

No. _____

IN THE
Supreme Court of the United States

JOSEPH WILLIAM HART,

Petitioner,

v.

RONALD BROOMFIELD,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In re Robbins, 18 Cal. 4th 770 (1998), and *In re Gallego*, 18 Cal. 4th 825 (1998) “explained many aspects of the timeliness rules applicable to petitions for writs of habeas corpus” after the California Supreme Court’s decision in *In re Clark*, 5 Cal. 4th 750 (1993). *In re Sanders*, 21 Cal. 4th 697, 701 (1999). Here, the Ninth Circuit found that even though *Robbins* and *Gallego* had only been decided three months prior, Hart was nevertheless on notice of California’s timeliness rule under *Clark* when he filed his habeas petition in the California Supreme Court. Thus, the Ninth Circuit found that *Clark*, standing alone, was adequate to bar his claim that the prosecution suppressed material impeachment evidence regarding an informant who testified at his capital trial.

Did the Ninth Circuit misapply the standard for adequate state grounds, in conflict with this Court's precedent in *Coleman v. Thompson*, 501 U.S. 722 (1991), and *Lee v. Kemna*, 534 U.S. 362, 375 (2002), when it found that California’s timeliness bar under *Clark* was “firmly established and regularly followed” and applied that bar to Hart’s habeas petition?

LIST OF PRIOR PROCEEDINGS

United States Supreme Court

Joseph William Hart v. California, Case No. 99-6694, petition for writ of certiorari denied January 10, 2000

United States Court of Appeals for the Ninth Circuit

Joseph William Hart v. Ronald Broomfield, Case No. 20-99011, judgment affirmed March 28, 2024, rehearing denied July 11, 2024

United States District Court for the Central District of California

Joseph William Hart v. Jill Brown, Case No. CV-03633-DSF, judgment entered September 1, 2020

California Supreme Court

People v. Joseph William Hart, Case No. S007970, judgment affirmed June 1, 1999, petition for rehearing denied July 12, 1999

In re Joseph William Hart, Case No. S074569, petition denied March 3, 2006

In re Joseph William Hart, Case No. S0134962, petition denied March 28, 2007

In re Joseph William Hart, Case No. S152912, petition denied September 28, 2011

Riverside County Superior Court

People v. Joseph William Hart, Case No. 25670, judgment entered May 27, 1988

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**APPENDIX IN SUPPORT OF
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**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioner Joseph Willam Hart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit affirmed the district court's denial of habeas relief in an opinion and unpublished memorandum disposition on March 28, 2024. *Hart v. Broomfield*, 97 F.4th 644 (9th Cir. 2024); *Hart v. Broomfield*, No. 20-99011, 2024 WL 1332715, at *1 (9th Cir. Mar. 28, 2024); (Petitioner's Appendix (Pet. App. 1-1-24¹; Pet. App. 2-25-35)). On July 11, 2024 the Ninth Circuit panel denied Hart's petition for panel rehearing and rehearing en banc. (Pet. App. 3-35.)

The district court denied habeas relief and entered judgment against Hart on August 5, 2020. (Pet. App. 4-36-266; Pet. App. 5-267.)

¹ The citation format refers to the Petitioner's Appendix, document number, followed by page range.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. The Ninth Circuit's opinion and memorandum disposition affirming the denial of habeas relief were filed on March 28, 2024. Hart filed a timely petition for rehearing, which was denied on July 12, 2024. Hart is filing this petition within the deadline after a 60 day extension of time granted by Justice Kagan on September 20, 2024. *See* Rule 13.1, 13.3 and 13.5. This Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the United States Constitution

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with

respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

STATEMENT OF THE CASE

A. Trial Court

Hart was charged and convicted after a jury trial of the first-degree murder of Diana Lynn Harper. Cal. Penal Code §§187(a), 189. (Pet. App. 9-275.) The jury found true two special circumstances: that the murder was committed during the commission of or attempted commission of both rape and sodomy. Cal. Penal Code §§190.2(a)(17)(C) &(D). (Pet. App. 9-275.) The jury also found Hart guilty of the rape, sodomy and oral copulation of Amy Ryan. Cal. Penal Code §§261, 286(c), 288(a)(c). (Pet. App. 9-275.)

