No. 08-992

IN THE

Supreme Court of the United States

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections, *et al.*,
Petitioners,

vs.

JOSEPH J. KINDLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

When state law provides both fair notice of the existence of a procedural rule and a reasonable opportunity to comply, is the state's default rule rendered "inadequate," for the purpose of subsequent federal habeas review, by discretion in its application or by the existence of exceptions not precisely defined in advance?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

In the present case, the Court of Appeals declared the well-established state fugitive dismissal rule "inadequate" to support the judgment even though the defendant had more than fair notice that his escape could result in forfeiture of his claims. This decision impairs the finality of a valid state judgment, affirmed in an appeal that was more than fair to the defendant. The resulting inference with the execution of a well-deserved sentence for an especially heinous crime is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 1982, Joseph Kindler and two other men burglarized a Pennsylvania store. *Kindler* v. *Horn*, 542 F. 3d 70, 72 (CA3 2008). Two of the men were stopped by police during the getaway, but Kindler managed to escape. *Ibid.* One of the captured men, David Bernstein, identified Kindler as the mastermind behind the crime and the driver of the getaway car. *Ibid.* Immediately following his release on bail, Kindler devised a plan to kill Bernstein in order to prevent his testimony. *Ibid.* On July 25, 1982, Kindler and two accomplices beat Bernstein with a baseball bat, jabbed him with an electric prod, kidnapped him, and finally drowned him. See *id*., at 72-73.

The jury convicted Kindler of first-degree murder and kidnaping, and fixed a sentenced of death. *Commonwealth* v. *Kindler*, 536 Pa. 228, 230, 639 A. 2d 1, 2 (1994). Before the sentence was formally imposed, Kindler filed post-verdict motions with the trial court, but he escaped from the Philadelphia jail while these motions were pending. *Id.*, at 232, 639 A. 2d, at 2. The trial court dismissed Kindler's post-verdict motions, reasoning that because Kindler had voluntarily removed himself from the court's jurisdiction he had

"waived whatever rights he might have had to have his post-verdict motions considered . . . ." *Ibid.*

Seven months after his escape, Kindler was arrested in Quebec, Canada. *Ibid.* The United States requested extradition, but while review was pending, Kindler escaped again. *Ibid.* He remained at large for almost two years. *Ibid.* In 1998, an "America's Most Wanted" broadcast led to Kindler's capture in New Brunswick, Canada. *Ibid.* He was returned to Philadelphia and formally sentenced to death on October 2, 1991. *Id.*, at 231-232, 639 A. 2d, at 1.

On direct appeal, Kindler argued the trial court erred when it dismissed his post-verdict motions. *Id.*, at 232, 639 A. 2d, at 2-3. The Pennsylvania Supreme Court stated the "general rule" that "defendants who are fugitives from justice during the appellate process have no right to any appellate review, even though they have been recaptured and returned to the custody of Pennsylvania." *Id.*, at 232, 639 A. 3d, at 3. On the question of whether to apply this rule to one who escapes during post-verdict motions rather than during appeal, the state court looked to *Ortega-Rodriguez* v. *United States*, 507 U. S. 234 (1993), as persuasive but not binding authority. See *Kindler*, 536 Pa., at 232-233, 639 A. 3d, at 3; see also *Goeke* v. *Branch*, 514 U. S. 115, 119 (1995) (*per curiam*) (*Ortega-Rodriguez* was supervisory, not constitutional, not binding on state courts). The plurality found a sufficient connection between Kindler's escape and the trial court process to warrant dismissal of the post-verdict motions. See 536 Pa., at 233-234, 639 A. 3d, at 3-4. The concurring justices found that the dismissal was within the trial court's discretion. See *id.*, at 243, 639 A. 3d, at 8. With the forfeited issues out of the case, the Pennsylvania Supreme Court proceeded with the limited review it conducts in capital cases regardless of default, and it

found no ground to reverse. See *id*., at 234-241, 639 A. 3d, at 4-8. This Court denied certiorari. *Kindler* v. *Pennsylvania*, 513 U. S. 933 (1994).

Almost two years later, Kindler filed a motion for post-conviction relief under Pennsylvania's Post-Conviction Relief Act, claiming ineffective assistance of counsel. *Commonwealth* v. *Kindler*, 554 Pa. 513, 520, 722 A. 2d 143, 146 (1998). The Pennsylvania Supreme Court affirmed dismissal of the petition, declining to grant Kindler "an evidentiary hearing on claims already *forfeited* by his flight from captivity . . . ." *Id.*, at 523, 722 A. 2d., at 148 (emphasis in original).

