No. 09-996

IN THE

Supreme Court of the United States

JAMES WALKER, Warden, *et al.*,

Petitioners,

vs.

CHARLES W. MARTIN,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

2. Should the varying rubrics used to express when a state procedural default rule is adequate be replaced with a single standard of fair notice of the rule and reasonable opportunity to make the claim?

3. On habeas corpus, as distinguished from direct review, does the adequacy inquiry provide sufficient marginal benefit to justify its litigation cost, or should it be abandoned altogether, recognizing that the cause-and-prejudice exception covers the relevant policy considerations?

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TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 6

Argument 6

I

The present confused state of procedural default law causes state rules to be declared "inadequate" without any basis in federal policy 6

II

An obsession with consistent application creates a perverse incentive for states to enact rigid, harsh rules to the detriment of criminal defendants . . 10

III

Given the *Sykes* and *Carrier* exceptions to the procedural default rule, the entire "adequacy" inquiry is unnecessary on habeas and a source of unjustified expense and delay 13

Conclusion 16

TABLE OF AUTHORITIES

Cases

Barefoot v. Estelle, 463 U. S. 880, 103 S. Ct. 3383,
77 L. Ed. 2d 1090 (1983) 12

Beard v. Kindler, 558 U. S. __, 130 S. Ct. 612,
175 L. Ed. 2d 417 (2009) 7, 8, 10, 11

Bennett v. Mueller, 322 F. 3d 573 (CA9 2003) 5

Brecht v. Abrahamson, 507 U. S. 619, 113 S. Ct. 1710,
123 L. Ed. 2d 353 (1993) 15

Carey v. Saffold, 536 U. S. 214, 122 S. Ct. 2134,
153 L. Ed. 2d 260 (2002) 3, 8, 9

Coleman v. Thompson, 501 U. S. 722, 111 S. Ct. 2546,
115 L. Ed. 2d 640 (1991) 13, 14

Dretke v. Haley, 541 U. S. 386, 124 S. Ct. 1847,
158 L. Ed. 2d 659 (2004) 13, 14

House v. Bell, 547 U. S. 518, 126 S. Ct. 2064,
165 L. Ed. 2d 1 (2006) 14

In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509,
855 P. 2d 729 (1993) 4

In re Little, No. D047468, 2008 WL 142832
(Cal. Ct. App., Jan. 16, 2008) 11, 12

In re Robbins, 18 Cal. 4th 770, 77 Cal. Rptr. 2d 153,
959 P. 2d 311 (1998) 4

King v. LaMarque, 464 F. 3d 963 (CA9 2006) 5

Lee v. Kemna, 534 U. S. 362, 122 S. Ct. 877,
151 L. Ed. 2d 820 (2002) 14

Lewis v. Jeffers, 497 U. S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990) 8

Lonchar v. Thomas, 517 U. S. 314, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996) 7

Murray v. Carrier, 477 U. S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) 14

O'Sullivan v. Boerckel, 526 U. S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) 14

People v. Fairbanks, No. C047810, 2006 WL 950267 (Cal. Ct. App., Apr. 11, 2006) 11, 12

People v. Martin, No. C022364 (Cal. App. 1997) (unpublished) 2, 3

People v. Martin, No. S059580 (Cal., Apr. 16, 1997) (unpublished) 3

Stewart v. Smith, 536 U. S. 856, 122 S. Ct. 2578, 153 L. Ed. 2d 762 (2002) 13

Stone v. Powell, 428 U. S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) 9

Sullivan v. Little Hunting Park, Inc., 396 U. S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969) 9

Townsend v. Knowles, 562 F. 3d 1200 (CA9 2009) 5, 7, 8

Wainwright v. Sykes, 433 U. S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) 14

United States Statutes

18 U. S. C. § 3771 15

28 U. S. C. § 2254(b) 14

28 U. S. C. § 2255(f) 12

Antiterrorism and Effective Death Penalty Act of
1996, Title I, 110 Stat. 1214 (1996) 7

Rules of Court

28 U. S. C. § 2254, former Rule 9(a) (1994 ed.) 7

28 U. S. C. § 2255, former Rule 9(a) (1994 ed.) 7

State Statutes

Ariz. Rev. Stat. § 13-4234 12

Mont. Code § 46-21-102 7

Va. Code § 8.01-654.1 12

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Movement, 61 Tenn. L. Rev. 869 (1994) 13

