finds that the claims are barred under *Dixon*, it should also find that appellate counsel, in failing to allege the claims despite his possession of triggering facts, performed ineffectively. A finding of ineffective assistance of prior counsel would allow this Court to review the merits of all the claims raised in the second petition. (*Sanders, supra*, 21 Cal.4th at 719).

1. Prior Appellate Counsel Performed Ineffectively By Failing to Include the Possibly Meritorious Record Based Claims in Petitioner's Second Petition as Claims of Error in His Direct Appeal.

Ineffective assistance of appellate counsel can serve as a basis for excusal of the *Dixon* bar. (See *Clark, supra,* 5 Cal.4th at 779; *Sanders, supra*, 21 Cal.4th at 719; *Harris, supra*, 5 Cal.4th at 832-33; and *Dixon, supra*, 41 Cal.2d at 759). To qualify, prior appellate counsel must have performed deficiently and failed to investigate potentially meritorious claims, despite counsel's possession of triggering facts, or failed to develop identifiable and potentially meritorious claims and include them with the

---

[133] Respondent argues that petitioner's non-repetitive appellate claims should be dismissed under *Dixon.* (Return, at 42). Respondent is wrong. Petitioner has presented "special circumstances that would rescue his case from the [*Dixon* bar]." (Contra *id.*). Petitioner denies that he has previously recognized that these claims "could have been presented on appeal because they are based on the trial record." (*Id.*). Petitioner admits that he has argued that these claims are cognizable due to the ineffective assistance of appellate counsel. Respondent fails to note that petitioner has alleged that the non-repetitive appellate claims are cognizable under other exceptions to *Dixon, supra,* 41 Cal.2d at 759. (See informal reply, at 15).

direct appeal. Petitioner must also show that the non-repetitive claim, not presented in the prior appeal, was potentially meritorious. (See *Clark, supra,* 5 Cal.4th at 779; and *Sanders, supra*, 21 Cal.4th at 719).

Respondent tries to limit the instances where ineffective assistance may serve as an exception to the *Dixon* bar. Respondent claims that there is a "strong presumption" that prior appellate counsel performed effectively. (Return, at 43). However, a determination of ineffective assistance is dependent upon the record, petitioner's allegations and not presumptions.

Petitioner is not "second guess[ing]" prior appellate counsel. (Contra *Id.*). Petitioner has shown that prior counsel committed "manifest miscalculation in deciding which issues to present from the myriad of possible claims." (Contra *id.* (citation omitted)). The hallmark of a good appellate attorney may be "the ability to sift out the less meritorious claims," (*id.* (citation omitted)) but here, petitioner's prior appellate counsel did not, as respondent argues, conduct reasonable investigation or conduct a "judicious selection of issues" (*id.* (citation omitted)) or properly "exercise discretion and present only the strongest claims instead of every conceivable claim." (*Id.*, at 44 (citation omitted) (internal quotation omitted)). Instead, despite his possession of triggering facts indicating the existence and materiality of the claims, prior appellate counsel failed to include several meritorious claims. (See traverse exhibits L and M (Declaration of Nolan, at 3-4; and Declaration of Van Winkle, at 5-7). As a result, petitioner has been forced to include meritorious non-repetitive appellate claims for the first time in the second petition. (See *Id.*).

Petitioner has demonstrated that his appellate counsel performed ineffectively by failing to identify, investigate, and develop potentially meritorious appellate claims despite the suggestion of triggering facts in the record. Prior counsel has admitted so. (See traverse exhibit H and L (Declaration of Nolan, at 3-4). The non-repetitive appellate claims in petitioner's second petition are more than potentially meritorious. Reasonably competent appellate counsel would not have failed to include these claims on direct appeal.[134] (See *Clark, supra*, Cal.4th at 796 n. 31). (See traverse exhibit M (Declaration of Van Winkle, at 5-7).

Respondent argues that appellate counsel "cannot be faulted for not including claims on direct appeal that were waived or forfeited at the trial." (Return, at 44).[135] As to the repetitive claims, this Court disposed of them on the merits without invoking the contemporaneous objection rule. As to the non-repetitive claims, respondent has not shown how any of the claims are affected by the contemporaneous objection rule. Several exceptions to

---

[134] Nor would competent habeas counsel not include the claims in a "petition filed in conjunction with the automatic appeal" (*Clark, supra*, Cal.4th at 796 n. 31) to demonstrate the ineffectiveness of appellate counsel. Here, however, petitioner's appellate and habeas counsel was the same attorney, and they thus failed to recognize their own ineffectiveness on direct appeal by identifying the potentially meritorious non-repetitive appellate claims in the first state petition filed in 1995.

[135] Respondent believes that this argument justifies appellate counsel's failure to raise claims: 13, 14, 22, 23, 35, 42, 43, 50, 51, 52, 53, 54, 55, 64, 72, 74, 75, 76, 78, 79, 82, 101, 114, 115, 116, 117, 119, and 124. Again however, respondent counts several claims that are repetitive claims or are habeas in nature. These claims include: 14, 50, 51, 52, 53, 54, 55, 64, 82, 114, and 115.

the contemporaneous objection rule exist and apply to the non-repetitive claims in this case.[136] If it is

---

[136] California's statutory law states a general rule that a verdict will not be set aside absent a timely and specific objection or motion concerning the erroneous admission of evidence. *See* Cal. Evid. Code § 353. However, several exceptions to the rule exist:

1) The contemporaneous objection rule is "subject to the constitutional requirement that a judgment must be reversed if an error has resulted in a denial of due process of law." (Law Revision Commission Comments to Cal. Evid. Code § 35 (quoting *People v. Matteson* (1964) 61 Cal.2d 466, 469-70 (overruled by *People v. Cahill* (1993) 5 Cal.4th 479, 510 n.15)); but see *In re Cameron* (1968) 68 Cal.2d 487);

2) The contemporaneous objection rule may be waived in cases where reversal was compelled by introduction of inadmissible evidence that forced defendant to surrender his federal constitutional right not to testify. (See *People v. Cabrellis* (1967) 251 Cal.App.2d 681, 685; *People v. Bolinski* (1968) 260 Cal.App.2d 705, 722; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173; *People v. Allen* (1974) 41 Cal.App.3d 196, 201 n.1; *People v. Norwood* (1972) 26 Cal.App.3d 148, 152; *People v. Bob* (1946) 29 Cal.2d 321, 324-25; *People v. Frank* (1985) 38 Cal. 3d 711, 729 n. 3; and *People v. Chambers* (1964) 231 Cal.App.2d 23, 27-28);

3) The contemporaneous objection may be waived where the issue was not properly presented at trial but the trial judge understood it nonetheless. (See *People v. Scott*, 21 Cal.3d 284, 290 (1978); *People v. Abbott* (1956) 47 Cal.2d 362, 372);

4) The contemporaneous objection rule may be excused where an objection would have proved futile. (See *People v. Turner* (1990) 50 Cal.3d 668, 703; and *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101); *People v. Simon* (1927) 80 Cal.App. 675, 678-79; *People v. Alvarado* (2006) 141 Cal.App.4th 1577, 158; and *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 646);

5) This Court may waive the contemporaneous objection rule based on its discretion to review claims on their merits. *See, e.g., People v. McLain* (1988) 46 Cal.3d 97, 110; *People v. Miranda* (1987) 44 Cal.3d 57, 85; *People v. Bruner* (1995) 9 Cal.4th 1178, 1183 n.5; *People v. Champion*, 9 Cal.4th 879, 908 n. 6 (1995); *People v. Fudge* (1994) 7 Cal.4th 1075, 1106-07; *People v. Pinholster* (1992) 1 Cal.4th 865, 912; *People v. Malone* (1988) 47 Cal.3d 1, 38; *McLain, supra,* 46 Cal.3d at 110; *Miranda, supra,*

appellate counsel's duty to raise "all potentially meritorious claims," then it is also their duty to provide evidence that a potentially meritorious claim meets an exception to the contemporaneous objection rule.

Here, appellate counsel failed to identify the non-repetitive claims let alone consider application of the contemporaneous objection rule. (See traverse exhibit L (Declaration of Nolan, at 3-4)). There is no evidence that prior appellate counsel reasoned that the non-repetitive claims were not "potentially meritorious" since they did not come within an exception to that rule. (Contra return, at 44). In fact, prior counsel admits that seventy-one (71) of the claims are potentially meritorious. (Traverse exhibit L

---

44 Cal.3d at 85; *People v. Crittenden* (1994) 9 Cal.4th 83, 122 n. 4; and *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1146 n. 11);

6) The contemporaneous objection rule may be excused when "special circumstances" exist. (See, e.g., *People v. Flores* (1968) 68 Cal.2d 563, 567; *People v. Chavez* (1980) 26 Cal.3d 334, 350 n.5; *People v. Kitchens* (1956) 46 Cal.2d 260, 262; *People v. Johnson* (1970) 5 Cal.App.3d 851, 863 (1970); and *People v. Robinson* (1965) 62 Cal.2d 889, 894);

7) The contemporaneous objection rule may be waived when reviewing violations of fundamental constitutional rights that must be expressly waived. (See *People v. Saunders* (1993) 5 Cal.4th 580, 589 n. 5; *People v. Rodrigues* (1994) 8 Cal. 4 1060, 1132; and *People v. Vera* (1997) 15 Cal. 4 269, 276);

8) The contemporaneous objection rule may be waived were the litigant raises a pure question of law presented on undisputed facts. (See *Hale v. Morgan* (1978) 22 Cal.3d 388, 394; and *People v. Brown* (1996) 42 Cal.App.4th 461, 471); and

9) The contemporaneous objection rule may be waived where the party uses a new legal argument on appeal but the argument involves the same facts or legal standard as those asserted at trial. (See *People v. Avila* (2006) 38 Cal. 4th 491, 527 n.22).

(Declaration of Nolan, at 3-4)). There is no evidence that prior appellate counsel would not have raised the claims regardless of the contemporaneous objection rule. In fact, appellate counsel admits that, had he identified the factual and legal bases of the claims, they would have been raised in the prior appeal. (*Id.*).

Moreover, appellate counsel performed ineffectively by failing to plead potentially meritorious claims, despite the contemporaneous objection rule, in order to exhaust the claims and ensure federal review. Petitioner has not "failed to carry his burden of showing that the attorneys who represented him on direct appeal performed below an objective standard of reasonable competence in selecting which claims to make on direct appeal." (Contra return, at 44; see traverse exhibit L (Declaration of Nolan, at 3-4). Petitioner has made specific assertions of ineffective assistance of counsel. (Contra return, at 44). Petitioner's proffered justifications for now filing the record-based claims are adequate. (Contra *id.*). Every way about it, appellate counsel performed ineffectively in failing to plead the non-repetitive claims and make a case for waiver of the contemporaneous objection rule before this Court and the federal courts. (See traverse exhibit M (Declaration of Van Winkle, at 3-4 and 8-9).

Contrary to respondent's assertions, petitioner has established, that he was "actually prejudiced by prior counsel's omission of the claim[s]." (Return, at 44 (citation omitted)). He has not failed his burden in this regard. (Contra *id.*). "Irrespective of the ultimate success of the petition [counsel] has the duty to conduct a reasonable investigation and to present

not just actually meritorious claims (an imponderable before adjudication), but all potentially meritorious claims." (*Sanders, supra,* 21 Cal.4th at 713). Petitioner's non-repetitive appellate claims are potentially meritorious and would have been raised by effective appellate counsel. (See traverse exhibit M (Declaration of Van Winkle, at 5-7). Indeed, prior appellate counsel has admitted that he should have raised these claims, and would have, had he identified their factual and legal basis. (See traverse exhibit L (Declaration of Nolan, 3-4). Appellate counsel's failure to perform his duties materially affected petitioner's chance of relief and his presentation of meritorious claims that undermine his capital conviction and sentence. (See *Clark, supra,* 5 Cal.4th at 780; see also *Sanders, supra,* 21 Cal.4th at 719; and *Robbins, supra,* 18 Cal.4th at 810). He has accordingly demonstrated ineffective assistance of appellate counsel.

