No. 09-996

In The Supreme Court of the United States

JAMES WALKER,

Petitioner,

v.

CHARLES W. MARTIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

(1) Whether a state court practice of determining the timeliness of non-capital habeas petitions on a case-by-case basis, with no established rule or principle for deciding either when a petition is untimely or whether its untimeliness will be ignored – a practice that has resulted in inconsistent treatment of similarly situated habeas petitioners – constitutes an "adequate" state procedural ground for extinguishing a federal constitutional claim.

(2) As the state offered up California's timeliness bar as an affirmative defense to Martin's claims, was the burden of proving that defense properly allocated to the state as the proponent of the defense?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

STATE CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

The Procedural History Of This Case

Respondent Martin is serving life imprisonment without the possibility of parole following a conviction for the robbery and first-degree murder of Charles Stapleton. Following his conviction, Martin raised six claims in his application for federal habeas corpus relief. Three of those claims, and part of a fourth, were dismissed on procedural grounds that are not before this Court. California's timeliness bar was applied to the following claims: Claim 3 (alleging a Sixth Amendment violation due to trial counsel's failure to investigate and present evidence that one Bobby Austin was culpable for the robbery and murder); Claim 4 (alleging a Sixth Amendment violation due to omissions of trial counsel that permitted testimonial out-of-court statements to be played to the jury); Claim 6 (alleging ineffective assistance of appellate counsel for failing to argue that admission of the testimonial statements violated the Confrontation Clause, and for failing to assert in a petition for review to the California Supreme Court that the evidence was insufficient to support conviction for robbery).

1. Factual Background

Charles Stapleton's body was found in a plywood box ten to twelve feet from the edge of the Sacramento

River on December 7, 1986. RT[1] 201-202, 207. Investigation ultimately led to an admitted drug addict, Bonnie Permenter. RT 29-30, 152. Police officers tape-recorded an interview which was admitted into evidence at trial. On the tape, Permenter implicated Martin and Bobby Austin in Stapleton's death.

Later, in an unrecorded interview, Permenter added incriminating detailed statements made by Martin to her. RT 158, 162-65.

On October 24, 1994 (eight years after Stapleton's body was found), Martin was arrested in Florida. RT 452.

2. Pretrial And Trial Proceedings

Prior to trial, the court conducted a hearing pursuant to Cal. Evidence Code § 402(b) to determine whether Permenter's recorded and un-recorded statements would be admitted under the exception to the hearsay rule for past recollections recorded codified in Cal. Evidence Code § 1237.[2]

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[1] "RT" and "CT" refer to the Reporter's and the Clerk's Transcripts of the original trial, lodged in the district court. "CR" refers to the district court docket entries. "ER" refers to the Excerpts of Record filed in the Court of Appeals. "Pet. App." refers to the Appendix accompanying the state's Petition for Writ of Certiorari.

[2] Cal. Evidence Code § 1237, requires that a prior statement be admitted only if the declarant testifies that the prior statement was a true statement of fact.

At the evidentiary hearing Permenter testified and denied any memory of conversations with the police on the topic of a body being found near the river. RT 17, 21-30. She testified that neither Martin nor anyone else had ever confessed to her about having been involved in the murder. RT 18-19.

Permenter also admitted that at the time of her 1986 interviews, she was again drinking and using cocaine. RT 29-30.

At the conclusion of the hearing, the trial court ruled both Permenter's recorded and unrecorded statements were admissible under Cal. Evid. Code § 1237. RT 128, 134-35. The court surmised that even if Permenter were using methamphetamine in 1986, she would have remembered a statement made to her. The court concluded that Permenter's statement to the police was proof that she recalled Martin's statements. The court also found that Permenter was feigning her memory loss as to the original statement and Martin's admissions. RT 42.

During deliberations, the jury requested the Permenter taped interview and the crime scene video. The jury returned a verdict of guilty shortly after reviewing the tapes.

3. Post Conviction History

Martin appealed his conviction to the California Court of Appeal, Third Appellate District. In an unpublished decision, the California Court of Appeal

found the statement to be properly admitted and thus, necessarily found there to be sufficient evidence to support the verdict. Following the denial of Martin's Petition for Review in the California Supreme Court, Martin's conviction became final on July 15, 1997.

On February 19, 1998, Martin filed *pro se* a petition for writ of habeas corpus in the Sacramento County Superior Court.[3] The petition was denied May 19, 1998, in the erroneous belief that Martin's direct appeal was not then final and that he had not shown that his appellate remedy was inadequate.

On June 19, 1998, Martin filed in the California Court of Appeal another petition for a writ of habeas corpus. That petition was summarily denied on June 25, 1998.[4] On July 17, 1998, Martin repeated his allegations in a petition filed in the California Supreme Court,[5] alleging ineffective assistance of both trial and appellate counsel, *citing Strickland v. Washington*, 466 U.S. 668 (1984). Exh. E, State's Mot. Dismiss at 3, 6.

Martin alleged also that his appellate counsel was ineffective "in fail[ing] to incorporate constitutional

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[3] Exhibit C, State's Motion for Summary Dismissal filed July 18, 2000. Clerk's Docket 35.

[4] Exhibit D, State's Motion for Summary Dismissal filed July 18, 2000. Clerk's Docket 35.

[5] Martin supplemented this petition on July 27, 1998.

deprivations on direct appeal and review, in violation of federal and state constitutions." *Id.* at 3.

The California Supreme Court denied Martin's habeas petition on January 27, 1999.[6]

4. Federal Habeas Proceeding

On February 4, 1999, Martin filed his first federal petition.[7] On March 24, 2000 an amended petition was filed,[8] and on July 18, 2000, the state filed a motion for summary dismissal.[9] An additional, amended federal petition followed on March 14, 2001.[10] On March 21, 2002, following an order for stay, a second petition for habeas corpus was filed in the California Supreme Court. That petition was denied on September 11, 2002, with citations to *In re Clark,* 5 Cal. 4th 750 (1993), and *In re Robbins*, 18 Cal. 4th 770 (1998).

On January 21, 2003, a fourth amended federal petition was filed.[11]

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[6] Exhibit F, Fourth Amended Petition, Clerk's Docket 45. The court's citations to *In re Walterus,* 62 Cal. 2d 218, 225 (1965) and *In re Dixon*, 41 Cal. 2d 756, 759 (1953), have no bearing on this petition or the Questions Presented.

[7] Clerk's Docket 1.

[8] Clerk's Docket 30.

[9] Clerk's Docket 35.

[10] Clerk's Docket 41.

[11] None of the previously filed petitions are relevant to the issue currently before this Court.

The district court found some claims procedurally barred pursuant to *In re Dixon,* and that those claims at issue here were barred pursuant to the state's affirmative defense of untimeliness.

On appeal the Ninth Circuit reversed the district court with respect to Claims 3 and 6, sub-parts 2 and 3, concluding that the state, as the proponent of its affirmative defense bore the ultimate burden of proving the elements of that affirmative defense. The Ninth Circuit remanded to afford the state an opportunity to do so.

On remand, the state moved once again to dismiss,[12] offering up 370 habeas cases, analyzing 100 of them, and arguing that the timeliness bar was adequate. However, eight petitions, each filed more than three years and five months after finality of direct review, received no citation to timeliness. The state *hypothesized* each of the eight fell within appropriate exceptions, although in none was the exception articulated.

Similarly, the district court looked to its own survey of explicated decisions, and concluded from it that California's timeliness bar and its exceptions, was consistently adhered to. Pet. App. 6. Accordingly, on March 10, 2008, the district court denied Martin's petition.

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[12] Clerk's Docket 95.

The Court of Appeals reversed the district court finding, that the government had failed to prove that California operated under clear standards for determining what constituted 'substantial delay' and that the state had failed 'to meet its burden of proving that California's timeliness was sufficiently clear to be an adequate state bar.

5. California's Jurisprudence And Practice Regarding The Timeliness Of State Habeas Petitions

a. Introduction

All of California's courts – the superior courts, courts of appeal and the California Supreme Court – have original jurisdiction to hear petitions for writs of habeas corpus. Cal. Const., art. VI, § 10.[13] If a new petition is filed in the California Court of Appeal, and there denied, the prisoner may then file an original petition in the California Supreme Court, bypassing completely both lower courts. *See*, *e.g.*, *In re Harris*, 49 Cal. 3d 131, 134 (1989).

Although California's habeas rules often lead a petitioner to file in either the superior court or the lower appellate court first, California does not require that a petitioner take any of these intermediary

[13] A petitioner has no right of direct appeal from the superior court's denial of all or part of the habeas petition. *See, People v. Garrett,* 67 Cal. App. 4th 1419 (1998). He may file another original petition or a petition for review with the California Supreme Court. *See,* Cal. Penal Code § 1506.

steps. *See,* Cal. Const., art. VI, § 10; California Rules of Court 8.380(a), 8.384(a)(1), 8.384(b)(1); *People v. Romero*, 8 Cal. 4th 728, 737 (1994).[14]

Should the court determine that none of the claims present a prima facie case for relief, or that all of the claims are, for one reason or another, procedurally barred, the Court will deny the petition outright with what is commonly, and sometimes pejoratively, referred to as a "post-card denial," but more formally referred to as a "summary denial." *Romero*, 8 Cal. 4th at 737, *citing Clark,* 5 Cal. 4th at 769 n.9.

