

No. 09-996

In The
Supreme Court of the United States

—◆—
JAMES WALKER, WARDEN, ET. AL.,

Petitioners,

v.

CHARLES W. MARTIN,

Respondent.

—◆—

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

—◆—

PETITIONER'S BRIEF ON THE MERITS

—◆—

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QUESTIONS PRESENTED

Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner “substantially delayed” filing his habeas petition. In federal habeas corpus proceedings, is such a state law “inadequate” to support a procedural bar because the federal court believes that (1) the rule is vague and (2) the state failed to prove that its courts “consistently” exercised their discretion when applying the rule in other cases?

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OPINIONS BELOW

The memorandum opinion of the Ninth Circuit in Case No. 08-15752, reversing the district court's dismissal of respondent Martin's federal habeas corpus petition, is unpublished. See Appendix to the Petition for Writ of Certiorari (Pet. App.) 1-3. The district court judgment is unpublished, see Pet. App. 4-5, as are the magistrate's underlying "findings and recommendations" (F&Rs). Pet. App. 6-19.

The earlier memorandum opinion of the Ninth Circuit in Case No. 05-15524, reversing the district court's earlier judgment dismissing the petition, is unpublished. Pet. App. 20-23. That earlier judgment of the district court is also unpublished, Pet. App. 25-27, as are the magistrate's underlying "findings and recommendations." Pet. App. 28-59.

**STATEMENT OF JURISDICTION**

The Ninth Circuit entered judgment reversing the dismissal of respondent's federal habeas corpus petition on November 20, 2009. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.1.



PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code provides, in pertinent part:

“(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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

State Criminal Proceedings

In December 1986, respondent Martin and an accomplice robbed and killed a drug dealer. Following the crime, Martin left the state and was not arrested until nearly ten years later. In 1995, Martin was convicted in a California court of first-degree murder and was sentenced to life in prison without the possibility of parole.

The California Court of Appeal affirmed Martin's conviction on direct review in 1997. The California Supreme Court denied further direct review.

State and Federal Post Trial Proceedings

In 1998, Martin filed a petition for writ of habeas corpus in the California Supreme Court, claiming he had received ineffective assistance of counsel at trial and on appeal and that the trial court erred in jury selection procedures. That court denied the petition in 1999.

Next, Martin filed a petition for writ of habeas corpus in the federal district court. The district court determined that Martin had "exhausted" his state-court remedies on only some of his claims. So, in February 2001, the court granted Martin a stay of the federal proceedings so that he could go back to the California Supreme Court and exhaust his remedies on his new claims.

Martin then filed his second California Supreme Court petition for writ of habeas corpus in March 2002—nearly five years after his conviction had become final and more than three years after the state supreme court had rejected his first state habeas petition. Joint Appendix (JA) 8, 9, 13. Martin claimed that his trial counsel was ineffective for failing to investigate witnesses and third party culpability and for failing to prevent the admission of certain evidence. Martin also claimed his appellate counsel was ineffective for failing to raise, on direct appeal, claims of prosecutorial misconduct, denial of confrontation, and insufficient evidence of guilt.

The California Supreme Court denied this second state petition in September 2002, citing *In re Clark*, 5 Cal.4th 750, 855 P.2d 729 (1993), and *In re Robbins*, 18 Cal.4th 770, 780, 959 P.2d 311, 317 (1998). Pet. App. 60. These citations indicate that Martin’s new second-petition claims were forfeited for lack of “timeliness.” See *In re Robbins*, 18 Cal.4th, at 814, n. 34. California’s habeas corpus timeliness rule requires state habeas corpus petitioners to file their known claims “as promptly as the circumstances allow” and without substantial unexplained delays. *In re Clark*, 5 Cal.4th, at 765, n. 5, 855 P.2d, at 738, n. 5. Further, the rule requires petitioners to disclose when they first learned of their claims and why they did not file sooner. Petitioners who file after substantial delay and without adequate justification might still obtain merits review, but only if they qualify for one of four enumerated exceptions to the rule. *In re Robbins*, 18

Cal.4th, at 780-81, 959 P.2d, at 317-18. The denial of Martin's claim for lack of timeliness, however, meant that the California Supreme Court had determined that none of the exceptions applied. See *In re Robbins*, 18 Cal.4th, at 814, n. 34.

Martin returned to federal court and filed an amended petition, raising six claims, in January 2003. The state moved to dismiss the petition on the basis that some of the claims were too late under the federal statute of limitations. See 28 U.S.C. § 2244. The state also argued that all six of Martin's claims were procedurally barred because they had been forfeited in state court under state procedural rules. Relying on the state-court precedent of *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513, 514 (1953), the state asserted that petitioner could and should have raised some of the claims on direct appeal rather than in a later state habeas corpus petition. The remaining claims, the state further argued, were procedurally barred because they had been deemed forfeited by the *Clark/Robbins* procedural ruling in state court.

The magistrate found that some claims were too late under the federal statute of limitations. The magistrate also found that other claims were procedurally barred because Martin could and should have raised them in state court on direct appeal. In addition, the magistrate concluded that claim 3 (ineffectiveness of trial counsel for failure to investigate witnesses and present a defense of third party culpability), claim 4 (ineffectiveness of trial counsel for failure to effectively object to certain

evidence), claim 5 (denial of personal presence at part of the trial), and claim 6 (ineffective appellate counsel) were all procedurally barred because the California Supreme Court had ruled that petitioner had failed to present them in a timely fashion as required by *Clark/Robbins*. The procedural bars were enforceable in federal court, the magistrate explained, because Martin had not made a sufficient factual allegation that the state procedural rule was inconsistently applied so as to shift the burden of proof to the state under the Ninth Circuit precedent of *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003). Pet. App. 28-59.

Martin objected only that he had shifted the *Bennett v. Mueller* burden back to the state with respect to the procedural bar applied to claims 3 through 6. But, in March 2005, the district court agreed with the magistrate and dismissed the entire petition. Pet. App. 25-27.

On appeal in 2006, a Ninth Circuit panel agreed that some of Martin's claims were too late under the federal statute of limitations. However, the panel reversed the district court and remanded claims 3, 4, and parts of claim 6 for a determination of the "adequacy" of the state's timeliness rule. Pet. App. 20-23.

On remand, the magistrate recommended that the remaining claims be dismissed as procedurally barred. After reviewing state court decisions, the magistrate found that it was well established that

the California timeliness rule applied to both capital and noncapital cases; and that the rule was sufficiently clear and consistently enforced, so as to support the federal procedural bar against Martin's remaining claims. The district court agreed and dismissed Martin's petition. Pet. App. 4-19.

