In the Supreme Court of the State of California

In re **RENO,** **On Habeas Corpus**	Case No. S124660 **CAPITAL CASE**

Los Angeles County Superior Court, Case No. 445665
The Honorable John A. Torribio, Judge

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General
ROBERT DAVID BRETON
Deputy Attorney General
State Bar No. 73686
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2279
Fax: (213) 897-6496
Email: Robert.Breton@doj.ca.gov
Attorneys for Respondent

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Respondent hereby files a Return to this Court's Order to Show Cause before this Court, when the matter is placed on calendar, why the petition for writ of habeas corpus filed in this case should be considered an abuse of the writ due to Petitioner's failure to allege sufficient facts to explain why the claims are cognizable and not procedurally barred.

PROCEDURAL BACKGROUND

Petitioner, an admitted homosexual pedophile, confessed to three homicides. In 1976, in John Anson Ford Park in Bell Gardens, he slit 12-year-old Scott's and 10-year-old Ralph's throats when Scott called him a "fucking faggot" and Ralph woke up and screamed. In 1978, in South Gate, he took seven-year-old Carl, Jr. to his apartment, taped his hands, choked him with a clothesline when he asked to leave, attempted anal sex, set up an alibi, and dumped Carl's body in a remote area, to which he later took police investigators.

Petitioner waived his right to a jury trial, and following a court trial, he was found guilty of second-degree murder of the 1976 killing of Scott F. (Count I) and guilty of first-degree murder as to the 1976 killing of Ralph C. (Count II) and the 1978 killing of Carl C., Jr. (Count III). (Pen. Code, § 187.) In connection with the 1978 murder count, the court found the multiple-murder special-circumstance allegation true, but found the felony-murder (lewd or lascivious conduct) special-circumstance allegation not true. (Former Pen. Code, § 190.2, subds. (c)(3)(iv) and (c)5).) After a penalty trial, the court imposed a judgment of death for the 1978 murder. (CT I 248, 262.)

On automatic appeal, this Court reversed, holding the trial court committed prejudicial error in summarily denying petitioner's *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion for discovery of information regarding complaints against police officers, including the four officers who participated in petitioner's interrogation. This Court further

held there was sufficient evidence to support the trial court's verdicts on the three homicide counts and double jeopardy principles therefore did not bar re-prosecution of petitioner for second-degree murder on the Scott F. charge (Count I) and for first-degree murder on the Ralph C. and Carl C., Jr. charges (Counts II and III). (*People v. Memro* (1985) 38 Cal.3d 658 (*Memro I*); S004312). The case was remanded to the trial court on June 6, 1985, and petitioner's 1982 petition for writ of habeas corpus (which presented three claims) was denied by this Court as moot on August 15, 1985. (*In re Memro*, case no. S022446 [hereinafter referred to as "1982 habeas corpus petition"].)

Following retrial, the jury found petitioner guilty of the second degree murder of Scott F. and of the first-degree murders of Ralph C., Jr. and Carl C., Jr. (Pen. Code, § 187.) The jury also found true a multiple-murder special-circumstance allegation as to Count III. (Pen. Code, § 190.2(a)(3).) After a penalty trial, the jury returned a verdict of death on Count III, and the trial court entered judgment accordingly on July 17, 1987. (CT II 455, 565, 577.)

On November 30, 1995, this Court affirmed the judgment in full on automatic appeal. (*People v. Memro* (1995) 11 Cal.4th 786 (*Memro II*); case no. S004770.) On January 19, 1995, petitioner, by and through the same two attorneys who had represented him on direct appeal, filed a petition for writ of habeas corpus (presenting 12 claims, two of which had two subclaims each, and one of which had eight subclaims), which this Court denied "on the merits" on June 28, 1995. (*In re Memro*, case no. S044437 [hereinafter referred to as "1995 habeas corpus petition"].) On October 7, 1996, the United States Supreme Court denied petitioner's petition for writ of certiorari. (*Memro v. California*, case no. 95-9021.)

On September 8, 1998, petitioner – represented by new lawyers appointed by the federal court two years earlier, on June 14, 1996 -- filed a

habeas corpus petition in the United States District Court for the Central District of California. (*Reno v. Calderon, Warden*, case no. CV 96-2768 (RT).) On October 7, 1998, respondent filed a motion to dismiss the federal petition for failure to exhaust many of the 74 grounds for relief. On May 7, 1999, the Central District Court struck the unexhausted claims from the petition, stayed and held the first amended petition in abeyance, and ordered petitioner to file an "exhaustion" petition in this Court.

On August 16, 2001, and December 18, 2001, the Central District Court granted federal counsel's motions to withdraw and substituted different attorneys for the lawyers who had filed the original federal habeas corpus petition. Six year later, on October 2, 2007, the federal court temporarily lifted the stay for the purpose of allowing Petitioner's new federal attorneys to file a second amended habeas corpus petition over respondent's objection, increasing the number of claims from 74 to 143. The federal court immediately reinstated the stay, held the entire second amended habeas petition in abeyance, and again ordered petitioner to file periodic updates regarding the status of the "exhaustion" petition pending in this Court.

In the meantime, on October 16, 2002, this Court had granted former state counsel's motion to withdraw and appointed present federal counsel to represent petition in this Court for all purposes, and one and one-half years later, on May 10, 2004, petitioner, by and through his new state attorneys (also acting as counsel on the presently pending federal petition), filed the instant "exhaustion" petition for writ of habeas corpus. By letter dated May 21, 2004, this Court requested respondent to file an informal response to the petition pursuant to Rule 60 of the California Rules of Court. Respondent filed the informal response on May 20, 2005, and on February 3, 2006, petitioner filed his reply to the informal response.

On March 25, 2010, counsel for petitioner filed a "Request for the Court to Act on the Petition for Writ of Habeas Corpus." On September 15, 2010, this Court "acted," issuing the Order to Show Cause. In the order, the Court asks the parties to address whether the petition "should be considered an abuse of the writ" for eight reasons, which are answered seriatim.

PRELIMINARY STATEMENT

"This Court has never condoned abusive writ practice or repetitious collateral attacks on a final judgment. (*In re Clark* (1993) 5 Cal.4th 750, 769; accord *In re Sanders* (1999) 21 Cal.4th 697, 721.) "Entertaining the merits of successive petitions is inconsistent with [this Court's] recognition that delayed and repetitious presentation of claims is an abuse of the writ." (*In re Clark, supra*, 5 Cal.4th at p. 769.) This Court has repeatedly "emphasized that repetitious successive petitions are not permitted" and has "condemned piecemeal presentation of known claims." (*In re Clark, supra*, 5 Cal.4th at p. 774; see also *id.* at p. 777.)

"The state's paramount interest in the finality of its criminal judgments demands no less." (*In re Harris* (1993) 5 Cal.4th 813, 834.) To countenance successive and progressively longer habeas corpus petitions without a substantial showing that newly discovered evidence has cast serious doubt on the accuracy and reliability of the verdict would be to merely pay lip service to the importance of finality. (See *In re Sander, supra*, 21 Cal.4th at p. 714 fn. 9.) "The basis and continuing import of [this Court's] procedural bars are . . . to promote finality [as well as to] protect [] the integrity of [this Court's] own appeal and habeas corpus process." (*In re Robbins* (1998) 18 Cal.4th 770, 778, fn. 1; see also *In re Sanders, supra*, 21 Cal.4th at p. 723, fn. 15.)

Indeed, this Court's habeas corpus jurisprudence has consistently "reflect[ed] policies that . . . have as their purpose a curb on abuse of the writ of habeas corpus." (*In re Clark, supra*, 5 Cal.4th at p. 774.)

> Willingness by [any] court to entertain the merits of successive petitions seeking relief on the basis of the same set of facts undermines the finality of the judgment. Moreover, such piecemeal litigation prevents the positive values of deterrence, certainty, and public confidence from attaching to the judgment. The values that inhere in a final judgment are equally threatened by petitions for collateral relief raising claims that could have been raised in a prior petition.

(*Id.* at p. 770.) "Without this usual limitation of the use of the writ, judgments of conviction of crime would have only a semblance of finality." (*In re McInturff* (1951) 37 Cal.2d 876, 880.)

> [T]he writ strikes at finality. One of law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known. Without finality, the criminal law is deprived of much of its deterrent effect.

(*Teague v. Lane* (1989) 489 U.S. 288, 309 [109 S.Ct. 1060, 103 L.Ed.2d 334]; see also *Kuhlmann v. Wilson* (1986) 477 U.S. 436, 452-454 [106 S.Ct. 2616, 91 L.Ed.2d 364].)

This Court has highlighted the "severe disruptions" that occur when claims are presented for the first time in a second habeas corpus petition. (*In re Clark, supra*, 5 Cal.4th at p. 776.) "If 'collateral review of a conviction extends the ordeal of trial for both society and the accused,' the ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system." (*Id.*, at p. 776, quoting *McCleskey v. Zant* (1991) 499 U.S. 467, 491-492 [111 S.Ct. 1454, 113 L.Ed.2d 517].) To recast his phrase in a new perspective, "The nature and irrevocability of [the three victims'] death sentence" carried out by petitioner demands no less. (Petn. 20.)

As a result, "[i]t has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief," and is "'particularly necessary' where a petitioner has made prior attacks on the validity of the judgment without raising the issues. (*In re Clark*, *supra*, 5 Cal.4th at p. 765; citing *In re Swain* (1949) 34 Cal.2d 300, 302, 304; accord *In re Sanders*, *supra*, 21 Cal.4th at p. 722.) "By requiring that such challenges be made reasonably promptly, [this Court] vindicate[s] society's interest in the finality of its criminal judgments, as well as the public's interest 'in the orderly and reasonably prompt implementation of its laws.'" (*In re Sanders*, *supra*, 21 Cal.4th at p. 703, citing *In re Robbins*, *supra*, 18 Cal.4th at p. 778.) "Such timeliness rules serve other salutary interests as well[, such as] help[ing to] ensure that possibly vital evidence will not be lost through the passage of time or the fading of memories, [i]n addition [to honoring] the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over." (*In re Sanders*, *supra*, 21 Cal.4th at p. 703; accord *In re Clark*, *supra*, 5 Cal.4th at pp. 764-765, 787.)

"'This [case] evidences the problems that can arise if [this Court] permit[s] post-conviction relief to destroy any concept of finality in [its] decisional process in the area of criminal law.'" (*In re Clark*, *supra*, 5 Cal.4th at p. 792.) "Clearly, that institutional interest would suffer were the timeliness requirement to be ignored." (*In re Robbins*, *supra*, 18 Cal.4th at p. 779.) Respondent therefore requests that this Court rigorously "remain vigilant," adhere to its policy of "enforc[ing] time limits on the filing of petitions for writs of habeas corpus," as well as all other procedural bars, and "take appropriate corrective action when faced with abusive writ practices," thereby recognizing "the deleterious effect on the legal system" caused by flagrant abuse of the writ. (See *In re Sanders*, *supra*, 21 Cal.4th at pp. 703, 723.)

ARGUMENT

I. PETITIONER HAS ABUSED THE WRIT BY FAILING TO ALLEGE SUFFICIENT FACTS INDICATING THE CLAIMS IN THE HABEAS PETITION ARE TIMELY OR FALL WITHIN AN EXCEPTION TO THE RULE REQUIRING TIMELY PRESENTATION OF CLAIMS

A successive petition, such as this one, "is, of necessity, a delayed petition." (*In re Clark* (1993) 5 Cal.4th at 750, 770.) Just as piecemeal collateral attacks on a final judgment are not condoned, so too are untimely ones, and this Court "insist[s] a litigant mounting a collateral challenge to a final criminal judgment do so in a timely fashion." (*In re Sanders*, *supra*, 21 Cal.4th at p. 703.) Thus, all habeas corpus petitions must be filed "promptly" (*ibid.*) and are subject to the general rule regarding timeliness: "The habeas corpus petition must be filed within a reasonable time after the petitioner knew, or with due diligence should have known, the facts underlying the claim, as well as the legal basis for the claim." (*In re Harris*, *supra*, 5 Cal.4th at p. 829 fn. 7, citing *In re Clark*, *supra*, 5 Cal.4th at p. 784; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 704; *In re Robbins*, *supra*, 18 Cal.4th at p. 787.)

"If a habeas corpus petition is filed more than 90 days after the final due date for the filing of the reply brief on direct appeal, the petitioner has the burden of *establishing* with respect to *each claim* (a) absence of substantial delay; (b) good cause for the delay; or (c) that the claim falls within an exception to the bar of untimeliness." (*In re Robbins*, *supra*, 18 Cal.4th at p. 780; italics added; see also *In re Sanders*, *supra*, 21 Cal.4th at pp. 704-705; *In re Robbins*, *supra*, 18 Cal.4th at p. 784; *In re Clark*, 5 Cal.4th at pp. 782-798.) This 90-day presumption of timeliness applies to all petitions filed after June 6, 1989. (Supreme Ct. Policies Regarding Cases Arising From Judgments of Death, policy 3, Standards governing

filing of habeas corpus petitions and compensation of counsel in relation to such petitions (Policy 3, pt. 1, Timeliness standards, std. 1-1.1 [hereafter Policies].)

To address counsel's apparent confusion about the application of the bar of untimeliness to the entire petition as opposed to individual claims (Reply 5-7, 18), the timeliness bar should be analyzed and applied on a claim-by-claim basis. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 704, 713, fn. 13; *In re Gallego*, *supra*, 18 Cal.4th at pp. 832, 837, fn. 12; *In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 784, 787-788, 799, fn. 21, 805; *In re Clark*, *supra*, 5 Cal.4th at pp. 765, 783, 784, 786, 799.) Petitioner wrongly insists that the timeliness standards do not apply to any habeas corpus petition filed before this Court's 1998 decision in *Robbins*. (Reply 7, 9-10.) This Court's timeliness standards were instated in 1989, long before *Robbins*. (*In re Robbins*, *supra*, 18 Cal.4th at p. 789; *In re Clark*, *supra*, 5 Cal.4th at p. 785.)

A. Petitioner's Burden to Show "Absence of Substantial Delay"

"All petitions for writs of habeas corpus should be filed without substantial delay." (Policies, standard 1-1; see also *In re Clark*, *supra*, 5 Cal.4th at pp. 782-786; *In re Stankewitz* (1985) 40 Cal.3d 391, 396, fn. 1.) In most cases, the habeas corpus petition should be filed in conjunction with the direct appeal, and in no case after the judgment is affirmed. (*In re Harris*, *supra*, 5 Cal.4th at p. 829, citing *People v. Pope* (1979) 23 Cal.3d 412, 426-427, fn. 17; *In re Clark*, *supra*, 5 Cal.4th at pp. 765 fn. 5, 782-783; *In re Stankewitz*, 40 Cal.3d at p. 396.) Under the Policies adopted by this Court in June 1989, standard 1-1.1, a petition for writ of habeas corpus in a capital matter, such as this case, will be *presumed* timely filed, i.e., without *substantial delay*, if done so within 90 days of the filing of appellant's reply brief on direct appeal. (*In re Sanders*, *supra*, 21 Cal.4th at

pp. 704-705; *In re Gallego* (1998) 18 Cal.4th 825, 831; *In re Robbins*, *supra*, 18 Cal.4th at pp. 779-780, 784; *In re Harris*, *supra*, 5 Cal.4th at p. 829 fn. 7; *In re Clark*, *supra*, 5 Cal.4th at pp. 782-783.)

