No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California courts, like federal courts and those of many other States, generally will not consider a claim on habeas corpus if the habeas petitioner could have raised the claim on direct appeal but failed to do so. The decision below holds that procedural default under this common rule was not an "adequate" state-law ground for rejecting habeas claims, because the State did not demonstrate "consistent" application of the rule by providing a full analysis of thousands of state cases in which it either was or could have been applied. The questions presented are:

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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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of warden Deborah Johnson, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-20a) is reported at 788 F.3d 1124. A previous opinion of that court (App. 72a-74a) is unpublished, as are the most recent opinion of the district court denying habeas relief (App. 21a-25a), the related report and recommendation of the magistrate judge (App. 26a-71a), an earlier opinion of the district court (App. 75a-76a), and the magistrate's report related to that opinion (App. 77a-130a). The orders of the California Supreme Court (App. 131a), the California Court of Appeal (App. 132a-133a), and the Superior Court for Los Angeles County (App. 134a-135a) denying Lee's state habeas petitions are also unpublished, as are the opinion of the California Court of Appeal affirming Lee's conviction (App. 137a-162a) and the order of the California Supreme Court denying review on direct appeal (App. 136a).

JURISDICTION

The judgment of the court of appeals was originally entered on June 9, 2015. The court reentered

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[1] Deborah Johnson has succeeded Debra Jacquez as warden of the state prison in which respondent Lee is incarcerated. Warden Johnson is substituted as the named petitioner in this case in compliance with this Court's Rule 35.3.

judgment when it denied rehearing en banc on August 17, 2015. On November 5, 2015, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 15, 2015. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in pertinent part:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> * * *
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

> on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

Many States, and the federal courts, apply a procedural rule under which courts generally will not consider, on post-conviction collateral review, claims that a defendant could have raised on direct appeal but did not. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350-351 (2006). In California this rule is known as the *Dixon* rule, after *In re Dixon*, 41 Cal. 2d 756 (1953). Like most rules, it is subject to limited exceptions. *See In re Harris*, 5 Cal. 4th 813 (1993).[2]

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[2] *See In re Robbins*, 18 Cal. 4th 770, 814 n.34 (1998) (explaining that *Harris* exceptions apply to *Dixon* rule). The exceptions allow review of an otherwise defaulted claim: (1) where "the claimed constitutional error is both clear and fundamental, and strikes at the heart of the trial process," *Harris*, 5 Cal. 4th at 834 (citing federal rule for structural error under *Arizona v. Fulminante*, 499 U.S. 279 (1991)); (2) where there was an unwaivable lack of "fundamental" (*i.e.*, subject matter) jurisdiction in the trial court that issued the judgment of conviction, *id.* at 836-838; (3) where the court imposed a sentence in "'excess of jurisdiction'" in a way that can be reviewed as a "strictly legal issue," *id.* at 838-841; or (4) where "a new rule of law" created between the time of direct appeal and the time of post-

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On federal habeas review, the federal courts generally will not review a claim rejected by a state court if the state rejection rests on an adequate and independent state-law ground, such as a state procedural default. *See, e.g.*, *Walker v. Martin*, 562 U.S. 307, 315 (2011). To be "adequate" for these purposes, a state procedural default rule must be "firmly established and regularly followed." *Id.* at 316 (internal quotation marks omitted). Here, the court of appeals held that California's *Dixon* rule was not an "adequate" ground for the state courts' rejection of respondent Lee's claims because the State did not prove to the federal court's satisfaction "the consistency of the rule's application." App. 18a. The decision below accordingly directs the district court to consider *de novo* on federal habeas review constitutional claims that respondent failed, without any apparent excuse, to present to the state courts on direct appeal.[3]

1. Respondent Lee and her boyfriend stabbed the boyfriend's mother and ex-girlfriend to death in front of the ex-girlfriend's two-year-old son. App. 83a, 138a-146a. In 1998, Lee was convicted of two counts of first degree murder with special circumstances and sentenced to life imprisonment without parole. *Id.* at 138a.

Lee raised four claims on direct appeal. App. 78a. The state court of appeal considered those claims and affirmed (App. 137a-162a), and in Decem-

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conviction review would affect the petitioner's case, *id.* at 841.

[3] As the court of appeals noted, "Lee has not asserted good cause for her default, nor has she claimed that a fundamental miscarriage of justice would occur absent consideration of her claim." App. 7a n.4.

ber 2000 the state supreme court denied review (*id.* at 136a).

