No. 15-789

In the Supreme Court of the United States

DEBORAH K. JOHNSON, WARDEN,
PETITIONER,
v.
DONNA KAY LEE,
RESPONDENT.

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

BRIEF OF ALABAMA, ALASKA, ARIZONA, COLORADO, FLORIDA, HAWAII, IDAHO, KANSAS, MAINE, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, for federal habeas purposes, California's procedural rule generally barring review of claims that were available but not raised on direct appeal is an "adequate" state-law ground for rejection of a claim.

2. Whether, when a federal habeas petitioner argues that a state procedural default is not an "adequate" state-law ground for rejection of a claim, the burden of persuasion as to adequacy rests on the habeas petitioner (as in the Fifth Circuit) or on the State (as in the Ninth and Tenth Circuits).

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INTEREST OF *AMICI CURIAE*[1]

Alabama, Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Kansas, Maine, Michigan, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia are States concerned that the Ninth Circuit's requirement that States apply procedural bars "mechanically and consistently" in order for those bars to qualify as independent and adequate in federal habeas misapplies this Court's precedents and threatens to undermine the procedural bar altogether. As this Court has cautioned before in reversing the Ninth Circuit on this same issue, procedural bars "ought not be disregarded automatically upon a showing of seeming inconsistencies." *Walker v. Martin*, 562 U.S. 307, 320 (2011). The lower court ignored this admonition, finding inadequate California's rule barring criminal defendants from bringing on collateral review claims that should have been raised on direct appeal but were omitted. All fifty States have enacted similar procedural bars, either by statute, procedural rules, or through case law.[2]

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[1] Consistent with Rule 37.2(a), the *amici* States provided notice to the parties' attorneys more than ten days in advance of filing.

[2] *See* Ala. R. Crim. P. 32.2(a)(5); Alaska Stat. § 12.72.020; Ariz. R. Crim. P. 32.2(a); *Mackey v. State*, 690 S.W.2d 353, 354 (Ark. 1985); Colo. R. Crim. P. 35(c)(3)(VII); *Gray v. Comm'r of Correction*, 854 A.2d 45, 47 (Conn. 2004); *Johnson v. State*, 460 A.2d 539, 540 (Del. 1983); Fla. R. Crim. P. 3.850(c); *Black v. Hardin*, 336 S.E.2d 754, 755 (Ga. 1985); Haw. R. Penal P. 40(a)(3); Idaho Code § 19-4901(b); *People v. Coleman*, 660

The Court should grant the writ and reverse, either summarily or after full briefing and argument.

N.E.2d 919, 927 (Ill. 1995); *Stephenson v. State*, 864 N.E.2d 1022, 1028 (Ind. 2007); Iowa Code § 822.8; *State v. Kingsley*, 326 P.3d 1083, 1087 (Kan. 2014); *Leonard v. Com.*, 279 S.W.3d 151, 156 (Ky. 2009); La. Code Crim. Proc. art. 930.4(C); Me. Stat. tit. 15, §§ 2128(1), 2128-A; Md. Code Crim. Proc. § 7-106(b); *Rodwell v. Com.*, 732 N.E.2d 287, 289 (Mass. 2000); Mich. Ct. R. 6.508(D); *Townsend v. State*, 723 N.W.2d 14, 18 (Minn. 2006); Miss. Code § 99-39-21(1); *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000); Mont. Code § 46-21-101(2); *State v. Suggs*, 613 N.W.2d 8, 11 (Neb. 2000); Nev. Rev. Stat. § 34.810(1)(b)(2); *Avery v. Cunningham*, 551 A.2d 952, 954 (N.H. 1988); N.J. R. Ct. 3:22-4(a); N.M. Stat. § 31-11-6(F); N.Y. Crim. Proc. Law § 440.10(2)(c); N.C. Gen. Stat. § 15A-1419(a)(3) & (b)(2); N.D. Code § 29-32.1-12(2)(a); *State v. Perry*, 226 N.E. 2d 104, 109 (Ohio 1967); *Cannon v. State*, 933 P.2d 926, 928 (Okla. 1997); Or. Rev. Stat. § 138.550(2); 42 Pa. Cons. Stat. § 9544(b); 10 R.I. Gen. Laws § 10-9.1-8; *Simmons v. State*, 215 S.E.2d 883, 885 (S.C. 1975); *Ramos v. Weber*, 616 N.W.2d 88, 91 (S.D. 2000); Tenn. Code § 40-30-106(g); *Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991); Utah Code § 78B-9-106(1)(c); *In re Hart*, 715 A.2d 640, 641 (Vt. 1998); *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974); W. Va. Code § 53-4A-1(c); *Wright v. State*, 718 P.2d 35, 37 (Wyo. 1986); Wis. Stat. § 974.06. Washington replaced its automatic procedural bar with an approach that permits constitutional arguments to be raised for the first time in a collateral attack, if the petitioner can establish actual prejudice or structural error. *Matter of Cook*, 792 P.2d 506, 510–511 (Wash. 1990). This approach is similar to the federal approach. *See Reed v. Farley*, 512 U.S. 339, 354 (1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

