No. 09-996

IN THE SUPREME COURT OF THE UNITED STATES

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JAMES WALKER, Warden, ET AL.,

Petitioner,

v.

CHARLES W. MARTIN

Respondent

_____

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

_____

RESPONDENT'S BRIEF IN OPPOSTION TO WRIT OF *CERTIORARI*

_____

REASONS FOR DENYING THE WRIT

Respondent, Charles Martin, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the lower court's opinion in this case[1].

I PETITIONER OVERSTATES ITS CLAIM THAT THE NINTH CIRCUIT IS OBSESSED WITH CONSISTENCY, INVALIDATING ALL RULES IT DEEMS LACK CONSISTENCY, THEREBY "KILLING" CALIFORNIA'S TIMELINESS BAR

While most states have adopted determinate standards specifically identifying the time period within which petitions for habeas corpus must be file, California has a unique, singular set of guidelines regarding when petitions will be deemed untimely. *See, Carey v. Saffold,* 536 U.S. 214, 221-22 (2002). Unlike the majority of other states, California's timeliness rule is indeterminate, relying instead on a general standard requiring the filing of post conviction claims be accomplished without, "undue" or "substantial delay." Thus, while California's procedural timeliness bar may seem typical, it is in fact quite atypical, and

[1] Respondent has no objection to Petitioner's jurisdictional statement or statement of the case.

for that reason this case is a poor vehicle for guidance.

Although petitioner, and amicus, contend the Ninth Circuit's decisions are driven by antipathy for exercised discretion and surfeit flexibility, a closer reading of those relevant decisions prove the contrary. It is not the exercise of discretion, or the fact there is built into California's standard a degree of suppleness that compels a finding of inadequacy; rather, it is that standards California applies when it imposes its timeliness bar are, in the words of at least one justice of the California Supreme Court, "impossibility amorphous" and "nebulous as well as riddled with exceptions and requiring fact-specific analysis." *See, In re Gallego,* 18 Cal.4th 825, 845 (1998), (Brown, J., concurring in part and dissenting in part). And, in the words of another Justice, the rule is, "indeterminate at [its] very core," the result of which is that, "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." *In re Robbins* 18 Cal.4th 770, 817 fn.3 (1998) fn.3 (Mosk, J, concurring).

Compounding the problem is the fact that California denies more than the vast majority of habeas petitions without explanation or comment. Some petitions are denied with only a citation to *In re Clark* and/or *In re Robbins*[2], the Court's indication that the petition is procedurally barred as untimely. The vast majority of other habeas petitions, however, are denied without reference to the State's timeliness bar, and of those denials, a significantly large number are completely silent, denied by the Court without hint of citation, *raison d'être* or opinion, permitting only of raw speculation as to whether the denial might be merits based, or procedurally defaulted.

So, not only is the California rule vague and internally standardless, requiring "diligence" but

[2] *In re Clark,* 5 Cal.4th 750, (1993); *In re Robbins* 18 Cal.4th 770, (1998).

nowhere defining the concept; frowning upon, “undue delay” but nowhere defining that thought either, no rule of court or authoritative holding tells non-capital petitioners when a habeas petition will be considered presumptively timely, and when it risks dismissal on timeliness grounds. Thus, the rule is facially and fundamentally inadequate.

Nor is the State’s argument bolstered by its habitual practice of issuing truly silent denials, those without reference to citation or suggestion of rationale, since it is impossible to tell from them the basis for, or the parameters of its denial. Even those denials which reference *Clark/Robbins* do nothing to help clarify the standard, or evidence its consistent application, since even from them the State is incapable of establishing any degree of sameness.

The determination of whether a state court’s decision rests on independent and adequate state grounds is placed squarely on the federal court’s shoulders, *see Coleman v Thompson*, 501 U.S. 722, 736,

(1991); *Abie State Bank* v. *Bryan*, 282 U.S. 765, 773, (1931). And since a timeliness rule which is standardless, both substantively and as to duration, fails to provide petitioners with adequate notice of the circumstances that will bar their claims, the Court of Appeals would have been remiss had it not decided as it did.

Nor is it quite correct that the Ninth Circuit is regularly in the habit of annulling rules predicated on the application of judicial discretion. *Wood v. Hall,* 130 F.3d 373, 376 (9th Cir. 1997)(defining adequacy, and noting that a rule is not rendered inadequate simply because the application of the rule requires the exercise of judicial discretion). Judicial discretion is a powerful thing. Discretion is the ability to choose. “To say that a court has discretion in a given area of law is to say that it is not bound to decide the question one way rather than another.” *Pullman v Swint,* 456 U.S. 273, (1982). However, “Judicial decisions are reasoned decisions. Confidence in a

judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust." *See Rita v. United States,* 551 U.S. 338, 127 S.Ct. 2456, 2468 (2007). Moreover, as long as a court exercises its discretion fairly and impartially, a reviewing court will not reverse unless it finds that the ruling constitutes an abuse of discretion. *See, United States v Novak,* 918 F.2d 107 (10th Cir. 1990).

But, when California's timeliness rule leads to arbitrary decisions, as the Magistrate Judge below concluded it might, Appendix to Petition for Writ of Certiorari at pg 14, one is not filled with great confidence that this is the right vehicle to provide broad guidance with respect to the adequate state ground doctrine.

II WITH RESPECT TO PETITIONER'S ASSERTION THAT NATIONAL UNIFORMITY IS ESSENTIAL AS TO WHOSE BURDEN OF PROOF IT IS TO ESTABLISH ADEQUACY – IT IS NOT

Finally, the State argues that the Ninth Circuit's burden shifting requirement is too great a task to be borne by the State; that the result would have been different in other Circuits. Pet. Appendix at pg. 14.

The ultimate question, however, is whether a particular State's procedural bar is adequate. It is a question which remains the same, irrespective of who bears the ultimate burden of proof. Thus, the fact one or more circuits take a different approach toward the ascertainment of that ultimate fact does not require national uniformity, and does not justify a place on the Court's Docket.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

DATED: May 17, 2010

Respectfully submitted,

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