NOTE

Racing Against the Clock: Why California Should Reform Its Timeliness Framework for Habeas Corpus Petitions

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INTRODUCTION

In California, an incarcerated person who petitions for a writ of habeas corpus[1] must do so "without substantial delay."[2] If a California court determines that a claim is untimely and that the delay was not justified by good cause or by an exception to the rule, the court will likely reject the claim.[3] The claim will then be considered procedurally defaulted in federal court.[4] When this happens, no court — neither the California court where the petitioner originally filed, nor a federal court sitting in review — will analyze the merits of that individual's claim.[5] No court will consider whether that person is being held in prison despite a serious constitutional violation.[6] One petitioner, who is deemed to have complied with California's undefined framework for timeliness, may receive habeas corpus relief, yet another petitioner, alleging the very same violation within a similar time frame, will continue to be imprisoned.[7]

California is the only state with a timeliness rule that has not been codified by statute or rule of court.[8] In California alone, individuals who seek to petition for habeas relief do not know how long they may take to investigate their claims, to gather their evidence, and to present their findings to the court.[9] At what point will the court reject their claim as substantially delayed?[10] At what point is a proffered justification not "good cause" for the delay?[11] Notably, other states either set forth a timeline that individuals must follow, or they do not bar habeas corpus

[1] *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 8.2(a) (7th ed. 2020) (describing the requirement that a habeas corpus petitioner be in actual physical confinement or subject to restraints not shared by the public generally).

[2] Walker v. Martin, 562 U.S. 307, 312 (2011).

[3] *See id.* at 312, 317.

[4] *See* HERTZ & LIEBMAN, *supra* note 1, § 26.1.

[5] *See id.*

[6] *See id.*

[7] *See, e.g.*, *infra* Part II.B (describing courts' inconsistent resolutions of the timeliness of petitions).

[8] Brief Amicus Curiae of the Habeas Corpus Resource Center in Support of Respondent at 12-15, *Walker*, 562 U.S. 307 (No. 09-996), 2010 WL 4278489, at *12-15 [hereinafter Brief Amicus Curiae, Walker]. Petitioners who are challenging their capital conviction or sentence are bound by a different set of rules, as described in *infra* Part III.A.

[9] *See infra* Part II.B.

[10] *See infra* Part II.B.

[11] *See infra* Part II.B.

petitions as untimely.[12] The fact that petitioners in California must "race against the clock," without knowing when the clock runs out, is uniquely concerning.[13]

Numerous scholars have found that the passage of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") shifted the responsibility for providing a forum for state prisoners to litigate constitutional challenges from the federal post-conviction system to the state post-conviction system.[14] The state now has a "commensurate level of responsibility in terms of providing a full and fair state process."[15] This Note joins that conversation by examining one state's post-conviction system, and specifically, one procedural rule of that state. This Note's aim is to focus attention on what states can immediately do to provide a full and fair process, given that federal substantive review of state convictions is constricted by AEDPA.[16]

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[12] Brief Amicus Curiae, Walker, *supra* note 8, at 12-15.

[13] *See* Robinson v. Lewis, 469 P.3d 414, 422 (Cal. 2020) ("It would benefit inmates in state court to have assurance that if a petition is filed within the time period, the claims will not be found untimely due (even in part) to gap delay, an assurance that is lacking under today's general reasonableness standard.").

[14] *See* Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 86, 89 (2012) [hereinafter *Challenging Habeas*]; *see also* Harrington v. Richter, 562 U.S. 86, 103 (2011) ("Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions."); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 352 (1997); Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 UC DAVIS L. REV. 1437, 1440, 1444, 1479-80 (2007) ("Federal habeas corpus has effectively vanished as a viable post-conviction remedy for potentially innocent state prisoners over the past decade."); Erik Degrate, Note, *I'm Innocent: Can a California Innocence Project Help Exonerate Me? . . . Not If the Antiterrorism and Effective Death Penalty Act (AEDPA) Has Its Way*, 34 W. ST. U. L. REV. 67, 77 (2006); Theresa Hsu Schriever, Comment, *In Our Own Backyard: Why California Should Care About Habeas Corpus*, 45 MCGEORGE L. REV. 763, 780-81 (2014).

[15] Marceau, *Challenging Habeas*, *supra* note 14, at 91; *see also* Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 766-67 (1987).

[16] *See* 28 U.S.C. § 2254(d) (2018); *cf.* Ruthanne M. Deutsch, *Federalizing Retroactivity Rules: The Unrealized Promise of* Danforth v. Minnesota *and the Unmet Obligation of State Courts to Vindicate Federal Constitutional Rights*, 44 FLA. ST. U. L. REV. 53, 76-77 (2016) (arguing that "[t]he Supreme Court's draconian enforcement of the *Teague* retroactivity bar, especially when combined with AEDPA's piled-on restriction of federal habeas review" mean that state courts "just might have occasion to become 'holier than the pope,' in providing post-conviction opportunities to review constitutional claims"); Justin F. Marceau, *Don't Forget Due Process: The Path Not (Yet) Taken in § 2254 Habeas Corpus Adjudications*, 62 HASTINGS L.J. 1, 6, 50 (2010) [hereinafter *Due Process*] (suggesting both that "*Due Process* requires a *full and fair review* of the issues raised by a prisoner challenging the constitutionality of one's

This Note proceeds in three parts. Part I explores the current procedural rules regarding California and federal habeas corpus petitions (specifically in a non-capital context). It details the origin and contentious development of California's rule against untimely and successive claims. Part II discusses the problems created by the current timeliness framework and the inconsistent approaches that have been documented. Part III examines recent changes in California law[17] and suggests two related avenues for solutions.[18] The first avenue is through the state process.[19] This Note proposes that California, either by legislative action or rule of court, create a one-year safe harbor provision[20] and broaden the exceptions to the requirement of timely filing.[21] These changes would reflect that the state's interest in the finality of convictions is not overriding and must be balanced against imprisoned people's interest in obtaining post-conviction relief when such relief is merited.[22] The second avenue is through the federal courts, which have an ongoing role in ensuring that California provides a full and fair process, especially as they interpret the cognizability and adequacy of asserted state procedural defaults.[23]

sentence or conviction," and that "*[f]ederal review constrained by the AEDPA* does not, standing alone, amount to a *full and fair review* of one's constitutional challenges" (emphasis in original)).

[17] *See infra* Part III.A.

[18] *See infra* Part III.B–D.

[19] *See infra* Part III.B–C.

[20] *See infra* Part III.B.

[21] *See infra* Part III.C.

[22] *See* DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 132-33 (2012); Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 378 (2015) ("While procedural requirements are important, reliance on them when it is apparent that there may have been a wrongful conviction undermines the goal of habeas litigation."); Katheryn Tucker, *Criminal Defense Lawyers Honor 'Just Mercy' Author*, LAW.COM (Sept. 22, 2020, 5:34 PM), https://www.law.com/dailyreportonline/2020/09/22/criminal-defense-lawyers-honor-just-mercy-author/ [https://perma.cc/H68K-937L] (quoting Bryan Stevenson as saying, "[o]ne of the problems with the administration of criminal law in this country right now is that our courts are more committed to finality than they are to fairness"); *cf.* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 56 (2010) [hereinafter *Structural Vision*] ("[M]any states now violate criminal defendants' federal rights not just with impunity but also as a matter of routine.").

[23] *See infra* Part III.D.

I. BACKGROUND

A. The Writ of Habeas Corpus in California

1. Generally

In California, "[every] person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint."[24] The writ may be granted based on newly discovered evidence, jurisdictional defects, and many constitutional claims,[25] such as constitutionally ineffective assistance of counsel.[26] Unlike the federal writ of habeas corpus,[27] a California writ may issue to a petitioner who demonstrates actual innocence, even if an independent constitutional violation did not contribute to the verdict.[28] However, the writ is not an acquittal: it invalidates the conviction, but the state may choose to continue to prosecute the individual.[29]

Procedural rules, standards of relief, and practical considerations greatly limit the availability of the writ in California today.[30] One practical consideration is the right to and availability of counsel.[31]

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[24] CAL. PENAL CODE § 1473(a) (2020).

[25] *In re* Clark, 855 P.2d 729, 739 (Cal. 1993); *see also* Schriever, *supra* note 14, at 769.

[26] *See, e.g.*, *In re* Harris, 855 P.2d 391, 401-02 (Cal. 1993) (noting that certain claims are "cognizable in a postappeal habeas corpus petition under the ineffective counsel rubric").

[27] *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 222-24 (2011) ("The U.S. Supreme Court has had three major opportunities to explicitly recognize an innocence claim and refused to do so each time."); HERTZ & LIEBMAN, *supra* note 1, § 2.5.

[28] Schriever, *supra* note 14, at 775.

[29] *See In re* Cruz, 129 Cal. Rptr. 2d 31, 37 (Ct. App. 2003).

[30] *See, e.g.*, *In re* Reno, 283 P.3d 1181, 1200-42, 1252 (Cal. 2012) (applying various California procedural rules to deny a habeas corpus petition); Levenson, *supra* note 22, at 338-39, 347 ("Prosecutors often erect procedural hurdles to prevent petitioners having their habeas claims heard in court."); Stephen J. Perrello, Jr. & Albert N. Delzeit, *Habeas Corpus in San Diego Superior Court (1991-1993): An Empirical Study*, 19 T. JEFFERSON L. REV. 283, 285-86 (1997).

[31] *See In re* Morgan, 237 P.3d 993, 996 (Cal. 2010) ("[O]ur task of recruiting counsel has been made difficult by a serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case. 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."); *In re* Clark, 855 P.2d 729, 748 (Cal. 1993) ("An imprisoned defendant is entitled by due process to reasonable access to the courts, and to the assistance of counsel if counsel is necessary

Importantly, the U.S. Supreme Court has not recognized a constitutional right to habeas counsel, and so incarcerated indigent people must generally investigate, draft, and file petitions without legal assistance.[32] By rule of court, a petitioner who has not been sentenced to death only becomes entitled to counsel after a court determines that the petitioner has made a prima facie showing of entitlement to relief.[33] Further, while there is a constitutional right to counsel on the first direct appeal of right,[34] the issues that are litigated on direct appeal differ in fundamental ways from the issues that are litigated on habeas corpus.[35]

Indeed, it has long been the rule that "[h]abeas corpus will not serve as a second appeal,"[36] and that habeas corpus generally only provides "an avenue of relief to those unjustly incarcerated when the normal

to ensure that access, but neither the Eighth Amendment nor the due process clause of the United States Constitution gives the prisoner, even in a capital case, the right to counsel to mount a collateral attack on the judgment."); Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 716-17 (2007).

[32] *See* Murray v. Giarratano, 492 U.S. 1, 3-4, 10 (1989); Pennsylvania v. Finley, 481 U.S. 551, 554-55 (1987); *In re* Sanders, 981 P.2d 1038, 1050-51 (Cal. 1999); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1224-26 (2012); *see also* 6 B.E. WITKIN, CAL. CRIM. LAW § 83 (4th ed. 2019); Levenson, *supra* note 22, at 379 & n.180 ("The overwhelming number of habeas petitions are filed initially by pro se prisoners. Almost immediately, such petitions are derided as nuisance petitions by nuisance plaintiffs who have nothing better to do than to claim they are innocent."); Marceau, *Challenging Habeas*, *supra* note 14, at 132; Schriever, *supra* note 14, at 770, 776 & n.116 ("An overwhelming ninety-five percent of habeas petitions are filed pro se.").

[33] CAL. R. CT. 4.551(c) (2020); *see also* People v. Rouse, 199 Cal. Rptr. 3d 360, 367 (Ct. App. 2016).

[34] Douglas v. California, 372 U.S. 353, 357 (1963). An appeal of right, unlike a discretionary appeal, is "one that the higher court must hear, if the losing party demands it . . . ." *Appeal*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/appeal (last updated May 2020) [https://perma.cc/46TK-V7AG].

[35] *See In re* Robbins, 959 P.2d 311, 316 (Cal. 1998) ("California law also recognizes that in some circumstances there may be matters that undermine the validity of a judgment or the legality of a defendant's confinement or sentence, but which are not apparent from the record on appeal, and that such circumstances may provide a basis for a collateral challenge to the judgment through a writ of habeas corpus."); *Clark*, 855 P.2d at 751 n.20 (noting that non-capital appellate counsel have "no obligation to conduct an investigation to discover if facts outside the record on appeal would support a petition for habeas corpus or other challenge to the judgment").

