No. 09-996

In the Supreme Court of the United States

JAMES WALKER, WARDEN, ET AL., *Petitioner,*

v.

CHARLES W. MARTIN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner "substantially delayed" filing his habeas petition.

In federal habeas corpus proceedings, is such a state law "inadequate" to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove that its courts "consistently" exercised their discretion when applying the rule in other cases?

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As explained in the certiorari petition, the "adequacy" of state-law procedural-default rulings to bar claims in federal habeas corpus proceedings is an important question affecting state sovereignty and the finality of state judgments. See Sup. Ct. R. 10(a). And, as this Court recently observed in *Beard* v. *Kindler*, 130 S.Ct. 612, 619 (2009), there is a need to further clarify the rules governing "adequacy." This case represents a proper and timely vehicle for answering questions left pending after *Kindler*.

1. Respondent Martin, as does the Ninth Circuit, purports to acknowledge that state procedural-default rulings may be "adequate" even where the underlying state rule is discretionary and depends on "reasonable" conduct by the litigant. (Opp. 3; *Wood v. Hall*, 130 F.3d 373, 376 (9th Cir. 1997)). Yet, similar to the Ninth Circuit, Martin in the end would give such rulings no effect precisely because the state court's fact-bound exercises of discretion inevitably result in more real or perceived variance in application than would result from rigid or mechanical bright-line rules. This Court's recognition in *Kindler* of the legitimacy of discretion-based rules, however, necessarily leads to the conclusion that federal courts should not second-guess the case-specific applications of the state's discretionary procedural rulings. If discretionary rules are valid, their inevitable results must be valid too. Martin's and the Ninth Circuit's view, if accepted, ultimately would nullify *Kindler*'s endorsement of discretionary state decisions.

That result is demonstrable and illustrates the need for this Court's intervention. By second-guessing the state procedural decisions that involve discretionary judgments, the Ninth Circuit has nullified the entire effect of California's habeas corpus timeliness bar. See *Morales* v. *Calderon*, 85 F.3d 1387 (9th Cir. 1996); *Bennett* v. *Mueller*, 322 F.3d 573 (9th Cir. 2003); *King* v. *LaMarque*, 464 F.3d 963 (9th Cir. 2006); *Townsend* v. *Knowles*, 562 F.3d

1200 (9th Cir. 2009).[1] For the same reasons, the Ninth Circuit has also nullified enforcement in federal court of other California habeas corpus rules, such as the rule barring successive petitions and the rule against using habeas corpus as a substitute for direct appeals. See *Cooper* v. *Calderon*, 255 F.3d 1104, 1111 (9th Cir. 2001); *Fields* v. *Calderon*, 125 F.3d 757, 765 (9th Cir. 1997). Martin has not provided any citation to Ninth Circuit authority which shows any softening of this refusal to honor the state's procedural rules.

Further, as suggested in Justice Kennedy's concurring opinion in *Kindler*, if a state procedural rule must be fixed in all of its particulars before it might be honored in federal court, the state courts would be deprived of the same case-law decisional methodology appropriately relied upon by the federal bench. Moreover, alleged or perceived variation in results on account of judicial discretion can hardly prejudice an individual litigant, for it is that very discretion which may allow him to avoid what might otherwise be seen as a harsh result required by a rigid rule. And the "cause and prejudice" safety valve guards against miscarriages of justice in any event.

2. Martin argues that California's timeliness rule is atypical because it is discretionary rather than fixed. Opp. 2-3. However, although many states have fixed deadlines for the filing of collateral habeas corpus challenges, nearly all of these states have discretionary exceptions to their rules. Just because California chooses to exercise its discretion on one side of the line, while the other states exercise their discretion on the other side of the line, does not make the fundamental nature of the exercise of that discretion different at all. Since the majority of states have discretion built into their timeliness

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[1] Now that the Ninth Circuit has in place several published opinions which have in effect killed California's habeas corpus timeliness bar, further published opinions are unlikely. This explains why the Ninth Circuit used a memorandum opinion to reject California's time bar here.