In an unpublished memorandum, however, the Ninth Circuit again reversed the district court's judgment. The court of appeals held that California's habeas corpus timeliness bar was "inadequate" to support a federal procedural bar because the state had not met its *Bennett v. Mueller* burden of showing that the rule was clear and consistently applied. As the Ninth Circuit put it, California "has chosen to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines," and the state had not proven that the state courts "consistently" applied the rule in other cases. The Ninth Circuit panel remanded the case for a determination of the merits of Martin's remaining claims. Pet. App. 1-3.



SUMMARY OF ARGUMENT

The California Supreme Court's denial of Martin's second state habeas petition on untimeliness grounds suffices to bar Martin's defaulted claims in federal habeas corpus proceedings. The state procedural rule is adequate to support the state judgment because it provides fair notice of what

respondent was required to do and because the rule serves a legitimate state interest. Indeed, the federal court should presume the adequacy of state procedural default rules. The habeas corpus petitioner, instead, should bear the burden of proving, as part of the “cause and prejudice” exception for barred claims under modern habeas corpus law, why the federal court nevertheless should consider the merits of his claims under the particular circumstances of his case.

I.

Where a habeas corpus petitioner forfeited a claim in state court by failing to adhere to an “adequate” state procedural rule, his claim generally will be barred in federal habeas corpus proceedings. As may be distilled from this Court’s many cases discussing “adequacy” in different contexts, a state procedural rule is “adequate” when the petitioner had fair notice of the rule and the rule served a legitimate state interest.

A. In most cases where this Court has found state rules inadequate, a lack of fair notice was explicitly or implicitly the basis for the decision. E.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958). Fair notice exists when a person of ordinary intelligence can reasonably understand what is required to comply with the state procedural rule. See *United States v. Harris*, 374 U.S. 612, 617 (1954). Conversely, fair notice does not exist when the

state court announces a new procedural rule and applies that rule retroactively, *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991), or when the state court has failed to consistently articulate or define a given state rule so as to frustrate fair notice, *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988).

Thus, consistent with recognition of fair notice as a hallmark, this Court has observed that a state procedural rule is adequate if it is “firmly established and regularly applied.” *Beard v. Kindler*, 130 S.Ct. 612, 617 (2009). Unfortunately, however, such terminology has led some federal courts, including the Ninth Circuit in this and many other cases, to employ an overly restrictive and mechanical standard for adequacy. They seek an arithmetical level of “consistent application,” as if for its own sake, and lose sight of the purpose of the adequacy inquiry—vindicating fair notice and legitimate state interests.

Instead, as recognized by this Court just last Term in *Beard v. Kindler*, a state rule provides fair notice even if it permits discretion. So fair notice adequacy is not defeated just because the case by case necessary by products of such discretion in applying the rule or its possible exceptions superficially might seem, from the federal court’s distant vantage, to be “inconsistent” applications of the state rule in cases other than the petitioner’s. Such characteristics, present in California’s timeliness rule, make it treacherous and untenable for the federal court to scrutinize how the state courts have exercised

discretion tinged state law rules in other cases of merely superficial similarity. Rather, the key remains whether the state rule, as formulated, provides fair notice of its requirements to litigants to give them an opportunity to present their claims. If it does, then perceived “inconsistent” applications of the procedural rule on the unique facts of other cases rarely will show that the petitioner somehow had been misled so as to negate fair notice.

B. In addition to ensuring fair notice, this Court’s “adequacy” jurisprudence reflects that a state procedural rule must serve a legitimate state interest. When the rule fails to advance any legitimate state interest, a federal court’s refusal to respect the rule does not offend comity or federalism. For example, if the rule on its face were to invidiously discriminate against federal claims or claimants, it certainly would advance no legitimate interest. Similarly, if the rule in general imposes arbitrary obstacles that frustrate any opportunity for the petitioner to present his claim, it may be found to be inadequate as an “arid ritual of meaningless form.” See, e.g., *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Because state rules typically serve any one of many legitimate interests, however, it will be the rare rule that can be said to serve none.

C. Of course, even a rule adequate on its face or in general might sometimes operate in a particular case in a fundamentally unfair manner. For example, this Court has sometimes declared a state procedural rule “inadequate” because it served no legitimate

state interests in the unique circumstances of a specific case. E.g., *Lee v. Kemna*, 534 U.S. 362, 376 (2002). But the availability of this Court’s modern “cause and prejudice” exception in habeas corpus cases obviates any need to treat individual cases of injustice as instances of alleged “inadequacy” of the state rule itself. The “cause and prejudice” inquiry serves as the most appropriate check against a miscarriage of justice in a specific case.

II.

Just as comity and federalism concerns led to adoption of the procedural bar doctrine in federal habeas corpus cases, see *Coleman v. Thompson*, 501 U.S. 722, 730, 739 (1991), those same considerations dictate that federal courts should presume the adequacy of a state procedural rule invoked by a state court as an independent ground for rejecting a petitioner’s claim. Federal courts presume, without further demonstration, the applicability of their own procedural rules; they should not insist on more as a prerequisite to respecting similar state rules. The presumption is further justified by the undeniable good faith of the state courts in faithfully enforcing federal law and the many interests that typically underlie state procedural rules. In addition, without always requiring case by case scrutiny, the presumption would reach the correct result in the vast majority of cases. And it makes sense that the defaulting petitioner should bear the burden of establishing inadequacy of the state rule. When a

petitioner flouts state procedural rules, he deprives the state court of the opportunity to address the merits of the underlying federal claim. So it should be incumbent upon the petitioner to establish that the rule was inadequate to bar federal review.

Habeas corpus policies in particular justify such a presumption. The state's interest in the finality of criminal judgments is a paramount interest. Further, cavalier treatment of state procedural rulings encourages petitioners to seek to short circuit state court review of the merits of their claims and thus to try to avoid AEDPA's central reform requiring deferential review of state court merits adjudications of decisions on federal claims. Also, the "cause and prejudice" safety valve makes intrusive federal scrutiny of state procedural rulings even less justifiable in the habeas corpus context. Finally, placing the burden on the petitioner to demonstrate the inadequacy of a state procedural rule is consistent with the allocation of similar burdens of proof on the petitioner in other areas of federal habeas corpus practice.

III.

Martin's default under California's timeliness rule is adequate to bar federal review of his claims. The timeliness rule provides fair notice of its requirements, and the rule serves legitimate state interests.