[36] *In re* Harris, 855 P.2d 391, 395 (Cal. 1993) (alteration in original); *see also In re* Waltreus, 397 P.2d 1001, 1005 (Cal. 1965); *Ex parte* Dixon, 264 P.2d 513, 514 (Cal. 1953); *Ex parte* McCoy, 194 P.2d 531, 533 (Cal. 1948); *Ex parte* Wallace, 152 P.2d 1, 3-4 (Cal. 1944); *Ex parte* Bell, 122 P.2d 22, 26-27 (Cal. 1942).

method of relief — i.e., direct appeal — is inadequate."[37] For one, a habeas petition is generally "supposed to be focused on claims of error based on facts *outside* the [appellate] record."[38] Because of that, the first responsibility for habeas counsel is a thorough investigation of the entire case.[39]

2. California's Timeliness Framework

California's unique timeliness framework[40] requires that petitioners seek habeas corpus relief "without substantial delay."[41] While the modern rules governing California's timeliness framework were set out with specificity in the 1990s, these rules derive from the 1949 decision *Ex parte Swain*,[42] in which the California Supreme Court held that it would

> require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation.[43]

Following *In re Swain*, numerous California courts expressed similar general requirements,[44] such as that "any significant delay in seeking

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[37] *Harris*, 855 P.2d at 397.

[38] David Aram Kaiser, *Opinion Analysis:* Briggs v. Brown *(2017) Part I*, SCOCABLOG (Oct. 17, 2017) (emphasis in original), http://scocablog.com/opinion-analysis-briggs-v-brown-2017-part-i/ [https://perma.cc/7PDQ-MBKJ] (explaining the general differences between a habeas corpus petition and a direct appeal).

[39] DENISE YOUNG, JOHN H. BLUME & MARK E. OLIVE, PLEADING PREJUDICE IN CAPITAL HABEAS CORPUS PROCEEDINGS: A PUBLICATION OF THE HABEAS ASSISTANCE AND TRAINING COUNSEL 37.

[40] *See* Brief Amicus Curiae, Walker, *supra* note 8, at 2-3 ("California's timeliness rule is unlike any other state's rule . . . .").

[41] *Harris*, 855 P.2d at 397.

[42] *Ex parte* Swain, 209 P.2d 793 (Cal. 1949); *see In re* Clark, 855 P.2d 729, 738 (Cal. 1993).

[43] *Swain*, 209 P.2d at 796.

[44] *See In re* Stankewitz, 708 P.2d 1260, 1266-67 (Cal. 1985) (Lucas, J., dissenting); People v. Jackson, 514 P.2d 1222, 1223-24 (Cal. 1973); *In re* Streeter, 423 P.2d 976, 979 (Cal. 1967); *In re* Wells, 434 P.2d 613, 615 (Cal. 1967); *In re* Shipp, 399 P.2d 571, 576 (Cal. 1965).

collateral relief . . . must be fully justified."[45] However, because the timeliness bar was "applied as a matter of discretion without regularity and uniformity," federal courts "consistently refused to recognize" the bar as an independent and adequate state ground sufficient to prevent federal courts from reviewing the merits of a claim.[46]

Three leading death penalty decisions from the 1990s sought to define California's modern timeliness framework, all of which garnered forceful dissenting opinions.[47] These cases — *In re Clark* (1993),[48] *In re Robbins* (1998),[49] and *In re Gallego* (1998)[50] — established the following general framework, which continues to apply to petitioners in non-capital cases.[51] A petitioner must seek habeas relief without "substantial delay,"[52] as "measured from the time the petitioner or [their] counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim."[53] "That time may be as early as the date of conviction,"[54] and "there is no express time window" that a petition will be considered timely.[55] It is the petitioner's

[45] *Jackson*, 514 P.2d at 1223-24.

[46] *In re* Gallego, 959 P.2d 290, 304 (Cal. 1998) (Brown, J., concurring and dissenting). *Compare, e.g.*, People v. Miller, 8 Cal. Rptr. 2d 193, 199 (Ct. App. 1992) (finding petitioner's two-year delay between discovering the issue and filing his petition was unreasonable, though petitioner was seeking legal representation at the time and contacted at least eight attorneys), *with In re* Huddleston, 458 P.2d 507, 508 (Cal. 1969) (finding that petitioner's unexplained lapse of over two years was not unreasonable because the delay worked to his own disadvantage).

[47] *See* Walker v. Martin, 562 U.S. 307, 311-12 (2011); *In re* Robbins, 959 P.2d 311, 317-18 (Cal. 1998); *id.* at 341-42 (Mosk, J., concurring); *id.* at 342-45 (Kennard, J., concurring and dissenting); *Gallego*, 959 P.2d at 290; *id.* at 300-01 (Kennard, J., concurring and dissenting); *id.* at 302 (Brown, J., concurring and dissenting); *Clark*, 855 P.2d at 729; *id.* at 766 (Mosk, J., concurring and dissenting); *id.* at 766-67 (Kennard, J., concurring and dissenting).

[48] *Clark*, 855 P.2d at 729.

[49] *Robbins*, 959 P.2d at 311.

[50] *Gallego*, 959 P.2d at 290.

[51] *See, e.g.*, *Walker*, 562 U.S. at 312 (stating that "[t]hree leading decisions describe California's timeliness requirement" as applied to "[p]etitioners in noncapital cases"); *In re* Reno, 283 P.3d 1181, 1207 (Cal. 2012) ("[W]e enforce time limits on the filing of petitions for writs of habeas corpus in noncapital cases . . . ."); *In re* Brown, 259 Cal. Rptr. 3d 56, 77 (Ct. App. 2020) (citing *In re Robbins* for the holding that "claims raised in a habeas corpus petition must be timely filed" in a noncapital context). For an overview of the timeliness requirement in capital cases, see *Briggs v. Brown*, 400 P.3d 29, 34-36, 51 (Cal. 2017).

[52] *See Clark*, 855 P.2d at 750.

[53] *Robbins*, 959 P.2d at 317.

[54] *Clark*, 855 P.2d at 738 n.5.

[55] *In re* Douglas, 132 Cal. Rptr. 3d 582, 586 (Ct. App. 2011).

burden to establish "(i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness."[56] An exception to the bar is recognized for a "fundamental miscarriage of justice," which may be established by showing one of four circumstances, including that the petitioner is actually innocent or that an "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."[57]

The timeliness framework applies not only to initial petitions, but also to petitions filed later, a subset of which are called successive petitions.[58] The petitioner may not file additional petitions unless there has been "a change in the applicable law or the facts" that the petitioner has adequately explained,[59] the petition acts as an appeal,[60] or the exception for a fundamental miscarriage of justice applies.[61] The first two types of petitions must be timely filed.[62]

California is also unique in that all California courts have original jurisdiction in habeas corpus proceedings, which means that a petitioner may file their first habeas petition in any court, including the

[56] *Robbins*, 959 P.2d at 317.

[57] *Clark*, 855 P.2d at 734 ("A fundamental miscarriage of justice is established by showing: (1) 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; (2) that the petitioner is actually innocent of the crime or crimes of which he was convicted; (3) that the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted under an invalid statute.").

[58] *See* Schriever, *supra* note 14, at 772-74; *see also* Magwood v. Patterson, 561 U.S. 320, 332 (2010) ("We have described the phrase 'second or successive' as a 'term of art.'"); Briggs v. Brown, 400 P.3d 29, 43 n.14 (Cal. 2017) ("We have used 'successive petition' to refer to one raising claims that could have been presented in a previous petition.").

[59] *See Clark*, 855 P.2d at 740.

[60] *See id.* at 740 n.7; *see also* Carey v. Saffold, 536 U.S. 214, 221-22 (2002). "A petitioner currently has no right to appeal from a superior court denial of habeas corpus relief. Instead, review is obtained by filing a new habeas corpus petition in a higher court." *Briggs*, 400 P.3d at 43.

[61] *Clark*, 855 P.2d at 734, 745.

[62] *See id.* at 745. ("In assessing a petitioner's explanation and justification for delayed presentations of claims in the future, the court will also consider whether the facts on which the claim is based, although only recently discovered, could and should have been discovered earlier. A petitioner will be expected to demonstrate due diligence in pursuing potential claims.").

California Supreme Court.[63] As a result, the state supreme court receives a "staggering" number of petitions every year,[64] and it rejects many of these with summary denials.[65] When the court states that it is denying a petition simply "on the merits," it is not known whether the court has deemed the petition timely or untimely.[66] On the other hand, when the court rejects the petition by citing *In re Clark*, *In re Robbins*, and/or *In re Gallego*, that indicates that the petition is untimely or successive.[67] Every year, the California Supreme Court "summarily denies hundreds of habeas petitions" by citing to *In re Clark* and *In re Robbins*.[68] Although the timeliness rule is discretionary, the U.S. Supreme Court held in *Walker v. Martin* that the rule is an independent and adequate state ground, which bars habeas corpus review in federal court, because it is regularly followed and firmly established.[69]

B. The Federal Writ of Habeas Corpus

1. Generally

Descriptions of the federal writ of habeas corpus range from the rapturous to the scathing. On the one hand, the historical function of the "great writ" has been to "judicially ferry[] persons whom the government, through restraints, has separated from their rights under the fundamental Law of the Land to the safe harbor afforded by that Law."[70] On the other hand, Emily Garcia Uhrig, reflecting on her work as a staff attorney with the Ninth Circuit Court of Appeals, has

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[63] *See* CAL. CONST. art. VI, § 10; Walker v. Martin, 562 U.S. 307, 312 (2011).

[64] *See Walker*, 562 U.S. at 312-13.

[65] Schriever, *supra* note 14, at 793; Matthew Seligman, Note, Harrington's *Wake: Unanswered Questions on AEDPA's Application to Summary Dispositions*, 64 STAN. L. REV. 469, 505-06 (2012) ("[A] California state habeas petition is almost certain to be denied summarily."). These summary rulings are often called "postcard denials," the very brevity of which is a separate issue. *See* CAL. CONSTITUTION CTR., *Postcard from the Ninth Circuit: "Please Help,"* SCOCABLOG (July 29, 2016), http://scocablog.com/postcard-from-the-ninth-circuit-please-help/ [https://perma.cc/A5NR-Y5FE].

[66] Evans v. Chavis, 546 U.S. 189, 194 (2006); *see In re* Robbins, 959 P.2d 311, 340 n.34 (Cal. 1998) ("We deny a claim 'on the merits' when we conclude, after review, that no prima facie case for relief is stated as to that claim."). However, when a respondent asserts that a claim should be barred as untimely, and the court does not impose the bar of untimeliness, that signifies that the court has determined that the claim is not barred as untimely. *Id.*; *see also* Levenson, *supra* note 22, at 378.

[67] *Walker*, 562 U.S. at 310; Schriever, *supra* note 14, at 774.

[68] *Walker*, 562 U.S. at 318.

[69] *Id.* at 316-17, 321.

[70] HERTZ & LIEBMAN, *supra* note 1, § 2.3.

described what she witnessed in federal habeas practice for non-capital, pro se litigants as a "slaughter" and a "sacrifice of unarmed prisoners to gladiators."[71]

A state prisoner who petitions for a federal writ of habeas corpus must satisfy two overarching requirements: first, the petitioner must be "in custody," and second, the claim asserted "must challenge the legality of custody on the ground that it is, or was imposed, 'in violation of the Constitution or laws or treaties of the United States.'"[72] Unlike the California writ of habeas corpus, the federal writ "has been understood in this country from the beginning as a 'clearly appellate' mechanism for reviewing incarceration."[73] Accordingly, state prisoners must exhaust their claims by first presenting them to the appropriate state courts, either on direct appeal or on a state habeas petition, before filing in federal court.[74] They can then petition the federal court to review the correctness of the state court's judgment in their case.[75]

2. The Effect of AEDPA

In 1996, AEDPA changed federal habeas corpus practice in many ways for state and federal prisoners.[76] Two provisions are of special interest here: the enactment of the first-ever statute of limitations for

[71] Uhrig, *supra* note 32, at 1222; *see also* Primus, *Structural Vision*, *supra* note 22, at 1 ("Experts have described the current [federal habeas] system as 'chaos,' an 'intellectual disaster area,' 'a charade,' and 'so unworkable and perverse that reformers should feel no hesitation about scrapping large chunks of it.'"); Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights [https://perma.cc/83MS-WJM2] ("[T]he demise of habeas corpus is equally disgraceful. As [Judge] Reinhardt writes in his law-review article, the Great Writ 'has been transformed over the past two decades from a vital guarantor of liberty into an instrument for ratifying the power of state courts to disregard the protections of the Constitution.'").