The lower court's decision places an unprecedented burden on States seeking to enforce even regularly applied procedural bars. In *Lee v. Jacquez*, the Ninth Circuit reviewed the adequacy of a procedural bar similar to those enforced in the federal system and in every State—that in the absence of certain exceptions, courts will not hear claims on collateral review that "should have been raised on direct appeal but were omitted," known as the *Dixon* bar in California.[3] 788 F.3d 1124, 1126 (9th Cir. 2015).

The lower court challenged California to show that this routinely applied bar was firmly established and regularly followed. In response, the State produced evidence that of the 4,700 collateral review denials around the time Lee filed her direct appeal, twelve percent were procedurally barred for failing to raise a claim on direct appeal. But showing that the procedural bar was applied in nearly one in every eight cases was not enough for the lower court. Rather, the lower court opined that unless the State could show the total number of cases in which the procedural bar *could have been applied*, "this

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[3] Alabama courts have considered this a "well-settled principle of law" for more than fifty years. *See Cooper v. Wiman*, 145 So. 2d 216, 217 (Ala. 1962); *see also* Ala. R. Crim. P. 32.2(a)(5) ("A petitioner will not be given relief under this rule based upon any ground which could have been but was not raised on appeal…").

percentage in no way indicates the consistency of the rule's application." *Id.* at 1133. The circuit court made the burden even greater on the State by refusing to exclude cases where denials may have silently applied the bar or cases involving guilty pleas, writing, "[u]nless the state points out an underlying *Dixon* default behind an ambiguous denial, we cannot assume that a silent adoption of *Dixon* occurred." *Id.* The practical impact of this decision is that, in the Ninth Circuit, petitioner's failure to properly raise a claim on direct review in state court does not prevent that petitioner from bringing the claim on federal habeas.

Under this standard, the State can only show a procedural bar is adequate if it can analyze every habeas proceeding, determine whether or not the procedural bar could have applied, and explain to the satisfaction of the federal court each of the cases in which the bar was not applied. The lower court gave no guidance as to what constitutes adequacy, refusing to "set any precise statistical bar that must be reached…" *Id.* at 1134. Instead, it held only that the state courts must apply the bar "mechanically and consistently," and that instances where the bar was not applied would constitute evidence of "the irregular application of the rule." *Id.* at 1130.

This approach ignores controlling precedent, including this Court's recent unanimous reversal of the Ninth Circuit in *Martin*. The lower court justified its novel approach by citing this Court's admonition in *Martin* that "federal courts must carefully examine state procedural requirements to ensure

that they do not operate to discriminate against claims of federal rights." *Id.* at 1131 (citing *Martin*, 562 U.S. at 321). But in performing that examination, the lower court ignored *Martin*'s guidance that federal courts should look to whether procedural bars are applied "to impose novel and unforeseeable requirements without fair or substantial support in prior state law" or are "applied infrequently, unexpectedly, or freakishly." *Martin*, 562 U.S. at 320.

If allowed to stand, the lower court's misguided approach threatens to allow the inadequacy exception to state procedural bars to swallow the rule whole. The Court should grant the petition to correct this error, either by summary reversal or after full briefing.

ARGUMENT

The lower court's approach to procedural bars contradicts controlling precedent in at least three ways. First, it ignores this Court's guidance on when a procedural bar is inadequate. Second, the burden it places on the State is inconsistent with the manner in which this Court has reviewed challenges to procedural bars. And finally, the lower court failed to properly consider the widespread application of rules equivalent to the *Dixon* bar, both at the federal and state level.

I. A procedural bar is inadequate only when it is novel, rarely applied, or applied in an arbitrary manner.

In taking an overly exacting approach to its review of the State's procedural bar, the Ninth Circuit ignored this Court's guidance. Procedural bars are grounded in "the general principle that federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds." *Dretke v. Haley*, 541 U.S. 386, 392 (2004). To ensure habeas petitioners are not unfairly prejudiced, the state rule in question must be "firmly established and regularly followed." *Beard v. Kindler*, 558 U.S. 53, 60 (2009).

