In the Supreme Court of the State of California

JULIUS M. ROBINSON, **Petitioner and Appellant,** **v.** **G.W. LEWIS,** **Respondent.**	Case No. S228137

On Certification (Cal. Rules of Court, rule 8.548) from the United States Court of Appeals for the Ninth Circuit, No. 14-15125

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

STATEMENT OF ISSUE

"When a California court denies a claim in a petition for writ of habeas corpus, and the petitioner subsequently files the same or a similar claim in a petition for writ of habeas corpus directed to the original jurisdiction of a higher court, what is the significance, if any, of the period of time between the earlier petition's denial and the subsequent petition's filing (66 days in this case) for the purpose of determining the subsequent claim's timeliness under California law?" (May 25, 2016 Order.)

INTRODUCTION

A direct appeal is the primary way to vindicate rights allegedly violated by a criminal judgment. Despite that primacy, an appeal is constrained in time, governed by short deadlines by which to challenge a lower court's presumptively-correct ruling. A non-capital superior court judgment is binding if not appealed to the California Court of Appeal within 60 days. A resulting decision from a Court of Appeal is binding after that court loses jurisdiction, unless this Court's discretionary review is sought within 10 days later.

Habeas corpus review, in turn, is not the primary vindication path; such review is extraordinary and limited. A non-capital petitioner should present his claim in superior court, and if it is denied he may re-present it to the Court of Appeal and to this Court. The rule is that "a petition should be filed as promptly as the circumstances allow" (*In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5 (*Clark*))—a quite " 'basic instruction' " (*In re Reno* (2012) 55 Cal.4th 428, 460 (*Reno*)). And in the superior court, promptness means filing without unjustified substantial delay, with "[d]elay . . . measured from the time a petitioner becomes aware of the grounds on which he seeks relief." (*Clark*, *supra*, 5 Cal.4th at p. 765, fn. 5.)

But if the superior court denies the petition, the pre-superior-court knowledge of facts has no bearing on how soon a re-filing in the Court of

Appeal or in this Court is "as promptly as the circumstances allow." For re-filings, "promptly" necessarily asks what circumstances the petitioner faces to re-present the same claim to next higher court.

Specifically as to *re*-filing as promptly as circumstances allow, this Court asks the "significance" of an obvious circumstance—that time is passing before a petitioner *re*-presents a claim he presented below. (May 25, 2016 Order.) The sound answer is this: One who complied with his duty to present his claim fully to the superior court has already done all the heavy lifting. Justification is thus lacking why his re-presentation of the claim to higher courts should be less speedy than is demanded for litigants proceeding on direct review and in non-habeas extraordinary writ cases.

This would not be the first notice to petitioners regarding California law, although it would be the first time this Court confirmed that notice. The United States Supreme Court years ago found it implausible that California permitted lengthy ad hoc delays for re-presentation of habeas claims to higher courts. Accepting California's right to identify re-filings as original actions, rather than just appeals of lower court denials, the Court noted a petitioner must file first in superior court, with higher court "review" being effectively of a "basic appellate" nature. (*Carey v. Saffold* (2002) 536 U.S. 214, 221-222 (*Saffold*).) The Court thought California law bars re-filing delay in the same way—and "to the same degree"—as in other states. (*Id.*, at pp. 222-223.) That is, California bars re-filing delays "substantially longer than those in States with determinate timeliness rules" (*Evans v. Chavis* (2006) 546 U.S. 189, 199-200 (*Chavis*), citing *Saffold*, *supra*, at pp. 222-223), such as "30 or 45 days after entry of a trial court's judgment" or "20 or 30 days[] after entry of the court of appeals judgment" (*Saffold*, *supra*, at p. 219).

Lower federal courts provided further notice to California habeas petitioners. Applying *Saffold* and *Chavis*, for years the lower courts have

found 60 days is the "benchmark" for habeas re-filings in California. (*Velasquez v. Kirkland* (9th Cir. 2011) 639 F.3d 964, 968; *Livermore v. Watson* (E.D. Cal. 2008) 556 F.Supp.2d 1112, 1118, fn. 2.)

The basic logic is sound, in that one invoking judicial process for limited and extraordinary habeas review should proceed as speedily as one proceeding on the primary path of direct review. Indeed, in non-habeas extraordinary writ cases, the California Rules of Court ("Rules") already apply the deadlines for direct review. This Court would act most soundly by confirming that the same speed is required to seek habeas review in the Court of Appeal and in this Court.

Applied here, that would mean Petitioner's Court of Appeal petition, filed 66 days after a superior court denied a first petition, was untimely. It was also untimely under a general rule to file as promptly as possible under the circumstances. The case comes to this Court on a judicially-determined premise that Petitioner knew to re-file in the Court of Appeal "within 60 days" (*Robinson v. Lewis* (9th Cir. 2015) 795 F.3d 926, 935, fn. 10) and he had no good reason not to re-file so promptly (*id.* at p. 934 [no "good cause"] & fn. 9; see *Blake v. Baker* (9th Cir. 2014) 745 F.3d 977, 981-982 ["good cause" just needs an evidence-based "reasonable excuse," not "extraordinary circumstances"]). The United States Court of Appeals for the Ninth Circuit should be told the filing was untimely.