[72] HERTZ & LIEBMAN, *supra* note 1, § 9.1 (citing 28 U.S.C. §§ 2241(c)(3), 2254(a) (2018)).

[73] *Id.* § 2.5 (citing *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 100-01 (1807)); *see also id.* § 1.1 ("[F]ederal habeas corpus provides a well-developed, historically validated, highly specialized, and relatively efficient system of federal appellate review of the judicial treatment that States and localities afford the federally protected liberties of their least favored citizens.").

[74] 28 U.S.C. § 2254(b) (2018); *see* HERTZ & LIEBMAN, *supra* note 1, §§ 5.1, 23.3.

[75] *See* 28 U.S.C. § 2254(d).

[76] HERTZ & LIEBMAN, *supra* note 1, § 3.2. For a history of the passage of AEDPA, see Liliana Segura, *Gutting Habeas Corpus: The Inside Story of How Bill Clinton Sacrificed Prisoners' Rights for Political Gain*, INTERCEPT (May 4, 2016, 10:54 AM), https://theintercept.com/2016/05/04/the-untold-story-of-bill-clintons-other-crime-bill/ [https://perma.cc/8ATW-986U].

federal habeas corpus petitions,[77] and the deferential standard of review imposed.[78]

AEDPA sets forth a one-year filing deadline for state prisoners seeking federal writ relief.[79] There are four alternate "trigger" dates that the one-year period runs from, the most common of which is the date on which the judgment becomes final.[80] This means that, in general, AEDPA's one-year clock begins to run after the direct appeal ends.[81] Where a petitioner has exhausted their claim by presenting it on direct appeal, the petitioner may immediately file in federal court.[82] However, because a petitioner may be required to exhaust their claim in state court by filing a state habeas corpus petition, AEDPA provides for statutory tolling.[83] A petitioner's AEDPA clock is "tolled," or stopped, during the "time [that] a properly filed application for State post-conviction . . . review with respect to the pertinent judgment or claim is pending."[84]

In addition to this first-ever filing deadline, AEDPA imposed a new constraint on the power of a federal habeas court to grant the writ,[85] akin to a highly deferential standard of review.[86] When a state court has denied a claim "on the merits," the federal court may not grant the writ unless the denial was either "contrary to, or involved an unreasonable application of" U.S. Supreme Court precedent,[87] or "resulted in a decision that was based on an unreasonable determination of the facts

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[77] *See* 28 U.S.C. § 2244(d) (2018); Mayle v. Felix, 545 U.S. 644, 654 (2005); Aaron G. McCollough, Note, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 367 (2005) ("For the first time in history, defendants seeking initial federal habeas corpus review were subject to a filing deadline." (footnote omitted)).

[78] *See* 28 U.S.C. § 2254(d)(2).

[79] 28 U.S.C. § 2244(d).

[80] 28 U.S.C. § 2244(d)(1) (providing that the limitation period may run from "the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review").

[81] *See* 28 U.S.C. § 2244(d)(1)(A).

[82] *See* 28 U.S.C. § 2254(b)(1)(A).

[83] *See* 28 U.S.C. § 2244(d)(2).

[84] *Id.*; Lawrence v. Florida, 549 U.S. 327, 329 (2007). A state post-conviction petition that is untimely under state law is not considered to be properly filed, and so it does not entitle a petitioner to statutory tolling under § 2244(d)(2). *See* Pace v. DiGuglielmo, 544 U.S. 408, 414-17 (2005).

[85] Williams v. Taylor, 529 U.S. 362, 411-12 (2000) (describing the effect of 28 U.S.C. § 2254(d)).

[86] *See* HERTZ & LIEBMAN, *supra* note 1, § 30.1 n.14.

[87] 28 U.S.C. § 2254(d)(1).

in light of the evidence presented in the State court proceeding."[88] Further, where a state court has not decided a claim "on the merits," but has instead invoked a procedural bar such as untimeliness, the respondent will likely raise the defense of procedural default, a defense that predates and survives AEDPA.[89] With exceptions, a federal court will not consider the substance of procedurally defaulted claims.[90]

The combination of the statute of limitations, the deference federal courts must accord state court decisions, the doctrines of exhaustion and procedural default, and more[91] have greatly limited federal courts' power to grant the writ.[92] In fact, empirical research shows that "AEDPA's bite has reached substantial proportions, in many ways

[88] 28 U.S.C. § 2254(d)(2). The standard set forth in 28 U.S.C. § 2254(d) is, and was meant to be, difficult to meet. Harrington v. Richter, 562 U.S. 86, 102 (2011). *Harrington v. Richter* is often cited for the proposition that AEDPA "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." *Id.*; *see, e.g.*, Shinn v. Kayer, 141 S. Ct. 517, 520 (2020) ("When a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal habeas court may not disturb the state court's decision unless its error lies 'beyond any possibility for fairminded disagreement.'" (citation omitted)). For other recent interpretations of the statute by the U.S. Supreme Court, see, for example, *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015); *White v. Woodall*, 572 U.S. 415, 425-27 (2014); *Cullen v. Pinholster*, 563 U.S. 170, 181-83, 187-88 (2011).

[89] *See* HERTZ & LIEBMAN, *supra* note 1, §§ 26.1-26.2; *see, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 76-77, 86-87 (1977) (indicating that a petitioner's failure to comply with a Florida procedural rule regarding motions to suppress prevents federal direct review, absent a showing of "cause" and "prejudice").

[90] *See* HERTZ & LIEBMAN, *supra* note 1, §§ 26.1-26.2; *see, e.g.*, *Wainwright*, 433 U.S. at 91 (instructing district court to dismiss habeas petition because petitioner did not comply with state procedural rule).

[91] *See, e.g.*, 28 U.S.C. § 2244(d) (2018) (establishing statute of limitations); *id.* § 2254(b) (requiring exhaustion); *id.* § 2254(d) (providing deferential standard of review); *id.* § 2254(e) (stating that "a determination of a factual issue made by a State court shall be presumed to be correct"). "What the various obstacles to review have accomplished . . . has been to effect a shift in the subject matter of habeas review from the substantive merits of the prisoners' claims to the question of which procedural obstacle will be used to bounce each claim out of federal court." Primus, *Structural Vision*, *supra* note 22, at 11 (footnote omitted).

[92] *See, e.g.*, Lynn Adelman, *Who Killed Habeas Corpus?*, AM. CONST. SOC'Y EXPERT F. (Mar. 12, 2018), https://www.acslaw.org/expertforum/who-killed-habeas-corpus/ [https://perma.cc/K9VY-RWGV] (describing AEDPA as an "utter and unmitigated disaster"); Emily Bazelon, *The Law That Keeps People on Death Row Despite Flawed Trials*, N.Y. TIMES MAG. (July 17, 2015), https://www.nytimes.com/2015/07/17/magazine/the-law-that-keeps-people-on-death-row-despite-flawed-trials.html [https://perma.cc/HP82-EBFL] ("[Nineteen] years of Supreme Court decisions based on [AEDPA] have fundamentally narrowed the scope of habeas review, from a fight over the merits of a claim of innocence or fairness to one over narrow process issues . . . .").

exceeding the initial concerns and hype surrounding the legislation."[93] So drastic have the effects of AEDPA been that scholars have "suggested that the general futility of habeas litigation dictates that individual, case-by-case habeas review should be abolished."[94] More measured reforms have called instead for recognition of "the critical role federal courts play in ensuring that the state court process is fundamentally fair."[95] The latter suggestion acknowledges that "state habeas systems are now the critical forum for the litigation of constitutional challenges . . . . [W]ith this great power, state post-conviction systems have assumed a commensurate level of responsibility in terms of providing a full and fair state process."[96]

II. FLAWS WITH THE CURRENT APPROACH

A. Generally

The concurring and dissenting opinions issued in *In re Clark*,[97] *In re Robbins*,[98] and *In re Gallego*[99] highlight the California Supreme Court's early concerns that the timeliness framework that it was developing was too indeterminate to be applied in a consistent manner.[100] Justice

[93] Marceau, *Challenging Habeas*, *supra* note 14, at 85; *see also* William A. Fletcher, *Our Broken Death Penalty*, 89 N.Y.U. L. REV. 805, 824 (2014) (comparing the rates at which federal courts in capital cases granted some form of relief on habeas before the passage of AEDPA and after); Editorial, *Death Row Inmates Have Constitutional Rights, Too*, L.A. TIMES (June 23, 2020, 3:00 AM PT), https://www.latimes.com/opinion/story/2020-06-23/death-row-constitutional-rights-congress-courts-wrongful-convictions-habeas [https://perma.cc/H8RC-BPE5]. Further, new empirical research discloses that "[f]ederal appellate judges are as much as 44.2% more likely to grant guilt-phase habeas relief to a death row petitioner than they are to grant the same relief to a person serving life in prison for the same crime." Brett Parker, Note, *Is Death Different to Federal Judges? An Empirical Comparison of Capital and Noncapital Guilt-Phase Determinations on Federal Habeas Review*, 72 STAN. L. REV. 1655, 1662 (2020).

[94] Marceau, *Challenging Habeas*, *supra* note 14, at 85; *see, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 819-23, 835 (2009) ("Our proposal would . . . [remove] federal jurisdiction over *all* federal noncapital habeas petitions, absent either proof of innocence or retroactive application of new law." (emphasis in original) (footnote omitted)).

[95] Marceau, *Challenging Habeas*, *supra* note 14, at 86.

[96] *Id.* at 91.

[97] *In re* Clark, 855 P.2d 729 (Cal. 1993).

[98] *In re* Robbins, 959 P.2d 311 (Cal. 1998).

[99] *In re* Gallego, 959 P.2d 290 (Cal. 1998).

[100] *See Robbins*, 959 P.2d at 342 n.3 (Mosk, J., concurring); *Gallego*, 959 P.2d at 307-08 (Brown, J., concurring and dissenting); *Clark*, 855 P.2d at 766 (Mosk, J., concurring and dissenting).

Kennard was concerned that the rule's indeterminacy would lead petitioners to inadvertently file untimely petitions,[101] and that the applications of the rule were becoming "technical," "overly precise," and "rigid."[102] Multiple justices, including Justice Brown, highlighted that the process of determining the timeliness of claims rather than resolving them on the merits requires more time and effort and does not further the goal of finality.[103] Justice Mosk, concurring and dissenting in *Clark*, pointedly wrote: "The majority's procedural 'rules' are indeterminate at their very core. As such, they lend themselves only to arbitrary and capricious operation."[104] For him, the only "sure way to discover abuse [of the writ] without defeating justice" is to "examine each petition on its own facts."[105]

California courts from the trial level to the Supreme Court have now been applying the timeliness framework for almost thirty years.[106] In that time, it has become clear that the framework does provide a benefit that many other states' timeliness rules and the federal rule do not: flexibility.[107] California's framework permits petitioners to explain what has caused their filing delay.[108] However, the concerns articulated by Justice Brown, Justice Kennard, and Justice Mosk remain relevant.[109] The framework appears to be applied in inconsistent ways, and

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[101] *Clark*, 855 P.2d at 769 (Kennard, J., concurring and dissenting) ("In California, a particular habeas petition may be found to be untimely even though the petitioner has no desire to misuse the judicial process.").

[102] *Robbins*, 959 P.2d at 345 (Kennard, J., concurring and dissenting); *Gallego*, 959 P.2d at 301 (Kennard, J., concurring and dissenting).

[103] *Robbins*, 959 P.2d at 342 (Mosk, J., concurring) ("Scrutiny of the merits . . . requires much less than does the effort to invoke each and every procedural bar. Or even the effort to invoke any one such bar."); *Gallego*, 959 P.2d at 306-07 (Brown, J., concurring and dissenting) ("Procedural bars do not promote finality, but rather compromise it in direct proportion to the litigation they generate. If a petitioner is not invoking an exception, the vagueness of the rule encourages definitional quibbles. Every effort to clarify simply creates additional rounds in the process for both state and federal courts.").

[104] *Clark*, 855 P.2d at 766 (Mosk, J., concurring and dissenting).

[105] *Id.*

[106] *Compare Clark*, 855 P.2d at 760-61 (applying the timeliness framework in 1993), *with* Robinson v. Lewis, 469 P.3d 414, 421 (Cal. 2020), *and In re* Brown, 259 Cal. Rptr. 3d 56, 77 (Ct. App. 2020) (providing examples of contemporary California courts applying the timeliness framework).