The penalty phase began on February 24, 1988. (Pet. App. 74-740.) The evidence presented at the penalty phase of Hart’s trial fell into three categories: (1) evidence of Hart’s prior criminal activity, (2) evidence

concerning the death of Hart's 11-year old niece, Shelah McMahan, and (3) evidence in mitigation and rebuttal.

The prosecution presented jailhouse informant and Hart's former cellmate Randy Gresham to testify about McMahan's death. (Pet. App. 2-25.) Gresham provided the crucial evidence linking Hart to McMahan's murder, testifying in exchange for a plea agreement, that Hart confessed to killing McMahan. (Pet. App. 71-727-37.) Gresham claimed Hart reenacted the murder, which Gresham recreated for the jury. (Pet. App. 71-728-29.) He also testified that Hart said that killing "was easier after you'd done it" (Pet. App. 71-731), suggesting that Hart also admitted to Harper's murder. Defense counsel sought to impeach Gresham with the fact that, in exchange for his testimony, he made a deal with the prosecution for a five-year reduction of his sentence for the attempted murder of a police officer. (Pet. App. 71-732.)

The jury deliberated for three days before returning a death verdict on March 31, 1988. (Pet. App. 75-741.) On March 30, 1988, during deliberations, Jury Foreman O.P. sent a message to the trial court asking for a copy of Gresham's testimony. (Pet. App. 72-733.) Instead of a readback, he wanted a hard copy so that the jury could "keep going over it," but the court declined. 13-ER-3192. The next morning, after three days of deliberations, the jury returned their death verdict. (Pet. App. 72-737; Pet. App. 75-741-42.)

Hart was sentenced to death on May 27, 1988. (Pet. App. 72-737.)

B. Appellate and State Habeas Proceedings

Hart appealed and the California Supreme Court (CSC) affirmed the trial court's judgment on June 1, 1999. (Pet. App. 9-275-404.); *People v. Hart*, 20 Cal. 4th 546 (1999). This Court denied Hart's petition for writ of certiorari on January 10, 2000. *Hart v. California*, 528 U.S. 1085 (2000).

Hart brought three state habeas petitions. On November 6, 1998, Hart filed a habeas petition in the California Supreme Court in case No. S074569, which was denied on March 1, 2006. (Pet. App. 6-268.) On June 22, 2005, he filed an exhaustion petition in case No. S134962, which was denied on March 28, 2007. (Pet. App. 7-269-73.) On May 22, 2007, Hart filed a second supplemental habeas petition based on previously-withheld and favorable material produced pursuant to a 2006 order of the Riverside Superior Court in case No. S152912. That petition was denied on September 28, 2011. (Pet. App. 8-274.) In each of these petitions, Hart alleged that the State unconstitutionally suppressed evidence related to Gresham. (Pet. App. 2-27.) Each time, the California Supreme Court denied Hart's claim as procedurally barred with citations to *Clark*, 5 Cal. 4th 750 and *Robbins*, 18 Cal. 4th 770.

In state court, Hart alleged that, although trial counsel specifically asked the prosecution about promises, agreements, or inducements given to any testifying witnesses (Pet. App. 13-415-16), they were not informed of the extent of the deal Gresham received, in violation of *Brady*. During post-

conviction discovery, Hart obtained records that the prosecution never provided trial counsel, demonstrating that Gresham was facing numerous criminal charges and received a much larger deal than was disclosed at trial. In addition to the attempted murder charges, Gresham faced over 30 additional charges, most of them robberies, and was afraid he would be sentenced to life in prison. (Pet. App. 27-453-56; *see also* Pet. App. 11-407-10; Pet. App. 14-417; Pet. App. 22-437-42; Pet. App. 23-443-46; Pet. App. 26-451-52; Pet. App. 30-472-75; Pet. App. 31-476-79; Pet. App. 32-480-88; Pet. App. 33-489-92; Pet. App. 34-493-95; Pet. App. 35-496-99; Pet. App. 36-500-04; Pet. App. 37-505-06; Pet. App. 38-507; Pet. App. 39-508-09; Pet. App. 40-510-16; Pet. App. 41-517-19; Pet. App. 42-520-23.)

