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**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

**PETITION FOR WRIT OF CERTIORARI**

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EDMUND G. BROWN JR.  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
DONALD E. DENICOLA  
Deputy State Solicitor General  
MICHAEL P. FARRELL  
Senior Assistant Attorney General  
CATHERINE CHATMAN  
Supervising Deputy Attorney General  
R. TODD MARSHALL  
Deputy Attorney General  
*Counsel of Record*  
1300 I Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550  
Telephone: (916) 324-5285  
Fax: (916) 324-2960  
*Counsel for Petitioner*

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## QUESTIONS PRESENTED

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

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James Walker, Warden of the California State Prison, Sacramento (the State), <sup>1</sup> respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### OPINIONS AND JUDGMENTS BELOW

The memorandum opinion of the Ninth Circuit, dated November 20, 2009, and reversing the district court's decision dismissing respondent Martin's federal habeas corpus petition, is unpublished. (Case No. 08-15752; App. 1-3.) The district court judgment of March 28, 2008, is unpublished (Case No. CIV S 99-0223 WBS GGH P; App. 4-19), as are the magistrate's underlying March 10, 2008, Findings and Recommendations (F&Rs) that respondent's federal petition be dismissed as procedurally defaulted.

The earlier memorandum opinion of the Ninth Circuit, dated July 26, 2006, and reversing the district court's earlier judgment dismissing the petition, is unpublished. (Case No. 05-15524; App. 20-23.) That March 8, 2005, judgment is unpublished (Case No. CIV S 99-0223 WBS GGH P; App. 25-59), as are the magistrate's August 6 and November 8, 2004, F&Rs recommending that respondent's petition be dismissed as procedurally defaulted.

### STATEMENT OF JURISDICTION

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

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<sup>1</sup> Warden Walker currently has custody of respondent.

## STATEMENT OF THE CASE

### *The Crime and Trial*

Respondent and an accomplice robbed and killed a drug dealer for money and drugs. Respondent was convicted of special circumstance murder and received a life without the possibility of parole sentence.

### *State and Federal Post-trial Proceedings*

In February 1999, respondent filed a petition for writ of habeas corpus in the federal district court. The district court determined that only two of respondent's claims had been exhausted by presentation to the state high court. Respondent was granted a stay of the federal proceedings so that he could go back to the California Supreme Court and exhaust his state remedies on his new claims.

Respondent filed his second California Supreme Court petition for writ of habeas corpus in March 2002, five years after his conviction became final and more than three years after the state supreme court rejected his first state petition. Respondent claimed that his trial counsel was ineffective for failing to investigate witnesses and third party culpability, and for not preventing the admission of certain evidence. Respondent also attacked the effectiveness of his state appellate counsel, claiming that she failed to raise issues of prosecutorial misconduct, denial of confrontation, and insufficient evidence in the California Supreme Court on direct review.

The California Supreme Court denied this petition in September 2002, with a citation to *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (1993) and *In re Robbins*, 18 Cal. 4th 770, 780, 959 P.2d 311, 317 (1998). The California habeas corpus timeliness rule requires state habeas litigants to file their habeas claims promptly and without substantial unexplained delays. Petitioners must disclose when

they first learned of their claims and why they did not file sooner. Petitioners who file after substantial delay without adequate justification may still obtain merits review if they qualify for one of four enumerated exceptions. *In re Robbins*, 18 Cal. 4th at 780-81, 959 P.2d at 317-18. These rules apply equally to both capital and non-capital litigants. *In re Clark*, 5 Cal. 4th at 783, 855 P.2d at 751.

Respondent returned to federal court and filed an amended petition in January 2003. The state moved to dismiss the petition on the basis that some of the claims were too late under the federal statute of limitations. 28 U.S.C. § 2244. The state also argued that all six of respondent's claims were procedurally barred because they had been forfeited under independent and adequate state grounds. Some of these claims could have been raised or were raised upon direct appeal, and therefore could not be raised in a habeas petition. The remaining claims were procedurally barred because they had been forfeited under the *Clark/Robbins* procedural rule in state court.

The magistrate found that some claims were too late under the statute of limitations. The magistrate found that other claims were procedurally barred because they could have been raised before the state high court on direct appeal but were not or were actually raised on direct appeal and could not be re-raised upon habeas corpus. *In re Waltreus*, 62 Cal.2d 218, 225, 397 P.2d 1001, 1005 (1965); *In re Dixon*, 41 Cal. 2d 756, 759, 264 P.2d 513, 514 (1953).