In 2000, Kindler filed a federal habeas corpus petition. See *Kindler* v. *Horn*, 291 F. Supp. 2d 323, 337 (E.D. Pa. 2003). The District Court rejected the state's procedural default argument based on Third Circuit precedent. See *id*., at 342-343 (quoting *Doctor* v. *Walters*, 96 F. 3d 675, 685-686 (CA3 1996)). The court found that the jury instructions in this case violated the rule of *Mills* v. *Maryland*, 486 U. S. 367 (1988). See 291 F. Supp. 2d, at 351. The court also found fault with the prosecutor's argument contrasting Kindler's leadership role in the conspiracy with codefendant Shaw's follower role. See *id*., at 358.

The Third Circuit affirmed the district court's grant of habeas relief, 542 F. 3d, at 72, adopting the district court's statement that an adequate state procedural rule "must speak in unmistakable terms, and the state court's refusal to review a petitioner's claim must be consistent with decisions in similar cases." *Id.*, at 79.

This Court granted certiorari on May 18, 2009.

SUMMARY OF ARGUMENT

The case law regarding when a state procedural default rule is "adequate" to preclude review of a federal question in federal court is confused and in need of overhaul. The "varying rubrics" used in the cases to date should be replaced with a relatively simple test that the defendant had notice of the rule and a reasonable opportunity to comply with it.

This standard would serve federal interests better than the "strictly followed" rule, which perversely encourages states to adopt draconian rules of forfeiture. It is consistent with the results, though not the language, of nearly all of this Court's precedents in the area.

The policies behind the federal habeas corpus rules of exhaustion and deference also support the above reformulation. The exhaustion rule requires a defendant to do what he can to obtain a state court ruling on the merits, to which the deference rule of § 2254(d) can apply. The procedural default rule should operate to preclude federal review of the claim where the defendant could have but did not obtain a state ruling on the merits while keeping federal review as a backstop when state procedure unfairly deprives the defendant of a merits determination.

Given the "cause and prejudice" exception for defaulted claims in habeas, it is doubtful whether a separate "adequacy" inquiry is needed at all. Considerable simplification could be achieved by merging the adequacy inquiry into the "cause" prong of the *Sykes* test.

The defendant in this case had more than fair warning that escape was wrongful and could result in forfeiture of his claims. That is all that is needed to decide this case.

ARGUMENT

The Court of Appeals held in the present case that Kindler's default of his claim in state court was inadequate to bar federal habeas review because a prior circuit opinion found that the fugitive forfeiture rule was not being "strictly applied" in Pennsylvania at the time, see *Kindler* v. *Horn*, 542 F. 3d 70, 79 (CA3 2008), and because the state courts had "discretion to reinstate [Kindler's] post-verdict motions" after his recapture. *Id.*, at 80. The notions that a state default rule must be "strictly applied" in order to be "adequate" for this purpose and that it must not be discretionary comes from a combination of two problems. First, the procedural default rule in habeas was tied to the "adequate and independent state grounds" doctrine that applies on direct review of state-court judgments by this Court. Second, that doctrine is deeply confused and needs a major overhaul.

I. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds, and the prior patchwork of confusing phrases discarded.

A. "An Untidy Area."

Justice Frankfurter once referred to habeas corpus as "an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal* v. *Large*, 332 U. S. 174, 184 (1947) (dissenting opinion). The same could be said today of the "adequate and independent state grounds" doctrine.

The problem of adequate and independent state grounds is common to state-prisoner habeas cases under 28 U. S. C. § 2254 and this Court's direct review of state judgments under 28 U. S. C. § 1257. See *Lee* v.

Kemna, 534 U. S. 362, 375 (2002). Most of this Court's precedents on the subject are in the latter category. These precedents span the entire twentieth century, and they form a haphazard patchwork, offering "Varying Rubrics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), serving "[n]o legitimate state interest," *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state

ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923), involved a jurisdictional objection based on an executive order implementing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading making the appearance clearly stated the objection. *Id*., at 24. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Ibid*.

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 7. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*.

Barr v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard re-

flected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457-458, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S., at 301, quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955), but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id*., at 383 (footnote omitted). The "strictly" requirement in *Barr* was a bolt from the blue, and, as discussed *infra*, at 14-15, and 28-29, one that can cause perverse results if taken literally.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the proce-

dure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id*., at 234; see also *infra*, at 14 (quoting Wright, et al., critique of *Sullivan*). Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id*., at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a standard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 386-387, 392 (2d ed. 1996). Nothing more is required.[2]

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2. In a criminal case, if trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000). In a civil case, a malpractice suit would be the remedy.

