No. 23-

IN THE

SUPREME COURT OF THE UNITED STATES

PEDRO RODRIGUEZ,

Petitioner,

v.

FISHER, Officer,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding that the California Supreme Court's summary denial of a habeas petition as untimely is beyond review by federal courts, even when the petitioner argues that the state court's application of its timeliness rules was unreasonable and inconsistent?

2. Does the rule of lenity apply to state habeas corpus petitions under AEDPA when a petitioner argues that state procedural rules are applied in an arbitrary and capricious manner?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED PROCEEDINGS

1. United States District Court (S.D. Cal.): *Pedro Rodriguez v. Officer Fisher*, *Warden*, No. 21-cv-01442-BAS-MSB (June 22, 2022).

2. United States Court of Appeals (9th Cir.): *Pedro Rodriguez v. Fisher, Officer*, No. 22-55658 (judgment on appeal on March 22, 2024; order denying rehearing on April 26, 2024).

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Cases

Statutes

Pedro Rodriguez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's unpublished memorandum is Appendix A: *Rodriguez v. Fisher*, No. 22-55658, 2024 U.S. App. LEXIS 6836 (9th Cir. Mar. 22, 2024). The district court's judgment, *Rodriguez v. Fisher*, No. 21-cv-1442-BAS-MSB, 2022 U.S. Dist. LEXIS 110980 (S.D. Cal. June 22, 2022), is attached as Appendix B.

JURISDICTION

The Ninth Circuit entered judgment on March 22, 2024, and denied a timely rehearing petition on April 26, 2024. *See* Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The one-year time limitation of 28 U.S.C. § 2244(d) is the subject of this appeal:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in

> custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

1. State Court Proceedings

In 2015, Pedro Rodriguez was convicted by a jury of several offenses arising out of an alleged sexual relationship with a sixteen-year-old female. (App. B at 10). Much of the evidence against him came from the phone of the victim. (App. D at 6). Rodriguez had tried to argue

at trial that the prosecution had manipulated the data on the phone to frame him. (App. D at 3).

After trial, Rodriguez discharged his trial counsel and then filed an extensive post-trial motion arguing the evidence had been manipulated. (App D. at 3). During this litigation, it came to light that there was a data transfer to the phone after Rodriguez was arrested and jailed and while the police had custody of the phone. (*Id.*) Rodriguez argued that he deserved a new trial because he had shown prosecutorial misconduct and evidence tampering through the deliberate fabrication of evidence. (*Id.*)

The trial court held multiple hearings and concluded that even if Rodriguez could prove the tampering, the other evidence was overwhelming such that Rodriguez could not establish prejudice. (App. D at 9).

Rodriguez then had appointed counsel for appeal, asked that lawyer to appeal the new trial motion, but the appellate attorney thought the trial court got it right and refused. (*Id.*) The direct appeal challenged his burglary conviction on the legal theory that there was no unlawful entry since he rented the hotel rooms. (App. D at 16-20).

Rodriguez also challenged the sufficiency of dissuading a witness charge because she had already reported the crime when the putatively unlawful persuasion occurred. (App. D at 20). The appellate court rejected the claims in a published decision. (App. D at 11). The California Supreme Court denied review on November 14, 2018, but ordered the decision depublished. (App. D at 11). Ninety days after November 14, 2018, is February 13, 2019.

2. State court habeas petitions

Rodriguez filed his first state court habeas petition 124 days later: March 18, 2019. (App. B at 4). The 310-page petition included eight grounds for relief and comprehensive appendices of the underlying proceedings.

Rodriguez's main argument was that his appellate attorney was ineffective in failing to raise the fabrication of evidence claim that he specifically asked her to argue. (App. D at 5). His other claims are derivative of the evidence fabrication claim and are the same argument framed as prosecutorial misconduct, *Brady*, closing argument misconduct, but all inextricably linked to the data transfer that Rodriguez was not told about pretrial and which casts doubt on all the

other evidence. (*Id*.)

The trial court dismissed the petition a month later, April 18, 2019. (App. D at 7). The trial court held that the appellate attorney was right about seeing the trial court's ruling on the harmlessness of the error as an insuperable barrier. (App. D at 8-9). The trial court included Rodriguez's letter to his lawyer specifically asking her to raise the issue. (App. D at 9).

