No. 15-789

IN THE

Supreme Court of the United States

DONNA 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 RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Like other states, California has a longstanding rule requiring that record-based claims be raised on direct appeal rather than in habeas corpus petitions. *In re Dixon,* 41 Cal. 2d 756 (1953). Over the years, however, the rule was inconsistently applied, prompting the California Supreme Court to clarify the rule in 1993 and again in 1998. In denying state habeas relief to Respondent Donna Kay Lee, the California Supreme Court ruled that some of her claims should have been raised on direct appeal and thus were barred under *Dixon.* In federal habeas proceedings, Petitioner, the State of California, asserted that the *Dixon* bar applied by the California Supreme Court precluded federal review of the barred claims. The question presented is:

> Did the court of appeals correctly determine that California's *Dixon* bar was not adequate to preclude federal review of Lee's claims, where Lee presented evidence that state courts at the time of her 1999 appeal had continued to apply *Dixon* inconsistently, and where the State's purported rebuttal evidence was unresponsive to the question of whether or not the bar was being consistently applied in 1999?

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Donna Kay Lee respectfully requests that this Court deny the State's petition for certiorari seeking review of the Ninth Circuit's opinion in this case. The decision is reported as *Lee v. Jacquez*, 788 F.3d 1124 (9th Cir. 2015) (*see* Pet. App. A).

STATEMENT OF THE CASE

I. Initial State and Federal Habeas Proceedings

Despite evidence that Lee was a victim of Battered Woman Syndrome and despite a joint trial with her accused batterer, Donna Lee was convicted of participating in the murder of her boyfriend's ex-girlfriend and his mother. She was sentenced to life without parole. (Pet. App. 149a, 150a.) Her boyfriend was sentenced to death. (Pet. App. 150a.) On June 10, 1999, Lee appealed her conviction to the California Court of Appeal. (Pet. App. 137a-162a.) She raised four claims, which were denied on August 28, 2000. (*Id.*) Her subsequent petition for review was denied by the California Supreme Court in December 2000. (Pet. App. 163a.) California does not appoint habeas counsel for non-capital inmates, so Lee represented herself after direct appeal.

In December 2001, Lee filed a timely pro se federal habeas petition that included several new claims. (Pet. App. 79a.) The district court granted a stay of federal proceedings so that Lee could exhaust her claims in state court. (*Id.*) Lee

filed a petition in superior court, which was denied, in part, on the basis of *In re Dixon*, 41 Cal. 2d 756 (1953). (Pet. App. 134a-135a.) *Dixon* requires California petitioners to raise record-based claims on appeal, rather than in habeas corpus proceedings. It is a mandatory bar, meaning that courts are required to apply the rule where the defaulted claims are based on the record. *Dixon*, 41 Cal. 2d at 759 ("the writ *will* not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.") (emphasis added). After the *Dixon* bar has been applied, courts may consider whether any of four exceptions to the bar apply.[1] If any are found, state courts will review the merits of the claim, despite the petitioner's failure to raise the claim on direct appeal. In Lee's case, the superior court did not apply any of these exceptions.

Lee filed a subsequent habeas petition in the California Court of Appeal, which also denied her claims with citation to other procedural bars but without citation to *Dixon*, though the claims were the same as the court below had denied on that basis. (Pet. App. 132a.) Then the California Supreme Court denied Lee's petition for review, citing *Dixon* and other procedural rules not relevant here. (Pet. App. 131a.)

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[1] The exceptions are: 1) "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process"; 2) there was an unwaivable lack of "fundamental" jurisdiction in the trial court; 3) the trial court imposed a sentence in "excess of jurisdiction"; or 4) a "new rule of law" created between the time of direct appeal and the time of post-conviction review would affect the petitioner's case. *In re Harris*, 5 Cal. 4th 813, 834, 836-841 (1993); *see also In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (applying *Harris* exceptions to the *Dixon* rule).

After exhaustion was complete, the district court lifted the stay and ruled on the federal petition. (Pet. App. 75a-76a.) It denied four of Lee's claims on the merits and found the rest of the claims to be procedurally barred under *Dixon*. (Pet. App. 77a.) Lee appealed the merits denial of two claims and the finding of procedural default on the other claims.

II. First Ninth Circuit Appeal

On appeal, Lee was appointed counsel for the first time. In her counseled brief, Lee argued that the *Dixon* bar was not an adequate and independent state law ground that could bar federal review of her claims. (Pet. App. 74a.) Her argument addressed the second step in the three-step procedure to determine a bar's adequacy and independence set forth by the Ninth Circuit in *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003). Under *Bennett,* the state must first raise procedural default as an affirmative defense. 322 F.3d at 585. The burden to challenge that defense then shifts to the petitioner. *Id.* at 586. At this second step, the petitioner must "satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* Should that requirement be satisfied, at the third step, the State bears the ultimate burden to show that "the state procedural rule has been regularly and consistently applied in habeas actions." *Id.*

Proceeding under step two of *Bennett,* Lee proffered evidence that *Dixon* was not adequate because it was not consistently applied at the time of Lee's purported default in June 1999. (9th Cir. case no. 08-55919, dkt. no. 39, Appellant's Opening