B. Policy Reasons.

There are solid policy reasons for federal courts to respect the procedural rules of state courts. See *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991). In our federal system, state courts must necessarily adjudicate federal questions, because it would be impractical to remove every case with a federal issue to federal court. Practical considerations also preclude having two different sets of procedural rules: one for state issues and another for federal. See Wright, Miller, & Cooper, *supra*, § 4021, at 302. A single objection will often have both state and federal grounds, such as the hearsay rule and the Confrontation Clause or the Takings Clause of the Fifth Amendment and a parallel provision of the state Constitution. Having two different sets of rules for the time to raise a single objection would be chaotic.

On habeas corpus, there are additional reasons for recognizing and giving effect to state procedural default rules. These are discussed in Part II, *infra*.

Balanced against these considerations are "the federal interests in protecting federal rights against bad procedure." Wright, Miller, & Cooper, *supra*, § 4021, at 302. Underlying many of the old cases is a strong, if unstated, suspicion of state-court hostility to the underlying federal law. It is no coincidence that the most sweeping statements come in cases of black defendants and the NAACP from the South at the height of the civil rights struggle. See Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 885-902 (1994) (describing how state grounds doctrine shifted during the civil rights struggle and has since shifted back). Fortunately, this era is behind us, and has been for

some time. See *Stone* v. *Powell*, 428 U. S. 465, 493-494, n. 35 (1976). This is not to say the Court was wrong to do what it did in the 1960s. Great struggles may require drastic measures, but when the crisis is over we should return to the normal modes of procedure. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866).

Conscious hostility is not the only danger to federal rights, however. Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case. See *Michel* v. *Louisiana*, 350 U. S. 91, 95 (1955). For example, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262-263 (1982), involved a rule against raising new issues in a petition for rehearing. This is generally a fair and unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconstitutional statute through drastic and unexpected surgery, see *id*., at 258-259, thereby raising a different federal question from the one originally presented. As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

A possibly separate class of default cases consists of those where the defendant did make the federal claim to the trial court and received an adverse ruling on it, and then an appellate court held that the claim was defaulted by failure to make a "repetition of a patently futile objection." *Douglas* v. *Alabama*, 380 U. S. 415, 422 (1965). In *Douglas*, the objection was so clearly sufficient, see *id*., at 421-423, and n. 4, as to raise a suspicion of intentional discrimination against the federal right. In *Lee* v. *Kemna*, 534 U. S. 362, 381 (2002), counsel did not follow up his oral motion for a continuance with a written one after the trial judge had denied the oral motion on substantive grounds with no

objection to the form. Two alternative bases for the *Lee* holding are that Lee lacked fair notice that the rule applied to the circumstances, see *id*., at 382, and that under the circumstances he did not have a reasonable opportunity to comply. See *id*., at 382-383. In *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990), a pornography case, counsel had failed to request jury instruction on a constitutionally required element after the trial judge had ruled definitively that the element was not required. The default discussion in this case is brief, and the Court did not explore whether the defendant had adequate notice and opportunity.

Another situation which still arises on occasion is the inherently fair rule that is unfairly applied retroactively. A state may legitimately specify *in advance* which of two possible remedies a claimant must pursue, but it cannot "bait and switch." See *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Similarly, there is a federal interest in protecting federal rights from unforeseeable applications of existing rules. See *supra*, at 9-10 (discussing *Sullivan*). A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim. See *Walker* v. *Birmingham*, 388 U. S., at 320 (petitioners "on notice" of the correct procedure and not "entrapped or misled"). That does not mean that the boundaries of the rule must be so crisp that the lawyer can confidently skate on the edge. There are good reasons for rules to be flexible, and flexibility necessarily creates fuzzy boundaries. Fair notice means that a procedure that appears to be in *clear* compliance cannot suddenly be declared to be a default.

However, there is *no* federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. This is the perverse incentive of opinions such as the

majority in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*.

> "The possible implication in the Sullivan opinion that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure. In many circumstances, appellate courts invest lower courts with discretion both because of a belief that a better decision will result, and because of a conviction that in any event the matter does not justify the institutional cost of plenary review. Although there is a modest risk that discretionary procedural sanctions may be invoked more harshly against disfavored federal rights, that does not warrant blanket disregard of state procedure. Instead, the discretionary nature of the state rule may be considered in applying the better tests of adequacy set out in the next section. If discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law, or to deny a fair opportunity to present federal claims, the state ground may be found inadequate." Wright, Miller, & Cooper, *supra*, § 4026, at 385-386.

Along the same line, there is no federal interest in denying effect to any state procedural rule which is not "strictly" applied in the sense of iron-clad severity. Again, such a formulation provides a perverse incentive for states to make their default rules more severe and less flexible than the state might otherwise choose. "The Court should continue to recognize that sound

procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts." *Id.*, § 4028, at 403.

