

09-274 AUG 31 2009

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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CHARLES L. RYAN,<sup>1</sup> DIRECTOR, ARIZONA  
DEPARTMENT OF CORRECTIONS,

*Petitioner,*

vs.

ROGER MARK SCOTT,

*Respondent.*

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On Petition for Writ of Certiorari  
to the Arizona Supreme Court

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PETITION FOR WRIT OF CERTIORARI

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**CAPITAL CASE  
QUESTIONS PRESENTED**

Respondent Roger Mark Scott was convicted of participating in the 1989 murder of a 4-year-old child and sentenced to death.

After the Arizona trial court dismissed Scott's post-conviction proceedings, Scott moved to amend his dismissed petition in order to raise additional ineffective assistance of counsel claims. The trial court denied Scott's motion, finding that the applicable state procedural rule did not allow such an amendment after the initial petition had been dismissed. Scott filed a petition for review with the Arizona Supreme Court, but he did not address the merits of these new claims in the body of the petition, and only included them in an appendix.

On federal habeas corpus review, the United States Court of Appeals for the Ninth Circuit reversed a decision by the United States District Court for the District of Arizona and held that the state rule did not provide a basis for an adequate state procedural bar. Specifically, the court held that the rule was not "regularly followed or 'consistently applied' by the Arizona state courts," based on one Arizona Court of Appeals decision in which the state appellate court held that a state trial court improperly denied a convicted defendant's request for permission to file a *pro se* petition for post-conviction relief after his appointed counsel declined to file a petition. Additionally, the Ninth Circuit also refused to consider Scott's failure to fairly present his new ineffective assistance claims in the body of the brief

he filed with the Arizona Supreme Court, as required by state procedure.

1. Can the application of a state procedural rule be characterized as “inadequate” under the adequate-state-ground doctrine—and therefore unenforceable on federal habeas corpus review—based upon one Arizona appellate case that involved the application of a different rule to different factual and procedural circumstances? *See Beard v. Kindler*, 2009 WL 273318 (February 2, 2009) (asking this Court to identify the proper inquiry to be conducted in determining the “adequacy” of a state rule), *accepted for certiorari review, Beard v. Kindler*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2381 (May 18, 2009).

2. Can a federal habeas court refuse to consider a state’s procedural requirement that issues be raised in the body of a brief, rather than in an appendix, in determining whether a petitioner has fairly presented his claims to the state’s courts? *See Cone v. Bell*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1769, 1780 (2009) (a petitioner must “properly raise his claims in state court”); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (“Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolved the claim on the merits.”).

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**OPINION BELOW**

The Ninth Circuit Court of Appeals' opinion is reported in *Scott v. Schriro*, 567 F.3d 573 (9th Cir.2009), and a copy is appended as Pet. App. A. A copy of the Arizona trial court's denial of Scott's motion to amend his petition is appended as Pet. App. D; a copy of the Arizona Supreme Court's order denying review without comment is attached as Pet. App. B. Copies of the order of the United States District Court regarding the procedural aspects of this matter, as well as its ultimate dismissal of Scott's habeas petition on its merits, are appended as Pet. Apps. E & F. Copies of the District Court's denials of Scott's motions for reconsideration are appended as Pet. Apps. G-K.

**STATEMENT OF JURISDICTION**

The Arizona Supreme Court affirmed Scott's death sentence on direct appeal. *State v. Scott*, 865 P.2d 792 (Ariz.1993). (Pet.App.C.) The state trial court denied Scott's petition for post-conviction relief, as well as his request to amend the petition after it had been dismissed, on December 11, 1996. (Pet. App. D.) The Arizona Supreme Court denied discretionary review without comment on June 24, 1997. (Pet. App. B.) The United States District Court denied Scott's petition for writ of habeas corpus on March 3, 2005. (Pet. App. F.) The Ninth Circuit reversed the district court's decision and remanded the case on June 2, 2009. (Pet. App. A.) This petition for writ of certiorari is timely filed within 90 days of that decision, and this Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

The constitutional and statutory provisions involved are the Sixth and Eighth Amendments to the United States Constitution, and 28 U.S.C. § 2254.

## STATEMENT OF THE CASE

James Styers shared an apartment with Debra Milke and Milke's 4-year-old son, Christopher. On Saturday, December 2, 1989, Styers placed Christopher in his automobile and picked up Styers' friend, Respondent Roger Mark Scott. Although Styers had told Christopher that they were taking him to a local shopping mall to see Santa Claus, the two men instead drove into the desert where Styers killed Christopher by shooting him three times in the back of the head. *Scott*, 865 P.2d at 795-96 (Pet.App.C. at 2-6.)