Brief, at 23.) She pointed to the California Supreme Court's own jurisprudence, which showed that as late as August 1998, *Dixon*'s application was unclear. (*Id.* at 24-26, citing *In re Robbins*, 18 Cal. 4th 770 (1993) (altering the bar by mandating that the *Harris* exceptions were to apply to the *Dixon* bar from that point forward); *Bennett*, 322 F.3d at 582 (recognizing "that a California court's pre-*Robbins* denial of a state habeas petition for a *Dixon* violation does not bar subsequent federal review.").) Lee also showed that in December 1999 – the same month her petition was denied – the California Supreme Court invoked the *Dixon* rule in less than ten percent of its habeas denials, even though many petitions included record-based claims that could have been raised on direct appeal. (*Id.* at 33-37.)

The Ninth Circuit determined that Lee met her burden at step two of *Bennett* and remanded to give the state an opportunity to present evidence of the *Dixon* bar's independence and adequacy. (Pet. App. 74a.) The court affirmed the denial of Lee's other claims on the merits. (Pet. App. 73a-74a.)

III. District Court Proceedings on Remand

Upon remand, the State raised two arguments regarding procedural default. First, it claimed that *Walker v. Martin*, 562 U.S. 307, 131 S. Ct. 1120 (2011), implicitly overruled the three-step process in *Bennett v. Mueller* for proving the adequacy of a procedural bar. (C.D. Cal. case no. 01-cv-10751-PA-PLA, dkt. no. 141, Appellee's Brief, at 6.) Under *Martin*, the State argued, procedural bars are presumptively adequate and must be "independently evaluated" by the court without regard to any evidentiary burdens. (*Id.* at 13, citing *Martin*, 131 S. Ct. at 1129.)

In the alternative, the State argued that, even under *Bennett*, it could meet its burden to prove *Dixon*'s adequacy. (*Id.* at 13.) To do this the State surveyed approximately 4,700 habeas dismissals by the California Supreme Court covering a two-year period, and reported that, in each of the months included in that survey, the *Dixon* bar had been cited in anywhere between seven and twenty-one percent of the denials, averaging about twelve percent. (*Id.* at 20.) The State concluded that this finding alone demonstrated that, over the relevant time period, "the *Dixon* bar was both firmly established and regularly followed by the California Supreme Court." (*Id.*)

The district court rejected "respondent's unsupported assertions in its Response that the Supreme Court in *Walker v. Martin* . . . 'implicitly overruled *Bennett*'s three-step burden-shifting process,' and that respondents no longer bear the ultimate burden of proving the adequacy of a procedural bar." (Pet. App. 52a n.6.) But it found that that the State met its burden to prove adequacy under *Bennett*'s third step. (Pet. App. 66a.)

IV. Second Ninth Circuit Appeal

On appeal, the State abandoned its argument that it should not bear the ultimate burden of proving adequacy. (*See, e.g.,* 9th Cir. case no. 12-56258, dkt. no. 20, Appellee's Brief, at 12.) Instead, the State argued that it met its burden under *Bennett* by showing that *Dixon* was applied to twelve percent of cases over a two-year period around the time of Lee's 1999 direct appeal. (*See id.* at 30; Pet. App. 17a.)

The Ninth Circuit disagreed. First, it held that *Martin*, on which the State heavily relied, was focused on California's timeliness bar for state habeas petitions, which is "inherently discretionary in its initial application, while the *Dixon* rule is mandatory in the first instance." (Pet. App. 11a.) For non-discretionary rules, this Court left unaltered its repeated recognition that federal courts must examine the adequacy of state procedural rules by analyzing their regular and consistent application. (Pet. App. 12a-13a, quoting *Martin*, 131 S. Ct. at 1130.) The appellate court also held that the State's attempt to meet their burden under *Bennett* was unpersuasive, because "*Dixon*'s application to twelve percent of all habeas denials tells us almost nothing about the rule's consistent application and, therefore, its adequacy." (Pet. App. 20a.) Because of this, the court held that "the state failed to meet its burden of proving the *Dixon* bar's adequacy at the time of Lee's procedural default." (Pet. App. 6a.)

REASONS FOR DENYING THE WRIT

I. The Lower Court's Decision Was Limited to the Facts of this Case and Does Not Implicate State or National Interests

The State frames its first question presented as a categorical referendum on the adequacy of the *Dixon* rule: "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." (Pet. 1.) This formulation suggests that the court below held *Dixon* inadequate for all California cases at all times. Not so. The Ninth Circuit made clear that its holding was limited to "the *Dixon* bar's adequacy *at the time of Lee's procedural*

default." (Pet. App. 6a (emphasis added).) Even on that narrow question, the court's ruling was limited to the State's statistically defective record in this case. The State remains entirely free to relitigate the question and develop a better record establishing the *Dixon* bar's adequacy in any future case.