A. California's timeliness rule mandates that habeas corpus petitioners act reasonably and with diligence in presenting their claims "as promptly as the circumstances allow," and that they allege with particularity facts showing when they discovered the basis for the claims and specific facts that explain any delay in presenting those claims to the state court. *In re Gallego*, 18 Cal.4th 825, 832-33, 959 P.2d 290, 295-96 (1998); *In re Robbins*, 18 Cal.4th, at 795, n. 16, 959 P.2d, at 327, n. 16; *In re Clark*, 5 Cal.4th, at 765 n. 5, 855 P.2d, at 738, n. 5. As a reasonableness standard, see *Carey v. Saffold*, 536 U.S. 214, 222 (2002), it provides fair notice of what is required of the petitioner. "Reasonableness" standards, indeed, suffice to give fair notice of potential civil or criminal liability; so such a standard is particularly "adequate" in the context of a petitioner's post judgment challenge to the "main event" criminal trial.

Certainly, California ought not be penalized, as the Ninth Circuit would have it, for eschewing a bright line or mechanistic timeliness rule in favor of a rule that permits some consideration of the unique circumstances of individual petitioners. In fact, the California rule benefits petitioners because it "is designed to be flexible, and it allows California courts to correct miscarriages of justice." *Carey v. Saffold*, 536 U.S., at 235 (Kennedy, J., dissenting).

B. California's timeliness rule also furthers significant and legitimate state interests. As the California Supreme Court has explained, the state timeliness rule in particular protects the state's

strong interest in the finality of its judgments and the protection of its scarce judicial resources. *In re Clark*, 5 Cal.4th, at 766, 770, 855 P.2d, at 739, 742. Such interests are clearly legitimate ones. See *Teague v. Lane*, 489 U.S. 288, 309 (1989).

The California timeliness rule is presumptively “adequate.” And, in this case, respondent Martin has made no “cause and prejudice” showing to lift the federal procedural bar. The district court was correct in dismissing Martin’s defaulted claims. The Ninth Circuit was wrong in reviving them.

◆

ARGUMENT

Introduction

The basic federal rule governing this case is clear. “A federal habeas court will not review a claim rejected by a state court ‘if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’” *Beard v. Kindler*, 130 S.Ct., at 614; *Coleman v. Thompson*, 501 U.S., at 729. Such a bar may be lifted only upon the petitioner’s showing of “cause” for the default and actual “prejudice” as a result of the alleged violation of federal law, *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977), or a compelling case of actual innocence, see *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995).

It is also clear and uncontested that the California Supreme Court in Martin's case actually relied on its "timeliness" rule as a sufficient state law procedural basis for rejecting Martin's claims of ineffective assistance of trial and appellate counsel. The California timeliness rule requires that known or reasonably knowable state collateral claims must be presented "as promptly as the circumstances allow." *In re Clark*, 5 Cal.4th, at 765, n. 5, 855 P.2d, at 738, n. 5; accord, *In re Robbins*, 18 Cal.4th, at 778, 959 P.2d, at 317. Here, Martin filed a successive state habeas corpus challenge more than six years after his conviction. Accordingly, in dismissing his ineffective assistance of counsel claims, the state court stated, "Petition for writ of habeas corpus is DENIED. (See *In re Clark* (1993) 5 Cal.4th 750; *In re Robbins* (1998) 18 Cal.4th 770, 780.)" Pet. App. 60.

And, on a final preliminary point, it is undisputed under settled law that application of the timeliness rule was "independent" of any resolution of the merits of Martin's federal claims. *Bennett v. Mueller*, 322 F.3d, at 582-83.

The central question in this case, then, is whether the state procedural forfeiture ruling was otherwise "adequate" to bar Martin's claims in the federal habeas corpus court. As the State shows below, it was.

I. A State Procedural Rule is “Adequate” if it Provides Petitioners with Fair Notice of What is Required of Them and Generally Furthers Legitimate State Interests.

This Court has recognized “the important interests in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.” *Coleman v. Thompson*, 501 U.S., at 750, citing *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). “A State’s procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.” *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). “Procedural rules, like the substantive laws they implement, are products of sovereignty and the democratic process.” *Lee v. Kemna*, 534 U.S., at 395 (Kennedy, J., dissenting). These considerations dictate that state procedural rules should not lightly be dismissed as “inadequate.”

In contrast, the chief arguable basis for federal habeas corpus courts to test the state courts’ independent procedural forfeiture rulings for “adequacy” is to guarantee that the state rule provides an avenue for vindicating federal claims in the “main event” of state court proceedings. See *Wainwright v. Sykes*, 433 U.S., at 88-90; 16B Charles Alan Wright et al., *Federal Practice and Procedure* §§ 4021, 4024 (2d ed. 1996).

While sometimes the phrases used to describe “adequacy” have varied, this Court’s precedents over time have reconciled these competing considerations. Those precedents indicate that, barring extremely unusual circumstances—such as invidious discrimination, see *Lee v. Kemna*, 534 U.S., at 391-92 (“established rules have been set aside only when they appeared to be calculated to discriminate against federal law”)—the federal interest is satisfied when a state procedural rule furthering a legitimate interest affords petitioners fair notice of what is required of them in order to obtain merits review of their federal claims in state court. The habeas corpus “cause and prejudice” exception provides a sufficient safety net that might save a defaulted claim in cases of injustice.

A. This Court’s Precedents Emphasize that Fair Notice of Legitimate State Procedural Rules is the Touchstone for “Adequacy.”

As reflected in this Court’s precedents, and as documented below, there are “two essential components of the adequate state ground inquiry: First, the defendant must have notice of the rule; and second, the State must have a legitimate interest in its enforcement.” *Lee v. Kemna*, 534 U.S., at 389 (Kennedy, J., dissenting). Although this Court’s precedents have used various phrases to measure adequacy—perhaps prompting this Court’s recent suggestion of a need for clarification in this area,

Beard v. Kindler, 130 S.Ct., at 619—they point to fair notice as the overarching requirement.

Bringing into relief the central requirement of fair notice, this Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S., at 457, rejected the state court procedural rulings where the “petitioner could not fairly be deemed to have been apprised of [the rule’s] existence.” “Novelty in procedural requirements” could not thwart federal review sought by those who brought their federal claims to state court “in justified reliance upon prior decisions.” *Id.*, at 457-58.