Next, the magistrate concluded that claim 3 (ineffective assistance of trial counsel for failure to investigate witnesses and present a defense of third party culpability), claim 4 (ineffective assistance of trial counsel for failure to effectively object to the admission of evidence), claim 5 (denial of personal presence at part of the trial), and claim 6 (ineffective assistance of appellate counsel) were all procedurally barred because they were not presented to the state high court in a timely fashion (*Clark/Robbins*). The magistrate enforced these procedural bars, he explained, because respondent had not made a

sufficient factual allegation that the state procedural rule was inconsistently applied to shift the burden of proof to the state under *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003).

Respondent did not challenge the procedural bar that was applied to dismiss claims 1 and 2. Instead, he challenged the procedural bar applied to claims 3 through 6, arguing that he had sufficiently challenged the adequacy of the state's timeliness bar to shift the burden of proof of "adequacy" back to the State.

In March 2005, the district court agreed with the magistrate and dismissed the entire petition.

On appeal in 2006, the Ninth Circuit agreed that some of respondent's claims were too late under the AEDPA Statute of limitations. However, the Ninth Circuit reversed the district court and remanded claims 3, 4, and parts of claim 6 for a determination of the "adequacy" of the state's timeliness rule. (Case No. 05-15524; App. 20-23.)

On remand, the state moved for dismissal again in the district court. On March 10, 2008, the magistrate issued F&Rs that recommended that the remaining claims be dismissed as procedurally barred. The magistrate found that California's time bar had been sufficiently clarified and consistently applied to bar federal review of Respondent's remaining claims. Specifically, the magistrate found that California's timeliness policies apply, on the whole, to both capital and non-capital litigants. The magistrate found further that the rule could be easily distilled to its essence and that it was therefore clearly defined and well established for non-capital habeas cases. The magistrate also explained that the California Supreme Court had published a number of decisions which supported the need to apply the timeliness bar. The magistrate then identified a series of both published and unpublished cases which supported a finding that the timeliness rule was consistently applied. On March 28, 2008, the district court ordered the F&Rs adopted in full. (Case No. CIV S 99-0223 WBS GGH P; App. 4-19.)

In an unpublished memorandum opinion by the Ninth Circuit dated November 20, 2009, the court of appeals reversed the district court's judgment. The Ninth Circuit held that California's habeas corpus time bar was "inadequate" because it is vague and inconsistently applied. The Ninth Circuit explained that California "has chosen to employ an undefined standard of 'substantial delay' in denying state habeas petitions for untimeliness, rather than using fixed statutory deadlines," and that the state had not proven that the state courts "consistently" applied the rule in other cases. Based upon this asserted lack of specificity, the Ninth Circuit concluded that the state had not met its burden of showing that the standard is clear or consistently applied. The Ninth Circuit remanded the matter for a merits determination. (Case No. 08-15752; App. 1-3.)

### **REASONS FOR GRANTING THE WRIT**

**BECAUSE THE NINTH CIRCUIT HAS REFUSED TO HONOR CALIFORNIA'S TIMELINESS RULINGS, THIS CASE PRESENTS IMPORTANT ISSUES CONCERNING STATE SOVEREIGNTY AND THE FINALITY AND ADEQUACY OF STATE JUDGMENTS WHICH THIS COURT HAS INDICATED NEED TO BE CLARIFIED FURTHER**

Federal courts, particularly habeas corpus courts, should presume the good faith validity of a state-court procedural-default ruling that is levied against a petitioner who violated a state rule despite notice and an opportunity to comply and present claims in conformity with the rule. Rather, when answering the federal issue of "adequacy," the federal habeas corpus court should accept the state-court procedural bar as "adequate" unless extraordinary circumstances exist.

In addition, actual practice shows that review for discretionary or inconsistent enforcement of state procedural rules is wasteful and unreliable. Such

review causes federal courts to engage in untenable second-guessing of the state court's pronouncements upon their own state-law questions. This Court should end such practices now.