Because the court's holding was restricted to the facts and circumstances of this case – a *Dixon* default that occurred nearly seventeen years ago and an analytically flawed defense of the bar by Petitioner – it has little to no application to any other case, much less to any "fundamental principles and interests at the heart of this Court's habeas jurisprudence." (Pet. 21.)

In arguing for certiorari, Petitioner also erroneously suggests that the appellate court imposed a new and unduly high burden for the state to prove adequacy:

> The court of appeals all but directed the State, as the price of federal respect for a common procedural bar rule, to review the case files of thousands of habeas dispositions and establish for each case whether the state court could and should have applied the *Dixon* bar rule rather than ruling on whatever other ground it did.

(Pet. 19.) But the court of appeals did no such thing – not in this case, and not in *Bennett*.

A procedural bar is an affirmative defense which, like any other affirmative defense, must ultimately be proved by the party asserting it. In *Bennett*, the Ninth Circuit set forth a procedural, burden-shifting framework for establishing how the pre-existing burden could be met, but did not include many details. It acknowledged that "[t]he scope of the state's burden of proof . . . will be measured by

the specific claims of inadequacy put forth by the petitioner." *Bennett*, 322 F.3d at 584-85 (quoting *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999)). *Bennett* also explained that the state may meet its burden by providing "records and authorities [that] prove whether its courts have regularly and consistently applied the procedural bar." *Id.* at 585. But it did not dictate which records the State must produce, or how it must prove the adequacy of any particular bar. Rather, it left the State free to decide how to meet its burden at step three.

And in fact, that is precisely what happened in this case. It was the State – not the court – that decided that a "statistical analysis would be the best way to demonstrate the [*Dixon*] rule's regular and consistent application" at step three. (Pet. App. 20a.) It was the State that chose to review approximately 4,700 summaries of case holdings from the California Supreme Court, covering a randomly chosen period, and count how many times within those summaries *Dixon* was cited. (Pet. App. 17a.) It was the State that chose to divide that number of mentions of *Dixon* by the total number of case summaries it looked at, and present the average – the number twelve percent – as somehow dispositive of adequacy. (*Id.*) As the opinion of the court below noted, this calculation "merely shows *Dixon*'s application as a percentage of *all* habeas denials filed during this time period, and does not purport to show to how many cases the *Dixon* bar *should* have been applied." (*Id.*, emphases in original.) Thus the number was irrelevant to the question of consistent application and the Ninth Circuit held that the State failed to meet its burden under *Bennett*.

In so holding, the court was clear that it had not imposed any new burdens on the State: "We do not suggest that the state must always use a statistical analysis to prove a rule's adequacy, and nor do we set any precise statistical bar that must be reached." (Pet. App. 20a.) Generally, "the state need not necessarily reach . . . a high statistical bar in order to prove its affirmative defense." (Pet. App. 14a.) But here, where "the state chose to use just such a statistical framework," and then presented "only a partial statistical picture" that "tells us almost nothing" about the rule's adequacy, the State failed to carry its burden. (Pet. App. 20a.)

Notably, the State itself admitted that the records that might actually establish that the *Dixon* bar was consistently applied "were likely available," but it chose not to avail itself of those records to make its showing. (*Id.*) In other words, the State chose to prove the adequacy of the *Dixon* bar by using a statistical analysis, but neglected to perform a complete analysis. Thus the State vastly overstates the burden placed upon it, and the reach of the Ninth Circuit's holding in this case.

This overstatement pervades the petition for certiorari, as well as the amici briefs. Together, they suggest that the Ninth Circuit has rejected *Dixon* and *Dixon*-type procedural rules *in toto*, such that states will universally be impeded from requiring record-based claims to be raised on direct appeal. (Pet. 21; Amici Brief of Alabama, etc., 13.) For example, the State claims that under *Lee*, "a [record-based] claim could . . . be properly presented in federal habeas proceedings – in the first instance, and for review *de novo*." (Pet. 21.) Petitioner claims that the ruling

"permits (or even encourages) litigants to withhold claims from the state court in their primary appeal." (*Id.*) The states' amici brief incorrectly cites the Ninth Circuit's holding as "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." (Amici Brief of Alabama, etc., 1.) The states justify their interest in the petition as based on the fact that all fifty states apply similar procedural bars. (*Id.*) These dire predictions have no basis in the Ninth Circuit's factually limited determination that the State chose here an unconvincing method to demonstrate one bar's inadequacy at one point in time.

This is perhaps why no jurist on the Ninth Circuit Court of Appeals objected in any way to this decision or sought its reconsideration. The panel decision was unanimous and no judge dissented from denial of en banc review. No jurist even requested a vote on the petition for the rehearing. (Pet. App. 163a.) If, as is alleged by Petitioner, this opinion truly had major potential consequences for California, the rest of the Ninth Circuit states, and all other states, it is likely that at least one Ninth Circuit jurist would have called for en banc review. But the panel that decided the case clearly limited its holding to the facts of this case, without in any way foreclosing further attempts to establish the *Dixon* bar's adequacy in other cases. Thus, the holding below does not provide the opportunity for this Court to reach the broad question presented by the State (the adequacy of the *Dixon* bar generally), nor does it merit certiorari review.