Styers, Scott, and Milke were charged with Christopher's murder and, after separate trials, all three were sentenced to death. On direct appeal, the Arizona Supreme Court affirmed their death sentences. (Pet. App. C.)

After the Arizona trial court subsequently denied Scott's post-conviction claims and dismissed his post-conviction relief proceedings, Scott moved, through new post-conviction counsel, to amend his original post-conviction relief petition to raise additional claims of ineffective assistance of counsel. The trial court denied Scott's motion, relying upon Arizona Rule of Criminal Procedure 32.6(d), which provides:

After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

The court noted that the Rule only authorized a court to permit such an amendment “before a dispositive order issues,” and that to grant Scott’s requested relief “would be contrary to the underlying purpose of Rule 32 and inconsistent with its procedures.” (Pet. App. D at 2; Pet. App. L.) The Arizona Supreme Court denied review of the trial court’s ruling without comment. (Pet. App. B.)

In Scott’s federal habeas corpus proceedings, the district court found that the additional claims of ineffective assistance of counsel that Scott attempted to raise were never fairly presented to the Arizona Supreme Court in a procedurally appropriate manner because the state trial court, in rejecting his attempted amendment, had relied upon Rule 32.6(d), which the district court found to be a state procedural rule that was regularly and consistently followed in Arizona. (Pet. App. E at 16–20.) The district court went on to find these claims procedurally defaulted, and ultimately denied Scott’s remaining claim on its merits, denying his habeas corpus petition with prejudice on March 3, 2005. (*Id.*; Pet. App. F.)

On *de novo* review, the Ninth Circuit rejected the district court’s procedural default ruling, finding that Rule 32.6(d) could not provide a basis for an adequate state procedural bar because it was not “regularly followed or ‘consistently applied’ by the Arizona state courts” in the manner applied by the

state trial court in Scott's case. *Scott*, 567 F.3d at 581–82 (Pet.App.A. at 13.). The Ninth Circuit based its finding on its reading of one Arizona case, *State v. Rodriguez*, 903 P.2d 639 (App.Ariz.1995), in which the Arizona Court of Appeals held that a state trial court improperly denied a petitioner's request to file a *pro se* petition for post-conviction relief after his attorney declined to file a petition. *Scott*, 567 F.3d at 581–82 (Pet. App. A at 13–14.).

The Ninth Circuit attempted to bolster its decision by engaging in its own statutory interpretation of Rule 32.6(d), finding that the state court's interpretation of the rule in Scott's case was "contrary to the plain language" of the rule because the text did not specifically provide that amendment was not available after the underlying post-conviction proceedings had been dismissed. (*Id.* at 12.)

The Ninth Circuit also rejected the State's argument that Scott's same ineffective assistance claims were subject to another procedural bar because he never fairly presented them to the Arizona Supreme Court in a procedurally correct manner after the state trial court denied his petition for post-conviction relief and his request to amend the petition. Scott raised these claims in an appendix to a petition for review, but under the Arizona Supreme Court's case law, a claim raised only in an appendix is considered waived—to be considered by an Arizona court, a claim must be raised and argued in the body of a brief. *State v. Kemp*, 912 P.2d 1218, 1286 (Ariz.1996) (striking all issues raised solely in the appendix to an opening brief). The Ninth Circuit held that Arizona law on this

point is irrelevant, because under its view, the fair presentation requirement “is an issue of federal law, not state law.” (Pet. App. A at 15.)

### SUMMARY OF ARGUMENT

The Ninth Circuit clearly erred and ignored basic principles of comity by rejecting the interpretation of an Arizona procedural rule by the Arizona trial court and the Arizona Supreme Court.

1. The Ninth Circuit’s quantitative methodology, under which it characterized Rule 32.6(d) as “inadequate,” and therefore unenforceable on federal habeas corpus review, is contrary not only to this Court’s jurisprudence, but to the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 [the AEDPA], as well. The Ninth Circuit’s requirement that a state prove that its procedural rule is “firmly established and regularly followed” is contrary not only to this Court’s view that state courts are presumed to know and follow state law, but also with the “highly deferential” standards of 28 U.S.C. § 2254(d). Additionally, placing this burden of proof on a state is unfair, because where, as here, the rule is well-understood and regularly followed by litigants and the state’s courts, it is unlikely that there will be a significant number of reported decisions on which the state can rely in attempting to meet the burden imposed by the Ninth Circuit.