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65 Colum. L. Rev. 943 (1965) 9

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Limitations on the Federal Habeas Corpus

Petitions of State Prisoners,
70 S. Cal. L. Rev. 1513 (1997) 7

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The Court of Appeals for the Ninth Circuit has adopted an extreme approach to determining the "adequacy" of state rules for the purpose of the procedural default doctrine. Even though the California Supreme Court clarified and explained the state timeliness rule 17 years ago, the Ninth Circuit has declared it inadequate on the ground that the state has not proved it is applied with the degree of uniformity that the Ninth Circuit deems necessary. That degree would serve no valid purpose and would ultimately be detrimental to criminal defendants.

The delay and expense that come from needless litigation of the "adequacy" issue and from needless litigation of defaulted claims are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On December 7, 1986, children playing along the banks of the Sacramento River discovered the body of Charles Stapleton. *People* v. *Martin*, No. C022364 (Cal. App. 1997), p. 2 (unpublished).[2] He had been stabbed eight times in the neck, back, and throat. *Ibid.* His skull was fractured. *Ibid.* In the same area, the children also found the wallet of Charles W. Martin. Respondent's Motion for Summary Dismissal in *Martin* v. *Hubbard*, No. Civ. S-99-0223 (ED Cal., Nov. 8, 2007), p. 10 ("MSD").[3]

Three days later, during a taped interview with police, Martin's girlfriend, Bonnie Permenter, made

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2. Available at http://www.cjlf.org/files/MartinCalApp1997.pdf.

3. Available at http://www.cjlf.org/files/MartinMotionSumDiss.pdf.

statements that incriminated Martin. *People* v. *Martin*, *supra*, at 2. Martin disappeared. *Id.*, at 3.

Martin was arrested in Florida eight years later. *Ibid*. A jury convicted him of first-degree murder and robbery in 1995. *Id.*, at 1. He was sentenced to life without the possibility of parole. MSD 2.

Martin appealed to the California Court of Appeal raising only a state-law hearsay claim. That court affirmed. See *People* v. *Martin*, *supra*, at 9. Martin filed a petition for discretionary review with the California Supreme Court, also raising the same claim. See Magistrate Judge's Findings and Recommendations (ED Cal., Feb. 1, 2001), p. 3 ("MJFR").[4] That court denied review. *People* v. *Martin*, No. S059580 (Cal., Apr. 16, 1997) (unpublished); MSD 3. The case was final on direct review for the purpose of federal habeas law on July 15, 1997.

Seven months later, Martin filed a habeas corpus petition in the state Superior Court. See MSD 3. This petition contained an ineffective assistance claim, along with claims regarding the jury pool and jury instructions. See *ibid*. When this petition was denied, Martin filed a similar petition in the Court of Appeal.[5] After denial of this petition, Martin filed a petition in the California Supreme Court, which was denied January 27, 1999. See MSD 4.

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4. Available at http://www.cjlf.org/files/MartinFindings010201.pdf.

5. In California, there is no appeal from denial of a habeas petition, and review is accomplished with a successive petition to a higher court. See *Carey* v. *Saffold*, 536 U. S. 214, 221 (2002). This was once common practice throughout the United States, although it is now unusual. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Carey* v. *Saffold*, No. 01-301, pp. 11-12, http://www.cjlf.org/pdf/Saffold.pdf.

Martin then filed a habeas corpus petition in federal court. See MSD 4. In 2001, the Magistrate Judge found that the ineffective assistance allegations of the second amended petition were sufficiently different from those filed in state court to constitute a new and unexhausted claim, and that a sufficiency of the evidence claim was also unexhausted. See MJFR 3-6.[6] This holding was followed by an amended petition of exhausted claims only and an abeyance order to allow petitioner to return to state court to exhaust, entered on July 9, 2001. See App. to Pet. for Cert. 33-34.

On March 18, 2002, nearly *five years* after the case was final on direct review, Martin filed a new state habeas petition in the California Supreme Court. This petition raised, for the first time in state court, the allegations that are the subject of the present petition. On September 11, 2002, the court denied this petition with citations to its precedents on untimeliness of habeas petitions, *In re Clark*, 5 Cal. 4th 750 (1993) and *In re Robbins*, 18 Cal. 4th 770, 780 (1998). App. to Pet. for Cert. 60.