Similarly, in *Wright v. Georgia*, 373 U.S. 284 (1963), this Court rejected the state court’s procedure based refusal to consider the defendant’s challenge to the denial of his new trial motion. Although the defendant had preserved his underlying legal arguments, he merely had failed to formally state that he was relying on them to challenge the denial of his motion. In other words, the petitioner failed to state at the end of his legal arguments, “[a] fortiori it was error for the trial court to overrule the motions for a new trial.” *Id.*, at 291. This Court gave two reasons for rejecting the rule as inadequate. It dismissed the state ruling as based on an “arid ritual of meaningless form.” *Id.*, at 291. And it explained that the inadequacy of the state’s procedural requirement “is especially apparent because no prior Georgia case which respondent has cited nor which we have found gives notice of the existence of any requirement that an argument in a brief be specifically identified with a motion made in the trial court.” *Id.*, at 291. Thus,

this Court concluded that the Georgia procedural rule failed to advance a legitimate state interest, see pp. 22-24, *post*, and that the defendant had not been afforded fair notice of what the rule required. *Id.*, at 291.

Notice was also crucial in *Johnson v. Mississippi*, 486 U.S. 578. There, the defendant sought relief from his death sentence on the ground that a New York appellate court reversed the felony conviction on which his Mississippi sentence was based. The Mississippi Supreme Court denied relief for, among other reasons, the defendant's failure to raise the issue on direct review. *Id.*, at 583. In reaching the conclusion that the rule imposed by the Mississippi Supreme Court was inadequate, this Court explained that it had found no evidence that the rule had been "consistently or regularly applied" and that, in fact, the "weight of Mississippi law [was] to the contrary" because it directed defendants to challenge the validity of a foreign conviction in the court of the other state. *Id.*, at 588. That is, the rule of procedure being applied was squarely contrary to the state's prior pronouncements of what the rule required of the defendant. *Id.*, at 588-89.

This Court's emphasis on fair notice is also reflected in *James v. Kentucky*, 466 U.S. 341 (1984). There, the Kentucky trial court had refused to give a defense requested instruction, regarding adverse inferences from the defendant's failure to testify, because defense counsel had requested an "admonition" rather than an "instruction" and there

was an asserted substantive difference in Kentucky between the two concepts. *Id.*, at 342-44. But this Court noted that the offered distinction between the two words was “not always clear or closely hewn” because Kentucky courts had used the two words interchangeably and under the state’s definition, the subject instruction seemed to more closely fit the admonition category. *Id.*, at 346-47. And it concluded that Kentucky’s subtle distinction was “not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights.” *Id.*, at 348-49. Under the circumstances, the alleged distinction between “admonition” and “instruction” operated as an unfair trap. *Id.*, at 349.

As in *James*, other precedents of this Court speak of adequacy in terms of whether the state rule was firmly established and regularly followed. And, as in *James*, they do so in service of the primary goal of ensuring that the litigant has fair notice of the procedural requirement. Thus, in *Ford v. Georgia*, 498 U.S. 411, the Georgia Supreme court ruled that petitioner had procedurally defaulted his claim of racial discrimination in the selection of his jury, and cited the “rule” requiring an objection after the jury was selected but before the trial began. *Id.*, at 417-18. But that procedural rule had not been announced until two years after petitioner filed his initial motion and was specifically made prospective in its application. *Id.*, at 424-25. This Court rejected the procedural ground, explaining that a new procedural

rule could not bar review of an equal protection claim advanced by a defendant who had relied upon the prior rule. In other words, the defendant did not have fair notice of the new rule. *Id.*, at 423, citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S., at 457-58.

B. This Court’s Precedents Also Require that a State Procedural Rule Serve Legitimate State Interests.

As indicated in *Wright v. Georgia*, a state procedural rule is not adequate where, on its face, it serves no legitimate state interest. So, in rare circumstances, the state might have no legitimate interest in the enforcement of a procedural rule. E.g., *Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965) (rule necessitating continuous repetition of the same constitutional objections); *Staub v. City of Baxley*, 355 U.S., at 317-18 (rule mandating that petitioner challenge individualized sections of the state law as opposed to the statute as a whole); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (rule waiving jurisdictional objections by appearing in the proceeding). But “[m]ost state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law. . . .” *Lee v. Kemna*, 534 U.S., at 391-92 (Kennedy, J., dissenting).

For example, in *Lee v. Kemna*, 534 U.S. 362, a Missouri state rule of procedure required that continuance motions be written and, when based

upon the absence of witnesses, state the expected materiality of the witnesses' testimony and when they could be expected to return. Upon discovering the unavailability of some witnesses, defense counsel made an oral motion to continue, but failed to articulate materiality or the expected return of the witnesses. The trial judge denied the motion. *Id.*, at 365-66. This Court acknowledged that Missouri's state rule ordinarily served important state interests in regulating continuance motions which could be used as a delaying tactic. Yet it observed that the rule as applied to the defendant was inadequate in this exceptional case. *Id.*, at 366, 381.

In the State's view, however, the best way to address the rare problem of an ordinarily adequate state procedural rule operating in an unusual case in a way that would defeat notice or fail to advance a legitimate state interest is to consider the question under the "cause and prejudice" doctrine. See *Lee v. Kemna*, 534 U.S., at 381, 405; *Coleman v. Thompson*, 501 U.S., at 750. As explained below, see pp. 28-33, *post*, habeas corpus policies in particular point toward reliance on this safety valve rather than requiring the state to prove adequacy or to risk unnecessarily condemning a state rule as inadequate just because it might work unfairly in a rare and extreme case.

Similarly, any concerns about invidious discrimination in the operation of state procedural rules, which might have arisen in civil rights cases in which this Court's adequacy doctrine saw development in the 1950's and 1960's, has diminished

over time with societal and governmental progress in racial matters. See *Northwest Austin Municipality District v. Holder*, 129 S.Ct. 2504, 2511-12 (2009). No longer should there be any suspicion that states might tend to distinguish between federal and state claims in the application of their procedural rules. With emphasis on fair notice and legitimate state interest, and the further guarantee of fairness afforded by the habeas corpus cause and prejudice doctrine, any “obstruction” or discrimination by a state in the application of its procedural rules can be identified and easily corrected if proved. Indeed, since the cause and prejudice doctrine is well suited to control any unwanted obstruction or discrimination, there might not be a compelling need in the habeas corpus context for adequacy scrutiny in the first place.¹

¹ See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in support of petition for writ of certiorari in this case, pp. 13-15.

C. Mere “Inconsistent” Application in the State’s Enforcement of its Procedural Rule in Other Cases is Immaterial to “Adequacy.”