Rodriguez then filed his petition to the California appellate court ten days later (April 29, 2019). (App. B at 13).

The California Courts of Appeal denied Rodriguez's habeas on May 10, 2019. (App. B at 17). Nothing in that Court's order indicated any problem with the timeliness of Rodriguez's first state court filing. (App. D 3-6).

Mr. Rodriguez filed his original habeas petition to the California Supreme Court fifty-six days later: July 5, 2019. (App. B at 5). The California Supreme Court denied review on July 14th, 2021, two years after Rodriguez had filed his original petition:

> The petition for writ of habeas corpus is denied. (*See In re Robbins* (1998) 18 Cal.4th 770, 780 [77 Cal. Rptr. 2d 153, 959 P.2d 311]

> [courts will not entertain habeas corpus claims that are untimely]; *In re Clark* (1993) 5 Cal.4th 750, 760–769 [21 Cal. Rptr. 2d 509, 855 P.2d 729] [courts will not entertain habeas corpus claims that are successive].) Individual claims are denied, as applicable. (See *In re Dixon* (1953) 41 Cal.2d 756, 759 [264 P.2d 513] [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal]; *In re Miller* (1941) 17 Cal.2d 734, 735 [112 P.2d 10] [courts will not entertain habeas corpus claims that are repetitive].) (App. B at 55).

3. Section 2254 petition

Rodriguez filed his federal habeas petition seven days after the Supreme Court denied review. (App. B at 2). Respondent moved to dismiss on timeliness grounds based on the Supreme Court's order. (App. B at 3). Rodriguez objected that his petition was timely by the standards described in *Robinson v. Lewis*, 9 Cal. 5th 883, 266 Cal. Rptr. 3d 13, 469 P.3d 414 (2020). (App. B at 10). And the Supreme Court's order is simply wrong about the procedural bars with respect to Rodriguez's ineffective assistance of appellate counsel claim: it could not have been brought prior to the end of direct appeal because prejudice would be speculative until the appeal was lost, and it was not

something that could have already been raised and rejected; Rodriguez cited the Court to *Pirtle v. Morgan*, 313 F.3d 1160, 1168 (9th Cir. 2002), for the proposition that if a habeas petitioner does not violate any state rule, he is not procedurally barred.

The district court was not convinced and found that Rodriguez "knew, or should have known, practically all the grounds upon which his state habeas was premised approximately three years before pursuing any collateral attack upon his judgment." (App. B at 12). The district court recognized that the ineffective assistance of appellate counsel claim was different: "The Court is unpersuaded the California Supreme Court's imposition of the *In re Robbins* timeliness bar was either novel or unforeseeable. Except for Petitioner's ineffective assistance of appellate counsel claim, the claims raised in the state habeas petition were claims for which the factual basis was, or should have been, known well before Petitioner raised those claims in his 2019 state habeas petitions." (App. B at 12).

The district court did not consider the petition on a claim-by-claim basis: "Thus, it cannot be said the California Supreme Court's invocation of the *In re Robbins* time bar as to the state habeas petition

in its entirety was either novel or unforeseeable." (App. B. at 12-13).

REASONS TO GRANT THE WRIT

RODRIGUEZ HAS A CONSTITUTIONAL RIGHT TO A HABEAS CORPUS THAT SHOULD NOT BE VOIDED BECAUSE OF AN UNCLEAR RULE

In *Boumediene v. Bush*, , 553 U.S. 723, 740, 128 S. Ct. 2229, 2244 (2008), this Court held that enemy combatants captured and held on foreign territory had a right to seek habeas review because habeas was such as a sacrosanct right: "the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled. 9 W. Holdsworth, *A History of English Law* 112 (1926) (hereinafter Holdsworth)." How can it be the case that the right is so important that even enemy combatants held in an extraterritorial military prison can claim it and yet be so also subject to an opaque rule of timeliness that can forever extinguish it?

If the enemy combatants were told that they could file a petition within a "reasonable" time and then filed a very long, comprehensive petition 124 days later, and their custodian responded two years later that the actual deadline – which these enemy combatants did not know

– was 120 days so their petitions were untimely and habeas corpus review was forever closed to them, would that be a "reasonable" outcome?

California's 120-day rule also says that it considers equitable circumstances and that it is not a strict deadline, and Rodriguez provided numerous grounds as to why any delay should be excused. Rodriguez, a pro se inmate, was abandoned by his lawyer who refused to file the only claim that had legs.