[107] *See* Medwed, *supra* note 14, at 1467-68. *Compare* 28 U.S.C. § 2244(d)(1) (2018) (establishing the federal one-year statute of limitations), *with Robbins*, 959 P.2d at 317 (stating that a petitioner bears the burden of showing they have raised their claim without "substantial delay" or with "good cause for the delay").

[108] *Robbins*, 959 P.2d at 317-18.

[109] *See infra* Part II.B.

individuals who want to assert their state and federal rights lack notice about what they must do to comply on a basic level with California's timeliness rule.[110] This structure is particularly unfair given that petitioners do not have a right to counsel at this stage of their post-conviction litigation.[111]

B. Examples of California Courts Applying the Timeliness Framework

California's undefined timeliness framework means that state courts must analyze timeliness on an individual, claim-by-claim basis.[112] This necessarily uses valuable judicial resources.[113] So, it is crucial to understand how California courts analyze timeliness, and to determine if these analyses are consistent. To this end, the Habeas Corpus Resource Center ("HCRC") conducted an empirical analysis of unpublished summary denials.[114] The HCRC analyzed a sample of 157 habeas corpus petitions that the California Supreme Court decided on September 11, 2002.[115] The HCRC chose this sample in order to analyze only "cases decided by the same court personnel and staff."[116] Thus, this sample should reflect much more consistency than, for example, a study of denials issued by various Courts of Appeal at different times.

What the HCRC found is troubling. In total, the court denied all 157 petitions on September 11, 2002.[117] Of these, the court denied ninety-five petitions on the merits, and sixty-two petitions on procedural

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[110] *See infra* Part II.B.

[111] *See supra* note 32; *see also* Levenson, *supra* note 22, at 377 ("[Procedural] hurdles involve the timely filing of petitions supported by admissible evidence, with little allowance made for the fact that the petitioner is frequently incarcerated with limited access to investigative resources. Petitioners must also identify specific constitutional violations and explain why contrary rulings when their convictions were appealed do not bar the claims in their petitions."); Uhrig, *supra* note 32, at 1252-53 (describing "the prototypical inmate").

[112] *See supra* Part I.A.2.

[113] *See Robbins*, 959 P.2d at 342 (Mosk, J., concurring) ("Scrutiny of the merits, however, requires much less than does the effort to invoke each and every procedural bar. Or even the effort to invoke any one such bar."); *In re* Gallego, 959 P.2d 290, 307-08 (Cal. 1998) (Brown, J., concurring and dissenting) (stating that the court "squanders judicial resources without advancing the state of the law or the quality of justice"); *cf.* Robinson v. Lewis, 795 F.3d 926, 931 (9th Cir. 2015) ("Because of the uncertainty surrounding timeliness, district courts spend substantial judicial resources addressing this issue.").

[114] Brief Amicus Curiae, Walker, *supra* note 8, at 3.

[115] *Id.* at 17-18.

[116] *Id.*

[117] *Id.* at 18.

grounds.[118] Further, the court denied thirty-four of the procedurally faulty petitions in a way that involved the timeliness bar.[119] Applying a consistent methodology, the HCRC could not identify a "principled way of distinguishing between habeas corpus cases that were denied as untimely and those that were denied on the merits."[120] That is, the HCRC could not determine why the court sometimes overlooked apparent procedural defects to review the merits of a petition.[121]

The HCRC approached the sample in four different ways. First, the HCRC compared denials by length of delay, but was not able to reach a general conclusion about the maximum delay that the California Supreme Court would permit.[122] For example, the HCRC examined cases with delays of five to six years from the date that a conviction became final, and found that sixty-two percent were denied on the merits, while only thirty-eight percent were denied as untimely.[123] Petitioner James Edward Cooper delayed filing his habeas petition, in which he alleged ineffective assistance of counsel ("IAC"), for five years from the date his conviction became final, but the court reviewed his petition on the merits.[124] On the other hand, petitioner Charles W. Martin delayed in raising a claim of IAC for an equivalent length of time, but the court denied his petition as untimely.[125]

Second, the HCRC compared petitions raising IAC claims, and determined that "in cases with similar delay to Mr. Martin's case, there were virtually equivalent numbers of cases denied on the merits as those denied as untimely."[126] Third, the HCRC compared cases by the justification that petitioners provided for the delay.[127] It determined that petitions denied on the merits offered "almost identical" justifications as petitions denied as untimely.[128] The HCRC was surprised to discover that where petitioners failed to justify their delay at all, this had "little effect on the disposition of the case."[129] The court denied petitions on the merits that failed to provide any justification for the delay, even

118 *Id.*
119 *Id.* at 21.
120 *Id.* at 25.
121 *See id.*
122 *Id.* at 26-28.
123 *Id.* at 25.
124 *Id.* at 27-28.
125 *See id.* at 25, 27-28.
126 *Id.* at 29.
127 *Id.* at 31.
128 *Id.*
129 *Id.* at 32.

where delays ranged from zero to over five years.[130] As a result, the HCRC stated that it was in the dark as to "what kind of justification and how much specificity or proof was required to overcome delay."[131]

Fourth and finally, the HCRC compared four cases, which are useful to view side by side.[132] The HCRC concluded that these "cases cannot be reconciled."[133]

Table 1: Case Comparison[134]

Case	**Claim**	**Justification**	**Delay**	**Denied on the merits or due to delay?**
In re Danny Ray Cameron, S107202	IAC; voluntariness of plea; due process and equal protection violations	Cal. Dep't of Corrections deprived petitioner of transcripts and petitioner is layman at law (no proof)	> one year from finality of conviction; > two years from sentencing	Merits
In re Scott G. Mullins, S107933	IAC	None	> one year from finality of conviction; > three years from entry of judgment	Merits
In re Bruce Senator, S107861	Challenge to sentence; voluntariness of plea	Prison-related impediments and other grounds	> one year from finality of conviction; > three years from entry of judgment	Untimely

[130] *Id.*
[131] *Id.* at 33-34.
[132] *See id.* at 34.
[133] *Id.* at 36.
[134] *See id.* at 34-36.

In re Alfrederick Love, S106541	IAC and other claims	Not specified	> one year from finality of conviction	Untimely

The HCRC's analysis demonstrates that even the same court, on the same day, evaluating similar petitions does not consistently apply the timeliness bar.[135] To be sure, expanded, updated empirical analysis of the ways that different California courts impose the timeliness bar would be useful. Nevertheless, this study spotlights the inherent difficulties that California courts face in resolving whether a claim is time-barred.[136]

One explanation comes from the fact that the court may have many reasons for denying a petition "on the merits," and those words do not by themselves indicate that the claim was timely raised.[137] This may mean that all of the five-year-old petitions cited by the HCRC are in fact untimely, but the court preferred to deny some on the merits for other reasons.[138] Because the court did not address this issue, this must remain an open question.

However, two recent cases suggest that different approaches to timeliness are at work. These cases provide a useful comparison of one court deeming a habeas claim untimely and denying it, while another court deems a similar habeas claim timely and grants it. In *In re McDowell*, decided by the California Court of Appeal for the Fourth District, petitioner John Dewitt McDowell's claim derived from a case that announced new law.[139] This case was *People v. Velasco*,[140] which held that the crime of active gang participation is not committed when a gang member commits a felony with a member of another gang.[141] *Velasco* was issued on March 13, 2015.[142] Because McDowell's petition was filed on May 17, 2017, more than two years later, the Court of

[135] *See id.* at 25.

[136] *Id.*

[137] Carey v. Saffold, 536 U.S. 214, 225-26 (2002) (noting, for example, that the court may reach the merits of an issue "where the merits present no difficult issue" or where the court "wishes to show a prisoner . . . that it was not merely a procedural technicality that precluded him from obtaining relief").

[138] Brief Amicus Curiae, Walker, *supra* note 8, at 25-28; *see Carey*, 536 U.S. at 225-26.

[139] *In re* McDowell, No. E072191, 2019 WL 6713280, at *3 (Cal. Ct. App. Dec. 10, 2019).

[140] 185 Cal. Rptr. 3d 94 (Ct. App. 2015).

[141] *Id.* at 103.

[142] *See McDowell*, 2019 WL 6713280, at *3 & n.5.

Appeal found the petition untimely and denied it.[143] The court rejected the argument that a two-year delay is not substantial for an incarcerated petitioner representing himself.[144]

Justice Slough disagreed; in her view, the petition was timely.[145] "Given that [McDowell] is an indigent, unsophisticated state prisoner who was unrepresented when he filed his petition, and given that his claim is based on a new development in the law (as opposed to newly discovered facts), two years does not constitute a substantial delay."[146] Justice Slough further found that "there is no reason to think McDowell knew about *Velasco* but put off filing his petition," especially as a petitioner's delay in such circumstances "primarily work[s] to his own disadvantage."[147]

Although Justice Slough's analysis did not prevail in *McDowell*, the adjacent California Court of Appeal for the Second District followed similar reasoning in *In re Gonzalez*.[148] Petitioner Enrique Gonzalez's claim also derived from a case that announced new law.[149] This case was *People v. Chiu*,[150] which held that the "natural and probable consequences theory of aiding and abetting a crime cannot be the basis" of a first-degree murder conviction.[151] *Chiu* was decided on June 2, 2014, but Gonzalez did not file his petition until more than three years later, on October 20, 2017.[152] The court deemed Gonzalez's petition timely filed, granted the writ, and vacated Gonzalez's conviction for first-degree murder.[153]

In its analysis of timeliness, the court explained that at the time *Chiu* was decided, "Gonzalez was incarcerated, had no pending appeal or petitions, and did not have legal representation."[154] In March 2017, Gonzalez's mother took steps to request his appellate record and seek relief for her son based on the decision in *Chiu*.[155] Gonzalez's appellate attorney agreed to prepare and file a habeas petition, and the attorney

143 *Id.* at *3-5.

144 *Id.* at *4.

145 *Id.* at *7 (Slough, J., concurring).

146 *Id.* (citing *In re* Saunders, 472 P.2d 921, 925-26 (Cal. 1970)).

147 *Id.* at *7-8 (quoting *In re* Huddleston, 458 P.2d 507, 508 (Cal. 1969)).

148 *See In re* Gonzalez, No. B285807, 2019 WL 291672, at *4-5 (Cal. Ct. App. Jan. 23, 2019).

149 *See id.* at *1.

150 People v. Chiu, 325 P.3d 972 (Cal. 2014).

151 *Gonzalez*, 2019 WL 291672, at *1 (citing *Chiu*, 325 P.3d at 980).

152 *Id.* at *4-5.

153 *Id.* at *4, *7.

154 *Id.* at *4.

155 *Id.*

spent seven months in 2017 investigating and preparing it.[156] Because Gonzalez had no legal representation at the time that *Chiu* was decided, and because his attorney prepared the petition diligently in 2017, the court held that the delay in filing the petition was not unreasonable.[157]

These decisions can be reconciled only by acknowledging that the meaning of "substantial delay" is open to very different interpretations.[158] This is especially true given that, at its origin, the timeliness requirement was *not* meant to "place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in [pro per] any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation."[159] Nonetheless, because of the open-ended nature of the inquiry, some courts may be more rigid than others and more unyielding in their expectations.

Indeed, while the analysis so far has focused on petitions that were filed years after the petitioners were convicted, the current timeliness framework provides no "safe harbor" period during which a claim (raised for the first time) will be guaranteed to be deemed timely.[160] The date that a petitioner or counsel "knew, or reasonably should have known,"[161] of the claim "may be as early as the date of conviction."[162] Thus, a state habeas claim may be denied as untimely even if filed before the expiration of the AEDPA one-year deadline described in Part I.B.2.

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[156] *Id.* at *4-5.

[157] *Id.* at *5 & n.4. Another 2019 decision of the California Court of Appeal for the Fourth District arrives at a similar result. In *In re Khalifa*, petitioner Shawn Malone Khalifa's claim derived from cases that announced new law. *In re* Khalifa, No. G057175, 2019 WL 4266820, at *3 (Cal. Ct. App. Sept. 10, 2019). See *People v. Banks*, 351 P.3d 330, 332-33 (Cal. 2015) and *People v. Clark*, 372 P.3d 811, 887 (Cal. 2016), for this new law. Khalifa filed his habeas petition based on these cases on January 2, 2019, two-and-a-half years after *Clark* was issued. *Khalifa*, 2019 WL 4266820, at *3. The petition was not deemed to be time-barred. *Id.* The court granted Khalifa's petition for a writ of habeas corpus. *Id.* at *9. See Claire Trageser, *California's Felony Murder Law Change Means Freedom for San Diego Man*, KPBS (Feb. 26, 2020), https://www.kpbs.org/news/2020/feb/26/after-16-years-prison-californias-felony-murder-la/ [https://perma.cc/NS2P-KB7U], to learn about Khalifa's life now.