FACTUAL AND PROCEDURAL BACKGROUND

The question of law certified to this Court by the United States Court of Appeals for the Ninth Circuit is based on these "facts," including procedural facts, "prepared by the requesting court" (Rule 8.548(b)(3)):

> The facts of this case are as follows. Julius Robinson was convicted by a jury of two counts of premeditated murder, two counts of malicious discharge of a firearm, and gun and gang enhancements. He was sentenced to a determinate term of 17 years, and an indeterminate term of 205 years to life. On February 8, 2011, the

California Court of Appeal modified the sentence and affirmed the judgment. The California Supreme Court denied review, and the deadline for Robinson to seek certiorari review with the United States Supreme Court expired on August 9, 2011.

On November 12, 2011, 94 days after the certiorari deadline passed, Robinson constructively filed a state habeas petition in California Superior Court. [Fn. 6] On January 19, 2012, the Superior Court denied Robinson's petition. On March 26, 2012, 66 days after the Superior Court denied his petition, Robinson filed a petition with the California Court of Appeal. On April 5, 2012, the California Court of Appeal denied Robinson's petition, citing *In re Steele*, 32 Cal.4th 682, 692, 10 Cal.Rptr.3d 536, 85 P.3d 444 (2004), and *In re Hillery*, 202 Cal.App.2d 293, 20 Cal.Rptr. 759 (1962). Neither case involves a timeliness determination. *Accord Walker v. Martin*, 562 U.S. 307, 310, 131 S.Ct. 1120, 179 L.Ed.2d 62 (2011) ("California courts signal that a habeas petition is denied as untimely by citing the controlling decisions, *i.e.*, [*In re*] *Clark*[, 5 Cal.4th 750, 21 Cal.Rptr.2d 509, 855 P.2d 729 (1993)] and *Robbins*."). On July 6, 2012, 91 days after the California Court of Appeal decision, Robinson filed a petition with the California Supreme Court. The California Supreme Court denied his petition on October 24, 2012.

> [Fn. 6] Because Robinson was a pro se, incarcerated petitioner, the "mailbox rule" applies, meaning that his petition is deemed filed on the date of its submission to the prison authorities for mailing. *See Noble v. Adams*, 676 F.3d 1180, 1182 (9th Cir. 2012). The application of this mailbox rule is not disputed. There are, however, several discrepancies in the record regarding the dates the petitions were constructively filed. Because the dates found by the magistrate judge are not disputed, we rely on the filing dates found by the magistrate judge as the operative ones.

Robinson filed a habeas petition under 28 U.S.C. § 2254 in federal district court on March 13, 2013, which was 139 days after the California Supreme Court issued its denial. Adding up the delays that were attributable to Robinson (delays of 94, 66, 91, and 139 days), and excluding the time when his filed petitions were being considered by the California courts, his petition was filed 390 days after his conviction became final and the time for seeking certiorari review by the Supreme Court expired.

The government moved to dismiss the petition, on the ground that the one-year statute of limitations under 28 U.S.C. § 2244 had

expired before Robinson filed his petition. A magistrate judge considered whether Robinson was entitled to tolling of the statute of limitations for the gaps between each lower court denial of Robinson's habeas petition and his subsequent filing of a new petition in the next-level state court. She concluded that the 66-day period between the denial of his California Superior Court petition and the filing date of his Court of Appeal petition was unreasonable, and therefore Robinson was not entitled to tolling for that period. The magistrate judge also concluded that Robinson was not entitled to tolling for the 91-day period between the denial of his California Court of Appeal petition and the filing date of his California Supreme Court petition. [Fn. 7] Absent tolling for either of these two periods, Robinson's petition was untimely. The district court adopted the magistrate judge's findings and recommendations and granted the government's motion to dismiss Robinson's federal habeas petition with prejudice as barred by the statute of limitations.

> [Fn. 7] In the district court, the state made clear that it "does not argue that the [California Supreme Court petition] was improperly filed; therefore [Robinson] is entitled to tolling for the pendency of his third state action ... for the period of August 1, 2012 through October 24, 2012." On appeal, the state nonetheless argued that no tolling should be permitted for the period between when Robinson filed his petition with the California Supreme Court and when that court decided it, because the untimely petition was not "properly filed." Because the state intentionally relinquished the argument in the district court, we will not consider it on appeal. *Wood v. Milyard*, —— U.S. ——, 132 S.Ct. 1826, 1834-35, 182 L.Ed.2d 733 (2012).

On appeal, we are considering only the question whether Robinson is entitled to tolling for the 66-day interval between the California Superior Court denial of habeas relief and his filing a new petition in the California Court of Appeal. [Fn. 8] The issue of good cause is absent in this case. Although Robinson claimed in district court that the delay was "attributed to further research and litigation of potential issues," the district court rejected this justification because "[t]he petition filed in the California Court of Appeal was simply a photocopy of the prior petition." Robinson did not dispute this conclusion in his briefing before our court. He has therefore waived it. [Fn. 9] *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005).