Aside from placing an unfair burden of proof on the state, the methodology employed by the Ninth Circuit is susceptible to arbitrary and capricious application, and specifically so here, where the Ninth Circuit based

its inadequacy finding upon only one other Arizona case, in which the state court applied a different state rule to different factual and procedural circumstances.

This case is similar to *Beard v. Kindler*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 2381 (May 18, 2009), in which this Court recently accepted for *certiorari* review the issue of whether a state procedural rule is “adequate” if it is subject to discretionary application by the state courts. This case provides an appropriate avenue for the Court to clarify the proper methodology to be used in determining whether a state statute can be characterized as adequate. As in *Beard*, the inquiry here into the adequacy of a state procedural rule is far better served by an analysis focusing on whether a state rule provides a petitioner with adequate notice so that he may conform his conduct to it. Regardless, under any appropriate adequacy standard, a state statute should not be characterized as inadequate simply because of one other state case in which the court interpreted or applied a different state rule to different factual and procedural circumstances.

2. The Ninth Circuit’s refusal to consider another basis for finding the same claims procedurally defaulted, *i.e.*, Scott’s failure to fairly present the claims to the Arizona Supreme Court in a procedurally proper manner, is contrary to this Court’s jurisprudence. The Arizona Supreme Court requires that all claims be raised and argued in the body of a brief, rather than in an appendix; thus, because Scott raised and argued his claims only in an appendix to his petition for review to the Arizona Supreme Court, he failed to provide the court a fair opportunity to

consider them. Moreover, the significance of the Ninth Circuit's erroneous decision goes far beyond its failure to follow this Court's jurisprudence. If an Arizona petitioner perceives that his constitutional claim might have a better probability of success on federal habeas corpus review than in the state courts, he could make a tactical decision to, in effect, hide the claim in an appendix or other attachment to his state brief, hoping that the state courts do not address the claim at all. Under the Ninth Circuit's opinion, if a petitioner successfully evaded any rulings by the Arizona courts, he would have nevertheless "fairly presented" the claim, and therefore preserved a right to federal habeas corpus review. Allowing a petitioner to circumvent the Arizona courts while preserving a right to subsequent *de novo* federal habeas corpus review violates the fundamental role that comity plays in the exhaustion requirement. It is also contrary to the AEDPA, which requires that claims be properly exhausted in state court.

#### **REASONS WHY THE WRIT SHOULD BE GRANTED**

There are two independent reasons that Scott procedurally defaulted his ineffective assistance of counsel claims in his state post-conviction proceedings. The Ninth Circuit ignored this Court's jurisprudence, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 [the AEDPA], as well as basic principles of comity, by reversing the District Court's ruling that Scott's ineffective assistance claims are procedurally barred from federal collateral review.

**A STATE PROCEDURAL RULE CANNOT BE CHARACTERIZED AS “INADEQUATE” UNDER THE ADEQUATE-STATE-GROUND DOCTRINE — AND THEREFORE UNENFORCEABLE ON FEDERAL HABEAS CORPUS REVIEW — BASED SOLELY ON THE INTERPRETATION OR APPLICATION OF A DIFFERENT RULE BY ONE OTHER STATE COURT TO DIFFERENT FACTUAL AND PROCEDURAL CIRCUMSTANCES.**

Under the “adequate state ground” doctrine, federal habeas courts generally will not review state court rulings in cases involving issues of federal law as long as the ground for the decision rested on a point of state law that was “adequate” to support the ruling. *Cone v. Bell*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1769, 1780 (2009) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) and *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). With regard to this adequacy requirement, this Court has stated that “[o]rdinarily, violation of ‘firmly established and regularly followed’ state rules . . . will be adequate to foreclose review of a federal claim.” *Lee*, 534 U.S. at 376 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984) and citing *Ford v. Georgia*, 498 U.S. 411, 422–424 (1991)).

The Ninth Circuit’s determination that the state courts misinterpreted the state procedural rule at issue is contrary to the provisions of the AEDPA, as well as this Court’s jurisprudence that state courts are

presumed to know and follow state law. *See, e.g., Bell v. Cone*, 543 U.S. 447, 455 (2005) (“As we have said before, § 2254(d) dictates a “‘highly deferential standard for evaluating state-court rulings,’ which demands that state-court decisions be given the benefit of the doubt.”) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997) and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)); *Parker v. Dugger*, 498 U.S. 308, 314–15 (1991) (“We must assume that the trial judge considered all this evidence before passing sentence. . . . Under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence.”) (internal citations omitted); *Walton v. Arizona*, 497 U.S. 639, 653 (1990) (“Trial judges are presumed to know the law and to apply it in making their decisions.”), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002).