[158] *See, e.g.*, *In re* Gallego, 959 P.2d 290, 307 (Cal. 1998) (Brown, J., concurring and dissenting) ("The primary problem is that 'good cause' and 'without substantial delay' defy standardization.").

[159] *Ex parte* Swain, 209 P.2d 793, 796 (Cal. 1949); *see also In re* Huddleston, 458 P.2d 507, 508 (Cal. 1969).

[160] *See In re* Douglas, 132 Cal. Rptr. 3d 582, 586 (Ct. App. 2011). The narrow exception to this is discussed in *infra* Part III.A.

[161] *In re* Robbins, 959 P.2d 311, 317 (Cal. 1998).

[162] *In re* Clark, 855 P.2d 729, 738 n.5 (Cal. 1993) (citing *In re* Saunders, 472 P.2d 921 (Cal. 1970); *In re* Wells, 434 P.2d 613 (Cal. 1967)).

For example, in the 2005 case *Ranieri v. Terhune*, Stephen J. Ranieri filed his first and second state habeas petitions within months of the California Court of Appeal affirming his conviction on direct appeal.[163] The court deemed Ranieri's second petition, filed on November 10, 1999 — a little over three months after his conviction became final on July 27, 1999 — untimely.[164] And only two months after Ranieri's second petition was denied, Ranieri filed a third petition, which was also denied as untimely.[165] Examining the history of this case, a federal district court found that Ranieri's claims were "procedurally defaulted because his state habeas petitions were untimely filed in the California Supreme Court."[166] The district court did not consider the merits of Ranieri's claims, and the timeliness bar stood as an obstacle to Ranieri attaining review.[167]

Finally, compounding the fact that there are no deadlines or determinate standards[168] is the fact that "the vast majority of decisions imposing a timeliness bar . . . are unpublished, unexplained summary orders that are unavailable to incarcerated petitioners."[169] As shown above, even when courts do explain their decisions, the applications may be inconsistent and the cases may still often be unpublished,[170]

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[163] Ranieri v. Terhune, 366 F. Supp. 2d 934, 937 (C.D. Cal. 2005). See *id.* at 936-37, for the full timeline. Apr. 2, 1997, Ranieri is convicted. *Id.* at 936. Sept. 18, 1998, Ranieri files direct appeal to the California Court of Appeal. *Id.* at 937. June 17, 1999, California Court of Appeal modifies Ranieri's sentence and otherwise affirms judgment. *People v. Ranieri*, APP. CTS. CASE INFO. (Feb. 26, 2021), https://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=2&doc_id=1052627&doc_no=B114080&request_token=NiIwLSEmTkw9W1BVSCJdVEtIQFw6USxfIiNeRzJTMCAgCg%3D%3D [https://perma.cc/64EG-EPWL]. July 27, 1999, Ranieri's conviction becomes final by the conclusion of his direct appeal. *See id.*; *infra* note 164. Between Sept. 1998–Oct. 1999, Ranieri files first state habeas petition. *See Ranieri*, 366 F. Supp. 2d at 937. Oct. 27, 1999, California Supreme Court denies first state habeas petition. *Id.* Nov. 10, 1999, Ranieri files second state habeas petition in California Supreme Court. *Id.* Jan. 25, 2000, California Supreme Court denies second state habeas petition, citing *In re Clark*, which indicates "that the court dismissed the petition as untimely." *Id.* Mar. 24, 2000, Ranieri files third state habeas petition in California Supreme Court. *Id.* June 28, 2000, California Supreme Court denies third state habeas petition, citing *In re Clark* to signify untimeliness. *Id.*

[164] *Ranieri*, 366 F. Supp. 2d at 937; *People v. Ranieri*, *supra* note 163; CAL. R. CT. 8.366(b)(1) (2020) (stating that a court of appeal decision in a criminal case is final thirty days after filing); CAL. R. CT. 8.500(e)(1) (2020) (stating that a petition for review must be filed within ten days of the court of appeal decision becoming final).

[165] *Ranieri*, 366 F. Supp. 2d at 937.

[166] *Id.* at 943.

[167] *See id.* at 938-44.

[168] *See supra* Part I.A.2.

[169] Brief Amicus Curiae, Walker, *supra* note 8, at 3.

[170] *See supra* notes 139–57 and accompanying text.

serving no precedential value to petitioners and courts.[171] As a consequence, state courts expend substantial judicial resources to determine the timeliness of habeas corpus claims, but the timeliness framework's indeterminate nature leads to inconsistent applications and at times unfair results.[172]

C. Federal Ramifications

There may be ramifications in federal court for an individual whose petition is untimely by state or federal standards. The following three hypothetical scenarios illustrate the interaction of state and federal habeas corpus procedures and the concerns inherent in the current structure.

In the first scenario, Taylor Bernhard, incarcerated for a state criminal conviction, files his first state habeas petition one year and one week after his conviction becomes final. He alleges juror misconduct and seeks to provide evidence in support of his claim that is not in the record.[173] Six months later, the California Supreme Court finds that his petition is timely, but incorrectly finds that it does not have merit and so rejects it. The result is that if Bernhard were to file a petition in federal court, his petition would be considered untimely because he did not toll the federal statute of limitations within one year.[174] Although the state court decision was wrong, Bernhard will likely not receive federal relief. Thus, AEDPA provides a strong incentive for petitioners

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171 *See* CAL. R. CT. 8.1115 (2020) ("[A]n opinion of a Court of Appeal . . . that is not certified for publication . . . must not be cited or relied on by a court or a party in any other action.").

172 *See supra* notes 113–58 and accompanying text; *infra* Part II.C; *see, e.g.*, *Ranieri*, 366 F. Supp. 2d at 937-38 (finding that federal review of petitioner's ineffective assistance of counsel claims is precluded by petitioner's late filing of his claims in the California Supreme Court, although petitioner raised his claims before expiration of his AEDPA one-year deadline).

173 *See* APPELLATE DEFS., INC., APPELLATE PRACTICE MANUAL, ch. 8, at 2-3 (2020), http://www.adi-sandiego.com/panel/manual/California_Appellate_Practice_Manual.pdf?201905 [https://perma.cc/NY98-CMVV]; *Juror Misconduct*, HABEAS ASSISTANCE & TRAINING, http://hat.capdefnet.org/helpful-cases/juror-misconduct (last visited Feb. 28, 2021) [https://perma.cc/88QB-68FD].

174 *See* 28 U.S.C. § 2244(d)(1)(A) (2018); Vroman v. Brigano, 346 F.3d 598, 602 (6th Cir. 2003) (affirming that "[t]he tolling provision, [28 U.S.C. § 2244(d)(2)], does not 'revive' the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run. Once the limitations period is expired, collateral petitions can no longer serve to avoid a statute of limitations" (quoting Rashid v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998))); HERTZ & LIEBMAN, *supra* note 1, § 5.2(b).

to file state habeas petitions within one year of their convictions becoming final, even in the absence of any state deadline.[175]

In the second scenario, Bernhard learns from his mistake and files his first state habeas petition four months after his conviction becomes final. Six months later, the California Supreme Court rejects his petition with a summary denial indicating untimeliness. Bernhard promptly files a habeas petition in federal court. However, the respondent may now raise the defense of procedural default.[176] Although pursuant to AEDPA, Bernhard had a full year from the date his conviction became final to raise his federal claim, Bernhard had to exhaust his claim in state court,[177] and the state court rejected his claim based on delay.

In the third scenario, Bernhard spends more time investigating his misconduct claim and files his first state habeas petition ten months after his conviction becomes final. Two months later, Bernhard's federal statute of limitations period expires, but Bernhard believes that he will be entitled to statutory tolling of the time that his petition is pending in state court.[178] A week later, the California Supreme Court rejects his petition as untimely. The result of this is that if Bernhard were to file a federal habeas petition, his claim would not only be considered procedurally defaulted, but also untimely in federal court under AEDPA.[179] Bernhard learned too late that he is not entitled to statutory tolling of the time that his state petition was pending because his state petition was not "properly filed" in state court.[180]

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[175] Petitioners have the additional structural incentive to file early because they want to obtain relief as promptly as possible. Evans v. Chavis, 546 U.S. 189, 203 n.1 (2006) (Stevens, J., concurring); Brief of Amici Curiae Habeas Law Scholars Albert Alschuler, John H. Blume, Erwin Chemerinsky, Eric M. Freedman, Randy Hertz, James S. Liebman, and Ira P. Robbins in Support of Respondent at 24, Mayle v. Felix, 545 U.S. 644 (2005), 2005 WL 682095, at *24 [hereinafter Brief of Amici Curiae, Mayle].

[176] *See* HERTZ & LIEBMAN, *supra* note 1, § 26.1 ("If a petitioner failed to comply with a state procedural rule when he presented a federal constitutional claim to the state courts, the petitioner thereafter may be barred from receiving federal habeas relief on the claim . . . ." (footnote omitted)); *see, e.g.*, *Ranieri*, 366 F. Supp. 2d at 937, 943 ("Ranieri's claims are procedurally defaulted because his state habeas petitions were untimely filed in the California Supreme Court.").

[177] 28 U.S.C. § 2254(b)(1)(A) (2018); *see also id.* § 2244(d)(1)(A); HERTZ & LIEBMAN, *supra* note 1, § 11.1.

[178] *See* 28 U.S.C. § 2244(d)(2).

[179] *See* Lakey v. Hickman, 633 F.3d 782, 785-86 (9th Cir. 2011) ("Because Lakey's untimely petition must be treated as improperly filed, or as though it never existed, for purposes of section 2244(d), the pendency of that petition did not toll the limitations period.").

[180] *See id.*; *see also* 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005); White v. Martel, 601 F.3d 882, 884 (9th Cir. 2010) (per curiam) ("We have

These scenarios reflect that timeliness rules stand in the way of state and federal courts' consideration of petitions that raise even meritorious constitutional claims. The state and federal timeliness frameworks work together to create a system in which a claim that is raised too late may be rejected as untimely and not considered by any state or federal court. And, although there are narrow exceptions to procedural default and untimeliness,[181] petitioners must generally navigate these complex areas of law without counsel.[182] Ultimately, while there may be little that California can do to address the federal one-year statute of limitations, California can seek to ensure that its own state habeas process is full and fair, including by reforming its timeliness framework, as proposed in the next Part.

III. SUGGESTIONS FOR REFORM

A. Recent Developments in California: Robinson v. Lewis *and Proposition 66*

Two recent developments in California law regarding the timeliness of habeas corpus petitions point the way to potential solutions. The first change is the California Supreme Court's decision in *Robinson v. Lewis*.[183] There, the court held that a new habeas corpus petition filed in a higher court within 120 days of the lower court's denial, raising the same claim(s), will never be considered untimely due to gap delay.[184] This 120-day period may be conceived of as a unique "safe harbor" period, providing clarity and consistency to courts and petitioners.[185]

Specifically, in *Robinson v. Lewis*, petitioner Julius M. Robinson filed a pro se habeas petition challenging his state court judgment in the superior court ninety-four days after his conviction became final.[186] The petition was denied.[187] Sixty-six days later, he filed a new petition in the

held that, pursuant to *Pace*, tolling under section 2244(d)(2) is unavailable where a state habeas petition is deemed untimely under California's timeliness standards.").

[181] *See, e.g.*, HERTZ & LIEBMAN, *supra* note 1, §§ 5.2(b)(iii)-(iv) (describing equitable tolling of the federal statute of limitations and the "actual innocence" exception); *id.* §§ 26.3-26.4 (describing the "cause and prejudice" and miscarriage of justice exceptions to procedural default). *See generally id.* § 26.2 (discussing the "components of a federally cognizable default").

[182] *See supra* note 32.

[183] Robinson v. Lewis, 469 P.3d 414 (Cal. 2020).

[184] *Id.* at 424.

[185] *Id.* at 422, 424.

[186] *Id.* at 418.