[Fn. 8] Robinson did not appeal the district court's determination that he was not entitled to tolling for the 91-day period.

[Fn. 9] Even had Robinson not waived this argument, our precedent dictates that we reject it. *See Waldrip v. Hall*, 548 F.3d 729, 736-37 (9th Cir. 2008) (rejecting a petitioner's justifications for delay when he had access to a library and his revised petition was nearly identical to his first); *Stewart*, 757 F.3d at 933 n. 3, 937 (rejecting a pro se petitioner's argument that his delay was justified by his inability to research claims when he eventually presented the same claims); *see also Velasquez*, 639 F.3d at 968.

(*Robinson v. Lewis*, *supra*, 795 F.3d at pp. 933-934.)

ARGUMENT

I. ASCENDING HABEAS RE-FILINGS SHOULD BE FOUND TIMELY IF ADHERING TO DEADLINES APPLICABLE IN NON-HABEAS CASES, AND OTHERWISE SHOULD BE FOUND UNTIMELY

A rule permeating the criminal law is that one should act promptly in behalf of an allegedly-threatened right. This case concerns how timely a habeas petitioner should act to seek higher court review of a claim denied in the superior court. Consistent with generally applicable rules, he should act as promptly as possible, and no later than is required for litigants seeking higher court review in non-habeas cases. Unlike the heavy burden required to present a claim in a lower court, the burden to re-present the claim to a higher court is light. A duty of promptness demands that little time be taken for the re-filing task.

A. Promptness Is Required Before Postconviction Review

A criminal defendant has a duty, first, to speak up at trial in the face of a claimed diminution of his rights, rather than remaining silent and then attempting to complain later. (*In re Seaton* (2004) 34 Cal.4th 193, 198; accord *People v. Barnum* (2003) 29 Cal.4th 1210, 1224 ["a right may be lost not only by waiver but also by forfeiture, that is, the failure to assert the right in timely fashion"], citing *Yakus v. United States* (1944) 321 U.S. 414,

444 for rule that "[n]o procedural principle is more familiar . . . than that a . . . right," even a "constitutional right," "may be forfeited".)

For a convicted defendant who believes his rights were violated, the main forum to press the point is the appeal:

> In California, as in other states and the federal system, in criminal proceedings it is *the trial* that is the main arena for determining the guilt or innocence of an accused defendant . . . , ... At trial, a defendant is afforded counsel and a panoply of procedural protections, including state-funded investigation expenses, in order to ensure that the trial proceedings provide a fair and full opportunity to assess the truth of the charges against the defendant and the appropriate punishment. . . . It is *the appeal* that provides the basic and primary means for raising challenges to the fairness of the trial.

(*In re Robbins* (1998) 18 Cal.4th 770, 777 (*Robbins*), original italics.) But he must act within 60 days to file his notice of appeal (Rule 8.308(a)), or the law intends that he forfeit direct review entirely. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1094 ["The purpose of the requirement of a timely notice of appeal is, self-evidently, to further the finality of judgments by causing the defendant to take an appeal expeditiously or not at all."].)

By design, that normally should be the extent of judicial attention. True, litigants can routinely seek this Court's discretionary review of the Court of Appeal decision. (Rule 8.500(a)(1).) But only in the unusual case is this Court's review actually warranted, in that "the issues . . . raised have sufficient statewide importance to warrant an opinion from this court." (See *People v. Braxton* (2004) 34 Cal.4th 798, 809.) The deadline to invoke this Court's discretion is concomitantly shorter—10 days after the 30-day period in which the Court of Appeal decision is within the lower court's jurisdiction. (Rules 8.366(b)(1), 8.500(e)(1).)

B. Promptness Is Required on Postconviction Review

A need for promptness when seeking ordinary review makes it all the more necessary to be prompt when seeking extraordinary review. And,

whether or not convicted persons have historically faced any sanction for failing to treat it as such, habeas review is extraordinary:

> Although habeas corpus thus acts as a "safety valve" [citation] or "escape hatch" [citation] for cases in which a criminal trial has resulted in a miscarriage of justice despite the provision to the accused of legal representation, a jury trial, and an appeal, this "safety valve" role should not obscure the fact that "habeas corpus is an extraordinary, *limited* remedy against a presumptively fair and valid final judgment" [citation].

(*Reno*, *supra*, 55 Cal.4th at p. 450, italics in *Reno*.) Hence,

> the judicial machinery is structured to allow one accused or convicted of a crime—in the vast majority of cases—to vindicate his or her rights well before a postconviction, postappeal writ of habeas corpus becomes necessary. Because a criminal defendant enjoys the right to appointed trial counsel, to a jury trial, and to an appeal, the various procedural limitations applicable to habeas corpus petitions are designed to ensure legitimate claims are pressed early in the legal process, while leaving open a "safety valve" for those rare or unusual claims that could not reasonably have been raised at an earlier time. The procedural rules applicable to habeas corpus petitions are thus "a means of protecting the integrity of our own appeal and habeas corpus process" [citation] and vindicate "the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments" [citation]. In short, our procedural rules "are necessary . . . to deter use of the writ to unjustifiably delay implementation of the law. . . . " [Citation.]