The Court has explained that the purpose of the "firmly established and regularly followed" rule is to prevent unexpected or arbitrary bars to a petitioner's claim. To evade a procedural bar, a petitioner must show more than that "outcomes under the rule vary from case to case." *Martin*, 562 U.S. at 319. Rather, a rule may fail this test if "applied infrequently, unexpectedly, or freakishly," or if it is used "to impose novel and unforeseeable requirements without fair or substantial support in prior state law." *Id.* at 320.

Procedural bars may be adequate even if they "permit consideration of a federal claim in some cases but not others." *Kindler*, 558 U.S. at 60–61. A procedural bar is adequate even if in some cases state courts "opt to bypass the [bar] and summarily dismiss a petition on the merits, if that is the easier path." *Martin*, 562 U.S. at 319. In fact, members of

the Court have indicated that even a procedural bar that has "not been fully explicated in prior decisions" may be adequate, "absent a showing of a purpose or pattern to evade constitutional guarantees." *Kindler*, 558 U.S. at 65 (Kennedy, J., joined by Thomas, J., concurring).

Under this standard, if a petitioner should have known that his or her claim was potentially subject to a state procedural bar and fails to act accordingly, the Court will not set aside that bar as inadequate. *See Kindler,* 558 U.S. at 63–64 (Kennedy, J., joined by Thomas, J., concurring) (noting that the adequacy requirement protects litigants who "in asserting their federal rights, have in good faith complied with existing state procedural law"). Mathematical tests and rigid adherence to a certain standard are inappropriate.

But that is precisely what the Ninth Circuit required in the decision below. The lower court construed Supreme Court precedent allowing for flexibility and reasonability to apply only to a procedural bar that is "inherently discretionary in its initial application," one that requires "a case-specific evaluation in every instance, leading inevitably to varied outcomes." *Lee*, 788 F.3d at 1130. But the lower court argued that the *Dixon* bar "is meant to apply to all habeas claims that could have been raised on direct appeal but were not." *Id.* Therefore, the lower court reasoned, if a court *could* apply this

procedural bar, it *must* apply this procedural bar.[4] "Thus, California state courts should be able to apply the *Dixon* bar mechanically and consistently, and a failure to cite *Dixon* where *Dixon* applies does not reflect the exercise of discretion so much as it reflects the irregular application of the rule." *Id.* As such, even the State's evidence of the routine application of the *Dixon* rule was insufficient; "*Dixon*'s application to twelve percent of all habeas denials tells us almost nothing about the rule's consistent application, and, therefore, its adequacy." *Id.* at 1134.

The Ninth Circuit's mechanistic approach ignores both the spirit and the letter of this Court's precedent. While this Court has answered the adequacy question by evaluating whether a state rule is applied "infrequently, unexpectedly, or freakishly," the lower court's approach might render inadequate even the most widely and consistently applied procedural bar. Under the lower court's standard, it is irrelevant whether petitioner acted in bad faith or knew that the procedural bar likely applied to her claim. And the lower court's standard casts doubt on any "mandatory" procedural bar, as all such rules have exceptions.

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[4] This analysis is incorrect, as the *Dixon* bar includes four exceptions. *See In re Robbins*, 959 P.2d 311, 340 n.34 (Cal. 1998).

II. The lower court's novel approach is inconsistent with the manner in which this Court has reviewed challenges to procedural bars.

Instead of crafting a novel rule, the lower court should have applied this Court's analysis of the adequacy question in *Martin*. Like the habeas petitioner here, Martin argued that the procedural bar at issue, the *Clark/Robins* bar, was not regularly followed. As the State did here, California provided evidence of numerous denials on the basis of *Clark/Robins*. But unlike the lower court, this Court in *Martin* found that evidence to be compelling.

The Court was explicit—"Nor is California's time rule vulnerable on the ground that it is not regularly followed." *Martin*, 562 U.S. at 318. The Court found decisive that each year, "the California Supreme Court summarily denies hundreds of habeas petitions by citing [*Clark/Robins*]." *Id.* at 318. In fact, the Court noted, "On the same day the court denied Martin's petition, it issued 21 other *Clark /Robbins* summary denials." *Id.* at 319. The Court did not find it necessary to ask how many other cases could have been dismissed on *Clark/Robbins* grounds, nor did it hold against the State that it was "impossible to tell why the California Supreme Court decides some delayed petitions on the merits and rejects others as untimely." *Id.* (internal quotation marks and citations omitted). The widespread use of the procedural bar was sufficient. In fact, this Court supported its conclusion that state courts "regularly invoke" the *Clark/Robins* bar with a footnote citing

four California cases decided between 1999 and 2010. *Id.* at 319 n.6.