[187] *Id.*

Court of Appeal raising the same claims, which was denied.[188] Robinson filed a new petition in the California Supreme Court ninety-one days later, which was likewise denied.[189] After a delay of 139 days, Robinson filed a petition in federal district court.[190] Adding up the delays attributable to Robinson, his federal petition was filed 390 days after his conviction became final.[191] The district court denied the petition as barred by the federal one-year statute of limitations, and Robinson appealed to the Court of Appeals for the Ninth Circuit.[192]

The Ninth Circuit, seeking to clarify what length of delay between petitions is permissible under California law after years of uncertainty, certified a question to the California Supreme Court.[193] In response, the state court clarified that a delay of up to 120 days between the denial of a petition in the superior court and the filing of a new petition in the Court of Appeal is not considered substantial delay.[194] Delay beyond that time period would be subject to the normal *In re Robbins* analysis described in Part I.A.2.[195] Therefore, it follows that Robinson is entitled to statutory tolling of the sixty-six days between the superior court's denial and Robinson's filing in the Court of Appeal, and so his federal court petition was timely filed within one year.[196]

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188 *Id.*

189 *Id.* at 419.

190 *Id.*

191 *Id.*

192 *Id.* at 416, 419.

193 *Id.* at 416; *see* David Ettinger, *Supreme Court Sets "Safe Harbor" Time for Filing Subsequent Non-Capital State Habeas Corpus Petitions*, AT THE LECTERN (July 20, 2020, 2:54 PM), http://www.atthelectern.com/supreme-court-sets-safe-harbor-time-for-filing-subsequent-non-capital-state-habeas-corpus-petitions/ [https://perma.cc/U8XD-ARJJ] (describing the "Ninth Circuit's longstanding plea for clarity about timeliness"). The United States Supreme Court suggested in 2006 that the Ninth Circuit Court of Appeals certify a question about timeliness to the California Supreme Court. Evans v. Chavis, 546 U.S. 189, 199 (2006). It was not until nine years later that this occurred. Robinson v. Lewis, 795 F.3d 926, 927-28 (9th Cir. 2015). The question was resolved five years later, in 2020. *Robinson*, 469 P.3d 414.

194 *Robinson*, 469 P.3d at 424.

195 *Id.* This has led one commenter to note that the *Robinson v. Lewis* opinion "offers only a degree of certainty in evaluating the timeliness of habeas claims." Ettinger, *supra* note 193.

196 Robinson v. Lewis, No. 14-15125, 2020 WL 4941157, at *497 (9th Cir. Aug. 24, 2020). However, the Ninth Circuit further commented that, "[b]ecause this is not a case where there was a delay 'far longer than the "short period[s] of time," 30 to 60 days, that most States provide for filing an appeal,' we leave for another day the question whether a non-substantial delay under California law could nevertheless be so long that it does not 'fall within the scope of the federal statutory word "pending" as interpreted in *Saffold*.'" *Id.* at *497 n.2. It is important to note that the 30-to-60-day time frame

The second, far less encouraging change is the passage of Proposition 66, or the Death Penalty Reform and Savings Act of 2016,[197] which changed the timeliness framework for habeas corpus petitions challenging capital convictions.[198] Prior to Proposition 66, the general *In re Robbins* timeliness framework applied to these petitions, with a significant difference.[199] A policy of the California Supreme Court created a "safe harbor" period, whereby a petition filed within three years of the appointment of habeas corpus counsel would not be considered substantially delayed.[200] Beyond that period, courts analyzed the facts of a given case to determine if a petition was substantially delayed, and if so, whether the delay was justified.[201]

Penal Code section 1509, subdivision (c), enacted as part of Proposition 66, changed this framework drastically. It provides that an initial habeas corpus petition must be filed within one year of the superior court's order either appointing counsel for an indigent prisoner, finding that the prisoner rejected an offer of appointment, or denying an appointment on the ground that the prisoner is not indigent.[202] A petition that is untimely under that section "shall be dismissed" unless the court finds that the petitioner is actually innocent or is ineligible for the death penalty.[203] Thus, after Proposition 66, the timeliness framework that was developed in *In re Clark*,[204] *In re*

represents the typical time to file a notice of appeal in state court, not an appellant's time to file the brief itself. *See Robinson*, 469 P.3d at 418. Accordingly, to determine whether a habeas petition should properly be considered "pending" in California state court, a more appropriate inquiry would compare the length of time that many states provide for the overall filing of opening briefs with the length of time that a petitioner has delayed filing their petition in a higher court in California. *See id.* at 423-24.

197 For a broader discussion of Proposition 66, see generally Alan Romero, *Making Constitutional Sense: A Modal Approach to California's Proposition 66*, 53 LOY. L.A. L. REV. 447 (2020); Flavia Costea, Note, *Burning a Hole in the Pocket of Justice: Prop. 66's Underfunded Attempt to Fix California's Death Penalty*, 52 LOY. L.A. L. REV. 239 (2019).

198 *See* Briggs v. Brown, 400 P.3d 29, 35-36 (Cal. 2017).

199 *See In re* Reno, 283 P.3d 1181, 1207-09 (Cal. 2012).

200 *See id.* at 1205 n.12 (describing Supreme Court Policies, policy 3, standard 1–1.1).

201 *See id.* at 1208-09.

202 CAL. PENAL CODE § 1509(c) (2020); *Briggs*, 400 P.3d at 51.

203 PENAL § 1509(d); *Briggs*, 400 P.3d at 51. For a broader discussion of the relevance of innocence to federal habeas corpus petitions, see HERTZ & LIEBMAN, *supra* note 1, § 2.5, proposing that "a habeas corpus petitioner's apparent guilt should *heighten*, not cut off or diminish, the scrutiny of the procedures by which he was convicted and sentenced."

204 *In re* Clark, 855 P.2d 729 (Cal. 1993).

Robbins,[205] and *In re Gallego*[206] in the context of death penalty cases now primarily applies to non-death penalty cases.[207]

The California Supreme Court or California Legislature should take this opportunity to reexamine the way that the timeliness framework functions in non-capital contexts. Two important changes should be made: establishing a one-year safe harbor provision and expanding the exceptions to the requirement of timely filing.

B. California Should Establish a One-Year Safe Harbor Provision for Habeas Corpus Petitions

The current timeliness framework works in many respects. Maintaining judicial flexibility to hear claims is an important goal, and California's timeliness framework is not as harsh as the federal statute of limitations and many other states' rules.[208] That said, it can be greatly improved. The court justifies the timeliness framework by the systemic interest in the finality of convictions,[209] but countervailing interests must also be addressed, including providing notice to petitioners, improving consistency among courts, and ensuring that petitioners can gain review of the merits of their claims.[210] Through legislation or rule

[205] *In re* Robbins, 959 P.2d 311 (Cal. 1998).

[206] 959 P.2d 290 (Cal. 1998).

[207] *Compare* PENAL § 1509(a)-(c) (establishing a one-year deadline for an individual who has been sentenced to death to petition for writ of habeas corpus), *with Robbins*, 959 P.2d at 317 (establishing that habeas corpus petitions must be filed without "substantial delay" or with "good cause for delay").

[208] *See* 28 U.S.C. § 2244(d)(1) (2018); Brief Amicus Curiae, Walker, *supra* note 8, at 12-15; Medwed, *supra* note 14, at 1467-68.

[209] *Clark*, 855 P.2d at 738, 746, 750, 753.

[210] For example, because the state's current timeliness framework was developed in 1993 and therefore before the 1996 passage of AEDPA, California should consider how AEDPA affects petitioners' access to habeas review and the procedural rules that California chooses to follow. *See id.* at 729; *Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/antiterrorism_and_effective_death_penalty_act_of_1996_(aedpa) (last visited Aug. 9, 2020) [https://perma.cc/UGZ8-HJY3]. By contrast to what was known in the late 1990s, the effects of AEDPA have now been studied and are more widely understood. *See, e.g.*, David R. Dow & Eric M. Freedman, *The Effects of AEDPA on Justice*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY 261 (2009), https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1917&context=faculty_scholarship [https://perma.cc/H5DW-9VYR] ("We have now learned, from a study covering the years 2000–2006 and here reported in full for the first time, that, insofar as the published case reveal, the success rate for capital inmates on federal habeas has fallen dramatically — to levels about a fifth of what they previously were." (footnote omitted)).

of court or procedure,[211] California should build on its former safe harbor provision for capital cases and the standard announced in *Robinson v. Lewis*[212] and incorporate a generally applicable one-year safe harbor provision.

The following proposed standard would serve the goal of improving consistency between the courts and providing notice to petitioners:

> A claim raised in a petition for writ of habeas corpus shall not be considered substantially delayed if it is filed within one year from the latest of (a) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review, or (b) the date that petitioner or their counsel knew of the information offered in support of the claim and the legal basis for the claim. A petitioner may show that a claim is filed without substantial delay, that there is good cause for the delay, or that the claim falls within an exception notwithstanding that it is filed after the expiration of the one-year safe harbor provision.

As to proposed subdivision (a), an assurance that a claim will not be considered delayed if filed within one year from the date that a conviction becomes final is desirable because it encourages petitioners to raise their claims in a prompt way that complies with the federal statute of limitations.[213] This would avoid the problem that has arisen in states such as Florida, which provide more than one year for petitioners to seek post-conviction relief.[214] In those states, petitioners may not realize that, although they are acting diligently under state law, they may "unwittingly miss AEDPA's deadline."[215] It also ensures that petitioners have some time after their direct appeals are concluded to receive their transcripts from their attorneys,[216] review their transcripts,

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[211] For example, in *Robinson v. Lewis*, the California Supreme Court set forth its standard about gap delay as a rule of judicial procedure. Robinson v. Lewis, 469 P.3d 414, 422 (Cal. 2020).

[212] *See supra* Part III.A.

[213] *See* 28 U.S.C. § 2244(d)(1)(A).

[214] Uhrig, *supra* note 32, at 1248.

[215] *Id.*

[216] *See* APPELLATE DEFS., INC., *supra* note 173, ch. 1, at 48-49 (describing the position taken by one California appellate office that "the client is entitled to [transcripts] on request at the end of the case," but that during the case "the client is not entitled to them while represented by counsel because counsel needs them"); Marceau, *Due Process*, *supra* note 16, at 50 ("[I]f the statute of limitations for filing a state postconviction petition is six months, but the reality of the system is that transcripts, records, and even counsel (if provided) may not actually be available for the prisoner

investigate issues and perform legal research, and file petitions if appropriate.

Proposed subdivision (b) presents a variation on the current standard, under which "[s]ubstantial delay is measured from the time the petitioner or [their] counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim."[217] However, a one-year safe harbor provision that begins to run when the petitioner "should have known" information does not provide notice or clarity to a petitioner. Moreover, given the incentives that already exist for a petitioner to file quickly, it is unnecessary. As the California Supreme Court recently noted, "in contrast to capital litigants, inmates serving prison terms who are seeking release 'have no incentive to engage in delaying tactics that would prolong their imprisonment.'"[218] Accordingly, a one-year safe harbor provision that begins when a petitioner learns information that supports a claim encourages reasonably prompt presentation of claims and provides notice to petitioners of how to assert their rights.

In response, the reader might ask: why retain the timeliness framework at all? Why not set forth a fixed deadline or eliminate the framework altogether? Both of these solutions, but especially the first, have drawbacks. A rigid deadline is arbitrary and inevitably leads to unfair results.[219] The lessons of AEDPA indicate the pitfalls of imposing a fixed deadline.[220] As Stephen Bright, former director of the Southern Center for Human Rights, has explained:

> There's a huge difference between law and justice. Law says that if a person misses a deadline by a day, even though it's an

until after this time period has run because of deficiencies in state funding or inefficiencies in the administrating bureaucracy, then the strictures of due process are not satisfied.").

[217] *In re* Robbins, 959 P.2d 311, 317 (Cal. 1998).

[218] Robinson v. Lewis, 469 P.3d 414, 423 (Cal. 2020) (quoting Catlin v. Superior Court, 245 P.3d 860, 866 n.3 (Cal. 2011)); *see also* Evans v. Chavis, 546 U.S. 189, 203 n.1 (2006) (Stevens, J., concurring) ("[W]hile prisoners on death row often have an incentive to adopt delaying tactics, those serving a sentence of imprisonment presumably want to obtain relief as promptly as possible.").

[219] *See, e.g.*, Mayle v. Felix, 545 U.S. 644, 650-54 (2005) (discussing the "relation back" doctrine); Jonathan Atkins, Danielle B. Rosenthal & Joshua D. Weiss, *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 STAN. L. REV. 427, 429-32, 431 n.13 (2016).