"Substantial delay is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*In re Sanders*, *supra*, 21 Cal.4th at p. 704; *In re Gallego*, *supra*, 18 Cal.4th at p. 832; *In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 787, 789; *In re Clark*, *supra*, 5 Cal.4th at p. 785.) If the petition is not entitled to a presumption of timeliness, he must demonstrate the absence of substantial delay by "show[ing] that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his [petition] for the writ." (*In re Clark*, *supra*, 5 Cal.4th at p. 779; see also *In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 788 fn. 10, 805; *In re Gallego*, *supra*, 18 Cal.4th at pp. 831-832, 835.) Thus, in order to avoid the bar of untimeliness, the *burden* is on the *petitioner* to state *specifically* as to *each claim and subclaim*[1] exactly *when* he became aware of the factual and legal bases for the claims *because* without *specific* factual allegations and "particulars from which [this Court] may determine when the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim," it is impossible to determine whether the claims are raised within a reasonable time. (*In re Gallego*, *supra*, 18 Cal.4th at p. 832; see also *In re Sanders*, *supra*, 21 Cal.4th at p.

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[1] "It is clear that a petitioner may not circumvent generally applicable timeliness requirements merely by aggregating analytically separate claims under the umbrella of a single designated claim." (*In re Robbins*, *supra*, 18 Cal.4th at p. 784.)

704; *In re Robbins*, *supra*, 18 Cal.4th at pp. 779-780, 787-788, 799 fn. 21, 805; *In re Clark*, *supra*, 5 Cal.4th at pp. 765, 783, 786, 799.)

The burden is substantial:

> A petitioner does *not* meet his or her burden simply by alleging in general terms that the claim or subclaim recently was discovered, or by producing a declaration of present or former counsel to that general effect. He or she must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and [demonstrating] that the information neither was known, nor, reasonably should have been known, at any earlier time, and he or she bears the burden of *establishing*, through those *specific* allegations (which may be supported by relevant exhibits [citation]) the absence of substantial delay. (Policy 3, *supra*, std. 1-1.2.)

(*In re Robbins*, *supra*, 18 Cal.4th at pp. 787-788; italics supplied, underlining added; see also *id.* at p. 789 & fn. 10; *In re Gallego*, *supra*, 18 Cal.4th at pp. 832-833, 836-838.) Moreover, the burden is *not* satisfied by averring merely that "second or successive post conviction counsel could not reasonably have discovered the information earlier." (*In re Robbins*, *supra*, 18 Cal.4th at p. 780.)

For instance, clearly insufficient are a petitioner's allegations that "neither he nor his prior or present counsel knew of the facts . . . until [present] counsel undertook the federal habeas corpus investigation," or that "none of the key facts underlying the . . . claims . . . were known or could have been known until a matter of months before the petition was filed." (*In re Gallego*, *supra*, 18 Cal.4th at pp. 837-838.) Similarly falling far short of the mark is a general assertion by federal counsel that he or she became aware of the factual and legal basis for a particular claim within three months of filing the exhaustion petition. (*In re Robbins*, *supra*, 18 Cal.4th at pp. 788, 797, 802.) "As noted, [a] petitioner must do more than simply allege in *general* terms that the claim or subclaim recently was discovered[, and] clearly the foregoing allegation does not satisfy

petitioner's obligation to allege, with *specificity*, facts showing *when* the information . . . was obtained and that the information . . . reasonably should not have been known at any earlier time." (*In re Robbins*, *supra*, 18 Cal.4th at p. 788, italics added; see also *id.* at pp. 804, 809 fn. 30.)

What is more, a petitioner cannot be heard to argue that his own knowledge of the factual basis of a claim should be irrelevant. "A prisoner who has knowledge of the facts upon which he believes that he is entitled to relief must explain any delay in seeking relief." (*In re Clark*, *supra*, 5 Cal.4th at p. 779, citing *In re Shipp* (1965) 62 Cal.2d 547, 553.) It is the petitioner's duty to alert counsel as to any and all factual issues. (*In re Clark*, *supra*, 5 Cal.4th at pp. 779-780.)

> When a petitioner or counsel representing a petitioner actually is aware of information that is sufficient to state a prima facie claim for relief on habeas corpus, that claim should be presented to a court *without substantial delay*. When, on the other hand, a petitioner or counsel knows or should know only of triggering facts -- i.e., facts sufficient to warrant further investigation, but insufficient to state a prima facie case for relief -- the potential claim should be the subject of further investigation either to confirm or to discount the potential claim. (*Clark*, *supra*, 5 Cal.4th at pp. 783-784; see also *Robbins*, *supra*, 18 Cal.4th at pp. 791-793 [scope of duty to investigate].) And when the petitioner and his or her counsel *lack triggering facts* concerning a particular claim, counsel has *no duty to investigate* that claim.

(*In re Gallego*, *supra*, 18 Cal.4th at p. 833; italics added; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 713.)

Counsel is under *no* obligation to conduct an "unfocused investigation," to uncover "*any* possible factual basis for collateral attack," or to venture into areas of questionable merit. (*In re Clark*, *supra*, 5 Cal.4th at p. 784; see also *Jones v. Barnes* (1983) 463 U.S. 745, 752 [103 S.Ct. 3308, 77 L.Ed.2d 987] [explaining that counsel need not raise all nonfrivolous claims on appeal]; *In re Gallego*, *supra*, 18 Cal.4th at p. 836

fn. 10 [noting that counsel has no duty to conduct any "unfocused" or broad investigation grounded on "mere speculation or hunch, without any basis in triggering fact"]; *In re Robbins*, *supra*, 18 Cal.4th at p. 794.) "Counsel is not expected to conduct an unfocused investigation grounded on mere speculation or hunch, without any basis in triggering fact." (*In re Robbins*, *supra*, 18 Cal.4th at pp. 781-782 & fns. 13, 14.) "[C]ounsel is neither required nor expected to launch habeas corpus investigations to explore . . . speculative possibilit[ies] . . . . We do not expect counsel to undertake, nor need this Court fund, [any] unfocused fishing expeditions." (*In re Robbins*, *supra*, 18 Cal.4th at p. 793; see also *id.* at p. 803 fn. 25.)

Therefore, the proper denial of a *timely* confidential funding request to investigate a "potential, but wholly undeveloped claim that does not state a prima facie basis for relief" -- based on counsel's failure to disclose sufficient triggering facts in support of the proposed follow-up investigation -- may be *relevant* to the inquiry regarding substantial delay in the filing of a subsequent habeas corpus petition, in that it would tend to show that, without funds, he did not actually know, and perhaps could not reasonably have been expected to know, of the information earlier. (*In re Sanders*, *supra*, 21 Cal.4th at p. 712; *In re Gallego*, *supra*, 18 Cal.4th at pp. 828-831, 834-835.) However, the proper denial of this unmerited funding request -- for an unwarranted investigation based on wholly conclusory allegations -- would *not* justify counsel's declining to file a habeas corpus petition containing other, substantiated claims as to which a prima facie basis exists, and would *not*, without more, necessarily *establish* the absence of substantial delay with regard to the as-yet undeveloped claim. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 712, 722; *In re Gallego*, *supra*, 18 Cal.4th at pp. 830 fn. 4, 834-835.)

The reason is obvious: just because counsel failed to include sufficient triggering facts in his funding request does not prove that he did

not know, or could not have known, about this triggering information any earlier. In other words, whether counsel submitted funding requests that were denied or not, he must still "establish when the information offered in support of [his] claim was obtained, and that the information was neither known, nor reasonably should have been known, at any earlier time." (*In re Gallego*, *supra*, 18 Cal.4th at p. 836.) If counsel merely asserts *generic* allegations that certain "facts" were uncovered indicating he had a meritorious claim, that he brought the claim within "a reasonable time" after he became aware of its "factual basis," that he could conduct no "plenary" investigation because his state funding request was denied, and that he was unable to unearth the full factual basis for the claim until he was given federal funding for a "plenary" investigation, these "*general*" assertions fall far short of showing good cause for his substantial delay. (*Id.* at pp. 836-837; italics added.)

To repeat, "the burden is on *petitioner* to establish the absence of substantial delay, and he, not respondent, must "get down to details." (*In re Gallego*, *supra*, 18 Cal.4th at p. 837; see *In re Robbins*, *supra*, 18 Cal.4th at p. 779, 805.) It is the petitioner who must establish precisely "*when* the information offered in support of [the] claim was obtained, *and* that the information was neither known, nor reasonably should have been known, at *any earlier time*," and even the submission of a declaration by prior appellate or habeas counsel to the effect that he was "not aware" of the facts discovered during the federal habeas corpus investigation is insufficient to establish these two facts. (*In re Gallego*, *supra*, 18 Cal.4th at p. 837 & fn. 11.) To reiterate, "general" assertions, i.e., allegations that are "insufficiently specific" will be found wanting. (*Id.* at p. 837-838.)

B. Petitioner's Burden to Show "Good Cause" for Substantial Delay

If the petition is neither presumptively timely nor without substantial delay in the presentation of one or more of his claims, the court will look to the reasons proffered to justify his delay. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 704-705; *In re Clark*, *supra*, 5 Cal.4th at p. 799.) "A claim or a part thereof that is substantially delayed will nevertheless be considered on the merits *if* the petitioner can demonstrate '*good cause*' for the delay." (*In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 805, italics added; see also *In re Walker* (1974) 10 Cal.3d 764, 774; *In re Shipp, supra,* 62 Cal.2d at p. 553.) Thus, "[this Court's] decisions have consistently required that a petitioner explain and justify any substantial delay in presenting a claim." (*In re Clark*, *supra*, 5 Cal.4th at p. 783, citing *In re Swain*, *supra*, 34 Cal.2d at p. 304; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 722 [requiring petitioner to "establish" – not merely allege – good cause for any substantial delay]; *In re Gallego*, *supra*, 18 Cal.4th at p. 832 [same].)

"Where the presumption of timeliness is not applicable, Policies, standards 1-1.2 and 1-1.3 govern. Those standards reflect and incorporate into the Policies the preexisting requirement that any substantial delay in the filing of a petition after the factual and legal bases for the claim were known or should have been known must be *explained* and *justified*." (*In re Clark*, *supra*, 5 Cal.4th at p. 784, italics added; see also *In re Robbins*, *supra*, 18 Cal.4th at p. 805.) The petitioner must allege *with specificity* the facts showing exactly when petitioner or counsel became aware of the factual and legal bases for the claim and must allege the circumstances that prevented them from discovering the factual bases any earlier. (*In re Clark*, *supra*, 5 Cal.4th at p. 786, citing *In re Stankewitz*, *supra*, 40 Cal.3d at p. 397, fn. 1 [requiring petitioner to "point to *particular* circumstances

sufficient to justify substantial delay"]; *In re Shipp*, *supra*, 62 Cal.2d at p. 553 [requiring petitioner to state "*with particularity* his reasons for the delayed presentation"]; *In re Swain*, *supra*, 34 Cal.2d at p. 304 [requiring petitioner to "*fully* disclose his reasons for delaying"]; see *In re Gallego*, *supra*, 18 Cal.4th at p. 831 ; see also *In re Clark*, *supra*, 5 Cal.4th at p. 765, fn. 5.)

When the proffered justification for a delayed petition in a capital case is ineffectiveness of prior appellate and/or habeas corpus counsel, it must be shown that prior counsel essentially *abandoned* his client and failed to conduct any reasonable follow-up investigation, *in the face of clearly known triggering facts*, to determine the existence of potentially meritorious claims, "citing [the] press of other work," thereby leading to a substantial delay in the investigation and presentation of the defendant's legal claims by his subsequent attorney. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 701, 706-709, 710 fn. 7, 711-712, 714, 717, 719, 721-724 [noting that abandonment occurred because counsel did "absolutely nothing" to investigate potentially meritorious habeas corpus claims, insisting that "doing so did not fit within his caseload" and that he was "busy with other matters"]; see also *In re Robbins*, *supra*, 18 Cal.4th at pp. 809-810.) However, the mere decision not to pursue further investigation does *not* constitute inadequate representation unless it is also shown that counsel neglected to act and follow up on triggering information that could reasonably lead to a potentially meritorious claim. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 707-708, 711 [requiring a showing that prior counsel's inaction left petitioner "*un*represented," i.e. "essentially with *no* legal representation"]; *In re Gallego*, *supra*, 18 Cal.4th at p. 834; *In re Robbins*, *supra*, 18 Cal.4th at pp. 792, fn. 13, 793, fns. 14, 15, 805.) "The circumstance that present counsel has raised an issue not advanced by prior

counsel does *not* itself establish inadequate performance by prior counsel." (*In re Robbins*, *supra*, 18 Cal.4th at p. 810.)

In fact, this Court has declared:

> Should counsel, after a diligent and thorough review of trial counsel's files, the trial record and the appellate briefs, reasonably conclude that there are no triggering facts that would lead one to suspect the existence of issues of potential merit, counsel may legally and ethically *cease* his or her efforts at the time. If triggering facts exist, however, counsel must investigate those grounds. If, after a diligent and thorough investigation, counsel reasonably concludes no potentially meritorious grounds exist for collateral relief, counsel may at that *terminate* his or her efforts.

(*In re Sanders*, *supra*, 21 Cal.4th at p. 708, italics added.)

In capital cases, the Policies impose an express obligation on appellate counsel to investigate leads ("triggering facts") and reasonably possible bases for habeas corpus. (Policies, std. 1-1; see *In re Sanders*, *supra*, 21 Cal.4th at pp. 710-711, 713, 718; *In re Robbins*, *supra*, 18 Cal.4th at pp. 781, 792 & fns. 11, 13, 808-809; *In re Clark*, *supra*, 5 Cal.4th at p. 785, fn. 21.) This obligation is "limited, however, to an investigation of potentially *meritorious* grounds for habeas corpus *which have come to counsel's attention in the course of preparing the appeal*," such as when reading the trial transcripts and notes, reviewing trial counsel's case files and reports, and interviewing trial counsel and petitioner. (Policies, std. 1-1; *In re Clark*, *supra*, 5 Cal.4th at pp. 783-784; see also *In re Sanders*, *supra*, 21 Cal.4th at pp. 707, 713; *In re Robbins*, *supra*, 18 Cal.4th at pp. 781, 791-793 & fns. 13, 15, 809 fn. 30.) "Only an investigation into *specific* [triggering] facts *known to counsel* which could *reasonably* lead to a potentially *meritorious* habeas corpus claim is anticipated and required." (*In re Clark*, *supra*, 5 Cal.4th at p. 784; see ; *In re Gallego*, *supra*, 18 Cal.4th at pp. 832-835; *In re Robbins*, *supra*, 18 Cal.4th at pp. 792 fn. 13, 793 fn. 15.)