Instead of thirty charges, in exchange for testifying against Hart, Gresham negotiated a deal that included, not just pleading guilty to assaulting an officer with a deadly weapon (as disclosed at trial), but also pleading guilty to two robberies, a felon with a firearm charge, and the theft of a vehicle. The prosecution withheld an agreement to recommend Gresham be placed in protective custody and that all “other charges which the People presently have any kind of information regarding it is agreed will not be filed” while it would also not charge him for an offense that would enhance his sentence by five years. (Pet. App. 27-455-56 ¶¶9-11; 29-462-71.) The additional charges were consolidated with Gresham’s existing charges and he

pled guilty to the five charges on September 19, 1986, shortly after Hart's August 14, 1986 preliminary hearing. (Pet. App. 18-426-34; 19-435; 20-436; 73-738-39.) The prosecution formally refused to charge Gresham with additional robbery charges and dismissed additional pending charges. (Pet. App. 19-435; 66-719.)

In 2002, Gresham recanted his testimony that Hart had confessed to McMahan's murder, admitting that he fabricated it. (Pet. App. 12-411-14.) In a signed declaration, Gresham revealed that the prosecution purposefully placed him with Hart, that he fabricated Hart's admissions after eavesdropping on Hart's conversations and reading police reports, and affirmed that Hart never admitted to killing anyone. Gresham also wrote a letter to counsel for Respondent stating that his testimony at Hart's trial was untruthful and the result of pressure by the prosecution.

When I testified in 1986 about Joseph Hart, I was strung out bad on all kinds of drugs. I had been threatened with like a 100 armed robberies (sic). I hadn't done but one or two but they said they could convict me if I didn't help.

(Pet. App. 21-438.)²

² At his 2003 deposition, Gresham recanted some of the statements in the 2002 declaration. Gresham's inconsistent statements only further supported the need for an evidentiary hearing.

C. Federal Court

The district court appointed the Office of the Federal Public Defender to represent Hart on June 6, 2005 and the FPD filed a timely federal petition on May 16, 2005. *Hart v. Broomfield*, No. CV 05-03633 DSF, Dkt. 3 (C.D. Cal., May 16, 2000).

After briefing, on August 5, 2020, the district court denied habeas relief, but granted a certificate of appealability on two related claims: prosecutorial suppression of evidence and ineffective assistance of counsel regarding state pathologist Dr. Dewitt Hunter. (Pet. App. 4-36-266; Pet. App. 1-4.) The court entered judgment on September 1, 2020. (Pet. App. 5-267.)

On appeal, Hart raised the certified claims and additional uncertified claims, including that the prosecution failed to disclose evidence about jailhouse informant Gresham.

On March 28, 2024, the Ninth Circuit panel denied Hart's certified claims in a published opinion. (Pet. App. 1-1-24.) The panel separately filed an unpublished memorandum granting a certificate of appealability on Hart's claim that the state withheld *Brady*³ information that could have been used to impeach jailhouse informant Gresham, who testified that Hart confessed to killing his niece. (Pet. App. 2-25-34.) After granting a COA on the claim,

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

the panel affirmed the district court's dismissal of the claim, finding it procedurally barred. (Pet. App. 2-27.) The panel denied a certificate of appealability on the additional uncertified claims. (Pet. App. 2-34.) Hart filed a petition for rehearing and petition for rehearing en banc, which was denied on July 11, 2024. (Pet. App. 3-35.)

REASONS FOR GRANTING THE WRIT

During the penalty phase of Hart's capital trial, jailhouse informant Gresham testified in exchange for a plea agreement that Hart had confessed to murdering his 11-year old niece. (Pet. App. 2-26.) In state and federal court, Hart alleged that the state violated its *Brady* obligations by suppressing evidence that could have been used to impeach Gresham, namely that Gresham received a much more favorable plea deal than revealed at trial. (Pet. App. 2-26.) Further, the State did not disclose that Gresham was planted in Hart's cell to extract a confession from him. (Pet. App. 2-26.)