Contrary to the Ninth Circuit’s approach in this and other cases, federal court scrutiny of how a state court exercises its discretion or judgment in enforcing a procedural rule in cases other than the petitioner’s is almost always misplaced and untenable. This Court in *Beard v. Kindler* upheld discretionary rules as adequate. It follows that the necessary results of exercises of case by case discretion, even if perceived as “irregular” from the distant vantage of the federal court, do not render the state rule “inadequate.” Occasional “inconsistency” in the results raises no important federal concern. See *Engle v. Isaac*, 456 U.S. 107, 121, n. 21 (1982); *Beck v. Washington*, 369 U.S. 541, 554-55 (1961); *Gryger v. Burke*, 334 U.S. 728, 731 (1947).

Further, it would offend comity and federalism if federal courts were to rely on discretionary procedural rules in their own practice while condemning the state courts for doing so. *Beard v. Kindler*, 130 S.Ct., at 618, citing *Francis v. Henderson*, 425 U.S. 536, 541-42 (1976). For example, the federal courts retain discretion to excuse a failure to object default. See Fed. R. Crim. Proc. 52(b); *United States v. Frady*, 456 U.S. 152, 162-63 (1982); *Davis v. United States*, 411 U.S. 233, 241 (1973). Similarly, as this Court decided in *Granberry v. Greer*, 481 U.S. 129, 136 (1987), and *Day v. McDonough*, 547 U.S. 198,

210-11 (2006), federal courts need not consider procedural bar and statute of limitation defenses if the state fails to assert them in a timely manner; but may exercise “discretion” to review those defaulted defenses on a case by case basis. It does not appear that federal courts hesitate, and undertake a review of their “consistent” enforcement of such rules in other cases, before accepting their procedural rules as valid. Federal courts, similarly, should respect state court procedural rules on the same terms.

Otherwise, the state would face an undesirable conundrum: a choice between maintaining flexibility and leniency that stems from affording courts discretion in enforcing procedural rules or excusing procedural defaults, and thus risking the finality of their judgments, or adopting rigid or strict rules that might operate with harsh results. See *Beard v. Kindler*, 130 S.Ct., at 618.

More to the point, mere “discretion” or “inconsistent” application does not deceive litigants as long as consistency of the formulation of the rule places them on fair notice that ignoring the rule risks forfeiture of their claim. Nor does such application of a state rule negate the state’s legitimate interest—unless perhaps the rule were applied so rarely as to show virtual abandonment of it.

It is true that this Court on occasion has inquired into the state court’s enforcement of procedural forfeitures as to a particular kind of federal claim. *Dugger v. Adams*, 489 U.S. 401, 410, n. 6 (1989), and

Wainwright v. Sykes, 433 U.S., at 85-86, are two examples, but in both cases this Court upheld the state procedural rule at issue. *Wainwright v. Sykes* merely mentioned that the state courts applied the rule in other cases; and *Dugger v. Adams* only observed that the rule had been applied “in the vast majority of cases.” Adams added that any contrary cases were insufficient to undermine the “adequacy” of the state court decision. The State is aware of no habeas corpus case in which this Court has invalidated a state procedural rule based upon “inconsistent” results in the application of the procedural rule in other cases.

Scrutiny for consistent application, further, involves federal courts in untenable second guessing of the state court’s interpretation of its own laws. State courts are the final and authoritative determiners of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Thus, when a state court finds that a state procedural bar acts to create a forfeiture of a petitioner’s federal issue, a federal court would be hard pressed to deny the validity of the ruling as a final determination of the state law question. See *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). It is untenable for a federal court to later declare such a state court ruling to be inconsistent with other state court exercises of their discretion.

Even where the Ninth Circuit recognizes that a rule has been consistently applied, it has paved the way for renewed attacks on whether the state court subsequently might lapse into renewed “inconsistency.” See *Ortiz v. Stewart*, 149 F.3d 923,

932 (9th Cir. 1998). Thus, the untenable practice of federal scrutiny of “consistent application” brings about the further undesirable result: that of leaving no definitive settlement of the question. This only illustrates further the bankruptcy of the entire enterprise of second guessing the state courts in their exercise of state law judgment in case by case application of procedural rules.

II. Federal Courts Should Presume the Adequacy of a State Procedural Ruling.

Habeas corpus procedural default law is mainly guided by concerns of comity and federalism and the States’ strong interest in the finality of their criminal convictions. *Coleman v. Thompson*, 501 U.S., at 730, 739. These considerations dictate that the federal courts should presume the adequacy of a state procedural forfeiture ruling, and place upon the petitioner the burden of establishing that the state rule did not afford fair notice or that the ruling did not generally advance a legitimate state interest.

Comity dictates deference to a state’s procedural rules, for they are of “vital importance to the orderly administration of its criminal courts,” *Lambrix v. Singletary*, 520 U.S., at 525, and “are products of sovereignty and the democratic process.” *Lee v. Kemna*, 534 U.S., at 395 (Kennedy, J., dissenting). Federal review of defaulted claims, moreover, impacts comity by undermining the State’s enforcement of its

own laws. *Coleman v. Thompson*, 501 U.S., at 730-31. Further, as noted earlier, it would disserve comity if federal courts anomalously disregarded state procedural rules which are largely similar to those which federal courts endorse in their own practice. *Beard v. Kindler*, 130 S.Ct., at 618; *Francis v. Henderson*, 425 U.S., at 541-42. In addition, “State courts are duty bound to give full effect to federal constitutional rights and it cannot be assumed that they will be derelict in their duty.” *Wade v. Mayo*, 334 U.S. 672, 679 (1948).

So federal courts should not assume without proof that a state procedural forfeiture rule, neutral on its face, is applied for no purpose, or in unforeseeable unfair ways, or in ways designed to discriminate against federal claims or claimants. Absent some evidence that a discretionary state procedural rule is operating to discriminate against federal claims, the rule should be found adequate.

Habeas corpus policies underscore the appropriateness of such presumptive acceptance of state procedural rulings. “In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism.” *Coleman v. Thompson*, 501 U.S., at 730-31. But, in habeas corpus in particular, the State’s special and paramount interest in the finality of criminal judgments also weighs heavily in the balance. Further, in the procedural default context, the traditional requirement of exhaustion of state remedies is plainly implicated. Without the

independent and adequate state ground doctrine in the federal habeas corpus context, petitioners could escape the exhaustion requirement by ignoring the state's procedural rules and accepting a forfeiture in state court before raising their claims in federal court. *Id.*, at 731-32.