Lee then filed a federal habeas petition. Her federal petition raised not only the claims she had advanced on direct appeal, but also more than ten new claims. App. 79a.[4] The district court stayed the federal proceeding so that Lee could present the new claims to the state courts. *Id.*

The state superior court denied Lee's new state habeas petition, relying in part on *In re Dixon*. App. 134a-135a. The state court of appeal also rejected her petition. *Id*. at 132a. The California Supreme Court denied Lee's petition on December 1, 2004, in a summary order stating: "Petition for writ of habeas corpus is DENIED. (See *In re Waltreus* (1965) 62 Cal.2d 218; *In re Dixon* (1953) 41 Cal.2d 756; *In re Seaton* (2004) 34 Cal.4th 193.)" App. 131a.[5]

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[4] The claims which Lee had presented on direct appeal challenged evidentiary rulings, the denial of Lee's severance motion, the denial of Lee's requested provocation instruction, and the constitutionality of California's lying-in-wait special circumstance. *See* App. 78a, 93a. Lee's newly added claims eventually included an objection to the fact that Lee's counsel and her codefendant's counsel shared office space; complaints that adverse evidentiary rulings effectively gave her no choice but to testify; allegations that she was punished for rejecting plea offers; objections to the prosecution's evidence on aiding and abetting; an allegation that Lee was assaulted by a deputy during jury deliberations; a claim that a juror "'nodded off'" during trial; a claim that her jury was tainted because two jurors were asked, in a public restroom, what case they were seated on; objections to Lee's arrest and interrogation; a claim that female jurors were systematically excluded; a complaint about a juror's comment during trial; and a challenge regarding her codefendant's statement. *Id.* at 79a-81a, 94a-95a.

[5] *Waltreus* bars relitigation on state habeas of claims that *were* raised on direct appeal. *See Harris*, 5 Cal. 4th at 825. On federal habeas, Lee eventually claimed that the state supreme court's citation to *Waltreus* pertained to two of her (continued…)

2. a. Returning to federal court, Lee again sought to raise both the four claims she originally presented on direct appeal and the many others that the state courts had now rejected as procedurally barred under *Dixon*. App. 93a-95a. A magistrate judge and the district court considered and rejected the four non-defaulted claims. *Id.* at 105a-129a; *id.* at 75a-76a. The other claims, they held, could not be considered on federal habeas because the state court judgments rejecting them rested on the adequate and independent state-law ground of the *Dixon* bar. *Id.* at 98a-104a; *id.* at 75a-76a.

In 2010, the court of appeals affirmed as to the properly presented claims, but vacated as to the claims defaulted under *Dixon*. App. 72a-74a. It directed the district court to consider whether the *Dixon* rule was consistently enough applied to be an "adequate" state-law ground. *Id.* at 74a. As explanation, the court cited its decision in *Bennett v. Mueller*, 322 F.3d 573, 586 (9th Cir. 2003), which had considered the "adequacy" of California's flexible timeliness rule for the filing of state habeas petitions. *See* App. 74a. *Bennett* established a three-step, burden-shifting framework under which the State bears the ultimate burden of establishing the "adequacy" of its procedural bar rules. *See id.* at 8a.

b. On remand, Lee argued that the *Dixon* bar was not "adequa[te]" for federal habeas purposes because the state courts did not consistently apply it. *See* App. 54a. She proffered an order list setting forth 210 California Supreme Court habeas denials issued on a single day (chosen without explanation) six months after the filing of her direct appeal: December 21, 1999. *Id.* Although 10% of the denials

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claims, while the *Dixon* citation applied to the others. App. 45a.

were based on *Dixon*, Lee asserted that there were many cases where the state court did not invoke the *Dixon* bar even though the petitions presented record-based claims that could have been raised on direct appeal but were not. *Id.* at 65a. As the magistrate judge observed, this assertion primarily rested on Lee's "unsupported speculation" that many "'primarily non-capital'" habeas petitioners "'would likely'" have "'thrown into a petition'" record-based claims that could have been brought earlier and thus should have been barred under *Dixon*. *Id.* Lee also argued that, among the California Supreme Court's 210 habeas denials that day, there were nine specific cases that Lee said were "'denied on the merits'" but where *Dixon* could have applied as a procedural bar. *Id.* at 55a.