The California Supreme Court denied Hart's claim as untimely with a citation to *Clark*, 5 Cal. 4th 750 and *Robbins*, 18 Cal. 4th 770. (Pet. App. 6-268.)

The district court found the claim to be procedurally barred, and the Ninth Circuit agreed. (Pet. App. 2-27.) The Ninth Circuit rejected Hart's argument that California's timeliness rule was not adequate at the time of his default. (Pet. App. 2-28.) Specifically, the Ninth Circuit found that Hart

did not allege how *Clark* is “insufficient to provide him notice of the timeliness rule” or why it was “inadequate to bar his claim.” (Pet. App. 2-29.) This decision conflicts with this Court’s precedent establishing when a state court rule is independent of federal law and adequate to support the judgment. *See* Rule 10(a).

A. The Ninth Circuit’s decision disregards *Coleman v. Thompson*’s requirement that a state court procedural rule be adequate to support the judgment.

1. The adequacy requirement

A state prisoner seeking federal habeas relief must first “exhaust the remedies available in the courts of the State... affording those courts the first opportunity to address and correct the alleged violations of the prisoner’s federal rights.” *Walker v. Martin*, 562 U.S. 307, 315-16 (2011) (cleaned up) (citing 28 U.S.C. § 2254(b)(1)(A)). A petitioner’s federal habeas petition will be barred from federal review when the state court did not address the petitioner’s federal claims because he failed to meet a state procedural requirement. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991), *holding modified by Martinez v. Ryan*, 566 U.S. 1 (2012).

In order to bar review in federal court, the state procedural rule must be “independent of the federal question and adequate to support the judgment.” *Id.* at 730. A state procedural rule that is “firmly established and

regularly followed” is “adequate to foreclose review of a federal claim.” *Lee v. Kemna*, 534 U.S. 362, 376 (2002).

2. *Clark, Robbins and Gallego* together established the relevant timeliness rule at the time Hart filed his state petition.

When the California Supreme Court decided *Clark* in 1993, it established that a state habeas corpus petition filed more than 90 days after the final due date for filing the appellant’s reply brief in the direct appeal required the petitioner to show, with specificity, how it was filed without substantial delay. *Clark*, 5 Cal. 4th at 784-85. *Clark* further laid out exceptions to the procedural bar, enabling a petitioner to surmount the bar by showing a fundamental miscarriage of justice in one of four ways: (1) error that made the trial fundamentally unfair; (2) actual innocence; (3) the death penalty was imposed with a misleading error or omission; or (4) the petitioner was convicted under an invalid statute. *Clark*, 5 Cal. 4th at 759. Applying these principles, the California Supreme Court found that Clark’s petition was not filed “within a reasonable time.” *Id.* at 785-86.

But after *Clark*, “some points remained unclear.” *Robbins*, 18 Cal. 4th at 818 (Kennard, J. dissenting). For that reason, the California Supreme Court took two related cases, *Robbins* and *Gallego*, to “analyze the timeliness issue and to explain, in the context of specific claims, how the timeliness rules are applied by our court.” *Id.*; see *Gallego*, 18 Cal. 4th 825. *Sanders*, 21

Cal. at 701 (“Our recent decisions in *In re Robbins* [] and *In re Gallego* [] explained many aspects of the timeliness rules applicable to petitions for writs of habeas corpus.”).

Robbins reiterated the 90-day rule from *Clark*, but also found that “a petitioner must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time.” *Robbins*, 18 Cal. 4th at 780. Further, the court found that “a petitioner bears the burden of establishing, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay.” *Id.* (italics omitted). *Gallego* cited *Robbins* to explain the petitioner’s burden of establishing substantial delay and further found that this can be established when a court denies timely-requested funding to investigate a claim. *Gallego*, 18 Cal. 4th at 833-35.