Under California law, Rodriguez can "demonstrate good cause for the delay" if he can show "he or she was conducting an ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims." *In re Robbins*, 18 Cal. 4th 770, 780, 77 Cal. Rptr. 2d 153, 160, 959 P.2d 311, 318 (1998). Rodriguez meets that requirement since he had the one ineffective assistance of appellate counsel claim that could not bring until he reached collateral review: "where the petitioner was unable to present his claim, the court will continue to consider the merits of the claim if asserted as promptly as reasonably possible." *In re Clark*, 5 Cal. 4th

750, 775, 21 Cal. Rptr. 2d 509, 525, 855 P.2d 729, 745 (1993).

Both the trial court and the appellate attorney misunderstood the standard of review for this constitutional claim. They pointed to the overwhelming nature of the other evidence against Rodriguez, but that is an application of the standard of review for nonconstitutional errors, i.e., did error more likely than not affect the verdict? Rodriguez's claim is about the manipulation of evidence and the misleading of the jury – this is a constitutional error claim. Harmless error for constitutional issues is not an assay of the case against Rodriguez; the question is whether the evidence prejudiced his defense. The case was all about credibility and whom should be believed. The inquiry for constitutional harmless error is whether the court has a grave doubt as to whether the verdict would have been the same absent the error: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 375 U.S. 85, 86, 11 L. Ed. 2d 171, 84 S. Ct. 229 (1963).

Rodriguez tried to get the error raised on appeal, but appellate

counsel refused. Under the law, Rodriguez's claim was not ripe until direct review ended. *Brown v. Atchley*, 76 F.4th 862, 867 (9th Cir. 2023) ("a claim does not become ripe until the facts that give rise to the constitutional claim first arise.")

Rodriguez believes that California was, as a matter of its own law, not being reasonable in deeming Rodriguez's petition late. When Rodriguez filed his state court habeas petitions in 2019, all he could know of California law is that it required him to file without "substantial delay." *See Robinson v. Lewis*, 9 Cal. 5th 883, 266 Cal. Rptr. 3d 13, 469 P.3d 414 (2020). Rodriguez filed his first state habeas petition 124 days after his conviction went final and only 34 days after the time for seeking certiorari expired. The petition included a claim of the ineffective assistance of appellate counsel, a claim which could not be brought on direct review. In *Robinson v. Lewis*, the California Supreme Court recognized that it takes time to file a habeas petition and that sometimes a petitioner could justify filing outside the 120 day safe harbor. For a petitioner like Rodriguez, he filed a comprehensive petition that was typewritten and addressed a very large record. *Robinson v. Lewis* notes the mandatory forms that Rodriguez had to file

which required recitals and descriptions plus many times "difficulties exist in gaining access to legal materials and copying, and in having the finished petition mailed to the court." All of these concerns were present in Rodriguez's case and added to it was the size of the record and the complexity of the issue.

Under 28 U.S.C. § 2244(d)(2), those petitions could only toll the clock if they were properly filed. The parties and the district court's agreement on this issue should have been dispositive. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579, 206 L. Ed. 2d 866 (2020) (court should have parties present the arguments and not decide the case based on arguments not presented by the parties).

The year after Rodriguez filed his collateral attacks, the California Supreme Court decided *Robinson v. Lewis* which explained that California would not consider delay between levels of the review, superior to appellate, appellate to supreme court, as substantial delay if the delay was 120 days or less. The gap delays in Rodriguez's case took eleven days, superior to appellate, and fifty-six days, appellate to supreme court. In light of *Robinson*, Rodriguez's petitions from the superior to the supreme court could not have been untimely.

When the California Supreme Court found Mr. Rodriguez's petition to be untimely and barred, it had to do so based on the timeliness of either Rodriguez's petition to the superior court, the appellate court, or the supreme court itself. The only period that could be untimely is the 124 days it took Rodriguez to file his initial petition in the superior court. *Robinson v. Lewis* clarifies that the 120-day period is not a strict cutoff and that delays beyond the 120-day period can be justified by "good cause." *Robinson v. Lewis*, 9 Cal. 5th at 898, 266 Cal. Rptr. 3d at 22, 469 P.3d at 421.