A bare allegation that a particular claim could not have been timely included in the first habeas corpus petition because it needed further investigation and development will not carry the day. (*In re Gallego*, *supra*, 18 Cal.4th at pp. 837-838.) If counsel is aware, or with diligence should be aware, of facts adequate to state a prima facie case as to that claim, he or she should include that claim without substantial delay, i.e., in the original petition, even if it is not fully developed or perfected. (*In re Sanders*, *supra*, 21 Cal.4th at p. 722.) This is because a factually based claim must be presented "promptly" unless "triggering" facts "known to counsel suggest the existence of other potentially meritorious claims which cannot be stated without additional investigation," thereby justifying placement of the prima facie claim on hold. (*In re Gallego*, *supra*, 18 Cal.4th at pp. 833, 838; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 704; *In re Clark*, *supra*, 5 Cal.4th at pp. 782-784.)

Petitioner accuses this Court of creating "considerable ambiguity" and "murki[ness]" in its definition and application of the timeliness bar, thereby providing him "no way of knowing whether his petition or a particular claim was filed without substantial delay, and requiring "guesswork" on his part." (Reply 10-13.) In addition, he complains that without "fixed guidelines," he is left in a "legal quandary" as to when to present perfected claims while still developing other claims (Reply 6). But his Court's decisions make it clear that to avoid the piecemeal presentation of claims, habeas counsel may put his petition on hold and delay presentation of his fully developed claims while he actively conducts a *bona fide*, *ongoing* investigation into other undeveloped claims based upon known, *triggering* facts which provide *good* reason to believe that further investigation will lead to all potentially meritorious claims. (*In re Sanders*, *supra*, 21 Cal.4th at p. 713; *In re Gallego*, *supra*, 18 Cal.4th at pp. 834, 838 & fn. 13; *In re*

Robbins, *supra*, 18 Cal.4th at pp. 780-781, 805-806; *In re Clark*, *supra*, 5 Cal.4th at pp. 767-770, 777, 781, 784.)

> This does *not* mean, however, that a prospective petitioner or his counsel . . . who *lacks triggering information* justifying investigation into [a still] unperfected claim . . . should [wait to] file a habeas corpus petition [containing claims are already developed]. If such a petitioner or counsel is, or should be, aware of *some* claims as to which prima facie case *may* be stated, and there is *no on-going bona fide* investigation into other potentially meritorious claims [based on triggering information] (see *Robbins*, *supra*, 18 Cal.4th at pp. 805-806), a petition advancing the known claims "must be presented promptly." (*Clark*, *supra*, 5 Cal.4th at p. 784.)

(*In re Gallego*, *supra*, 18 Cal.4th at p. 834, italics added; see also *id.* at p. 838.) "A contrary interpretation . . . improperly would permit petitioners to establish good cause for the delayed presentation of known claims even if there was an intervening delay of years during which such claims sat on the shelf while there was *no ongoing* investigation into other potentially meritorious claims." (*In re Robbins*, *supra*, 18 Cal.4th at p. 806 fn. 28; see also *id.* at p. 807 fn. 29.)

The denial of investigative funds can hamper counsel's ability to follow up on leads that appear promising, but the denial itself cannot necessarily be cited as good cause for delaying a petition that already has perfected claims. If petitioner's request for funding fails to provide sufficient triggering facts to justify granting the request, or if the request is denied without prejudice, the denial cannot serve as good cause. In either case, it is incumbent upon counsel to renew his request for funds, making sure to allege specific triggering facts that suggest there may be an issue of possible merit before he can assign a denial for funding as good cause for delay. (See *In re Sanders*, *supra*, 21 Cal.4th at pp. 712-713.)

Thus, if no prima facie case for relief can be stated on every one of the bases believed to exist, the delay may be justified when the petition is

ultimately filed *only if* "(1) the petitioner had *good reason* [based on triggering facts] to believe other meritorious claims existed, *and* (2) the existence of [additional] facts supporting those claims could not *with diligence* have been confirmed at an earlier time." (*In re Clark*, *supra*, 5 Cal.4th at p. 781, italics added; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 713; *In re Robbins*, *supra*, 18 Cal.4th at p. 806 fn. 28.)

> The delay will *not* be deemed justified, however, unless the petitioner demonstrates that there was *good reason* [based on triggering facts] to believe that further investigation would lead to facts supportive of a *clearly* meritorious claim. Nor will the delay be deemed justified if, not withstanding the existence of substantial, potentially meritorious claims, the petitioner delays filing the petition in order to investigate potential claims of *questionable* merit.

(*In re Clark*, *supra*, 5 Cal.4th at p. 781, fn. 17; italics added.) Therefore, "a petitioner who has only information that does *not* rise to the level of a prima facie claim is *not* required or expected to file a petition embodying such [an undeveloped] claim." (*In re Gallego*, *supra*, 18 Cal.4th at p. 834.)

> Furthermore, if the petitioner [himself] is aware of facts that may be a basis for collateral attack, and of their potential significance, he may not fault counsel for failing to pursue that theory of relief if the petitioner failed to advise counsel of those facts. Moreover, [prior counsel's] *mere omission* of a claim 'developed' by new counsel does *not* raise a presumption that prior habeas corpus counsel was incompetent, or warrant consideration of the merits of a successive petition. *Nor* will the court consider on the merits successive petitions attacking the competence of trial or prior habeas corpus counsel which reflect *nothing more than* the ability of present counsel with the benefit of *hindsight*, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages.

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

Therefore, to show constitutionally ineffective assistance of prior appellate or habeas counsel, present counsel must establish the objectively inadequate performance of that counsel in his selection of which claims to present and which to weed out. (See *In re Sanders*, *supra*, 21 Cal.4th at pp. 705, 713, fn. 8 ["just as '[the] process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail . . . is the hallmark of effective appellate advocacy' [citations], so too habeas corpus counsel must make decisions on what claims to include in a petition"].) "Appellate counsel (and, by analogy, habeas corpus counsel as well) performs *properly* and *competently* when he or she exercise discretion and presents *only* the strongest claims instead of every conceivable claim." (*In re Robbins*, *supra*, 18 Cal.4th at p. 810; citing *Jones v. Barnes, supra,* 463 U.S. at p. 752; *Smith v. Murray* (1986) 477 U.S. 527, 536 [106 S.Ct. 2661, 91 L.Ed.2d 434].) It goes without saying that counsel cannot be faulted for "failing to raise a *meritless* claim." (*In re Robbins*, *supra*, 18 Cal.4th at p. 810.)

Moreover, to make a prima facie case of constitutionally defective representation by appellate or habeas counsel sufficient to constitute good cause for substantial delay, new counsel must demonstrate that the petitioner was actually prejudiced by prior counsel's alleged failure to act upon the triggering information by investigating the additional claims. (*In re Robbins*, *supra*, 18 Cal.4th at p. 805; *In re Harris*, *supra*, 5 Cal.4th at p. 833; *In re Clark*, *supra*, 5 Cal.4th at pp. 774, 780; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Pope, supra,* 23 Cal.3d at p. 425.) Furthermore, the timeliness of a claim of ineffective assistance of appellate counsel or prior habeas corpus counsel is not necessarily measured from the date of appointment of present counsel. (*In re Robbins*, *supra*, 18 Cal.4th at p. 815, fn. 35.) Instead, it is measured "from the date upon which the

petitioner (or *any* counsel representing the petitioner) knew, or reasonably should have known, of the information offered in support of the claim of ineffective assistance of appellate or prior habeas corpus counsel." (*Ibid.*)

In addition, to show good cause for the delay, new counsel must allege "with specificity" and demonstrate that the issue is one that "would have entitled petitioner to relief" had prior counsel raised it earlier. (*In re Clark*, *supra*, 5 Cal.4th at p. 780; see also *In re Robbins*, *supra*, 18 Cal.4th at p. 810; *In re Banks* (1971) 4 Cal.3d 337, 343.) Thus, the petitioner must establish prejudice as a demonstrable reality – not simply through speculative argument – by showing a probability sufficient to undermine confidence in the accuracy of the outcome. (*People v. Williams* (1988) 44 Cal.3d 883, 937, 944-945; see also *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694.) If the alleged failing of prior counsel was not prejudicial with respect to the merits of the claim, the good-cause showing falls short.

C. Petitioner's Burden to Show He Comes within One of Four *Clark* Exceptions

If the petitioner has not carried his burdens with regard to substantial delay and good cause, the unjustifiably delayed claims will be barred unless petitioner demonstrates that he qualifies under one of the four miscarriage-of-justice exceptions enumerated in *In re Clark*, *supra*, 5 Cal.4th at pp. 797-798. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 704-706, 721, fn. 14; *In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 811-813, 815, fn. 34.) To avail oneself of these exceptions, the petitioner must allege facts that would establish a fundamental miscarriage of justice had occurred. This is the same miscarriage-of-justice exception considered when a claim is presented for the first time in a successive petition. (*In re Clark*, *supra*, 5 Cal.4th at pp. 759, 797-799.)

Under the four *Clark* exceptions to the timeliness bar, the petitioner must demonstrate:

> (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 trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (4) that the petitioner was convicted or sentenced under an invalid statute.

(*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781, 811, quoting *In re Clark*, *supra*, 5 Cal.4th at p. 759.) For purposes of applying the first three exceptions to the bar of untimeliness, this Court assumes that a federal constitutional error has been stated, and will find the exception inapposite if, based upon this Court's application of state law, the exception is not met. (*In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 811-812 & fn. 32; accord *In re Gallego*, *supra*, 18 Cal.4th at p. 839, fn. 14.)

D. Petitioner Has Failed to Carry His Burdens

1. The Petition Is Not Presumptively Timely

This procedural bar applies to petitioner. His appeal having concluded in 1995, he is not entitled to a presumption of timeliness because the instant habeas corpus petition was not filed "within 90 days after the final due date for the filing of appellant's reply brief on the direct appeal." (Supreme Ct. Policies, *supra*, policy 3, std. 1-1.1.) Inasmuch as it was filed on May 10, 2004 -- well outside the 90-day period under standard 1-1.1 -- the instant petition is patently not presumptively timely.

2. Petitioner Has Failed to Establish Absence of Substantial Delay

Under the Policies, standard 1-1.2, a petition filed more than 90 days after the reply brief *may* nevertheless establish the absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel "(a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim." However, petitioner has not satisfied the requirements of either standard. His attorneys have neither stated exactly when and how they became aware of the legal and factual bases for the claims presented herein, nor justified the substantial delay in presenting the claims that apparently were known, or with diligence could have been known, at the time of, or shortly after, entry of judgment.

Many of the grounds asserted for relief herein are but restatements or reformulations of arguments made and rejected on appeal or in the 1995 habeas corpus petition, while others are claims that could and should have been made on appeal, if at all. To the extent that new grounds for relief are stated, the petition fails to demonstrate that these claims could not have been asserted in the prior petition, or that any of the claims could not have been presented by a petition filed in conjunction with the appeal. Petitioner's lack of specificity is fatal to any argument that he is not guilty of substantial delay.

The following claims were previously presented to this Court on direct appeal and/or in the first habeas corpus petition and, by definition, their re-presentation cannot be deemed timely presented in these proceedings:

Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 73, 77, 80, 81, 83, 84, 86, 87, 89, 90, 91, 92, 93, 94, 96, 98, 100, 101, 102, 104, 107, 108, 109, 110, 112, 113, 118, 120, 121, 122, 123, 125, 126, 127, 128, 129, 130, 135, and 140. In addition to the foregoing claims, the following claims are based on facts that either were readily apparent in the appellate record or were known or could have been discovered -- through the exercise of reasonable diligence -- at the time of trial or during the pendency of the appeal: Claims 11, 13, 14, 22, 23, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69, 71, 72, 74, 75, 76, 78, 79, 82, 85, 88, 91, 92, 95, 97, 99, 103, 105, 106, 107, 108, 109, 111, 114, 115, 116, 117, 119, 123, 124, 130, 131, 133, 134, 135, 136, 137, 138, 139, 140, 141, and 143. Thus, these claims are substantially delayed.

Given that every single one of the claims are based primarily on facts known or discoverable at the time of trial and included in the appellate record, so that both the factual and legal bases for the claims should have been known a long time ago, petitioner cannot deny or justify his substantial delay in raising these claims. (See Policies, Std. 1-1.2; *In re Robbins*, *supra*, 18 Cal.4th at p. 814 ["the vast majority of the claims presented in the petition rely *exclusively* upon the appellate record[,] . . . were known, or reasonably should have been known, years ago and should have been presented to this Court, if at all, in a habeas corpus petition filed much earlier"]; *In re Gallego*, *supra*, 18 Cal.4th at p. 838 ["the vast majority of the claims rely *exclusively* upon the appellate record[,] . . . were known or reasonably should have been known to immediately preceding counsel, and . . . should have been presented to this Court, if at all, in a habeas corpus petition shortly after [this Court] denied petitioner's request for investigation funds"]; *In re Clark*, *supra*, 5 Cal.4th at p. 786 [many of

the claims were based on facts known at time of trial]; *People v. Jackson* (1973) 10 Cal.3d 265, 268-269.) Consequently, as to all such claims, petitioner fails to establish the absence of substantial delay.

Indeed, petitioner concedes untimeliness as to these claims, yet insists that this Court's prior rejection of these claims on the merits rendered them timely then and forever more, thereby precluding *any* timeliness ruling on the identical claims now. (Reply 3-4, 7-8.) Petitioner's position is untenable. This petition is a new action, requesting collateral relief as to each claim, and while a particular claim may have been timely when first presented, it is now being presented again as a separate ground for relief and cannot be found to have been timely presented in this action.

Thus, a repetitive claim is, of necessity, a delayed claim upon its re-presentation. Moreover, if this Court can deny a claim on procedural grounds and alternatively on the merits in a single proceeding, it can certainly do so in successive proceedings. Petitioner's argument that this Court's previous denial of a claim on the merits precludes it from applying any procedural bars in this action is disingenous at best. If counsel for petitioner wanted to avoid a procedural default ruling by this Court as to any repetitive claim, they should have refrained from presenting them herein.

Moreover, petitioner's attorneys have flouted this Court's unambiguous directive that all allegations and exhibits submitted in support of any arguments regarding the absence of substantial delay or good cause for substantial delay be included in the *petition* itself, *not* the informal reply or the traverse. (*In re Sanders*, *supra*, 21 Cal.4th at p. 713, fn. 13; *In re Robbins*, *supra*, 18 Cal.4th at p. 799, fn. 21.) Furthermore, petitioner's attorneys have disregarded this Court's clear instruction to provide particularized explanations as to *each* claim and *each* subclaim. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 704, 713, fn. 13; *In re Gallego*, *supra*, 18

Cal.4th at p. 832; *In re Robbins*, *supra*, 18 Cal.4th at pp. 780, 784, 787-788, 799, fn. 21, 805; *In re Clark*, *supra*, 5 Cal.4th at pp. 765, 783, 786, 799.) Thus, "such inadequate allegations in [the instant] petition [necessarily] lead to a conclusion that the petitioner has failed to meet *his burden* of *establishing* absence of substantial delay." (*In re Robbins*, *supra*, 18 Cal.4th at p. 789; italics added.)