Dugger v. *Adams*, 489 U. S. 401 (1989), illustrates that this Court does not apply the "strictly" requirement literally. The dissent argued that the Florida Supreme Court had reached the merits in two other cases despite the same default, and therefore, under *Barr*, the state rule was inadequate. *Id.*, at 416-419 (Blackmun, J., dissenting). The majority rejected this argument, noting that the rule was applied in "the vast majority of cases." *Id.*, at 411, n. 6. The Court noted that even though the failure to clearly state the procedural default in a few cases would permit federal habeas review in those particular cases, it would not "undercut the adequacy" of the rule in general. *Id.*, at 412, n. 6.

No doubt in the mid-1960s there was a legitimate concern underlying the apparent distrust of discretionary or less-than-strict rules. That was the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants. See Glennon, 61 Tenn. L. Rev., at 895 (noting "state court efforts to use their procedural rules to impede the civil rights movement"). Over 40 years later, that possibility may not have vanished entirely, but it is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. Flexibility and discretion in the application of default rules should be encouraged, not discouraged.

If the state courts really did exercise discretion so as to discriminate on the basis of race or against fundamental rights, that would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such

presumptions should only be used where they produce the correct result most of the time. See *Coleman* v. *Thompson*, 501 U. S., at 737. Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

In general, then, the requirements of fair notice and a reasonable opportunity to comply accommodate all the important policy considerations. Two supplemental rules should also be recognized to deal with unusual situations: a state rule should not be allowed to defeat the policy of a pertinent federal statute, and actual, invidious discrimination in the application of a state rule independently violates the Equal Protection Clause.

C. Consistency with Precedent.

As we noted earlier, respect for *stare decisis* requires that any restatement of the doctrine of adequate and independent state grounds be as consistent as possible with precedent. No coherent theory could possibly embrace the widely disparate language of the precedents, but it is possible to reconcile all but two of the major cases on their facts. "It is black letter law that the holding of a case is determined by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." *People* v. *Davis*, 7 Cal. 4th 797, 823, 872 P. 2d 591, 608 (1994) (Mosk, J., dissenting) (internal quotation marks omitted). Hence, consistency with the material facts is at least as important as consistency with the language.

First, we can put to one side those cases in which the state rule operates contrary to the policy of a federal statute or regulation. *Davis* v. *Wechsler*, 263 U. S. 22 (1923), belongs in this category. That case involved a suit against a railroad under federal control,

and it was brought in violation of a federal executive order prescribing the venue of such suits. See *id*., at 23; see also *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111, 112-114, and n. 1 (1921) (quoting and upholding the order). The purpose of the order was to divest the court of authority to hear the case at all, so the policy considerations supporting respect for state procedure, see *supra*, at 11, diminish to the vanishing point. It would defeat the policy of the order and the statute it implemented to allow a minor misstep in local procedure to subject a federally controlled entity to suit in a court where the case never should have been. Taking a limited view of *Davis*, such as this one, is necessary to reconcile it with *Central Union Tel. Co.* See *supra*, at 8.[3] *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294 (1949), can be considered in the same special class. "*Brown* did not involve a pleading problem at all but rather a misconception by the state court as to the governing substantive [federal statutory] law." Hill, *supra*, 65 Colum. L. Rev., at 973.

The federal statute cases aside, we turn to the facts of other cases. The easiest cases are those where the state rule, as applied, is so grossly unfair as to violate due process. *Reece* v. *Georgia*, 350 U. S. 85 (1955), is the exemplar of this group. The indigent defendant's time to challenge the composition of the grand jury expired before counsel was appointed. See *id*., at 88-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

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3. An alternative limited view of *Davis* is that the state court's procedural ruling was novel and surprising. See Hill, *supra*, 65 Colum. L. Rev., at 975-976. If Professor Hill is correct, the *Davis* holding on its facts is consistent with our proposed general standard.

Cases involving new rules unfairly applied retroactively fit with our proposed requirement of fair notice. These include *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991), *Johnson* v. *Mississippi*, 486 U. S. 578, 587-589 (1988) (state case law at the time of the "default" indicated that the procedure defendant used was proper), and *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677-678 (1930), found that the retroactive application of a new rule defaulting the federal claim was a due process violation, so this case fits both categories.

Closely related are those cases where the state rule was clearly established before the "default," but the procedure followed by the federal claimant appeared to be in compliance with the rule as applied up to that time. These include the infamous *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"), *Sullivan* v. *Little Hunting Park*, discussed *supra*, at 9, and *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). In *Barr*, the state court had held that the objection was "too general to be considered." *Ibid*. Yet, this Court noted, in four other nearly contemporaneous cases, the state court had considered equally general objections and, significantly, had *granted* relief in two of those cases. See *ibid*. Cases granting relief are more significant than cases reaching the merits but denying relief.[4] In *James* v. *Kentucky*,

4. A decision to deny a clearly meritless claim on the merits rather than deal with a difficult procedural question may be justified as a simple matter of judicial economy. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997). Such a sensible procedure should not be considered a failure to regularly enforce the rule.