Moreover, the very existence of the “cause and prejudice” exception in habeas corpus—an exception not available to litigants in the direct review context in this Court from their defaults in state cases—itsself counsels in favor of presuming that the state court's state law procedural ruling is valid and adequate. Given this built in protection, there is even less possible justification for viewing state court procedural rulings with suspicion or requiring special justification for those rulings.

Congress' enactment of the AEDPA has provided additional reasons for respecting state procedural default rulings. AEDPA aims to give “effect to state convictions *to the extent possible under law.*” *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (emphasis added). AEDPA policy should guide the interpretation of standard habeas corpus issues such as those involving procedural bars. See *Calderon v. Thompson*, 523 U.S. 538, 554 (1998). When a federal court inappropriately rejects a fair and neutral state procedural bar ruling, by imposing unnecessary and unconstitutional “adequacy” conditions, it undermines the foundations of the AEDPA reform.

Further, pursuant to 28 U.S.C. § 2254(d), federal courts are required to give broad deference to state court merits rulings upon federal issues. However, when federal courts inappropriately reject state court procedural default rulings and proceed to the merits of federal claims, it might prompt petitioners to seek to evade the exhaustion requirement and avoid the deference accorded by § 2254 because there was no merits ruling issued by the state court. See *Pirtle v. Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002); *Fisher v. Texas*, 169 F.3d 295, 299-303 (5th Cir. 1999); *Moore v. Park*, 148 F.3d 705, 708, 710 (7th Cir. 1998). In disrespecting the exhaustion rule and thwarting the deference standard, unjustified suspicion of a state court's procedural bar rulings has become particularly objectionable under AEDPA.²

Presuming the adequacy of state procedural rulings, and placing the burden on the petitioner to prove "inadequacy," moreover, is consistent with the burden of proof applicable in other habeas corpus contexts. When the state relies on a procedural forfeiture ruling to bar a claim, it is similar to setting up an affirmative defense to that federal habeas corpus claim. In an analogous area, when a state pleads the affirmative defense that the petitioner's claims fall outside of the federal statute of limitations, 28 U.S.C.

² In qualifying capital cases, and absent narrow exceptions, the AEDPA allows that "the district court shall only consider a claim or claims that have been decided on the merits in the State courts." 28 U.S.C. § 2264(a).

§ 2244, the petitioner bears the burden of showing the applicability of statutory tolling, *Smith v. Duncan*, 297 F.3d 809, 814 (9th Cir. 2002), abrogation on other grounds noted in *Moreno v. Harrison*, 245 Fed. App'x 606, 608 (9th Cir. 2007), and equitable tolling, *Pace v. DiGuglielmo*, 544 U.S. 408, 415 (2005); *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002); *Alexander v. Cockrell*, 294 F.3d 626, 629 (5th Cir. 2002). The petitioner should bear the burden in the procedural bar context too.

In *Coleman v. Thompson*, this Court rejected the petitioner's assertion that federal courts should presume that no independent and adequate state ground was relied upon in every case in which a state prisoner presented federal claims to a state court. *Coleman v. Thompson*, 501 U.S., at 737-38. Once the state pleads that a state court procedural forfeiture ruling was applied to a petitioner's claims, the burden of showing that the state rule failed to provide fair notice and was therefore inadequate to support the judgment should be placed upon the petitioner. Any other rule engages federal courts in the improper presumption that state court decisions are invalid or unconstitutional. The opposite, however, is true. And, after all, a presumption should "reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S., at 737. Here, a presumption in favor of the adequacy of the state procedural ruling would do so. For it will be the rare case in which an otherwise fair state procedural rule operates in an unfair way in a particular case.

Nor should federal courts apply their procedural rules in their own cases without any excessive scrutiny for adequacy yet require such scrutiny for the states courts' similar applications of their procedural rules. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944). Even though federal appellate courts are permitted to reach barred claims upon a showing of plain error pursuant to Federal Rule of Criminal Procedure 52(b), there apparently is no "adequacy" scrutiny into "consistent" application as a prerequisite. Instead, in comparable federal collateral proceedings, the federal courts apply the federal procedural rule and require the petitioner to show "cause and prejudice" in order to lift the bar. See *United States v. Frady*, 456 U.S., at 167; see also *Davis v. United States*, 411 U.S. 233. Equivalent solicitude for the state courts should be the rule as well.

III. California's Timeliness Rule is Adequate to Bar Martin's Claims from Federal Habeas Corpus Review.

California's procedural rule requiring timely presentation of habeas corpus claims "as promptly as the circumstances allow" is adequate to support the state court procedural dismissal of Martin's claims.

The state rule fairly placed respondent Martin on notice that he was risking forfeiture of his claims when he delayed presenting them to the state court, and the state rule on its face obviously serves legitimate state interests in finality, in preserving judicial resources, and in the reliability of retrials.

A. California's Timeliness Rule Provides Petitioners with Fair Notice of What is Required of Them in Order to Obtain Merits Review of Their Federal Claims in State Court.

1. The California Supreme Court's pronouncements on the habeas corpus timeliness rule provide fair notice to petitioners that they must present known or reasonably knowable claims promptly unless they are actively engaged in the investigation of additional claims. And petitioners are clearly told that they have a reporting duty in which they must articulate with specificity when they learned of their claims and what circumstances, if any, prevented them from seeking review sooner.

As the California Supreme Court has clearly explained, state habeas corpus claims must be filed without "substantial delay," i.e., "as promptly as the circumstances allow." *In re Clark*, 5 Cal.4th, at 765, n. 5, 855 P.2d, at 738, n. 5. Delay in seeking habeas relief is measured from the time a petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and

the legal basis for the claim. *In re Robbins*, 18 Cal.4th, at 780, 787, 959 P.2d, at 317, 323. In capital cases, there is a presumption that a habeas corpus petition is timely if it is filed within 180 days from the date that the direct review reply brief is due. Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, standard 1-1.1. However, once the presumption of timeliness has passed, the timeliness requirements are applicable to “all habeas corpus petitions.” *In re Clark*, 5 Cal.4th, at 783, 855 P.2d, at 751.³

To establish absence of “substantial delay,” petitioners must specifically allege, with supporting evidence, when information offered in support of each claim was known, and reasonably should have been known. *In re Gallego*, 18 Cal.4th, at 832-33, 959 P.2d, at 295-96; *In re Robbins*, 18 Cal.4th, at 795, n. 16, 959 P.2d, at 327, n. 16. Of course, claims relying exclusively on the face of the trial or appellate record reasonably should have been known at that time. *In re Gallego*, 18 Cal.4th, at 838, 959 P.2d, at 299; *In re*

³ This represents another area where the Ninth Circuit has engaged in an untenable second guessing of California’s interpretation of its own laws. Despite California’s clear pronouncement that capital and noncapital litigants are treated the same once the presumption of timeliness passes, the Ninth Circuit has declared that California’s capital cases provide no guidance in the noncapital context. *King v. LaMarque*, 464 F.3d 963, 966 (9th Cir. 2006) (“*Clark* did nothing to clarify the application of the basic ‘substantial delay’ standard with regard to noncapital cases.”).