Upon return to federal court, these claims were dismissed as procedurally defaulted. The Magistrate Judge found that the state procedural default rule was adequate, and the petitioner did not claim that the cause-and-prejudice or actual-innocence exceptions applied. See App. to Pet. for Cert. 54-57. The District Court adopted the Magistrate Judge's findings. On the question of procedural default, the District Court

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6. Whether different alleged shortcomings of counsel are separate claims or one claim is an unresolved question. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Bell* v. *Kelly*, No. 07-1223, pp. 13-23, http://www.cjlf.org/briefs/BellE.pdf. Because the holding that they were different claims was not disputed in the Court of Appeals, we will assume it to be correct for the purpose of this case.

declined to "do as petitioner urges and interpret *Bennett* v. *Mueller*[7] to require respondents to sort through thousands of noncapital habeas petitions to prove a negative where petitioner has failed to point to any specific cases wherein the rule was inconsistently applied." App. to Pet. for Cert. 27.

The Court of Appeals for the Ninth Circuit reversed based on another case decided the same day, *King* v. *LaMarque*, 464 F. 3d 963 (CA9 2006). App. to Pet. for Cert. 21. "On remand, in order to be able to maintain its affirmative defense of procedural default, the government must show that cases after *In re Clark*, 855 P. 2d 729 (Cal. 1993), had sufficiently clarified the rule and that it had been consistently applied." *Ibid*.

On remand, the Magistrate Judge found that the state had indeed met its burden, App. to Pet. for Cert. 6-19, and the District Court adopted the findings and dismissed the action. App. to Pet. for Cert. 4-5. The Court of Appeals reversed again, based on its recent decision in *Townsend* v. *Knowles*, 562 F. 3d 1200, 1207 (CA9 2009). App. to Pet. for Cert. 1-3. Because California has chosen to use a general standard of "substantial delay" rather than a rigid cutoff, and because that standard has not been "firmly defined" (*i.e.*, made rigid) through case law, the state rule is deemed "inadequate." See App. to Pet. for Cert. 3.

The warden's petition for certiorari was docketed in this Court on February 23, 2010.

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7. 322 F. 3d 573 (CA9 2003).

SUMMARY OF ARGUMENT

California's timeliness requirement was declared "inadequate" in this case because it is an open-ended rule rather than a rigid statute of limitations. Yet the federal rule was similarly open-ended before 1996, and such flexibility may be better for criminal defendants. Insisting that states go to rigid cut-offs before their rules are considered "adequate" serves no federal policy.

Indeed, the Ninth Circuit's obsession with consistency, achievable only through rigidity, creates a perverse incentive. This Court recognized the illogic of such a rule in the discretionary/mandatory context in *Beard* v. *Kindler*. The same reasoning applies for time limitations, and other kinds of rules as well. The time is long overdue for placing the entire "adequate state ground" inquiry under a single standard of fair notice and reasonable opportunity.

For habeas, as distinguished from direct review, there is no need for a separate adequacy inquiry at all. The "cause and prejudice" and "miscarriage of justice" exceptions cover the ground of when federal policy favors reaching the merits despite a default. The separate adequacy inquiry provides little or no marginal benefit and comes at a high cost of needless litigation.

ARGUMENT

I. The present confused state of procedural default law causes state rules to be declared "inadequate" without any basis in federal policy.

"[I]t would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts."

Beard v. *Kindler*, 558 U. S. __, 130 S. Ct. 612, 618, 175 L. Ed. 2d 417, 425 (2009). For 20 years, federal courts had rules of court providing for dismissal of delayed petitions under certain conditions with no precise definition of what constituted a delayed petition. See 28 U. S. C. § 2254, former Rule 9(a) (1994 ed.) (state prisoner cases); 28 U. S. C. § 2255, former Rule 9(a) (1994 ed.) (federal prisoner cases). Despite the lack of a bright line, it was apparent under the former rule that a petition delayed for a time comparable to the present case was a delayed petition. See *Lonchar* v. *Thomas*, 517 U. S. 314, 317-318 (1996) (seven years from completion of direct review to first federal habeas, during two of which Lonchar's state habeas was pending); *id.*, at 326-327 (noting petition was a "delayed petition" and the question was the existence of prejudice).