California is the entity that decided to base its timeliness view based on reasonableness. But it cannot be reasonable to have complete discretion about how to parse the word "reasonable" and the phrase "good cause" in an arbitrary manner. California's disposition of Rodriguez's case is internally contradictory as claims cannot both be unexhausted and previously presented. It is not reasonable for California to misapprehend the legal posture of the case and still have its decision deemed reasonable.

Rodriguez's petition is ninety-six hours outside the 120-day safe harbor period, but "California courts allow a longer delay if the

petitioner demonstrates good cause." Rodriguez is unable to find any clear definition of what "good cause" is; nevertheless, the factors that courts have relied upon in the few "good cause" cases apply to Rodriguez. For instance, California has found delay to be justified because of a petitioner's "ignorance of law and legal procedures." Rodriguez is a layman, unskilled at the law. Second, Rodriguez's claim is about the ineffective assistance of appellate counsel. In *In re Hampton* , 48 Cal. App. 5th 463, 261 Cal. Rptr. 3d 907 (2020), California found good cause for substantial delay based on an ineffective assistance of appellate counsel claim. "Hampton was entitled to rely on his appellate counsel's judgment concerning what claims to raise on appeal." Here, Rodriguez was specifically abandoned by counsel who refused to file Rodriguez's *Brady*/fair trial claim that the prosecution had manipulated the digital evidence against him. He then filed this an original petition with the superior court only four days outside the safe harbor. "'Similar reasons have been held to justify a delay of 18 months. ([*In Re Spears* (1984) 157 Cal.App.3d 1203, 1208 [204 Cal. Rptr. 333] [petitioner has adequately explained this delay as attributable to his lack of capacity to represent himself … and the scarcity of channels through which legal assistance is available to indigent prisoners']."

Given the kind of petition Rodriguez had to file – a complicated legal issue that had not been raised below or briefed by counsel based on a forty-two volume, 4500-page record – Rodriguez has good cause for being late by four days. California recognizes that investigation into a complex not yet decided issue can excuse some delay. California labels its time limit as reasonable, but even California judges applying the law view it as intractable. *Cf. In re Gallego*, 959 P.2d 290, 307 (Cal. 1998) (Brown, J., concurring and dissenting) ("The primary problem is that 'good cause' and 'without substantial delay' defy standardization.")

California's timeliness rules are arbitrary. Such a system violates due process. Cf. *Judulang v. Holder*, 565 U.S. 42, 61, 132 S. Ct. 476, 488 (2011) (observing that an arbitrary system remains arbitrary on the "thousandth try as on the first" and violative of due process).

THIS COURT SHOULD APPLY THE RULE OF LENITY TO CALIFORNIA'S REASONABLENESS REQUIREMENT

It appears that California has decided that the word "reasonable" means that California can find petitions untimely as it sees fit. If this were a penal statute, the rule of lenity would require the interpretation

of reasonable that provided Rodriguez with fair notice and gave him guidance about how to comply with it. *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 341 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.") And while the habeas corpus statute is civil it only applies to liberty-restricted people.

The rule of lenity is supposed to apply to defendants. *Burrage v. United States*, 571 U.S. 204, 216 (2014) ("[W]e cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant.") Rodriguez's standing to file his habeas petition is based on the penal sanction imposed upon him after his conviction at trial. His liberty is implicated, and the rule of lenity is supposed to be in furtherance of our nation's strong preference for liberty." *United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (en banc) (Bibas, J, concurring).

Rodriguez acknowledges that the rule of lenity is a cannon of

statutory construction meant to resolve the vague, not to rewrite statutes. *Callanan v. United States*, 364 U.S. 587, 596, 81 S. Ct. 321, 327 (1961). Here, however, we do not have a statute; we have a judicially created series of rules which were changed mid-appeal to Rodriguez's detriment.

The purpose of the rule of lenity is to promote fair notice of those subject to the criminal laws and "minimize the risk of selective or arbitrary enforcement." *United States v. Kozminski*, 487 U.S. 931, 952, 108 S. Ct. 2751, 2764 (1988). And while the statute of limitations for a habeas corpus petition is not a criminal law, it is criminal adjacent. Like this Court said in *Beckles v. United States*, 580 U.S. 256, 276, 137 S. Ct. 886, 900 (2017), "A defendant is entitled to understand the legal rules that will determine his sentence.")

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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