No. 09-996

IN THE

Supreme Court of the United States

JAMES WALKER, Warden, et al.,
Petitioners,

vs.

CHARLES W. MARTIN,
Respondent.

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

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

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QUESTIONS PRESENTED

1. 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 (1) the federal court believes that 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?

2. Should the varying rubrics used to express when a state procedural default rule is adequate be replaced with a single standard of fair notice of the rule and reasonable opportunity to make the claim?

3. On habeas corpus, as distinguished from direct review, does the adequacy inquiry provide sufficient marginal benefit to justify its litigation cost, or should it be abandoned altogether, recognizing that the cause-and-prejudice exception covers the relevant policy considerations?

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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.

The Court of Appeals for the Ninth Circuit has adopted an extreme approach to determining the

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.

"adequacy" of state rules for the purpose of the procedural default doctrine. Even though the California Supreme Court clarified and explained the state timeliness rule 17 years ago, the Ninth Circuit has declared it inadequate on the ground that the state has not proved it is applied with the degree of uniformity that the Ninth Circuit deems necessary. That degree would serve no valid purpose and would ultimately be detrimental to criminal defendants.

The delay and expense that come from needless litigation of the "adequacy" issue and from needless litigation of defaulted claims are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On December 7, 1986, children playing along the banks of the Sacramento River discovered the body of Charles Stapleton. *People* v. *Martin*, No. C022364 (Cal. App. 1997), p. 2 (unpublished).[2] He had been stabbed eight times in the neck, back, and throat. *Ibid*. His skull was fractured. *Ibid*. In the same area, the children also found the wallet of Charles W. Martin. Respondent's Motion for Summary Dismissal in *Martin* v. *Hubbard*, No. Civ. S-99-0223 (ED Cal., Nov. 8, 2007), p. 10 ("MSD").[3]

Three days later, during a taped interview with police, Martin's girlfriend, Bonnie Permenter, made statements that incriminated Martin. *People* v. *Martin*, *supra*, at 2. Martin disappeared. *Id.*, at 3.

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2. Available at http://www.cjlf.org/files/MartinCalApp1997.pdf.

3. Available at http://www.cjlf.org/files/MartinMotionSumDiss.pdf.

Martin was arrested in Florida eight years later. *Ibid*. A jury convicted him of first-degree murder and robbery in 1995. *Id.*, at 1. He was sentenced to life without the possibility of parole. MSD 2.

Martin appealed to the California Court of Appeal raising only a state-law hearsay claim. *People* v. *Martin*, *supra*, at 1. That court affirmed. *Id*., at 9. Martin filed a petition for discretionary review with the California Supreme Court, also raising the same claim. See Magistrate Judge's Findings and Recommendations (ED Cal., Feb. 1, 2001), p. 3 ("MJFR").[4] That court denied review. J. A. 8. The case was final on direct review for the purpose of federal habeas law on July 15, 1997.

Seven months later, Martin filed a habeas corpus petition in the California Superior Court. See MSD 3. This petition contained an ineffective assistance claim, along with claims regarding the jury pool and jury instructions. See *ibid*. When this petition was denied, Martin filed a similar petition in the Court of Appeal.[5] After denial of this petition, Martin filed a petition in the California Supreme Court, which was denied January 27, 1999. J. A. 9.

Martin then filed a habeas corpus petition in federal court. See MSD 4. In 2001, the Magistrate Judge found that the ineffective assistance allegations of the second amended petition were sufficiently different

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4. Available at http://www.cjlf.org/files/MartinFindings010201.pdf.

5. In California, there is no appeal from denial of a habeas petition, and review is accomplished with a successive petition to a higher court. See *Carey* v. *Saffold*, 536 U. S. 214, 221 (2002). This was once common practice throughout the United States, although it is now unusual. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey* v. *Saffold*, No. 01-301, pp. 11-12, http://www.cjlf.org/pdf/Saffold.pdf.

from those filed in state court to constitute a new and unexhausted claim, and that a sufficiency of the evidence claim was also unexhausted. See MJFR 3-6.[6] This holding was followed by an amended petition of exhausted claims only and an abeyance order to allow petitioner to return to state court to exhaust, entered on July 9, 2001. See App. to Pet. for Cert. 33-34.