The state rule at issue here is straight-forward and understandable:

After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

Ariz. R. Crim. P. 32.6(d) [1996]; *see also Scott*, 567 F.3d at 581 (Pet. App. A at 12.). The state court construed the rule to be inapplicable in Scott’s case because his underlying post-conviction proceedings had already

been dismissed.<sup>2</sup> (Pet. App. D at 2.). This construction is based on logic and common sense—once a petition for post-conviction relief has been dismissed, there is nothing left to “amend.” Thus, it is not surprising that the state court’s construction of the rule in Scott’s case is nearly identical to this Court’s characterization of Federal Rule of Civil Procedure 15. Although there is no language in Rule 15 specifically barring amendment of a pleading if the underlying proceedings have been dismissed, this Court has nevertheless read the Rule to generally include such a bar. *See Mayle v. Felix*, 545 U.S. 644, 655 (2002) (“The Civil Rule governing pleading amendments, Federal Rule of Civil Procedure 15, made applicable to habeas proceedings by § 2242, Federal Rule of Civil Procedure 81(a)(2), and Habeas

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<sup>2</sup> The Ninth Circuit disagreed with the state court’s construction, noting that the text of the rule does not specifically bar amendment in such situations, and then held that the state court’s construction was therefore “contrary to the plain language [of the rule].” *Scott*, 567 F.3d at 580–81 (Pet. App. A at 11–12.). However, the Ninth Circuit lacked jurisdiction to question the state court’s interpretation of the state procedural rule. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (“We have repeatedly held that a state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.”) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) and *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

Corpus Rule 11, allows pleading amendments with 'leave of court' any time *during a proceeding.*") (emphasis added).

With regard to the "regularly followed" prong of the traditional adequacy analysis, this Court has noted that in circumstances where a state rule "has been faithfully applied" in "the vast majority of cases," this adequacy requirement is met. *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989). However, the Court "has never articulated a coherent modern [adequacy] rationale, and it is not easy to weave a pattern from the threads of its opinions." C.WRIGHT, A.MILLER & E.COOPER, FEDERAL PRACTICE AND PROCEDURE, VOL. 16B, 292 (2<sup>ND</sup> ED.1996). Thus, legal development regarding adequacy has been uneven and inconsistent in the lower courts, as most recently illustrated by this Court's grant of *certiorari* review in *Beard*, 129 S.Ct. at 2381.

The question this Court will answer in *Beard* is whether a state procedural rule can be considered adequate, and thus provide a basis for the procedural default of a claim in a subsequent federal habeas corpus proceeding, if the state rule is subject to discretionary application by the state courts. *See Beard v. Kindler*, 2009 WL 273318 (February 2, 2009), \*1, \*\*6–7. Scott's case presents the Court with the same type of discretionary rule, since Ariz.R.Crim.P.32.6(d) permits amendment only upon a showing of "good cause." Additionally, the instant case also presents the Court with an opportunity to identify the proper inquiry to be conducted in determining adequacy—whether a federal court can reject a state court's

interpretation of a state procedural rule as part of the inquiry, and whether a state procedural rule can be characterized as inadequate based upon the application of a different state rule by one other state court to different factual and procedural circumstances.

In setting out its methodology concerning its adequacy analysis, the Ninth Circuit stated:

“[P]rocedural default is an affirmative defense, and *the state has the burden* of showing that the default constitutes an adequate and independent ground” for denying relief. *Insyxiengmay* [v. *Morgan*, 403 F.3d 657, 665 (9<sup>th</sup> Cir.2005)] (emphasis added). . . .

To constitute an adequate and independent state procedural ground sufficient to support a state court’s finding of procedural default, “a state rule must be *clear, consistently applied, and well-established at the time* of petitioner’s purported default.” *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9<sup>th</sup> Cir.2001) (citations omitted) (emphasis added). A state rule is considered consistently applied and well-established if the state courts follow it in the “vast majority of cases.” *See Dugger*

*v. Adams*, 489 U.S. 401, 411 n. 6, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).<sup>3</sup>

*Scott*, 567 F.3d at 580 (Pet.App.A. at 10–11.).

While the Ninth Circuit’s quantitative analytical methodology purports to be based upon this Court’s expansive language regarding adequacy, it is flawed, both in its general application, as well as the manner it was applied in *Scott*’s case.