466 U. S. 341, 346-348 (1984), the preexisting case law was too confused to give fair notice that defendant had to ask for an "instruction" rather than an "admonition" under the circumstances. In *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the Court noted "a long line" of decisions permitting motions like the defendant's. The second of the alternative bases of *Lee*, 534 U. S., at 382, also fits in this category. In *Douglas*, 380 U. S., at 421-422, defense counsel was assured by the prosecutor that his objection was sufficient.

Douglas, *Osborne*, and *Lee* may all be categorized as "futile repetition" cases. Only *Osborne* actually depends on this ground, however. *Douglas* and *Lee* may be considered inadequate notice cases, see *supra*, and *Lee* may be considered an inadequate opportunity case. See *infra*. A "futile repetition" prong of the adequacy test would be needed only to be consistent with the result in *Osborne*. This minor point in a single case, only briefly considered in the opinion, is insufficient to warrant maintaining a separate exception.

Finally, there are the cases where the rule as applied denies a reasonable opportunity to present the federal claim, however well established it may be and however fair it may be in most cases. *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982), illustrates this category. The petition for rehearing in that case was the first opportunity to present the federal question as a practical matter. See *supra*, at 12. Regardless of whether the state rule against raising new issues on petition for rehearing violated due process as applied, the plaintiffs did not have a fair opportunity to present their claim, and hence the state ground was not adequate to bar federal review. In *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 23 (1920), the "coercive means" used by local authorities to illegally tax exempt Indian land had left the Indians with no reasonable opportunity to make the

prepayment challenge the state required. *Lee* v. *Kemna*, *supra*, also fits in this category. See *supra*, at 12; see also Brief for Petitioner 33.

One case that cannot be reconciled on its facts is *Henry* v. *Mississippi*, 379 U. S. 443 (1965). That case involved a contemporaneous objection rule. *Id*., at 445-446. The defendant did not object to certain evidence when it was introduced, although he did later. *Ibid*. The actual holding of this confusing case was to remand to the state court with an invitation to adopt the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U. S. 391 (1963), for its own procedural default rule. See *Henry*, *supra*, at 453.[5]

Henry's deficiencies were obvious at the time and were cataloged in Justice Harlan's dissent, *id*., at 457-465, and Professor Hill's article, *supra*, 65 Colum. L. Rev., at 982-992. Today, there are additional reasons the Court should not be too concerned with *Henry* as precedent. The decision itself is routinely ignored. See *supra*, at 8; *Lee*, 534 U. S., at 394 (Kennedy, J., dissenting). Most importantly, though, *Henry* is heavily dependent on *Fay* v. *Noia*, which has since been overruled. See Wright, Miller, & Cooper, *supra*, § 4020, at 282, 291. At this point, *Henry* has so little value as precedent that it should not prevent the formulation of a coherent standard.

In summary, a coherent standard of "adequate" state grounds is needed to replace the existing patchwork for state procedural default rules. An adequate state procedural rule is one that gives fair notice that the rule exists and applies, and provides a reasonable

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5. The state court declined the invitation. This Court denied certiorari, superfluously adding that the denial was without prejudice to habeas relief, and Henry subsequently obtained habeas relief. See Glennon, 61 Tenn. L. Rev., at 898-899.

opportunity to present the claim. This standard embraces the important policy considerations and is consistent with all but two of the precedents, one of which should no longer be considered a valid precedent.

II. The purpose behind the habeas procedural default rule is better served by a focus on reasonable opportunity than on strict application.

A. A Secondary and Limited Procedure.

"Habeas corpus 'is designed to guard against *extreme malfunctions* in the state criminal justice systems.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 634 (1993) (emphasis added) (quoting *Jackson* v. *Virginia*, 443 U. S. 307, 332, n. 5 (1979) (Stevens, J., concurring in the judgment)). This role is "secondary and limited." *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983). Keeping federal habeas confined to that role has been a continuing challenge for both Congress and this Court for well over a century. The first limitation to be imposed was the exhaustion rule. See Forsythe, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 Notre Dame L. Rev. 1079, 1121-1123 (1995).

Prior to the period of *de novo* review, exhaustion was much more than a rule of timing. Its purpose was to require the defendant to go to the state courts for a ruling on the merits which would, in most cases, be the last full examination of the case. "[A] federal court will *not ordinarily re-examine* upon writ of habeas corpus the questions thus adjudicated." *Ex parte Hawk*, 321 U. S. 114, 118 (1944) (*per curiam*) (emphasis added). Relitigation in federal court was limited to cases where "the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . ." *Ibid.*; see also *Fay* v. *Noia*, 372 U. S. 391, 459-460 (1963) (Harlan, J.,

dissenting). This is the rule Congress understood it was endorsing when it codified the exhaustion rule in 1948. See *Darr* v. *Burford*, 339 U. S. 200, 211 (1950); *Rose* v. *Lundy*, 455 U. S. 509, 516 (1982).