On March 18, 2002, nearly *five years* after the case was final on direct review, Martin filed a new state habeas petition in the California Supreme Court. This petition raised, for the first time in state court, the allegations that are the subject of the present petition. On September 11, 2002, the court denied this petition with citations to its precedents on untimeliness of habeas petitions, *In re Clark*, 5 Cal. 4th 750 (1993) and *In re Robbins*, 18 Cal. 4th 770, 780 (1998). App. to Pet. for Cert. 60.

Upon return to federal court, these claims were dismissed as procedurally defaulted. The Magistrate Judge found that the state procedural default rule was adequate, and the petitioner did not claim that the cause-and-prejudice or actual-innocence exceptions applied. See App. to Pet. for Cert. 54-57. The District Court adopted the Magistrate Judge's findings. On the question of procedural default, the District Court declined to "do as petitioner urges and interpret *Bennett* v. *Mueller* [322 F. 3d 573 (CA9 2003)] to require respondents to sort through thousands of noncapital habeas petitions to prove a negative where petitioner

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6. Whether different alleged shortcomings of counsel are separate claims or one claim is an unresolved question. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 13-23, http://www.cjlf.org/briefs/BellE.pdf. Because the holding that they were different claims was not disputed in the Court of Appeals, we will assume it to be correct for the purpose of this case.

has failed to point to any specific cases wherein the rule was inconsistently applied." App. to Pet. for Cert. 27.

The Court of Appeals for the Ninth Circuit reversed based on another case decided the same day, *King* v. *LaMarque*, 464 F. 3d 963 (CA9 2006). App. to Pet. for Cert. 21. "On remand, in order to be able to maintain its affirmative defense of procedural default, the government must show that cases after *In re Clark*, 855 P. 2d 729 (Cal. 1993), had sufficiently clarified the rule and that it had been consistently applied." *Ibid*.

On remand, the Magistrate Judge found that the state had indeed met its burden, App. to Pet. for Cert. 6-19, and the District Court adopted the findings and dismissed the action. App. to Pet. for Cert. 4-5. The Court of Appeals reversed again, based on its recent decision in *Townsend* v. *Knowles*, 562 F. 3d 1200, 1207 (CA9 2009). App. to Pet. for Cert. 1-3. Because California has chosen to use a general standard of "substantial delay" rather than a rigid cutoff, and because that standard has not been "firmly defined" (*i.e.*, made rigid) through case law, the state rule is deemed "inadequate." See App. to Pet. for Cert. 3.

This Court granted certiorari on June 21, 2010.

SUMMARY OF ARGUMENT

The rule that a state procedural rule must be "firmly established and regularly followed" has been routinely misused in the Ninth Circuit. Rules that are no less established and no less regularly followed than the corresponding federal court rules are routinely declared inadequate.

This Court's precedents on what is an adequate state ground present a confused jumble of varying rubrics. The common theme underlying all the cases,

on their facts if not in their language, is that a state rule must give the defendant fair notice of how to make his claim and a reasonable opportunity to make it. That should be the standard.

The habeas petitioner in this case had more than fair notice. Although California's flexibly defined timeliness standard may be uncertain in some cases, there is no doubt five years after finality on direct review is untimely. No federal policy warrants disregard of the state rule in this case.

While an adequate state ground is jurisdictional on direct review of state judgments in this Court, it is not on habeas corpus. This difference has permitted development of the "cause and prejudice" and "actual innocence" exceptions to the procedural default rule. These exceptions fully accommodate the federal policies served by the adequacy inquiry. There is no need for a separate adequacy inquiry on habeas corpus.

ARGUMENT

I. The "regularly followed" requirement has been routinely misused in the Ninth Circuit to sweep aside fair, necessary, and well-established state procedural rules.

In Part II, *infra*, we describe how the "inadequate state ground" doctrine is a confused, haphazard collection of ranging rubrics. This confused state of the law might not matter so much if it only applied to this Court's direct review of state court judgments, because we could be confident that the doctrine would be applied fairly and sensibly in practice, however lacking it may be in precision.