The Ninth Circuit’s quantitative approach is contrary to the fundamental structure of federal habeas corpus law. A habeas corpus petitioner who mounts a direct constitutional challenge to a state court procedural bar, on the ground that it is inconsistent with due process, must exhaust the claim in state court, overcome *Teague v. Lane*, 489 U.S. 288 (1989), and clear the deference hurdles provided in 28 U.S.C. § 2254(d) and (e) (1) of the AEDPA. However, under the Ninth Circuit’s methodology, a petitioner making the same sort of arguments, but in the guise of an “adequacy” challenge, need do none of that. Yet if the petitioner prevails, he achieves substantially the same result: relief from his default, and the virtual annulment of the state procedural bar in future habeas cases. The “adequacy” analysis should not be used to

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<sup>3</sup> In *Dugger*, the Court did not require that, for a state rule to be considered adequate, it must be followed in the “vast majority of cases.” Rather, as previously discussed, the *Dugger* court simply noted that in circumstances where a state rule “has been faithfully applied” in “the vast majority of cases,” it satisfies the adequacy requirement. 489 U.S. at 411 n.6.

avoid the normal requirements of federal habeas corpus review.

Apart from being inconsistent with the AEDPA and this Court's jurisprudence, requiring the state to prove that a state rule is adequate is unfair because, as in Scott's case, it is a burden that often cannot be met. If a rule is well-understood and regularly followed by litigants and the state courts, then there may likely be little, if any, significant litigation construing or applying it. This leads to a Catch-22 situation—because a rule is well-understood and regularly followed by litigants and the state courts, there are no significant reported decisions concerning it, and because of this lack of reported decisions, the state cannot prove that the rule is well-understood and regularly followed.

Because the construction of the rule in Scott's case is based on logic and common sense, the fact that there are no other contemporaneous state opinions applying it in the same manner does not demonstrate that the rule was not regularly and consistently applied; rather, it demonstrates the opposite—that the rule was well-understood and regularly followed by litigants and the state courts. *See, e.g., Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 195 (1925) (because the state court's interpretation was not "forced or strained . . . it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it.").

Aside from placing an unfair burden of proof on the state, the methodology employed by the Ninth Circuit

is also contrary to sound public policy. The Ninth Circuit's approach encourages states to blindly follow procedural rules, rather than basing their application upon justice and fairness. Instead, some imprecision in the application of a state procedural rule should be tolerated to encourage equitable treatment of particular circumstances that may be difficult to quantify. Moreover, if a state procedural rule was applied without exception, it would probably be attacked as an "exorbitant application[]," *Lee*, 534 U.S. at 376, as "pointless severity," *NAACP v. Alabama ex. Rel. Flowers*, 377 U.S. 288, 297 (1964), or as an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Additionally, the Ninth Circuit's approach encourages federal habeas corpus courts to micro-manage the manner in which state courts apply their state procedural rules, which is contrary to this Court's long-standing jurisprudence that state courts have exclusive power to prescribe their own rules of practice, and that those rules "are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of" state law. *Central Union Telephone Co.*, 269 U.S. at 195. Moreover, it is also contrary to the integral role that comity plays in federal habeas corpus jurisprudence. See *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Rose v. Lundy*, 455 U.S. 509, 518 (1982). Regardless, notwithstanding these concerns of federalism and comity, it is the state courts, rather than reviewing federal habeas corpus courts, that are in the best position to determine whether non-compliance with a rule is appropriate:

[This] Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts.

16B WRIGHT & MILLER, at 385–86, 403.

Finally, the Ninth Circuit's quantitative methodology is easily susceptible to arbitrary and capricious application. Other than quoting *Dugger* for the proposition that a state rule is adequate if it is followed in the "vast majority of cases," *Scott*, 567 F.3d at 580 (Pet.App.A. at 11.), the Ninth Circuit failed to identify what, if any, additional factors were or should have been considered in determining whether the state rule was "clear, consistently applied, and well-established at the time of petitioner's purported default." *Id.* (quoting *Lambright*, 241 F.3d at 1203). Certainly the Ninth Circuit's methodology offers *no* guidance where, as here, due to the logical and common sense meaning of the state rule, there are no reported state cases construing or applying it in the same manner.

The application of this quantitative methodology was especially arbitrary and capricious in *Scott's* case, where the Ninth Circuit based its finding that the Arizona rule was not consistently interpreted to bar amendment of a petition after the underlying proceedings had been dismissed, on only one case—*State v. Rodriguez*, 903 P.2d 639 (Ariz.App.1995). The Ninth Circuit failed to explain how the existence of one

state case, which it construed as interpreting or applying the rule differently, demonstrates that the rule was not “clear, consistently applied, and well-established.” Moreover, because the Ninth Circuit’s methodology focuses on the manner in which a state rule is construed or applied by state courts, it opens up the possibility that, because the federal court is unfamiliar with state law and procedure, it may misinterpret the state rules and decisions it is examining—exactly what happened in Scott’s case.