In response, the State provided evidence that, during approximately two years surrounding the filing of the direct-appeal brief in which Lee failed to raise the claims at issue, the California Supreme Court decided some 4,700 habeas petitions, of which approximately 12% involved denials of relief based on *Dixon*. App. 61a. The rate of dismissals invoking *Dixon* over this time was consistent, ranging from ten to fifteen percent. *Id.* Regarding Lee's nine specific cases from December 21, 1999, the State observed that several of those cases would not have been subject to *Dixon* because they involved claims of ineffective assistance of counsel, which could not have been raised on direct appeal. *Id.* Several others involved defendants who had pleaded guilty, which would have limited their direct appeal possibilities (and thus *Dixon*'s applicability) as well. *Id.*

The magistrate judge recommended rejecting Lee's challenge, relying largely on *Walker v. Martin*, 562 U.S. 307 (2011). App. 63a-66a. Decided after the remand order in this case, *Martin* reversed the Ninth

Circuit's determination of inadequacy regarding the state habeas timeliness rule that had been at issue in *Bennett*—the case the court of appeals cited in its remand order here, and in which it adopted its burden-shifting framework for analyzing "adequacy" claims. In assessing Lee's argument that the *Dixon* bar was not consistently applied, the magistrate judge considered *Martin*'s holding that there was "'no reason to reject California's time bar simply because a [state] court may opt to bypass the [timeliness] assessment and summarily dismiss a petition on the merits, if that is the easier path.'" App. 66a (quoting *Martin*, 562 U.S. at 319). He also noted this Court's approval of state rules allowing for the "'appropriate exercise of discretion.'" *Id.* (quoting *Beard v. Kindler*, 558 U.S. 53, 61 (2009)). Noting that Lee did "not contend that 'the California Supreme Court exercised its discretion in a surprising or unfair manner,'" *id.* (quoting *Martin*, 562 U.S. at 320), the magistrate concluded that the *Dixon* bar was "well established and regularly followed" during "the time leading up to petitioner's default," *id.*, and thus adequate to preclude federal habeas review.

After reviewing the evidence, the district court adopted the magistrate judge's recommendation and dismissed Lee's claims. App. 21a-25a.

c. The court of appeals reversed. App. 1a-20a.

The court first recited an "adequacy" standard drawn from its own cases: "In order to be adequate, a procedural bar must be 'clear, consistently applied, and well-established at the time of the petitioner's purported default.'" App. 7a. The court equated that standard with this Court's articulation that a state procedural rule must be "'firmly established and regularly followed.'" *Id.* at 8a (quoting *Martin*, 562 U.S. at 316).

The court then reiterated the burden-shifting framework it had adopted in *Bennett*. App. 8a. If the State "plead[s] the existence of an independent and adequate state procedural bar as an affirmative defense" to a habeas claim, the habeas petitioner may "'assert[] specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule.'" *Id.* This burden of "put[ting] adequacy at issue," the court made clear, is "'modest.'" *Id.* Once that is done, "the burden shifts back to the State, which must carry 'the ultimate burden of proving the adequacy of [a] … state procedural bar' as an affirmative defense." *Id.* Here, the court accepted Lee's partial analysis of nine habeas denials issued by the California Supreme Court on one day as meeting her burden, thus leaving the case "at the final stage of *Bennett*'s framework, where the state must prove the *Dixon* bar's adequacy." *Id.* at 9a; *see also id.* at 18a-19a (rejecting challenge to Lee's analysis).

The court next rejected the State's argument that, under *Martin*, "any inconsistency in *Dixon*'s application reflects only the state's exercise of discretion rather than the rule's inadequacy." App. 11a. It reasoned that the timeliness rule at issue in *Martin* was "inherently discretionary in its initial application, while the *Dixon* rule is mandatory in the first instance." *Id.* The state courts thus "should be able to apply the *Dixon* bar mechanically and consistently," and a court's failure to cite it where it might have been applied "reflects the irregular application of the rule." *Id.* In the court's view, this required that the state do more to "prove the *Dixon* rule's regular and consistent application around the time of Lee's default." *Id.* at 13a.

In that regard, the court acknowledged that it had not "'defin[ed] what is a statistically insignificant irregularity and inconsistency in the application of a state procedural bar.'" App. 14a. It suggested that the state "need not necessarily" show reliance on the rule "in the vast majority of cases." *Id*. It noted, however, that *Bennett* "advises the state to provide 'records and authorities'" to sustain its burden, which "suggests that the state should do more than just discredit the [habeas] petitioner's evidence." *Id*. at 15a (quoting *Bennett*, 322 F.3d at 585). The court also regarded the development of the law in the state courts over time as evidence "that the *Dixon* bar was applied inconsistently until at least September 30, 1993, when the California Supreme Court decided *Harris* to 'provide needed guidance,'" and possibly thereafter as the cases continued to develop. *Id*.