When Congress supplanted the open-ended delay rule with a fixed statute of limitations,[8] the change produced much wailing from commentators sympathetic to habeas petitioners. See, *e.g.*, Sessions, Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners, 70 S. Cal. L. Rev. 1513, 1568 (1997). While many states followed Congress's lead, see, *e.g.*, Mont. Code § 46-21-102, California has stayed with the pre-AEDPA model. This is the kind of policy choice that states should be permitted to make in a federal system. Yet the lack of a precise definition of "substantial delays" renders the California rule "inadequate" in the Ninth Circuit's view. See *Townsend* v. *Knowles*, 562 F. 3d 1200, 1208 (CA9 2009).

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8. This change was made, among many others in habeas law, by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Title I, 110 Stat. 1214, 1217-1221.

What legitimate federal policy is served by declaring a state rule to be "inadequate" merely because the state has chosen to make the same policy choice that the federal courts followed for decades? The legitimate reasons for declaring a state rule to be inadequate are to prevent a state from changing the rules without adequate notice so as to trap litigants who "have in good faith complied with existing state procedural law" and to prevent a state from imposing "novel procedural requirements . . . for the purpose of evading compliance with a federal standard." *Kindler*, 130 S. Ct., at 619, 175 L. Ed. 2d, at 426 (Kennedy, J., concurring). No trap or evasion even arguably occurred in the present case.

The Ninth Circuit's insistence that the state must nail down its rules in detail so that they are "certain," see *Knowles*, 562 F. 3d, at 1207, seems to spring from a desire "to peer majestically over the [state] court's shoulder so that [they] might second-guess its" application of its own rules. Cf. *Lewis* v. *Jeffers*, 497 U. S. 764, 780-781 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)). In the absence of a procedural trap, an evasion of federal law, or at least probable cause to suspect either of these, there is simply no policy justification for such intense federal court scrutiny of state procedures.

The Ninth Circuit's hypersuspicion of state procedural holdings contrasts sharply with the holding of this Court in a closely related context in *Carey* v. *Saffold*, 536 U. S. 214 (2002). For the purpose of implementing the federal statute of limitation's tolling provision, this Court directed that the state court's decision regarding whether a petition was timely filed should be accepted as conclusive without further inquiry. "If the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,' *that would be the*

end of the matter, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.*, at 226 (emphasis added). There was a time when suspicion was justified that state courts were misusing procedural rules to evade federal law and deny civil rights. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in *Philip Morris USA* v. *Williams*, No. 07-1216, pp. 8-13, http://www.cjlf.org/briefs/PhilipMorris.pdf ("CJLF *Philip Morris* Brief"). As *Saffold* implies, that time is long past. See also *Stone* v. *Powell*, 428 U. S. 465, 493-494, n. 35 (1976). A state court's decision to enforce a procedural default rule, find it inapplicable, or find good cause to waive it should be presumed to be in good faith in the absence of solid evidence to the contrary. The mere fact that the state rules have not been specified with such mechanical rigidity as to predetermine the outcome in every case is not sufficient to declare the rule inadequate.

This Court's jurisprudence of "adequate state grounds" has been plagued by imprecise language, as many commentators have noted over many years. See, *e.g.*, R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003); Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965); see also CJLF *Philip Morris* Brief 8-13. That imprecise language is responsible in part for the hostility to state rules of procedure that we see in too many federal habeas decisions.

Kindler took a step in the right direction, effectively disapproving problematic and unnecessary language in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969). See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026, pp. 385-386 (2d ed. 1996) (critique of *Sullivan*). However, the step was

small and the holding narrow. See *Kindler*, 130 S. Ct., at 619, 175 L. Ed. 2d, at 425. A larger step is sorely needed. The standard for deciding when a state ground is "inadequate" needs to be tailored to better fit the policies underlying the doctrine.

II. An obsession with consistent application creates a perverse incentive for states to enact rigid, harsh rules to the detriment of criminal defendants.

In rejecting the notion that discretionary procedural default rules are "inadequate," *Kindler* noted the perverse incentives that such a doctrine would create.