(*Id.*, at p. 452, fn. omitted.) In general terms, the long-settled rule[1] is a "basic instruction" to litigants "simply" to file the habeas petition "as

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[1] Neither court Rule nor statute expressly governs the timing of habeas petitions. (*Reno*, *supra*, 55 Cal.4th at p. 460.) In such a void, courts regulate their access to ensure some litigants do not deplete scarce judicial resources that must be available to all. (*Id.*, at p. 522 [courts' inherent supervisory or administrative powers are not statutory]; *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 55 [court has "power of self-preservation" and "power to remove all obstacles to its successful and convenient operation"].)

promptly as the circumstances allow." (*Reno*, *supra*, 55 Cal.4th at p. 460, citation and internal quotation marks omitted; *Clark*, *supra*, 5 Cal.4th at p. 765, fn. 5.) What that means, however, logically varies depending on the stage of presentation.

1. Timing to Initially File in Superior Court

When this Court has explored promptness, the context has not been that of re-filing a claim in a higher court after denial of a claim in a lower court. Rather, the context has been capital litigation, in which this Court is the only state court that will see the habeas claim. Thus, when this Court has elaborated on the meaning of promptness, it has been in the context of the time needed to present a claim for the first time on habeas. (E.g., *Clark*, *supra*, 5 Cal.4th 750; *In re Stankewitz* (1985) 40 Cal.3d 391.) In a context of first presentation, this Court has explained that filing "as promptly as the circumstances allow" means filing without unjustified substantial "delay" as "measured from the time a petitioner becomes aware of the grounds on which he seeks relief." (*Clark*, *supra*, 5 Cal.4th at p. 765, fn. 5.) And this Court has explained this promptness analysis applies to first presenting a claim in non-capital habeas cases as well (*id.*, at p. 782; *In re Shipp* (1965) 62 Cal.2d 547, 553)—which, in the normal non-capital case, should be in a petition filed in the superior court (*In re Johnson* (2016) 246 Cal.App.4th 1396, 1402; *People v. Esparza* (2015) 242 Cal.App.4th 726, 747).

For that initial filing in superior court, some delay often will be inevitable, given that: the factual basis of a claim normally should not be shown by the appellate record[2]; vague or conclusory notice-type pleading is

[2] "[W]hile the appellate record may be a starting point for developing habeas corpus claims, it is not the primary basis for asserting them." (*Marks v. Superior Court* (2002) 27 Cal.4th 176, 188.)

barred[3]; the facts must be, and must affirmatively be shown as, a product of a declarant's personal knowledge[4]; and the petition itself "must" include the concrete information that is the foundation of the claim.[5]

One readily may acknowledge that such initial presentation amounts to no trivial thing. To borrow a succinct statement from another context, a petitioner "who ventures upon [the] effort" to collaterally attack a judgment "better have his facts and figures, and they should be compelling." (*People v. Wilson* (1986) 182 Cal.App.3d 742, 750 [addressing traversal of a search warrant].) Given that task, case-specific assessment of promptness is unavoidable with respect to first presentation of a claim.

2. Timing to Re-File in Court of Appeal

What amounts to re-filing the claim in the Court of Appeal "as promptly as the circumstances allow," after an adverse Superior Court

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[3] *In re Martinez* (2009) 46 Cal.4th 945, 955-956.

[4] The Evidence Code applies in habeas proceedings. (See Evid. Code, § 300; *In re Scott* (2003) 29 Cal.4th 783, 816.) Apart from proper expert testimony, assertions not shown to be based on personal knowledge are not properly considered for any purpose. (Evid. Code, §§ 403(a)(2), 702; *Kahn v. Superior Court* (1987) 188 Cal.App.3d 752, 770, fn. 7 ["an affidavit which is based on 'information and belief' is hearsay and must be disregarded, and it is ' "unavailing for any purpose" whatsoever. . . .' "); *Ayala v. Chappell* (9th Cir. July 20, 2016, No. 13-99005 __ F.3d __ [2016 WL 3913446, *22-*23] [supposition in a pleading, even in sufficient detail to state the elements of a claim, is still "nothing to support" a claim, given the requirement "personal knowledge" be the "sources" of allegations].)