These summary denials sometimes, but far from anything close to the majority of time, contain a shorthand reference to the reason for the petition's denial in the form of case citations. If the basis for denial is one of California's procedural bars, the citation might reference the bar.[15] On other occasions,

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[14] That being said, a court of appeal has discretion to deny without prejudice a habeas corpus petition that was not filed first in lower court (*i.e.*, in a superior court), but the court of appeal need not do so. *See, In re Steele*, 32 Cal. 4th 682 (2004) (*citing*, *inter alia, In re Ramirez*, 89 Cal. App. 4th 1312 (2001)).

[15] The following are representative, but not exclusive: *Walterus*, 62 Cal. 2d at 225 (issue raised and rejected on appeal); *Dixon*, 41 Cal. 2d at 759 (1953) (issue should have been raised on appeal); *In re Miller*, 17 Cal. 2d 734 (1941) (issue raised and rejected in prior habeas); *In re Swain*, 34 Cal. 2d 300, 304 (1949) (failure to justify delay in bringing petition); *In re Streeter*, 66 Cal. 2d 47, 52 (1967) (delayed too long in filing the petition); *In re Seaton*, 34 Cal. 4th 193, 197-201 (2004) (claim forfeited by failure to raise claim, or object, in the trial court); *People v.*

(Continued on following page)

but very rarely, the order will summarily state that the petition is denied *on the merits*. Many summary denials, however, are completely silent, bereft of reason, rationale or explanation.

For example: in the six months before and in the six months following Martin's purported default, some 1,960 habeas corpus petitions were denied by the California Supreme Court. Of those, approximately 1,000 were summarily denied without a case citation (specifying a procedural bar), or without a cause specified. More recently, in the first six months of 2010, of the nearly 1,357 petitions denied, approximately 833 petitions were denied without case citation (specifying a procedural bar) or without a cause specified.[16]

b. California's Timeliness Bar Requirements

California's timeliness bar is generally considered to have its genesis in *Swain*, 34 Cal. 2d at 302, which required, "an applicant for habeas corpus, where there is substantial delay, to explain the reasons for the delay." *Moreno v. Nelson*, 472 F.2d 570,

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Duvall, 9 Cal. 4th 464, 474 (1995) (failure to state with particularity the facts upon which a claim is based).

[16] The data presented is derived from searches performed in LexisNexis. The survey is inexact. It is, however, given the data available, reasonably accurate. Even so, and in spite of its limitations, it is certainly instructional.

571 (9th Cir. 1973), *overruled on other grounds, Harris v. Superior Court*, 500 F.2d 1124 (9th Cir. 1974).

In 1993, the California Supreme Court, noting that "no clear guidelines" were discernible from extant case law, attempted to clarify its timeliness rules in *Clark*, 5 Cal. 4th at 763. *Clark* was an elaboration of timeliness policies released by the state supreme court in 1989 to clarify issues in capital cases. *See* Supreme Court Policies in Cases Arising from Judgments of Death, Policy 3: Standards Governing Filing of Habeas Corpus Petitions and Compensation of Counsel in Relation to such Petitions.[17]

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[17] A September 1990 amendment increased this period to 90 days. Subsequent amendments have increased the notice period to its current 180 days. Currently, the Supreme Court Policies (2002) state the following:

> All petitions for writs of habeas corpus should be filed without substantial delay.
>
> 1-1.2. A petition filed more than 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or more than 24 months after appointment of habeas corpus counsel, whichever is later, may establish absence of substantial delay if it alleges with specificity facts showing the petition was filed within a reasonable time after petitioner or counsel (a) knew, or should have known, of facts supporting a claim and (b) became aware, or should have become aware, of the legal basis for the claim.
>
> 1-2. If a petition is filed after substantial delay, the petitioner must demonstrate good cause for the delay. A petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay.

(Continued on following page)

The Policies set forth a number of *Standards* that, among other things, created a presumption of timeliness in *capital habeas cases* and also expressly incorporated the existing *substantial delay* standard from prior case law.

Effectively, what the Court has done is convert California's habeas proceedings, in *capital cases*, to a system wherein habeas corpus matters are litigated in conjunction with direct appeal – not so for non-capital cases.

The California Supreme Court did attempt to clarify what it meant by the term, *substantial delay.* Rather than defining "delay" or "substantial delay" however, it simply described the event that would be treated as commencing a period of delay:

> Substantial delay is measured from the time the 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.

1-3. Any petition that fails to comply with these requirements may be denied as untimely.

1-4. The court may toll the 180-day period of presumptive timeliness for the filing of a capital-related habeas corpus petition (which begins to run from the final due date to file the appellant's reply brief in the appeal) when it authorizes the appellant to file supplemental briefing. The court will not toll before the 180-day presumptive timeliness period begins to run or after it has finished running.

Robbins, 18 Cal. 4th at 780; *see also, Clark,* 5 Cal. 4th at 781.

Although California's timeliness *rule* applies to both capital and non-capital cases,[18] the timeliness *standard* for capital cases is actually quite different, and is far more precise than it is for non-capital cases.

While it is true that many California non-capital habeas cases do in fact cite to the need for a habeas petitioner to file *without substantial delay,* the precedential authority for those non-capital cases is grounded exclusively in capital habeas jurisprudence. Those courts which do find *substantial delay* in non-capital cases consistently cite to capital cases in support. More to the point, they do nothing to clarify for non-capital habeas petitioners just how the capital case guidelines affect them.

Unlike other states, and, unlike the federal scheme, California has declined to establish a determinate time period within which a prisoner may file a petition for habeas corpus in non-capital cases.[19] Instead, a non-capital petitioner must file a petition *without substantial delay*, or if delayed, to

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[18] The present case is of course in the latter category.

[19] Under the statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) a state prisoner generally must file his federal habeas petition within one year after his state conviction becomes final. 28 U.S.C. § 2244(d)(1).

satisfactorily explain the delay. *See, In re Harris*, 5 Cal. 4th 813, 828 n.7 (1993).

However, a non-capital petitioner must justify delay *only* when there is present *substantial delay* or a lack of *diligence* in identifying the basis for the claim. *See, In re Stankewitz*, 40 Cal. 3d 391, 396 n.1 (1985) and cases cited. *See also, In re Gallego,* 18 Cal. 4th 825 (1998).

Under California law, *diligence* is required when investigating the basis for a claim, but that term has never been defined. Petitioners are then directed to file their claim within a *reasonable time period* but without *substantial delay.* What exactly constitutes a *reasonable time period,* or *substantial delay* has never been defined.

c. The Ninth Circuit's Ruling

In *Bennett v. Mueller,* 322 F.3d 573, 585 (2003), *citing Gray v. Netherland,* 518 U.S. 152 (1996) (state-court "procedural default is an affirmative defense") and *O'Neal v. McAninch,* 513 U.S. 432, 443 (1995) (party asserting affirmative defense "bears the risk of equipoise") and consistent with the view adopted by the Tenth Circuit, the Ninth Circuit placed the ultimate burden of proving the adequacy of California's affirmative defense of procedural default upon the state. *Bennett*, 322 F.3d at 585-586.

In its earlier memorandum opinion, Pet. App. at 20, the Ninth Circuit found that Martin, once

confronted with the state's affirmative defense, had met his burden of establishing that the state's defense was inadequate.[20] Having satisfied his burden, the burden of proving its defense shifted to the state. *Id.* at 2. On remand Walker was unable to establish that California operated under clear standards for determining what constituted substantial delay, Pet. App. 1, all but conceding he could not do so, at least empirically. Pet. App. at 95, n.6.

> In sum, unlike other states, California has chosen to employ an undefined standard of "substantial delay" in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines. We have concluded in *Townsend*, and other cases, that this standard has yet to be firmly defined and that the state has not met its burden of proof of showing that the standard is consistently applied. After a careful review of the record in this case, that conclusion remains unaltered.

Because the state failed to meet its burden, proving its affirmative defense of lack of timeliness, the district court was reversed and the matter remanded for a determination on the merits. *Id.* at 1.

[20] Martin did so by alleging that rule was inadequate as previously determined by *Morales v. Calderon,* 85 F.3d 1387, 1390-92 (9th Cir. 1996).

SUMMARY OF ARGUMENT

Under California law, the writ of habeas corpus is an equitable, flexible remedy, subject to no specific time limits for seeking relief. Under *Clark*, 5 Cal. 4th 750, the leading case on delayed petitions (and repetitive and successive petitions as well), state habeas petitioners who fail to demonstrate the absence of "substantial delay" in presenting their claims, or alternatively the existence of "good cause" for such delay, are at risk for having their claims barred as untimely. Neither *Clark* nor its only three descendants, *Robbins*, 18 Cal. 4th 770; *Gallego*, 18 Cal. 4th 825; and *In re Sanders*, 21 Cal. 4th 697 (1999), provide means for distinguishing those time spans that amount to substantial delay from those that do not. Two of the cases, *Gallego* and *Sanders* shed some light on "good cause" for delay, but only with regard to facts applicable to capital cases alone. As a result of California's "post-card" denial system where the overwhelming majority of petitions for writ of habeas corpus are denied without explanation, the process by which timeliness is assessed on a case-by-case basis is never revealed.