> "We are told that, if forced to choose, many States would opt for mandatory rules to avoid the high costs that come with plenary federal review. See, *e.g.*, Brief for State of California et al. as *Amici Curiae* 19; Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 14. That would be unfortunate in many cases, as discretionary rules are often desirable. In some circumstances, for example, the factors facing trial courts 'are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result.' *United States* v. *McCoy*, 517 F. 2d 41, 44 (CA7) (Stevens, J.), cert. denied, 423 U. S. 895 (1975); see also Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 760–761 (1982). The result 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. See *Henry* v. *Mississippi*, 379 U. S. 443, 463, n. 3 (1965) (Harlan, J., dissenting) ('If, in order to insulate its

> decisions from reversal by this Court, a state court must strip itself of the discretionary power to differentiate between different sets of circumstances, the [adequate state ground] rule operates in a most perverse way')." 558 U. S. __, 130 S. Ct., at 618, 175 L. Ed. 2d, at 424 (slip op., at 7-8).

The same principle applies to fixed versus open-ended time limitations. In holding that California decisions applying the timeliness rule "do not form a coherent pattern of consistent application," App. to Pet. for Cert. 3, the Court of Appeals cited two unpublished intermediate appellate court decisions. "*Compare, e.g., In re Little*, No. D047468, 2008 WL 142832 (Cal. Ct. App. Jan. 16, 2008) (fourteen months not an unreasonable delay), *with People v. Fairbanks*, No. C047810, 2006 WL 950267 (Cal. Ct. App. Apr. 11, 2006) (one year delay substantial and untimely)." *Ibid*. Very well, we will compare them.

Little does *not* hold that 14 months is *per se* a reasonable delay. It holds, in footnote 6, "*In the circumstances of this case*, we conclude Little did not unreasonably delay . . . ." (Emphasis added). The court does not elaborate on what circumstances led it to that conclusion. In an unpublished decision that resolves this procedural point in favor of the petitioner but ultimately denies the petition on the merits, it is understandable that the court did not expend limited resources to belabor the point. In *Fairbanks*, on the other hand, the court notes, while holding that one year was an excessive delay, that the petitioner had made no showing whatever of any cause for the delay. *Fairbanks*, *supra*, Part I, last para. Despite the default, the court went on to alternatively reject the claim on the merits. *Id*., at Parts II, III.

These cases do not show courts setting traps for unwary petitioners, discriminating against the assertion of federal rights, or even arbitrarily switching default rules on and off. These are two cases close to the borderline of what would be considered an excessive delay. Cf. 28 U. S. C. § 2255(f) (one year). A flexible standard allowed one of the courts to make a more generous allowance in circumstances it thought warranted an extension, while the other did not do so where it found no such circumstances. The decisions may also have been affected by the magnitude of the consequences at stake. Little was sentenced to life in prison, while Fairbanks had lost her driving privileges.

If the state must replace this flexible standard with a fixed one in order to have it respected in federal court, what would that standard be? It would likely be a rigid rule of one year or less, perhaps much less. See, *e.g.*, Ariz. Rev. Stat. § 13-4234(C), (G) (150 days from judgment or 90 days from affirmance in noncapital cases; limit is jurisdictional); Va. Code § 8.01-654.1 (60 days from denial of certiorari or 120 days from appointment of counsel in capital cases). No federal policy supports giving states an incentive to adopt such rigid rules. On the contrary, it is better to encourage states to have flexible procedures that can take individual differences into account, so that state courts can review the merits first when it is appropriate to do so, and federal habeas can be reserved for its "secondary and limited" role. See *Barefoot* v. *Estelle*, 463 U. S. 880, 887 (1983).

The same principle applies to other default rules, including successive petition limitations and limits on claims which were or could have been raised on direct appeal. Across the board, the varying rubrics for what is an adequate state ground should be abandoned and replaced with a single standard: fair notice and a

reasonable opportunity. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Beard* v. *Kindler*, No. 08-992, pp. 6-29, http://www.cjlf.org/briefs/Kindler.pdf.

III. Given the *Sykes* and *Carrier* exceptions to the procedural default rule, the entire "adequacy" inquiry is unnecessary on habeas and a source of unjustified expense and delay.