[5] To establish "prima facie case," a petition "must" supply the court with the " 'reasonably available documentary evidence supporting the claim' " (*In re Hawthorne* (2005) 35 Cal.4th 40, 48), and a resulting prima facie case showing must be one of "concrete information" rather than "speculation or hope that a basis for collateral relief" may exist (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260; see *Seaton, supra*, 34 Cal.4th at p. 205 [supporting evidence is the "substance" of the claim; accord, *Borden v. Allen* (11th Cir. 2011) 646 F.3d 785, 810 [petitioner "is, or should be, aware of the evidence to support the claim before bringing his petition").

ruling, does not appear to have been discussed by this Court previously.[6] But basic reason precludes reference back to the substantial-delay-after-knowing-the-facts standard that applied to the superior court filing. To comply with a rule to present his claim in the lower court first (*In re Johnson, supra*, 246 Cal.App.4th at p. 1402), the petitioner had to have already presented his full allegations of fact and the concrete information on which the allegations were based.[7] Having "present[ed] [his] case in a judicial setting" already, the petitioner's "die has long since been cast" (cf. *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 514) by the time the superior court has denied relief.

In stark contrast to the burden of initial presentation in the superior court, the petitioner's re-representation task is light indeed—even trivial. All he need do (and should do) is send the Court of Appeal a copy of what he filed in the Superior Court. As this Court has noted, "rebriefing" is just "wasteful." (*In re Michael E.* (1975) 15 Cal.3d 183, 193, fn. 15.)[8] This is efficient because a Court of Appeal logically would assume a petitioner's intent to seek relief on all grounds advanced in the Superior Court, and in the overwhelming number of cases that assumption is most likely the correct one.

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[6] See Rule 8.548(a)(2) (lack of "controlling precedent" is premise of this Court's acceptance of certified question).

[7] Cf. *People v. Mendez, supra*, 19 Cal.4th at p. 1099 (one who "has complied only 'substantially,' . . . has not complied sufficiently; and if he has not complied sufficiently, he has not complied at all"); *People v. Breckenridge* (1992) 5 Cal.App.4th 1096, 1100 ("judicial economy" does not warrant "using one device or another to circumvent" a rule regulating when a litigant must act), disapproved on other grounds (as still too lenient) in *In re Chavez* (2003) 30 Cal.4th 643, 657, fn. 6.

[8] Cf. Rule 8.520(a) (contemplating, on review in this Court, parties' election to rely on briefs filed in Court of Appeal).

Not much is needed to reach a sound conclusion that 60 days is an outer limit of "as promptly as the circumstances allow" when a re-filing can and should be so easily accomplished. The effort required is about as much as needed to file a notice of appeal, an act normally due within 60 days. (Rule 8.308(a).) That is the time allowed the State to appeal if a superior court has granted a writ of habeas corpus. (See Pen. Code, § 1506 [habeas appeal is governed by these Rules]; Rule 8.388(a) [normal appellate rules govern].) And the "60-day period applicable to appeals" normally is enforced judicially in mandamus cases. (*Popelka, Allard, McCowan & Jones v. Superior Court* (1980) 107 Cal.App.3d 496, 499, citing *Reynolds v. Superior Court* (1883) 64 Cal. 372, 373; *People v. Superior Court (Brent)* (1992) 2 Cal.App.4th 675, 682.) Last, in habeas cases lower federal courts have for years alerted California prisoners to consider 60 days the "benchmark" to re-file. (See *Velasquez v. Kirkland*, *supra*, 639 F.3d at p. 968; *Livermore v. Watson*, *supra*, 556 F. Supp. 2d at p. 1118, fn. 2.)

This Court would act most soundly by holding that "as promptly as the circumstances allow" implies a Court of Appeal re-filing within 60 days after a superior court's habeas denial.

3. Timing to Seek Review in This Court

Similarly absent from this Court's prior discussions is what amounts to "as promptly as the circumstances allow," when one presents a habeas claim in this Court after an adverse Court of Appeal decision. Here, too, logic precludes reference to a substantial-delay-after-knowing-the-facts standard that was only relevant to an initial presentation of the claim in the superior court. Again, what is prompt must consider the task facing a petitioner. And that task should be a simple, swift filing of a petition for discretionary review.

To permit non-capital petitioners routinely to file original habeas petitions in this Court is to endorse a "staggering" burden on this Court.

(See *Reno*, *supra*, 55 Cal.4th at p. 453.) No sound policy supports that. There is no general principle that a litigant who may press his claims in a superior court in the first instance, and then seek review in a Court of Appeal as a matter of right, should also enjoy an unfettered ability to force this Court to a renewed examination.