Here, the court held that the State's analysis of approximately 4,700 California Supreme Court habeas denials over a two-year period surrounding Lee's default, showing invocation of the *Dixon* bar in approximately 12% of all cases and a range of 7% to 21% from month to month, was "entirely insufficient." App. 17a. Although these figures showed regular invocation of the bar, the court reasoned that they did not prove "consistent" application, because they did not show "to how many cases the *Dixon* bar *should* have been applied." *Id.* Without "the denominator that would give any meaning to the state's number," the 12% invocation rate "in no way indicate[d] the consistency of the rule's application." *Id*. at 18a. In its assessment, the court made clear, it would count against the State any case in which "'claims to which the *Dixon* rule could apply were instead rejected on the merits,'" *id*. at 17a, as well as any unexplained denial of relief unless the State specifically identified, on a case-by-case basis, those

"cases in which a silent denial relied on a prior invocation of *Dixon*," *id.* at 18a.

Applying these principles and its own formulation of the "adequacy" test, the court of appeals held that the State had "failed to meet its burden of proving that the *Dixon* bar was 'clear, consistently applied, and well-established at the time of [Lee's] purported default.'" App. 19a. The court did not advert again to this Court's statement of the test, that a bar must be "firmly established and regularly followed." *Compare id.*, *with Martin*, 562 U.S. at 377 (internal quotation marks omitted).

REASONS FOR GRANTING CERTIORARI

Twice in recent years this Court has reversed decisions holding state procedural bars "inadequate" for purposes of federal habeas review. *Walker v. Martin*, 562 U.S. 307 (2011); *Beard v. Kindler*, 558 U.S. 53 (2009). The result should be the same here. The decision below demands "mechanical[]" consistency in the application of a state rule (App. 11a), rather than respecting the ability of the state courts to exercise discretion, including ruling on the merits where it is more efficient to do so. It thus declines to treat as "adequate" for federal purposes a state procedural bar that is not only longstanding and sensible in its own right but also commonly used in other States and, indeed, by the federal courts themselves.

That result cannot be reconciled with this Court's precedents or with any sound understanding of the purpose of the "adequacy" inquiry or the proper role of federal habeas review. These issues are of great importance, because state procedural bars are properly invoked as to many claims in federal habeas proceedings, and enforcing them is critical to the proper operation of both the state and the federal judicial systems. In requiring the State to prove ade-

quacy, rather than requiring a habeas petitioner to show that a facially proper state-law ground for judgment is *in*adequate, the decision below also reflects a square conflict among the courts of appeals. And because the state rule at issue here is a "typical procedural default," this case would be a "[]suitable vehicle for providing broad guidance on the adequate state ground doctrine." *Kindler*, 558 U.S. at 63.

1. "A federal habeas court will not review a claim rejected by a state court 'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Kindler*, 558 U.S. at 55. "To qualify as an 'adequate' procedural rule, a state rule must be 'firmly established and regularly followed.'" *Martin*, 562 U.S. at 316. The requirement that a rule be "regularly followed" ensures that application of a bar in a particular case is not "surprising or unfair," and does not "operate to discriminate against claims of federal rights." *Id*. at 320-321; *see also id*. at 320 n.7 (reviewing holdings showing that "seeming inconsistencie[s]" are unobjectionable if differences are not "arbitrar[y] or irrationa[l]" (internal quotation marks omitted)); *Kindler*, 558 U.S. at 63-64 (Kennedy, J., concurring) (adequate state ground doctrine must be applied in light of its purposes, including providing "adequate notice to litigants" and avoiding "the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard").

Here, there has been no contention that the California courts apply the *Dixon* default rule in any surprising or unfair manner as a general matter, or that they did so in this case. *See* App. 66a. The court of appeals instead held that it would not respect the bar as an adequate state ground for decision because

the State did not prove that state courts apply the bar "consistently," which it understood to mean "mechanically." App. 11a. That approach cannot be squared with the purposes of the standard or with this Court's decisions in *Martin* and *Kindler*.

Martin considered the adequacy, for federal habeas purposes, of the California rule requiring post-conviction claims to be brought "'as promptly as the circumstances allow.'" 562 U.S. at 310. In that case the Ninth Circuit, applying the same burden-shifting framework from its *Bennett* decision that it reaffirmed in this case, held that California's rule was inadequate because of the discretion it afforded state courts, and potential inconsistency in the results in individual cases.[6] This Court unanimously reversed, holding that "[a] rule can be firmly established and regularly followed … even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." 562 U.S. at 316 (internal quotation marks omitted). Indeed, "'[s]ound procedure often requires discretion to exact or excuse compliance with strict rules,' and [the Court had] no cause to discourage standards allowing courts to exercise such discretion." *Id.* at 320 (citation omitted).