II. There Is No Circuit Split

Petitioner's second question presented asks "[w]hether, 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)." (Pet. i.) The State made the same argument in 2003 when it unsuccessfully petitioned for certiorari review of *Bennett*. The State essentially is attempting to use Lee's case as a vehicle once again to seek review of *Bennett*. But then, as now, there is no meaningful circuit split requiring this Court's attention. The burden-shifting schema of the Fifth Circuit appears different from that of the Ninth and Tenth Circuits because it is founded on a different type of rule; but in fact the procedures function the same way.

The Fifth Circuit decided the question before it in a manner that was specific to the bar at issue – a bar constructed through the legislative process. *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995). The bar was a three-year statute of limitations on post-conviction claims imposed by the Mississippi state legislature and expressly relied on by the court to bar collateral relief. *Id.* at 417. The circuit court thus assumed that the bar, as based on statute rather than court-created rules, was presumptively adequate. *Id.* at 416-17. Nevertheless, it acknowledged that "[t]he presumption of adequacy can be rebutted in certain circumstances . . ., if the state's procedural rule is not 'strictly or regularly followed.'" *Id.* at 416 (citations omitted).

By contrast, the Ninth and Tenth Circuits' foundational cases addressed court-created procedural rules. Such judicially created rules are, by their nature, more susceptible to erratic application than the sort of bright-line legislative mandates the Fifth Circuit addressed in *Sones*. Thus the Ninth and Tenth Circuits began, not with an automatic presumption of adequacy, but rather with a requirement that the state assert a rule's adequacy to bar federal review. The burden then would shift to the petitioner to rebut that assertion.

At that point, both the Ninth and Tenth Circuits explicitly provided the state an opportunity to overcome the petitioner's rebuttal evidence. The Tenth Circuit ruled:

> Once the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner. This must be done, at a minimum, by specific allegations by the petitioner as to the adequacy of the state procedure. The scope of the state's burden of proof thereafter will be measured by the specific claims of inadequacy put forth by the petitioner.

Hooks, 184 F.3d at 1217; *see also Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999) (same).

The Ninth Circuit in *Bennett*, similarly examining a court-created bar, adopted the framework laid out by the Tenth Circuit. First, the state must raise procedural default in federal court, thus averring its adequacy. 322 F.3d at 585. The petitioner must then rebut that assertion "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Id.* at 586.

Should petitioner succeed in bringing the rule's adequacy into question, then the State has a chance to show that "the state procedural rule has been regularly and consistently applied in habeas actions." *Id.*

In effect, the procedure for determining the adequacy of a procedural bar functions the same way in all of the circuits that have proffered such a procedure. The Ninth and Tenth Circuits have a three-step burden-shifting process – state/petitioner/state – while the Fifth Circuit appears on its face to have only a two-step process – presumption/petitioner. In practice, however, the process in the Fifth Circuit does not end with the petitioner. Should the petitioner successfully present rebuttal evidence, the court does not end the inquiry there and declare the bar inadequate. In practice, the state is provided with a chance to address the rebuttal evidence and show the bar to be consistently and regularly applied. For example, in one case, a bar was asserted and presumed adequate. *Walker v. Stephens*, 583 Fed. App'x 402, 403 (5th Cir. 2014). The petitioner then argued that the rule was not adequate. *Id.* The final step was that the state conceded the inadequacy. *Id.* The court found that the bar did not preclude federal review. *Id.* In another Fifth Circuit case involving a court-created bar, the rule was initially presumed adequate. *Nixon v. Epps*, 111 Fed. App'x 237, 245 (5th Cir. 2004). The burden to rebut fell to the petitioner, who was unable to present any cases demonstrating irregularity in application. *Id.* Though the petitioner was unable to meet his burden, the court was "reluctant to foreclose the issue altogether *because*

the cases cited by the state are less than compelling." *Id.* (emphasis added). Thus the state was given the last word.

The Fifth Circuit appears to differ in its approach from the Ninth and Tenth Circuits because its foundational ruling was based on a different type of bar – legislative rather than judicial. Because of this, the Fifth Circuit began with the language of presumption of adequacy. The Ninth and Tenth Circuits, examining less inherently reliable rules, did not begin from a stated presumption, but rather required the state to support the idea of such a presumption by stating the rule's adequacy to foreclose federal review. In all circuits the burden then shifts to the petitioner to bring the bar into question. And in all circuits, the state is then given the final opportunity to challenge the rebuttal evidence and show the bar to be regularly and consistently applied and thus adequate. Thus there is no actual conflict.

Petitioner and amici here ask this Court to overturn *Bennett* and impose a Fifth-Circuit-style approach everywhere to procedural bars. They present the Fifth Circuit schema as placing the entire burden of proof on the petitioner. The underlying assumption is that the petitioner – who lacks resources and access to the necessary evidence – will be unable to establish inadequacy. However, should the petitioner succeed in doing so – as does occur – the states will never allow the courts to simply accept the rebuttal evidence and end the inquiry there, with a loss to the state. When a petitioner meets the burden of challenging a bar, the state will no doubt seek the last word. The State here is presenting a false split, and asking the

court to impose a burden-shifting approach which in fact it and the courts could not accept.