As to all non-repetitive claims and subclaims raised for the first time in this second habeas corpus petition, petitioner fails to carry his burden of establishing with specificity when the information offered in support of each claim or sub-claim was obtained and that the information was neither known, nor reasonably should have been known, at any earlier time. Thus, it is impossible to determine whether the claims are raised within a reasonable time after he or his attorneys became aware of the factual and legal bases for his claims. Indeed, even a casual review of his claims reveals that many, if not most, are based on facts that were known at the time of trial.

Completely missing from the *petition* are any "particulars from which [this Court] may determine when the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim[s] and the legal basis for the claim[s]." (*In re Gallego*, *supra*, 18 Cal.4th at p. 832.) There are no pertinent allegations in the *petition* from which to conclude that petitioner has satisfied his obligation of establishing *when* the information offered in support of *each* of his non-repetitive claims was obtained and that the information neither was known, nor reasonably could have been discovered, at any earlier time. (Petn. 17-19.) Notably missing from the *petition* are assertions regarding exactly when any triggering facts were discovered by his attorneys and averments as to the dates when any purported "ongoing" investigations actually commenced. (Petn. 17-19.)

Indeed, the *petition* merely makes the same generic, vague assertions that were disapproved by this Court in *Gallego* and *Robbins*: that "present counsel learned of the bases for relief alleged in this petition [presumably all 143 claims] during *this time period*," i.e. between August 16 and December 18, 2001, when present counsel were appointed by the federal court, and October 16, 2002, when this Court appointed present counsel to represent petitioner in these proceedings. (Petn. 17-18.) If the three-month time span was insufficiently definite in *In re Robbins*, *supra*, 18 Cal.4th at pp. 788, 797, 802, 804, 809 fn. 30, then certainly the ten-month time frame here is wholly inadequate and cannot even approach the specificity requirement. In a similar vein, if a general assertion that none of the key facts were known until after federal counsel could undertake the federal habeas investigation and develop the claims a few months before filing the petition was found lacking in *In re Gallego*, *supra*, 18 Cal.4th at pp. 837-838, then the allegations in the present petition the claims were "learned" between 2001 and 2004 and "have been presented as quickly as possible after the legal and factual bases for them became known" (Petn. 17; Reply) cannot even begin to pass muster. (See Policy 3, std. 1-1.2.)

As noted above, the burden to *establish* absence of substantial delay is not met "by alleging in *general* terms that the claim or subclaim recently was discovered" (*In re Robbins*, *supra*, 18 Cal.4th at pp. 787-788), or by averring that "second or successive post conviction counsel could not reasonably have discovered the information earlier" (*In re Robbins*, *supra*, 18 Cal.4th at p. 780) General assertions by federal counsel that they did not became aware of the factual and legal basis for the claim until after they undertook the federal habeas corpus investigation are clearly inadequate. (*In re Gallego*, *supra*, 18 Cal.4th at pp. 837-838; *In re Robbins*, *supra*, 18 Cal.4th at pp. 788, 797, 802.) Generic allegations that certain facts were uncovered by the new attorneys after their appointment and that they

brought the claim within a reasonable time will be found wanting. (*In re Gallego*, *supra*, 18 Cal.4th at pp. 836-837.)

The petition suffers from yet another defect. Petitioner utterly fails to *establish* that the information previously was unknown by any of his *previous* attorneys or by petitioner himself and that it could not have been discovered by them in the exercise of due diligence. His duty in this regard cannot be discharged by making general assertions uncorroborated by declarations from *all* prior counsel that provide in detail the missing showings. (Policy 3, std. 1-1.2.)

In addition, any bare allegations that petitioner's present or former attorneys were unaware of certain predicate, triggering facts or potentially meritorious claims are simply inadequate. (See *In re Robbins*, *supra*, 18 Cal.4th at p. 780 [burden not satisfied by averring merely that habeas corpus counsel "could not reasonably have discovered the information earlier"].) As noted above, absence of substantial delay is not established merely by showing when prior or present counsel first became aware of certain facts, but must include a detailed, particularized examination of when those facts reasonably could have been ascertained earlier through the exercise of due diligence and a showing that they could not have been discovered any earlier. (Policy 3, std. 1-1.2; *In re Gallego*, *supra*, 831-832, 835, 837; *In re Clark*, *supra*, 5 Cal.4th at pp. 767, 783, 786, 799.) Also, he must provide specifics regarding *each one* of his present and prior state and *federal* lawyers. (See *In re Gallego*, *supra*, 18 Cal.4th at pp. 837-838; *In re Robbins*, *supra*, 18 Cal.4th at pp. 779-780, 787-788, 799, 805.)

The *petition* is fatally silent concerning exactly when petitioner and his prior appellate and habeas corpus lawyers knew of any triggering or predicate facts or when they reasonably could have become aware of these facts. Petitioner must account not merely for the information each of his previous state appellate and habeas attorneys knew or should have

discovered (Jay L. Lichtman, Thomas J. Nolan, and Andrew Parnes), but also for the information that was known or could have been ascertained by each of the attorneys who have represented him from 1996 to 2001 in the federal proceedings (Abby E. Klein, Stanley Greenberg, Nicholas C. Arguimbau, Maureen M. Bodo, and Michael D. Abzug), as well as the federal attorneys who were substituted for them in 2001), and the new attorneys appointed by this Court to represent him in these proceedings, (Peter Giannini, James S. Thomson, and Saor Eire Stetler).

Alleging when *current* counsel became aware of the facts and the claims (Petn. 17-18) does not satisfy the plain requirement that the petition must allege when petitioner and *each* of his attorneys knew or should have known of the facts and the claims. Specifically missing is a *particularized* allegation that neither trial nor appellate or habeas counsel were aware of these facts. (*In re Clark*, *supra*, 5 Cal.4th at pp. 775, 799.) That is not surprising, however, since the facts underlying the claims were as available to petitioner's prior counsel as they were to present counsel.

Petitioner maintains that "he cannot be held responsible for the multiple counsel" who have represented him on appeal, the first state habeas corpus petition, or the first federal habeas corpus petition. (Reply 8.) Respondent disagrees and submits that the law is to the contrary. (See *In re Harris*, *supra*, 5 Cal.4th at p. 765 [noting that the burden to explain reasons for a belated collateral attack "is not met by an assertion of counsel that he or she did not represent the petitioner earlier"].) Petitioner cannot be allowed to hide behind the tag-team artifice of chain substitutions of attorneys. (Reply 7-8, 28-30; see *In re Clark*, *supra*, 5 Cal.4th at p. 779 ["any other rule would put a premium on repeated changes of counsel, and would wholly undermine the policy underlying the court's refusal to consider the merits of successive petitions offering piecemeal presentation of claims"]; *id.* at p. 766, fn. 6 ["were the rule otherwise, the potential for

abuse of the writ would be magnified as counsel withdraw or are substituted and each successor attorney claims that a petition was filed as soon as the successor attorney became aware of the new basis for seeking relief"].) It is true that "petitioner should not be penalized for [prior] counsel's ineffective assistance" (Reply 29) and that their failings "should not be held against him" (Reply 30), but petitioner must first demonstrate that ineffectiveness by proving both prongs of the *Strickland* standard.

The timeliness of a claim of ineffective assistance of appellate counsel or prior habeas counsel is measured "from the date upon which the petitioner (or *any* counsel representing the petitioner) knew, or reasonably should have known, of the information offered in support of the claim of ineffective assistance of appellate or prior habeas corpus counsel." (*In re Robbins*, *supra*, 18 Cal.4th at p. 815, fn. 35.) This Court will look to not just what petitioner himself knew, but also to what his then counsel, at the time of the appeal or any prior habeas corpus petition, knew, and to whether the facts could have been discovered earlier, either by petitioner or by his prior attorneys, in the exercise of due diligence. (*In re Clark*, *supra*, 5 Cal.4th at pp. 775, 779.) Consequently, "a *change* of counsel is *irrelevant*[;] instead, the Court will look to what petitioner and/or his [*then*] counsel knew or *could have known* at the time of the filing of the earlier habeas corpus petition, not at when current counsel learned of the information (*In re Clark*, *supra*, 5 Cal.4th at p. 779, italics added.)

In any event, even if this Court were to consider the supplemental allegations in petitioner's reply (Reply 4-36), petitioner has still failed to establish when any triggering facts justifying an investigation were discovered or that they could not reasonably have been discovered earlier.

In a separate section of the *petition* that glosses over the issue of substantial delay, petitioner purports to "incorporate by reference" all the allegations set forth in each of the 143 claims and merely proffers general,

across-the-board assertions of lack of delay that are wholly vague and conclusionary. (Petn. 20.) This is the very type of generic, blanket allegation that this Court specifically condemned as inadequate in 1998. (See *In re Gallego*, *supra*, 18 Cal.4th at p. 837 fn. 12 ["a petitioner does *not* allege, with *specificity*, absence of substantial delay merely by generally 'incorporating by reference' all the facts set forth in the [petition and] exhibits"].) This Court cautioned that counsel must "clearly present *in the petition* specific allegations (with appropriate references to, and description of, any supporting exhibits that may be provided) concerning when information offered in support of *each claim and subclaim* was obtained, was known, and reasonably should have been known." (*In re Robbins*, *supra*, 18 Cal.4th at p. 799, fn. 21; italics in original.) Petitioner recognizes that this practice of incorporating by reference is "disfavored" by this Court. (Reply 25.)

In sum, petitioner has failed to satisfy his burden of demonstrating that his claims nevertheless were filed without substantial delay. Although petitioner complains that respondent has propounded nothing more than "generic blanket assertions of all defaults" (Reply 12) "against virtually every claim" (Reply 13), it is *petitioner* who must "get down to details." (*In re Gallego*, *supra*, 18 Cal.4th at p. 837.) The onus is on petitioner, not respondent, to provide specific facts as to each claim, showing when he obtained the information or demonstrating that it could not reasonably have been acquired any earlier.

Accordingly, he has failed to establish an absence of substantial delay as to all claims in the filing of his petition.

3. Petitioner Has Failed to Establish Good Cause for His Substantial Delay

Here, petitioner has neither adequately explained his failure to include all of his present claims in his prior federal petition (filed by other

attorneys) nor sufficiently explicated his failure to include them in his prior state petition. He has not provided adequate reasons justifying his substantial delay in bringing the claims to this Court. Petitioner's proffered reasons are far from persuasive.

First, with regard to all the repetitive claims that were previously raised and rejected on appeal or on the prior habeas corpus proceeding, no good cause could conceivably exist, since they are not even cognizable herein. (See Args. II, IV, *post.*) Second, regarding all claims that rely exclusively upon the appellate record, petitioner has failed to establish good cause for the delay. He has neither demonstrated that prior appellate counsel was ineffective in failing to raise the claims on appeal nor shown that he was actually prejudiced by the omission.

Third, with regard to claims based on facts outside the appellate record, petitioner has not shown that all his previous habeas corpus attorneys were lax and "dropped the ball" by failing to develop and present these claims. He has failed to exclude the *real* possibility that his prior attorneys *did* consider and investigate the possible factual and legal bases for the claims and then reasonably concluded that they were lacking in potential merit or had been forfeited or waived. He has not demonstrated that his previous attorneys' failure to present these claims was not a reasonable strategic choice made after discussing the facts with petitioner's previous trial and appellate attorneys, investigators, and petitioner himself, and after reading the trial transcripts and reviewing the case files of all previous attorneys, including the murder book, the trial attorneys' file, and the defense's investigative reports. (See *People v. Williams*, *supra*, 44 Cal.3d at pp. 936-937 [declaring that "it must also appear that the omission or omissions were not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make"].)

Severely lacking in specificity as justification for the delay is petitioner's conclusory assertion that previous appellate and habeas counsel were negligent and ineffective in failing to recognize, investigate and present these claims. (Petn. 12, 17-20, 517-519.) He merely alleges that, "former counsel . . . failed to raise these issues;" that, "the only reason these claims were not raised on appeal or in the first habeas petition is because of the ineffectiveness of prior counsel;" and that "there was no strategic reason to omit the claims included in the instant petition." (Petn. 17, 517-519; Reply 8-9, 13-16, 28-30.) These unsworn and unsupported declarations fall short of the required showing. (See *In re Robbins*, *supra*, 18 Cal.4th at p. 810 ["the circumstance that present counsel has raised an issue not advanced by prior counsel does *not* itself establish inadequate performance by prior counsel"]; *In re Clark*, *supra*, 5 Cal.4th at p. 780 ["mere omission of a claim 'developed' by new counsel does *not* raise a presumption that prior habeas corpus counsel was incompetent"].)

As noted above, this Court will *not* consider successive petitions attacking the competence of prior appellate or habeas corpus counsel which are nothing more than Monday-morning quarterbacking "with the benefit of hindsight, additional time and investigative services, and newly retained experts." (*In re Clark*, *supra*, 5 Cal.4th at p. 780.) Therefore, when the proffered justification for a delayed petition is ineffectiveness of prior counsel, the petitioner must allege "with specificity" and demonstrate that the issue is one which "would have entitled petitioner to relief" had prior counsel raised it on appeal or in an earlier petition, and that "counsel's failure to do so reflects a standard of representation falling below that to be expected" of a criminal defense attorney. (*In re Clark*, *supra*, 5 Cal.4th at pp. 774, 780.) Petitioner, who must shoulder the burden of demonstrating ineffectiveness as to each and every one of his prior attorneys, has not

included the necessary allegations or made the proper showing, making his proffered justification inadequate.

Fourth, petitioner's general, conclusory allegations -- that some claims rest on newly discovered evidence that was not available earlier and that was part of an investigation into all potentially meritorious claims in an effort to avoid piecemeal litigation (Reply 6, 11, 13) -- are patently deficient. "[Such] general allegations are inadequate to establish good cause for the substantially delayed presentation of *any* claim set out in the petition. They refer only to ongoing investigation by *present* counsel, and do not demonstrate that any investigation was ongoing at the time the facts offered in support of the . . . claim were obtained or reasonably should have been discovered." (See *In re Robbins*, *supra*, 18 Cal.4th at p. 806 fn. 29.)