The *Martin* Court also saw "no reason to reject California's time bar simply because a [state] court may opt to bypass the [timeliness] assessment and summarily dismiss a petition on the merits, if that is the easier path." 562 U.S. at 319. Moreover, noting the existence of federal procedural rules similar to the state rule at issue, this Court reiterated that federal habeas analysis should not "'disregard state pro-

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[6] *See Martin v. Walker*, 357 Fed. App'x 793, 794 (9th Cir. 2009) (following *Townsend v. Knowles*, 562 F.3d 1200, 1206-1208 (9th Cir. 2009), which held the rule inadequate under *Bennett*).

cedural rules that are substantially similar to those to which we give full force in our own courts.'" *Id.* at 318 (quoting *Kindler*, 558 U.S. at 62). Noting the absence of any contention that the California Supreme Court "exercised its discretion in a surprising or unfair manner," *id.* at 320, or that the rule "either by design or in operation[] discriminate[d] against federal claims or claimants," *id.* at 311, this Court upheld the "adequacy" of the rule.

Here, the court of appeals sought to distinguish *Martin*'s tolerance of the variation that may result from discretionary application. It reasoned that *Martin* "focused its analysis on the discretion inherent in the timeliness bar's initial application, rather than on the application of the bar's exceptions," whereas "even if courts must exercise discretion when applying *Dixon*'s exceptions, this analysis occurs only after *Dixon* has first been applied." App. 12a. In assessing, however, whether a rule is being applied fairly and regularly as opposed to arbitrarily, it makes no difference whether courts exercise discretion "inherent" in the rule itself or, instead, in deciding whether or exactly how to apply it. *Martin* expressly recognizes that "'[s]ound procedure often requires discretion to exact *or excuse* compliance with strict rules.'" 562 U.S. at 320 (emphasis added). And *Kindler* emphasizes that federal habeas law should not force States into the "unnecessary dilemma" of choosing between providing their courts with the "discretion *to excuse* procedural errors" and "preserv[ing] the finality of their judgments." *Kindler*, 558 U.S. at 61 (emphasis added).

The court of appeals also made clear that, in assessing whether a state procedural rule is "inadequate" for federal purposes because it is "inconsistently" applied, it would count against the State any case in which a state court dismissed a

claim on the merits when it *could* instead have invoked a *Dixon* bar. *See* App. 17a. The court faulted the State's evidence of regular application for not looking behind every case in which the California Supreme Court denied habeas relief in a summary order to see whether it could ascertain or surmise a *Dixon* basis for the ruling. *Id*. at 18a. Yet *Martin* expressly held, in the context of the State's bar on untimely habeas petitions, that there was "no reason to reject" the time rule as "inadequate" in cases in which it *was* applied, simply because the state courts were free to "to bypass the [timeliness] assessment and summarily dismiss a petition on the merits, if that is the easier path." 562 U.S. at 319. The reasoning of the decision below is flatly inconsistent with that holding.

Finally, the decision below ignores this Court's repeated warning that federal habeas courts should not "'disregard state procedural rules that are substantially similar to those to which we give full force in our own courts.'" *Martin*, 562 U.S. at 318 (quoting *Kindler*, 558 U.S. at 62). Under federal law, as in California, a defendant who fails to raise an available claim on direct appeal is generally barred from raising it for the first time later, on collateral review. *See Sanchez-Llamas*, 548 U.S. at 350-351 (citing *Massaro v. United States*, 538 U.S. 500 (2003), and *Bousley v. United States,* 523 U.S. 614 (1998)); *Sunal v. Large*, 332 U.S. 174, 178 (1947). Like California's *Dixon* rule, the federal rule is subject to exceptions. *Sunal*, 332 U.S. at 178; *see, e.g.*, *Bousley*, 523 U.S. at 622-624. But that does not make it any less the general rule.[7]

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[7] Federal courts may also, like state courts, bypass procedural questions when it is more efficient to dismiss a postconviction claim on the merits. *See* 28 U.S.C. § 2254(b)(2); *Lambrix* (continued…)

A "proper constitutional balance ought not give federal courts latitude in the interpretation and elaboration of [federal] law that it then withholds from the States." *Kindler*, 558 U.S. at 65 (Kennedy, J., concurring); *see generally Coleman v. Thompson*, 501 U.S. 722, 746 (1991) ("a proper respect for the States require[s] that federal courts give to the state procedural rule the same effect they give to the federal rule"). Divergence from that principle, as in the decision below, raises significant questions about whether a federal court is according its state counterparts due respect.[8]

2. The decision below also reaffirms the court of appeals' position that the State bears the burden of proving that a state procedural rule is "adequate" for federal habeas purposes—even where the rule is a common one that clearly promotes valid interests, and the habeas petitioner has adduced no evidence that the rule has been applied in some unfair or surprising manner or that it discriminates in any way

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(…continued)
v. Singletary, 520 U.S. 518, 525 (1997). In addition to ignoring such parallel federal rules, the court below also failed to consider that rules similar to *Dixon* operate in many other States. *See* p. 23-25 & n.14, *infra*; *cf. Kindler*, 558 U.S. at 62.