The State presented a similar argument as to conflict in 2003, when it petitioned for certiorari review of the *Bennett* case. That petition was denied. The situation has not changed since then. Thus here, as in 2003, certiorari review is not warranted.

III. The Decision in the Court Below Is Correct

Because this case does not implicate the *Dixon* bar generally, and there is no circuit split to resolve, the only issue is whether the case was properly decided. It was, and this Court should reject the state's unfounded request for error correction. United States Supreme Court Rule 10.

A. *Walker v. Martin* Does Not Render *Dixon* Adequate, nor Does It Abrogate Well-Established Principles of Procedural Default

As it did in the court below, the state argues that *Martin* extends to procedural bars other than the California timeliness bar specifically addressed in that case. (Pet. 13.) Under this theory, the entire federal doctrine of procedural default has been abrogated by *Martin*, though this Court explicitly states otherwise in the text of that opinion. But the Ninth Circuit correctly rejected this argument and this Court should not revisit that holding.

1. This Court's Well-Established Doctrine Requires that Non-Discretionary Bars Be Consistently Followed

The doctrine that a state procedural rule cannot bar federal review unless that rule is firmly established and consistently followed has long been accepted and applied. A state procedural rule is inadequate to bar federal review if the rule, on

its face or as applied, is arbitrary or violates due process. *Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (per curiam). A rule is arbitrary and violates due process when it is not "strictly or regularly followed" by the state courts. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984) (only state procedures that are "firmly established and regularly followed . . . can prevent implementation of federal constitutional rights").

A rule that is "strictly or regularly followed" conforms to due process as it provides a petitioner with notice of a state court's expectations and practice. Thus a bar must be applied consistently where it is warranted. The State here alleges that Ninth Circuit case law is the sole source of this requirement that a rule be applied consistently, *i.e.*, where warranted, as opposed to just regularly. (Pet. 8.) This is not so. This Court's rulings require consistency in a bar's application, and have always done so. *See, e.g.*, *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar cases."); *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) ("A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and *consistently* followed.") (emphasis added); *Johnson v. Mississippi*, 486 U.S. 578, 588-89 (1988) ("we cannot conclude that the procedural bar relied on by the Mississippi Supreme Court in this case has been *consistently* or regularly applied.") (emphasis added); *Dugger v. Adams*, 489 U.S. 401, 410-11 n.6

(when a state has followed a procedural rule in the "*vast majority of cases*," deviations in a "few cases" may not establish failure to apply the "procedural rule regularly and *consistently*" and may not be sufficient to establish the rule's inadequacy) (emphases added). Thus this Court has formulated the requirement for adequacy to include consistent application of a rule in the majority of cases where warranted.

2. *Walker v. Martin* Does Not Supersede the Doctrine of Adequacy and Independence with Regard to Non-Discretionary Bars

Petitioner mistakenly asserts that the long-held doctrine that procedural rules must be adequate and independent to forestall federal review has been overturned by *Martin*. Its underlying argument is that *Martin* did away with any requirement of consistency, and that the *sine qua non* of adequacy is now regularity, which the State proffers to mean that the rule has to be applied often even if it is not applied consistently.

Martin, however, did not purport to overturn prior case law calling for consistency. *Martin* merely recognized a limited exception where that requirement is relaxed. The case explicitly focuses only on the question of whether California's timeliness bar can be adequate even though it is discretionary. In fact, *Martin* emphasizes that the "decision . . . leaves unaltered this Court's repeated recognition that federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Martin*, 562 U.S. at 1130. Thus the State is incorrect in its assertion that *Martin*

universally eliminated the requirement that procedural bars be applied consistently if they are to be recognized as adequate and independent.

Martin extended the reasoning of *Beard v. Kindler*, 558 U.S. 53 (2009), to California's timeliness bar. In *Kindler*, this Court addressed the question: "Is a state procedural rule automatically 'inadequate' under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?" 558 U.S. at 55. The Court found that, in certain cases, "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review." *Id.* at 60. This Court explicitly kept its ruling narrow, however, in the face of the Commonwealth's urging to state a broad new standard for inadequacy, as "[t]he procedural default at issue here . . . is hardly a typical procedural default." *Id.* at 62-63.

Two years later the Court revisited the issue raised in *Kindler* in the context of another discretionary procedural rule, California's timeliness bar. California's rule for timeliness in the filing of a habeas petition does not set a concrete, objectively measurable amount of time in which a petition must be filed, but instead requires petitioners to seek habeas relief "without substantial delay." *Martin*, 131 S. Ct. at 1125. Thus, as in the rule at issue in *Kindler*, discretion is built into the law. The Court found that the reasoning applied in *Kindler* was also applicable to this rule: if the exercise of discretion is appropriate in light of the subjective elements inherent in the rule, then the rule can be found adequate to foreclose federal review without a showing of consistency. *Id.* at 1128. Such exercise of

discretion, however, must still have "fair and substantial support in prior state law," and avoid surprise and unfairness, or it may be adjudged inadequate as being applied arbitrarily to block federal court review. *Id.* at 1128, 1130.