Fifth, petitioner's implication that he had to wait until he could conduct a federally funded plenary investigation in conjunction with his preparation of the federal habeas neither explains nor justifies the failure to include the claims in the prior habeas corpus petition. (Reply 7-8, 13-14.) This Court has made it clear that delay in the presentation of claims cannot be justified on the basis of an assertion that the investigation was "ongoing" if there are any unexplained delays or intervals between investigations. (*In re Robbins*, *supra*, 18 Cal.4th at p. 806 fn. 28 [observing that good cause for delayed presentation cannot be shown where perfected claims "sat on the shelf while there was *no* ongoing investigation into other potentially meritorious claims"]; *In re Gallego*, *supra*, 18 Cal.4th at p. 838 fn. 13.) The "ongoing-investigation-of-other-claims" rationale disappears with the first gap occurring between the filing of the first habeas petition or the denial by this Court of a confidential request for funding and the date when federal habeas corpus counsel is appointed or when federal counsel receive federal funding with which to conduct an investigation. (*In re Robbins*, *supra*, 18 Cal.4th at pp. 805-806 [declaring that the ongoing-investigation

component of good cause falters where months or years pass between the filing of the state habeas petition and the initiation of the investigation by federal habeas corpus attorneys].)

Sixth, petitioner's possible allegation that he was conducting an ongoing investigation into several claims cannot withstand close scrutiny. (Reply 8, 14.) There is a huge difference between a legitimate ongoing investigation and a fishing expedition. Petitioner has not established that the claims allegedly being investigated while the petition was put on a shelf awaiting their development were clearly potentially meritorious claims.

Petitioner does not assert or even imply that certain claims were perfected and then delayed for good cause pending his completion of an ongoing investigation into any other matter. (Reply 8, 13.) Nor does petitioner allege or suggest as good cause for delay that, although he was aware of the information offered in support of the claims, he recognized that, by itself, a particular claim did not state a prima facie case and, accordingly, he withheld it until he discovered other related claims that rose to the level of a prima facie case. Indeed, petitioner's contentions are to the contrary: he attests generally that he was unaware of both the factual and legal basis of any of the claims, and also asserts this particular claim as an independent basis for relief.

As noted above, petitioner has the burden to "explain and justify" (*In re Clark*, *supra*, 5 Cal.4th at p. 783), "fully disclose his reasons for" (*In re Walker*, *supra*, 10 Cal.3d at p. 774), or, in other words, "demonstrate good cause for" (Policy 3, *supra*, std. 1-2) the substantial delay of his present *and* prior attorneys. (See *In re Robbins*, *supra*, 18 Cal.4th at p. 807, fn. 29.) His delay cannot be excused based on any reason or factual supposition that he has not actually advanced. "Good cause" justifications cannot be ascribed to petitioner that conflict with his own allegations. (*Ibid.*)

Thus, petitioner has failed to carry his burden of demonstrating good cause for the delay.

4. Petitioner Has Not Shown That Any Exception to the Bar of Untimeliness Applies

Having failed to adequately explain and justify not raising the above-listed claims in a prior habeas corpus petition, those claims will be barred unless petitioner has alleged facts demonstrating a fundamental miscarriage of justice.

> 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.

(*In re Clark*, *supra*, 5 Cal.4th at p. 759; see also *In re Robbins*, *supra*, 18 Cal.4th at p. 811.) In assessing whether the first three exceptions apply, it is assumed that a federal constitutional error is stated. (See *In re Robbins*, *supra*, 18 Cal.4th at pp. 811-812; see also *In re Gallego*, *supra*, 18 Cal.4th at p. 839 fn. 14.)

As to all the unjustified successive claims cited above, however, petitioner has alleged no *facts* demonstrating a fundamental miscarriage of justice so as to permit consideration of the claims on the merits. He alleges in conclusory language -- but does not establish -- that errors of constitutional magnitude led to a fundamentally unfair trial. He also avers that the sentencer had a grossly misleading profile of him. (Petn. 18; Reply 14-15.)

Respondent begs to differ, and, in any event, petitioner's showing is too conclusory to be given any credence. Petitioner does not demonstrate as to any claim that, on the basis of the entire record, and pursuant to the application of state law, the assumed constitutional error was of such magnitude as to lead to a trial that was so fundamentally unfair that no reasonable juror would have convicted him in the absence of the error. (See *In re Robbins*, *supra*, 18 Cal.4th at pp. 811-812; *In re Clark*, *supra*, 5 Cal.4th at p. 797.) As found by this Court on direct appeal, the evidence of appellant's guilt was overwhelming and was supported by his full confession and by other corroborative evidence. (*Memro II*, *supra*, 11 Cal.4th at pp. 862-863.) There is no indication that the alleged errors substantially affected the fundamental fairness of the trial, the truth-ascertainment process, the accuracy of the guilt or special-circumstance determinations, or the appropriateness of the death-penalty determination. The first exception is inapposite.

Second, petitioner's claims do not suggest, much less establish, that he is actually innocent of the crimes of which he was convicted. He merely states, in conclusory terms, that he "is innocent" and that the verdict "is unreasonable." (Reply 26-27.) None of the proffered evidence rises to -- or even approaches -- the requisite level of proof: "irrefutable evidence of innocence of the offense or the degree of offense of which the petitioner was convicted. (See *In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33.) The purported evidence of innocence does not undermine the entire prosecution case or point unerringly to innocence or reduced culpability. (See *In re Robbins*, *supra*, 18 Cal.4th at p. 812.) At most, the evidence he now offers is evidence that the prosecution could easily refute and any reasonable juror would reject. The second exception is inapplicable.

Third, based upon the facts of this case and the averments presented in the petition, it has not been established that the profile portrayed of

petitioner at the penalty phase was so grossly misleading and inaccurate that absent the error or omission no reasonable judge or jury would have imposed a sentence of death. (Petn. 18-19; Reply 27; see *In re Robbins*, *supra*, 18 Cal.4th at p. 813; *In re Clark*, *supra*, 5 Cal.4th at p. 798.) On the contrary, the evidence relied upon by the prosecutor at the penalty phase in asking the jury to vote for death was primarily evidence of the circumstances surrounding petitioner's commission of the instant offenses, as well as evidence of one prior violent incident to which petitioner has confessed. Thus, based on the entire record, it must be concluded that none of the evidence would bring petitioner within this exception.

Fourth, and finally, none of the claims implicate the exception for conviction or sentencing under an invalid statute. (See *In re Robbins*, *supra*, 18 Cal.4th at p. 813.) Petitioner baldly asserts that he was convicted and sentenced under an invalid statute. (Reply 15.) He fails to acknowledge, however, that this Court rejected that contention on direct appeal and upheld the constitutionally validity of the death penalty statute. Thus, this exception, like the other three, does not apply.

To summarize, petitioner has not carried his burden of establishing the timeliness of his petition. He has failed to establish the absence of substantial delay, good cause for such delay, or the applicability of any exception to the bar of untimeliness. Thus, all of the above-listed claims should be denied as untimely.

II. PETITIONER HAS ABUSED THE WRIT BY FAILING TO ALLEGE SUFFICIENT FACTS INDICATING CERTAIN CLAIMS IN THE HABEAS CORPUS PETITION ARE COGNIZABLE DESPITE HAVING BEEN RAISED AND REJECTED ON DIRECT APPEAL

As a general rule, "habeas corpus will not serve as a second appeal." (*In re Foss* (1974) 10 Cal.3d 910, 930; see also *In re Terry* (1971) 4 Cal.3d 911, 927.) Where a claim was already raised and rejected on the direct appeal, this Court will ordinarily decline to examine it again and will summarily deny it. (*In re Waltreus* (1965) 62 Cal.2d 218, 225; see also *In re Winchester* (1960) 53 Cal.2d 528, 532.) "Issues resolved on appeal will not be reconsidered on habeas corpus" absent either strong justification or the applicability of at least one of four narrow exceptions. (*In re Harris*, *supra*, 5 Cal.4th at pp. 825-829, & fn. 3; *In re Clark*, *supra*, 5 Cal.4th at p. 765.)

If established procedural rules are followed, habeas corpus "may provide an avenue of relief to those unjustly incarcerated when the normal method of relief – i.e., direct appeal – is inadequate." (*In re Harris*, *supra*, 5 Cal.4th at p. 828; accord *In re Sanders*, *supra*, 21 Cal.4th at p. 703.) But "[t]he scope of habeas corpus is more limited" in that it serves as a narrow "avenue of relief to those for whom the standard appellate system failed to operate properly," not as an "inappropriately broad" boulevard open to free-ranging abuse. (*In re Harris*, *supra*, 5 Cal.4th at pp. 828, 832, 834.) "Proper appellate procedure thus demands that, . . . in the absence of strong justification, any issue that was actually raised and rejected on appeal cannot be renewed in a petition for a writ of habeas corpus because "[c]ourts will presume that the elaborate appellate system established by the state Constitution and the Legislature was sufficient to allow a person to present adequately his or her grievances for judicial review." (*Id.* at p. 829, citing *In re Waltreus*, *supra*, 62 Cal.2d at p. 225.)

A habeas corpus petitioner therefore bears a heavy burden to demonstrate sufficient justification warranting review on habeas corpus of a claim that was already rejected on direct appeal. A claim rejected on appeal may warrant reconsideration based on newly discovered, additional information that was not in the appellate record, but that casts new light on the issue. (*In re Robbins*, *supra*, 18 Cal.4th at p. 815 fn. 34.) However, the *Waltreus* bar will nonetheless be applied to the claim if the new evidence or exhibit "contains nothing of substance not already in the appellate record." (*Ibid.*)

Moreover, this previously rejected appellate ground must first be found to qualify under one of the now-familiar four exceptions to the *Waltreus* rule which this Court has developed and "set out in *In re Harris*, *supra*, 5 Cal.4th 813." (*In re Robbins*, *supra*, 18 Cal.4th at p. 815 fn. 34.)

The first exception is for those "rare" cases where the right allegedly violated was a "clear" and "fundamental" constitutional right that struck "at the heart of the trial process," amounting to a structural defect that so fatally infected the trial as to result in a miscarriage of justice. (*In re Harris*, *supra*, 5 Cal.4th at pp. 829-837, citing *In re Winchester*, *supra*, 53 Cal.2d at p. 532.) The second exception is for the even rarer case where the judgment under collateral attack was rendered by a court "wholly lacking in fundamental jurisdiction over the subject matter or the party." (*In re Harris*, *supra*, 5 Cal.4th at pp. 836-838.) The third "narrow" exception is for cases where the trial court may be said to have acted "in excess of jurisdiction," as in cases involving an illegal, unauthorized sentence. (*In re Harris*, *supra*, 5 Cal.4th at pp. 838-841.) The fourth exception is for claims rejected on appeal based on settled precedent that has subsequently been overruled and is no longer controlling because the new rule applies retroactively to all cases. (*In re Harris*, *supra*, 5 Cal.4th at p. 841.)

This procedural bar applies to petitioner. The following claims were presented and rejected by this Court on direct appeal: Claims 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 15, 16, 17, 18, 19, 24, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 44, 45, 47, 48, 49, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 70, 71, 73, 77, 80, 81, 83, 84, 91, 93, 96, 98, 112, 113, 121, 123, 125, 126, 127, 128, 129, 130, and 135.

Petitioner avers in conclusionary terms -- but does not establish -- that he qualifies under one of the above-listed *Harris* exceptions. (Reply 17.) He states that his allegations and supporting documents "establish that the violations of [his] rights are clear and fundamental and strike at the heart of the trial process . . . ." (Reply 17.) Clearly, this is insufficient. Consequently, it is apparent that petitioner is unjustifiably attempting to rework old issues already decided by this Court on direct appeal. He should not be permitted to put new clothes on claims that previously wore appellate garments.

Thus, the above-cited claims should be denied as repetitive.

III. PETITIONER HAS ABUSED THE WRIT BY FAILING TO ALLEGE SUFFICIENT FACTS INDICATING CERTAIN CLAIMS IN THE PETITION ARE COGNIZABLE DESPITE THE FACT THEY COULD HAVE BEEN RAISED ON APPEAL, BUT WERE NOT INCLUDED

When an issue could have been, but was not, raised on appeal, the unjustified failure to present it on appeal generally precludes its consideration in a post-appeal habeas corpus petition. (*In re Harris*, *supra*, at p. 829. As a general rule, "habeas corpus cannot serve as a substitute for an appeal." (*In re Dixon* (1953) 41 Cal.2d 756, 759.) "It is the *appeal* that provides the basic and primary means for raising challenges to the fairness of the trial." (*In re Robbins*, *supra*, 18 Cal.4th at p. 777.)

The petitioner clearly bears the burden to provide "a satisfactory reason for not resorting to his remedy of appeal" with regard to the claims

presented on habeas, and "in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." (*In re Shipp*, *supra*, 62 Cal.2d at pp. 552-553, quoting *In re Dixon*, *supra*, 41 Cal.2d at p. 759; see also *In re Mitchell* (1961) 56 Cal.2d 667, 671; *In re Chapman* (1954) 43 Cal.2d 385, 390.) By definition, the facts underlying any appellate-type issue omitted by appellate counsel were previously known, since such an issue can be based only on the trial record. Therefore, the decision not to raise this issue cannot be attributed to any lack of awareness by appellate counsel of the predicate facts.

This procedural bar applies to petitioner. He presents no special circumstances that would rescue his case from the general rule.

The following claims are based solely on the trial record and therefore could have been raised on appeal:

Claims 7, 11, 13, 14, 22, 23, 25, 26, 34, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 69, 72, 74, 75, 76, 78, 79, 82, 85, 88, 89, 90, 92, 95, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 110, 111, 114, 115, 116, 117, 122, 124, 131, 133, 134, 140, and 143. They are therefore barred. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.)

Petitioner fully recognizes that these claims could have been presented on appeal because they are based on the trial record, but nonetheless insists that their omission on appeal was the result of ineffective assistance of appellate counsel. (Petn. 517-518; Reply 8-9, 13-14, 28-30.) The argument is unavailing.

"In *limited* circumstances, consideration may be given to a claim that prior [appellate] counsel did not competently represent a petitioner." (*In re Clark*, *supra*, 5 Cal.4th at p. 779, italics added; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 719; *In re Harris*, *supra*, 5 Cal.4th at pp. 832-833; *In*

re Dixon, *supra*, 41 Cal.2d at pp. 759-760.) However, when a petitioner proffers prior counsel's failure to afford adequate representation on appeal as an explanation and justification for the need to file a second habeas corpus petition, he must first demonstrate that appellate counsel's performance was deficient in that his failure to recognize and present the assignment of error reflects a standard of representation falling below that to be expected from reasonably competent defense attorneys. (*In re Clark*, *supra*, 5 Cal.4th at p. 780; accord *In re Sanders*, *supra*, 21 Cal.4th at pp. 719-720; see generally *Strickland v. Washington*, 466 U.S. at pp. 687-688; *In re Banks, supra,* 4 Cal.3d at p. 343.) In addition, it is incumbent on petitioner to allege with specificity "that the issue is one which would have entitled petitioner to relief" had counsel raised it on appeal. (See *In re Clark*, *supra*, 5 Cal.4th at p. 780 [requiring specificity when alleging that the inadequate omission of any issue reflects incompetence of counsel as justification for filing a successive and/or delayed petition]; see also *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694; *In re Smith* (1970) 3 Cal.3d 192, 202.)