In this case, faced with the same argument and even more evidence, the lower court came to the opposite conclusion. Taking the approach endorsed by the Court in *Martin*, California "analyzed 4,700 California Supreme Court habeas denials surrounding the time of Lee's June 10, 1999 default…" *Lee*, 788 F.3d at 1133. The *Dixon* bar was invoked in twelve percent, or almost six hundred, of these cases. But unlike this Court in *Martin*, the lower court found "this evidence entirely insufficient to meet the State's burden of showing the *Dixon* rule's adequacy." *Id.* Instead, the lower court demanded a "denominator" that would "give any meaning to the state's number." *Id.*

The Ninth Circuit's approach would require States to comb through what the *Martin* Court called "a staggering number of habeas petitions each year," 562 U.S. at 307, to determine not only what *did happen* during the denial of habeas but what *could have happened*, including in denials involving guilty pleas, "multiple procedural bars" or rulings that are "ambiguous" or "silent" as to their reasoning. This Court required no such showing in *Martin*, a fact of which the lower court should have been well-aware.

This case is on all fours with *Martin*. The Court reversed the Ninth Circuit's erroneous decision in *Martin* unanimously. This case deserves similar treatment.

III. Every State and the federal courts apply a similar rule to the *Dixon* bar.

The lower court failed to consider the widespread application of rules equivalent to the *Dixon* bar, both at the federal and state level. As Justice Kennedy has warned, "The adequate state ground doctrine cannot be applied without consideration of the purposes it is designed to serve." *Kindler,* 558 U.S. at 63 (Kennedy, J., joined by Thomas, J., concurring). The Court has explained that in considering those purposes, it will look to the application of similar federal rules. "In light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts." *Kindler*, 558 U.S. at 62. It would be even stranger, the Court has noted, "to do so with respect to rules in place in nearly every State, and all at one fell swoop." *Id.*

The federal courts apply similar procedural bars to that announced in *Dixon.* Petitioners are barred from seeking relief under 28 U.S.C. § 2255 "if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him…" 28 U.S.C. § 2255(e). This Court also has stated that when a petitioner fails to raise a claim that can be "fully and completely addressed on direct review," that claim is "procedurally defaulted" on collateral review. *See Bousley v. United States*, 523 U.S. 614, 622 (1998); *Reed v. Farley*, 512 U.S. 339, 354 (1994) ("Where the petitioner—whether a state

or federal prisoner—failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes cause for the waiver and shows actual prejudice resulting from the alleged violation.") (internal citations and quotation marks omitted).

All fifty States have enacted similar waiver provisions, either by statute, procedural rules, or through case law. *See* sources cited *supra* note 2.

The Court has recognized the important public policy considerations that underlie these rules. They include finality, judicial economy, and conservation of scarce resources. "Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and undercuts the State's ability to enforce its procedural rules." *Murray v. Carrier*, 477 U.S. 478, 491 (1986) (internal citations and quotation marks omitted); *Reed v. Ross*, 468 U.S. 1, 10 (1984) ("Each State's complement of procedural rules facilitates this complex process, channeling, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.").

In *Ross*, the Court reviewed North Carolina's requirement that defendants "raise a legal issue on appeal, rather than on postconviction review…" *Id.* The Court explained that this requirement benefits both the States and criminal defendants. It "affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available

both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal." *Id.* It also forces "the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." *Id.* at 10–11. If the Court were to simply disregard North Carolina's requirement or the *Dixon* bar, "these legitimate state interests may be frustrated." *Id.* at 11.

The lower court failed to take these considerations into account, just as it ignored the existence of a nearly identical federal rule. In doing so, it required the State meet a novel, expensive, and time-consuming burden before it could confidently exercise the most basic procedural bar. If allowed to stand, it is likely most States will choose not to bear these costs. Rather, as this Court warned in *Kindler* and *Martin,* if federal courts force States "to choose between mandatory rules certain to be found 'adequate' or more supple prescriptions that federal courts may disregard as inadequate," they will "opt for mandatory rules to avoid the high costs" of the alternative. *Martin*, 562 U.S. 321.

CONCLUSION

The Court should grant certiorari and reverse the court of appeals.

Respectfully submitted,

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