Regrettably, that is not the case. The doctrine applies equally to habeas review of state court criminal

judgments in the lower federal courts. See *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). In the hands of a panel that is hostile to a state's law, such as capital punishment or "three strikes," and looking for a way to reach defaulted claims, the "firmly established and regularly followed" rubric is a dangerous weapon for effectively nullifying perfectly valid state rules. That is precisely what has happened in the Ninth Circuit.

The present case involves the timeliness rule, but the Ninth Circuit has demonstrated hostility to other rules as well. Standard practice throughout the United States requires that claims based on the trial record be made on direct appeal. With some exceptions, such claims are defaulted if they are raised for the first time on collateral review, and they will generally be rejected on that basis. See *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331, 350-351 (2006). California follows this rule. It was plainly stated in a decision of the state's highest court over half a century ago, see *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953), and the rule was already well established by that time. See *In re Connor*, 16 Cal. 2d 701, 705, 108 P. 2d 10, 13 (1940).

Rigid application of procedural rules can produce unjust results, and so most rules have exceptions. It is common for these exceptions to evolve and be clarified over time. For example, the "cause and prejudice" test for federal collateral review was not fully formed until the comparatively late date of 1982, see *United States* v. *Frady*, 456 U. S. 152, 167-168, and the categorical exception of ineffective assistance claims from the raise-on-appeal rule was not settled until seven years ago. See *Massaro* v. *United States*, 538 U. S. 500, 504 (2003). A state's rule ought not be declared inadequate merely because it evolves over time through the process of case law. See *Beard* v. *Kindler*, 558 U. S. __, 130 S. Ct. 612,

620, 175 L. Ed. 2d 417, 426-427 (2009) (Kennedy, J., concurring).

In California, the *Dixon* rule contained an exception for "special circumstances constituting an excuse for failure" to raise the issue on direct appeal, 41 Cal. 2d, at 759, 264 P. 2d, at 514-515, with the boundaries of that exception left for further development. Lack of precision in the circumstances for excuse of a default does not constitute a "springe" that is unfair to the party making the claim, cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923), so long as the rule itself is clear and feasible. If the law of the state clearly tells the parties, "Make claim A via procedure X or else you *may* not be allowed to make it later," there is nothing inherently unfair about relief from default being handled on a discretionary, case-by-case basis.

This is all just common sense, but the Ninth Circuit is oblivious to it. Instead, the "regularly followed" requirement for "adequacy" of a state ground is applied with "pointless severity," cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), in a manner that "would further no perceivable [federal] interest." Cf. *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990).

In 1979, Stevie Lamar Fields perpetrated a "one-man crime wave," committing numerous acts of rape, robbery, forcible oral copulation, assault with a deadly weapon, kidnapping, and murder against five victims. See *People* v. *Fields*, 35 Cal. 3d 329, 336, 673 P. 2d 680, 683 (1983). The State of California provided him with a direct appeal for his claims on the trial record and a habeas proceeding for claims requiring additional facts. See *In re Fields*, 51 Cal. 3d 1063, 800 P. 2d 862 (1990). When he came back for a third bite at the apple, the state high court invoked the long-established *Dixon* rule. See *Fields* v. *Calderon*, 125 F. 3d 757, 760 (CA9 1997).

"Normally, . . . such rules constitute an adequate and independent state-law ground preventing [a federal court] from reviewing the federal claim." *Sanchez-Llamas*, 548 U. S., at 351. Not in the Ninth Circuit. Even though the rule was clear, its applicability was clear, and compliance was readily available, the Ninth Circuit branded the rule "inadequate" because the California Supreme Court subsequently felt the need to clarify and crystalize the exceptions to the rule and the circumstances under which relief from default would be granted. See *Fields*, 125 F. 3d, at 762-763.

Instead of being narrowed to the claims properly presented to the state courts, the case was sent back to the district court for consideration of the defaulted claims as well, see *id*., at 765, and another decade of litigation followed. A case that should have been over in 1997 only became final two years ago. See *Fields* v. *Ayers*, 552 U. S. 1314 (2008) (denial of certiorari).