This Court has repeatedly confirmed that the adequate state ground doctrine requires that litigants be fairly apprised of what is required to preserve a federal constitutional claim for review. *E.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958); *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991). It is also well-established that the doctrine does not permit state courts to disregard and extinguish

federal rights by invoking untenable state grounds, *e.g., Wright v. Georgia*, 373 U.S. 284, 289-291 (1963); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-301 (1964); *Barr v. City of Columbia*, 378 U.S. 146, 149-150 (1964), including grounds that are not "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

Clark's timeliness doctrine fails to fairly apprise state habeas petitioners of what they must do to avoid procedurally defaulting their claims. The exhortation to file reasonably promptly fails to provide meaningful guidance. "Delay," "substantial delay," and "good cause" are inherently vague and remain undefined by state court practice. The terms are insufficient to apprise those whose conduct is subject to regulation of what is necessary to comply, or to insure against arbitrary, discriminatory, or ad hoc decision making by those charged with enforcing the regulation. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Walker's argument that "reasonableness" is a commonplace legal term that is commonly understood to possess sufficiently specific meaning in a variety of settings has no merit. Meaning and ambiguity vary with context and depends on frames of reference. California has provided no benchmarks for assessing whether filing within any given time frame is to be considered "reasonably prompt," "delayed" or "substantially delayed."

The facts do not support Walker's contention that the Ninth Circuit has insisted on a level of mathematical precision that is inherently inconsistent with the exercise of discretion.

Long before this Court's decision in *Beard v. Kindler*, 130 S. Ct. 612 (2009), the Ninth Circuit appreciated that state rules of procedure can be both discretionary and adequate. The Ninth Circuit has not scrutinized the California courts' invocations of *Clark* in a manner likely to confuse discretion and inconsistent application. The court has instead looked to practice to determine whether a sufficiently unambiguous meaning may be gleaned from *Clark*'s rulings in action. Doing so does not violate a presumption that judges follow the law. No Ninth Circuit decision has ever suggested that California judges are violating *Clark*. Empirical observation confirms that in all likelihood state court judges are doing precisely what *Clark* requires them to do: decide matters of reasonableness, delay, and good cause on a subjective ad hoc basis.

Nor is it inappropriate that the ultimate burden of proving the adequacy of the state's timeliness bar, an acknowledged affirmative defense, be allocated to the state. Federal Rules of Civil Procedure, Evidence and relevant case law are clear; a party asserting an affirmative defense has the burden of proving it, a general rule with which Walker implicitly agrees. Pet. Br. at 31. Since Walker tacitly acknowledges his inability to meet his burden and establish the adequacy of the state's affirmative defense of timeliness,

it must be concluded that the Ninth Circuit's findings against him are correct.

Last Term, this Court declined to re-evaluate the circumstances under which federal courts would abstain from exercising review under 28 U.S.C. § 2254(a) on the grounds that an atypical default rule is "unsuitable for providing broad guidance on the adequate state ground doctrine." *Beard*, 130 S. Ct. at 619. California, joined by one amicus from *Beard*, comes before the Court with the identical arguments in a more unsuitable case. The requested revisions, especially if made to accept California's ad hoc, unexplained rulings, would replace an entire existing body of law with a deceptively simple "fair notice" approach, although this Court cannot predict the effect of such a change on a wide variety of federal rights and state procedures. The job of explaining what an adequacy doctrine rooted only in "fair notice" would mean, against the backdrop of a rule extraordinarily vague on its face, would be fraught with difficulty and likely to engender confusion. Moreover, a "fair notice" revision to the adequate and independent state ground doctrine would serve no purpose in this case. Walker seeks primarily to eliminate notions of consistent application, except when relevant to question of notice. Even if the Court were to agree, that would not cure California's consistency problems. "The vices – the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial

review – are the same." *Interstate Circuit v. Dallas*, 390 U.S. 676, 689-690 (1968).

Amicus argues for an even more radical change to the adequate and independent state ground doctrine, which would split off habeas corpus cases from all other types of cases governed by the doctrine. Adequacy would be eliminated for habeas cases and replaced by a modified version of "cause and prejudice." That request is not properly before the court, *Illinois v. Gates*, 462 U.S. 213 (1983), and should be rejected along with Walker's request to retain the doctrine only in a substantially modified form.

ARGUMENT

I. THE STATE HAS FAILED TO MEET ITS BURDEN OF PROOF AND THUS IS NOT ENTITLED TO ITS AFFIRMATIVE DEFENSE

A. California's Time Bar Is An Affirmative Defense And The Burden Of Proof Is Properly The State's Under Case Law As Well As The Federal Rules Of Civil Procedure

Walker argues that the ultimate burden of proof on adequacy of the procedural bar be assigned to Martin. Pet. Br. at 31. Such an allocation is contrary to the long established burden assumed by a party in litigation asserting the positive of a position, in this case the State's pleading of the affirmative defense of

procedural default against petitioner. This Court's precedent, along with the Second, Fourth, Ninth, and Tenth Circuits, rejects the position advanced by the state. Together, these courts have recognized that it is the state raising a potentially dispositive affirmative defense and thus it is the state that is required to carry the ultimate burden in proving it.

In *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996), this Court specifically held that procedural default is an affirmative defense in a federal habeas corpus proceeding that the state is obliged to either raise or lose. In *Day v. McConough*, 547 U.S. 198 (2006), this Court's holding, and application of Federal Rules of Civil Procedure 8(c), 12(b) and 15(a) effectively aligned statute of limitations and timeliness bars with other affirmative defenses to habeas petitions. In addition,

> [a]ny possible doubt about this point has been removed by the statutory procedure Congress has provided for the disposition of habeas corpus petitions, a procedure including such non-appellate functions as the allegation of facts, 28 U.S.C. § 2242, the taking of depositions and the propounding of interrogatories, § 2246, the introduction of documentary evidence, § 2247, and, of course, the determination of facts at evidentiary hearings, § 2254(d).

See, Keeney v. Tamayo-Reyes, 504 U.S. 1, 14 (1992) (O'Connor, Blackmun, Steven and Kennedy, dissenting) *citing*, *Ex parte Tom Tong,* 108 U.S. 556, 559-560 (1883).

The rule is not complicated. By virtue of Rule 8(c) a party "[i]n pleading to a preceding pleading shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." J. Thayer, A Preliminary Treatise on Evidence 353-389 (1898). *See*, *e.g.*, 9 J. Wigmore, Evidence §§ 2485-2498 (J. Chadbourn rev. 1981). There is nothing novel, inconsistent or untoward about the Ninth Circuit's approach. Federal Rules of Civil Procedure, Evidence, and relevant case law make it abundantly clear that a party asserting an affirmative defense has the burden of proving it.

As a settled general rule then, the burden of proving an affirmative defense is on the party asserting it. *See, e.g., Stonehenge Eng'g Corp. v. Employers Ins. of Wausau*, 201 F.3d 296, 302 (4th Cir. 2000); *Girard v. Gill*, 261 F.2d 695, 697 (4th Cir. 1958). It is a rule Walker implicitly concedes. Pet. Br. at 31. But he attempts to escape assignment of his burden of proof by reference to a series of cases that are inapposite and which all involve the shifting of *the burden of producing evidence* rather than assignment of *the ultimate burden of proof* on an issue, as here. Moreover the cases cited by Walker all involve issues of tolling not present in the instant case.

In *Bennett,* 322 F.3d 586, the Ninth Circuit adopted an approach that readily comports with the rules established at common law, is accepted by the Federal Rules of Civil Procedure, and is followed in other civil cases. *See, California Sansome Co. v. Gypsum,* 55 F.3d 1402 (1995). Other circuits concur.

The Tenth Circuit has determined that the state is ultimately responsible for proving the adequacy of a state procedural bar, reasoning that since the bar constitutes an affirmative defense the state is in the best position to establish the uniform application of the procedural rule. *Hooks v. Ward*, 184 F.3d 1206, 1216-17 (10th Cir. 1999). The Second Circuit has taken a middle ground, assuming – without deciding – that "[b]ecause the procedural bar is a defense to a habeas claim, . . . the state bears the burden of proving the adequacy of the state procedural rule." *Cotto v. Herbert*, 331 F.3d 217, 238 n.9 (2nd Cir. 2003).

These circuits are quite correct, but not only because their rules are consistent with the Federal Rules of Civil Procedure. Equitable principles that traditionally govern applications for habeas relief in federal courts recognize that the state is the party raising a potentially dispositive affirmative defense. These equitable principles require the state to carry the ultimate burden in proving it, assigning to the party who most justly and efficiently is able to provide relevant, accurate and necessary information to the court concerning the adequacy of its procedural bar.

The Tenth Circuit agrees, finding that it is the state that is in the better position to establish the regularity, consistency and efficiency with which it has applied a state procedural bar "than are habeas petitioners, who often appear pro se, to prove the converse." *Hooks*, 184 F.3d at 1217. Elaborating on the Tenth Circuit's approach, the Ninth Circuit in

Bennett recognized the obvious when it said, "it is the state, not the petitioner, often appearing pro se, who has at its hands the records and authorities to prove whether its courts have regularly and consistently applied the procedural bar." *Bennett,* 322 F.3d at 585. And, citing to early precedent of this Court, the Ninth Circuit noted that "the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Id.* at 585 (*citing United States v. New York, N.H. & H.R. Co.* 355 U.S. 253 (1957)).

In addition, while not in and of themselves controlling, California cases also concede that superior knowledge of a party is a strong factor in calling for allocation of the burden of proof upon the party proposing the defense. *See, Orange v. Barrett Amer.,* 150 Cal. App. 4th 420, 438 (2007) (in action against county alleging that fees imposed on development projects were excessive, trial judge properly placed burden on county to show that expenditures of amounts collected were reasonable and necessary; county was party with knowledge of and access to evidence regarding its compliance with statute; similarly *see Amaral v. Cintas Corp No. 2,* 163 Cal. App. 4th 1157, 1190 (2008)).

It follows then, that although a petitioner must ultimately prove his claim in a habeas action, just as plaintiff ultimately must prove his claim in a tort action, a defendant who pleads an affirmative defense

either in a tort or in habeas, bears the ultimate burden of proving that defense.