Such a rule could not be justified on the ground that a criminal judgment is at issue. As noted, direct review from a criminal judgment is the primary means to vindicate claimed violation of rights. (*Robbins*, *supra*, 18 Cal.4th at p. 777.) But the mere fact that a criminal judgment implicates liberty is not seen as cause to accept the reality that this Court's resources normally should be limited to discretionary consideration, in cases with issues of "sufficient statewide importance to warrant an opinion from this court." (*People v. Braxton*, *supra*, 34 Cal.4th at p. 809; see also Rule 8.500(b)(1).) Rather, it is normally deemed sufficient that the lower courts already passed on the merits of the case. A habeas petitioner cannot justify an entitlement to greater access to this Court on habeas review that is already extraordinary, and purposefully limited, in order to attack a judgment presumed valid.[9]

There is no mandatory extraordinary writ review in this Court in non-habeas cases. If a Court of Appeal denies an extraordinary writ, an original petition in this Court is improper when "a plain, speedy, and adequate remedy, in the ordinary course of law" exists. (Code Civ. Proc., § 1086; *W. States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566, fn. 1 [original writ available "only" when other "ordinary" means of presentation

[9] Cf. *People v. Allenthorp* (1966) 64 Cal.2d 679, 683 (if persons convicted in superior court have no right to mandatory review after Court of Appeal denies *coram nobis* relief, inappropriate to grant to municipal court convictees a right of mandatory review after superior court denies *coram nobis* relief].)

were unavailable].) Such other remedy exists—a petition for this Court's discretionary review. (Rule 8.500(a)(1).)

And the burden of such unfettered access is "staggering." (*Reno*, *supra*, 55 Cal.4th at p. 453; see also *id.*, at p. 515 [abusive exhaustion petitions "threaten the court's ability to function"].) Such an unwieldy load cannot help but contribute to a practice to give little or no guidance as to the actual reasons for rejecting a non-capital habeas petitions. For example, in non-capital cases a most common citation from this Court is to *People v. Duvall* (1995) 9 Cal.4th 464, 474—a page listing cumulative bases for denial. (See *Seeboth v. Allenby* (9th Cir. 2015) 789 F.3d 1099, 1103 [that page of *Duvall* "discusses both procedural and substantive requirements for habeas petitioners," among them that the facts pled actually suffice "to state a claim"].) Too, it has been lamented that, if this Court adds a common citation to *In re Swain* (1949) 34 Cal.2d 300, federal courts still "struggle to decipher" them, after "puzzling over these same two citations for more than a decade." (*Curiel v. Miller* (9th Cir. July 25, 2016, No. 11-56949) __ F.3d ___ [2016 WL 3974172, *12 & fn. 2] (*Curiel*) (conc. opn. of Bybee, J.); see *Seeboth v. Allenby*, *supra*, 789 F.3d at p. 1104, fn. 3.)[10] Staggering burden should not persist without compelling reason.

The mere fact of original jurisdiction is no compelling reason for the burden. That is most prominently reflected in the United States Supreme

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[10] It is mild to say the federal habeas implications are unhelpful. For example, one of Swain's defects was a failure to explain substantial delay in seeking habeas relief; this Court ordered he could re-file and try to cure the defect. (*In re Swain*, *supra*, 34 Cal.2d at pp. 302, 304.) But just recently the Ninth Circuit en banc rejected *Swain* as a "case dealing with untimeliness"; rather, when *Swain* and *Duvall* are cited together, the Ninth Circuit will deem this Court to have ruled all state petitions were *timely* filed and that the entire basis to deny relief is failure to plead facts with particularity. (*Curiel*, *supra*, __ F.3d __ [2016 WL 3974172 at *3].)

Court's refusal to permit unfettered access, although that court has fundamental jurisdiction to entertain an original habeas petition. (28 U.S.C. § 1651.) But "exceptional circumstances," and a lack of possible "adequate relief" in "any other form," are needed or an original petition will not be entertained. (U.S. Supreme Ct. Rules, rule 20.4(a); *Felker v. Turpin* (1996) 518 U.S. 651, 665.) The high court noted original writ proceedings are "drastic and extraordinary" and that:

> Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice.

(*In re McDonald* (1989) 489 U.S. 180, 184-185.) The high court noted other states that do not routinely permit original filings in the highest court. (*Saffold, supra*, 536 U.S. at p. 224.)

This Court, too, should reject unfettered original filings and so ensure this Court's "successful and convenient operation." (*Superior Court v. County of Mendocino, supra*, 13 Cal.4th at p. 55.) Rarely has this Court spoken on the point. But the few statements accord with a rule that a non-capital habeas petitioner should appeal to this Court's discretion via a petition for review and should not presume his claims warrant an original petition. This Court's most direct statement made the point in strong terms:

> petitioner's counsel did not seek a hearing in this court following a denial of a petition for writ of habeas corpus by the Court of Appeal, but instead sought an original writ here upon which our order to show cause issued. We *disapprove* of such procedures. Not only is rebriefing wasteful, but published opinions remain in the books even when, as in this case, a hearing would have been granted, thus compounding the problems of courts and practitioners in researching the law.

(*In re Michael E., supra*, 15 Cal.3d at p. 193, fn. 15, italics added.) To the extent the caselaw since then has not been entirely faithful on the point, it is

this Court's province and wise practice to re-confirm rules that bar abuse of habeas review. (E.g., *Clark*, *supra*, 5 Cal.4th at p. 763 [noting absence of "clear guidelines" in cases and clarifying rules for non-abuse].) This Court should confirm that non-capital petitioners are not to resort to original petitions in this Court if a petition for discretionary review in this Court (after review in the superior court and Court of Appeal) could have been filed instead.[11]

As for "promptly" seeking such discretionary review, the time should be brief. As noted above, after a superior court habeas denial, time to re-file in the Court of Appeal should be 60 days, just as in non-habeas cases. Likewise, time to file in this Court should be as in non-habeas cases.