Nevada has a one-year statute of limitations for habeas petitions. Nev. Rev. Stat. 34.726(1). The statute is straightforward enough on its face, but in *Collier* v. *Bayer*, 408 F. 3d 1279 (CA9 2005), the question arose whether an amendment to the judgment making no change to the sentence, but only correcting a statutory reference, restarted the clock. See *id*., at 1282. The state courts ruled it did not, and the Ninth Circuit held this rule "inadequate" as not "well established" because that issue had not been fully resolved until after Collier's default. See *id*., at 1285-1286, and n. 5; cf. *id*., at 1289 (Bea, J., dissenting).

The corresponding federal statute has required more than a few cases to work out its kinks. See, *e.g*., *Duncan* v. *Walker*, 533 U. S. 167 (2001); *Pace* v. *DiGuglielmo*, 544 U. S. 408 (2005); *Day* v. *McDonough*, 547 U. S. 198 (2006); *Holland* v. *Florida*, 560 U. S. __ (No. 09-5327, June 14, 2010). Yet the Ninth Circuit branded

the Nevada statute "inadequate" because of a similar process of refining the rule through decisional law. Cf. *Kindler*, 130 S. Ct., at 620, 175 L. Ed. 2d, at 426 (Kennedy, J., concurring).

The Ninth Circuit's pointless insistence on mechanical predictability and regularity of application, detached from the purpose of the adequacy rule, squanders scarce resources on needless collateral litigation. In *Bennett* v. *Mueller*, 322 F. 3d 573, 585-586 (CA9 2003), the Ninth Circuit remanded a case to the district court for a new round of litigation to determine if the state courts "regularly" enforce their rule, even though there had been no showing that the defendant had insufficient notice or opportunity to comply or that state rules had been applied in a discriminatory manner. Such remands are routine. See, *e.g.*, *McKinney* v. *Kane*, No. 05-56830, 2008 U. S. App. Lexis 10952 (CA9, May 16, 2008) (unpublished) (requiring further litigation of claim of instructional error raised for the first time on the *fourth* state habeas petition). Although the Ninth Circuit has created this morass of pointless litigation, this Court's confused jurisprudence on adequate state grounds has made it possible. The present case provides an opportunity to bring clarity to this area.

II. "Notice and 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 & 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), "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, 574-575 (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 11. 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*.

Henry v. *Mississippi*, 379 U. S. 443, 447 (1965), seemed to say that the test was whether the state rule served a "legitimate state interest."[7] In *Monger* v. *Florida*, 405 U. S. 958 (1972), the defendant's claim had been barred by one of the rare procedural rules that appears to lack a legitimate interest. This Court denied certiorari but took the unusual step of specifying the reason—"an adequate state ground." *Id*., at 958. Monger had filed his notice of appeal too early, before formal entry of judgment, and he did not renew it afterward. *Id*., at 958-959 (Douglas, J., dissenting). The dissent quoted *Henry* to no avail. *Id*., at 961-962. See also Hart & Wechsler, *supra*, at 561, and n. 12 (citing *Monger* for the proposition that "for the most part Henry has been ignored in subsequent cases"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4028, pp. 396-397 (2d ed. 1996); E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Harnett, Supreme Court Practice § 3.26, p. 226 (9th ed. 2007) (comparing *Henry* with *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)).

At times, the standard seems to appear out of nowhere. In *Henry*, *supra*, the Court declared that its

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7. We hedge with "seemed," because the *Henry* opinion is universally considered unclear. See Hart & Wechsler, *supra*, at 561 ("confusing"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4020, p. 288 (2d ed. 1996) ("surprisingly ambiguous"); Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 196, n. 39 ("puzzling"); Hill, *supra*, 65 Colum. L. Rev., at 984, n. 173 ("confusing"); *id*., at 986, n. 174 ("unclear").

"legitimate state interest" standard was based on settled law, 379 U. S., at 447, but this assertion was simply false. See Hill, 65 Colum. L. Rev., at 988; Wright, Miller, & Cooper, *supra*, § 4020, at 289 (cases cited do not support this statement); Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 899 (1994) ("remarkable remake of the . . . doctrine"). Similarly, *Barr* v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard reflected 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. 288, 301 (1964), quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964) (*per curiam*), 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 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 procedure 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. 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 Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[8]

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 is an additional reason for recognizing and giving effect to state procedural default rules. The requirement that the petitioner first exhaust state remedies is a time-honored federal policy. See 28 U. S. C. § 2254(b), (c); *Ex parte Royall*, 117 U. S. 241, 253 (1886). Respect for state procedural default rules is necessary to " 'protect the integrity' of the federal exhaustion rule." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999) (quoting *id*., at 853 (Stevens, J., dissenting)).