The Fifth Circuit is the only Circuit to take an alternative approach, instead *presuming* the adequacy and independence of a state procedural rule. *See, Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995). But, the Fifth Circuit's approach has been explicitly rejected by the Tenth and Ninth Circuits, and implicitly so by the Second and Fourth Circuits, which have recognized the bar as an affirmative defense and so decline to afford it an irrebutable presumption. *Bennett,* 322 F.3d at 585; *McNeil v. Polk*, 476 F.3d 206, 220 (4th Cir. 2007) (King, concurring).

The burden shifting rules established in these cases make particular sense when determining whether a state procedural rule has met the conditions of adequacy. Since the state is always represented by the Attorney General, the state is in a unique position to ensure that the federal courts are provided all necessary information to determine whether the state's rule is in fact adequate. Indeed, the Attorney General will know of the rule's application in every instance. To place the ultimate burden of proof concerning adequacy on a petitioner would mean that the federal courts will often be provided incomplete and/or inconsistent information regarding the application of the procedural rule.

B. Walker's Analogy To AEDPA's Statute Of Limitations Is Unavailing

Walker seeks to persuade this Court to adopt for the state the same burden shifting rules applied by the federal courts when deciding the applicability of AEDPA's statute of limitations and its tolling provisions. Pet. Br. at 31-32.

Walker misperceives the effect of pleading an affirmative defense, such as statute of limitations, to a claim and misunderstands the obligations of the respective parties when an affirmative defense is raised.

A shift in the *burden of producing evidence* does not relieve an opposing party of its *burden of proof* on an affirmative defense. The burden of going forward with the evidence may shift during the conduct of proceedings without affecting a party's burden of proof as to a particular fact. The tolling and equitable tolling cases referred to in the state's brief (Pet. Br. at 31-32) are not persuasive or even helpful in understanding the burden of proof issue in this case. Rather, those cases articulate a well founded, long employed evidentiary protocol that effectuates a shift in the *burden of producing evidence.* Put simply, when a plaintiff responds to a defendant's claim that the statute of limitations has run, the plaintiff must produce evidence that it has been tolled, or equitably tolled. The plaintiff's *burden of producing evidence* does not relieve the party asserting the time bar

(Walker, in our case) from its ultimate burden of proof that the statute had indeed run.

Walker's misperception in fact highlights the problems with California's indeterminate time bar, particularly when compared to AEDPA's traditional statute of limitations.

Under AEDPA, petitioner has one year from the date the judgment becomes final on appeal to complete preparations as thorough as possible within that time and to present the claims resulting therefrom to federal court. 28 U.S.C. § 2244(a)(1)(A). The statute then addresses three ways in which claims may fall outside of the ordinary course. 28 U.S.C. §§ 2244(d)(1)(A)-(D). In each instance, the statute dictates filing within a year after some identifiable event.

In concrete terms that means that when the state, in its answer, or by way of motion to dismiss, raises the statute of limitations as a defense, petitioner may respond that he is excused by virtue of one of the provisions set forth in 2244(d)(1)(B)-(D). Assuming that he responds satisfactorily, it is then the state's responsibility, its burden, to prove petitioner is not entitled to the cited provision of the statute; that the state is indeed entitled to its affirmative defense that the statute of limitations had run. *See, California Sansome Co.,* 55 F.3d 1402. (A defendant raising the statute of limitations as an affirmative defense has the burden of proving that action is time barred (citing cases)); *see also, Stonehenge Eng'g Corp.*, 201 F.3d at 302; *Girard,* 261 F.2d at 697.

In the context of the burden of proof relative to affirmative defenses, the difference between AEDPA's bona fide statute of limitations, and the state's procedural bar, is conceptually nonexistent. Walker, having raised the procedural bar as a defense, effectively shifted the burden of producing evidence, not the burden of proof, to Martin. Martin alleged the bar to be inadequate. The burden of proving adequacy within the framework of this Court's adequacy jurisprudence then shifted back to Walker, the party raising the affirmative defense. Walker was unable to meet his burden and the Ninth Circuit ruled accordingly.

II. UNDER THIS COURT'S SETTLED RULES REGARDING THE ADEQUACY OF A STATE PROCEDURAL BAR, CALIFORNIA'S PRACTICE OF DECLARING HABEAS PETITIONS TIMELY OR UNTIMELY IS INADEQUATE

A. Procedural Default Doctrine

The procedural default doctrine prohibits federal courts from reviewing a state court decision involving a federal question if the state court decision is based on a rule of state law that is independent of the federal question and adequate to support the judgment. *See Gray*, 518 U.S. at 162; *Lambrix v. Singletary,* 520 U.S. 518, 522 (1997) (*quoting Coleman v. Thompson,* 501 U.S. 722, 729 (1991)).

Whether the state court decision rests on a state law ground that is independent of the federal question and adequate to support the judgment, however, "is itself a federal question." *Lee v. Kemna,* 534 U.S. 362, 375 (2002).

B. The Adequate State Ground Doctrine Repeatedly Confirmed By This Court Requires That A State Procedural Bar Fairly Apprise Litigants Of Its Requirement And Be Regularly And Consistently Applied

Requiring that a state's procedural rules be clear, firmly established and regularly followed, in a word, adequate, protects federal rights from capricious and arbitrary infringement by state courts.

If a state procedural bar is applied arbitrarily, infrequently, or is so vague that it may not be readily understood and thus adherence thwarted, the rule discriminates, in that term's broadest sense, against a federal right and so, is inadequate. *Prihoda v. McCaughily,* 910 F.3d 1379, 1383 (7th Cir. 1990).

Petitioner attempts to separate and parse the concepts of "fair notice" and "consistent application" as measures of adequacy, and then to elevate "fair notice" as a "hallmark" of adequacy. Pet. Br. at 9. In fact, the concepts of *fair notice, consistent application* and *firmly established* are inextricably intertwined as the dissenting opinion in *Lee v. Kemna* observed:

> The initial step of the adequacy inquiry considers whether the State has put litigants on notice of the rule. The Court will disregard state procedures not firmly established *and* regularly followed.

Lee, 534 U.S. at 389 (Kennedy, J., dissenting). *See also Patterson*, 357 U.S. at 457-58 ("[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights").

This Court found in *Staub v. City of Baxley,* 355 U.S. 313, 318 (1958), that an inconsistently applied, and sometimes ignored state procedural rule was an inadequate state ground to foreclose federal review of the underlying federal issue. *Id.* at 320. In cases which followed, federal review was regularly permitted when it became apparent that the procedural rule was not regularly adhered to, and thus, inadequate. *See Barr,* 378 U.S. at 149 (federal review not barred by state procedural grounds "not strictly or regularly followed"); *James,* 466 U.S. at 348, (holding that only state procedural grounds that are "firmly established and regularly followed" will be "adequate" to bar federal review of the underlying federal claim). *See also Ford,* 498 U.S. at 423-424. In *Hathorn v. Lovorn*, 457 U.S. 255 (1982), this Court reached the merits of the petitioner's claim although there was evidence the petitioner had violated the Mississippi Supreme Court's timeliness rule finding, "we cannot conclude

that the state court consistently relies upon this rule." *Id*. at 263. *See also Sullivan v. Little Hunting Park*, 396 U.S. 229, 231 n.1, 233-34 (1969) (with respect to state procedural rule being inadequate because state precedents "do not enable us to say that the Virginia court has so consistently applied [the rule] . . . as to amount to a self-denial of the power to entertain the federal claim here presented if the [court] . . . desires to do so").

In *Johnson v. Mississippi,* 486 U.S. 578, 587 (1988), a default based on a claim that had not been raised on direct appeal when binding precedent from the state's highest court dictated the claim should have been raised in a post conviction motion and not on direct appeal was rejected. In *Barr,* 378 U.S. 146, a deficient objection was found to be an inadequate reason to refuse to review a constitutional claim when the state court held identical objections sufficient three times in the two months before *Barr* and again held the objections sufficient a few weeks later. In *Patterson,* 357 U.S. at 457, an alleged error in the organization of a brief was the purported reason for the state court decision barring relief. It was a minor error and the rule, which the petitioner had allegedly violated, was routinely not enforced. The bar was held to be inadequate. And in *Staub,* 355 U.S. at 320, the state's procedural rule was inconsistent with long standing state supreme court decisions). In *Wright,* 373 U.S. at 291, this Court found inadequate a procedural rule that an appellate brief explicitly link the argument to a claim in the new trial motion because

that rule had never before been enforced in any published case.

While Walker asserts, repeatedly, that it is "untenable" for federal courts to review a state court's application of its own procedural bars for more than fifty years, this Court and the lower federal courts have examined how state courts apply their rules both to ascertain the nature of the rule in order to determine whether the party asserting federal rights actually violated the rule, and to determine whether that conduct was treated similarly in other cases. Far from "second guessing" state courts, adequacy review is an historical query and the only means by which a federal court can discern whether state courts have applied a state procedural bar with such consistency that the rule can be characterized as clearly established and regularly followed.

Even Walker acknowledges, albeit indirectly, that an inconsistently applied state rule is inadequate. *See, e.g.,* Pet. Br. at 19 ("central requirement" is "fair notice" "novelty" cannot thwart federal review); Pet. Br. at 21 (recognizing that the Court's precedents require the state rule to be "firmly established and regularly applied").

The alternative to federal court adequacy review is effectively an irrebuttable presumption that all state procedural bars are well established and consistently applied allowing states to evade federal review regardless of whether the bar is applied even handedly. As described by one court:

> If inconsistently applied procedural rules sufficed as "adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules" – directions of general applicability – rather than by whim or prejudice against a claim or claimant.