Though *Robbins* and *Gallego* do not conflict with *Clark*, they clarified and added to the timeliness rules that *Clark* first espoused. For the first time, the California Supreme Court required a written explanation of any delays “separately as to each subclaim” alleging “with specificity a legal theory of good cause for delay as to each subclaim” and an “ongoing bona fide investigation of undeveloped claims.” *Robbins*, 18 Cal. 4th at 819 (Kennard, J. dissenting) (italics omitted). Death penalty habeas petitioners and their

counsel “had no notice of these previously unarticulated requirements....

[H]ad all these requirements been well and clearly established, there would have been no reason to issue an order to show cause” in *Robbins*. *Id.* If *Clark* had been “adequate” to describe the timeliness bar, the California Supreme Court would not have had to take *Robbins* and *Gallego* to “explain” the timeliness bar. *See In re Sanders*, 21 Cal. 4th 697, 701 (1999) (explaining that *Robbins* and *Gallego* together “explained many aspects of the timeliness rules applicable to petitions for writs of habeas corpus”). Together, *Clark*, *Robbins* and *Gallego* “describe California’s timeliness requirement.” *Walker*, 562 U.S. at 312.

3. California’s timeliness rule was not “adequate” at the time Hart filed his state petition.

After agreeing that *Robbins* and *Gallego* were “both decided only three months earlier” than Hart’s petition was filed, the Ninth Circuit applied only part of the rule, *Clark*, and found that “Hart has not explained why *Clark* was insufficient to provide him notice of the timeliness rule or why, in the circumstances of the case, the CSC’s decision in *Clark* was inadequate to bar his claim.” (Pet. App. 2-29.)

The Ninth Circuit’s conclusion that *Clark* alone alerted Hart to the applicable timeliness rule rests on a misapprehension of procedural bar standards. At the time Hart filed his initial state habeas petition, November

6, 1998, *Clark* alone was not the timeliness rule. *Bradford v. Davis*, 923 F.3d 599, 611 (9th Cir. 2019). As the Ninth Circuit panel noted, the California Supreme Court “typically invokes the timeliness rule by citing *Clark* and *Robbins* together.” (Pet. App. 2-29.) In Ninth Circuit briefing, Hart did not explain that *Clark* alone was inadequate, because *Clark* itself was not the rule at the time. By requiring Hart to explain why *Clark* was inadequate, the panel applied an incorrect procedural bar.

Though the Ninth Circuit should have applied *Robbins* and *Gallego*, the timeliness rule under those cases was not adequate under Supreme Court precedent at the relevant time. Under the procedural bar doctrine, this Court “will not review a question of federal law decided by a state court if the decision of that court rests ‘on a state law ground that is independent of the federal question and adequate to support the judgment.’” *Coleman*, 501 U.S. at 729. To be adequate, this Court has held that a state procedural rule must be “firmly established and regularly followed.” *Cruz v. Arizona*, 598 U.S. 17, 25–26 (2023). At the time that Hart filed his petition, neither *Robbins* and *Gallego* were “firmly established” or “regularly followed.” *Bradford v. Davis*, 923 F.3d 599, 610-11 (9th Cir. 2019).

Hart filed his petition on November 6, 1998, just three months after *Robbins* and *Gallego* came out in August of 1998. Three months after the timeliness rule was changed, it could not have been regularly followed or

firmly established.⁴ Here, the Ninth Circuit cited *Walker* to explain that the California courts “typically” deny petitions by citing *Clark* and *Robbins* together. (Pet. App. 2-29) (citing *Walker*, 562 U.S. at 318). However in *Walker*, this Court found that the California timeliness rule under *Clark*, *Robbins* and *Gallego* was adequate in 2002, when the petitioner in *Walker* had filed the habeas petition at issue. *Walker*, 562 U.S. at 321; 319 (“On the same day the court denied Martin's petition, it issued 21 other *Clark /Robbins* summary denials.”). The Court did not find that the bar was adequate in 1998 when Hart filed his petition, only three months after *Robbins* and *Gallego* were published.

Because Hart has specifically explained that he did not have adequate notice of the timeliness rules under *Robbins* and *Gallego*, it was then the State’s burden to prove that the bar was adequate. *See* (Pet. App. 2-29) (explaining that Hart bears the initial burden to “assert[] specific factual allegations” on the bar’s inadequacy, though the State bears the “ultimate burden of proving adequacy”) (citing *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir. 2003)).