There is a strong presumption that counsel exercised good judgment in determining whether there existed potentially meritorious claims, and, if so, which ones had a more reasonable chance of success. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 689-690.) Appellate counsel -- who are not obligated to pile on every conceivable claim under pain of being branded incompetent -- should not be second-guessed without a compelling showing of a manifest miscalculation in deciding which issues to present from the myriad of possible claims. (*In re Clark*, *supra*, 5 Cal.4th at p. 780.) As noted above, the judicious selection of issues to raise is a core exercise of appellate advocacy, and the hallmark of a good appellate attorney is the ability to sift out the less meritorious claims. (*In re Sanders*, *supra*, 21 Cal.4th at pp. 705, 713, fn. 8; *People v. Williams*, *supra*, 44

Cal.3d at pp. 936-937.) Appellate counsel cannot be found derelict when they "exercise discretion and present only the strongest claims instead of every conceivable claim." (*In re Robbins*, *supra*, 18 Cal.4th at p. 810; citing *Jones v. Barnes, supra,* 463 U.S. at p. 745; *Smith v. Murray, supra*, 477 U.S. at p. 536.)

Furthermore, appellate counsel cannot be faulted for not including claims on direct appeal that were waived or forfeited at the trial. (See *In re Harris*, *supra*, 5 Cal.4th at p. 828, fn. 7.) Thus, appellate counsel were justified in not raising the following claims as to which the issue had been forfeited or waived, but which could easily have been presented in the first habeas corpus petition under the rubric of ineffective assistance of counsel: Claims 13, 14, 22, 23, 35, 42, 43, 50, 51, 52, 53, 54, 55, 64, 72, 74, 75, 76, 78, 79, 82, 101, 114, 115, 116, 117, 119, 124

Here, petitioner has failed to carry his burden of showing that the attorneys who represented him on direct appeal performed below an objective standard of reasonable competence in selecting which claims to make on direct appeal. Petitioner's assertions in the petition of ineffective assistance of appellate counsel are not specific. (Petn. at 17, 517-518; Reply 17.) Therefore, his proffered justification for seeking a second appeal is inadequate.

In addition, to establish constitutionally defective representation by appellate counsel sufficient to justify raising appellate-type issues that were withheld from the appeal, new counsel must demonstrate that the petitioner was actually prejudiced by prior counsel's omission of the claim. (*In re Robbins*, *supra*, 18 Cal.4th at p. 805; *In re Harris*, *supra*, 5 Cal.4th at p. 833; *In re Clark*, *supra*, 5 Cal.4th at pp. 774, 780; see generally *Strickland v. Washington, supra,* 466 U.S. at p. 687-696.) Here, petitioner has failed to meet his burden of demonstrating actual prejudice as a result of any of the alleged shortcomings. Thus, the procedural bar applies.

As noted above (see Arg. II, *ante*), absent the necessary justification, an appellate-type issue will not be entertained on habeas corpus unless: (1) "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process" (*In re Harris*, *supra*, 5 Cal.4th at p. 834); (2) the confining court lacked subject matter jurisdiction (id. at p. 836); (3) the confining court acted in excess of its jurisdiction (id. at p. 840); or (4) the issue is based on intervening new law (id. at p. 841). Petitioner asserts, again in conclusory terms, that the first of these exceptions applies. (Petn. 517-518; Reply 17.) Even assuming that he did, the first exception goes beyond a "mere assertion that one has been denied a 'fundamental' constitutional right." (*In re Harris*, *supra*, 5 Cal.4th at p. 834.)

Rarely will a denial of a fundamental constitutional right be one which also "strik[es] at the heart of the trial process." (*Id.* at p. 836.) Although this Court has not yet defined the exact boundaries of this exception (*ibid.*), it is narrower than ordinary reversible error which results in a miscarriage of justice. (*Id.*, at p. 834 [*Waltreus* exception for error which results in a miscarriage of justice, discussed in *In re Winchester, supra,* 53 Cal.2d at p. 532, is inappropriately broad].) Arguably the exception may encompass only errors which can never be harmless, e.g., complete denial of counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335, 341 [83 S.Ct. 792, 9 L.Ed.2d 799]). In any event, petitioner's conclusory assertion of "miscarriage of justice" (Petn. 18, 21) is inadequate and not unfounded.

Even assuming arguendo the claimed constitutional errors would be ordinarily reversible in the appellate context, they do not fall within the boundaries of errors that are both clear and fundamental errors and ones which strike at the heart of the trial process. (*In re Harris*, *supra*, 5 Cal.4th at p. 834.) Petitioner alleges in conclusory terms that

Thus, the above-cited claims should be denied as successive.

IV. PETITIONER HAS ABUSED THE WRIT BY FAILING TO ALLEGE SUFFICIENT FACTS INDICATING CERTAIN CLAIMS ARE COGNIZABLE DESPITE HAVING BEEN RAISED AND REJECTED IN HIS 1995 PETITION FOR WRIT OF HABEAS CORPUS

As noted above, piecemeal collateral attacks are not countenanced, and repetitious presentation of previously denied claims is not condoned. (*In re Clark, supra*, 5 Cal.4th at p. 767, 777.) "It has long been the rule that absent a change in the applicable law or the facts, the court will not [even] consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark, supra*, 5 Cal.4th at p. 767, citing *In re Terry, supra,* 4 Cal.3d at p. 921, fn. 1.) "Thus, "[i]t is the policy of this Court to deny an application for habeas corpus which is based upon grounds urged in a prior petition which has been denied, where there is shown no change in the facts or the law substantially affecting the rights of the petitioner." (*In re Horowitz* (1949) 33 Cal.2d 534, 546-547; *In re Miller* (1941) 17 Cal.2d 734, 735; see also *In re De La Roi* (1946) 28 Cal.2d 264, 275.)

This procedural bar applies to petitioner. This is the second time petitioner has collaterally attacked his 1987 conviction in this Court. His first habeas petition was filed 85 days after the filing of his reply brief on direct appeal in *Memro II*. This Court denied the 1995 habeas corpus petition "on the merits" on June 28, 1995. (*In re Memro*, case no. S044437.)

In this second habeas corpus petition, petitioner has presented all the claims that were raised in the 1995 habeas corpus petition and rejected by this Court on the merits. These repetitive claims are in derogation of this Court's policy to deny an application for habeas corpus that is based upon the same grounds urged in a prior petition that was denied on the merits. Contentions that concern matters previously disposed of by this Court in

denying a prior petition are generally not cognizable, not because they are being denied on the same grounds on which they were previously rejected, but because this Court is invoking a procedural bar to their reconsideration. (*In re Lynch* (1972) 8 Cal.3d 410, 439 fn. 26.)

The following claims are repetitious, in that he presented them to this Court in his first petition: Claims 5, 7, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26, 29, 30, 34, 36, 37, 63, 69, 86, 87, 89, 90, 93, 94, 100, 101, 102, 104, 107, 108, 109, 110, 118, 120, 121, 122, 127, and 140. Thus, this Court's rejection of these claims is a procedural bar to pursuing them here.

A habeas corpus petitioner bears a heavy burden to demonstrate sufficient justification warranting review on habeas corpus of a claim that was already rejected in previous habeas corpus proceedings. This Court has developed the now-familiar four exceptions to the *Waltreus* rule over the years, which also apply to claims that are raised again after previous rejection on habeas corpus. (See Arg. II, *ante*) Absent the necessary justification, an issue that has already be rejected by the Court will not be entertained on habeas corpus unless: (1) "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process" (*In re Harris*, *supra*, 5 Cal.4th at p. 834); (2) the confining court lacked subject matter jurisdiction (id. at p. 836); (3) the confining court acted in excess of its jurisdiction (id. at p. 840); or (4) the issue is based on intervening new law (id. at p. 841).

Petitioner does not assert that these exceptions apply to his previously rejected habeas corpus claims. (Petn. 517-518; Reply 14.) Even assuming that he did make the appropriate allegations, he has failed to make the necessary showing. He has not alleged, much less demonstrated, that the trial court lacked jurisdiction or acted in excess of its jurisdiction or that the law has changed with regard to a particular claim that was previously rejected.

The first exception goes beyond a "mere assertion that one has been denied a 'fundamental' constitutional right." (*In re Harris*, *supra*, 5 Cal.4th at p. 834.) Rarely will a denial of a fundamental constitutional right be one which also "strik[es] at the heart of the trial process." (*Id.* at p. 836.) Although the Court has not yet defined the exact boundaries of this exception (ibid.), it is narrower than ordinary reversible error which results in a miscarriage of justice. (*Id.*, at p. 834 [*Waltreus* exception for error which results in a miscarriage of justice, discussed in *In re Winchester* (1960) 53 Cal.2d 528, 532, is inappropriately broad].) Arguably the exception may encompass only errors which can never be harmless, e.g., complete denial of counsel (*Gideon v. Wainwright*, *supra,* 372 U.S. 335). In any event, petitioner's conclusory assertion of "miscarriage of justice" (Petn. 18, 21) is inadequate and not well-founded.

Thus, the above-cited claims should be denied as repetitive.

V. PETITIONER HAS ABUSED THE WRIT BY FAILING TO ALLEGE SUFFICIENT FACTS INDICATING CERTAIN CLAIMS IN THE PETITION ARE COGNIZABLE DESPITE THE FACT THEY COULD HAVE BEEN RAISED IN HIS 1995 HABEAS CORPUS PETITION

As noted above, piecemeal collateral attacks on a final judgment are not condoned. (*In re Clark* (1993) 5 Cal.4th 750, 769-770.) "The petitioner cannot be allowed to present his reasons against the validity of the judgment against him piecemeal by successive proceedings for the same general purpose." (*In re Drew* (1992) 188 Cal. 717, 722.) "[R]epetitious successive petitions are not permitted," and "unjustified successive petitions will not be entertained on the merits, unless the factual basis for the claim was "unknown to the petitioner and he had no reason to believe that the claim might be made." (*In re Clark*, *supra*, 5 Cal.4th at p. 775; see also *In re Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9.)

Thus, a petitioner is procedurally barred from presenting "new grounds based on matters known to the petitioner at the time of previous [collateral] attacks upon the judgment." (*In re Horowitz*, *supra*, 33 Cal.2d at pp. 546-547.)

This procedural bar applies to petitioner. As noted above (see Arg. IV, *ante*), petitioner returns to this Court for habeas corpus relief nine years after his first habeas corpus petition was denied on the merits. However, the predicate facts for his new claims were known or discoverable at the time he prepared and filed his first habeas corpus petition.

Here, nearly all of petitioner's new, non-repetitive claims are based on facts which were known to him or his attorneys, or were available and discoverable by him or his attorneys, at the time of his earlier habeas corpus petition. The other claims are pure issues of law and could have been presented in the first habeas corpus petition. As to all non-repetitive claims, the proffered explanations and justifications for not including the claims in his earlier habeas corpus petition are inadequate. Thus, every single new claim presented herein could have been presented in the first habeas corpus petition.

The following claims are successive, and there is no justification for not including them in the first habeas petition, since they arise from facts apparent in the trial and appellate record: Claims 11, 13, 14, 22, 23, 35, 42, 43, 46, 50, 51, 52, 53, 54, 55, 64, 72, 74, 75, 76, 78, 79, 82, 85, 88, 92, 95, 97, 99, 103, 105, 106, 111, 114, 115, 116, 117, 123, 124, 130, 131, 133, 134, 135, 136, 137, 138, 139, 140, 141, and 143.)

The following claims are successive, and there is no justification for not presenting them in the first habeas petition, because, to the extent that they are based on facts outside the trial record, they are stem from facts that either were known or could have been known--through the exercise of reasonable diligence--at the time of trial or at the time of the filing of the

earlier habeas corpus petition: 71, 88, 91, 107, 108, 109, 119, 124, 127, 131, 133, 134, 135, 136, 137, 138, 139, 140, and 141.

Moreover, the petitioner has the initial burden "of giving a satisfactory reason for not resorting to his remedy of appeal." (*In re Shipp*, *supra*, 62 Cal.2d at p. 553; see also *In re Clark*, *supra*, 5 Cal.4th at p. 798 fn. 35.) Furthermore,

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

(*In re Clark*, *supra*, 5 Cal.4th at p. 775.)

Therefore, before the claims in this successive petition may be entertained on their merits, petitioner must either (1) adequately explain and justify his failure to present them in a prior habeas corpus petition or (2) allege facts demonstrating a fundamental miscarriage of justice. (See *In re Clark*, *supra*, 5 Cal.4th at pp. 768, 782, 774-775; see also *In re Robbins*, *supra*, 18 Cal.4th at p. 788, fn. 9.) If the factual basis of a claim was previously unknown to the petitioner, and he had no reason to know of or discover the claim, the claim will be considered on the merits if asserted promptly even when presented in a successive petition. (*In re Clark*, *supra*, 5 Cal.4th at p. 775.) However, the Court will look to not just what petitioner himself knew, but also to what his then counsel, at the time of the prior habeas corpus petition, knew, and to whether the facts could have been discovered earlier, either by petitioner or by his attorney, in the exercise of due diligence. (*Id.* at pp. 775, 779.)

Furthermore, even if it is proven that the predicate facts for a claim were only recently discovered and could not reasonably have been discovered any earlier, the "newly discovered evidence is a basis for relief only if it undermines the prosecution's entire case." (*In re Clark, supra*, 5 Cal.4th at p. 766.) Generally, collateral attack on the judgment "is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension." (*In re Clark, supra*, 5 Cal.4th at pp. 766-767.) However, "trial errors, even though of constitutional dimension, are not cognizable on habeas corpus [unless] the error 'carries with it [a] risk of convicting an innocent person.'" (*Id.* at p. 767, quoting *In re Sterling* (1965) 63 Cal.2d 486, 487.)

"It is *not* sufficient that the [new] evidence might have *weakened* the prosecution case or presented a *more difficult question* for the judge or jury." (*In re Clark, supra*, 5 Cal.4th at p. 766 (italics added), citing *In re Hall* (1981) 30 Cal.3d 408, 417; *In re Weber* (1974) 11 Cal.3d 703, 724; and *In re Branch* (1969) 70 Cal.2d 200, 215.) Thus, "a criminal judgment may be collaterally attacked on the basis of 'newly discovered' evidence only if the 'new evidence' casts fundamental doubt on the accuracy and reliability of the proceedings." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1246.)

As his reason for not raising this final classification of claims in an earlier habeas corpus petition, petitioner suggests that both prior state habeas corpus counsel were ineffective. (Petn. 17-18, 517-519; Reply 8-9, 13-15, 25-30.) Since petitioner's assertions of ineffective assistance of habeas corpus counsel are not specific, his proffered justification for filing successive claims in a second habeas corpus petition is inadequate. Were this Court to accept petitioner's assertions as justification for the successive claims, this Court would increase, not reduce, the incentive to delay.