Bronshtein v. Horn, 404 F.3d 700, 708 (3rd Cir. 2005) (per Alito, J.). Examination of state practice ensures that ill-defined or irregularly-applied procedural rules will not result in the inconsistent enforcement of federal constitutional rights for similarly-situated litigants.

Walker's chief complaints about the Ninth Circuit's analysis of the adequacy of the state procedural bar applied in his case are: (1) the Ninth Circuit has taken this Court's requirement that a state procedural rule be "firmly established and regularly applied" before it is deemed "adequate" and turned that into an "overly restrictive and mechanical standard for adequacy" that requires states to apply a bar with an "arithmetical level" of consistency (Pet. Br. at 10); (2) the Ninth Circuit fails to appreciate that a state procedural bar that allows for discretion, and thus inevitably leads to inconsistent results, can still be adequate (Pet. Br. at 10-11); (3) the Ninth Circuit's method of determining whether a state procedural bar is adequate involves an "untenable" examination of state courts' application of their own rules, Pet. Br.

at 10-11; and (4) the Ninth Circuit improperly places the burden of proving adequacy on the government rather than requiring a federal petitioner to prove that the state procedural bar that was invoked in his case is inadequate (Pet. Br. at 12-13).

Thus, in objecting to a consistency review of the state's application of its timeliness rule to habeas petitions, Walker ignores the historical context of this Court's adequacy jurisprudence requiring consistent application. *See, Hathorn*, 457 U.S. at 262-63 (*quoting Barr*, 378 U.S. at 149). That he does so is curious, for in his brief to the Ninth Circuit, Walker acknowledged that the independent and adequate state ground doctrine requires that "the actual application of the default rule to all similar claims has been even-handed 'in the vast majority of cases.'" Pet. App. at 60, *citing Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th Cir. 1996); *Dugger v. Adams*, 489 U.S. 401, 410-412 n.6 (1989). Indeed, the Ninth Circuit can hardly be faulted for doing precisely what this Court has done on numerous occasions.

In *James,* 466 U.S. at 346, this Court reviewed a dozen state court decisions to determine that the Kentucky Supreme Court had no history of inconsistency in distinguishing jury "instructions" from "admonitions." Although Walker cites *Ford*, 498 U.S. 411, for the proposition that a state court may not under the adequate state grounds doctrine announce a new rule and apply it retroactively, Pet. Br. at 10, Walker ignores this Court's additional observation that the state court's invocation of the alleged waiver

rule "also fail[ed] the second *James* requirement that the state practice has been regularly followed." *Id*. at 425.

This case is not about whether review for consistent application is inconsistent with Beard's conclusion that discretionary rules can pass adequacy muster. In fact, years before *Beard* the Ninth Circuit embraced this Court's very point, stating, "The mere fact that a state's procedural rule includes an element of discretion does not render it inadequate." *Fields v. Calderon,* 125 F.3d 757, 761 (9th Cir. 1997), *citing, Morales v. Calderon,* 85 F.3d 1387, 1392 (9th Cir. 1996).

However, judicial discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits. Thus it is that this case instead is whether a federal court, consistent with any of the teaching regarding adequacy can honor state court procedural doctrines that subject litigants to unknowable, entirely ad hoc, decisions rendered with unbridled, standardless discretion.

If Walker is to prevail on his argument that that timeliness bar is consistently applied, he is obligated to point to cases where there is some consistency between the present event – (time of default from the state's perspective) – and the past event – (the triggering point, i.e., the specific date upon which the basis for the claim was discovered.) He cannot do so because reported cases rarely identify with specificity the date of default; nor do the state's perfunctory

post-card denials identify that date. Because the state has no readily identifiable past event – i.e., triggering point – from which to begin its analysis, and certainly no identifiable date by which substantial delay might be determined, the state is incapable of establishing any degree of consistency.

Prior to *Clark* illustrative cases were sparse and sent conflicting messages. *In re Spears*, 157 Cal. App. 3d 1203, 1208 (1984) (18 mos.); *In re Mitchell*, 68 Cal. 2d 258 (1968) (2 yrs); *In re Huddleston*, 71 Cal. 2d 1031 (1968) (2.5 yrs); *In re Saunders*, 2 Cal. 3d 1033 (1970) (5 yrs); and *In re Jones*, 265 Cal. App. 2d 376 (1968) (8 yrs).

More recently, lower courts have examined even more extensive showings. In *Dennis v. Brown*, 361 F. Supp. 2d 1124, 1130 (N.D. Cal. 2005), the court examined 200 California Supreme Court opinions, most of which were post-card denials, and was able to determine that the court applied the timeliness bar inconsistently.

In this case, following the Ninth Circuit's initial remand,[21] the State attempted to demonstrate consistency,[22] but that attempt was unpersuasive. More importantly, the state subsequently disavowed the attempt to show consistency of application. In its brief in the Ninth Circuit, it stated that it was "abandon[ing] the surgery of silent denials proffered in the

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[21] Pet. App. 20.

[22] Clerk's Doc. 95, Motion to Dismiss.

District Court for the sound reasons offered by that Court, namely, a review of silent denials simply requires too much speculation to be useful to answer the inquiry."[23]

In light of that abandonment, it is difficult to find fault in the Ninth Circuit's conclusion that the weight of the evidence supported Martin's position regarding inconsistent application.

Finally, in *Carey v. Saffold*, 536 U.S. 214 (2002), during oral argument the state's attorney general spoke of the triggering point as that of *finality* of the prior proceeding.[24] In *Evans v. Chavis*, 546 U.S. 189 (2006), the Attorney General argued to this Court that the triggering point considered by the state's courts is the *date of conviction*.[25] And, in the present case, the attorney general argued before the district court, and again in the Ninth Circuit, that the triggering date from which to measure delay is in fact the date direct review is final.[26] Walker makes the same argument before this Court. Pet. Br. at 5.

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[23] Pet. App. at 95.

[24] *Carey v. Saffold* Transcript of Oral Argument at 12-13.

[25] *Evans v. Chavis* Transcript of Oral Argument at 5.

[26] In its motion to dismiss, the attorney general focused on the finality of direct appeal as the appropriate triggering date. "[Martin] filed his untimely state high court petition more than four years and six months after his *direct review became final*." Doc. 95 at 18, emphasis added. Equally telling is the state's attempt to establish that no habeas petitions were granted after substantial delay. From a list of 370 it culls 100, "to analyze the time frame between *finality of direct review and the filing of the*

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If the state's lawyers are unable to press their case without an identifiable triggering point, and they are themselves unable to decide which triggering point to advance in argument, how can the state honestly expect a *pro se* petitioner to know? Moreover, if the state cannot, or will not, identify the parameters of, or at least the outside limits beyond which the filing of a claim will be barred, is it reasonable to say fair notice has reasonably been achieved?

C. California's Timeliness Bar Is So Vague On Its Face That It Does Not Fairly Apprise Non-Capital Habeas Petitioners Of Its Requirements

When a state creates an inherently vague or subjective timeliness bar to cut off key rights, fairness suggests some sort of higher burden to establish the practical constraints of the rule, such that litigants know how to shape their conduct.

Otherwise, a federal court is at a loss to evaluate whether the state court is acting appropriately, and consistently, when it declares a petition unreasonably delayed when it files after five years; or one year; or even one month.

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habeas petition[.]" *Id.* at 24. The state makes the identical argument in the Court of Appeals; that measured from the date of finality of direct review, Martin's petition, filed four years and six months after is late. Respondent's Brief at 34, 37.

If states refuse to provide guidance to litigants, federal courts will – as a practical matter – either be unable to evaluate the adequacy of the rule, or be forced to rely upon some sort of common law idea of what terms like "substantial delay" or "reasonableness" might mean. Certainly, federalism concerns are greatly reduced when a state has failed to provide any guidance on what its rule means.

This Court has described vague standards as those "failing 'to provide a person of ordinary intelligence fair notice of what is prohibited . . . '" *Skilling v. United States*, 130 S. Ct. 2896 (2010) (Scalia, J, dissenting) (*quoting United States v. Williams*, 553 U.S. 285, 304 (2008)). Moreover, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Const. Co.,* 269 U.S. 385, 391 (1926) (citation omitted). *See, Kolender*, 461 U.S. 352. And, as this Court identified in *Hill v. Colorado,* 530 U.S. 703 (2000) (*citing Chicago v. Morales,* 527 U.S. 41, 56-57 (1999)) "[a] statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, a rule will be found to be vague if it authorizes, or even encourages arbitrary and discriminatory enforcement." *Hill,* 530 U.S. at 732. *Grayned v. City of Rockford*, 408 U.S. 104 (1972), tells why:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second . . . laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108-09 (citations omitted).

California's failure to clearly define its timeliness standards has not been lost on members of the California Supreme Court. According to late Justice Mosk, "[t]he procedural bar of untimeliness itself is 'indeterminate at [its] very core.' . . . As such, its application to any given claim may yield varying results, as reasonable persons differ as to whether the claim in question has been presented without 'substantial delay' and, if not, whether 'good cause' exists for any such delay." *Robbins*, 18 Cal. 4th at 817, n.3 (Mosk, J., concurring) (citation omitted).

Not only did members of the California Supreme Court clearly see California's failure, the Ninth Circuit also had it quite correct, noting:

> The rule's ambiguity is not clarified by the California Supreme Court's application of the timeliness bar, in part because the court

> usually rejects cases without explanation, only citing *Clark* and *Robbins*.

King v. Lamarque, 464 F.3d 963, 966 (9th Cir. 2006).