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8. 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.

Without the default rule, "a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by 'letting the time run' on state remedies." *Id*., at 848 (opinion of the Court quoting the dissent on this point).

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 Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, 61 Tenn. L. Rev., at 885-902 (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 unconsti-

tutional 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.

Lee v. *Kemna*, 534 U. S., at 382-383, is arguably a case of this type. Although a requirement that a motion for continuance be in writing and supported by affidavit is normally fair, it would have been impractical and pointless in the unusual circumstances of the case. *Lee* could also be read more broadly, "to adopt a sweeping general view that 'close enough is good enough,' rejecting the adequacy of state procedural grounds merely because no important procedural interest seems at risk in the specific circumstances." See Wright, Miller, & Cooper, *supra*, § 4028, at 46 (2010 Supp.) Such a reading would make *Lee* a radical departure from precedent, though, see *ibid*., and it would validate the dissent's charge that the majority was reviving the discredited approach of *Henry* v. *Mississippi*, 379 U. S. 443 (1965). See Hart & Wechsler, *supra*, at 562-563. The *Lee* Court denies that it does either of these, see 534 U. S., at 386, so a broad reading of *Lee* is not correct. See *Johnson* v. *Texas*, 509 U. S. 350, 365-366 (1993) (an opinion cannot be read so broadly as to overrule earlier precedents, when the opinion itself expressly holds it does not create a new rule).

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 15 (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, see Wright, Miller, & Cooper, *supra*, § 4026, at 385-386, 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 "more properly deemed discretionary than jurisdictional" language of the *Sullivan* majority opinion was overruled *sub silento* in *Kindler*. "Nothing inherent in [a discretionary] rule renders it inadequate for purposes of the adequate state ground doctrine." 130 S. Ct., at 618, 175 L. Ed. 2d, at 424. This is an important first step in dismantling those aspects of the adequate state ground doctrine that serve no important federal interest.

If *Sullivan* is defunct, what becomes of *Barr*'s "strictly or regularly followed" requirement? How does a court decide if another court or system of courts "strictly" applies a discretionary rule? Failures to apply the rule and exercises of discretion within the rule may not be possible to distinguish.

Dugger v. *Adams*, 489 U. S. 401 (1989), illustrates that this Court does not apply the "strictly" require-

ment 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 416-418 (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 411-412, n. 6.

While *Adams* reached the correct result, it did not establish a workable rule for the guidance of other federal courts. Application in the "vast majority of cases" is sufficient, but whether it is necessary is not specified. Nor is there any quantification of how vast the majority needs to be.

The answer, *amicus* suggests, is not to be found in numbers. "The adequate state ground doctrine cannot be applied without consideration of the purposes it is designed to serve." *Kindler*, 130 S. Ct., at 619, 175 L. Ed. 2d, at 425-426 (Kennedy, J., concurring). The purpose is to insure that litigants are not cheated out of a fair opportunity to present their federal claims. Just as that purpose is not served by encouraging states to purge discretion from their rules, neither is it served by encouraging them to replace general standards with rigid cut-offs or to restrict their exceptions so as to keep their "regularly applied" numbers up.

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"). In 2010, 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 or general standards 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 prece-

dents, but it is possible to reconcile all but one 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 16, 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 12-13.[9] *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 prob-

9. 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.

lem 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 89-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

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 15, 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*. This is not mere inconsistent application; it is a rule so vague it fails to give fair notice. In *James* v. *Kentucky*, 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.

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 17. 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 18.

The 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. *Id*., at

445. 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.[10]

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 13; *Lee*, 534 U. S., at 394 (Kennedy, J., dissenting). The most recent mention of the case in this Court is *Kindler*'s quotation of Justice Harlan's dissent. See 130 S. Ct., at 618, 175 L. Ed. 2d, at 424. 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 (1) gives fair notice that the rule exists and applies, and (2) provides a reasonable opportunity to present the claim. This standard embraces the important policy considerations and is consistent with all the major precedents, except for one case that should no longer be considered a valid precedent.