[8] *See* recording of oral argument (Nov. 17, 2014), available at http://www.ca9.uscourts.gov/media/view.php?pk_id=0000013497, at 22:00-23:27 (judge theorizing that state-court prosecutions lead to more postconviction proceedings than federal prosecutions do, because state judges feel "no fixed individual responsibility"; if they "mess up," they will have transferred to another department before case returns to their court); *id.* at 24:15-24:21 (judge's comment that "the states aren't doing their job—they're giving the work to the federal courts"); *id.* at 29:38-30:30 (judge's complaint that state prosecutors do not handle cases as carefully as federal prosecutors and are less "selective" about bringing "good" cases); *cf. id.* at 24:25 ("the Great Writ" has become "the great joke").

against federal claims. That reaffirmation solidifies a recognized conflict among the courts of appeals. *See McNeill v. Polk*, 476 F.3d 206, 219-220 (4th Cir. 2007) (King, J., concurring in part) (discussing different approaches).

In the Fifth Circuit, a state procedural rule is "presume[d]" adequate. *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995). A habeas petitioner who argues that the application of the bar does not provide an "adequate" state ground for the rejection of a federal claim by the state courts in his or her case "bears the burden of proving that [the State] did not apply the doctrine with sufficient strictness and regularity during the relevant time period." *Emery v. Johnson*, 139 F.3d 191, 201 (5th Cir. 1997).

In the Ninth and Tenth Circuits, however, "the state bears the burden of proving the adequacy of a state procedural bar." *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999); App. 8a. The Tenth Circuit, like the Ninth, implements this rule through a three-step burden-shifting framework. "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 [habeas] petitioner." *Hooks*, 184 F.3d at 1217. The challenger must make, "at a minimum, … specific allegations … as to the inadequacy of the state procedure." *Id.* If the challenger succeeds in putting the matter fairly at issue, the ultimate burden of persuasion shifts to the State. "The scope of the state's burden," however, is "measured by the specific claims of inadequacy put forth by the petitioner." *Id.*

As this case confirms, the Ninth Circuit has adopted the Tenth Circuit's basic framework. *See Bennett*, 322 F.3d at 585 (following *Hooks*); App. 8a. It has, however, modified that framework to increase the State's burden in two ways. First, the Ninth Cir-

cuit specifies that a habeas petitioner need make only a "'modest'" allegation of inadequacy to trigger the State's burden of proof—as, indeed, this case well illustrates. App. 8a. Second, although the decision below recites that, as under *Hooks*, the State's burden is "'measured by the specific claims of inadequacy put forth by the petitioner'" (*id*. at 15a), in practice it makes clear that the amount and kind of proof the court will demand from the State is not meaningfully tied to or limited by the challenger's specific showing. Simply "discredit[ing] the [habeas] petitioner's evidence" is not enough. *Id*.; *see also King v. LaMarque*, 464 F.3d 963, 967-968 (9th Cir. 2006) (State's "ultimate burden" remains the same "whether or not the petitioner identifies the correct basis upon which to challenge the adequacy of the rule").[9]

As this case demonstrates, placing the burden of proving "adequacy" on the State can subject the State to a litigation demand grossly disproportionate to the purposes, and proper starting presumptions, of the inquiry. Lee claimed she should be exempt from following *Dixon* because, on a single day (which she chose for comparison with no explanation, *see* App. 54a), the California Supreme Court denied state

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[9] Other circuits have adopted no clear burden-placing rule. *See McNeill*, 476 F.3d at 219 (King, J., concurring in part) (Fourth Circuit has not "squarely address[ed]" the issue, and implications of its decisions "are not entirely compatible" with each other); *Risdal v. Iowa*, 243 F. Supp. 2d 970, 973 (S.D. Iowa 2003) ("it does not appear that the Eighth Circuit … has addressed this issue"); *compare Cotto v. Herbert*, 331 F.3d 217, 238 n.9 (2d Cir. 2003) ("assum[ing] without deciding that the state bears the burden of proving the adequacy of the state procedural rule") *with Larrea v. Bennett*, 2002 WL 1173564, at *12 & n.14 (S.D.N.Y. 2002) (reading *Wedra v. Lefevre*, 988 F.2d 334, 340 (2d Cir. 1993), as "impl[ying] that the [habeas] petitioner had the burden of proving inadequacy").

habeas relief in nine cases, out of a total of 240 such denials that day, in which she said the court could have invoked *Dixon* but instead ruled on other grounds. Under the decision below, that perfunctory showing imposed on the State a heavy burden to prove the "adequacy" of its procedural rule. 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. *See* App. 17a-18a.