By rule, this Court's discretionary review must be sought within 10 days after a decision is final in the Court of Appeal, in all cases. (Rule 8.500(e)(1).) A Court of Appeal summary denial of an extraordinary writ usually is final at once. (Rules 8.387(b)(2)(A) [habeas order, absent a related appeal], 8.490(b)(1)(A) [mandate, certiorari, and prohibition].) In

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[11] The United States Supreme Court understood *In re Reed* (1983) 33 Cal.3d 914, 918, footnote two, to amount to an apparent reversal of the *In re Michael E.* language—as though in *Reed* this Court re-characterized an "original writ" in this Court as something "not 'extraordinary' " and "*interchangeable* with the petition for hearing." (*Saffold*, *supra*, 536 U.S. at p. 225, original italics.) But that reading does not follow. The *Reed* footnote rejected that estoppel barred a petitioner from any higher state court re-filing after a superior court denial. The footnote cannot bear the weight of an intended reversal of *In re Michael E.* to hold that original writs are interchangeable with a petition for review in this Court. Indeed, the footnote noted a petition for review is preferred, and for a reader curious to the degree of the preference, *Reed* cited the case that disapproved wasteful rebriefing via an original petition, in favor of a petition for review. (*In re Reed*, *supra*, 33 Cal.3d at p. 918, fn. 2, citing *In re Michael E.*, *supra*, 15 Cal.3d at p. 193, fn. 15.)

short, a petition for review must be filed as of the tenth day after decision (or the next business day).

That is a short deadline. But it is justified by the likely lack of justification for this Court's review, and by the extreme ease in compliance. And it is ameliorated by a normal allowance for incarcerated litigants' lack of direct filing access, and by the Chief Justice's ability to accept a filing during the time the Court could grant review on it's own motion.

As justification, in the vast number of cases, review would and should be unlikely. By definition, justices of a Court of Appeal will have devoted time to review of the record and issues and found that not even one claim made out a prima facie case for relief.[12] The issues presented normally should not have been novel, and a summary unpublished decision likely will not warrant review to provide guidance in future trials.[13] Rather, in nearly all cases the only practical reason for a petitioner to seek this Court's discretionary review is not because this Court would or should find review warranted but because that step is needed before the petitioner can proceed to federal court.[14]

On direct review, that precise circumstance is accounted for via a rule that requires only a brief statement of issues and a cover noting exhaustion is the goal. (Rule 8.508.) This Court has borrowed from that direct review procedure in the capital habeas context. (*Reno*, *supra*, 55 Cal.4th at p.

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[12] Given a prima facie case, this Court requires appointment of counsel (*Clark*, *supra*, 5 Cal.4th at p. 780) and the resulting order to show cause generally delays finality by 30 days (Rule 8.387(b)(1)).

[13] Normally, novel legal issues governing the proper conduct of criminal proceedings are the province of appeals, not habeas corpus. (*Teague v. Lane* (1989) 489 U.S. 288, 304; *In re Harris* (1993) 5 Cal.4th 813, 831; *In re Moore* (2005) 133 Cal.App.4th 68, 74.)

[14] See *O'Sullivan v. Boerckel* (1999) 526 U.S. 838, 845-848 [state prisoner on collateral review normally must seek discretionary review in state's highest court]; *Reno*, *supra*, 55 Cal.4th at p. 489.

518.) A non-capital habeas petitioner would efficiently accomplish the same exhaustion compliance by this Court allowing him to just file a one-page letter asking for review of the Court of Appeal's denial of relief.

Even a brief perusal of the record and pleadings will, in most cases, likely affirm to this Court the wisdom of customary deferral to the Court of Appeal's resolution of case-specific mundane issues. And absent a staggering burden of mandatory re-visitation of merits in all cases, this Court (like the federal and other state high courts) may conserve its resources for identifying the truly rare case in which a Court of Appeal so seriously erred that intervention is demanded.[15]

As amelioration, while 10 days is a short span for prisoners, this Court has broadly held that prisoners constructively accomplish filings by placing them in the prison mail system for court delivery. (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 129; *In re Jordan* (1992) 4 Cal.4th 116, 130 [declining "burdensome" task of divining "diligence of prisoners on a case-by-case basis" in favor of a "bright-line rule"].) Too, while the 10-day deadline (for such constructive filing) cannot be extended, the Chief Justice may accept an untimely filing within the time the Court could order review on its own motion (Rule 8.500(e)(2))—that time being 30 days from finality, absent a sua sponte extension of time (Rule 8.512(c)).