2. Procedural Dismissal of Petitioner's Claims Under *Dixon* Will Result in a Miscarriage of Justice.

Claims pass the *Dixon* bar when they meet any of the four exceptions outlined in *Harris, supra,* 5 Cal.4th at 825 n. 3, or they challenge the validity of a statute. (See also *Robbins, supra,* 18 Cal.4th at 814 n. 34). Thus, exempted claims include:

1. those premised on fundamental constitutional error that strikes at the heart of the trial process;

2. the judgment and sentence was rendered by a court wholly lacking jurisdiction over the case;

3. the defendant has been sentenced to an illegal sentence and the judgment may be corrected within redetermination of any facts;

4. the claim is premised on "a change in the law affecting the petitioner"; and

5. challenges to the validity of a statute may be raised at any time.

(See *Harris, supra,* 5 Cal.4th at 826-41; and *Clark, supra*, 5 Cal.4th at 775 (citing *Bell*, supra, 19 Cal.2d at 493)).

Petitioner's non-repetitive appellate claims involve fundamental constitutional violations, and claims challenging the validity of several statutes. They are thus cognizable. Respondent wrongly asserts that petitioner has "in conclusory terms" argued that his claims meet these exceptions. (Return, at 45). Respondent seeks to limit the constitutional violations that qualify as "fundamental" and "strik[ing] at the heart of the trial process." (*Id.,* (citation omitted)). To do so, respondent creates a new test, without legal foundation, that would limit the exceptions application to claims involving "errors which can never be harmless." (*Id.*). In respondent's view, only the complete denial of counsel would qualify under the state's test for fundamental constitutional violations. (*Id.*). Alternatively, respondent incorrectly argues that not one of petitioner's asserted claims of error "fall within the boundaries of errors that are both clear and fundamental [ ] and [ ] which strike at the heart of the trial process." (*Id.*).

In the second petition, petitioner included eighteen (18) non-repetitive appellate claims premised on fundamental constitutional error.[137]

---

[137] See Claims 11, 12, 13, 42, 43, 45, 72, 74, 75, 76, 77, 78, 79, 83, 84, 116, 117, and 124.

(See *Harris, supra,* 5 Cal.4th at 826-836). These claims allege violations of petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Without these alleged errors no reasonable juror would have found petitioner guilty or sentenced him to the punishment of death. Additionally, when the non-repetitive appellate claims are viewed together, cumulatively the errors strike at the heart of the trial.[138]

3. Inclusion of Petitioner's Non-Repetitive Appellate Claims in the Second Petition Is Necessary To Present Petitioner's Claims of Cumulative Error and to Exhaust All Claims For Relief.

Petitioner has brought all the non-repetitive appellate claims in the second petition in order to present "all potentially meritorious claims," (*Clark, supra,* 5 Cal.4th at 780), and to allow this Court to view the totality of errors when assessing petitioner's claims. Claims cannot be evaluated in a vacuum, and must be assessed in the full context of the trial. (See e.g., *Kyles, supra,* 514 U.S. 419; *Ortega, supra,* 561 F.2d 803; *McLister, supra,* 608 F.2d 785); and *Garcia, supra,* 163 Cal.App.3d at 151). Certainly, cumulative error, and prosecutorial misconduct *Brady* violations and ineffective assistance of counsel, claims must be assessed together when determining the reliability of a capital verdict. (See generally Blume & Seeds, *supra,* 95:4 Jour. Criminal Law & Criminology at 1153). Accordingly, even if this Court finds that none of the non-repetitive claims meet an exception under the *Dixon* bar, it should nevertheless find that no abuse of the writ occurred here as the inclusion of the non-repetitive

---

[138] See Claims 22, 23, 34, 35, 36, 37, 44, and 101.

appellate claims was necessary to present Claims 140 - 143 and to exhaust all claims for petitioner's federal petition. (See traverse exhibit M (Declaration of Van Winkle, at 3-4 and 8-9).

D. PETITIONER HAS ALLEGED SPECIFIC AND SUFFICIENT FACTS PROVING THAT HIS REPETITIVE HABEAS CLAIMS ARE COGNIZABLE.

***

Respondent has failed to show that petitioner has abused the writ for "failure to allege sufficient facts indicating certain claims in the petition are cognizable despite having been raised and rejected in petitioner's first habeas corpus proceeding, *In re Memro on Habeas Corpus*, S044437, petition denied June 28, 1995." (Order To Show Cause - Issue #4) (citing *In re Miller* (1941) 17 Cal.2d 734, 735).

***

Respondent erroneously argues that thirty-eight (38) claims should be barred under *Waltreus* since they were raised earlier. (Return, at 47).[139] Petitioner's first petition filed in 1995 only included twelve (12) claims. Petitioner has only repeated twelve (12) claims in the second petition.[140] Respondent concedes as much, later, when it notes that prior habeas counsel "presented only 12 claims." (Return, at 64).

---

[139] Respondent argues that the following claims "are repetitious, in that [petitioner] presented them to this Court in his first petition: Claims 5, 7, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 29, 30, 34, 36, 37, 63, 69, 86, 89, 90, 93, 94, 100, 101, 102, 104, 107, 108, 109, 110, 118, 120, 121, 122, 127, and 140." (Return, at 47). Respondent incorrectly counts Claims 5, 17, 24, 29, 30, 34, 36, 37, 63, 69, 86, 90, 93, 94, 100, 101, 102, 104, 107, 108, 109, 110, 118, 120, 127, and 140.

[140] The repetitive habeas claims include: Claims 7, 15, 16, 18, 19, 20, 21, 25, 26, 30, 121, and 122.

This Court has recognized that successive petitions are necessary, "subject to undefined exceptions and that the court may be willing to entertain multiple collateral attacks on a judgment not withstanding the potential for abusive writ practice." (*Clark, supra,* 5 Cal.4th at 768). Here, as in *Sanders*, petitioner has brought a successive petition in order to correct errors made by prior court appointed appellate and habeas counsel. (*Sanders, supra*, 21 Cal.4th at 719).

Petitioner recognizes that repetitive claims are not cognizable unless exempted from dismissal under the *Waltreus* bar. (See *Harris, supra,* 5 Cal. 4th at 826). The *Waltreus* rule holds "that in the absence of strong justification, any issue that was actually raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus." (*Id.* at 829 (emphasis omitted)). The *Waltreus* bar is not absolute and, as outlined above, a repetitive habeas claim is exempted from dismissal if petitioner has shown:

1. sufficient justification for the claim's renewal on habeas corpus;

2. the claim is premised on newly discovered or additional information that was not in the appellate record but casts new light on the issue;

3. the claim is premised on fundamental constitutional error that strikes at the heart of the trial process;

4. the judgment and sentence was rendered by a court wholly lacking jurisdiction over the case;

5. the defendant has been sentenced to an illegal sentence and the judgment may be corrected without redetermination of any facts; or

6. the claim is premised on a change in the law affecting the petitioner's case.

(*Harris, supra,* 5 Cal.4th at 825-841; and *Robbins, supra,* 18 Cal.4th at 815 n. 34; and *Miller, supra,* 17 Cal.2d at 735 ("a successive petitioner will be denied unless petitioner has demonstrated a "change in the facts or the law substantially affecting the rights of the petitioner ....").

Contrary to respondent's wishes, petitioner's claims are not barred under *Waltreus* simply because "[t]his is the second time petitioner has collaterally attacked his 1987 conviction in this court." (Return, at 46). Each of petitioner's repetitive habeas claims meet an exception under the *Waltreus* bar and are cognizable. The repetitive habeas claims were not filed "in derogation of this Court's policy to deny an application for habeas corpus that is based upon the same grounds urged in a prior petition that was denied on the merits." (Contra *id.*, at 46).

Respondent asserts that petitioner's repetitive habeas claims are barred "not because they are being denied on the same grounds on which they were previously rejected, but because this Court [should invoke] a procedural bar to their reconsideration." (Return, at 47 (citing *In re Lynch* (1972) 8 Cal.3d 410, 439 n. 26)). Respondent's citation to *Lynch* does nothing to support the state's point. There, this Court declined to consider the merits of a repetitive habeas claim since the contention had "been raised in *several* prior applications for habeas corpus by petitioner, each of which we have denied. Accordingly, it does not require our reconsideration." (*Lynch, supra,* 8 Cal.3d at 439 n. 26 (citing *Miller, supra,* 17 Cal.2d at 735) (emphasis added)). Thus, the Court in *Lynch* declined to reconsider its prior denials of the claim.

However, there, contrary to respondent's assertion (see return, at 47), this Court did not utilize the *Waltreus* bar to erect a separate procedural bar to the claims it previously denied on the merits. (See *Lynch, supra,* 8 Cal.3d at 439).[141] Further, Mr. Lynch had filed "several prior applications for habeas corpus" while petitioner has only filed one prior petition. (*Id.* at 426 n. 29). The second petition was filed based on prior counsel's failure to file an effective petition in 1995, while in *Lynch* the petitioner provided no additional justifications for his successive filings besides the violation of his constitutional rights. (*Id.*).

Respondent argues that petitioner "bears a heavy burden" to show that his repetitive habeas claims may be heard by this Court. (Return, at 47). Not so, the burden only requires petitioner to make a prima facie showing that his claims meet an exception to the *Waltreus* bar. (*Harris, supra,* Cal.4th at 841-42). Respondent wrongly argues that petitioner has conceded that none of his claims meet the *Waltreus* exception. (See *Id.*). Petitioner has made no such concession and has made the appropriate allegations to exempt his repetitive habeas claims from procedural dismissal. Here, petitioner has met his burden and can show that each of his

---

[141] Moreover, the federal courts have recognized that when this Court denies a claim by citing *Waltreus*, it is not erecting a separate procedural basis to preclude review of the claim, but merely indicating that the merits of the claim have been reviewed and denied before. (*See Ylst, supra,* 501 U.S. at 805). Indeed, this is why the federal courts have developed the "look through doctrine" in cases involving citation to *Waltreus*, to review the prior determination on the merits despite the *Waltreus* dismissal. (*Id.*). The *Waltreus* bar thus essentially, confirms exhaustion of the claim. (*Id.*).

repetitive habeas claims should be heard by this Court and resolved on the merits.

1. This Court Should Reconsider Its Prior Denial Of Petitioner's Repetitive Habeas Claims Due to Material Changes in the Law.

The *Waltreus* bar will not bar review of "[a claim or] an issue previously rejected on direct appeal when there has been a change in the law affecting the petitioner." (*Harris, supra*, 5 Cal.4th at 841 (citing *Terry, supra*, 4 Cal.3d at 916; *King, supra,* 3 Cal.3d at 229 n. 2; and *Jackson, supra*, 61 Cal.2d 500)). Petitioner has significantly developed the legal and factual bases for three claims previously raised in the first petition.[142] Accordingly, this Court is free to review the merits of these claims.

---

[142] See second petition, at 88 (Claim 15: (Petitioner's Rights were violated by the Prosecutions' Use of Perjurious Jailhouse Snitches (citing second petition, exhibits B, C, and E)); 117 (Claim 20 (The Prosecution Violated Petitioner's Rights by Withholding Brady Evidence Regarding Benefits Paid to Jailhouse Snitches who Testified at Pretrial Hearing (citing *Banks v. Dretke* (2004) 540 U.S. 668, 692; *Giglio v. United States* (1972) 405 U.S. 150, 153; *Mooney v. Holohan* (1935) 294 U.S. 103, 112; *Berger, supra,* 295 U.S. at 88; *Strickler, supra*, 527 U.S. at 284. n. 14; *Bracy v. Gramley* (1997) 520 U.S. 899, 909; *United States v. Chemical Foundation, Inc.* (1926) 272 U.S. 1, 14-15; *Kyles, supra,* 514 U.S. at 439-440; *Bagley, supra,* 473 U.S. at 675 n. 6; and *Olmstead v. United States* (1928) 277 U.S. 438, 484)); and 430 (Claim 121 (Petitioner was Deprived of a Fair and Accurate Guilt and Penalty Phase Due to Lack of Available Material Evidence (citing second petition exhibit M)).

2. This Court should reconsider Its Prior Denial Of Petitioner's Repetitive Habeas Claims Due to The Ineffective Assistance of Prior Habeas Counsel.