"In *limited* circumstances, consideration may be given to a claim that prior habeas counsel did not competently represent a petitioner." (*In re Clark*, *supra*, 5 Cal.4th at p. 779, italics added; see also see also *In re Harris*, *supra*, 5 Cal.4th at pp. 832-833; *In re Dixon*, *supra*, 41 Cal.2d at pp. 759-760.) However, when a petitioner proffers prior counsel's failure to afford adequate representation in a prior habeas corpus application as an explanation and justification for the need to file a second habeas corpus petition, he must first demonstrate that prior counsel's failure to identify, investigate, develop, and present the claim reflects a standard of representation falling below that to be expected from reasonably competent defense attorneys. (*In re Clark*, *supra*, 5 Cal.4th at p. 780; see also *In re Banks*, *supra*, 4 Cal.3d at p. 343.) In addition, it is incumbent on petitioner to allege with *specificity* "that the issue is one which would have entitled petitioner to relief" had counsel raised it on appeal. (See *In re Clark*, *supra*, 5 Cal.4th at p. 780 [requiring *specificity* when alleging that the inadequate omission of any issue reflects incompetence of counsel as justification for filing a successive and/or delayed petition]; *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694; see also *In re Smith*, *supra*, 3 Cal.3d at p. 202.)

Here, according to petitioner, his current counsel allegedly discovered the claims only after their appointment by the federal court on December 18, 2001. (Petn. 17; Reply 7-9.) However, as noted above, "a *change* of counsel is *irrelevant* to whether the merits of claims raised for the first time in a successive petition should be entertained." (*In re Clark*, *supra*, 5 Cal.4th at p. 779, italics added; see also *In re Harris*, *supra*, 5 Cal.4th at p. 765 [noting that the burden to explain reasons for a belated collateral attack "is not met by an assertion of counsel that he or she did not represent the petitioner earlier"].) Instead, the Court will look to what petitioner and/or his [*then*] counsel knew or *could have known* at the time of the filing of the

earlier habeas corpus petition, not at when current counsel learned of the information. (*In re Clark*, *supra*, 5 Cal.4th at p. 779; italics added.) "Any other rule would put a premium on repeated changes of counsel, and would wholly undermine the policy underlying the court's refusal to consider the merits of successive petitions offering piecemeal presentation of claims." (*Ibid*; see also *id.* at p. 765, fn. 6.)

Granted, consideration may be given to a claim that prior habeas corpus counsel did not adequately represent counsel. But "mere omission" of a newly developed claim does not establish prior habeas corpus counsel incompetency. (*In re Clark*, *supra*, 5 Cal.4th at pp. 779-780.) The petitioner must allege "with specificity" the facts underlying an assertion that the omission of a claim reflects incompetence of counsel. (*Id.* at p. 780.)

This means petitioner must allege with factual specificity "the issue is one which would have entitled the petitioner to relief had it been raised and adequately presented in the initial petition, and that counsel's failure to do so reflects a standard of representation falling below that to be expected from an attorney engaged in the representation of criminal defendants." (*In re Clark*, *supra*, 5 Cal.4th at p. 780.) Furthermore, the petitioner must establish to a "demonstrable reality" that the newly discovered evidence is sufficient to show that the verdict was unreliable or that constitutional trial error risked convicting an innocent person. (*Id.*, at pp. 766-767.)

Habeas corpus counsel is under *no* obligation to conduct an "unfocused investigation," to uncover "*any* possible factual basis for collateral attack," or to venture into areas of questionable merit. (*In re Clark*, *supra*, 5 Cal.4th at p. 784; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 713, fn. 8 [noting that ""although we often see voluminous habeas corpus petitions in capital cases, raising dozens of issues and sub-claims, accompanied by hundreds of pages of exhibits, we emphasize that counsel

should present *only* those claims that are potentially meritorious, *not* all *possible* claims"].) "Counsel is not expected to conduct an unfocused investigation grounded on mere speculation or hunch, without any basis in triggering fact." (*In re Robbins*, *supra*, 18 Cal.4th at pp. 781-782 & fns. 13, 14; accord *In re Gallego*, *supra*, 18 Cal.4th at p. 836 fn. 10; see also *In re Robbins*, *supra*, 18 Cal.4th at p. 794.) "[C]ounsel is neither required nor expected to launch habeas corpus investigations to explore . . . speculative possibilit[ies] . . . . We do not expect counsel to undertake, nor need this Court fund, [any] unfocused fishing expeditions." (*In re Robbins*, *supra*, 18 Cal.4th at p. 793; see also *id.* at p. 803 fn. 25.)

> Furthermore, if the petitioner is aware of facts that may be a basis for collateral attack, and of their potential significance, he may not fault counsel for failing to pursue that theory of relief if the petitioner failed to advise counsel of those facts. Moreover, mere omission of a claim 'developed' by new counsel does not raise a presumption that prior habeas corpus counsel was incompetent, or warrant consideration of the merits of a successive petition. Nor will the court consider on the merits successive petitions attacking the competence of trial or prior habeas corpus counsel which reflect nothing more than the ability of present counsel with the benefit of hindsight, additional time and investigative services, and newly retained experts, to demonstrate that a different or better defense could have been mounted had trial counsel or prior habeas corpus counsel had similar advantages.

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

Here, petitioner's conclusory allegations fail to make the requisite showing. (Petn. 17-18, 517-519.) He suggests that the same appellate counsel who failed to recognize the claims in the first instance could not be expected to recognize his own ineffectiveness for failing to spot the errors. (Petn. 517-519.) This does not satisfy the requirement either, however.

"[A]bsent justification for the failure to present all known claims in a single, timely petition for writ of habeas corpus, successive and/or untimely

petitions will be summarily denied." (*In re Clark*, *supra*, 5 Cal.4th at p. 797.) "The only exception to this rule are petitions which allege facts which, *if proven*, would establish that a *fundamental* miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence." (*Ibid.*)

Thus, for purposes of the exception to the procedural bar against successive or untimely petitions,

> 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.

(*In re Clark*, *supra*, 5 Cal.4th at p. 759, 797-798.)

Here, petitioner claims, in conclusory terms, that all his claims "are meritorious and demonstrate that a fundamental miscarriage of justice occurred." (Reply 26.) He also contends that he should be excused from including the claims in his first habeas corpus petition because he is "innocent of the charged crime of first degree murder and the special circumstance and the resulting death sentence." (Reply 26-27.) Not so.

As argued above (Arg. I, *ante*), petitioner does not actually *demonstrate* that he qualifies under these exceptions. Having failed to adequately explain and justify his not failure to raise the above-listed claims in a prior habeas corpus petition, his claims are barred. With regard to the four exceptions listed in *Clark*, petitioner has failed to allege facts demonstrating a fundamental miscarriage of justice. Regarding the exception for "error of constitutional magnitude [that] led to a trial that was

so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner" (*In re Clark*, 797), petitioner has not made a persuasive showing that, absent the alleged constitutional violations, he would not have been convicted. (See *In re Clark*, *supra*, 5 Cal.4th at p. 798.) He has not demonstrated that the excluded evidence was such that it would "undermine the entire prosecution case and point unerringly to innocence or reduced culpability. (See *People v. Gonzalez*, *supra*, 51 Cal.3d 1179, 1246.)

Similarly, with regard to the exception for actual innocence, petitioner has barely alleged (Reply 26-27), but certainly has not shown, that the "newly discovered, irrefutable evidence of innocence of the offense or degree of offense" was such that it would "undermine the entire prosecution case and point unerringly to innocence or reduced culpability. (See *People v. Gonzalez*, *supra*, 51 Cal.3d 1179, 1246.) Evidence that merely raises a reasonable doubt as to guilt or that a reasonable jury could have rejected falls far short of demonstrating actual innocence. (*In re Clark*, *supra*, 5 Cal.4th at p. 798.) Here, he has not met his "heavy burden" of "satisfying the Court that the evidence of innocence could not have been, and presently cannot be, refuted. (*In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33.) "Evidence relevant only to an issue already disputed at trial, which does no more than conflict with trial evidence, does not constitute "'new evidence' that fundamentally undermines the judgment.'" (*In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33; *People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1247.)

With regard to the exception for a "grossly misleading profile" leading the jury to vote for death, "*accurate* evidence relevant to a petitioner's culpability and the appropriateness of the death penalty does *not* paint a 'grossly misleading' picture . . . regardless of whether the evidence was erroneously admitted." (*In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 34; italics added; accord *In re Robbins*, *supra*, 18 Cal.4th at p.

813.) Of course, false or perjured evidence may create a distorted or "grossly misleading profile. (*In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 34.) However, "not all false or perjured evidence will create a 'grossly misleading profile." (*In re Robbins*, *supra*, 18 Cal.4th at p. 813.) Here, petitioner contends that the evidence presented at the penalty phase was "inadequate," but makes no claim that false or misleading evidence was presented at the penalty phase. (Reply 27.)

A "grossly misleading profile" is "*not* one which simply fails to alert the jury to some *potentially* mitigating evidence." (*In re Clark*, *supra*, 5 Cal.4th at p. 798; italics added.) Rather, "[t]he picture of the defendant painted by the evidence at trial must differ *so greatly* from his actual characteristics that the court is satisfied that *no* reasonable judge or jury would have imposed the death penalty had it been aware of the defendant's true personality and characteristics." (*In re Robbins*, *supra*, 18 Cal.4th at p. 813; *In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 34; italics added.) Thus, it cannot even be debatable whether a reasonable jury would have voted for death if presented with the additional evidence mitigation.

Petitioner has not addressed the fourth exception under *Clark*, in which the petitioner was convicted under an invalid statute.

As to all the unjustified successive claims cited above, petitioner has alleged no facts demonstrating a fundamental miscarriage of justice so as to permit consideration of the claims on the merits. He does not address the limited exceptions set forth by this Court to decide whether the merits of an unjustified successive and untimely petition should be considered. Accordingly they are barred.

Thus, the above-cited claims should be denied as successive.

VI. PETITIONER HAS ABUSED THE WRIT BY FAILING TO ALLEGE SUFFICIENT FACTS INDICATING CLAIMS OF INSUFFICIENCY OF THE EVIDENCE TO SUPPORT A CONVICTION ARE COGNIZABLE IN A PETITION FOR WRIT OF HABEAS CORPUS

In Claim 67, petitioner challenges the sufficiency of the evidence to sustain the first-degree murder conviction under the felony-murder theory on Count III, and in Claim 68, he attacks the sufficiency of the evidence of premeditation and deliberation to support the first-degree murder convictions on Counts II and III. (Petn. 249-253.) The identical claims were rejected by this Court on direct appeal. (*Memro II*, 11 Cal.4th at pp. 861-864; see also *Memro I*, *supra*, 38 Cal.3d at pp. 690-699.) Aside from that procedural bar (see Arg. II, *ante*), he has further failed to demonstrate that these run-of-the-mill sufficiency-of-the-evidence claims are cognizable on habeas corpus.

"Upon habeas corpus, . . . the sufficiency of the evidence to warrant the conviction of the petitioner is not a proper issue for consideration." (*In re Lindley* (1947) 29 Cal.2d 709, 723.) Here, petitioner bases these two grounds solely on the evidence adduced at trial and does not claim that his convictions were based on perjured or false evidence knowingly presented by the prosecutor. (Petn. 249-253.) What is more, he simply ignores the rule that sufficiency claims are not cognizable on habeas and makes no attempt whatsoever to explain to this Court why it should disregard the procedural bar and address the claim.

Thus, the above-cited claims should be denied as non-cognizable.

VII. PETITIONER HAS ABUSED THE WRIT BY FAILING TO ALLEGE SUFFICIENT FACTS INDICATING THAT HIS SEARCH AND SEIZURE CLAIMS BASED ON THE FOURTH AMENDMENT ARE COGNIZABLE IN A PETITION FOR A WRIT OF HABEAS CORPUS

"[H]abeas corpus is not available to challenge the use of evidence obtained by an unconstitutional search and seizure." (*In re Sterling, supra,* 63 Cal.2d at p. 487; see also *In re Sakarias* (2005) 35 Cal.4th 140, 169; cf. *Stone v. Powell* (1976) 428 U.S. 465, 489-495 [96 S.Ct. 3037, 49 L.Ed.2d 1067].) Thus, habeas corpus is not available as a remedy because the defendant has "readily available remedies" to litigate the Fourth Amendment claim through "an orderly proceeding." (*In re Sterling, supra,* 63 Cal.2d at pp. 487-489; accord *In re Clark, supra,* 5 Cal.4th at p. 767.)

"[T]he question whether evidence was admitted at trial in violation of the Fourth Amendment is not cognizable on habeas corpus." (*In re Harris, supra,* 5 Cal.4th at p. 830.) This is so because the erroneous admission of unlawfully seized evidence presents no risk that an innocent defendant might be convicted. (*In re Harris* (1956) 56 Cal.2d 879, 880 (conc. Opn. of Traynor, J.).) Thus, "Fourth Amendment violations need not be considered on habeas corpus *even* where the issue [has] not been raised on appeal." (*In re Clark, supra,* 5 Cal.4th at p. 767; italics added.)

In Claim 1, petitioner challenges the validity of his arrest, and in Claim 3, he attacks the legality of the search of his apartment and garage. (Petn. 23-36, 49-52.) In Claims 25, 26, and 27, he contests the fairness of the hearing on the motion to suppress. (Petn. 130-137.) In Claim 30, he assails the trial court's denial of his motion to renew and relitigate the 1538.5 motion (Petn. 141-143), and in Claims 89 and 94, he questions trial counsel's failure to use the missing-juvenile report to undermine the legality of his arrest (Petn. 303-305, 317-319).

These same claims were rejected by this Court on direct appeal. (*Memro II*, *supra*, 11 Cal.4th at pp. 838-847.) Aside from that procedural bar under *Waltreus* (see Arg. II, *ante*), he has further failed to show that the search-and-seizure issues based on the Fourth Amendment are cognizable on habeas corpus. Petitioner simply ignores the rule that search and seizure claims are not cognizable on habeas and makes no attempt whatsoever to explain to this Court why it should disregard the procedural bar and address the claim.

Thus, the above-cited claims should be denied as repetitive and non-cognizable.

VIII. PETITIONER HAS ABUSED THE WRIT BY FAILING TO GIVE ANY PLAUSIBLE EXPLANATION HOW ANY ALLEGED ERRORS OCCURRING IN HIS FIRST TRIAL COULD HAVE AFFECTED THE FAIRNESS OF HIS SUBSEQUENT RETRIAL

On automatic appeal from the first judgment of death, this Court reversed the guilt, special-circumstance, and penalty verdicts, holding the trial court committed prejudicial error in summarily denying petitioner's *Pitchess* motion (*Pitchess v. Superior Court*, *supra,* 11 Cal.3d 531) for discovery of information regarding complaints against police officers, including the four officers who participated in petitioner's interrogation. This Court has subsequently held that remand, rather than outright reversal, is the appropriate remedy when the trial court erroneously denies a *Pitchess* motion without conducting an in camera review of the requested documents, thereby expressly overruling *Memro I* on this point. (*People v. Gaines* (2009) 46 Cal.4th 172, 1080 fn. 2.) Nonetheless, this Court remanded the case to the trial court on June 6, 1985 for retrial. (*People v. Memro I*, *supra*, 38 Cal.3d at pp. 665, 685, 705.)