analyzes[2], this case is particularly appropriate to

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[2] See, e.g., Ala. Crim. Pro. R. 32, 35 ("good cause" and "diligence" standards for second-appeal and successive petitions); Colo. R. Crim. Pro. 35(c)(2) ("interest of justice"); *People* v. *Scheer*, 184 Colo. 15, 20, 518 P.2d 833, 835 (1974) ("special circumstances" excusing successive petition); Colo. Rev. Stats. Ann. § 16-5-402(1) ("justifiable excuse" or "excusable neglect"' for statute-of-limitations violation); Conn. Practice Book § 23-29(3) (successive-petition bar inapplicable for claim not "reasonably available" earlier); Del. Superior Ct. Crim R. 61(i)(2, 5) ("cause and prejudice" and "fundamental miscarriage of justice" exceptions to successive-petition bar); Fla. R. Crim. Pro. 3.850(b) (limitations-period bar excused for claim undiscovered despite "diligence"); Ga. Stats. § 9-14-47.1 (successive-petition bar lifted if facts could not "reasonably" have been asserted in first petition); Hawaii Penal R. 40(a) ("extraordinary circumstances" for second petition); Idaho Code §§ 19-4901(b), 19-4908 ("reliability" and "diligence" components of exception to no-second-appeal rule; "insufficient reason" precludes successive petition); 725 Ill. L. C. S. § 5/122-1 ("no culpable negligence" and "fundamental fairness" exceptions to statue-of-limitations and successive-petition rules); Indiana Post-Conviction R. PC 1(8) ("sufficient reason" for second petition); Iowa Code Ann. § 822.8 ("sufficient reason" exception for successive petition); Kan. Stats. Ann. § 60-1507(c) (court not "required" to consider successive petition); Ky. R. Crim. Pro. 11.42(10) (limitations-period bar lifted for facts defendant could not "reasonably" have known); La. Crim. Pro. Code, Art. 930.4 ("interests of justice" exception to no-second-appeal rule; "inexcusably omitted" standard for successive petitions); 15 Me. Rev. Stats. Ann. § 2128 (no second appeal unless "excusable"); Md. Code Crim. Pro. 7-103, 7-104 ("interest of justice" exception to successive-petition rule; "extraordinary cause" exception for statute of limitations); Mass. R. Crim. Pro. 30(c)(2) (judicial "discretion" to allow successive petition); *Spears* v. *State*, 725 N.W.2d 696, 700 (Minn. 2006) (limited-situation "fairness" exception for successive-petition and second-appeal procedural-bars if default was not deliberate and "inexcusable."); Miss. Stats. § 99-39-21 ("cause and prejudice" requirement for second appeal); Mont. Code Ann. § 46-21-105 (no successive petition unless claims "could not reasonably have been raised" in first petition); Nev. Rev. Stats. § 34.724 (statute-of-limitations bar lifted where delay not defendant's "fault"); N.J. R. of Ct. 3:22-4 (successive-petition and second-appeal (continued...)

afford needed guidance with respect to honoring the procedural rules of many states.

Next, Martin posits that "unexplained" denials of habeas corpus petitions by California courts create uncertainty about whether the ruling is based on the merits or on procedural default. Opp. 4. But California courts and the Ninth Circuit have made it clear that such an unexplained denial is an adjudication on the merits and that no procedural bar was contemplated. See, *Griffey v. Lindsey*, 345 F.3d 1058, 1066, vacated as moot, 349 F.3d 1157 (9th Cir. 2003); *Visciotti v. Woodford*, 288 F.3d 1097, 1104-05 (9th Cir.), rev'd on other grounds, 537 U.S. 19 (2002); *Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992); *Harris v. Superior Court*, 500 F.2d 1124, 1128 (9th Cir. 1974) (en banc); see *In re Robbins*, 18 Cal.4th 770, 814, n. 34 (1998); *People v. Duvall*, 9 Cal.4th 464, 475 (1995); *People v. Romero*, 8 Cal.4th 728, 737-38 (1994); *In re Clark*, 5 Cal.4th 750, 768-70 (1993).

Conversely—and somewhat inconsistently—Martin complains that state courts often deny petitions with only a citation to *Robbins* or to *Clark*. Opp. 4. But the California Supreme Court has explained that such citations mean that the petition is being rejected on the grounds that it is untimely. *Robbins*, 18 Cal.4th at 814, n. 34. The state court should not have to issue any further clarification. Given the shear volume of habeas corpus petitions addressed yearly in California [3], it would waste

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bars lifted for "fundamental injustice"); N.Y. Crim. Pro. L. § 440.10(c) ("interest of justice" discretion to lift successive-petition bar); Vt. Stats. Ann. § 7134 (court "not required to entertain successive petitions"); Wisc. Stats. § 974.06(4) (no successive post-conviction motions unless "sufficient reason" shown); Wash. Rev. Code § 10.73.140 (successive petitions barred unless "good cause" shown why not raised earlier"); see also Ohio Rev. Code § 2953.23.

[3] State courts in California dispose of nearly 20,000 criminal habeas corpus petitions each year. 2009 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS. (continued...)

precious judicial resources if the State were required to offer a fully explicated opinion on every one.

Martin suggests that his view of the law does not offend comity because, he suggests, the federal court should not ignore a state procedural ruling unless it constitutes an abuse of discretion. Opp. 7. But federal review of abuse-of-discretion questions necessarily entangles the federal court in untenable—and, as illustrated in this case, wasteful—second-guessing of state-law decisions on matters of state law. In any event, the Ninth Circuit's approach in actual effect presumptively treats the California courts, without supporting evidence, as if they had abused their discretion or exercised it unfairly.

3. In this case, Martin was on fair notice of the requirement that he bring his habeas corpus claims to the state high court without substantial unexplained delay. And he was provided with a fair opportunity to bring all of his claims during his first state habeas petition. But he provided no proper justification for why he waited years to advance claims that had been knowable at the time of his trial and direct appeal. It hardly could be unconstitutionally arbitrary for the state court to have deemed his unreasonably-delayed claims to have been defaulted. So there is no good reason for the federal court to dishonor the state procedural ruling.

If there ever might have been a time for especially critical skepticism of state-court discretionary procedural rules and rulings, that time has long passed. The Ninth Circuit's wholesale attack upon California's timeliness bar, and other California appellate and habeas corpus rules, is at odds with modern concepts of federalism and comity recognized by this Court. The Ninth Circuit's refusal to honor the state's timeliness rule should be rejected

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See http://www.courtinfo.ca.gov/reference/documents/csr-2009.pdf.

in favor of supporting the state's legitimate interest in the finality of its judgments.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: May 27, 2010

Respectfully submitted

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