Counsel has the duty, after conducting reasonable investigation into readily identifiable triggering facts, of competently presenting all "potentially meritorious claims" where a *prima facie* case of error can be made. (*Clark, supra,* 5 Cal.4th at 780). Failure to do so constitutes ineffective assistance of counsel justifying resubmission of successive and delayed petitions. (*Sanders, supra,* 21 Cal.4th at 819). It will also constitute good cause for reconsideration of the previous denial of the claims on the merits. (*Clark, supra,* 5 Cal.4th at 780).

Here, petitioner timely submitted his petition and claims of ineffective assistance of prior habeas counsel. (Contra return, at 30). He argues that his right to effective assistance of counsel was violated by the materially deficient performance of his prior habeas counsel. Petitioner previously asserted that "[t]o the extent that meritorious claims were not raised in petitioner's appeal and initial habeas petition, petitioner was deprived of his federal and state constitutional rights to effective assistance of appellate and habeas counsel." (Second petition, at 21).

In total, petitioner's prior habeas counsel failed to conduct a diligent review of the appellate record, failed to present potentially meritorious appellate claims not presented by appellate counsel, and failed to present a claim of ineffective assistance of prior appellate counsel. Prior habeas counsel failed to identify triggering facts in the trial record and failed to identify triggering facts and material evidence outside the record. Prior

habeas counsel failed to conduct reasonable investigation into potentially meritorious claims based on triggering facts in their possession. Ultimately, prior habeas counsel failed to include forty-nine (49) non-repetitive and potentially meritorious habeas claims raised for the first time in the second petition. (See traverse exhibit L (Declaration of Nolan, at 3-4). Thus, this Court should reconsider its denial of the twelve (12) repetitive habeas claims.

The failure of prior counsel to perform these duties materially affected petitioner's chance of relief, *or presentation of a meritorious issue undermining his capital conviction or sentence.* Thus, he has stated a case for ineffective assistance of counsel. (See *Clark, supra,* 5 Cal.4th at 780; see also *Sanders*, 21 Cal.4th at 719; and *Robbins*, *supra*, 18 Cal.4th at 810). Had counsel presented the repetitive claims with all the "potentially meritorious claims" lodged in the second petition, petitioner would have likely earned favorable relief. However, prior habeas counsel failed to identify triggering facts in his possession, failed to investigate potentially meritorious claims, failed to competently present meritorious claims and ultimately failed petitioner. Because prior habeas counsel performed ineffectively in violation of petitioner's constitutional rights, this Court should find justification for reconsideration of the twelve (12) repetitive habeas claims.

3. This Court should reconsider Its Prior Denial of Petitioner's Repetitive Habeas Claims Because The Procedural Dismissal of Petitioner's Claims Will Result in a Miscarriage of Justice.

This Court should reconsider its prior denial of petitioner's twelve (12) repetitive habeas claims because their denial will result in a miscarriage of justice. Respondent wrongly argues that petitioner "has not alleged, much less demonstrated, that the trial court lacked jurisdiction or acted in excess of its jurisdiction or that the law has changed with regard to a particular claim that was previously rejected." (Return, at 47). Petitioner has set forth persuasive justification for reconsideration of this Court's prior denial and has demonstrated that each claim qualifies under an applicable miscarriage of justice exception.

Petitioner has done more than make the "mere assertion that one has been denied a 'fundamental' constitutional right." (Contra return, at 48 (citing *Harris, supra,* 5 Cal.4th at 834). Petitioner has not made conclusory allegations, but has instead presented well reasoned and substantiated claims of error. (Contra return, at 48). Petitioner's claims are "well-founded" in both fact and law. (Contra *id.*). The claims presented here "strike at the heart of the trial process." (*Harris, supra,* 5 Cal.4th at 834). This is true both individually and cumulatively. Petitioner has alleged four repetitive habeas claims[143] premised on fundamental errors stemming from the withholding of evidence; the falsification of evidence, and the lack of

---

[143] See Claims 20, 21, 121, and 122.

material evidence of petitioner's guilt.[144] These errors alleged strike at the heart of the trial process and occurred in violation of petitioner's fundamental rights.

Respondent's argument that fundamental constitutional errors are "narrower than ordinary reversible error which results in a miscarriage of justice" is wrong. By limiting fundamental errors to "only errors which can never be harmless," respondent seeks to limit the application of this exception to incidents only involving the "complete denial of counsel." (See return, at 48 (citing *Gideon, supra,* 372 U.S. 335)). Moreover, petitioner was denied the effective assistance of trial, appellate, and habeas counsel; and has thus suffered a complete denial of his right to effective assistance of counsel as guaranteed by the California and United States Constitutions.

4. Inclusion of Petitioner's Repetitive Habeas Claims in the Second Petition Is Necessary To Present Petitioner's Claims of Cumulative Error and to Exhaust All of Petitioner's Claims For Relief.

Petitioner has brought the repetitive habeas claims in the second petition in order to allow this Court to view the totality of the circumstances

---

[144] See second petition, at 117 (Claim 20 (The Prosecution Violated Petitioner's Rights by Withholding *Brady* Evidence Regarding Benefits Paid to Jailhouse Snitches who Testified at Pretrial Hearing)); 120 (Claim 21 (The Prosecution Violated Petitioner's Rights by Failing to Disclose Exculpatory Evidence in Discovery Regarding the Prior Felony Convictions and Probationary Status of Prosecution Witness Scott Bushea)); 430 (Claim 121 (Petitioner was Deprived of a Fair and Accurate Guilt and Penalty Phase Due to Lack of Available Material Evidence)); and 436 (Claim 122: Petitioner was Deprived of his Constitutional Rights as a Result of Falsification of Sgt. Carter's Alleged Interrogation Notes)).

in assessing petitioner's claims. Claims cannot be evaluated in a vacuum, and must be assessed in the full context of a trial. (See e.g., *Kyles, supra,* 514 U.S. 419; *Ortega, supra,* 561 F.2d 803; *McLister, supra,* 608 F.2d 785; and *Garcia, supra,* 163 Cal.App.3d at 151). Cumulative error, and particularly claims of *Brady* violations and ineffective assistance of counsel, should be assessed together when determining the reliability of a capital verdict. (See generally Blume & Seeds, *supra,* 95:4 Jour. Criminal Law & Criminology at 1153).

Likewise, even if this Court finds that none of the repetitive habeas claims meet an exception under the *Waltreus* bar, it should nevertheless find that no abuse of the writ occurred here. The inclusion of the (12) repetitive habeas claims is justified. First, this Court may reconsider its prior denial of the claims based on its discretionary power of review. Second, this Court should re-examine its prior denial of the claims in the context of the facts and claims alleged in the second petition, which is more complete and detailed than the prior habeas pleadings filed in this Court. Third, the twelve (12) claims have been brought to exhaust and present the cumulative error claims to this Court. Fourth, it is necessary to exhaust all claims in the federal petition including claims of cumulative error. Fifth, the twelve (12) claims have been raised to provide context so that this Court may better assess the prejudice stemming from the multitude of errors infecting petitioner's capital proceedings. Sixth, to provide context for this Court's determination as to whether prior appellate and habeas counsel performed ineffectively by failing to raise all potentially meritorious claims included

within the second petition. Finally, three of the claims have been developed with additional case law since their prior denial. (See traverse exhibit M (Declaration of Van Winkle, at 7).

E. PETITIONER HAS ALLEGED SPECIFIC AND SUFFICIENT FACTS THAT JUSTIFY THE FILING OF HIS SUCCESSIVE PETITION AND PROVE THAT HIS NON-REPETITIVE HABEAS CLAIMS ARE COGNIZABLE.

***

Respondent has failed to show that petitioner has abused the writ for "failure to allege sufficient facts indicating certain claims in the petition are cognizable despite the fact they could have been raised in the first petition." (Order to Show Cause - Issue #5) (*Clark, supra*, 5 Cal.4th at 774-775; and *Horowitz supra*, 33 Cal.2d at 546-547).

***

Respondent contends that petitioner has presented "new grounds based on matters known to the petitioner at the time of previous collateral attacks upon the judgment." (Return, at 49 (citing *Horowitz, supra,* 33 Cal.2d at 546-47). Respondent incorrectly asserts that fifty-one (51) claims are barred on this ground. (Return, at 49).[145] Actually, fifty-two (52) non-

---

[145] Respondent asserts that the following claims are procedurally barred since they are "successive, and there is no justification for not including them in the first habeas petition, since they arise from facts apparent in the trial and appellate record: Claims 11, 13, 14, 22, 23, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 72, 74, 75, 76, 78, 79, 82, 85, 88, 92, 95, 97, 99, 103, 105, 106, 111, 114, 115, 116, 117, 123, 124, 130, 131, 133, 134, 135, 136, 137, 138, 139, 140, 141, and 143." (Return, at 49). Respondent incorrectly includes in its count, Claims 11, 13, 22, 23, 35, 42, 43, 50, 51, 52, 53, 54, 55, 64, 72, 74, 75, 76, 78, 79, 82, 92, 116, 117, 123, and 124. Again respondent double counts claims by including, as non-repetitive and habeas based, claims the state previously deemed to be repetitive or appellate in nature. However, respondent fails to note some claims that are non-repetitive and habeas in nature including claims: 69, 71,

repetitive claims should be considered here,[146] and none should be barred.

Respondent argues that this Court's precedent bars the filing of successive petitions in their entirety. (See return, at 48 ("Repetitious successive petitions are not permitted.") (citing *Clark supra*, 5 Cal.4th at 775)). To the contrary, this Court has created a separate successiveness bar, but has not outlawed successive petitions *in toto*. Such a restriction would be "unprecedented" (see *Clark, supra*, 5 Cal.4th at 795 n. 30), and would violate the habeas corpus clause of the California Constitution. (See *Id.* at 764 n. 2 (quoting Cal. Con. Art. I, § 1).

Petitioner's claims are not procedurally barred because he has "return[ed] to this Court for habeas corpus relief nine years after his first habeas corpus petition was denied on the merits." (Return, at 49). While the time period is long, there has been no substantial delay in the filing of the petition and, alternatively, petitioner has justified any delay. Petitioner's prior habeas counsel performed ineffectively in failing to present the non-repetitive habeas claims in the first petition. Current counsel filed the second petition seventeen (17) months after their appointment by this Court. Petitioner's current counsel are the first counsel

---

86, 87, 89, 90, 91, 93, 94, 96, 98, 100, 102, 104, 107, 108, 109, 110, 113, 119, 120, 126, 127, 128, 129, 132, and 142.

[146] The non-repetitive habeas claims include: Claims 14, 46, 69, 71, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, 115, 119, 120, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, and 143.

in his case to provide competent representation by, after identifying all triggering facts and reasonably investigating all claims of error, presenting all "potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780).

1. Petitioner Has Justified the Filing of His Successive Petition.

This Court has stated that claims presented in a "subsequent" petition that should have been presented in an earlier filed petition will be barred as "successive" unless the petitioner "adequately explain[s]" (see return, at 55), his or her failure to present all claims in the earlier filed petition. (See *Horowitz, supra*, 33 Cal.2d at 540, 547; and *Clark, supra*, 5 Cal.4th at 768, 776, 782). In accordance with this Court's requirements, petitioner has justified the filing of his second petition based on appellate and prior habeas counsel's ineffective assistance. The successiveness bar has not been strictly or regularly adhered to in the past. (See *Clark, supra*, 5 Cal.4th at 768; and *Robbins, supra,* 18 Cal.4th at 788 n. 9). Nevertheless:

> [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 representation of the petitioner's claims.

(*Clark, supra,* 5 Cal.4th at 774). This Court will also consider a claim raised in a successive petition if the petitioner demonstrates that the claim meets a miscarriage of justice exception. (*Id.* at 790).