Four years after the Policies in capital cases were announced the California Supreme Court conceded the vagueness and arbitrary application of its timeliness standard in capital cases. *Clark*, 5 Cal. 4th 750. The court's review of habeas petitions in *Clark* led it to a simple but unassailable conclusion: "*no clear guidelines* have emerged in our past [habeas] cases." *Id.* at 763. Five years later, in *Robbins*, 18 Cal. 4th 770, another capital case, the California Supreme Court addressed the level of specificity required to demonstrate the absence of substantial delay, but without providing prospective petitioners with a definition of what constitutes such delay.[27]

Although refusing to acknowledge the extent, or the effect of the differences between capital and non-capital habeas rules, the state has agreed that the two are in fact treated differently. *See, Evans v. Chavis*, 546 U.S. 189, 192-201 (2006), Justice Stevens, concurring in the result:

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[27] *Gallego*, 18 Cal. 4th 825 (deciding whether delay was justified when an attorney representing a *capital* defendant abandons his client). *Sanders* does acknowledge that, "we enforce time limits on the filing of petitions for writs of habeas corpus in non-capital cases." *Sanders,* 21 Cal. 4th at 703. *Sanders,* however, fails to discuss what those time limits are or whether the capital habeas standards might be applicable to non-capital cases, a particularly telling omission given the fact that the Policies' presumption is applicable only to capital habeas petitioners.

> As California's Deputy Attorney General pointed out at oral argument . . . in capital cases . . . the California Supreme Court has adopted separate rules for [capital] cases. See, Tr. Of Oral Arg. 63.

Id. at 198.

And this Court, because of the very uncertain reach of California's time standard in non-capital cases, suggested that, "[t]he California courts might alleviate the problem by clarifying the scope of 'reasonable time' or by indicating, when denying a petition, whether the filing was timely." This Court suggested that the Ninth Circuit "might seek guidance by certifying a question to the State Supreme Court in an appropriate case." *See, Evans*, 546 U.S. at 199.

In *Chaffer v. Prosper*, 592 F.3d 1046 (9th Cir. 2009), the Ninth Circuit did just as this Court suggested and issued an order requesting certification of two questions to the California Supreme Court. *Chaffer v. Lockyer*, S166400, Order, March 11, 2009.

The first question requested clarification with respect to time limits and the concept of "substantial delay."

(1) "When is a state habeas petition timely filed in California courts; does the term 'substantial delay,' as described in *In re Stankewitz*, 40 Cal. 3d 391, 396-97 n.1 (1985), mean *any* delay that exceeds 60 days after the denial of a habeas petition by another state court, as suggested by *Chavis*, 546 U.S. at 200-01?" *Chaffer v. Prosper*, 542 F.3d 662, 663 (9th Cir. 2008).

The second question spoke to asserted justification for delay.

(2) "If either Chaffer's state habeas petition before the California Court of Appeal or his state habeas petition before the California Supreme Court was 'substantially delayed,' was the delay justified?" *Id*.

The California Supreme Court denied certification, issuing an order that the request was,

> denied because a decision by this court is unlikely to be determinative in the federal proceedings and there is controlling precedent on the question of timeliness.

Chaffer v. Lockyer, S166400, Order, March 11, 2009.

Just as it has been the California Supreme Court's position in the past, Walker argues now that *Clark's* decree is incontrovertible, an unassailable bellwether of clarity establishing once and for all that all habeas cases, capital and non-capital alike are bound by the same standard. *See,* Pet. Br. at 35. And here again Walker also insists the standards for both capital and non-capital habeas rules are identical, ignoring its concession in *Evans* that there is a difference. Doggedly determined, the state offers but a single citation, *Clark* (followed by a footnote extolling, "California's clear pronouncement that capital and non-capital litigants are treated the same *once the presumption of timeliness passes* . . . ") Pet. Br. at 35 n.3.

First, the state argues from a false premise: that there is, in non-capital cases, a "presumption of timeliness." There is not. Second, Walker's argument fails because in capital cases there is an identifiable triggering point; in non-capital cases there is none.[28] Again, the Ninth Circuit got it absolutely right when, in *King,* 464 F.3d at 966, it said:

> There are no standards for determining what period of time or factors constitute "substantial delay" in noncapital cases. There are also no standards for determining what factors justify any particular length of delay.

Former California Supreme Court Justice Brown, speaking of California's timeliness standards recognized the problem, stating categorically that [the state's] are, "impossibly amorphous standards." *Gallego*, 18 Cal. 4th at 849 (Brown, J., concurring in part and dissenting in part). Former Justice Brown also found that the California Supreme Court's explanations in *Clark*, *Robbins*, and *Gallego* were "equally nebulous as well as riddled with exceptions requiring fact-specific analysis." *Id.* After examining *Clark* in detail, former Justice Brown concluded that its,

> imprecise, circular, and tautological language does not define a "clear" rule this court can "consistently appl(y)" to create a "well-established" standard. (*Morales*, supra, 85

[28] Other than that a petitioner should file without "[d]elay . . . measured from the time a petitioner becomes aware of the grounds on which he seeks relief." *Clark*, 5 Cal. 4th at 765 n.5.

> F.3d at p.1393). Nor does it even provide guidance.

Id. at 850.

Conversely, and similar to other limitation statutes, AEDPA addresses these problems traditionally and precisely, setting forth four possible triggering events.

Under the ordinary provision of AEDPA, within one year from the date the judgment becomes final on appeal, petitioner must complete preparations as thoroughly as possible and present the resulting claims to federal court.[29] A habeas petitioner is thus able to verify precisely when his petition is due. The final triggering event is limited to those circumstances where a petitioner had no reason to believe that the factual predicate for the claim existed until its chance discovery.[30]

California's complete lack of meaningful guidance leaves petitioners investigating potential claims without any reliable basis for determining how they

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[29] 28 U.S.C. § 2244(a)(1)(A). With respect to each of the statute's additional ways in which claims may fall outside of the ordinary course of events, the statute dictates filing within one year of discovery. 28 U.S.C. §§ 2244(d)(1)(A)-(D).

[30] *See, e.g.*, *Wilson v. Beard*, 426 F.3d 653 (3rd Cir. 2005) (clock began when petitioner learned of a videotape showing trial prosecutor explaining how to successfully utilize peremptory challenges to remove African-American prospective jurors from the jury); *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001) (clock began to run when petitioner learned one of petitioner's jurors had romantic ties to a prosecution witness).

should balance the conflicting demands of presenting each individual claim promptly but also presenting all claims in a single petition. The state offers nothing to guide petitioner's efforts, leaving petitioner bereft of the means to determine how to balance the requirements of presenting individual claims promptly against the conflicting demand to present all claims in a single petition. Thus, California's timeliness standards provide no reasonable basis for assessing the risk of forfeiting all future claims by halting an investigation against the risk of forfeiting all claims, current and future, by continuing the investigation.

Delay entails more than the mere passage of time. In the context of timeliness rules, *delay* would seem to suggest that petitioner took somewhat more time than he or she should have taken to complete a task. *See*, *e.g.*, American Heritage Dictionary (4th ed. 2001) at 230 (defining "delay" as "caus[ing] to be later or slower than expected or desired"); *accord* Webster's Unabridged New International Dictionary of the English Language (3d ed. 1981) at 595 ("to cause to be slower or to occur more slowly than normal"). However, California's timeliness standards, and cases addressing them, say nothing about how long any of these tasks should, under usual circumstances, take to complete, and thus provide no guidance to petitioner regarding how much time to allocate to completing such tasks.[31]

[31] The fact the state refuses to define what constitutes a "reasonable time" is particularly vexing. Recognizing its failure,

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and the undeniable need for an unambiguous limitations period, the state's lawyers have, on at least two occasions, attempted to cajole this Court into doing the state's work for it. In *Carey v. Saffold* the state, and its amici, proposed that this Court *adopt* the same time period used for the filing of notices of appeal – 60 days. *Carey v. Saffold*, Transcript of Oral Argument at 19. This Court correctly determined that that decision was properly left to the state to decide. *Carey v. Saffold*, Transcript of Oral Argument at 19.

In *Evans v. Chavis*, while confessing the call for a predetermined limitation period, once more suggested this Court *adopt* a 60 day *presumption* of timeliness. Again for the same reasons expressed in *Saffold.* And, once again this Court sensibly declined to adopt the state's submission. *Evans v. Chavis*, Transcript of Oral Argument at 3-5, 11, 22-24. Such a scheme is grossly unreasonable in any event. In California, following sentencing, a defendant's *notice of appeal*, a one page document, must be filed *by trial counsel* within 60 days of sentencing. *See,* Cal. Penal Code section 1240.1. Appellant is then appointed counsel to assist him on appeal. Investigation and preparation and filing of a petition of a habeas corpus is far more daunting, a fact recognized by this Court *Harris v. Nelson*, 394 U.S. 286 (1969).

> [T]his Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a "procedural morass."

This very logical and simply stated fact is acknowledged by the California Supreme Court.

> It would be grossly unfair, however, to impose this difficult task [investigation and filing of a habeas corpus petition] on petitioner himself, an indigent death row inmate who is untrained in the law and statutorily entitled to appointed habeas corpus counsel. The advantages of having an experienced attorney prepare

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The purported explanation that "[d]elay 'is measured from the time the petitioner or counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis of the claim,'" is no explanation at all. The attempt to identify the starting point for gauging delay does nothing to define *delay* itself.