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10. 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.

III. The habeas petitioner in this case had more than fair notice and opportunity.

As the Magistrate Judge in this case noted, "Since *In re Clark*, it cannot be seriously contended that California's timeliness rule for habeas petition is other than well established. In several cases, the state supreme court has gone to great lengths to emphasize the importance of this rule. [Citations.]" App. to Pet. for Cert. 54.

California's timeliness standard, as expressed in *Clark*, is that "a petition should be filed as promptly as the circumstances allow, and the petitioner 'must point to particular circumstances sufficient to justify any substantial delay . . . .' " *In re Clark*, 5 Cal. 4th 750, 765, n. 5, 855 P. 2d 729, 738, n. 5 (1993). The Ninth Circuit has noted disapprovingly that this limitation is less clear than the one-year cutoff of AEDPA. See *Townsend* v. *Knowles*, 562 F. 3d 1200, 1208 (2009). It is indeed, and it is also generally much more favorable to petitioners. Under the federal statute, there are a few alternative starting dates that rarely apply, see 28 U. S. C. § 2244(d)(1)(B)-(D), and equitable tolling for extraordinary circumstances. See *Holland* v. *Florida*, 560 U. S. __ (No. 09-5327, June 14, 2010) (slip op., at 19). Other than those uncommon situations, though, the federal rule is "one size fits all"—one year from finality on direct review. See also 28 U. S. C. § 2255(f)(1) (same for federal prisoners).

The California rule is similar to the pre-AEDPA federal rule. See *Lonchar* v. *Thomas*, 517 U. S. 314, 326 (1996) (quoting former Habeas Rule 9(a)). That rule permitted dismissal of delayed petitions without defining "delayed." California's rule has been declared "inadequate" because the State has chosen *not* to follow the lead of Congress and *not* enact a law like the one widely bemoaned as "draconian" by pro-petitioner

commentators. See, *e.g.*, Zheng, Actual Innocence as a Gateway Through the Statute of Limitations Bar on the Filing of Federal Habeas Corpus Petitions, 90 Cal. L. Rev. 2101, 2131 (2002). It is "particularly strange to disregard state procedural rules that are substantially similar to those to which we [gave] full force in our own courts," *Kindler*, 130 S. Ct., at 618, 175 L. Ed. 2d, at 425, for many years before AEDPA, and which are more favorable to petitioners than AEDPA.

No one could be surprised that a habeas petition filed five years after finality on direct review would be considered delayed. See, *e.g.*, *Lonchar*, 517 U. S., at 317-318 (five years not counting two for pendency of state petition); *id*., at 326-327 (petition is delayed, only question is prejudice). There may be cases where a petitioner could claim lack of fair notice, but this is not one of them. "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U. S. 733, 756 (1974). If that is true for statutes defining crimes, it surely should be sufficient to respect a rule of procedure.

The State of California provided Martin with a procedure to adjudicate his challenges to his conviction. It gave him fair warning that a multi-year delay could result in loss of his claims. He had a reasonable opportunity to comply with the rule. He does not claim to be able to meet the "cause and prejudice" or "actual innocence" exceptions. See App. to Pet. for Cert. 57 (Magistrate Judge). That is all that is needed to dispose of the claim. The Magistrate Judge got it right six years ago.

IV. Given the *Sykes* and *Carrier* exceptions to the procedural default rule, the entire "adequacy" inquiry is unnecessary on habeas and a source of unjustified expense and delay.

In our brief supporting the certiorari petition, at pages 13-15, *amicus* CJLF argued that the federal policies underlying the adequate state grounds doctrine are fully served by the "cause and prejudice" and "actual innocence" exceptions to the procedural default rule. If a petitioner shows that he defaulted his claim because he was tricked or trapped by a genuinely "inadequate" state rule, that is "cause." Hence, no separate analysis of adequacy is necessary on habeas, as distinguished from this Court's direct review of state-court judgments. We will not repeat the argument in full here but incorporate our argument from the certiorari stage.

CONCLUSION

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

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Respectfully submitted,

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