Brown v. *Allen*, 344 U. S. 443 (1953), is the case generally credited with (or blamed for) abandoning the rule of deference and establishing *de novo* review as the norm. See, *e.g.*, *Noia*, 372 U. S., at 460 (Harlan, J., dissenting); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 154-155 (1970); but see *Wright* v. *West*, 505 U. S. 277, 287-288 (1992) (opinion of Thomas, J.) (disputing that *Brown* actually held that); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, No. 91-542, pp. 14-16 (same). Judge Friendly attributes the abandonment of this rule and the establishment of *de novo* review on federal habeas to "the growth of the country and the attendant increase in the Court's business," so that the Court "had to summon the inferior federal judges to its aid" to correct errors in state courts. Friendly, *supra*, at 155. While growth of the country may be part of the explanation, there can be no doubt that state court resistance to civil rights and to the greatly expanded rights for criminal defendants in the 1950s and 1960s was also a major factor. By the mid-1970s, this hostility to federal rights had abated, see *Stone* v. *Powell*, 428 U. S. 465, 493, n. 35 (1976), and a period of retrenchment began, culminating in the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 933-940, 953 (1998).

AEDPA made many changes to habeas corpus law, but the most important was the abrogation of the rule of *de novo* review. See *Williams* v. *Taylor*, 529 U. S. 362, 404 (2000). Simultaneously, Congress strength-

ened the exhaustion rule, specifying that the state could expressly waive the rule, but not inadvertently default it. See 28 U. S. C. § 2254(b)(3). Congress must have considered exhaustion to be a vitally important policy to make it one of the few defenses in the law which cannot be lost by failure to assert it. The reason lies in how three rules—exhaustion, default, and deference—fit together to restrain federal habeas from substituting for state appeal.

B. Three Interlocking Pieces.

In *O'Sullivan* v. *Boerckel*, 526 U. S. 838 (1999), both the majority opinion and Justice Stevens' dissent addressed the "interplay" of the exhaustion and procedural default rules. See *id.*, at 848. The majority agreed with the dissent that

> "a prisoner could evade the exhaustion requirement—and thereby undercut the values that serves—by 'letting the time run' on state remedies. *Post*, at 853. To avoid this result, and thus 'protect the integrity' of the federal exhaustion rule, *ibid.*, we ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts, see *post*, at 854." *Ibid.* (emphasis in original).

The *O'Sullivan* dissent's assertion that the two rules are "analytically distinct," *id.*, at 850, is an overstatement. The fact that one of the principal purposes of the procedural default rule is to protect the integrity of the exhaustion rule necessarily ties the two together. Indeed, in *Daniels* v. *Allen*, the companion case to *Brown* v. *Allen*, *supra*, the Court at one point appears to consider the default rule to be simply one aspect of the exhaustion rule.

> "We have interpreted § 2254 as not requiring repetitious applications to state courts for collateral relief, p. 447, *supra*, but clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, such as is referred to just above at notes 32 and 33, bars federal habeas corpus. The statute requires that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ." *Brown*, 344 U. S., at 487.

At another point in the opinion, though, the Court seemed to adopt an independent state grounds rationale. See *id*., at 458; see also *Fay* v. *Noia*, 372 U. S., at 461-462 (Harlan, J., dissenting). The opinion of the Court in *Fay*, *supra*, at 433-435, rejected both independent state grounds and exhaustion as bases for the procedural default rule, omitting any mention of the contrary alternative holdings in *Brown* noted in the dissent. *Fay* was effectively overruled[6] in *Wainwright* v. *Sykes*, 433 U. S. 72, 86-88 (1977), which adopted the independent and adequate state ground rationale for the procedural default rule and simultaneously adopted the "cause and prejudice" exception.

Basing the default rule on independent state grounds rather than failure to exhaust makes the habeas rule different in theory from the rule in administrative law, but *Woodford* v. *Ngo*, 548 U. S. 81, 92-93 (2006), indicated that the difference is merely one of "terminology." On either theoretical ground, the

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6. The official overruling came in *Coleman* v. *Thompson*, 501 U. S. 722, 750-751 (1991).

question is whether the would-be federal litigant has *properly* exhausted the primary remedy before turning to the federal courts. Compare *O'Sullivan*, 526 U. S., at 848, with *Woodford*, *supra*, at 93.