Here, petitioner has provided "satisfactory reasons" for not presenting his non-repetitive claims in the first petition (contra return, at 55), and has justified having to resort to a successive petition for "remedy

of appeal." (*Shipp, supra,* 62 Cal.2d at 553). Appellate and prior habeas counsel failed to identify triggering facts, failed to conduct a reasonable investigation into claims of error, and failed to include in petitioner's direct appeal or first petition potentially meritorious grounds. Thereby, prior counsel provided ineffective assistance of counsel. (*Sanders, supra,* 21 Cal.4th at 719). Petitioner Reno could not have previously discovered the meritorious claims of error included in the second petition, since prior counsel ineffectively failed to identify the claims or inform petitioner as to their legal basis. (See *Clark, supra,* 5 Cal.4th at 775; see also traverse exhibits L and K (Declaration of Nolan, at 3-4; and Declaration of Reno, at 1-2)).

Nine of the non-repetitive habeas claims included within the second petition are premised on "newly discovered evidence [that] undermines the prosecution's entire case." (*Clark, supra,* 5 Cal.4th at 766).[147] The claims allege errors that are fundamental in nature. This is true whether they regard state misconduct in the form of withheld evidence;[148] the ineffective

---

[147] See Claim 71 (citing second petition exhibits F-K); Claim 90 (citing second petition exhibit K); Claim 91 (citing second petition exhibits D and F); Claim 98 (citing second petition exhibit BB); Claim 102 (citing second petition exhibit P); Claim 108 (citing second petition exhibits M - X); Claim 109 (citing second petition exhibits S - AA); Claim 119 (citing second petition exhibit CC); and Claim 120 (citing second petition exhibit AA).

[148] See second petition, at 256 (Claim 71 (The Prosecutor Committed Misconduct in Violation of Petitioner's Constitutional Rights in Failing to Disclose Impeachment Evidence Regarding Jailhouse Snitch Anthony Cornejo)).

assistance of trial counsel;[149] or petitioner's incompetence to stand trial.[150]

Petitioner's current counsel have exhibited "due diligence" by thoroughly investigating all potentially meritorious claims for relief, identifying all potentially meritorious triggering facts, and presenting the second petition as quickly as reasonably possible. (See *Clark, supra,* 5 Cal.4th at 775). In less than two and a half years from appointment, current counsel identified, investigated, developed, and presented one-hundred-forty-three (143) claims. Eighty-seven (87) of those claims were identified, investigated, and developed for the first time. All one-hundred-forty-three (143) potentially meritorious claims were refined, verified, and further developed for final presentation to this Court. Counsel also established a

---

[149] See second petition, at 309 (Claim 90 (Trial Counsel Rendered Ineffective Assistance by Failing to Investigate and Present Scientific Evidence or to Cross-Examine the Coroner Regarding the Alleged Penal Code § 288 Violation)); 313 (Claim 91 (Trial Counsel Rendered Ineffective Assistance When He Failed to Impeach Cornejo Based on Favors Regularly Conferred upon Him in Exchange for His Testimony)); 331 (Claim 98 (Petitioner's Right to Effective Assistance of Counsel was Violated as a Result of Counsel's Failure to Conduct an Adequate Voir Dire)); 337 (Claim 102 (Trial Counsel Rendered Ineffective Assistance By Failing to Impeach Dr. Choi with his Preliminary Hearing Testimony)); 358 (Claim 108 (Petitioner's Rights to Due Process and Effective Assistance of Counsel at Both Guilt and Penalty Phases, and to a Reliable Determination of Penalty, Were Violated as a Result of Failure to Investigate and Present Mitigating Penalty Phase Evidence)); and 361 (Claim 109: (Trial Counsel Rendered Ineffective Assistance for Failing to Present Mitigating Evidence in the Sentencing Phase of Trial)).

[150] See second petition, at 417 (Claim 119 (Petitioner was Mentally Incompetent to Stand Trial)); and 422 (Claim 120 (Petitioner Was Deprived of His Right of Access to and Assistance of Competent Mental Health Experts, in Violation of *Ake v. Oklahoma*)).

working relationship with the client, reviewed the claims with the client, and researched developments in the law. All this was conducted within the time that this Court would typically grant for investigation and development of a petition for writ of habeas corpus in a capital case following appointment of habeas counsel. (See Supreme Court Policies Regarding Cases Arising from Judgments of Death, std. 1-1.1).

Respondent argues that in no circumstance should procedural bars be excused because petitioner "is 'innocent of the charged crime of first degree murder and the special circumstance and the resulting death sentence.'" (Return, at 55 (citation omitted)). Respondent argues that petitioner has "barely alleged, but certainly has not shown, that the 'newly discovered, irrefutable evidence of innocence of the offense' or degree of offense was such that it would 'undermine the entire prosecution case and point unerringly to innocence or reduced culpability.'" (*Id.* at 56 (citing *Gonzalez, supra,* 51 Cal.3d at 1246). Respondent is wrong; included within the second petition are claims premised on trial errors of constitutional dimension that "carr[y] with [them] a risk of convicting an innocent person." (*Sterling, supra,* 63 Cal.2d at 487).

Petitioner has done more than proffer evidence "that merely raises a reasonable doubt as to guilt or that a reasonable jury could have rejected...." (Contra return, at 56). In Claims 86 and 87, petitioner proffered substantive evidence of his innocence that prior trial, appellate, and habeas

counsel had failed to identify, investigate or develop.[151] Petitioner submitted several exhibits to this Court that demonstrate he is actually innocent of the crimes.[152] Petitioner has submitted mental health evidence relative to his claims of reduced culpability. (See second petition exhibits X - CC). Moreover, petitioner has shown that prior counsel failed to develop and present substantial evidence in mitigation. Petitioner's evidence does more than relate "only to an issue already disputed at trial," and does much more than "conflict with trial evidence...." (Contra *Id.*, at 56 (citations omitted)). Petitioner has met his burden by submitting "evidence of innocence that could not have been, and presently cannot be, refuted."

---

[151] The evidence includes indications that fourteen (14) other suspects were identified by police as the likely culprits of the 1976 killings. Throughout the police investigation, a multitude of alternate suspects emerged, and trial counsel could have readily identified and located these facts. Trial counsel rendered ineffective assistance of counsel in failing to conduct an independent investigation and present evidence regarding the alternate suspects. There was no strategic reason for counsel not to investigate and bring up these alternate suspects. Counsel's failure to do so violated petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights. Likewise, there was no strategic reason for prior appellate and habeas counsel not to identify and present the evidence.

[152] Defense counsel failed to investigate and present evidence that could have been obtained as a result of leads contained in the discovery materials including, but not limited to, evidence that two other individuals were involved in the actual killings, neither of whom was petitioner. (See second petition exhibits G and H). Had trial counsel investigated and presented this evidence, it is reasonably probable that the outcome would have been different at the guilt and penalty phases had this failure not occurred.

(*Clark, supra*, 5 Cal.4th at 798 n. 33).[153]

Contrary to respondent's assertions, the foregoing establishes that "petitioner has alleged [] facts demonstrating a fundamental miscarriage of justice so as to permit consideration of the claims on the merits." (Return, at 57). Petitioner has addressed "the limited exceptions set forth by this Court to decide whether the merits of an unjustified successive and untimely petition should be considered." (*Id.*). Accordingly, petitioner's claims are not barred, may be considered on the merits, and should not "be denied as successive." (*Id.*).

Respondent wrongly argues that only "false or perjured evidence may create a distorted or 'grossly misleading profile.'" (Return, at 57 (citation omitted)). Perjured testimony *may cause* a "grossly misleading profile" of petitioner during the penalty phase. (See *Clark, supra,* 5 Cal.4th at 798 n. 34). However, there is no requirement that petitioner must present evidence of perjury at his trial to show that the jury was presented with a "grossly misleading profile" during the penalty phase due to other errors by

---

[153] Petitioner did not receive funding from this Court for the investigation that led to the development of his actual innocence claims, since those claims were developed in a successive petition. To this end, in his second petition, petitioner requested funding for further investigative services. (See second petition, at 520-21). Since an order to show cause was issued in his case, petitioner will file a confidential motion for ancillary funding in conjunction with his traverse and will move for discovery in accordance with the rights attached to the issuance of an order to show cause in his case. Petitioner's prior claim rested upon a *prima facia* case of his innocence and reduced culpability. When and if further evidence of petitioner's innocence is established through investigation and discovery, the allegations in his second petition and traverse will be supplemented.

trial counsel, the prosecutor, or the trial court. (Contra return, at 57 (citation omitted)). Besides, petitioner has claimed that the state submitted false and perjurious evidence during the trial that led to a "grossly misleading profile." (Contra *id.*).[154]

Finally, contrary to respondent's arguments, petitioner has done more than merely show that "accurate evidence" was submitted at his penalty phase. (Contra *Clark, supra,* 5 Cal.4th at 798 n. 34). Likewise, petitioner has done more than argue "that the evidence presented at the penalty phase was 'inadequate'." (Contra return, at 57 (citation omitted)). Petitioner has demonstrated that trial counsel did not submit any real evidence in mitigation. Respondent thus wrongly concludes that it is not "debatable whether a reasonable jury would have voted for death if presented with the additional evidence of mitigation." (*Id.* at 57).

2. Petitioner's Prior Habeas Counsel Performed Ineffectively By Failing To Investigate the Triggering Facts Underlying the Meritorious Non-Repetitive Claims Presented In Petitioner' Successive Habeas Petition.

Respondent recognizes that in some circumstances "consideration may be given to a claim that prior habeas counsel did not competently represent a petitioner." (Return, at 52 (citing *Clark, supra,* 5 Cal.4th at

---

[154] See second petition, at 88 (Claim 15: Petitioner's Rights were violated by the Prosecutions' Use of Perjurious Jailhouse Snitches); second petition, at 92 (Claim 16: Petitioner's Rights were Violated by the False and Perjurious Testimony of Anthony Cornejo); and second petition, at 253 (Claim 69: The Prosecution's Presentation of Facts was Directly Contrary to Those Contained in the Missing-Juvenile Report).

779)). Here, petitioner has alleged with specificity that prior counsel failed to identify, investigate, develop, and file the non-repetitive habeas claims and that prior counsel's representation fell below that to be expected from a reasonably competent capital defense attorney. (*Id.* at 780). Petitioner has also shown that the non-repetitive claims presented in the second petition "would have entitled petitioner to relief" if raised in the prior habeas petition. (*Id.*).

Respondent correctly notes that petitioner's current counsel discovered the non-repetitive claims after being appointed to petitioner's case by the federal court. (Return at 52). Respondent erroneously argues that this fact is "irrelevant to whether the merits of claims raised for the first time in a successive petition should be entertained." (Return, at 52 (citations and emphasis omitted)). In fact, it is demonstrative of when petitioner became aware of the potentially meritorious claims omitted by his prior ineffective counsel and when current counsel began investigating the case. (See generally traverse exhibits H, I, J, and K (Declarations of Giannini, Thomson, Stetler, and Reno). All of these considerations are necessary to resolve whether any of petitioner's claims are barred under *In re Dixon*.

Petitioner has done more than suggest that his prior state habeas corpus counsel was ineffective. (See return, at 51; and see generally traverse exhibits L and M (Declarations of Nolan and Van Winkle). Respondent insists that "petitioner's assertions of ineffective assistance of habeas corpus counsel are not specific, [and that] his proffered justification

for filing successive claims in a second habeas corpus petition is inadequate." (*Id.*). Respondent incorrectly alleges that petitioner has sought to establish ineffective assistance by arguing that his prior counsel "mere[ly] omitted" the non-repetitive claims. Respondent alleges, without recourse to proof, that prior counsel performed effectively by not conducting "an 'unfocused investigation' to uncover 'any possible factual basis for collateral attack'" and by not venturing "into areas of questionable merit." (*Id.* at 53 (emphasis, citations, and internal quotations omitted)). Respondent insists that petitioner's allegations are "conclusory" and "fail to make the requisite showing." (*Id.* at 54). Respondent wrongly accuses petitioner of attacking the competency of prior counsel's performance using:

> nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigate services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages.

(Return, at 54 (quoting *Clark, supra,* 5 Cal.4th at 780)).