This Court has implied that there is doubt whether the "independent" prong of the "adequate and independent state ground" rule applies to habeas at all. See *Coleman* v. *Thompson*, 501 U. S. 722, 741 (1991); see also *Stewart* v. *Smith*, 536 U. S. 856, 860 (2002) (*per curiam*). In light of the development of the "cause and prejudice" and "actual innocence" exceptions to the procedural default rule, it is worth asking whether the "adequacy" prong provides a sufficient marginal benefit to justify its cost.

The doctrine that a state procedural rule must be "independent of the federal question and adequate to support the judgment" in order to preclude federal review, *Coleman*, 501 U. S., at 729, developed in cases coming to this Court on direct review of state decisions, and it was fleshed out to its present form during the civil rights struggle of the 1950s and 1960s. The history is traced in Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 885-900 (1994). In this context the limitation is jurisdictional, see *Coleman*, *supra*, at 729, and the Court has no authority to devise exceptions on grounds of policy.

Habeas is different. The rule is not jurisdictional. See *Dretke* v. *Haley*, 541 U. S. 386, 392-393 (2004). Also, the procedural default rule in habeas serves the

additional purpose of preventing evasion of the exhaustion rule. See *id.*, at 392 ("corollary"); *Coleman*, 501 U. S., at 732; *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 848 (1999);[9] see also 28 U. S. C. § 2254(b) (exhaustion rule). For this nonjurisdictional rule, the Court has established exceptions based on its assessment of the balance of interests. See *House* v. *Bell*, 547 U. S. 518, 536 (2006). The two exceptions are "cause for the default and prejudice from the asserted error," *ibid.*, and new evidence of actual innocence that demonstrates "more likely than not any reasonable juror would have reasonable doubt." *Id.*, at 538; see also *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) (cause and prejudice); *Murray* v. *Carrier*, 477 U. S. 478, 495 (1986) (miscarriage of justice).

The marginal benefit of the adequacy inquiry on habeas lies in enabling a federal court to reach a meritorious claim where (1) a state procedural rule has been used to trap a defendant into forfeiting a federal right or a state court had invoked the rule to evade federal law, see *supra* at 8, and yet (2) on federal habeas the petitioner is unable to meet the cause-and-prejudice test. It is difficult to even imagine such a case. In *Lee* v. *Kemna*, 534 U. S. 362, 381-385 (2002), for example, the same factors that led this Court to declare the generally valid state rule to be inadequate as applied on the unusual facts of the case would have been sufficient to constitute "cause" for the *Sykes* rule.[10] The *Sykes* rule does have the additional prejudice element, but an error with no prejudice is not a ground for federal

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9. Arguably, this is the primary purpose of the procedural default rule in habeas. See *O'Sullivan*, *supra*, at 853-854 (Stevens, J., dissenting).

10. The Court refrained from expressly ruling on this point, *id.*, at 387, n. 17, but it seems obvious.

habeas relief in any event. See *Brecht* v. *Abrahamson*, 507 U. S. 619, 623 (1993).

While the separate adequacy inquiry provides little or no marginal benefit, it does so at a high marginal cost, particularly under the extreme version of the rule practiced by the Ninth Circuit. Instead of focusing on the merits of the case and whether the petitioner has already had a fair adjudication in state court, the federal court and counsel must engage in a bizarre exercise of combing through numerous state court dispositions of other cases. See Magistrate Judge's Findings and Recommendations, App. to Pet. for Cert. 17-18; District Court Order, App. to Pet. for Cert. 27 ("sort through thousands of noncapital habeas petitions").

In a world where resources are always limited and legitimate needs are always going unmet, it is a travesty to squander resources on this pointless litigation. The resulting delay contributes to the ongoing violation by the federal courts of crime victims' "right to proceedings free from unreasonable delay." See 18 U. S. C. §§ 3771(a)(7), (b)(2)(A). The *Sykes* and *Carrier* tests cover the ground on whether federal habeas policy requires reaching the merits despite a default in state court. *Amicus* therefore respectfully suggests that this Court consider whether to scrap the "adequacy" inquiry in habeas altogether.

CONCLUSION

The petition for writ of certiorari should be granted.

March, 2010

Respectfully submitted,

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