Contrary to the Ninth Circuit’s assertion, the decision in *Rodriguez* was not based on Rule 32.6(d) and does not compel the conclusion that the Rule is not regularly and consistently applied. In *Rodriguez*, the petitioner filed a notice of state post-conviction relief, and counsel was appointed at his request. 903 P.2d at 639. Counsel informed the state court that he was unable to find any viable claims, and asked that the petitioner be granted an additional 30 days to file a *pro se* petition for post-conviction relief. *Id.* Although the prosecutor did not object, the state court denied counsel’s request, and also ordered that the “petition” be dismissed, although no petition had been filed. *Id.* at 639–40. The petitioner filed a motion for a rehearing, which was denied, and then filed a petition for review to the Arizona Court of Appeals. *Id.* at 640. The reviewing court’s only substantive reference to Rule 32.6(d) concerned the court’s rejection of the petitioner’s argument that a former version of that rule applied to him:

Initially, we reject defendant’s argument that because he was tried for

conduct that occurred in 1991, these post-conviction proceedings were subject to the former version of Rule 32. Former Rule 32.6(d) permitted liberal amendment of a petition prior to entry of judgment. However, with one exception not applicable here, the 1992 amendments to Rule 32 apply “to all post-conviction relief petitions filed on and after September 30, 1992.” Supreme Court Order, 171 Ariz. XLIV (Sept. 24, 1992). Defendant filed his notice of post-conviction relief on February 28, 1994; therefore, this case is governed by the current version of the rule.

*Rodriguez*, 903 P.2d at 640. Because no petition had been filed on the petitioner’s behalf, there was nothing to amend. Thus, the case turned on an entirely different Arizona procedural rule:

*Rule 32.4(c)* provides that the post-conviction relief petition must be filed by counsel within sixty days of appointment but that, “[o]n a showing of good cause, a defendant in a non-capital case may be granted a thirty day extension within which to file the petition.” Good cause exists when, as in this case, appointed counsel does not indicate until the sixty-day period has expired that he declines to file a petition. *See Montgomery v. Sheldon*, 181 Ariz. at 259–60, 889 P.2d at 617–18.

...

We grant review of defendant's petition and grant relief by vacating the dismissal of the Rule 32 proceeding and remanding to the trial court with instructions to grant defendant a thirty-day extension *under Rule 32.4(c)*.

*Rodriguez*, 903 P.2d at 641 (emphasis added).

The Ninth Circuit's misinterpretation of *Rodriguez* illustrates the inherent flaws in its quantitative approach to determining adequacy. As the State of Pennsylvania points out in *Beard*, the inquiry into adequacy is far better served by an analysis focusing on whether a state procedural rule provides a petitioner with adequate notice so that he may conform his conduct to it. *Accord* WRIGHT & MILLER, VOL. 16B, 387 (“[T]he most generally functional test is that state law must afford a fair opportunity to present federal claims.”). Under this more appropriate approach, if there is a reasonable likelihood that non-compliance with the rule will cause a default, and the petitioner nevertheless fails to comply, he should be bound by the consequences. “Adequacy” review should require no more, because the twin exceptions to the procedural default doctrine, “cause and prejudice,” and the existence of a “fundamental miscarriage of justice,” see *House v. Bell*, 547 U.S. 518, 536 (2006), are adequate safeguards against injustice.

Scott's case, coupled with *Beard*, provides an appropriate avenue for the Court to clarify the proper methodology to be used in determining whether a state rule can be characterized as adequate. Under the state rule in question, Scott had more than reasonable notice that, if he wanted to amend his petition, he had to do so before his initial petition for post-conviction relief was dismissed. Regardless, under any appropriate adequacy standard, a state rule should not be characterized as inadequate solely because one other state case interprets or applies a different state rule to different factual and procedural circumstances.

This Court should grant certiorari review of the Ninth Circuit's ruling.

## II

### **A FEDERAL HABEAS COURT MUST CONSIDER A STATE'S PROCEDURAL REQUIREMENTS, RELATING TO PROPER ISSUE PRESENTATION, IN DETERMINING WHETHER A PETITIONER HAS FAIRLY PRESENTED HIS CLAIMS TO THE STATE'S COURTS.**

The requirement that a state prisoner must exhaust his claims in state court before he may be granted federal habeas corpus relief "is grounded in principles of comity and reflects a desire to 'protect the state courts' role in the enforcement of federal law.'" *Castille*, 489 U.S. at 349 (quoting *Rose*, 455 U.S. at 518). Comity requires "that when a prisoner alleges that his continued confinement for a state court conviction

violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief.” *Boerckel*, 526 U.S. 838, 844 (1999) (citing *Rose*, 455 U.S. at 515–516, and *Darr v. Burford*, 339 U.S. 200, 204 (1950)).<sup>4</sup>

The exhaustion principle has been codified in 28 U.S.C. § 2254:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

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

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

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

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<sup>4</sup> The exhaustion requirement also has a pragmatic basis—“federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review.” *Rose*, 455 U.S. at 519.