Petitioner has proffered, with specificity, allegations of ineffective assistance of prior habeas counsel that rise above "conclusory allegations." (Contra return, at 54). Petitioner has not "suggest[ed] that the same appellate counsel who failed to recognize the claims in the first instance could not be expected to recognize his own ineffectiveness for failing to spot the errors." (*Id.* at 54). Respondent's paraphrasing lacks quotations and good sense. Moreover, respondent admits that several of petitioner's non-repetitive claims are premised on evidence outside the record, that prior

counsel admittedly failed to locate and develop.[155]

All of the non-repetitive habeas claims are premised on triggering facts that were either in prior habeas counsel's possession or, though being readily identifiable, were not developed by prior habeas counsel. He performed deficiently by failing to identify triggering facts and cultivate potentially meritorious claims. (*See Clark, supra,* 5 Cal.4th at 780). Because many of the non-repetitive claims would have warranted relief had they "been raised and adequately presented in the initial petition," prior habeas counsel's failure "to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants." (*Id.*; see also traverse exhibit M (Declaration of Van Winkle, at 8-9).

Based on the evidence presented by petitioner in his petition, informal reply, and in this traverse, this Court should determine that petitioner's prior habeas counsel performed ineffectively. (See generally traverse exhibit L and M (Declarations of Nolan and Van Winkle). Petitioner's claims should be exempted from the *Dixon* and successiveness bars due to ineffective assistance of his prior habeas counsel. (Contra return, at 51). Accordingly, this Court should excuse the *Dixon* bar as to all non-repetitive habeas claims.

---

[155] In this regard, respondent admits that the following claims are based on evidence outside the record and not previously presented to this Court: Claims 71, 88, 91, 107, 108, 109, 119, 124, 127, 131, 133, 134, 135, 136, 137, 138, 139, 140, and 141. (Return, at 54).

3. The Predicate Facts For Each Claim Were Not Known By Petitioner At the Time His Prior Habeas Counsel Filed the 1995 Petition.

Respondent argues that "the predicate facts [of petitioner's] new claims were known or discoverable at the time he prepared and filed his first habeas corpus petition." (Return, at 49). Respondent incorrectly asserts that petitioner's non-repetitive habeas claims "are based on facts which were known to him or his attorneys, or were available and discoverable by him or his attorneys, at the time of the earlier habeas corpus petition." (*Id.*).

First, the legal basis and facts underlying the claims were not known by petitioner. (See traverse exhibit K (Declaration of Reno, at 1-2). None of the non-repetitive habeas claims are premised on facts known by petitioner during the prior litigation, since petitioner's appellate and prior habeas attorney ineffectively communicated with petitioner, failed to identify critical triggering facts, and failed to competently present all potentially meritorious legal claims. (See traverse exhibit K (Declaration of Reno, at 2). Second, the legal and factual bases for the claims could and should have been identified and developed by his prior counsel. (See traverse exhibit L and M (Declaration of Nolan, at 5; and Declaration of Van Winkle, at 5-7).

Petitioner is not a capital habeas lawyer and cannot be expected to understand and be versed in this arcane legal field. (See Alarcón, *supra*, 80 S. Cal. L. Rev. 697) (discussing the complexity of capital habeas litigation). He has indicated that he was not aware of the legal and factual basis of any of the non-repetitive claims, even though the events occurred prior to or

during his trial. (See traverse exhibit K (Declaration of Reno, at 2-3). He did not become aware of the underlying factual and legal bases for the claims until his current counsel completed a draft version of his second petition in April 2003, and at that point *a prima facie* case had not been made as to many of the claims. (See *Id.*; and traverse exhibit J (Declaration of Stetler, at 3-4). He has thus shown that the second petition was timely raised after he became aware of the claims and counsel could finish all the claims in the second petition. Moreover, if respondent is correct in asserting that "every single new claim presented herein could have been presented in the first habeas corpus petition," (*id.*) then respondent's arguments prove that petitioner's prior counsel was ineffective in failing to identify, research, investigate, and present the many meritorious claims presented in the second petition.

4. The Procedural Dismissal of Petitioner's Non-Repetitive Habeas Claims Will Result in a Miscarriage of Justice.

A claim is exempt from the *Dixon* bar when it meets any of the four exceptions outlined in *Harris, supra*, 5 Cal.4th at 825 n. 3. (See also *Robbins, supra*, 18 Cal.4th at 814 n. 34). Additionally, challenges to the validity of a statute may be raised at any time. (*Clark, supra*, 5 Cal.4th at 775 (citing *Bell*, supra, 19 Cal.2d at 493). Likewise, claims premised on the ineffective assistance of trial counsel may be brought at any time. (*Robbins, supra*, 18 Cal.4th at 815 n. 34 ("We do not apply [*Waltreus* and *Dixon*] bars to claims of ineffective assistance of trial counsel, even if the habeas corpus claim is based solely upon the appellate record") (citations

omitted)). In the second petition, informal reply, and this traverse, petitioner has demonstrated that his non-repetitive habeas claims should be reviewed because they meet one of these exceptions.

Respondent accuses petitioner of stating "in conclusory terms, that all his claims are meritorious and demonstrate that a fundamental miscarriage of justice occurred." (Return, at 55 (internal quotations omitted) (citation omitted)). Respondent argues that petitioner does not actually "demonstrate that he qualifies under one of [the *Clark* or *Harris*] exceptions." (See *Id.* (emphasis omitted)). Respondent argues that petitioner has "failed to adequately explain and justify his [ ] failure to raise the above-listed claims in a prior habeas corpus petition, his claims are thus barred." (*Id.*). Lastly, respondent contends that "petitioner has failed to allege facts demonstrating a fundamental miscarriage of justice." (*Id.*). Respondent errs in all respects.

Each of petitioner's non-repetitive habeas claims meet an exception under the *Dixon* bar and thus may be heard. Petitioner has demonstrated that dismissal of his non-repetitive habeas claims will result in a miscarriage of justice in a case involving actual innocence and reduced culpability. (Contra return, at 55). Petitioner has justified his filing of a successive petition based on prior trial, appellate, and habeas counsel's ineffective assistance. (Contra *Id.*).

This Court is free to review each of petitioner's claims premised on ineffective assistance of trial counsel. (*Robbins, supra,* 18 Cal.4th at 814 n. 34 (citing *Mendoza Tello, supra,* 15 Cal.4th at 267)). This is especially true

where as here, petitioner's trial, appellate, and habeas counsel serially failed to present almost any of the readily identifiable and material mitigating evidence in petitioner's case. (See *Clark, supra,* 5 Cal.4th at 798). This Court may thus review the merits of each of the (28) non-repetitive habeas claims that are premised on the ineffective assistance of trial counsel.[156] In short, due to trial counsel's ineffectiveness, "the picture of [petitioner] painted by the evidence at trial [] differ[ed] so greatly from his actual characteristics that...no reasonable judge or jury would have imposed the death penalty had it been aware of the defendant's true personality and characteristics." (*Robbins, supra,* 18 Cal.4th at 813).

Regarding the first exception to the *Dixon* bar, respondent argues that, "petitioner has not made a persuasive showing that, absent the alleged constitutional violations, he would not have been convicted." (Return, at 56 (citation omitted)). Respondent is wrong. Fundamental errors "strike at the heart of the trial process...." (*Harris, supra,* 5 Cal.4th at 834 (citing *Fulminante, supra,* 499 U.S. at 309)). Such errors, if committed, would ensure that no reasonable juror would vote for conviction or a sentence of death. (*Id.*). Here, petitioner presented forty-two (42) non-repetitive habeas claims that include constitutional errors that are fundamental in nature.[157]

---

[156] Claims premised on the ineffective assistance of trial counsel include: Claims 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 113, 114, and 140.

[157] The non-repetitive habeas claims that are premised on fundamental errors include: Claims 14, 46, 69, 71, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 104, 105, 106, 107, 108,

These claims are premised on violations of petitioner's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments and parallel provisions of the California Constitution. Petitioner has thus made a sufficient showing demonstrating that these errors struck at the core of the trial process and that, in their absence, no reasonable juror would have convicted him or voted for a sentence of death.

Petitioner further alleged several non-repetitive habeas claims that the trial court lacked jurisdiction, or acted in excess of jurisdiction, when it sentenced him to the punishment of death.[158] These claims are premised on petitioner's right to be found guilty, beyond a reasonable doubt, by a unanimous jury that agrees as to all elements of the capital offense and sentence. The claims are also based upon the fact that the trial court could not, under binding and controlling international law, sentence petitioner to death. Together these claims make clear that the sentence imposed upon petitioner may be "restrained or annulled if determined to be in excess of the court's powers as defined by constitutional provision, statute, or rules developed by courts." (*Zerbe, supra,* 60 Cal.2d at 667-68).

Respondent incorrectly asserts that "[p]etitioner has not addressed the fourth exception under *Clark*, in which the petitioner was convicted under an invalid statute." (Return, at 57). In fact, petitioner has included

---

109, 110, 111, 112, 113, 114, 115, 119, 120, 127, 132, 137, 141, 142, and 143.

[158] See Claims 133, 134, 135, 136, 137, 138, and 139.

several claims attacking the validity of California's sentencing statutes.[159] In sum, these claims make clear that petitioner's capital sentence was unlawfully imposed under statutes that violate the state and federal constitutions. Thus, this Court is free to also review the merits of these claims. (*Clark, supra,* Cal.4th at 779; and *Sanders, supra,* 21 Cal.4th at 719).

5. Inclusion of Petitioner's Non-Repetitive Habeas Claims in the Second Petition Is Necessary To Present Petitioner's Claims of Cumulative Error and to Exhaust All of Petitioner's Claims For Relief.

Petitioner has brought all the non-repetitive appellate claims in the second petition in order to present "all potentially meritorious claims," (*Clark, supra,* 5 Cal.4th at 780), and to allow this Court to view the totality of errors when assessing petitioner's claims. Case law is clear that claims cannot be evaluated in a vacuum, and must be assessed in the full context of a trial. (See e.g., *Kyles, supra,* 514 U.S. 419; *Ortega, supra,* 561 F.2d 803; *McLister, supra,* 608 F.2d 785; and *Garcia, supra,* 163 Cal.App.3d at 151). Cumulative error, and particularly claims of *Brady* violations and ineffective assistance of counsel, should be assessed together when determining the reliability of a capital verdict. (See generally, Blume & Seeds, *supra,* 95:4 Jour. Criminal Law & Criminology 1153). Accordingly, even if this Court finds that none of the non-repetitive habeas claims meet an exception under the *Dixon* bar, it should nevertheless find that no abuse

---

[159] See Claims 128, 129, 130, and 131.

of the writ occurred here as the claims' inclusion in the second petition was necessary to present Claims 140 - 143 and to exhaust all the claims in petitioner's federal petition. (See traverse exhibit M (Declaration of Van Winkle, at 3-4 and 8-9).

F. PETITIONER'S INSUFFICIENCY OF THE EVIDENCE CLAIMS ARE COGNIZABLE.

***

Respondent has failed to show that petitioner has abused the writ for "failure to allege sufficient facts indicating that claims of insufficient evidence at trial to support a conviction are cognizable in a petition for a writ of habeas corpus." (Order to Show Cause - Issue #6) (*Lindley, supra,* 29 Cal.2d at 723).

***

Respondent contends, and petitioner admits, that Claims 67 and 68 in the second petition address the insufficiency of the evidence used to sustain the first degree murder convictions. (See second petition, at 249 and 251). Claims 67 and 68 were rejected in petitioner's direct appeal, but are nevertheless exempt from the *Waltreus* bar. Respondent also errs in arguing that these claims should be barred under *Lindley, supra,* 29 Cal.2d at 723, as they are "run-of-the-mill sufficiency-of-the-evidence claims...[and that petitioner has failed to demonstrate that they] are cognizable on habeas corpus." (Return, at 58).

Petitioner recognizes that a "[p]ostconviction habeas corpus attack on the validity of a judgment of conviction is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension." (*Clark, supra,* 5 Cal.4th at 766-67 (citing *Hall, supra,* 30 Cal.3d at 420; and *Bell, supra,* 19 Cal.2d at 493-496). Nevertheless, this Court should consider petitioner's sufficiency

of evidence claims for a number of reasons and should not deny the claims as "non-cognizable." (Contra return, at 58).