In *Martin*, as in *Kindler*, this Court expressly limited its holding. In addition to making it clear that its reasoning is applicable to procedural rules inherently requiring discretion, the Court explicitly noted that "[t]oday's decision, trained on California's timeliness rule for habeas petitions, leaves unaltered this Court's repeated recognition 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 1130. The Court was careful to note that "a state procedural ground would be inadequate if the challenger shows a 'purpose or pattern to evade constitutional guarantees'." *Id.* at 1131 (quoting *Kindler*, 558 U.S. at 65 (Kennedy, J., concurring)). It found no such showing was made, however, on the record before it in the *Martin* case. *Martin*, 131 S. Ct. at 1131. The opinion says nothing about other procedural rules, especially non-discretionary rules like *Dixon*, other than to direct federal courts to continue to carefully examine their adequacy. And, in fact, other courts post-*Martin* have continued to inquire into whether state procedural rules are regularly followed and consistently applied. *See, e.g., Lee v. Corsini*, 777 F.3d 46, 54 (1st Cir. 2015) (citing the "regularly followed" standard for adequacy); *Lark v. Sec'y Pa. Dep't of Corr.*, 645 F.3d 596, 613 (3d Cir. 2011) (distinguishing a "facially mandatory state procedural rule which was not clearly followed" from the discretionary rules evaluated in *Kindler* and *Martin*). The Ninth Circuit noted that

its sister circuits continued to engage in this inquiry, and that their actions buttressed its own conclusion in this case. (Pet. App. 13a n.5.)

The *Dixon* rule at issue here is not discretionary; no element is subjective. It bars from habeas consideration claims that could have been but were not raised on appeal. *See, e.g., Dixon*, 41 Cal. 2d at 759; *Robbins*, 18 Cal. 4th 770, 779 n.1 (1998). A claim falls into this category if it is based solely on the trial-court record. *Id.* The reasoning underlying this rule is that "habeas corpus cannot serve as a substitute for an appeal." *Dixon*, 41 Cal. 2d at 759. Courts are generally familiar with the categories of claims that are record-based, such as those citing issues with jury instructions, and those that are not record-based because they require further investigation and elaboration, such as those based on ineffective assistance of counsel. They quickly sort through habeas claims and dismiss under *Dixon* those that are record-based but were not raised on direct appeal.

Petitioner contends, however, that the reasoning applied by this Court to two discretionary rules must extend to the non-discretionary *Dixon* rule – and apparently to *all* procedural rules. Petitioner attempts to justify this unwarranted extension in two ways, neither of which is persuasive.

First, the State completely ignores the distinction made in the *Kindler* and *Martin* opinions between discretionary and non-discretionary rules. Both cases make clear that the issue is determining the adequacy of *discretionary* rules. The State, however, portrays those opinions as sweeping away all prior case law

regarding adequacy and independence for all rules, across the board. (*See, e.g.*, Pet. 11, 12.)

Second, the State attempts to convince the Court that any rule is "discretionary" if it allows for exceptions. The California Supreme Court has made it explicit that, when a record-based claim is first raised on habeas such that its consideration should be denied per *Dixon*, it will still review that claim on its merits should one of four rare exceptions apply: (1) fundamental constitutional error; (2) lack of fundamental jurisdiction; (3) a court acting in excess of jurisdiction; or (4) a change in the law. *Robbins*, 18 Cal. 4th at 814 n.34, citing *In re Harris*, 5 Cal.4th 813, 825 n.23, 829-41 (1993). According to the State, because the state court's procedures allow for review of claims under very limited circumstances, that rule is fully discretionary and falls under the *Martin* standard for adequacy review.

The court below, however, was not persuaded by this argument. The court perceived a clear difference between a standard such as that embodied in California's timeliness bar, which is inherently discretionary in its initial application, and a rule such as that expressed in *Dixon*, that is mandatory in the first instance. (Pet. App. 11a.) Under *Dixon*, a claim is barred if it could have been raised on direct appeal but was not. "Deciding whether a claim is barred by *Dixon* involves not a malleable, circumstance-specific question of 'reasonableness', but a straightforward review of the record: A claim is either record-based, or it is not, and the petitioner either raised it or omitted a claim on direct appeal." (*Id.*)

Inconsistent application of the bar thus reflects irregular, inadequate practice rather than an exercise of discretion. (*Id.*)

The court below noted another flaw in the State's contention that *Dixon*'s exceptions transform a mandatory rule into a discretionary standard. Most, if not all, procedural bars are subject to some categorical exceptions – including the timeliness bar at issue in *Martin*. "Yet *Martin* mentioned these exceptions only in passing," instead focusing "its analysis on the discretion inherent in the timeliness bar's initial application, rather than on the application of the bar's exceptions." (Pet. App. 12a.) Any discretion a court may have in deciding whether exceptions apply is exercised only *after* the *Dixon* bar has been applied. The Ninth Circuit correctly rejected the state's argument and there is no need for this Court to review the issue.