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

This Court has held that the purpose of § 2254(c) is to promote comity by requiring state prisoners to “give state courts a fair opportunity to act on their claims.” *Boerckel*, 526 U.S. at 844 (citing *Castille*, 489 U.S. at 351 and *Picard v. Connor*, 404 U.S. 270, 275–276 (1971)). In meeting this duty of fair presentment, a petitioner must necessarily raise his claims in accordance with a state’s procedural rules, because “a habeas petitioner who has failed to meet the State’s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance.” *Coleman*, 501 U.S. at 732. *See Cone*, 129 S.Ct. at 1780 (a petitioner must “*properly* raise his claims in state court”) (emphasis added); *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) (“Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits.”)

In *Schriro v. Landrigan*, 550 U.S. 465 (2007), in finding that the petitioner was not entitled to an evidentiary hearing because he failed to fairly present his claim to the Arizona courts, this Court noted that the petitioner raised his claim “for the first time in a

motion for rehearing from the denial of his postconviction petition” and that, “[u]nder Arizona law, a defendant cannot raise new claims in a motion for rehearing.” *Id.* at 479 n.3 (internal citations omitted). Similarly, in *Baldwin v. Reese*, 541 U.S. 27 (2004), in finding that the petitioner failed to fairly present his claim to the Oregon courts, this Court noted that “Oregon Rule of Appellate Procedure 9.05(7) (2003) instructs litigants seeking discretionary review to identify clearly *in the petition itself* the legal questions presented, why those questions have special importance, a short statement of relevant facts, and the reasons for reversal, “including appropriate authorities.” *Id.* at 31 (emphasis added).

Here, Scott did not raise the additional ineffective assistance claims in the body of his amended petition for review to the Arizona Supreme Court. Instead, he included them in an appendix to his petition. The summary denial by the Arizona Supreme Court does not address those claims, nor is there anything in the denial itself that suggests that the supreme court actually considered these claims. Similarly, the Arizona trial court did not consider the merits of these claims. This is understandable, because the only issue before the Arizona courts was procedural—whether Scott could amend his post-conviction relief petition after the post-conviction proceedings had been dismissed. The merits of the underlying additional claims were never at issue.

Regardless, the Arizona Supreme Court would not have considered the additional underlying claims, because under its own procedural rules all claims must

be raised and argued in the body of a brief, rather than in an appendix:<sup>5</sup>

Kemp raises 12 issues in the appendix to his opening brief. Argument, however, must be in the body of the brief. We therefore strike the text contained in the appendix of Kemps' opening brief. All of these issues, which we list in our Appendix, are waived. Counsel, to avoid preclusion, must briefly argue the issue in the body of the brief. As we said in *Walden*, “[a] list of issues in the brief is not adequate. *Nor may the argument be in the appendix.*”

*Kemp*, 912 P.2d at 1286 (emphasis added, internal citations omitted) (quoting *State v. Walden*, 905 P.2d 974, 984 (Ariz. 1995)). See also *State v. Miller*, 921 P.2d 1151, 1160 (1996) (claim raised in footnote waived).

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<sup>5</sup> In *Cone*, this Court noted that it has “no . . . duty to apply state procedural bars where state courts have themselves declined to do so.” 129 S.Ct. at 1782. However, this is not a case where the Arizona supreme court “declined” to apply its rule requiring that a claim be raised and argued in the body of a brief because, as previously noted, the only issue before the Arizona courts was whether Scott could amend his post-conviction petition after the underlying proceedings had been dismissed.

In finding that Scott fairly presented his additional claims to the Arizona Supreme Court, the Ninth Circuit panel refused to give effect to Arizona's procedural law requiring that all claims must be raised and argued in the body of a brief:

Scott included his ineffective assistance of counsel claims in the appendix of his petition for review to the Arizona Supreme Court. He explicitly referenced his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. He also stated the operative facts on which each of the claims were based and cited federal case law to support his arguments. The only issue the state contests is whether including the claims in an appendix in a petition for review to the Arizona Supreme Court satisfied the fair presentation requirement for purposes of exhaustion. *This is an issue of federal law, not state law.* We hold Scott did accomplish a full and fair presentation of his claims to the Arizona Supreme Court. Scott included a copy of the amended petition for post-conviction relief he sought to file in the post-conviction court in the Appendix to his petition for review filed with the Arizona Supreme Court.