⁴ Though it may have been by the time the California Supreme Court denied Hart’s petition, on March 1, 2006. (Pet. App. 6-268.)

4. *Clark* was not an adequate procedural rule under *Coleman* at the time Hart filed his petition.

Even assuming that *Clark* was properly applied as the procedural bar here, *Clark* is not an adequate rule under this Court's precedent. *Coleman*, 501 U.S. at 730. Both *Robbins* and *Gallego* state that they were taken up by the California Supreme Court to explain the timeliness bar. *Robbins*, 18 Cal. 4th at 779 ("We issued an order to show cause in these two cases to analyze the timeliness issue and to explain, in the context of specific claims, how the timeliness rules are applied by our court."); *Gallego*, 18 Cal. 4th at 828 ("We issued an order to show cause in this matter and in the companion case of *In re Robbins* [], to address issues relating to application of the procedural bar of untimeliness.").

Though *Clark* is continually cited in California Supreme Court cases to deny petitions on the procedural grounds, it is not cited on its own, but always with *Robbins* or *Gallego*. See e.g. *Walker*, 562 U.S. at 319. That *Clark* alone is inadequate is implied by the California Supreme Court taking up *Robbins* and *Gallego*. See e.g. *Bradford*, 923 F.3d at 611 n.4 ("We have not yet expressed any opinion as to whether *Clark* sufficiently clarified the timeliness rule such that it was firmly established from then on.").

Despite the Ninth Circuit's implication otherwise, *Robbins* and *Gallego* do not have to conflict with *Clark* for *Clark* to be inadequate here. *Clark* was

not clear in what was required from habeas petitioners, and *Robbins* and *Gallego*, for the first time, clearly articulated what was required. *See Robbins*, 18 Cal. 4th at 819 (Kennard, J. dissenting). Only after *Robbins* and *Gallego* had been regularly applied did this Court find that the procedural bar was adequate. *Walker*, 562 U.S. at 319.

5. Even assuming the timeliness rule was properly applied, Hart satisfied it.

Even if California's timeliness rule was properly applied here, Hart did meet the requirements in *Clark*, *Robbins* and *Gallego*. Hart was only placed on notice of the timeliness rules on August 3, 1998, when *Robbins* and *Gallego* were decided, and he filed his petition within a reasonable time of the announcement of the new rules. *Gallego* specifically states that "a petitioner may establish the absence of substantial delay by showing that he or she previously was unaware of information offered in support of a given claim, and reasonably failed to discover earlier the information offered in support of the claim because he or she timely requested but was denied funding to investigate the claim." *Gallego*, 18 Cal. 4th at 834-35. Hart complied with the requirement that he provide a specific explanation when his state habeas counsel advised the California Supreme Court that they wanted to investigate the development that Hart may have brain damage, based on results of psychological evaluations. (Pet. App. 76-744-46.) Counsel requested

reconsideration of funding requests to further investigate the brain damage, which was denied by the Supreme Court eight months later. (Pet. App. 76-744-46.) State habeas counsel then filed the habeas petition two months later. Counsel properly delayed the filing of Hart's petition while waiting to hear whether they could get additional funding to investigate an undeveloped claim. This was in keeping with California's warning to avoid filing "piecemeal" claims and successive petitions. *Clark*, 5 Cal. 4th at 777 ("[P]iecemeal presentation of known claims and repetitious presentation of previously denied claims have not been condoned in this state."). Despite having only three months to comply with the new rules, Hart met these new timeliness requirements with his specific explanation for the delay because of a funding request.

B. Any procedural bar should also be excused because Hart can establish cause and prejudice.

A petitioner may meet the exception to the procedural default bar if they show "cause for the default and prejudice from a violation of federal law." *Martinez v. Ryan*, 566 U.S. 1, 10 (2012). For Hart's *Brady* claim, cause and prejudice can be evidenced by showing that the state's suppression of the evidence was the reason for failing to develop the facts, and the evidence was material. *Strickler v. Greene*, 527 U.S. 263, 282-83 (1999). The Ninth Circuit found that the State's failure to provide evidence that Gresham was a

government agent and may have testified falsely did not satisfy cause because Hart was on notice of the factual basis for this claim “as early as his 1995 direct appeal,” which claimed that Gresham was a government agent. (Pet. App. 2-32.) Further, the Ninth Circuit stated that Hart could have contacted Gresham anytime after his 1988 trial. (Pet. App. 2-32.)