B. The Court Below Correctly Found that the *Dixon* Bar Was Not Adequate in June 1999

1. The California Courts Acknowledged Inconsistent and Irregular Application of the *Dixon* Bar Shortly Before the Bar Was Applied to Lee's Case

The *Dixon* rule was formulated in 1953. Forty years later, the California Supreme Court acknowledged problems in the bar's application. In 1993 the California Supreme Court undertook to "provide needed guidance" for application of the *Dixon* rule going forward. *Harris*, 855 P.2d at 395 n.3, 398. Five years later, in August 1998, the California Supreme Court was still substantially amending the *Dixon* rule "in order to provide guidance." *Robbins*, 18 Cal. 4th at 814 n.34. The court recognized the need to reformulate the rule and publish its revised

parameters to bring clarity and consistency to its application. As the Ninth Circuit found, *Robbins* purported to establish the adequacy and independence of the state court's future *Dixon* rulings. *Park v. California*, 202 F.3d 1146, 1153 & n.4 (9th Cir. 2000).

The law in the Ninth Circuit is that a default under *Dixon* occurs at the time the direct appeal is filed without the claim later raised in habeas. *Fields v. Calderon*, 125 F.3d 757, 761 (9th Cir. 1997) (procedural default under *Dixon* "occurs at the moment the direct appeal did not include those claims that should have been included for review"). Respondent filed her direct appeal on June 10, 1999. Thus, after forty-six years of failed attempts to apply the *Dixon* rule regularly and consistently, and within one year of Lee's purported default, the state itself acknowledged the rule's per se inadequacy.

Petitioner and the amici states argue that the Ninth Circuit's ruling in this case has an untenable impact on their own abilities to manage their courts. (Pet. 21; Amici Brief of Alabama, etc., 13.) But as the California Supreme Court's opinions in *Harris* and *Robbins* show, the problems with the *Dixon* bar's adequacy belong uniquely to California, and arguably, to the time period around when Lee filed her direct appeal. The issue addressed in the court below is distinctly local and temporally limited.

2. On the Record in this Case, the Ninth Circuit's Finding that Dixon Was Inconsistently Applied in 1999 Was Correct

In the first Ninth Circuit appeal, the court accepted Lee's evidence challenging the independence and adequacy of the *Dixon* bar, and remanded to the

district court to allow the State to attempt to meet its burden at the next step. (Pet. App. 74a.) The State has not appealed this finding that the second step under *Bennett* had been met, though it has attacked Lee's evidence in attempting to meet its own burden. (Pet. 9, 19.)

Lee presented evidence in the courts below that California had not corrected its courts' problems with irregular and inconsistent application of the *Dixon* bar around the time of Lee's purported default on June 10, 1999, and even in the following years. This evidence included an order list issued by the California Supreme Court on December 21, 1999 – six months after Lee's default[2] – in which that court denied approximately 210 habeas corpus petitions and only invoked the *Dixon* bar in about nineteen of them, less than ten percent of its habeas denials. (9th Cir. case no. 08-55919, dkt. no. 39, AOB, at 35.) Lee also analyzed a small sample of cases from that same order list. (*Id.*; *see also* Pet. App. 18a-19a.) This analysis reveals that, within that small sample, there are many cases where the state court did not invoke the *Dixon* bar even though the petitions presented record-

[2] Petitioner has faulted Lee for providing evidence from a period just after Lee's default date, rather than for the date itself. First, such evidence is still probative, as it is unlikely that the bar would have been inconsistently applied less than a year before her default and six months after, but would somehow have been consistently applied just between. "A procedural rule is either adequate or inadequate during a given time period." *King v. LaMarque*, 464 F.3d 963, 968 (9th Cir. 2006). Second, the evidence for the actual date in question was unobtainable to Lee, as it is for almost all petitioners in her position. Largely for this reason the burden of providing the evidence belongs on the State. "Although the burden of proving an affirmative defense is generally on the party asserting it, in this context, this placement is also the most just. It is the state, not the petitioner, often appearing pro se, who has at its hands the records and authorities to prove whether its courts have regularly and consistently applied the procedural bar." *Bennett*, 322 F.3d at 585.

based claims that could have been raised on direct appeal but were not. Thus, Lee demonstrated that the California Supreme Court did not apply the *Dixon* bar between August of 1998 and December of 1999 with the consistency required to bar federal merits review of orders issued between those dates. Lee's default date – June 10, 1999 – falls well within this period. Lee met her second-step burden. (Pet. App. 9a, 74a.)

At the third step, the State, with access to all of its own documents, gathered records for a large number (approximately 4,700) of habeas denials covering the two years surrounding Lee's alleged default. Petitioner counted the number of times the California Supreme Court cited to *Dixon* bars in its denials. It found that, month to month, *Dixon* citations appeared in anywhere from seven to twenty-one percent of the total cases. The average on the whole was approximately twelve percent of habeas denials that included citations to *Dixon.* (Pet. App. 16a.) Petitioner presented this calculation to the court below as dispositive – as proving conclusively that the bar was adequate at the relevant time. According to the State, at a twelve percent application rate, a rule is adequate, period. No explanation was given as to why this figure is dispositive of anything related to a bar's consistent application where merited.