That requirement departs completely from any sound model of federal habeas review. The California Supreme Court "rules on a staggering number of habeas petitions each year." *Martin*, 562 U.S. at 312-313.[10] Many are decided in summary orders—a salutary practice that "enable[s] a state judiciary to concentrate its resources on the cases where opinions are most needed." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). A brief dispositive order may cite precedents showing that a procedural bar was found to apply. Indeed, the State's evidence here showed that the Court expressly invoked *Dixon* in approximately 12% of a large and relevant sample of cases. When, instead, the court acts completely without comment, its silent denial may "indicate th[e] court has considered and rejected the merits of each claim raised." *In*

[10] *See* Judicial Council of California, 2015 Court Statistics Report, at 10, available at http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf (noting annual California Supreme Court dispositions of original habeas petitions ranging from 2,285 to 3,759 in recent years). The California Supreme Court also disposes each year of several hundred additional petitions for review in which a prisoner seeks review of a lower court's denial of habeas relief. *Id.* at 7.

re Reno, 55 Cal. 4th 428, 447 (2012). That is exactly what this Court presumes. *Richter*, 562 U.S. at 99-100. The entire system is rational, clear, and fair. There is no basis for the court below to require state lawyers, in order to justify respect for the *Dixon* procedural bar in later federal proceedings, to examine the underlying files in thousands of silent-denial cases to determine whether the state court could have invoked a *Dixon* bar—and then to hold *against* the State, on a theory of "inconsistency," any case in which the court instead gave a habeas petitioner the benefit of review on the merits. *See Martin*, 562 U.S. at 319.

The habeas "adequacy" doctrine is designed to prevent a state court's reliance on a procedural bar from blocking later review of a federal claim on the merits in rare circumstances in which application of the state rule involved unfair surprise, arbitrariness or irrationality, or discrimination against federal rights or claims. *See, e.g.*, *Martin*, 562 U.S. at 311, 320 n.7, 321. Lee has never contended that application of the *Dixon* bar here involved any such thing. The court below thus erred in applying the doctrine in this case, and in particular in requiring the State to prove that a common and regularly invoked procedural bar rule was "adequate" for federal habeas purpose, rather than requiring Lee to prove that it was not. Procedural defaults affect the scope and outcome of a large proportion of federal habeas cases, and the conflict in the lower courts on the burden-of-proof question warrants resolution by this Court.[11]

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[11] *See* King & Hoffman, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 Miss. L.J. 433, 440 (2008) (almost 20% of non-capital federal habeas cases involve a procedurally defaulted claim).

3. The questions in this case implicate fundamental principles and interests at the heart of this Court's habeas jurisprudence. As this Court has observed, in the structure of federal habeas law the exhaustion requirement, respect for state procedural bars, and the statutory deference to merits decisions required under 28 U.S.C. § 2254(d) are all closely related and complementary. *Martin*, 562 U.S. at 315-316; *Richter*, 562 U.S. at 103. All three work to help "ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Richter*, 562 U.S. at 103.

Here, for example, if a defendant fails to raise a claim on direct appeal, and the claim is later raised but deemed *Dixon*-barred (that is, not within any recognized exception) on state collateral review, the proper outcome is that the claim has been forfeited by failure to raise it at the appropriate time to permit efficient and orderly review. Under the decision below, however, such a claim could instead be properly presented in federal habeas proceedings—in the first instance, and for review *de novo* rather than under the deferential standard that § 2254(d) would impose if the claim had been properly presented to the state courts and resolved on the merits on direct appeal. A ruling that permits (or even encourages) litigants to withhold claims from the state courts in their primary appeal is inconsistent with ensuring that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Richter*, 562 U.S. at 103.

The court of appeals' opinion also implicates the fundamental principle that federal courts should not seek to dictate how state courts manage their operations. The court of appeals faulted California's *Dixon* rule because the State did not prove that it was applied with "mechanical[]" consistency. App. 11a. But

this Court has expressed concern that "if forced to choose, many States would opt for mandatory rules to avoid the high costs that come with plenary federal review." *Kindler*, 558 U.S. at 61. That "would be particularly unfortunate for criminal defendants, who would lose the opportunity to argue that a procedural default should be excused through the exercise of judicial discretion." *Id*. It is not a choice that federal habeas courts should seek to foist on their state counterparts. *See also Martin*, 562 U.S. at 311 (California should not be forced to choose between implementing an inflexible deadline "or preserving the flexibility of current practice, 'but only at the cost of undermining the finality of state court judgments'"). Similarly, the decision below interferes with state court processes by effectively directing that state courts forgo unexplained denials in state habeas cases and, as a substantive matter, always apply an available procedural bar even if it would be more efficient in a particular case to proceed directly to the merits. That conflicts not only with *Martin*'s express approval of taking "the easier path" to resolve any given case, 562 U.S. at 319, but also with this Court's recognition of the important role summary dispositions can play in busy state systems, *see Richter*, 562 U.S. at 99; *see also Johnson v. Williams*, 133 S. Ct. 1088, 1095 (2013) ("federal courts have no authority to impose mandatory opinion-writing standards on state courts").[12]