In the usual scheme of things a "time bar" is defined as: "a bar to a legal claim arising from the lapse of a defined length of time, esp. one contained in a statute of limitations."[32] While it is true that

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> and file a habeas corpus petition were succinctly summed up in a prior decision of this court: "[W]ith their formal legal training, professional experience, and unrestricted access to legal and other resources, counsel possess distinct advantages over their inmate clients in investigating the factual and legal grounds for potentially meritorious habeas corpus claims and in recognizing and preparing legally sufficient challenges to the validity of the inmates' death judgments."

In re Barnett, 31 Cal. 4th 466, 477 (2003); *In re Morgan*, 50 Cal. 4th 932 (2010).

A newly convicted defendant, in custody, without the assistance of counsel simply is unable to proceed with the diligence demanded of him in non-capital habeas cases. An excellent first-hand account of a prisoner's first six months following conviction is set forth in the two following URL's from California PrisonTalk and are somewhat instructive. http://www.prisontalk.com/forums/showpost.php?p=1125588&postcount=36; http://www.prisontalk.com/forums/showthread.php?s=&threadid=15736.

[32] Black's Law Dictionary 708-09 (Bryan A. Garner ed., 2nd pocket ed. 2001).

many statutes of limitations are defined as a period of time beginning at that point in time when plaintiff either knew or should have known the onset of injury or harm, virtually all are also possessed of a defined end point, thus providing clear notice of the length of time a plaintiff or claimant has to perfect his case.

In California, in non-capital cases, a petitioner is told that he must file within a "reasonable time" and "without substantial delay" following the identification of a meritorious claim. Unfortunately, "reasonable time" and "substantial delay" at least in this context, are meaningless terms.

If time is viewed as a measurement between two sequenced events,[33] it stands to reason that unless *both* events are specifically and clearly identified there can be no realistic measurement of time between them.[34]

Assume for a moment petitioner has identified his claim – the first event in the sequence. In the present framework of things, California has steadfastly refused to identify the second event in the sequence – the date upon which petitioner's claims will be defaulted if not filed. Since the second event in

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[33] As it is in the usual statute of limitations cases.

[34] Black's Law Dictionary defines "time" as: "a measure of duration." Black's Law Dictionary 708-09 (Bryan A. Garner ed., 2nd pocket ed. 2001). The Internet Encyclopedia of Philosophy states it this way: "Time is what clocks measure. We use time to place events in sequence one after the other, and we use time to compare how long events last." http://www.iep.utm.edu/time/.

the sequence – the date of default – is unidentified, the petitioner's claims, when they eventually are filed are neither early, nor delayed, nor substantially delayed. This is so because the time between the two events (identified basis of claim and default) cannot be measured.

Walker suggests that since in other contexts the *reasonable time* has been held to be sufficiently specific, it should be here as well.[35] The suggestion is of limited utility here.

As this Court has instructed, how specific something must be, or indeed even can be, depends almost entirely on the context.[36] In fact, words that are indefinite in meaning can provide adequate notice only if they are "well understood in common parlance," *Scales v. United States*, 367 U.S. 203, 223 (1961), or

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[35] Petitioner cites four illustrative cases that have nothing, or nearly nothing, to do with an issue of notice but simply refer to concepts such as: "substantial" "asportation," or lack of "reasonable" diligence in filling out Securities and Exchange filings. Pet. Br. at 38 (*citing American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 586 (1978); *Feit v. Leasco Data Processing Equipment Corp.*, 332 F.Supp. 544, 568 (EDNY 1971); *People v. Blakeley*, 23 Cal. 4th 82, 87-88 (2000); *People v. Nguyen*, 22 Cal. 4th 872, 885-86 (2000)).

[36] Many legal terms have meaning that is provided by context. *Clay v. United States*, 537 U.S. 522, 527 (2003). *Jimenez v. Quarterman*, 129 S. Ct. 681, 685 (2009): Indeed, "'meaning – or ambiguity – of certain words or phrases may only become evident . . . in context.'" *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), *quoting FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

have an established meaning in a particular trade or business subject to regulation. *See McGowan v. Maryland,* 366 U.S. 420 (1961).

Notably, Walker has never attempted to identify that particular point in time when the permissible period for Martin to file his claims expired, i.e., when his default occurred, and for good reason. The answer exists only in the eye of the beholder, but it is a vision never shared with the parties let alone the public, let alone this Court. The state's timeliness standards make it impossible for any petitioner adequately to "foresee," "foreshadow," or "adequately guard against" an adverse result. Lacking any meaningful guidance the state's timeliness standard places habeas petitioners in a continuous state of uncertainty with respect to just when they should file their petitions.

III. This Court Should Reject The State's Request To Employ Martin's Case As A Vehicle For Consideration Of Proposals To Reshape The Longstanding Adequate State Ground Doctrine

A. Walker's Ill-Advised Request Would Result In A Radical Change In A Variety Of Civil And Criminal Contexts

Walker's ill-advised request would result in a radical change in a variety of civil and criminal contexts and would adopt, for non-capital habeas corpus cases, a rule Congress has rejected. Moreover,

this case presents a very poor vehicle for such sweeping revisions in that: (1) California timeliness requirement, although addressing a commonly recurring situation, does so in the most uncommon of ways; (2) shifting to a "fair notice" model of adequacy would affect neither the outcome nor the fundamental analytic approach in this case.

The adequate state ground doctrine is not unique to habeas cases, finding precedent in civil, criminal and administrative proceedings.[37] Walker proposes that this Court redefine this well-established body of law to make fair notice the "touchstone" for adequacy. Pet. Br. at 18.

But "notice" has never been the sole measure of adequacy of a state procedural bar. "Fair notice" is a threshold element of Due Process.[38] If the cases had

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[37] *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 123-125 (1990); *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241 (1978); *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 397-399 (1990); *Film Corp. v. Muller*, 296 U.S. 207, 210-211 (1935).

[38] *See*, *e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("elementary and fundamental requirement of due process" is "notice . . . and . . . opportunity" to be heard); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), *quoting Baldwin v. Hale*, 1 Wall. 223, 233 (1863) (the "central meaning of procedural due process" is right "to be heard"; in order to "enjoy that right [party] must first be notified").

meant to say that the test of adequacy of a state procedural bar is whether it violates Due Process, the cases would have so held.

Walker's proffered support for its radical request is insubstantial, consisting largely of an attempt to re-examine much of this Court's adequacy jurisprudence in the light of the proposed fair notice test.[39] That a "fair notice" framework fits with many of this Court's decisions is hardly surprising. "Fair opportunity to present federal claims" has been recognized as "the most generally functional test" for one line of adequacy cases. C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure (2d ed. 1996), § 4027 at 320). Indeed, the leading treatise on this court's practice fails even to mention "fair notice" as a separate test of adequacy, instead discussing petitioner's cases within the context of a more general discussion of "untenable" state grounds. *See* E. Gressman, et al., Supreme Court Practice, ch. 3.26 at 223-226 (9th ed. 2007).

The historical and conceptual basis for the requirement of consistency in state procedural rulings that bars the merits of federal claims is not merely to

[39] *See* Pet. Br. at 19-21 (discussing *Patterson*, 357 U.S. at 457; *Wright*, 373 U.S. 284; *Johnson*, 486 U.S. 578; and *James*, 466 U.S. 341).

provide litigants fair notice but to prevent state courts from declining to enforce federal rights.[40]

Walker acknowledges that the adequate state ground doctrine is intended to protect litigants against the arbitrary or discriminatory invocation of state court rules of procedure to extinguish federal constitutional rights. Pet. Br. at 22-24. But its simplistic proposal to limit the adequacy inquiry to the existence of notice and a legitimate state interest would allow just that kind of evasion.

Petitioner next contends that federal courts should not look at the consistency *vel non* of state court practice and that most of this Court's precedents can be explained under its notice based rule. Pet. Br. at 25-28. Neither contention is well founded. In fact, this Court almost always considers the consistency of state court practice in determining whether a state court procedural ruling is adequate.[41] Abandoning consideration of actual state court practice in favor of a rule focused merely on notice would

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[40] *See Ward v. Board of City Commissioners of Love City*, 253 U.S. 17 (1920); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *Patterson*, 357 U.S. at 454-458; *NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 293-301; *Wright*, 373 U.S. 284; *Ford*, 498 U.S. at 421-425.

[41] *See Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925); *Staub,* 355 U.S. at 320; *Patterson*, 357 U.S. at 456; *Wolfe v. North Carolina*, 364 U.S. 177, 188-91 (1960); *Flowers*, 377 U.S. at 297; *Barr*, 378 U.S. 146; *Hathorn*, 457 U.S. at 263; *James*, 466 U.S. at 348-49; *Johnson*, 486 U.S. at 587-89; *Dugger*, 489 U.S. at 410.

reverse many decisions, both in habeas and direct review cases. For example, in *Staub*, *Flowers*, *Barr*, *Hathorn*, *James* and *Johnson*, the state courts relied on codified or otherwise generally applicable rules. Thus, the petitioners in those cases had notice of the rule and an opportunity to comply with it – but in practice, the state courts had not consistently or regularly relied on the rule to deny review.

This Court has similarly, and very recently, rejected as inadequate state court procedural bar rulings that had no fair or substantial support. *See Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009) (state court ruling that claim was "previously determined" "rested on a false premise"); *Lee*, 534 U.S. at 382 (novel application of existing rule to circumstances "Missouri courts had not confronted before"). In both these cases, notice of the rule existed, but notice was ultimately irrelevant.