[220] *See, e.g.*, Atkins et al., *supra* note 219, at 429-30 (analyzing the federal statutory deadline and concluding that "courts' strict formalist understanding of the agency [theory of the lawyer-client relationship] has led, in many cases, to profoundly unjust results for prisoners seeking federal habeas review of their convictions when their lawyers negligently mishandled their habeas petitions").

> innocent mistake, that person is going to be denied any relief in the court. That's not justice. Justice would say let's look and see what happened and do the right thing.[221]

On the other hand, eliminating the timeliness framework altogether may have the unintended consequence of causing petitioners to lose access to federal courts.[222] Petitioners may believe that because there is no deadline to file in state court, there is no federal deadline.[223] On a practical level, the elimination of the requirement of timely filing is also unlikely to occur, given that California courts have repeatedly, over decades, emphasized the state's interest in finality.[224] As a result, there will continue to be an element of inconsistency and uncertainty regarding the application of California's requirement of timely filing. This inconsistency and uncertainty may be mitigated by an additional reform, described next, which ensures that even if courts disagree about what constitutes substantial delay, certain sufficiently important claims will be heard on the merits.

C. California Should Expand the Exceptions to the Requirement of Timely Filing

To achieve meaningful reform, the exceptions to the requirement of timely filing must be reevaluated and expanded. There are currently four exceptions that a petitioner may assert if their petition is substantially delayed without good cause.[225] Such a delayed claim "nevertheless will be entertained on the merits if the petitioner demonstrates":

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[221] TRUE JUSTICE: BRYAN STEVENSON'S FIGHT FOR EQUALITY (HBO 2019) (54:15-54:34), https://eji.org/projects/true-justice [https://perma.cc/3B64-H32A].

[222] *See* Uhrig, *supra* note 32, at 1248-49; *see also Robinson*, 469 P.3d at 424 (observing that a petitioner's unexplained delay of six months between a lower court's denial of a claim and the reassertion of the claim in a higher California court "might endanger gap tolling in federal court").

[223] *See* Uhrig, *supra* note 32, at 1248-49.

[224] *See, e.g.*, *Robinson*, 469 P.3d at 423 (observing that timeliness requirements vindicate society's interest in the finality of its criminal judgments); *In re* Clark, 855 P.2d 729, 737-38 (Cal. 1993) ("Our cases simultaneously recognize, however, the extraordinary nature of habeas corpus relief from a judgment which, for this purpose, is presumed valid . . . , the importance of finality of judgments . . . , and the interest of the state in the prompt implementation of its laws." (footnote and citations omitted)).

[225] *In re* Robbins, 959 P.2d 311, 318 (Cal. 1998).

> (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.[226]

Yet the first exception is so specific, and sets so high a bar for relief, that it is all-but impossible for a petitioner to meet.[227] The third exception does not apply to non-capital habeas petitions.[228] The fourth exception is almost never relevant.[229] This means that, as a practical matter, a petitioner who has unduly delayed filing a petition must show that they are actually innocent.[230] This is a structure that prizes innocence above all else. But as numerous scholars have highlighted, the "obsession today with innocence claims has had the unfortunate side effect of diminishing interest in whether defendants receive fair trials."[231]

State procedural rules should thoughtfully balance the state's interest in the finality of convictions with imprisoned people's interest in obtaining habeas relief when such relief is merited.[232] Given that even

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[226] *Id.*

[227] *Clark*, 855 P.2d at 767 (Kennard, J., concurring and dissenting).

[228] *See Robbins*, 959 P.2d at 318.

[229] *In re* McDowell, No. E072191, 2019 WL 6713280, at *4 n.7 (Cal. Ct. App. Dec. 10, 2019), *review denied* (Mar. 25, 2020) ("We have traced the invalid statute exception back to *In re Clark* . . . [which] cited no authority for it and did not actually apply it; indeed, our research has not revealed any other case that applied it."). See *In re* Reno, 283 P.3d 1181, 1219 (Cal. 2012), for a case applying this exception to a challenge to California's death penalty statutes.

[230] *See Robbins*, 959 P.2d at 318.

[231] *See* Levenson, *supra* note 22, at 388 & n.214; *see also* HERTZ & LIEBMAN, *supra* note 1, § 2.5 ("It is in fact arguable that a habeas corpus petitioner's apparent guilt should *heighten*, not cut off or diminish, the scrutiny of the procedures by which he was convicted and sentenced."); JOSHUA DRESSLER, GEORGE C. THOMAS III & DANIEL S. MEDWED, CRIMINAL PROCEDURE: PROSECUTING CRIME 63 (7th ed. 2020).

[232] *See* Levenson, *supra* note 22, at 378 ("While procedural requirements are important, reliance on them when it is apparent that there may have been a wrongful

factually guilty people are entitled to fundamentally fair trials,[233] and that not all actually innocent petitioners can demonstrate actual innocence,[234] procedural rules should give way not only when a petitioner can show actual innocence. To that end, expanding the exceptions to the requirement of timely filing would alleviate some of the harshness implicit in California's indeterminate rule. Below are proposed changes to the four exceptions that seek to achieve a more just balancing of the competing interests.

First, the exception for an error of constitutional magnitude leading to a trial so unfair that no reasonable judge or jury would have convicted[235] should be replaced with a more lenient exception for prejudicial trial error. The exception, as it stands today, is "virtually impossible" for a petitioner to meet and drew biting early criticism from Justice Kennard.[236] It could be altered to provide that where a petitioner shows that there is a "reasonable probability" of a different result at trial had the asserted error not occurred — i.e., a probability "sufficient to undermine confidence in the outcome" — the court should overlook any delay and consider the merits of the claim.[237] Because many, if not most, types of claims that are brought by habeas corpus petition do not require such a strong showing of prejudice,[238] this change would make

conviction undermines the goal of habeas litigation."). "[F]inality of state convictions is a *state* interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts." Danforth v. Minnesota, 552 U.S. 264, 280 (2008) (emphasis in original); *see also* Ake v. Oklahoma, 470 U.S. 68, 78 (1985); Stone v. Powell, 428 U.S. 465, 523-24 (1976) (Brennan, J., dissenting).

233 *See generally* U.S. CONST. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ."); Medina v. California, 505 U.S. 437, 443-46 (1991) (affirming that the State's power to "regulate procedures under which its [criminal] laws are carried out" is limited by the Due Process Clause and principles of "fundamental" fairness).

234 *See* Medwed, *supra* note 14, at 1440, 1479-80.

235 *Robbins*, 959 P.2d at 318.

236 *In re* Clark, 855 P.2d 729, 767 (Cal. 1993) (Kennard, J., concurring and dissenting) ("[T]he majority's rigid standard, under which the petitioner must show that 'no reasonable judge or jury' would have convicted the petitioner or returned a death verdict, will make it virtually impossible for this court ever to grant relief.").

237 *See* United States v. Bagley, 473 U.S. 667, 682 (1985) (setting forth prejudice standard for *Brady v. Maryland* claims); Strickland v. Washington, 466 U.S. 668, 694 (1984) (setting forth prejudice standard for ineffective assistance of counsel claims).

238 *See generally* YOUNG ET AL., *supra* note 39 (breaking down standards of prejudice into five categories, the most demanding of which requires the petitioner to show a "constitutional violation and a reasonable probability that, but for the error, the result of the proceeding would have been different").

it difficult for petitioners to prevail on untimely habeas claims, but it would no longer be next to impossible.

Next, the court should retain the exception for actual innocence, as well as the exception for an invalid statute, recognizing, however, that the latter exception is seldom applicable.[239] The exception for the imposition of the death penalty by a sentencing authority that had a grossly misleading profile does not apply to non-capital petitions, and so it is not discussed here.

Finally, the state supreme court or legislature should incorporate a new exception for claims that do not challenge the final judgment of conviction. This change is justified by the fact that such claims do not involve the same finality concerns that motivated the court to establish the timeliness framework in the first place.[240] Indeed, California courts have already chosen to not apply the timeliness framework to habeas petitions challenging a governor's reversal of a grant of parole,[241] and to a petition challenging the correctional department's decision to deny an overnight visit to the petitioner.[242] One appellate court reasoned that the timeliness rule does not apply because the petition does not contemplate "setting aside the final judgment of conviction when retrial would be difficult or impossible."[243] Further, it has long been the rule in California that petitioners may challenge an "unauthorized sentence"

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[239] *See Robbins*, 959 P.2d at 317-18.

[240] *See Clark*, 855 P.2d at 739 ("Without this usual limitation of the use of the writ, judgments of conviction of crime would have only a semblance of finality." (quoting *Ex parte* McInturff, 236 P.2d 574, 577 (Cal. 1951))); *id.* at 746 ("Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." (quoting McCleskey v. Zant, 499 U.S. 467, 492 (1991))); *id.* at 753 ("[T]he requirement that a petitioner explain and justify delayed presentation of habeas corpus claims reflects recognition that a substantial delay will prejudice the respondent's ability to answer the petition, respects the importance of finality of judgments to the state, and recognizes the difficulty of retrial in the event that a judgment is set aside on habeas corpus many years after the conviction.").

[241] *In re* Hunter, 141 Cal. Rptr. 3d 350, 355-56 (Ct. App. 2012) (finding that a habeas petition challenging a governor's reversal of a grant of parole is not subject to the same timeliness requirements as a habeas petition challenging a conviction); *In re* Burdan, 86 Cal. Rptr. 3d 549, 558 (Ct. App. 2008) (explaining that considerations of finality that apply in a capital case do not apply where a life prisoner challenges a parole decision).

[242] *In re* Espinoza, 120 Cal. Rptr. 3d 849, 851-53 (Ct. App. 2011).

[243] *Id.* (finding that a habeas petition challenging the correctional department's decision to deny an overnight visit to the petitioner will not "prejudice CDCR or the People by unjustifiably delaying implementation of the law or setting aside the final judgment of conviction when retrial would be difficult or impossible. . . . Rather, as Defendant points out, if there is any prejudice, it has been to him").

at any time.[244] This disparate body of case law should be harmonized into a clear, easy-to-apply exception for claims that do not seek to set aside the final judgment of conviction.[245]

In sum, the exceptions to the requirement of timely filing should be expanded to reflect that a claim that is substantially delayed without good cause, and hence is untimely, will be considered on the merits if the petitioner shows one of the following. First, that error led to a trial so fundamentally unfair that absent the error there is a reasonable probability of a different outcome. Second, that the petitioner is actually innocent. Third, that the petitioner was convicted or sentenced under an invalid statute. Or fourth, that the petitioner is not seeking to set aside the final judgment of conviction. By reevaluating the exceptions, it becomes possible to ensure that even if courts disagree about what is or is not substantial delay, certain types of claims are heard.

D. The Federal Court's Role

The fact that, to date, California has not reformed its timeliness framework[246] suggests that some outside pressure is needed before that will occur. This pressure could come from federal courts determining when a state procedural default based on untimeliness is, and is not,

[244] *See* People v. Scott, 885 P.2d 1040, 1054 (Cal. 1994), *as modified on denial of reh'g* (Mar. 14, 1995) ("The 'unauthorized sentence' principle also has been invoked to determine whether claims previously rejected or never raised are procedurally barred on habeas corpus . . . . [A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (citation omitted)); *In re* Harris, 855 P.2d 391, 407 (Cal. 1993); *In re* Brown, 259 Cal. Rptr. 3d 56, 77-78 (Ct. App. 2020) ("Here, regardless of any delay, the trial court properly granted defendant's writ petition . . . . Writ relief 'will always issue to review an invalid sentence, when, without the redetermination of any facts, the judgment may be corrected to accord with the proper determination of the circumstances.'" (quoting *In re* Estrada, 408 P.2d 948, 955 (Cal. 1965))); People v. Miller, 8 Cal. Rptr. 2d 193, 195 (Ct. App. 1992).

[245] In determining if a petition challenges a final judgment of conviction or a sentence, courts could look to the state's case law interpreting Penal Code section 1237.5. For example, the court in *Panizzon* explained that the "critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of a plea[.]" People v. Panizzon, 913 P.2d 1061, 1065-66 (Cal. 1996). This proposed change would also make clear that the timeliness framework does not apply to the various statutory resentencing procedures that are available under California law, as these do not pose any concerns regarding the finality of convictions. *See, e.g.*, CAL. PENAL CODE § 1170.18 (2020) (providing a resentencing procedure for those convicted of certain felony offenses); CAL. PENAL CODE § 1170.91 (2020) (providing a resentencing procedure for veterans).