Following retrial, the jury found petitioner guilty of the second degree murder of Scott F. and of the first-degree murders of Ralph C. and Carl C.,

Jr. and found true a multiple-murder special-circumstance allegation. After a penalty trial, the jury returned a verdict of death on Count III, and the trial court entered judgment accordingly on July 17, 1987. On November 30, 1995, this Court affirmed the judgment in full on automatic appeal. (*Memro II*, *supra*, 11 Cal.4th at p. 888.)

By raising claims based on his first trial, such as Claims 11, 13, 14, 25, 26, 27, and 99, petitioner is impermissibly collaterally attacking the judgment that was reversed in its entirety by this Court in 1985. He fails to demonstrate any connection between these alleged errors occurring his first trial and the manner in which his retrial was conducted. In other words, he has not shown that the alleged errors in the first trial had any impact on the subsequent retrial.

Under the law of the case doctrine, a matter adjudicated on a prior appeal normally will not be relitigated on a subsequent appeal in the same case. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 507.) This doctrine is generally applied upon retrial of a case following reversal of the judgment on appeal and deals with the effect of the first appellate decision on the subsequent retrial or appeal, but only as to questions of law, not questions of fact. (*People v. Barragan* (2004) 32 Cal.4th 236, 246-252; *People v. Shuey* (1975) 13 Cal.3d 835, 842; *Estate of Baird* (1924) 193 Cal. 225, 234-239.) The decision of an appellate court, stating a principle or rule of law necessary to the decision of the case, conclusively establishes that rule of law and makes it determinative of the rights of the same parties both in any subsequent retrial and upon subsequent appeal in the same case. (*People v. Barragan*, *supra*, 32 Cal.4th at pp. 246-248; *People v. Mattson* (1990) 50 Cal.3d 826, 850; *Kowis v. Howard* (1992) 3 Cal.4th 888, 893.) [6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 633, p. 4552.]

In this case, the only issues decided during the first appeal were the *Pitchess* issue, the issue involving failure to obtain a separate waiver of jury

on the special-circumstances allegation, and the issue regarding the applicability of double jeopardy principles to re-prosecution of petitioner. (*People v. Memro, supra*, 38 Cal.3d.) Thus, those are the only two issues as to which the law of the case doctrine could apply to the retrial. (*People v. Mattson, supra*, 50 Cal.3d at pp. 838, 848, 852-853.) Hence, no other issues arising from the first trial were cognizable on the appeal from the retrial.

Only error relating to, and stemming from, the retrial itself may be considered in a subsequent appeal. (*People v. Deere* (1991) 53 Cal.3d 704, 713; *People v. Durbin* (1966) 64 Cal.2d 474, 477.) Yet petitioner assigns as error certain claims that he raised on appeal from the first trial. (Claims 14, 99.) These issues were rendered moot when this Court reversed the conviction in *Memro I* and remanded the entire case for retrial.

Thus, the above-cited claims should be denied as non-cognizable.

IX. PETITIONER'S PIECEMEAL PRESENTATION OF UNTIMELY, REPETITIOUS, AND NON-COGNIZABLE CLAIMS, WITHOUT PROVIDING SPECIFIC REASONS AND PARTICULARIZED JUSTIFICATION THEREFORE, CONSTITUTES AN ABUSE OF THE WRIT, WHICH SHOULD BE DENIED IN ITS ENTIRETY

"The problem of . . . controlling abuse of the writ is not new." (*In re Clark, supra*, 5 Cal.4th at p. 791, citing Comment, *Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the "Monster?"* (1982) 20 Duq. L. Rev. 237.) An "abuse of the process" occurs when the habeas petitioner deliberately disregards procedural rules that have been firmly established to govern petition for writs of habeas corpus and attempts to short-circuit the orderly procedure. Habeas corpus is an extraordinary remedy that was "not created for the purposes of defeating, [mocking,] or embarrassing justice, but to promote it." (*In re Alpine* (1928) 203 Cal. 731, 744, quoted

approvingly in *In re Sanders*, *supra*, 21 Cal.4th at pp. 721-722 and *In re Robbins*, *supra*, 18 Cal.4th at p. 777.)

The requirement that a petitioner who files a second or successive petition "explain and justify the failure to present claims in a timely manner" vindicates "the interest of the state in carrying out its judgments, the interest of the respondent in having the ability to respond to the petition and to retry the case should the judgment be invalidated, and the burden on the judicial system." (*In re Clark*, *supra*, 5 Cal.4th at pp. 774-775.)

The United States Supreme Court has emphasized that "abusive writ practice has a serious [detrimental] impact on the states' administration of criminal justice." (*In re Clark*, *supra*, 5 Cal.4th at p. 775, citing *McCleskey v. Zant*, *supra*, 499 U.S. at pp. 488, 491-492.) In *McCleskey*, the high court stressed that a petitioner abuses the writ when he presents a claim that could have been presented in an earlier petition. (*Id.* at 488) The *McCleskey* court "clearly recognized the interests which California decisions governing successive and delayed petitioner have long reflected." (*In re Clark*, *supra*, 5 Cal.4th at p. 776.)

Certainly, this Court has repeatedly recognized the "extraordinary nature" of habeas corpus relief from a judgment that is presumed valid, as well as the extraordinary toll that abuse of that process takes on the orderly administration of justice. (*In re Robbins*, *supra*, 18 Cal.4th at p. 778; *In re Clark*, *supra*, 5 Cal.4th at p. 764.) Consequently, habeas corpus "may not be invoked where the accused has [had] a remedy under the orderly provisions of a statute designed to rule the specific case upon which he relies for his discharge." (*In re Alpine*, *supra*, 203 Cal. at p. 739, quoted in *In re Harris*, *supra*, 5 Cal.4th at p. 764 fn. 3.) Not to use the established, orderly process is to abuse it.

This case invites and signals another foray into the quest to tame habeas corpus litigation and curtail abusive and dilatory writ practice. The

gambit of delay and distract must be checked. The all-out assault on prior appellate and habeas corpus counsel must be countered.

As respondent "strenuously argue[d]" in *In re Sanders*, *supra*, 21 Cal.4th 697, to allow newly appointed attorneys to inevitably resort to "the magic words of 'ineffective assistance of counsel'" (*In re Clark*, *supra*, 5 Cal.4th at p. 792) as justification for all manner of procedural defaults:

> would defeat the purpose of establishing procedural requirements. If any procedural default, whether volitional or inadvertent . . . could be excused by alleging ineffectiveness of counsel, then the exceptions would swallow the rule . . . . Procedural default would be an empty concept, and the procedural rules for filing habeas corpus petitions, along with their underlying purposes of fairness and prompt resolution of legitimate claims, would be meaningless.

(*In re Sanders*, *supra*, 21 Cal.4th at p. 722.)

This case is similar to *Robbins*, but with a twist: one additional set of attorneys were substituted/appointed *after* the federal habeas petition was filed. With each new set of attorneys, petitioner's claims have increased exponentially. Habeas attorneys, as they are want to do, are prone to second-guess prior counsel and to pile on new claims that previous lawyers may very well have considered and wisely rejected.

That is apparently what occurred here. The first state habeas corpus petition (filed by Thomas J. Nolan and Andrew H. Parnes) presented only 12 claims, with 12 subclaims. The first federal habeas corpus petition (filed by Michael D. Abzug, Maureen M. Bodo, and Nicholas C. Arguimbau) presented 74 claims, and the amended federal petition (filed by Peter Giannini and James S. Thomson), which is identical to the instant state habeas corpus petition, contains 143 separate claims for relief, with one

claim (Claim 27) . Thus, the claims, like the brooms in The Sorcerer's Apprentice, keep multiplying, with no way to halt them.

Thus, the claims have grown in number, with each succeeding set of attorneys adding more and more line of attack. This Court has warned against the efficacy of this shotgun strategy:

> In *Jones v. Barnes*, *supra*, 463 U.S. at page 752, the United States Supreme Court, quoting former Justice Jackson, observed: "Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one . . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one." Similarly, in *Smith v. Murray*, *supra*, 477 U.S. 527, 536, the high court observed: "[The] process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."

(*In re Robbins*, *supra*, 18 Cal.4th at p. 811, fn. 31.) An attorney can *always* think of new claims, limited only his creativity, but a prudent attorney will submit only those that have the highest potential of succeeding.

In the instant petition, petitioner alleges over 100 violations of his constitutional rights that were raised and rejected on appeal. Petitioner forthrightly acknowledges that he has repeated many of the claims "previously presented" on appeal and on habeas corpus and found by this Court to be meritless. (Petn. 21; Reply 2, 4, 25.) Apparently, his new attorneys decided to restate, reorganize, and reclassify all prior and additional claims under new categories in both the federal habeas corpus petition and the instant state habeas corpus petition -- "for the sake of clear presentation" and convenience -- in order to facilitate his future demonstration to the federal court that all federal constitutional grounds were exhausted in this Court, as well as to support his claims of cumulative

prejudice (Claims 140-143) and to provide context to all his new claims. (Petn. 21; Reply 2, 4, 25.)

The flaw in this approach, however, is that petitioner did not forewarn this Court in the *petition* that it he was intentionally listing claims that concededly had been previously rejected and consequently were procedurally barred -- merely for the convenience of the federal court, and purportedly to buttress his claims of cumulative prejudice. He neglected to inform this Court that it need not rule on the previously rejected claims since they are patently procedurally barred. He did not acknowledge his reasons for this stratagem until he filed his Reply, in which he candidly and finally admitted that this Court could either reject the repetitive claims out-of-hand as procedurally barred, reconsider them on the merits, or simply ignore them so he can move on to a more receptive federal court or international tribunal. (Reply at 2.)

In so doing, therefore, petitioner is abusing the writ by flaunting procedural rules that have been carefully crafted and clearly established and consistently applied by this Court, and is causing this Court, as well as respondent, to undertake a needless and burdensome waste of time and resources. Petitioner posits that all "procedural defaults are inapplicable" to these claims since they have been "denied on their merits." (Reply 2.) In the very next breath, however, he asks this Court to "reexamine its prior rulings on these claims," even though reconsideration of the previously denials is procedurally barred. (Reply 2.)

Only consistent application of procedural bars and strict adherence to definitive rules of compulsory force designed to thwart those who would circumvent them will put an end to abusive tactics and curb lawyer excesses.

> Petitioner offers no persuasive reason for routinely permitting consideration of the merits of such [repetitious,

> successive] claims. Were [this Court] to do so, [it] would sanction a practice which unreasonably delays execution of judgment and imposes undue burdens on the state both in responding to claims made in delayed petitions and in marshalling stale evidence when retrial is necessary. Successive petitions also waste scarce judicial resources as [this] Court must repeatedly review the record of the trial in order to assess the merits of the petitioner's claims and assess the prejudicial impact of the constitutional deprivation of which he complains.

(*In re Clark*, *supra*, 5 Cal.4th at p. 770; see also *id.* at pp. 786-787 [declaring that the same interests are served by barring delayed claims and untimely petitions].)

By submitting procedurally barred claims without addressing the procedural defects in the *petition*, petitioner has attempted to avoid writ policies and procedures clearly set by this Court. Thus, he is abusing the writ. What is more, petitioner's gambit of asserting serial ineffectiveness of prior appellate and succeeding habeas counsel in one fell swoop as the sole justification for presenting more than one hundred successive and repetitious claims, if unchecked, will stalemate the orderly administration of justice in this case and in other cases. (See *In re Clark*, *supra*, 5 Cal.4th at pp. 765 fn. 6, 779.)

Respondent requests that this Court take such additional steps as it may deem necessary to address this "vexing problem of repetitive petitions" that is so rife with abuse, especially in capital cases "where petitioners, unlike prisoners who are not under sentence of death, have a strong incentive for delay." (*In re Clark*, 5 Cal.4th at pp. 792, 796, fn. 3; see also *In re Sanders*, *supra*, 21 Cal.4th at p. 714, fn. 9.) The time has come to "stem the [intolerable] tide of successive petitions" (*In re Clark*, *supra*, 5 Cal.4th at p. 792) and to curtail abusive and dilatory writ practice which continues to burden the courts and frustrate the ends of justice. "'[I]ts importance to the integrity of our system of jurisprudence requires

[this Court's] attention.'" (*In re Clark*, *supra*, 5 Cal.4th at p. 792; see also *In re Sanders*, *supra*, 21 Cal.4th at pp. 721-722.)

CONCLUSION

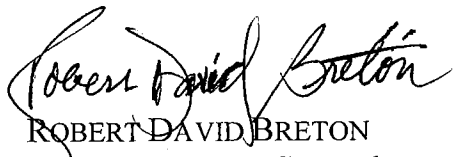
Petitioner has not stated specific facts to establish that his newly made claims were presented without substantial delay. Other claims have been rejected previously by this Court on direct appeal and on habeas. And the new claims are based on the appellate record or on facts that easily were available or discoverable at the time the first habeas corpus petition was filed. None of the claims is shown to fall within any of the four *Clark* exceptions or the four *Harris* exceptions.

Accordingly, the petition for writ of habeas corpus should be considered an abuse of the writ for the eight reasons set forth above and should be denied as procedurally barred.

Dated: November 15, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General



ROBERT DAVID BRETON
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

CAPITAL CASE

I certify that the attached RETURN TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 22,059 words.

Dated: November 15, 2010

EDMUND G. BROWN JR.
Attorney General of California

ROBERT DAVID BRETON
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Reno, on Habeas Corpus**
No.: **S124660**

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 that same day in the ordinary course of business.

On November 15, 2010, I served the attached **RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Peter Giannini
Attorney at Law
Law Offices of Peter Giannini
1015 Gayley Avenue, #1000
Los Angeles,CA 90024

James S. Thomson
Attorney at Law
819 Delaware Street
Berkeley, CA 94710

Saor E. Stetler
Attorney at Law
P. O Box 2189
Mill Valley, CA 94942

Philip Millett
Deputy District Attorney
Los Angeles County District Attorney's Office
12720 Norwalk Blvd.
Norwalk, CA 90650
(Courtesy Copy)

Death PenaltyClerk
U.S. District Court
312 N. Spring Street, Rm. 810
Los Angeles, CA 90012

California Appellate Project
Attn: Michael Millman
101 Second Street, Suite 600
San Francisco, CA 94105

The Honorable John A. Torribio, Judge
Los Angeles County Superior Court
Southeast District, Dept. L
12720 Norwalk Boulevard
Norwalk, CA 90650
(Courtesy Copy)

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 November 15, 2010, at Los Angeles, California.

Lily Hood
Declarant

Lily Hood
Signature

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