Respondent correctly notes that in Claims 67 and 68 petitioner has not "claim[ed] that his convictions were based on perjured or false evidence knowingly presented by the prosecutor." (Return, at 58). Petitioner has made those allegations elsewhere,[160] and in any event, those claims should be considered in relation to Claims 67 and 68. Respondent incorrectly argues that petitioner has "ignore[d] the rule that sufficiency claims are not cognizable on habeas...." (*Id.*). Respondent errs in arguing that petitioner has made "no attempt whatsoever to explain to this Court why it should disregard the procedural bar and address the claim." (*Id.*).

First, the sufficiency of the evidence presented at trial is undoubtedly related to petitioner's claim of actual innocence. This is especially true when the sufficiency of evidence theory is considered "in light of the relevance of the violation to the correct determination of petitioner's guilt, the purpose of the constitutional principle involved, and the effect that granting the remedy would have on the administration of criminal justice." (*Sterling*, *supra*, 63 Cal.2d at 487). Here, Justice Traynor's reasoning goes against the reasoning of leading current wrongful conviction studies

---

[160] See second petition, at 88 (Claim 15: Petitioner's Rights were violated by the Prosecutions' Use of Perjurious Jailhouse Snitches); second petition, at 92 (Claim 16: Petitioner's Rights were Violated by the False and Perjurious Testimony of Anthony Cornejo); and second petition, at 253 (Claim 69: The Prosecution's Presentation of Facts was Directly Contrary to Those Contained in the Missing-Juvenile Report).

indicating that insufficiency of the evidence, and lack of material evidence, is a significant cause and trait of wrongful convictions. (See generally, Keith A. Findley, and Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases* (2006) Wis. L. Rev. 291; and Boaz Sangero, and Mordechai Halpert, *Why a Conviction Should Not Be Based on a Single Piece of Evidence: a Proposal for Reform* (2007) 48 Jurimetrics J. 43). Thus, the sufficiency of the evidence claims are related to petitioner's other claims alleging that he is actually innocent and the prosecution lacked material evidence of his guilt.[161]

Second, the sufficiency of the evidence claims have been presented again here because prior appellate counsel ineffectually presented the claims on direct appeal. Appellate counsel left the claims hollow by failing to present twenty-seven (27) non-repetitive appellate claims included within petitioner's second petition[162] in addition to the insufficiency of the evidence claims. This fact bolsters the need to present the claims now and as part of a claim of cumulative error, or specifically, Claim 141 (Appellate Counsel Committed Ineffective Assistance of Counsel).

Third, the parties had litigated the contention at trial of whether there was sufficient evidence of the underlying felony. In its first opinion, this

---

[161] The claims relative to petitioner's actual innocence are Claims 64, 69, 72, 74, 78, 86, 87, 103, 104, 105, 107, 108, 115, 140, 141, 142, and 143.

[162] Claims 11, 12, 13, 22, 23, 34, 35, 36, 37, 42, 43, 44, 45, 72, 74, 75, 76, 77, 78, 79, 83, 84, 101, 116, 117, 124, and 125 are claims premised on the record and were not raised in a prior direct appeal.

Court stated:

> Once inside, appellant took Carl Jr. into the bedroom, turned on "black strobe lights," and sat down on the bed. The boy stood adjacent to the bed, watching the lights blink on and off. Suddenly, when Carl Jr. announced his departure, appellant became angry, grabbed the clothesline and strangled him. Although appellant confessed to binding Carl Jr.'s hands, he was unable to remember whether he tied the boy's hands before strangling him, and no independent evidence established the timing of that act.
>
> No specific "plan" vis-a-vis Carl Jr. had been formulated.

(*Memro I, supra,* 38 Cal.3d at 699).

This was a factual finding by this Court, presumed correct under federal law. (See, e.g., 28 U.S.C. § 2254(e)(1)). Thus, the doctrines of *res judicata* and collateral estoppel, in conjunction with double jeopardy principles, would operate to prevent the prosecution from relitigating the case in order to prove a different set of facts. (See e.g., *Ashe v. Swenson* (1970) 397 U.S. 436). Likewise, this factual finding precludes a finding of premeditation and deliberation. This Court found as much when it noted that there was no evidence to establish the timing of the acts. Without such evidence, there is insufficient evidence to find premeditation and deliberation. Thus, *Memro I* established that there was insufficient evidence of premeditation.

Fourth, and finally, petitioner has brought the insufficiency of the evidence claims in this second petition in order to allow this Court, in assessing all of petitioner's claims, to view the totality of errors infecting petitioner's trial. (See e.g., *Kyles, supra,* 514 U.S. 419; *Ortega, supra,* 561 F.2d 803; *McLister, supra,* 608 F.2d 785; and *Garcia, supra,* 163

Cal.App.3d at 151). Accordingly, even if this Court finds that Claims 67 and 68 do not meet an exception under the *Waltreus* or *Sterling* bars, it should nevertheless find that no abuse of the writ occurred here as the inclusion of the repetitive claims was necessary to present Claims 140 - 143 and to exhaust all claims in petitioner's amended federal petition. (See traverse exhibit M (Declaration of Van Winkle, at 3-4 and 8-9).

G. PETITIONER HAS NOT ABUSED THE WRIT AND HAS ALLEGED SUFFICIENT FACTS INDICATING THAT HIS SEARCH AND SEIZURE CLAIMS BASED ON THE FOURTH AMENDMENT ARE COGNIZABLE.

***

Respondent has failed to show that petitioner has abused the writ for "failure to allege sufficient facts indicating that claims based on the Fourth Amendment are cognizable in a petition for a writ of habeas corpus." (Order to Show Cause - Issue #7) (citing *Sterling, supra,* 63 Cal.2d at 487-488; and *Sakarias, supra,* 35 Cal.4th at 169).

***

In Claims 1 and 3, petitioner has challenged the validity of his arrest and the search of his property. In Claims 25, 26, 27, 30, 89, and 94, petitioner has addressed the fairness of the hearings on the motion to suppress.[163] Only Claims 1 and 3 arguably apply under this bar, (Contra return, at 59), and this Court may review the merits of all claims because petitioner was not granted a fair and adequate hearing on his motion to suppress. Likewise, this Court may consider petitioner's claims due to the inadequate representation by trial, appellate and prior habeas counsel. Petitioner has thus shown that "the search and seizure issues based on the Fourth Amendment are cognizable on habeas corpus." (Contra return, at

---

[163] Claims 1 and 3, though raised in petitioner's second direct appeal, and Claims 25, 26, 27, 30, 89, and 94, though raised for the first time in the second petition, are exempt from procedural bar under *Waltreus* and *Dixon.*

60).

Respondent wrongly concludes that "habeas corpus is not available as a remedy because the defendant has 'readily available remedies' to litigate the Fourth Amendment claim through 'an orderly process.'" (Return, at 59 (citing *Sterling, supra,* 63 Cal.2d at 487-89; and *Clark, supra*, 5 Cal.4th at 767)). In fact, habeas corpus is the proper vehicle to raise a claim of error premised on the violation of the Fourth Amendment when the petitioner has not had an adequate opportunity to litigate the claim. (*Sterling, supra,* 63 Cal.2d at 289).

Petitioner has not "ignore[d] the rule that search and seizure claims are not cognizable on habeas...." (Contra return, at 60). Petitioner recognizes that - some fifty (50) years ago - in *In re Harris* (1961) 56 Cal.2d 879, 880, this Court found that habeas corpus is not available to challenge the use of evidence obtained by an unconstitutional search and seizure.[164] These notions stem from Justice Traynor in *Harris, supra,* 56 Cal.2d at 880 (conc. opn. of Traynor, J.), where he concluded that the erroneous admission of unlawfully seized evidence presented no risk that an innocent defendant might be convicted, and:

> [t]he risk that the deterrent effect of the [exclusionary] rule will be compromised by an occasional erroneous decision refusing

---

[164] *Miranda* claims and claims premised on involuntary confessions are exempt from this bar. (*Sakarias, supra,* 35 Cal.4th at 169). This conclusion coincides with claims of actual innocence, which often rest upon false confessions exacted from the accused by oppressive police interrogations. (See generally, Richard Leo, *Police Interrogations and American Justice* (2008) Harvard University Press).

> to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack.

(*Harris, supra,* 56 Cal.2d at 884 (conc. opn. of Traynor, J.)). In *Shipp, supra,* 62 Cal.2d 547 and *In re Lessard* (1965) 62 Cal.2d 497, this Court adopted the rule urged by Justice Traynor in his concurring opinion in *In re Harris*. However, in *Sterling* this Court noted that claims premised on a violation of the Fourth Amendment may be heard when the state has failed to afford a "defendant a full and fair opportunity to secure an adjudication of all claimed deprivations of his constitutional rights in the securing of the evidence offered against him at trial." (*Sterling, supra,* 63 Cal.2d at 488).

Here, the proceedings surrounding petitioner's motion to suppress at trial were inadequate for several reasons. First, petitioner was represented by trial counsel who performed ineffectively by failing to locate and utilize material evidence; failing to effectively prepare for the proceedings; and failing to effectively cross-examine the state's witnesses during the proceeding.[165] Had trial counsel effectively represented petitioner, the prior suppression hearing would have been conducted fairly and adequately.

---

[165] See second petition, at 289 (Claim 85: Defense Counsel's Failure to Examine Officer Carter's Contemporaneous Notes of the Confession Constituted Ineffective Assistance); second petition at 303 (Claim 88: Trial Counsel Rendered Ineffective Assistance by Failing to Attack the Credibility of the Police Officers); second petition at 305 (Claim 89: Trial counsel was Ineffective for Failing to Raise Issues Concerning the Missing-Juvenile Report); second petition at 319 (Claim 94: Trial Counsel Rendered Ineffective Assistance by Failing to Use the Police Missing-Juvenile Report to Impeach Key Prosecution Testimony and Otherwise Undermine the Legality of Petitioner's Arrest).

Second, respondent errs in arguing that petitioner has made "no attempt whatsoever to explain to this Court why it should disregard the procedural bar and address the claim." (Contra return, at 60). Petitioner has demonstrated that his search and seizure claims were inadequately litigated, due to trial court error, ineffective assistance of counsel, and the failure to disclose exculpatory evidence.[166] Thus, direct appeal was inadequate to challenge the violation of petitioner' Fourth Amendment rights "for reasons for which the defendant was not responsible." (*Sterling, supra*, 63 Cal.2d at 488 (citing *In re Spencer* (1965) 63 Cal.2d 400, 406).

Finally, petitioner has brought claims premised on the Fourth Amendment in the second petition to allow this Court to view the totality of the circumstances in assessing petitioner's claims. (See e.g., *Kyles, supra,* 514 U.S. 419; *Ortega, supra*, 561 F.2d 803; *McLister, supra*, 608 F.2d 785; and *Garcia, supra*, 163 Cal.App.3d at 151). Accordingly, even if this Court finds that Claims 1 and 3 do not meet an exception under the *Waltreus* or *Sterling* bars, it should nevertheless find that no abuse of the writ occurred as the inclusion of the repetitive claims was necessary to present cumulative error claims 140 - 143 and to exhaust all claims in petitioner's amended federal petition. (See traverse exhibit M (Declaration of Van Winkle, at 3-4 and 8-9).

---

[166] See Claims 25, 26, 27, 30, 89, and 94.

H. PETITIONER HAS PROVIDED AN ADEQUATE EXPLANATION AS TO HOW ERRORS OCCURRING IN HIS FIRST TRIAL AFFECTED THE FAIRNESS OF HIS SUBSEQUENT RETRIAL AND ARE CRITICAL TO HIS FEDERAL AND STATE HABEAS PROCEEDINGS.

***

Respondent has failed to show that petitioner has abused the writ for "raising legal issues related to petitioner's first trial, when his conviction and sentence resulting from that trial were reversed by this Court, absent any plausible explanation why such alleged errors affected the fairness of his subsequent retrial." (Order to Show Cause - Issue #8) (citing *Memro* (I), *supra,* 38 Cal.3d 658).