If the procedural default rule is important to protect the integrity of the exhaustion rule, we must ask why the exhaustion rule itself is important. The traditional explanation is that the purpose of the rule is to give "an opportunity to the state courts to correct a constitutional violation" before a federal court intervenes. *Darr*, 339 U. S., at 204. However, in *Coleman* v. *Thompson*, 501 U. S. 722 (1991), this Court clarified that the States themselves, not the state courts, are the focus of concern.

> "State courts presumably have a dignitary interest in seeing that their state law decisions are not ignored by a federal habeas court, but most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction." *Id.*, at 738-739.

The exhaustion rule, complemented by the procedural default rule, enhances the finality of state court judgments by requiring the defendant to make his objection known early in the process. Finality is delayed and cost is increased if the defendant is allowed to pursue his state appeals with one set of arguments and, when those are unsuccessful, proceed in federal court with a new set of arguments. Even before AEDPA, habeas petitioners were normally required to

present the factual basis of the claim to the state courts, and the state courts' findings on those facts were presumed to be correct. See 28 U. S. C. § 2254, former subd. (d) (1994 ed.).

With the enactment of AEDPA, the exhaustion and procedural default rules not only reinforce each other, but they now serve the additional purpose of protecting the integrity of the "deference" standard of 28 U. S. C. § 2254(d). After AEDPA, it is once again the exception rather than the norm for a question decided in state court to be decided again in federal court, as it was before *Brown* v. *Allen*. See Scheidegger, 98 Colum. L. Rev., at 946; *supra*, at 21-22. If the state court decided the merits, then the federal court need only satisfy itself that the state court's decision is neither contrary to nor an unreasonable application of Supreme Court precedent. At that point the habeas case is over, and the federal court need not decide the underlying question. See, *e.g.*, *Lockyer* v. *Andrade*, 538 U. S. 63, 71 (2003); *Woodford* v. *Visciotti*, 537 U. S. 19, 27 (2002) (*per curiam*).[7] Only by such shortening of the decision process would this section achieve Congress's goal in enacting it, to reduce delay. See *Williams* v. *Taylor*, 529 U. S., at 404.

C. Procedural Default and Habeas Policy.

The preferred mode of proceeding is for the criminal defendant to present his federal claim to the state courts in the manner required by state law and receive a ruling on the merits. If the ruling is in his favor, the case never reaches federal court. If the ruling is against

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7. The habeas court *may* decide the merits first, as a correct decision is necessarily a reasonable decision, see *Weeks* v. *Angelone*, 528 U. S. 225, 231-237 (2000), but this will typically not be the most efficient method.

him, the threshold questions in federal court are whether the state ruling is contrary to clearly established law, an unreasonable application of that law, or based on an unreasonable finding of the facts. See 28 U. S. C. § 2254(d). Those questions can and should be answered solely on the state court record, providing prompt resolution of most habeas cases. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *McDaniel* v. *Brown*, No. 08-559, pp. 8-19. Proceeding in this mode will implement the goal of Congress in enacting AEDPA to limit relitigation. See *Williams* v. *Taylor*, 529 U. S., at 404; Scheidegger, 98 Colum. L. Rev., at 946.

The exhaustion rule reinforces the deference rule by requiring the defendant to go to the state courts first. The procedural default rule reinforces the exhaustion rule by requiring him to go *properly* to the state courts first. See *supra*, at 25. The exceptions to the deference rule *and* the procedural default rule implement the policy of keeping habeas available to correct "extreme malfunctions" in the state court proceedings. The exceptions to the deference rule provide relief in cases where the state ruling on the *merits* is outside the bounds of reasonable disagreement. The exceptions to the exhaustion and procedural default rules provide relief where the state system has *procedurally* denied the defendant a fair opportunity to obtain a ruling on the merits. For exhaustion, this principle is expressly stated in the statute. See 28 U. S. C. § 2254(b)(1)(B).

Ideally, no defendant would ever qualify for an exception to the procedural default rule. All state rules should be adequate, and a defendant with good cause and resulting prejudice or a strong showing of actual innocence should qualify for an exception to the state's own default rule. While perfection is unattainable, the federal rule should encourage state systems to move in

that direction. Instead, the perverse "strictly followed" rubric does just the opposite.

At oral argument last term in *Bell* v. *Kelly*, Justice Breyer expressed surprise that Virginia's default rule had no exception for new evidence, that the defendant could not have discovered earlier, that "shows the whole trial was a farce . . . ." Tr. of Oral Argument in *Bell* v. *Kelly*, No. 07-1223, pp. 16-17. Why would a state court or legislature enact such a harsh, uncompromising, potentially cruel rule? Because the "strictly followed" standard threatens disregard of state rules by federal courts as punishment for the sin of being too generous to defendants.