This case presents important issues involving state sovereignty and the finality of state judgments. See, Supreme Court Rule 10(a). Indeed, this Court's recognition of the importance of the question presented may be inferred from its recent grant of certiorari and subsequent opinion in *Beard v. Kindler*, 130 S.Ct. 612 (2009). The *Kindler* opinion suggests the need to further clarify the rules relating to the "adequacy" of state procedural bars. *Id.*, 130 S.Ct. at 619 (because the facts underlying the case were unique, the case presented an "unsuitable vehicle for providing broad guidance on the adequate state ground doctrine.") Justice Kennedy in his concurring opinion also suggested that if federal courts insist that a state procedural rule be established in all of its detail before it will be given effect in federal court, it would deprive the states of the case-law decisional approach that the federal judiciary finds proper and necessary in administering its own procedural rules. Justice Kennedy concluded that such important concerns should be addressed in the "proper case." *Kindler*, 130 S.Ct. at 620 (Kennedy, J., concurring) This case is the right vehicle to provide broad guidance on the adequate state ground doctrine and address these further areas of concern.

The practical importance of the question cannot be gainsaid. The Ninth Circuit has in effect killed California's habeas corpus timeliness bar within the federal procedural default context. *Morales v. Calderon*, 85 F.3d 1387 (9th Cir. 1996); *Bennett v. Mueller*, 322 F.3d 573; *King v. LaMarque*, 464 F.3d 963 (9th Cir. 2006); *Townsend v. Knowles*, 562 F.3d 1200 (9th Cir. 2009). Indeed, the reasons upon which the Ninth Circuit refuses to honor California "timeliness" rulings also has served to render unenforceable in federal court California's similar habeas corpus rules against successive petitions and habeas corpus as a substitute for direct

appeals. The Ninth Circuit has engaged in a wholesale campaign that has nullified any procedural-bar effect in federal court from state court findings that petitioners have unreasonably delayed the presentation of the federal claims in state court. Such a full scale eradication of the state's procedural timeliness rule is an affront to notions of federalism and comity. The Ninth Circuit should not be permitted to regularly undermine the state's important interests in the finality of its judgments. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997).

The Ninth Circuit's approach in any event conflicts with that of other circuits on the issue of the burden of proof. This case may well have been decided differently in either the Fourth or Fifth Circuits where the burden of establishing inadequacy is, at least, placed upon the petitioner rather than on the state. See *McNeill v. Polk*, 476 F.3d 206, 213 (4th Cir. 2007); *Stokes v. Anderson*, 123 F.3d 858, 860 (5th Cir. 1997). The Ninth Circuit has taken a position and promulgated a standard which is so strict that it cannot be defended.

Because the Ninth Circuit has nullified the effect of California's timeliness rule and other rules in the federal procedural default context, the state must engage in costly litigation of claims that should be barred. In the district court respondent proffered a survey of California Supreme Court decisions showing that in just under eleven months, the state high court invoked the *Clark* timeliness bar in 370 cases. App. 28-32 (F&Rs 8/6 p. 20). The added expense of litigating claims that should be barred in federal court is simply unjustifiable. One example can be found in *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000). In that case, the Ninth Circuit rejected California's time bar and then concluded that the writ should be granted on the basis of penalty phase ineffective assistance of counsel. *Id.* at 1153-54, 1165-66. Thus, the state was put to an extremely costly potential retrial many years after the crime on a claim that should have been barred, not to mention the cost of the federal evidentiary hearing litigation itself. Another similar example

can be found in *Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). in which the Ninth Circuit rejected the state's procedural bar and forced the state to conduct an expensive evidentiary hearing and litigate claims that should have been barred for years in federal court. *Fields v. Woodford*, 309 F.3d 1095, 1106, amended 315 F.3d 1062 (9th Cir. 2002); *Fields v. Brown*, 431 F.3d 1186, 1190 (9th Cir. 2005).

The Ninth Circuit approach is wrong. Moreover, it inevitably leads to untenable second-guessing of the state courts on state-law questions.

It is most appropriate for federal courts to embrace an approach which treats as "adequate" a fair state-court procedural-bar judgment which is premised upon an established and reasonable procedural rule. "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. at 525. "Procedural rules, like the substantive laws they implement, are the products of sovereignty and the democratic process." *Lee v. Kemna*, 534 U.S. 362, 394 (2002) (Kennedy, J., dissenting). "Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or as one treatise puts it, that they did not afford a reasonable opportunity to assert federal rights." *Id.* (citing VOL. 16B, FEDERAL PRACTICE & PROCEDURE 392 [§ 4027]).