[246] *See* Robinson v. Lewis, 469 P.3d 414, 424 (Cal. 2020).

federally cognizable.[247] As one scholar has remarked, after AEDPA, federal courts' review of the process by which state courts arrive at their decisions must be "frequent and capacious."[248] Accordingly, federal courts should frequently and fully engage in this type of review to find asserted state procedural defaults to be not federally cognizable in appropriate instances.

In their treatise on habeas corpus, Professors Hertz and Liebman gathered federal courts' reasons for finding state procedural defaults to be not federally cognizable.[249] Simply put, if a state procedural default is found to be "cognizable," then that provides a defense to the respondent and a reason for the court to reject the claim.[250] But a procedural default may be found not cognizable because, for example, the case falls within a state's recognized exception to its own procedural rule or the petitioner effectively complied with the state rule.[251] One important component of a federally cognizable default is procedural adequacy,[252] a longstanding doctrine grounded in "equitable concerns about fairness and due process."[253]

A typical scenario implicating adequacy occurs when a case presents a federal question, "and the state court attempts to 'evade' federal court review by resting its decision" on a state rule that is "essentially arbitrary or a mere device to prevent" the federal court from reviewing the federal question.[254] In this scenario, the federal court should "deem the state

[247] *See* HERTZ & LIEBMAN, *supra* note 1, § 26.2.

[248] Marceau, *Challenging Habeas*, *supra* note 14, at 144-45. This is as opposed to substantive review, which has become "rare and limited" under AEDPA. *Id.*

[249] HERTZ & LIEBMAN, *supra* note 1, § 26.2.

[250] *See id.*

[251] *See id.* §§ 26.2(b)-(c).

[252] *Id.* § 26.2(d).

[253] Eve Brensike Primus, *Federal Review of State Criminal Convictions: A Structural Approach to Adequacy Doctrine*, 116 MICH. L. REV. 75, 98 (2017) [hereinafter *Federal Review*].

[254] *Id.* In 1923, the Court in *Davis v. Wechsler* described the doctrine as: "Whatever springes [or snares] the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923). Since then, procedural adequacy has been understood in a number of different ways, and its application has changed over time, especially during the civil rights movement of the 1950s and 1960s. *See* Primus, *Federal Review*, *supra* note 253, at 98-102. Courts have, for example, interpreted procedural adequacy to mean that state courts must "afford a reasonable opportunity to assert federal rights, without placing unreasonable obstacles in the way." CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4027 (3d ed. 2020) (describing functional tests of adequacy). If a state court does not afford such an opportunity, then the state court's imposition of a procedural bar is inadequate. *See id.*

ground inadequate to preclude federal review"[255] and review the federal question anyway.[256] As Professors Hertz and Liebman identified, there are numerous specific reasons why a state procedural bar may be inadequate as it is applied to a petitioner.[257] It could be that the state rule was applied "with a high degree of severity for the first time in petitioner's case," or it may be that the means a petitioner used "to raise a particular claim, even if they did not comply with the state rule, 'substantially served' the state interests behind the rule."[258]

The Court in *Walker v. Martin*[259] left the door open to this type of "as applied" adequacy challenge when it indicated that its conclusion would be different if a petitioner were to allege that the "California Supreme Court exercised its discretion in a surprising or unfair manner."[260] Indeed, when the Supreme Court examined California's timeliness bar, it found it to be adequate in general, as Charles Martin did not contend that the California Supreme Court had exercised its discretion unfairly in his case.[261] The Ninth Circuit Court of Appeals has approved such "as applied" adequacy challenges with regard to other procedural bars.[262] It could find a procedural bar inadequate in

255 Primus, *Federal Review*, *supra* note 253, at 98.

256 *See, e.g.*, Lee v. Kemna, 534 U.S. 362, 387 (2002) (concluding that "no adequate state-law ground hinders consideration of Lee's federal claim," given that, for one, there was no reference in the trial court to the rules that were the "purported procedural impediments the Missouri Court of Appeals later pressed").

257 HERTZ & LIEBMAN, *supra* note 1, § 26.2(d)(i).

258 *Id.*

259 Walker v. Martin, 562 U.S. 307 (2011).

260 *Id.* at 320-21.

261 *Id.*

262 *See, e.g.*, Sivak v. Hardison, 658 F.3d 898, 906-07 (9th Cir. 2011) ("The Idaho Supreme Court's application of § 19–2719(5) is premised on an erroneous factual determination . . . . Here, the state court applied the state's procedural rule to Sivak's case in an erroneous and arbitrary manner."); Williams v. Ryan, 623 F.3d 1258, 1264 (9th Cir. 2010) ("Because this claim was denied in state court on an inadequate procedural ground, there was thus no failure on the part of Williams. We agree with the district court that Rule 32.4(c) was arbitrarily applied in this case. As the district court concluded '*every* first request for an extension of time in a capital case' had been granted previously in Arizona courts."); Collier v. Bayer, 408 F.3d 1279, 1285-86 (9th Cir. 2005) ("The adequacy of this general time bar, however, is not at issue here. The issues for review are specific to the application of this rule in Collier's case. . . . Because this rule was not adequately established, if at all, prior to 2004, it cannot bar federal habeas review in Collier's case.").

the timeliness context as well, especially where the bar has been applied in a highly unfair or surprising manner.[263]

Consequently, in an appropriate case, a petitioner in federal court should argue that an asserted state procedural default based on untimeliness is not federally cognizable. The petitioner could argue, for example, that the timeliness framework does not apply in the same way to the petitioner because their petition challenges their sentence, not conviction.[264] Or the petitioner may be able to show that the timeliness bar was applied unreasonably in their case because their state petition was in fact filed without substantial delay; or if delayed, the delay was justified; or the petition falls into an exception that the California court overlooked.[265]

A petitioner seeking to overcome a procedural default would also likely argue that the default should be excused under the cause and prejudice test.[266] Under this test, set forth in the 1977 case *Wainwright v. Sykes*, "a state prisoner who failed to comply with state procedural rules can have her federal claim considered on the merits in federal court if she can show": (1) cause (that is, an objective factor external to the petitioner) for not complying; and (2) prejudice to the outcome of her case.[267] This argument may succeed depending on the circumstances,[268] but if the procedural default was due to the petitioner's simple mistake or unawareness, the petitioner will likely not meet the elements of the test.[269]

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[263] *Walker*, 562 U.S. at 320. This approach also accords with Professor Marceau's call-to-action that, post-AEDPA, federal courts have a constitutional duty to remedy state procedural unfairness. *See* Marceau, *Challenging Habeas*, *supra* note 14, at 137-38.

[264] *See supra* notes 241–44 and accompanying text.

[265] *See In re* Robbins, 959 P.2d 311, 317-18 (Cal. 1998).

[266] *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); Primus, *Federal Review*, *supra* note 253, at 81, 105-10. *But cf.* Ranieri v. Terhune, 366 F. Supp. 2d 934, 942 (C.D. Cal. 2005) (noting that Ranieri did not attempt to make a showing of cause and prejudice).

[267] Primus, *Federal Review*, *supra* note 253, at 81; *see also Wainwright*, 433 U.S. at 90-91.

[268] *See* WRIGHT & MILLER, *supra* note 254, § 4266.1 (outlining contemporary applications of the *Wainwright* rule for showing cause and prejudice).

[269] *See* Primus, *Federal Review*, *supra* note 253, at 107 ("A negligent failure to follow state procedural rules, or a purely unknowing one, would not excuse a default."); *see also* Stephen B. Bright, *Death by Lottery — Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 687-90 (1990) (explaining that under *Wainwright v. Sykes*, counsel's mistake or negligence does not excuse a procedural default, which has had an unjustifiable impact on the poor in capital cases).

Significantly, excusing a petitioner's default under the cause and prejudice test will not catalyze structural reform of the state system or initiate a dialogue between the state and federal courts in the same way as numerous federal court findings of procedural inadequacy might.[270] For example, when the California Supreme Court was developing its timeliness framework in the 1990s, one justice was motivated to oppose the new framework by the fact that, until that date, federal courts had found California's timeliness bar to be "too vague to constitute adequate state grounds."[271] On the other hand, when a federal court excuses a procedural default under the cause and prejudice test, this communicates nothing about the fairness or robustness of the state process; it speaks only to the individual petitioner's circumstances.[272]

Yet while the cause and prejudice test is relatively well-known, the various exceptions to a federally cognizable default are complex and can be obscure.[273] To ensure that petitioners are in fact able to bring procedural adequacy challenges, federal courts should appoint counsel whenever possible to litigate these issues.[274] In this way, petitioners will be more likely to demonstrate to the federal courts that the timeliness framework has been applied unfairly in their case, which may over time lead California to reform its system.

CONCLUSION

California's timeliness framework is only one of many procedural barriers to a foundationally important right in the American legal system, the right to petition for a writ of habeas corpus.[275] Individuals

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[270] *See* Primus, *Federal Review*, *supra* note 253, at 112-16; *see also* Marceau, *Challenging Habeas*, *supra* note 14, at 144-45.

[271] *In re* Gallego, 959 P.2d 290, 304 (Cal. 1998) (Brown, J., concurring and dissenting).

[272] *See* Primus, *Federal Review*, *supra* note 253, at 112-16.

[273] *See id.* at 109-10.

[274] There currently exists no absolute right to appointment of counsel in habeas proceedings. Nevius v. Sumner, 105 F.3d 453, 460 (9th Cir. 1996). However, 18 U.S.C. § 3006A(a)(2)(B) (2018) authorizes the appointment of counsel at any stage of the case if "the interests of justice so require." Ideally, the magistrate or district judge would appoint counsel upon a petitioner's motion. Abdallah v. Chertoff, No. 06-CV-1541, 2008 WL 5401668, at *1 (S.D. Cal. Dec. 29, 2008) (granting petitioner's motion for the appointment of counsel based on, among other factors, the "complexity of the legal issues involved").

[275] *See* People v. Villa, 202 P.3d 427, 430 (Cal. 2009); HERTZ & LIEBMAN, *supra* note 1, § 2.3 ("[F]or centuries the writ has served the same essential function, at essentially the same intergovernmental and intercourt junctions in the Anglo-American system of criminal justice, of judicially ferrying persons whom the government, through

incarcerated for non-capital crimes who are seeking habeas relief are instructed to file promptly.[276] To the question, "but what does that mean?" there are no clear answers.[277] Despite decades of interpretation, disagreement continues as to what the command entails, and petitioners may find themselves inadvertently shut out of court for not complying.[278]

In this context, the California Legislature or California Supreme Court should prioritize reforms. A one-year safe harbor provision for raising claims[279] and broadened exceptions to the requirement of timely filing are needed.[280] For too long, the state's interest in the finality of convictions was seen as an overriding interest, while imprisoned people's interest in obtaining merited post-conviction relief was not sufficiently protected.[281] But the finality of convictions is not so precarious that severe procedural rules are required. The federal one-year statute of limitations already motivates individuals alleging federal constitutional violations to file state petitions as promptly as possible.[282] Further, as recently acknowledged by the California Supreme Court, petitioners seeking habeas relief have almost no tactical reason to delay, because they are the ones who will be most harmed by the delay.[283]

While federal courts have an ongoing role to play in ensuring that California provides a full and fair process to state petitioners, meaningful structural reform ultimately must come from the state.[284] California should take this opportunity to institute needed procedural reforms. Such reforms will serve the crucial goal of encouraging courts to do what they are best situated to do: examining the merits of petitions and correcting wrongful convictions.

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restraints, has separated from their rights under the fundamental Law of the Land to the safe harbor afforded by that Law."); MEDWED, *supra* note 22, at 126 ("All told, the post-conviction road to freedom is strewn with procedural potholes.").

276 *See In re* Robbins, 959 P.2d 311, 317-18 (Cal. 1998).

277 *See supra* Part II.A–B.

278 *See supra* Part II.A–B.

279 *See supra* Part III.B.

280 *See supra* Part III.C.

281 *See In re* Clark 855 P.2d 729, 746 (Cal. 1993); Levenson, *supra* note 22, at 378 ("While procedural requirements are important, reliance on them when it is apparent that there may have been a wrongful conviction undermines the goal of habeas litigation.").

282 *See* 28 U.S.C. § 2244(d) (2018); *see also supra* note 210.

283 *See* Robinson v. Lewis, 469 P.3d 414, 423 (Cal. 2020); *see also* Evans v. Chavis, 546 U.S. 189, 203 n.1 (2006) (Stevens, J., concurring); Brief of Amici Curiae, Mayle, *supra* note 175, at 24.

284 *See supra* Part III.D.