For example, Ohio does have a "good cause" exception to its procedural default rule. In *Richey* v. *Mitchell*, 395 F. 3d 660, 680 (CA6 2005), reversed on other grounds in *Bradshaw* v. *Richey*, 546 U. S. 74 (2005) (*per curiam*), the Sixth Circuit declared this rule "inadequate" because " 'the state courts have not achieved consensus on what constitutes "good cause" to excuse noncompliance with rule 26(B).' " Of course they haven't, and they never will. Exceptions such as "good cause" must necessarily be elastic. See *supra*, at 14. In the absence of any evidence that exceptions are being applied in a discriminatory manner, declaring a state rule to be inadequate because exceptions have been made for other defendants is contrary to the policy behind the default rule.

The overarching goal of AEDPA was to streamline federal habeas proceedings, and the exhaustion rule was strengthened to advance that goal. See *Rhines* v. *Weber*, 544 U. S. 269, 277 (2005). It *should* go without saying that an interpretation of the exhaustion and default rules that spawns collateral litigation on top of collateral litigation cannot be correct. Yet the Ninth Circuit did exactly that in *Bennett* v. *Mueller*, 322 F. 3d

573, 583-584 (2003), where it remanded a habeas case to the district court for an inquiry having nothing to do with Bennett's individual case but rather to investigate whether the California courts had applied the state's clearly stated and easily followed timeliness rule with sufficient consistency to be considered "adequate."[8] Such squandering of limited judicial resources must stop.

The "extreme malfunction" that federal habeas should protect against occurs when a defendant has been trapped into forfeiting his federal claim by a state rule that fails to give fair notice or a reasonable opportunity to comply. The adequacy test need go no further. State rules with insufficient exceptions can be dealt with under the cause and prejudice test.

III. For habeas, the "adequacy" inquiry could be merged into the *Sykes* "cause" inquiry.

In Part I of this brief, we propose a reformulation of the "adequate state grounds" rule applicable to direct review and habeas alike. However, there is already an important difference between direct review and habeas. The habeas variant of the rule has exceptions for "cause for the default and prejudice from the asserted error" and miscarriages of justice. *House* v. *Bell*, 547 U. S. 518, 536 (2006).

Lack of fair notice that a rule exists and applies to the situation is certainly cause not to comply with it. So, too, is a situation that makes compliance impractical. The "prejudice" prong of the test is no longer a major impediment to claims that would otherwise

8. We understand this issue will be discussed in greater detail in the brief for *amici* States.

qualify for relief since *Brecht* v. *Abrahamson*, 507 U. S. 619 (1993), raised the bar on harmless error review.

Given these realities, one might well ask why a separate adequacy inquiry is needed at all. Cf. *Strickler* v. *Greene*, 527 U. S. 263, 282 (1999) (merger of *Brady* materiality with *Sykes* prejudice inquiry). A much needed simplification of the complex jurisprudence of habeas corpus could be achieved by simply saying that the two exceptions noted in *House*, *supra*, are the only exceptions and dispensing with the superfluous adequacy inquiry.

IV. A case squarely on point is not required to give fair notice.

In arguing that the state rule was not clearly established, Kindler notes that there have been some changes in the fugitive disentitlement rule in Pennsylvania, as the Pennsylvania Supreme Court has worked its way through various permutations of what stage of proceedings is pending when the prisoner escapes, when that proceeding is dismissed, and when the fugitive is recaptured. See Brief in Opposition 6-8.

In a legal system where law is made largely through judicial decisions in cases, this is a normal process. The question should not be whether every "t" was crossed and every "i" dotted at the time of the default. That would be an impossible standard. The appropriate question is whether the law at the time Kindler escaped failed to give him fair warning that forfeiture of his claims was a possible consequence.

Rules that specify the consequences of failure to follow the correct procedure need not be laid out with the same exactitude as the rules that define a criminal offense. Cf. *Rogers* v. *Tennessee*, 532 U. S. 451, 469-470

(2001) (Scalia, J., dissenting) (discussing "fair warning" in that context). Changes in the law, or clarifications of unsettled points, are less problematic in matters of procedure than in regulation of primary conduct. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 275 (1994); *Republic of Austria* v. *Altmann*, 541 U. S. 677, 696 (2004).

State law needs to give the defendant fair notice of the correct mode of proceeding and fair warning that loss of the claim is a possible consequence of proceeding incorrectly. In this unusual case, escape from custody was not only clearly wrong procedure, it was a crime. The fugitive disentitlement rule provided fair notice of forfeiture as a possible consequence, see Brief for Petitioner 36-42, even if the precise point in this case had yet to be decided. The state did not set a "springe," cf. *supra*, at 8, and Kindler has not been treated unfairly. That is all that is needed to decide this case.

CONCLUSION

The decision of the United States Court of Appeals for the Third Circuit should be reversed.

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Respectfully submitted,

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