Moreover, State courts are the final and authoritative determiners of state law. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Thus, when a state court finds that a state procedural bar acts to create a forfeiture of a petitioner's federal issue, a federal court would be hard pressed to deny the validity of the ruling as a final determination of the state-law question. See *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). Without specific proof by the petitioner, federal courts should never assume that state court's are not rigorously following their own rules or that

such a state-law decision was unconstitutional.<sup>2</sup> See *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938). It would not make any sense for a federal court which is bound to accept a state procedural ruling as authoritative, presumptively constitutional, and correct to refuse to accept the ruling as the final word on the procedural issue. Without extraordinary circumstances, like unconstitutionality in the state court ruling, the federal court can safely conclude the adequacy inquiry by, at a minimum, validating a fair state procedural ruling which is premised upon a rule that affords the petitioner a reasonable opportunity to obtain a merits ruling upon his federal issue.

A policy of deferential treatment by federal courts toward state procedural bar rulings in criminal cases is further supported by the deferential way that federal courts treat procedural defaults in federal criminal cases. Federal courts of appeal regularly find a federal defendant's demonstrated failure to comply with established federal procedural rules, like the contemporaneous objection requirement, sufficient to stop review of a claim upon appeal. See *United States v. Olano*, 507 U.S. 725, 732 (1993). There is no fundamental difference between state-court procedural bars and those imposed by federal courts in federal criminal cases. Simply put, it offends principles of comity if federal

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<sup>2</sup> However, the Ninth Circuit is engaging in exactly this sort of second-guessing of California's interpretation of its own laws. The California Supreme Court has declared that the habeas corpus timeliness rules apply to *all* (both capital and non-capital) habeas litigants once the presumption of timeliness for capital litigants has past. *In re Clark*, 5 Cal. 4th at 783, 855 P.2d at 751. Yet, despite this declaration by the state of its interpretation of its own state laws, the Ninth Circuit has inappropriately declared that California capital cases provide no guidance upon the timeliness question in the non-capital context. *King v. LaMarque*, 464 F.3d at 966; *Townsend v. Knowles*, 562 F.3d at 1207-08. This sort of second-guessing of the state's interpretation of its own laws is forbidden. *Estelle v. McGuire*, 502 U.S. at 67.

courts were to accord less respect to state-court procedural rulings than they do to their own. *Francis v. Henderson*, 425 U.S. 536, 541-42 (1976).

Here, California's habeas corpus timeliness rule provides fair notice and an opportunity to comply such that it is adequate to bar federal review, and any contrary decisions by the Ninth Circuit are indefensible. California describes its timeliness bar as follows:

Pursuant to policies adopted by this court in June 1989, a habeas corpus petition is not entitled to a presumption of timeliness if it is filed more than 90 days after the final due date for the filing of appellant's reply brief on the direct appeal. In such a case, to avoid the bar of untimeliness with respect to each claim, the petitioner has the burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness.

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. A petitioner must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time. It is not sufficient simply to allege in general terms that the claim recently was discovered, to assert that second or successive postconviction counsel could not reasonably have discovered the information earlier, or to produce a declaration from present or former counsel to that general effect. A petitioner bears the burden of establishing, through his or

her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay.

A claim or a part thereof that is substantially delayed nevertheless will be considered on the merits if the petitioner can demonstrate good cause for the delay. Good cause for substantial delay may be established if, for example, the petitioner can demonstrate that because he or she was conducting an ongoing investigation into at least one potentially meritorious claim, the petitioner delayed presentation of one or more other known claims in order to avoid the piecemeal presentation of claims, but good cause is not established by prior counsel's asserted uncertainty about his or her duty to conduct a habeas corpus investigation and to file an appropriate habeas corpus petition.

A claim that is substantially delayed without good cause, and hence is untimely, nevertheless will be entertained on the merits if the petitioner demonstrates (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute. When we apply the first three of these exceptions, we shall do so exclusively by reference to state law. When we apply the

fourth exception, we apply federal law in resolving any federal constitutional claim.

*In re Robbins*, 18 Cal. 4th at 780-81, 959 P.2d at 317-18.

While the presumption of timeliness applies only to capital litigants, the rest of the policies apply in principle and in actuality to non-capital habeas litigants. The California Supreme Court has expressly stated as much:

The [capital case] Policies [footnote 18 omitted] did not create or modify the timeliness requirements applicable to *all habeas corpus petitions* except insofar as they (1) establish a presumption of timeliness if a petition by a capital defendant is filed within 90 days of the final due date for the filing of an appellant's reply brief (Policies, std. 1-1.1); and (2) take into account this court's decision in *In re Stankewitz*, [] 40 Cal.3d 391 [(1985)], when evaluating the timeliness of a habeas corpus petition in a capital case (Policies, std. 1-1.3).