Walker also claims the "undeniable good faith" of the state courts will dependably ensure the enforcement of federal law, Pet. Br. at 12, and he may be correct that overt manifestations of racial bias by state courts are now a rarity. However, the elected state judiciaries are more vulnerable to majoritarian and other pressures than the judiciary of the United States. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (elected judge should have recused himself faced with risk of bias created by his receipt of substantial donation from litigant's principal). *See also, Judges in the Culture Wars Crossfire: The 'Least Dangerous Branch' is Becoming the Most*

Vilified Branch, 91 American Bar Association Journal 44 (October 2005). Only 20 years ago the electorate dramatically changed the makeup of the California Supreme Court as a result of widespread dissatisfaction with the justices' receptivity to the assertion of federal constitutional rights. *See* Uelmen, Gerald F., *Review of death penalty judgments by the Supreme Courts of California: a tale of two courts*, 23 Loy. L. Rev. 237 (1989).[42] Given the relative freedom of the federal judiciary from improper financial incentives and the political debates of the day, this Court's existing analysis of adequacy, applied to the actual practice of the state courts provides a surer safeguard of federal constitutional rights that the truncated analysis that Petitioner proposes.

This Court has explicitly applied the adequate state ground doctrine to habeas proceedings since its decision in *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). The Court reiterated that the doctrine applies to habeas proceedings in *Coleman*, 501 U.S. at 729-30.

The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, although in

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[42] *See also, Article: Judicial Reaction to Change: The California Supreme Court Around The 1986 Elections*, 13 Cornell J.L. & Pub. Pol'y 405 (2004) (discussing retention election system and its impact on California's judiciary); *see also*, B. Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977) (advancing argument that federal courts are more favorable than state court for litigants seeking to vindicate federal rights).

some respects did limit a state prisoner's access to a federal forum for the independent review of federal claims, did nothing to abrogate this absolute right to do so or the adequate state ground doctrine. Indeed, just as had Section 2254 pre-AEDPA, AEDPA still specifically provides that the federal courts are available to state prisoners through the writ of habeas corpus for violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). Significantly, during the debate of the statute, an amendment was offered by Senator Kyl of Arizona that would have denied lower federal courts the right to review claims that had been brought under a state system that was both adequate and effective for addressing those claims.[43] The amendment would have limited review to the filing of an appeal, or an original habeas petition in the United States Supreme Court. It is noteworthy that the Senate declined to adopt Senator Kyl's scheme of things or to otherwise modify the adequate state ground doctrine.

The limited action Congress actually took is telling, and this Court should decline to adopt Walker's proposed rule, when Congress clearly did not intend such a result.

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[43] Congressional Record S7828 (Daily Ed. June 7, 1995).

B. This Case Is A Particularly Poor Vehicle For Wholesale Revisions Of The Adequacy Doctrine

This Court is being asked to completely abandon the established adequacy analysis normally applicable in scrutinizing a state rule for the sake of a single state's indeterminate rule that operates far outside the mainstream of state "timeliness" rules. It is a rule that this Court has found to be so ill-defined that it has suggested that the California legislature would do well to conform its rules to the law of most other States, *see Evans,* 546 U.S. at 199, since at present the rule's uncertainty often renders a court's application of it "unanswerable." *Carey,* 536 U.S.at 236 (Kennedy, J., dissenting). It is, moreover, a rule that the California Supreme Court has explicitly declined to clarify through the certified question procedure, *see Chaffer,* 592 F.3d at 1048 n.1, even when that request was made at this Court's behest. *Evans*, 546 U.S. at 199. California's rule has not therefore been demonstrated to be like the rule in *Wainwright* that clearly served "many interests in its own right." *Wainwright,* 433 U.S. at 88. Nor are the interests of federal-state comity overall well-served by entertaining the demands of a state whose Supreme Court has declined to reciprocate the federal courts' willingness to respect its rules, even by answer to a federal court's direct question.

Within its last Term, this Court declined to reevaluate the circumstances under which federal courts would abstain from exercising review under

28 U.S.C. § 2254(a) on the ground that an atypical default rule is "unsuitable for providing broad guidance on the adequate state ground doctrine." *Beard,* 130 S. Ct. at 619. The contemporaneous objection rule at issue in *Wainwright*, which was "by no means peculiar" to one state, merited respect, "both for the fact that it is employed by a coordinate jurisdiction . . . and for the many interests which it serves in its own right" such as clarification of the trial record and the possibility of earlier finality to litigation if objectionable evidence is excluded. *Wainwright,* 433 U.S. at 88.

Petitioner also contends that the adequacy of a state court procedural ruling should be presumed, and Martin concurs that, initially at least, such a presumption should prevail. Indeed, it is difficult to conceive of a functional legal system where statutes or court-created rules had to be demonstrated as valid before they could be applied.

The Ninth Circuit's approach has, in fact been to accord a presumption of regularity to state court rules, including its untimeliness rule. That does not mean, however, the parties will not be required to follow the usual rules applicable to affirmative defenses. *See*, *Bennett*, 296 F.3d at 763.

Petitioner seems virtually alone in believing that the work of the federal courts is rendered "treacherous and untenable" by the Ninth Circuit's approach in this case, Pet. Br. at 10, or that the rule is otherwise unworkable. In other cases of recent vintage concerning the adequate state ground rule

concerned litigants flocked to present their position. In the direct review case of *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), thirteen *amici* with potentially affected interests filed briefs, including CJLF and a group of eight of the States.[44] In *Lee*, 534 U.S. 362, a habeas case, and in *Beard*, 130 S. Ct. 612, amicus briefs were again filed by CJLF and some of the states.[45] In *Beard*, however, the overriding issue was the validity of discretionary procedural rules, a matter of concern to more than one State.

In the present case, Walker is joined only by CJLF, perhaps demonstrating that California's rule lies so far afield of the procedural rules of other jurisdictions that protecting it is not of any wider interest.

C. Adopting Petitioner's "Fair Notice" Approach To Adequacy Would Not Change The Outcome Or The Analytical Approach To This Case

Lack of notice and inconsistency are joint concepts in this Court's vagueness jurisprudence. The

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[44] *See* Brief of the State of Oregon et al., *Amici Curiae* in Support of Respondent, filed October 9, 2008 in *Philip Morris USA v. Williams*, Docket No. 07-1216.

[45] *See* Brief of the State of Nebraska et al., *Amici Curiae* in Support of Respondent, filed July 13, 2001 in *Lee v. Kemna*, Docket No. 00-6933; Brief of the State of California et al., *Amici Curiae* in Support of Respondent, filed October 9, 2008 in *Beard v. Kindler,* Docket No. 09-992.

requirement that rules be stated with sufficient definiteness that ordinary people can understand what conduct is prohibited is largely to ensure against arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-358; *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned*, 408 U.S. 104. Although the vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, this Court has noted that the more important aspect "is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith*, 415 U.S. at 574. "The vices – the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial review – are the same." *Interstate Circuit*, 390 U.S. at 689-690.

California has failed to provide even minimal guidelines and thus has failed to provide notice sufficient to bar federal review.

IV. The Extreme Proposals Of Amicus CJLF That All Prevailing Adequate State Ground Doctrine Be Scrapped Or Radically Revamped Are Not Properly Before The Court In This Case

CJLF makes two submissions that go beyond the arguments advanced by the State of California. These are epitomized by "Questions Presented" 2 and 3 in

its amicus briefs at the merits and certiorari stages. Under its "Question Presented" Number 3, it argues that the adequate and independent state ground rule which has been a fixture of federal habeas corpus law for decades should be "abandoned altogether." Under its "Question Presented" Number 2, it argues that the rule should be radically reformulated and turned into a "fair notice" rule, an innovation that would jettison this Court's extant jurisprudence on the subject.

Neither of these submissions can be considered by the Court consistently with *Illinois v. Gates*, 462 U.S. 213 (1983). The holding of *Gates* is that when a case "is before us on the State's petition for a writ of certiorari," there is "no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim." *Id*. at 221.

In *Gates*, the State of Illinois "had challenged, at every level of the Illinois court system, . . . [Gates'] claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered." *Id*. at 220-221. This Court held that under those circumstances, it could not properly use the case as a vehicle for considering whether the extant Fourth Amendment exclusionary rule itself should be significantly modified.

Here, the State of California argued in the lower courts that it, rather than Martin, was entitled to prevail when this Court's rules relating to the adequacy of a state-law ground of decision were applied to the facts of the case at bar. California never argued that those rules should be modified and the courts below never considered any request for their modification. Had California proposed any significant change in the long-standing principles governing adequacy of a state procedural ground, the case would not be coming to this Court from a four-page, unpublished Ninth Circuit opinion which does no more than apply those principles to the facts. California's certiorari petition continued to present the case as one in which the problem for correction was the Ninth Circuit's purportedly improper application of settled adequate state ground principles.[46] It did not ask that those principles be "abandoned altogether" or radically revamped. Under *Gates*, this Court itself would not consider abandoning or radically revamping its longstanding rules in this

[46] California's certiorari petition presented to this Court, the question whether California's "state law . . . [under which] a prisoner may be barred from collaterally attacking his conviction when the prisoner 'substantially delayed' filing his habeas petition . . . is '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. . . ." The petition asked this Court to clarify the extent to which the element of discretion in a state procedural-bar rule renders that rule "inadequate" within long-standing adequate-and-independent-state-law-ground principles.

case. It should certainly not do so at the instance of a non-party which has presumed to add two *amicus*-concocted questions to those presented by the certiorari petition and by the proceedings below.

And, worth noting is the fact that *amicus* is not entitled to present additional question. *United Parcel Service v. Mitchell,* 451 U.S. 56, 60 n.2 (1981).

CONCLUSION

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

Dated: October 20, 2010

Respectfully submitted,

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