***

Respondent argues that Claims 11, 13, 14, 25, 26, 27, and 29 "impermissibly collaterally attack[] the judgment that was reversed in its entirety by this Court in 1985." (Return, at 61). To the contrary, only Claims 14 and 26 were raised following petitioner's first trial.[167] Here again, respondent miscounts the applicable claims.[168] Respondent shows its error, when it later asserts that only Claims 14 and 26 were "raised on appeal from the first trial." (*Id.* at 62).

On automatic appeal from his first judgment of death, this Court

---

[167] See second petition at 78 (Claim 14: Denial of Petitioner's Right to Counsel at the Penalty Phase of the First Trial Deprived Petitioner of Due Process at the Retrial); and second petition, at 132 (Claim 26: Petitioner was Deprived of a Fair and Accurate Suppression Motion Hearing at the First Trial).

[168] Respondent wrongly includes claims 11, 13, 25, 27 and 29.

reversed the guilt, special circumstance, and penalty verdicts, due to the trial court's error in summarily denying petitioner's *Pitchess* motion. The Court remanded the case to the trial court for retrial. (*Memro I, supra*, 38 Cal.3d at 665). This Court expressly declined to consider the other claims of error raised in petitioner's first direct appeal. (*Id.* ("Of the numerous claims made on appeal, this Court need consider only one - that the trial court erred in summarily denying appellant's discovery motion.")). Following his retrial, petitioner was again found guilty of the three murders, the multiple murder special circumstance found true; and he was sentenced to death. Petitioner has raised claims of error stemming from his first trial, because their favorable resolution would have prevented his second penalty phase from occurring.

Respondent incorrectly asserts that "[o]nly error relating to, and stemming from, the trial itself may be considered in a subsequent appeal." (Return, at 62 (citing *People v. Deere* (1991) 53 Cal.3d 704, 713; and *People v. Durbin* (1966) 64 Cal.2d 474, 477)). Respondent errs in arguing that petitioner "has not shown that the alleged errors in the first trial had any impact on the subsequent retrial." (Return, at 61). Respondent wrongly argues that petitioner has failed to "demonstrate any connection between these alleged errors occurring [in] his first trial and the manner in which his retrial was conducted." (*Id.*). Finally, respondent errs in arguing that the claims were "rendered moot when this Court reversed the conviction in *Memro I* and remanded the entire case for retrial." (*Id.*, at 62).

Petitioner has included Claims 14 and 26 taken from his first direct appeal, because, had this Court reached the merits on the first direct appeal, a favorable ruling for petitioner would have barred the state from seeking the punishment of death at a later time under double jeopardy principles. This is in line with petitioner's double jeopardy claims, which also show that he could not have been retried upon legal theories rejected by the jury at his first trial.[169]

Respondent fails in its attempt to invoke the doctrine of the law of the case. (Return, at 61 (citing *Davies v. Krasna* (1975) 14 Cal.3d 502, 507)). Respondent admits that the doctrine only concerns issues of law stemming from the first trial and effecting the subsequent retrial. (*Id.* (citations omitted)). Respondent wrongly concludes that "no other issues arising from the first trial were cognizable on the appeal from the retrial."

---

[169] See second petition, at 58 (Claim 8: Petitioner's Prosecution for First-Degree Murder on Count III Violated the Prohibition against Double Jeopardy under the State and Federal Constitution); second petition at 63 (Claim 9: Petitioner's Prosecution on Count III Violated Petitioner's Rights Under the Fifth, Sixth, Eighth and Fourteenth Amendments); second petition, at 66 (Claim 10: Petitioner was acquitted of felony-murder on Count III and retrying him under that theory violated Double Jeopardy Principles); second petition, at 71 (Claim 11: Petitioner's Constitutional Rights Were Violated by the Failure to Follow Statutory Requirements Regarding Charges of Felony-Murder); second petition, at 74 (Claim 12: Petitioner was Acquitted of Premeditated Murder in Count III and Retrying him Under that Theory Violated Double Jeopardy Principles); second petition, at 77 (Claim 13: Trying Petitioner Under a Felony-Murder Theory for Count I Violated Double Jeopardy Since Petitioner Was Acquitted Under That Theory at the First Trial); second petition, at 78 (Claim 14: Denial of Petitioner's Right to Counsel at the Penalty Phase of the First Trial Deprived Petitioner of Due Process at the Retrial).

(Return, at 62).

First, the law of the case doctrine does not apply to the claims previously asserted on direct appeal because this Court explicitly refused to decide any claims besides the *Pitchess* claim - which ultimately earned reversal of petitioner's convictions. (See *Memro* (I), *supra,* 38 Cal.3d at 665). This fact makes this case distinguishable from *Krasna* where this Court found "[a]pplication of that rule is particularly appropriate ... since two prior appellate decisions have resolved the issue as between these parties." (*Krasna, supra,* 14 Cal.3d at 507 (emphasis omitted)). Moreover, the law of the case doctrine is subject to an important limitation: it "applie[s] only to the principles of law laid down by the court as applicable to a retrial of fact," and "does not embrace the facts themselves...." (*Moore v. Trott* (1912) 162 Cal. 268, 273 (citation omitted)). Because no principles of law were deduced by this Court as to these claims during the prior direct appeal, the doctrine of the law of the case does not apply to relitigation of the facts underlying the claims now.

Second, allowing a retrial of the penalty phase against petitioner after the error committed during the prior penalty phase was a "constitutionally intolerable event." (*Herrera, supra,* 506 U.S. at 419 (concurring opn., O'Connor J.); *see also Lambert v. Blackwell* (E.D. Pa. 1997) 962 F.Supp. 1521 (*rev'd on other grounds, Lambert v. Blackwell* (3rd Cir. 1997) 134 F.3d 506). Petitioner should have been subject to, at most, a sentence of life in prison without parole. This error also prejudiced petitioner in the guilt phase at the retrial because petitioner's jury was

"death-qualified" pursuant to *Witherspoon v. Illinois* (1968) 391 U.S. 510, 518 n.11.[170] Petitioner's jury in his second trial should not have been death-qualified, since he should not have been retried in the penalty phase. By allowing the retrial of the penalty phase, the trial court improperly forced

---

[170] In *Witherspoon*, the Court recognized that the *voir dire* practice of "death qualifi[cation] (*Id.*)" -- the exclusion for cause, in capital cases, of jurors opposed to capital punishment -- can dangerously erode this "inestimable safeguard" of representative juries by creating unrepresentative juries "uncommonly willing to condemn a man to die." *(Adams v. Texas* (1980) 448 U.S. 38, 44). Research has determined that "death-qualified" juries are often particularly prone to convict defendant's as well. *See, e.g.*, H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (University of Chicago Monograph 1968) (Zeisel); W. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas, 1964) (Wilson); Goldberg, Toward Expansion of *Witherspoon*: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 53 (1970) (Goldberg); Jurow, New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971) (Jurow); and Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law & Hum. Behav. 53 (1984) (Cowan-Deliberation); Louis Harris & Associates, Inc., Study No. 2016 (1971) (Harris-1971); Bronson, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970); Bronson, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L. J. 11 (1980); Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984); and Precision Research, Inc., Survey No. 1286 (1981). In addition, McCree introduced evidence on these issues from Thompson, Cowan, Ellsworth, & Harrington, Death Penalty Attitudes and Conviction Proneness, 8 Law & Hum. Behav. 95 (1984); Ellsworth, Bukaty, Cowan, & Thompson, The Death-Qualified Jury and the Defense of Insanity, 8 Law & Hum. Behav. 81 (1984); A. Young, Arkansas Archival Study (unpublished, 1981); and various Harris, Gallup, and National Opinion Research Center polls conducted between 1953 and 1981.

petitioner to undergo a guilt trial with a jury that was conviction prone. That jury should not have been death qualified, since petitioner should not have been death eligible. Trying petitioner in the guilt phase under these circumstances violated petitioner's rights to a fair trial by an impartial jury from a cross-section of the community. Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated.

Finally, petitioner brings claims related to his first trial in the second petition in order to allow this Court to view the totality of the errors affecting his trial when assessing petitioner's claims. (See e.g., *Kyles, supra,* 514 U.S. 419; *Ortega, supra,* 561 F.2d 803; *McLister, supra*, 608 F.2d 785; and *Garcia, supra*, 163 Cal.App.3d at 151). Accordingly, even if this Court finds that Claims 14, 26, and 92 are barred it should nevertheless find that no abuse of the writ occurred here as the inclusion of the repetitive claims was necessary to present cumulative error claims 140 - 143 and to exhaust all claims in petitioner's amended federal petition.

VII. CONCLUSION.

The writ of habeas corpus is "the safe guard and the palladium of our liberties." (*In re Begerow* (1901) 133 Cal. 349, 353). In a capital case, where the state threatens to extinguish the ultimate liberty - that of life - only the writ of habeas corpus can correct errors undermining a capital conviction and sentence once direct appeals have ceased and "the normal method of relief [proven] is inadequate." (*Harris, supra*, 5 Cal.4th at 828 (footnote omitted)). Thus, "[t]he manifest need for time limits on collateral attacks on criminal judgments [ ] must be tempered with the knowledge that mistakes in the criminal justice system are sometimes made." (*Sanders,*

supra, 21 Cal.4th at 703 (citing U.S. Const., art. I, § 9, cl. 2 (limiting federal government's power to suspend writ of habeas corpus); Cal. Const., art. I, § 11 (limiting state government's power to suspend writ of habeas corpus)).

In the words of this Court's former Chief Justice, California's capital habeas system is "dysfunctional." (CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT, Gerald Uelman, ed., available at: http://www.ccfaj.org/documents/CCFAJFinalReport. pdf (last visited December 19, 2010)). The problem is simply volume. In California, there are too many capital defendants and capital appeals and too few competent capital counsel, for this Court to efficiently and effectively address the issues raised in each case.[171] In response, this Court has adopted procedures that have sought to increase the expeditious review of habeas appeals and enhance its ability to find competent capital counsel. (*See Morgan, supra,* 50 Cal.4th at 940). However, these procedural reforms have proven unable to "timely" resolve capital appeals in California, or promote the appointment of qualified capital counsel.[172]

---

[171] *See Morgan, supra,* 50 Cal.4th at 938 ("the need for qualified habeas corpus counsel has increased dramatically in the past 20 years: The number of inmates on California's death row has increased from 203 in 1987 to 670 in 2007. (Cal. Com. on the Fair Admin. of Justice, Final Rep. (2008) p. 121 (California Commission Final Report))."). As of today, the number of capital inmates has grown and there are currently 717 inmates on California's death row. (California Department of Corrections, Division of Adult Operations, *Condemned Inmate Summary List;* available at: http://www.cdcr.ca.gov/ Capital_Punishment/docs/ CondemnedInmateSummary.pdf (last visited February 5, 2011)).

[172] See *Morgan, supra,* 50 Cal.4th at 938-39 ("Although hundreds of indigent death row inmates already have been provided with appointed habeas corpus counsel, approximately 300 of these inmates still lack such

Petitioner has not committed an abuse of the writ. He has submitted his second petition without substantial delay despite problems inherent in California's capital system. Petitioner has provided specific and particularized justifications for excusal of procedural bars. The potentially meritorious claims are substantiated by material, verifiable and exculpatory evidence. All the claims are cognizable, and this petition should not be denied in its entirety, or at all.

By his second petition, petitioner has sought to vindicate the many violations of his constitutional rights that occurred during his capital trials. He is justified in filing this successive petition, because prior counsel, at all levels, failed to prevent or correct his illegal confinement and unlawful sentence. Trial, appellate, and prior habeas counsel all performed deficiently in this case by failing to investigate exculpatory and identifiable triggering facts, failing to develop meritorious legal claims or defenses, and failing to present to the California courts and juries evidence and legal theories materially relevant to their guilt and sentencing determinations. Current counsel are the first counsel to present the many "potentially meritorious claims," which riddle petitioner's fundamentally unfair capital trial and appellate proceedings and are therefore the first to perform competently in petitioner's case. (*See Clark, supra,* 5 Cal.4th at 780).