Hart established cause under *Strickler*. 527 U.S. at 289. In *Strickler*, this Court found that the petitioner established cause when the prosecution withheld exculpatory evidence and the petitioner relied on the prosecutor’s open file policy and representations that everything had been turned over. *Id.* Similarly, in *Banks v. Dretke*, this Court found cause and prejudice when the State withheld evidence that a witness was working with the government, and testified falsely. 540 U.S. 668, 693-94 (2004). This Court held that the prosecution representing at trial and in postconviction proceedings that they had held nothing back entitled the petitioner to treat the prosecutor’s submissions as truthful. *Id.* at 698. Like *Strickler* and *Banks*, the prosecution in Hart’s case represented that they turned over all *Brady* evidence. Petitioners should not have to “scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.” *Id.* at 695.

The Ninth Circuit's conclusion that Hart was on notice of this claim because he asserted that Gresham was a government agent in his direct appeal is also in conflict with this Supreme Court precedent. The California Supreme Court found that Hart's claim that Gresham was a government agent was "unsupported by the record on appeal." *People v. Hart*, 20 Cal. 4th 546, 636 (1999), *as modified* (July 21, 1999). The factual basis that supported the California Supreme Court conclusion was not the entire picture. *See Id.* at 636. As uncovered in post-conviction discovery, in addition to the five years Gresham stated was taken off of his sentence, possibly 30 additional charges were dropped, which had created a fear that he would face life in prison. Pet. App. 27-453-55.) Contrary to the panel's opinion, the extent of Gresham's connection to the government in this case was not clear at the time of appeal. A petitioner does not have "to prove these representations [from the prosecution] false" rather, a petitioner is "entitled to treat the prosecutor's submissions as truthful. *Banks*, 540 U.S. at 698.

Hart can also establish prejudice. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). The Ninth Circuit found that this evidence about Gresham would only have been cumulative, and not material under *Brady*. (Pet. App. 2-33.) But the evidence would not have simply been more evidence that Gresham was working with the government or that he would be getting a reduced sentence.

The extent of the deal completely called into question Gresham's credibility, because he may have had decades more prison time at stake than what he testified to. Not only would the additional evidence have undermined his testimony at the time and shown he was lying about his deal and what Hart confessed to him, but it also would have shown Gresham to be a career criminal. Further, Gresham's testimony was important to the jury, as they asked for it to be read back to them and they wanted to "keep going over it." (Pet. App. 72-734.) The effect of this evidence could have put the case in "such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 419.

C. Application of the procedural bar here would result in a fundamental miscarriage of justice.

This Court has allowed for an exception to procedurally defaulted claims if the failure to hear a petitioner's claims would constitute a "miscarriage of justice." *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). If a petitioner can show that they would be ineligible for the death penalty, they can meet this exception. The Ninth Circuit ignored this argument in its opinion.

Here, the State used Gresham's testimony that Hart brutally murdered McMahan as the centerpiece in the evidence of aggravation in the penalty phase. The jury deliberated for three days, which shows that the death

sentence was not a certainty. The lack of Gresham's testimony would have created a "fair probability" that the jury could have had a reasonable doubt as to Hart' eligibility for the death penalty. *Id.* at 346-47. Because this results in a fundamental miscarriage of justice, the exception to the procedural default should apply.

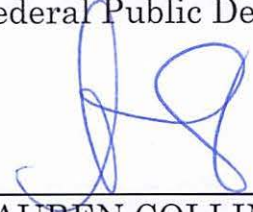
CONCLUSION

Based on the foregoing, Hart respectfully requests that this Court grant his petition for certiorari.

Respectfully submitted,

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DATED: December 5, 2024

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