*In re Clark*, 5 Cal.4th at 783, 855 P.2d at 751, (emphasis added).

There is a similarity between California's timeliness rule, which measures "substantial delay" from the time the petitioner or counsel knew or reasonably should have known of the factual and legal bases of the claim, *In re Robbins*, 18 Cal. 4th at 780, 959 P.2d at 317, and the triggering date within the AEDPA statute of limitations: "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

A conclusion that procedural bars necessitating "reasonableness" or "promptness" and "diligence" from the petitioner when presenting claims in a timely manner as opposed to after "substantial delay" are "inadequate" is not mandated here. The American justice system employs

“reasonableness” standards through out its case and statutory law. As an example, citizens can be held liable in tort cases if they engage in “unreasonable” negligence or citizens can be found criminally responsible for violent conduct even if they honestly but “unreasonably” believe that they need to defend themselves. In another example, in California, a simple kidnapping can be elevated to aggravated kidnapping if the perpetrator “substantially” increases the risk of harm. *See People v. Nguyen*, 22 Cal. 4th 872, 885-86, 997 P.2d 493, 501 (2000). “Reasonableness” standards do not instantly become infirm when they are employed in a procedural rule as opposed to a substantive one.

Nor should “adequacy” depend upon the federal court’s second-guessing of how the state court has exercised state-law “discretion” in other cases. This Court has never refused to uphold a state procedural-bar ruling as “inadequate” to stop review of a federal habeas corpus issue simply because of “discretionary,” or “inconsistent,” usage of the state’s procedural rules by the state court. Nor does this Court’s habeas corpus precedent mandate that the state must first carry a burden of showing “non-discretionary” or “consistent” usage of the bar in a sampling of other state cases before the bar can operate.

This Court did analyze evidence of the state court’s general enforcement of a procedural bar in *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) and *Wainwright v. Sykes*, 433 U.S. 72, 85-86 (1977). Cf. *Johnson v. Mississippi*, 486 U.S. 578 (1988).<sup>3</sup> However, both cases upheld the state procedural rule at issue. *Sykes* only mentioned that the state courts applied the rule in other cases, and *Adams* merely

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<sup>3</sup> In any event, *Johnson* appeared in this Court on direct appeal from the state court, and the procedural rule used by the state in that case was new and contradicted the existing rule at the time of the purported default. As such, the rule would likely have been inadequate under the fair notice, fair opportunity to comply standard advanced here.

observed that the rule had been applied “in the vast majority of cases.” *Adams* added that any contrary cases were insufficient to undermine the “adequacy” of the state-court decision.<sup>4</sup>

In addition, federal policy should not frown upon “discretion” or leniency in favor of mechanistic, rigid, and inflexible rules with “mandatory” operation when the states are enforcing or relaxing their procedural bars. Discretion, possible exceptions, and lenity based upon considerations of justice, are positive attributes that can avoid the potentially draconian effect of fixed rules. Alternatively, there is no basis in reason why a petitioner who is capable of following an established rule must know in advance the exact manner in which the state court’s discretion might work or what excuses could abate the risk of forfeiture, when he has fair notice of the rule and decides not to comply.

Federal procedural requirements are tempered with judicial discretion. See *United States v. Olano*, 507 U.S. at 732 (involving judicial discretion to excuse a default based upon a failure to object pursuant to Fed. R. Civ. Pro. 52(b)); *United States v. Frady*, 456 U.S. 152, 162-63 (1982); *Davis v. United States*, 411 U.S. 233, 241 (1973). In *Granberry v. Greer*, 481 U.S. 129 (1987) and *Day v. McDonough*, 547 U.S. 198, 210-11 (2006), this Court decided not to mandate that federal courts address, on their own, procedural-bar and statute-of-limitation defenses if the state fails to assert them in a timely manner. However, the Court permitted the exercise of “discretion” to review those unraised defenses on a case-by-case basis. One should presume that the

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<sup>4</sup> In *Adams*, this Court noted that the Florida high court had routinely imposed forfeiture of late *Caldwell v. Mississippi* claims specifically. However, unlike what the Ninth Circuit has accomplished, namely the wholesale rejection of California’s timeliness bar, this Court has never suggested that a state procedural bar could in some way become per se “inadequate” on a global scale for all federal claims for a never-ending period spanning decades.

state could not advance the argument that, as a result of this discretion, federal courts are now required to evaluate in every case, the state's unraised defenses.