There is no need for this Court "to tame habeas corpus litigation and curtail abusive and dilatory writ practice" because of this case. (Return, at 63). No abusive or dilatory writ practices have occurred here. Respondent inappropriately chides all "[h]abeas attorneys" as "prone to second-guess

---

counsel. The search for qualified counsel can take eight to 10 years or longer (Cal. Com. Final Rep., *supra*, at 122.)").

prior counsel and to pile on new claims that previous lawyers may very well have considered and wisely rejected." (*Id.,* at 64). However, and like in other cases, "respondent's arguments are premised on an erroneous understanding of our habeas corpus procedural rules and the scope of counsel's duty to conduct a habeas corpus investigation in a capital case." (*Robbins, supra,* 18 Cal.4th at 791).

Here, instead of committing dilatory practices, petitioner's counsel sought to represent their client as competently as possible. (Contra return, at 64). Thus, counsel has sought to exhaust all the claims raised in his current federal petition. For the first time, petitioner has thus presented a petition consisting of all "potentially meritorious claims" and meeting this Court's standards for competent representation in a capital habeas case. (*Clark, supra,* 5 Cal.4th at 780).

This Court should not heed respondent's prodding to "check[]" petitioner so that the "assault on prior appellate and habeas corpus counsel [may] be countered." (*Id.*).[173] Respondent's ire appears directed at other counsel's "abusive tactics and lawyer excesses" and causes the state to divert focus from the specifics of petitioner's case.[174] (*Id.*). In so doing,

---

[173] "That an appellate attorney has demonstrated a willingness to undertake the difficult task of representing criminal defendants sentenced to suffer the death penalty does not excuse his failure timely to investigate fully the potential grounds for habeas corpus relief in any particular case." (*Sanders, supra,* 21 Cal.4th at 712 (citations omitted)).

[174] Respondent fails to provide a citation for their conclusion that "[a]n abuse of [] process occurs when the habeas petitioner deliberately disregards procedural rules that have been firmly established to govern petition for writs of habeas corpus and attempts to short-circuit the orderly procedure." (Return, at 62 (internal quotation omitted)). Instead,

respondent fails to show that petitioner has committed an abuse of the writ and that his claims are not cognizable. Respondent's cry that a favorable ruling for petitioner would "stalemate the orderly administration of justice in this case and in other cases" is erroneous. (*Id.*). A favorable ruling for petitioner would advance the orderly administration of justice and would checkmate the miscarriage of justice that has occurred in his case.

Respondent seeks to limit the use of ineffective assistance of counsel as an exception to procedural bars, not because petitioner has failed to justify the exception in his case, but because respondent wants to impede "newly appointed attorneys [from] inevitably resort[ing] to the magic words of ineffective assistance of counsel." (Return, at 64 (citations and internal quotations omitted)). Respondent's arguments are thus not grounded in the facts of petitioner's case, but rather, in the policies that respondent would like to see this Court adopt for administration of capital habeas appeals. By admission here, prior state counsel performed ineffectively and prior federal counsel was previously found to have provided inadequate and incompetent representation in a California capital habeas case in federal court. (See traverse exhibits G and L (Court Order in *Ross v. Woodford*; and Declaration of Nolan, at 3-4).

Petitioner has not run a "gambit of delay and distract[ion]" in filing the second petition. (Contra return, at 64). In fact, and to the contrary, petitioner quickly filed his exhaustion petition directly following the

---

respondent believes that a review of the federal "abuse [of the] writ" standard is instructive. (*Id.* at 63 (citing and discussing *McCleskey, supra,* 499 U.S. at 488, 491, and 493). However, this Court previously determined that *McCleskey* "is irrelevant to petitioner's burden in this court []." (*Clark, supra,* 5 Cal.4th at 777).

abeyance of his federal litigation, appointment by this Court, and the development of a *prima facie* case for each of the one-hundred-forty-three (143) claims lodged in his second petition. Petitioner has not "attempted to avoid writ policies and procedures clearly set [out] by this Court." (*Id.* at 67). In fact, petitioner has abided by all writ policies and has sought to live up to this Court's expectations for competent capital habeas counsel by presenting all "potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780; see also *Morgan, supra,* 50 Cal.4th at 941).

Contrary to respondent's arguments, petitioner has not asserted the serial ineffectiveness of prior counsel as the "sole justification for presenting more than one hundred successive and repetitious claims." (Contra return, at 67). Petitioner has established, in addition to his case of ineffective assistance of counsel, a *prima facie* case that the dismissal of his claims would constitute a miscarriage of justice. Thus, each of his one-hundred-forty-three (143) claims are cognizable under one of the many exceptions to this Court's procedural bars, and all are presentable as cumulative error claims.

Further, and contrary to respondent's assertion that this Court's conclusion in *Robbins* controls, this case is more similar to *Sanders* than *Robbins*. (Contra return, at 64). Here, appellate and prior habeas counsel did not, "after a diligent and thorough review of trial counsel's files, the trial record and the appellate briefs, reasonably conclude [that] there [were] no triggering facts that would lead one to suspect the existence of issues of potential merit...." (*Sanders, supra,* 21 Cal.4th at 708). Here, like in *Sanders,* counsel "cease[d] representation before he or she should have done so (i.e., before investigation is complete, and/or before counsel has a

reasonable basis upon which to conclude that no potentially meritorious habeas corpus issue exist[ed]." (*Id.* at 708-09). Likewise, "[i]n response to such triggering facts, counsel did not seek additional funding or conduct a further investigation in order to determine whether potentially meritorious claims existed." (*Id.* at 714; see also traverse exhibit L (Declaration of Nolan, at 4-5). Moreover, petitioner's second "petition contains no shortage of claims raising issues of potential merit" (*id.*, at 713 (emphasis omitted)), and petitioner has alleged that appellate and prior habeas counsel failed to identify, investigate, develop and present these claims to this Court. Thus, like in *Sanders*, this Court may review the merits of all one-hundred-forty-three (143) claims lodged in the second petition. (*Id.* at 719).

Respondent's analogy of petitioner's claims to the multiplication of brooms in the Sorcerer's Apprentice is odd at best, and resorts to the use of fuzzy math.[175] (*Id.* at 65). For example, respondent argues that "[w]ith each new set of attorneys, petitioner's claims have increased exponentially." (Return, at 64).[176] In actuality, however, the fact that the second petition

---

[175] Petitioner denies that he has presented "over 100 violations of his constitutional rights that were raised and rejected on appeal." (Return, at 65). Previously respondent argued that petitioner had presented 94 repetitive claims. (*Id.*, at 7). Respondent has inconsistently counted claims throughout their return. Whereas petitioner has consistently counted fifty-six (56) repetitive claims amidst the one-hundred-forty-three (143) raised in his second petition.

[176] Mathematically speaking, something is said to increase or decrease exponentially if its rate of change may be expressed using exponents. An exponent is a function which raises some given constant (the "base") to the power of its argument. A graph of such a rate would appear not as a straight line, but as a curve that continually becomes steeper or shallower. Thus, if petitioner were to have "exponentially" increased his

includes one-hundred-forty-three (143) claims proves that petitioner has finally been appointed counsel who have brought "all potentially meritorious claims" to this Court. (*Clark, supra,* 5 Cal.4th at 780).

Respondent erroneously faults petitioner for the ineffective assistance provided to him by his appellate and prior habeas counsel appointed by this Court. (See *Id.*). Petitioner has not adopted a "shotgun strategy" of presenting claims in a piecemeal fashion. (See return, at 65). Instead, petitioner presented all his claims in the second petition to ensure that there will not be a need to again return to this Court and present more potentially meritorious claims. Had petitioner's prior counsel performed effectively in doing the same at an earlier time, this second petition, would be unnecessary. Here again, respondent errs because habeas counsel is not charged with bringing only claims with "the highest potential of succeeding" (*Id.*), but instead must bring "all potentially meritorious claims." (*Clark, supra,* 5 Cal.4th at 780).

Moreover petitioner has justified the presentation of all one-hundred-forty-three (143) claims by: 1) demonstrating a *prima facie* showing that each claim meets an exception to any applicable procedural bars and should be reviewed on the merits; 2) arguing that their inclusion are necessary for the sake of clarity and convenience; 3) arguing that their inclusion is necessary to facilitate his future demonstration to the federal court that all

---

claims from the original fifty-six (56) claims the equation would be $(56)^2$. Fifty-six multiplied by fifty-six would require petitioner to present 3,136 claims in order to exponentially increase his claims. Needless to say, respondent's "exponential count" is more rhetorical than mathematical, but no more persuasive.

federal constitutional grounds were exhausted in this Court; 4) arguing that their inclusion is necessary to support his claims of cumulative prejudice. (See Claims 140-143); and 5) arguing that their inclusion is necessary to provide context to all his new claims and particularly in his ineffective assistance of counsel claims. (See traverse exhibit M (Declaration of Van Winkle, at 7-8).

Petitioner has not abused the writ by "flaunting procedural rules that have been carefully crafted and clearly established an consistently applied by this Court." (Contra return, at 66). First, this Court's procedural default laws have been found to be inconsistently applied. (See *Morales, supra,* 85 F.3d at 1392). Second, petitioner has not flaunted the rules since, as respondent admits, petitioner has conceded that many claims are repetitive and identified the claims accordingly. The fact that respondent has spent considerable time trying to rebut petitioner's assertions only speaks to the strength of the *prima facie* case petitioner has presented for excusal of the procedural bars. Petitioner has not caused respondent and this Court to "undertake a needless and burdensome waste of time and resources." (Contra *Id.* at 66). The claims of error asserted in petitioner's second petition are meritorious and have been raised to vindicate violations of his constitutional rights.

Respondent may feel burdened in attempting to refute petitioner's substantiated and meritorious claims of trial court error, ineffective assistance of counsel and prosecutorial misconduct; but the fact that respondent cannot carry that burden does not make the state's effort "needless." Instead, it proves that petitioner has presented "all potentially meritorious claims" (*Clark, supra*, 5 Cal.4th at 778, 780) in his case, and

has substantiated them with credible and verifiable evidence in a concisely formatted petition that accords with this Court's standards in a capital case. In no way is it a waste of time for this Court to review claims alleging that a capital conviction and death sentence have been obtained in violation of the California and United States Constitutions.

In summary, petitioner has stated specific facts to establish that his newly made claims were presented without substantial delay. Petitioner has stated specific facts justifying reconsideration of other claims, rejected on direct appeal and habeas, and justifying the exemption of the claims under the *Waltreus* bar. Petitioner has stated specific facts justifying his filing of a successive petition and indicating that all non-repetitive claims are cognizable under the *Dixon* bar. All of the claims fall within one of the four *Clark* and *Harris* exceptions. Accordingly the petition for writ of habeas corpus should not be considered an abuse of the writ and should not be denied as procedurally barred. Indeed, the second petition should be granted by the Court.

DATED: February 26, 2011

Respectfully submitted,

JAMES S. THOMSON
PETER GIANNINI
Attorneys for Petitioner Reno

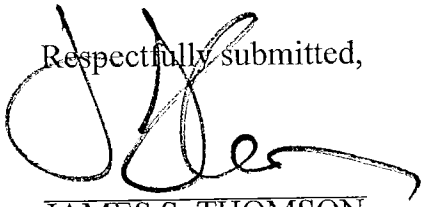
CERTIFICATE OF COMPLIANCE

CAPITAL CASE

I certify that the attached PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN TO THE SECOND PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 57,751 words.

DATED: February 26, 2011

Respectfully submitted,



JAMES S. THOMSON
PETER GIANNINI
Attorneys for Petitioner Reno

DECLARATION OF SERVICE

Re: *In re Reno* Case No: S124660

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 819 Delaware Street, Berkeley, CA 94710.

On February 28, 2011, I served the attached **PETITIONER'S TRAVERSE TO RESPONDENT'S RETURN TO THE SECOND PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Berkeley, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Robert David Breton
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Peter Giannini
Law Offices of Peter Giannini
1015 Gayley Avenue, #1000
Los Angeles, CA 90024

Reno
Box D-63100
San Quentin State Prison
San Quentin, CA 94974

Saor Stetler
Law Office of Saor Stetler
P.O. Box 2189
Mill Valley, CA 94942

I declare under penalty of perjury that the foregoing is true and correct.

Signed on February 28, 2011 at Berkeley, California.

AARON JONES