C. This Court Should Bring Clarity to Timing of Ascending State Habeas Petitions

The Ninth Circuit notes, "[b]ecause of the uncertainty surrounding timeliness, district courts spend substantial judicial resources addressing this issue." (*Robinson v. Lewis*, *supra*, 795 F.3d at p. 931.) For example,

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[15] Cf. *Reno*, 55 Cal.4th at p. 453 (" 'It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.' ").

federal courts must allow otherwise-premature federal petitions, given a petitioner's "reasonable confusion" whether California petitions proceeded untimely from one court to another, affecting whether the federal habeas limitation period was tolled. (See *Mena v. Long* (9th Cir. 2016) 813 F.3d 907, 910; *Bonner v. Carey* (9th Cir. 2006) 425 F.3d 1145, 1149 [noting the "harshness" resulting from federal court's required post-hoc determination that limitation period was not tolled].) This Court would act in the soundest way to reduce any such confusion by holding that the normal rules, which already work so well in non-habeas cases to govern review in the Courts of Appeal and this Court, likewise apply in the habeas context.[16]

II. PETITIONER'S COURT OF APPEAL HABEAS PETITION WAS NOT FILED "AS PROMPTLY AS THE CIRCUMSTANCES ALLOW" AND THUS WAS UNTIMELY

The final issue is timeliness of Petitioner's habeas petition in the Court of Appeal. (*Robinson v. Lewis*, *supra*, 795 F.3d at p. 934.) It was untimely.

A. Facts

After the superior court denied the habeas petition, Petitioner delayed 66 days to mail a copy of that petition to the Court of Appeal. (*Robinson v. Lewis*, *supra*, 795 F.3d at p. 934; see *id.* at p. 933 & fn. 6 [discussing constructive filing].) He knew that not filing "within 60 days" risked an untimeliness finding in federal court. (*Id.*, at p. 935, fn. 10.) And there was no "good cause" why he did not file within that 60 days. (*Id.*, at p. 934 & fn. 9.)

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[16] This would address a concern raised by petitioner, to the effect that existence of a time certain to file helps enable prisoners to seek priority access to legal materials. (Opening Brief on the Merits (OBM), p. 14.)

B. Discussion

Under the date-certain timelines that Respondent asks this Court to confirm as California law in habeas cases, 66 days was too long. But this case does not raise the issue whether retroactive application would be unfair to Petitioner, because the above facts imply he did not file the Court of Appeal petition under any fair understanding the pre-existing general "as promptly as the circumstances allow" language.

The Ninth Circuit's quite generous "good cause" standard "turns on whether the petitioner can set forth a reasonable excuse, supported by sufficient evidence, to justify that failure." (*Blake v. Baker*, *supra*, 745 F.3d at p. 982.) Thus, to find Petitioner lacked good cause why he did not file within 60 days was to find he had no persuasive evidence of even a reasonable excuse not to file so promptly.[17] In short, he did not follow the settled "basic instruction" to just file "as promptly as the circumstances allow." (See *Reno*, *supra*, 55 Cal.4th at p. 460, citation and internal quotation marks omitted; *Clark*, *supra*, 5 Cal.4th, at 765, fn. 5.) That is untimely.

C. Petitioner's Counters

Petitioner does not appear once to address the "basic instruction" to just file "as promptly as the circumstances allow." He accordingly does not appear to address how the facts before this Court could lead to a conclusion that his taking 66 days to mail a photocopy of the superior court petition to the Court of Appeal amounted to as promptly as his circumstances allowed. Instead, he appears to argue for an amorphous "substantial delay" standard

[17] Petitioner cannot rely on a suggestion that other inmates lack law library access (OBM, p. 14), as he had such access (*Robinson v. Lewis*, *supra*, 795 F.3d at p. 934). As noted above, a clear instruction from this Court to do within 60 days what Petitioner waited 66 days to do—just file a copy of the superior court petition—prospectively would do much to eliminate this issue in future cases.

for re-filings in the Court of Appeal and in this Court, categorically more than 66 days and apparently up to at least 757 days. (OBM, pp. 16-33.)

Given the facts that Petitioner faces here (see Rule 8.548(b)(3)), that effort is perhaps understandable. But this Court's resources are limited. The unusual act to accept a certified issue bespeaks an interest to state a rule with clarity, to promote efficiency in litigation. Petitioner says nothing in that regard; as noted, he does not discuss his own conduct in relation to a basic rule to file as promptly as circumstances allow. All that is left is that 66 days was not as promptly as Petitioner's circumstances allowed for him to re-file in the Court of Appeal (indeed, 60 days is enough as a rule).

This Court should find the Court of Appeal filing was untimely.

CONCLUSION

Accordingly, Respondent respectfully asks this Court to hold: (1) the timing rules for review in the Court of Appeal and in this Court in habeas cases are the same as in the wide criminal and non-criminal variety of non-habeas cases; and (2) Petitioner's Court of Appeal petition was untimely.

Dated: September 14, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Answer Brief on the Merits** uses a 13 point Times New Roman font and contains **6,095** words.

Dated: September 14, 2016

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Robinson v. Lewis** No.: **S228137**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 15, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 15, 2016, at Sacramento, California.

_____
Declarant

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