In this same vein, AEDPA's statute of limitations starts to run when the factual predicate of the claim could have been discovered by the use of due diligence. 28 U.S.C. § 2244(d)(1)(D). Further, it has not always been clear when applying this Court's exceptions to the procedural default principle, exactly what circumstances amount to "cause," see *Reed v. Ross*, 468 U.S. 1, 13 (1984), or what boundaries define "prejudice," see *United States v. Frady*, 456 U.S. at 170. Petitioner is not aware of any federal authority that restricts the use of these federal procedural rules until the federal court can show that the rules are devoid of "discretion" and that it has "strictly" or regularly and consistently" applied such rules in the "vast majority" of other federal cases. Ironically, the Ninth Circuit has declared that it has the discretion to reject a barred habeas corpus issue on the merits when the procedural bar at issue seems complicated. *Franklin v. Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002). This is the same exercise of judicial discretion that the Ninth Circuit regards with undue suspicion when applied by a state court.

The California courts ought to be afforded the same type of discretion and leniency as the federal courts when the state courts rule that procedural bars either do or do not apply. California permits criminal defendants to raise collateral habeas corpus challenges to their convictions. These challenges must be brought to court "without substantial delay" from the time the defendant should have reasonably become aware of the bases for the challenge. Claims that are raised after substantial delay without justification are defaulted. Circumstances and case-by-case analyses necessarily guide the conclusion about when a claim was unreasonably delayed and what circumstances present an exception to the rule. See *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729.

However, the mere exercise of “discretion” or occasional “inconsistency” in the application of a state’s procedural rules which apply state law to case specific circumstances leads to no constitutional infirmity. *Engle v. Isaac*, 456 U.S. 107, 121 n. 21 (1982); *Beck v. Washington*, 369 U.S. 541, 554-55 (1962); *Gryger v. Burke*, 334 U.S. 728, 731 (1948). When the petitioner is afforded fair notice of the rule and the danger that failure to comply risks forfeiture of his claims, along with a fair opportunity to follow the rule, state-court “discretion” and the periodic decision to relax the rules to promote justice and protect federal rights should not be discouraged.

Punishing the state’s procedural laws because they are lenient or flexible is objectionable for other reasons as well. Such a system discourages flexible case-by-case factual considerations which might operate to excuse or alleviate the impact of a procedural violation. See, e.g., *Fearance v. Scott*, 56 F.3d 633, 642 (6th Cir. 1995) (state procedural default rule became “adequate” once state law eliminated judicial discretion to review “successive” habeas corpus petitions). This could lead to the undesirable consequence that the states would be motivated to enact fixed, mechanical, and rigid rules which starkly constrain the exercise of judicial discretion. Such rigid rules can have the potentially unfair result of barring federal claimants based upon mere technical violations. *Coleman v. Thompson*, 501 U.S. 722, 742-43 (1991) (claims barred because attorney filed appeal three days late).

Furthermore, there is no proper basis to think that state procedural rules that involve discretion could be directed at federal claims instead of state issues. Rather, state court’s imposition of a procedural bar for a petitioner’s federal claim would naturally bar related state law based claims. There is simply no showing that state procedural rules that incorporate some discretion operate to bar federal claims at a disparate rate than corresponding state claims.

An overly strict standard of adequacy which mandates rigid application or the federal court’s

belief about consistency or regularity when the states are exercising discretion in imposing procedural bars leads to odd and excessive results. In addition, testing for regularity in the state's rulings on excuses and exceptions requires federal courts to delve deeply into questions of state law and procedure. *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385 (7th Cir. 1990). Such a business is forbidden by federal habeas corpus courts. *Estelle v. McGuire*, 502 U.S. at 67.

This case presents important issues concerning state sovereignty and the finality and adequacy of state judgments which this Court has stated need to be clarified further. The doctrines of federalism and comity are violated by the second-guessing approach taken in the Ninth Circuit. This Court should grant certiorari to provide broad guidance upon the issues presented here.



**CONCLUSION**

The petition for writ of certiorari should be granted.

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Respectfully submitted

EDMUND G. BROWN JR.  
Attorney General of California  
DANE R. GILLETTE  
Chief Assistant Attorney General  
DONALD E. DENICOLA  
Deputy State Solicitor General  
MICHAEL P. FARRELL  
Senior Assistant Attorney General  
CATHERINE CHATMAN  
Supervising Deputy Attorney  
General



R. TODD MARSHALL  
Deputy Attorney General

*Counsel of Record*  
*Counsel for Petitioner*

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