Robbins, 18 Cal.4th, at 814, 959 P.2d, at 340. It is not incumbent upon the respondent to allege what petitioner and/or his counsel knew with respect to a particular claim, or when they should have known it. It is the petitioner, in possession of the information, who “must ‘get down to details.’” *In re Gallego*, 18 Cal.4th, at 837, 959 P.2d, at 298-99.

Under certain circumstances, substantial delay nevertheless may be justified. Thus, while a petitioner is still conducting an ongoing investigation into further claims, based on “triggering” information giving rise to a bona fide belief that such further claims exist, he may temporarily withhold presentation of completed claims until the investigation concludes, rather than presenting his claims in piecemeal fashion in successive petitions. *In re Gallego*, 18 Cal.4th, at 838, n. 13, 959 P.2d, at 299, n. 13; *In re Robbins*, 18 Cal.4th, at 805-06, n. 28, 959 P.2d, at 335, n. 28. However, when there is no “bona fide investigation into other potentially meritorious claims,” then a petition advancing the known claims must be presented promptly. *In re Gallego*, 18 Cal.4th, at 834, 959 P.2d, at 297; *In re Robbins*, 18 Cal.4th, at 805-06, 959 P.2d, at 311.

Finally, an exception to the timeliness requirement will be made for an unjustifiably delayed petition if the petitioner can show that the conviction and/or sentence being challenged constitutes a “fundamental miscarriage of justice.” A “fundamental miscarriage of justice” occurs where (1) an error of constitutional magnitude led to a trial that was so

fundamentally unfair that, absent the error, no reasonable judge or jury would have convicted the petitioner; (2) the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (3) the death penalty was based on a profile of the petitioner so grossly misleading, that absent the trial error or omission, no reasonable judge or juror would have imposed the sentence of death; or (4) the petitioner was convicted or sentenced under an invalid statute. *In re Robbins*, 18 Cal.4th, at 780-81, 959 P.2d, at 318. The first three exceptions are determined exclusively by an application of state law. Federal law is applied to the fourth exception when a federal constitutional claim is being resolved. *Id.*, at 812, n. 32, 959 P.2d, at 339, n. 32. The exceptions are general and apply to all cases, but for the one that pertains solely to imposition of a death sentence. *Id.*, at 780-81, 959 P.2d, at 317-18.

2. Despite California's clear edict that known claims be presented promptly, the Ninth Circuit has refused to respect the state's timeliness default rulings, asserting that "[t]here are no standards for determining what period of time or factors constitute 'substantial delay' in noncapital cases" and "no standards for determining what factors justify any particular length of delay." *King v. LaMarque*, 464 F.3d, at 966. Similarly, the Ninth Circuit declares, "'substantial delay' has not yet been defined." *Townsend v. Knowles*, 562 F.3d 1200, 1207-08 (9th Cir. 2009). On such grounds, the Ninth Circuit has

engaged in a wholesale refusal to respect California “timeliness” rulings.

The exactitude that the Ninth Circuit seeks is unjustified. California employs a reasonableness standard for timeliness in collateral state challenges. See *Evans v. Chavis*, 546 U.S. 189, 192 (2006) (“Under [California’s collateral review] system, the equivalent of a notice of appeal is timely if filed within a ‘reasonable time.’”) *Carey v. Saffold*, 536 U.S., at 221. That is, California state collateral challenges are to be presented reasonably promptly. See *In re Robbins*, 18 Cal.4th, at 778, 959 P.2d, at 316. State petitioners must conduct reasonable and diligent investigations so that all of their claims for relief can be presented in their first habeas petition. *In re Robbins*, 18 Cal.4th, at 793, n. 14, 959 P.2d, at 326, n. 14; *In re Gallego*, 18 Cal.4th, at 836, n. 10, 959 P.2d, at 298, n. 10 (citing *McCleskey v. Zant*, 499 U.S., at 498). And they must allege facts demonstrating due diligence. *In re Clark*, 5 Cal.4th, at 779, 855 P.2d, at 748.

A reasonableness standard of this type—expressed in terms of promptness, substantial delay, and justification—provides adequate notice. In numerous contexts, failure to adhere to a standard of “reasonableness” may subject individuals to both civil liability and criminal punishment. Thus, citizens are liable in tort for “unreasonable” negligence. *American Motorcycle Assn. v. Superior Court*, 20 Cal.3d 578, 586, 578 P.2d 899, 904 (1978). Likewise, civil liability under the Federal Securities Act can be predicated

upon a failure to exercise “reasonable” care in preparing registration statements. *Feit v. Leasco Data Processing Equipment Corp.*, 332 F.Supp. 544, 568 (E.D.N.Y. 1971). And citizens may be found criminally liable where they “unreasonably” believe they need to defend themselves. *People v. Blakeley*, 23 Cal.4th 82, 87-88, 999 P.2d 675, 678 (2000). Similarly, a simple kidnapping becomes aggravated kidnapping where the perpetrator “substantially” increases the risk of harm. See *People v. Nguyen*, 22 Cal.4th 872, 885-86, 997 P.2d 493, 501 (2000). If “reasonableness” and “substantial” standards are appropriate in substantive rules of civil and criminal liability, they do not become infirm when they are employed in a state procedural rule governing litigation of collateral attacks on the “main event” criminal trial. *Beard v. Kindler*, 130 S.Ct., at 618.