The questions presented in this case implicate the States' critical interest in enforcing reasonable procedural rules in the state courts. "A State's procedural rules are of vital importance to the orderly

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[12] *Cf. Carey v. Saffold*, 536 U.S. 214, 225-226 (2002) (exploring reasons why a court may sometimes "address the merits of a claim that it believes was presented in an untimely way").

administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). Of particular relevance here, the Court has clearly recognized the important purposes served by rules "requir[ing] the defendant initially to raise his legal claims on appeal rather than on post-conviction review." *Murray v. Carrier*, 477 U.S. 478, 490 (1986). Such rules

> afford[] 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.... This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing 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 490-491 (quoting *Reed v. Ross*, 468 U.S. 1, 10-11 (1984)).[13]

The importance of these purposes is presumably why many other States also have rules that, like *Dixon*, require claims to be brought on direct appeal, while excusing noncompliance in appropriate circum-

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[13] The California Supreme Court has described *Dixon* as "speed[ing] resolution of claims, avoid[ing] delay, ... encourage[ing] the finality of judgments," and allowing resolution of claims while "the evidence is relatively fresh," before "'evidence may have disappeared and witnesses may have become unavailable.'" *In re Reno*, 55 Cal. 4th at 490.

stances.[14] "Normally, in [this Court's] review of state-court judgments, such rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim." *Sanchez-Llamas*, 548 U.S. at 351; *see*, *e.g.*, *Bradshaw v. Richey*, 546 U.S. 74, 79 (2005) (enforcing Ohio rule); *Dug-*

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[14] *See*, *e.g.*, Mich. Ct. R. 6.508(D) (barring postconviction relief for claims which "could have been raised on appeal," but noting exceptions for "jurisdictional defects," cases where there is a "significant possibility that the defendant is innocent," and cases where the defendant demonstrates "good cause" and "actual prejudice"); N.J. R. Ct. 3:22-4(a) (barring postconviction claims that were not raised on direct appeal, but with exceptions for, *inter alia*, claims based on a "new rule of [state or federal] constitutional law" or cases where enforcement of the bar "would result in fundamental injustice"); N.C. Gen. Stat. § 15A-1419(a)(3) & (b)(2) (barring postconviction relief for claim that could have been raised on direct appeal, but stating exception where "failure to consider the defendant's claim will result in a fundamental miscarriage of justice"); Idaho Code § 19-4901(b) (postconviction review not available for "[a]ny issue which could have been raised on direct appeal," unless, *inter alia*, "the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt"); Me. Stat. tit. 15, §§ 2128(1), 2128-A (Maine rule barring postconviction review of errors that "could have been raised on a direct appeal," but incorporating any exceptions that would apply "in a federal habeas corpus proceeding"); *Townsend v. State*, 723 N.W.2d 14, 18 (Minn. 2006) (recounting Minnesota rule, which bars postconviction review of claims that were not raised on direct appeal but which does not apply to cases where the claim would have been novel at the time of direct appeal, or where "'fairness'" requires review and the petitioner's default was not "'deliberate[] and inexcusabl[e]'"). *See also*, *e.g.*, Fla. R. Crim. Proc. 3.850(c); Haw. R. Penal P. 40(a)(3); La. Code Crim. Proc. art. 930.4(C); Nev. Rev. Stat. § 34.810(1)(b)(2); N.Y. Crim. Proc. Law § 440.10(2)(c); *State v. Perry*, 10 Ohio St. 2d 175, 182 (1967); Okla. Stat. tit. 22, § 1089(C)(1); Tenn. Code Ann. § 40-30-106(g); Utah Code Ann. § 78B-9-106(1)(c); *Slayton v. Parrigan*, 215 Va. 27, 30 (1974). *See also* p. 15-16, *supra* (noting similar federal rule).

ger v. Adams, 489 U.S. 401, 408-409 (1989) (enforcing Florida rule); *Teague v. Lane*, 489 U.S. 288, 297-298 (1989) (enforcing Ohio rule); *Murray*, 477 U.S. at 489-490 (enforcing Virginia rule). The court of appeals' conclusion that such restrictions did not apply to its review of Lee's claims cannot be reconciled either with this Court's precedents or with basic principles of federal habeas jurisprudence. Its decision warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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