The Ninth Circuit found the state's evidence unconvincing:

> We find this evidence entirely insufficient to meet the state's burden of showing the *Dixon* rule's adequacy. The state's evidence merely shows *Dixon*'s application as a percentage of *all* habeas denials filed during this time period, and does not purport to show to how many cases the *Dixon* bar *should* have been applied. Logic dictates

> that in order to know if invoking *Dixon* in twelve percent of all cases shows consistent application, we need to know "the number of times that claims to which the *Dixon* rule could apply were instead rejected on the merits." . . . Thus, we are missing the denominator that would give any meaning to the state's number. Without a baseline number against which to measure the twelve percent application rate, this percentage in no way indicates the consistency of the rule's application.

(Pet. App. 17a-18a; emphases in original; citation omitted.)

At oral argument, the State conceded that the records required to provide "the denominator that would give any meaning" to its numbers were likely available to it. (Pet. App. 20a.) Why it nevertheless chose to proceed with an incomplete statistical analysis remains unexplained.

Before Lee's case, all challenges in federal courts to California's *Dixon* bar have been decided at the first or second step of the *Bennett* framework. In first-step cases, the bar has been found to be adequate because it simply was alleged by the State, and the pro se petitioner was unable to meet his second-step burden "by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule." *Bennett*, 322 F.3d at 586. *See, e.g.*, *Flores v. Roe*, 228 F. App'x 690, 691 (9th Cir. 2007) (pro se petitioner failed to place the defense at issue as required under *Bennett*); *Sanchez v. Ryan*, 392 F. Supp. 2d 1136, 1138-39 (C.D. Cal. 2005) (pro se petitioner offered "nothing in response to Respondent's allegation, much less any specific factual allegations demonstrating inconsistent application of the *Dixon* rule"); *Protsman v. Pliler*, 318 F. Supp. 2d 1004, 1008-09 (S.D. Cal. 2004) (finding of adequacy due to the petitioner's lack of showing).

In rare instances a petitioner has been able to meet his burden at the second step, without any third-step response by the state – resulting in a finding against the State. *See, e.g.*, *Dennis v. Brown*, 361 F. Supp. 2d 1124 (N.D. Cal. 2005) (petitioner introduced citations to approximately 200 cases decided between 1980 and 2003 showing inconsistent application of procedural bars for successive or untimely claims, or those falling under the *Dixon* rule; and State did not meet its third-step burden); *Carpenter v. Ayers*, 548 F. Supp. 2d 736, 756-57 (N.D. Cal. 2008) (petitioner effectively challenged *Dixon* bar adequacy primarily by citation to *Brown*; State did not counter).

Lee appears to be the first case where, after a petitioner met her second-step burden, the State made an attempt to meet its third-step burden. The State is not foreclosed from trying again in another case, and next time presenting evidence that is not meaningless but is actually probative of adequacy – unless, of course, California courts had *not* in fact remedied their self-admitted problems applying the *Dixon* bar by the time of Lee's default. In that case the State should not be attempting to block federal review of petitioners' claims on the basis of a rule that, on its face or as applied, is arbitrary or violates due process. *Dobbs*, 506 U.S. at 359. Either way, the Ninth Circuit's decision was correct and certiorari is not warranted.

IV. The Case's Posture Is Interlocutory and the Issues Presented by the State Are Insufficiently Developed

Finally, this Court should deny certiorari because the procedural posture in this case remains interlocutory. This outcome is not final; the Ninth Circuit

remanded the case to the court below. The outcome there could be determined on factors not raised here. For example, Lee also challenged the independence of *Dixon* bar. (9th Cir. case no. 12-56258, dkt. no. 7, AOB, at 34-38.) The Ninth Circuit did not decide this issue, which thus remains to be determined and could impact the case's result. (Pet. App. 3a.)

In addition, the issues presented by Petitioner and amici are not sufficiently developed to merit this Court's attention. Few circuits have decided on the procedures to apply in the determination of a bar's adequacy and independence, and even fewer times has a final outcome been tested in federal appellate courts. This reflects the fact that petitioners – incarcerated and lacking knowledge and resources – are most often unable to meet even the "modest" burden placed on them to challenge the bar. The State also often declines to present evidence regarding *Dixon*'s adequacy, preferring strategically to seek merits review instead. Thus this is hardly an issue of national importance that must be addressed now.

Petitioner and amici, however, have presented a parade of horribles that they allege will result from the State's failed attempt in this case to prove a bar's adequacy. None of their allegations are at all likely, but should any of them prove correct in any way, that will be borne out in future cases. As the situation stands, only one incomplete attempt has been made to prove adequacy in only one case, on the basis of a procedural schema that had been in place since 2003, for a rule that has existed since 1953, and with a result that could be determined by extraneous

factors on remand. The issues presented by Petitioner remain largely undeveloped, and this case does not merit certiorari review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: March 17, 2016

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