Nor must state courts articulate in advance all of the parameters of their procedural rule or all possible justifications or every factual scenario that will qualify for an exception in order to obtain a finding of adequacy. *Beard v. Kindler*, 130 S.Ct., at 620 (Kennedy, J., concurring). Thus, in *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925), an Illinois rule provided that constitutional claims must be pursued in the state high court in the first instance and that, if the claims were brought initially to the lower appellate court, the constitutional claims would thereby be forfeited. The litigant complained that he could not tell whether the state rule governed federal constitutional claims as

opposed to state constitutional claims because the Illinois state high court had not previously made the distinction clear. But, as this Court explained, “[i]t is not, however, a forced or strained interpretation to hold” that the state rule contemplated both the state and federal constitutions. *Id.*, at 195. While notice is the central inquiry, all of the particulars of a state rule need not be fleshed out in advance. See also *Beard v. Kindler*, 130 S.Ct., at 620 (Kennedy, J., concurring).

The Ninth Circuit also is wrong in refusing to respect California’s procedural rules because, as it asserts, the “overly ambiguous standards almost inevitably lead to inconsistent application.” *King v. LaMarque*, 464 F.3d, at 966; see *Bennett v. Mueller*, 322 F.3d, at 573, 583; *Morales v. Calderon*, 85 F.3d 1387, 1392 (9th Cir. 1996). As explained above, see pp. 25-28, *ante*, however, federal criticism of reasonably clear state procedural rules for mere “discretion” or resultant “inconsistent” application does not significantly promote any legitimate procedural bar policy. When a convicted criminal has been put on fair notice of a state’s procedural requirements, and yet ignores the rule, he has no proper basis to complain when the state court predictably bars his claims, regardless of whether the federal court thinks the state court should have applied the rule to different litigants on different facts. As Justice Kennedy recognized in his concurring opinion in *Beard v. Kindler*, if federal courts insist that a state procedural rule be established in all of its detail before it will be given

effect in federal court, it would deprive the states of the case law decisional approach that the federal judiciary finds proper and necessary in administering its own procedural rules. *Beard v. Kindler*, 130 S.Ct., at 620 (Kennedy, J., concurring).⁴

⁴ In this case, the Ninth Circuit rejected California's collateral challenge timeliness rule, which is based upon the state's exercise of discretionary judgment in determining reasonableness, because, "The decisions that do discuss *Clark* or *Robbins* do not form a coherent pattern of consistent application. Compare, e.g., *In re Little*, No. D047468, 2008 WL 142832 (Cal. Ct. App. Jan. 16, 2008) (fourteen months not an unreasonable delay), with *People v. Fairbanks*, No. C047810, 2006 WL 950267 (Cal. Ct. App. Apr. 11, 2006) (one year delay substantial and untimely)." Pet. App. 3. By measuring the results of the application of California's discretionary based procedural rule, the Ninth Circuit engaged in untenable second guessing of California's interpretation of its own laws.

The *In re Little* opinion did not hold that 14 months was per se a reasonable delay. There, the state appellate court held, in footnote 6, "In the circumstances of this case, we conclude Little did not unreasonably delay . . ." The court did not expand upon what circumstances led it to that conclusion. In an unpublished decision that resolves this procedural point in favor of the petitioner but ultimately denies the petition on the merits, it is understandable that the court did not expend limited resources to belabor the point. In *People v. Fairbanks*, on the other hand, the court held that one year was an excessive delay, because the petitioner had made no showing whatever of any cause for the delay. Despite the default, the court went on to alternatively reject the claim on the merits.

These cases do not show courts setting traps for unwary petitioners or discriminating against the assertion of federal rights. Rather, California's flexible standard allowed one of the courts to accept circumstances it thought warranted an extension, while the other did not because it found no such

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B. California’s Timeliness Bar Promotes a Strong State Interest in the Finality of its Criminal Convictions and the Protection of its Scarce Judicial Resources.

There can be no doubt that the state timeliness rule also is adequate in that it serves legitimate state interests. The California Supreme Court has stressed that its habeas corpus rules and the timeliness bar in particular are aimed at the state’s strong interest in the finality of its judgments and the protection of its scarce judicial resources. *In re Clark*, 5 Cal.4th, at 766, 770, 855 P.2d, at 739, 742; *In re Harris*, 5 Cal.4th, at 831, 855 P.2d, at 399-400. “The diligence requirement is not some abstract technical obstacle placed randomly before litigants seeking relief, but instead reflects the balance between the state’s interest in the finality of decided cases and its interest in providing a reasonable avenue of relief for those whose rights have allegedly been violated.” *People v. Hyung Joon Kim*, 45 Cal.4th 1078, 1097, 202 P.3d 436, 449 (2009). Protecting the finality of criminal convictions and scarce judicial resources are legitimate state interests. *Teague v. Lane*, 489 U.S., at 309; *Schlup v. Delo*, 513 U.S., at 322-24; *Calderon v. Thompson*, 523 U.S., at 555-56.

justification. This example shows why measuring the results of the application of a state’s discretionary procedural rule necessarily engages federal court’s in the untenable second guessing of a state court’s pronouncements of its own rules and is completely unworkable.

As the California Supreme Court also has explained, “[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.” *In re Harris*, 5 Cal.4th, at 831, 855 P.2d, at 400, quoting *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring and dissenting). The California Supreme Court has also recognized the importance of finality to victims of crime: “[W]e cannot overestimate the value of the psychological repose that may come for the victim, or the surviving family and friends of the victim, generated by the knowledge the ordeal is finally over.” *In re Sanders*, 21 Cal.4th 697, 703, 981 P.2d 1038, 1042 (1999).

C. Martin has Shown No Cause and Prejudice, or Actual Innocence, to Lift the Federal Procedural Bar.

In the Ninth Circuit, Martin’s sole basis for attacking California’s timeliness bar was an asserted lack of clarity and consistency. JA 32-56, 110-116. In Martin’s successive state high court collateral challenge, he merely asserted in a conclusory way that he had “acted with diligence” and that the “People will suffer no prejudice” from his delay. JA 11. This justification, offering no specific facts about when he learned or should have learned the basis for his claims and why he had not presented them earlier, utterly failed to comport with the state’s

clearly established disclosure requirement. See *In re Gallego*, 18 Cal.4th, at 832-33, 959 P.2d, at 295-96; *In re Robbins*, 18 Cal.4th, at 795, n. 16, 959 P.2d, at 327, n. 16. Nor did Martin ever advance any argument that one of the state's four exceptions to the timeliness rule applied to him.

Similarly, Martin has never advanced any argument in federal court that the state's timeliness rule was calculated to discriminate against federal rights. And, finally, Martin has never advanced any claim that the cause and prejudice doctrine applied to him or asserted a compelling claim of actual innocence.

In sum, Martin's procedural default under the California timeliness rule was adequate to support the state judgment and to bar his forfeited claims from federal habeas corpus review.



CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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