*Scott*, 567 F.3d at 582 (Pet. App. A at 15.) (emphasis added).

The Ninth Circuit correctly recognized that whether a claim is fairly presented to a state's highest court is "an issue of federal law. . . ." However, contrary to its analysis, the inquiry does not end there because, under federal law as determined by this Court, in order to be subject to potential federal habeas corpus relief, the claim must first have been presented to the state courts in accordance with the procedural rules of that state. *Cone*, \_\_\_ U.S. at \_\_\_, 129 S.Ct. at 1780 ("[W]e have held that when a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review.") (citing *Coleman*, 501 U.S. at 731); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) ("With 'very rare exceptions' . . . we will not consider a petitioner's federal claim unless it was either addressed by, *or properly presented to*, the state court that rendered the decision we have been asked to review.") (emphasis added) (quoting *Adams v. Robertson*, 520 U.S. 86, 86 (1997) (citing *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217–219 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)). This is because "[a] State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997).

The significance of the panel's erroneous decision goes far beyond its failure to follow *Cone* and *Coleman*, and its corresponding vitiation of the Arizona Supreme

Court's rule requiring that claims be raised in the body of a brief. Rather, the decision will ultimately allow Arizona petitioners to manipulate the state review process to obtain subsequent federal habeas corpus review. For example, if an Arizona petitioner perceives that his constitutional claim might have a better probability of success upon federal habeas corpus review than in the state courts, he may reasonably wish to avoid a merits determination by the state courts, which would be entitled to deference due to the limited review under 28 U.S.C. § 2254(d), as well as the presumption of correctness under 28 U.S.C. § 2254(e)(1). Consequently, to avoid a merits determination by the Arizona courts, as well as a state procedural ruling that could form the basis for a subsequent federal procedural default ruling, the petitioner could make a tactical decision to, in effect, hide the claim in an appendix or other attachment to his state brief, hoping that the state court does not address the claim at all. Under the court of appeals decision here, if this petitioner successfully evaded any rulings by the Arizona courts, he would have nevertheless "fairly presented" the claim, and therefore preserved a right to federal habeas corpus merits review of his claim. Allowing a petitioner to circumvent the Arizona courts while preserving a right to subsequent federal habeas corpus merits review violates the fundamental role that comity plays in connection with the exhaustion requirement, as recognized by this Court in *Boerckel*, *Castille*, and *Rose*. It is also contrary to the AEDPA, which requires that claims be exhausted in state court. 28 U.S.C. § 2254(b).

This case represents the third time the Ninth Circuit has recently misinterpreted this Court's jurisprudence concerning fair presentation. In *Reese v. Baldwin*, 282 F.3d 1184, 1193–94 (9<sup>th</sup> Cir. 2002), the Ninth Circuit held that the federal nature of a claim was fairly presented to the Oregon supreme court, because that court had the opportunity to read a lower Oregon court opinion which had sufficiently identified the claim as being based upon federal law. This Court succinctly disagreed:

We begin by assuming that Reese's petition by itself did not properly alert the Oregon Supreme Court to the federal nature of Reese's claim. On that assumption, Reese failed to meet the "fair presentation" standard, and the Ninth Circuit was wrong to hold the contrary.

...

[W]e consequently hold that ordinarily a state prisoner does not "fairly present" a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so.

*Baldwin*, 541 U.S. at 30–32. Subsequently, in *Landrigan*, in reversing the Ninth Circuit's decision

granting the petitioner an evidentiary hearing,<sup>6</sup> this Court pointed out that the petitioner's claim was not fairly presented to the Arizona courts, because it was first raised in a motion for rehearing, and that under Arizona law claims cannot be raised for the first time in such motions. 550 U.S. at 479 & n.3.

The Ninth Circuit panel decision is not only contrary to this Court's precedent, it completely ignores the doctrine of comity by vitiating Arizona's procedural rules. It is also contrary to the provisions and purposes of the AEDPA. If allowed to stand, the decision will allow petitioners to circumvent Arizona court rulings on claims and preserve a right to subsequent *de novo* federal habeas corpus review.

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<sup>6</sup> See *Landrigan v. Schriro*, 441 F.3d 638 (9<sup>th</sup> Cir. 2006).

CONCLUSION

For these reasons, the State respectfully requests that the Court grant the petition.

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