Criminal Law & Procedure

The Inadequate Jurisprudence of Adequate State Grounds

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The United States Supreme Court has inched its way toward clarifying the standards that define whether a state procedural ruling is "adequate" so as to preclude federal court review. Unfortunately, it has failed to adopt a consistent standard, leaving state court rulings subject to "second-guessing" by federal courts. On December 8, 2009, the Court decided *Beard v. Kindler*,[1] holding narrowly that a state procedural rule is not automatically "inadequate" simply because the rule is discretionary rather than mandatory.[2] But the Court declined to articulate a clearer understanding of "inadequacy" for such state rules, deferring that step for a case that might be a more suitable "vehicle for providing broad guidance on the adequate state ground doctrine."[3] In another case presenting an opportunity to refine the standard, *Philip Morris USA v. Williams*,[4] the Court granted certiorari and had squarely before it the opportunity to clarify the adequate state ground doctrine and adopt a standard of fair notice and reasonable opportunity. On March 31, 2009, however, the Court dismissed the writ of certiorari in *Philip Morris* as improvidently granted.[5] This paper describes the adequate state ground doctrine as it exists today and offers a clearer standard that, if adopted by the Court, would be consistently workable and understandable by state and federal courts.

I. The Present State of the Adequate State Ground Doctrine

Generally, federal courts will not review a question of federal law decided by a state court if that decision rests on a state law ground, whether substantive *or procedural*, that is independent of the federal question and adequate to support the judgment.[6] The question whether a state procedural ruling serves as an "adequate" ground to bar federal review, including federal habeas corpus review, is itself a question of federal law.[7] Most often the doctrine arises in the form of a "procedural default," where the petitioner failed to comply with a rule of state procedure, thereby subjecting himself to a bar to federal review or federal habeas corpus relief. For example, the petitioner in *Wainwright v. Sykes* claimed in federal habeas review that certain statements he made and that were offered against him at trial were obtained in violation of his *Miranda*[8] rights.[9] He was tried and convicted in a Florida court without moving to suppress the statement before trial or contemporaneously objecting to the statements at trial. Florida law bars subsequent relief when a petitioner fails to challenge such a statement.[10] Ultimately, the U.S. Supreme Court, explaining the salutary effect of the contemporaneous objection rule and the need for finality of the state court judgment, upheld the procedural default involved as an adequate state ground and denied the habeas relief.[11] A safeguard in the form of a "cause" and "prejudice" showing, the Court noted, served to prevent a miscarriage of justice.[12] More recently, the Court in *Coleman v. Thompson* noted the underlying federalism concerns in the adequate state ground doctrine:

> In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.[13]

Notwithstanding the rather straight-forward notion that failure to comply with state procedural requirements may serve as an adequate ground to bar subsequent federal relief, the mischief arises in the application of the doctrine by federal courts. In *James v. Kentucky*, the Supreme Court framed the adequacy inquiry by asking whether the state rule was "firmly established and regularly followed."[14] Some federal courts, seizing upon this language, have been quick to find state court rules and rulings "inadequate" because the rulings, in the courts' judgment, are inconsistently applied or are poorly defined.[15]

The Ninth Circuit Court of Appeals has granted relief to habeas petitioners in California in decisions, for example, holding that California's "timeliness" rule—where a petitioner must justify any "significant" or "substantial" delay in seeking habeas corpus relief—is standardless, poorly defined, and thus "inadequate" to bar federal habeas relief.[16] The court of appeals in *King v. LaMarque* said this timeliness rule did not adequately define what period of time or factors constitute "substantial delay" and that there were "no standards for determining what factors justify any particular length of delay."[17] In *Martin v. Walker*,[18] the Ninth Circuit, relying on *King* and *Townsend v. Knowles*,[19] twice reversed the findings of a lower court that the state timeliness procedural default rule was adequate. *Martin* involved a petitioner who, in state court, filed a habeas petition five years after the case was final on direct review, and who did not claim that the cause-and-prejudice or actual-innocence exceptions applied. Because California chose 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 was deemed "inadequate."

The Ninth Circuit's expectation that state procedural rules must be more "certain" than they already are exemplifies the present confused state of procedural default law and appears 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.[20] In the absence of a procedural trap, an evasion of federal law, or at least probable cause to suspect either of

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these, there is no policy justification for such intense federal court scrutiny of state procedures.

The Ninth Circuit's suspicion of state procedural holdings contrasts sharply with the holding of the Supreme Court in a closely related context in *Carey v. Saffold*,[21] where, for the purpose of implementing the federal statute of limitation's tolling provision, the 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."[22]

To be sure, the blame for this conflicting precedent does not rest entirely with the courts of appeals that have been restrictive regarding what constitutes an inadequate state ground. The Supreme Court's precedents regarding what state grounds are "inadequate" form a haphazard patchwork.[23]

Early articulations include where the rules were applied "without any fair or substantial support,"[24] as an "arid ritual of meaningless form,"[25] where the defendant "could not fairly be deemed to have been apprised of [the rule's] existence,"[26] where a rule had not been previously applied "with the pointless severity of the present case,"[27] or where it "impos[ed] unnecessary burdens upon [federal] rights."[28] Other articulations referred to where the rules were "more properly deemed discretionary than jurisdictional,"[29] or were "not strictly or regularly followed,"[30] and finally whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court."[31]

Many of the older cases arose out of the civil rights struggles of the 1950s and 1960s. The distrust of discretionary or less-than-strict rules is likely based in the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants,[32] and at the time that suspicion was often justified. *Saffold* implies that this time is long past.[33] Over forty years later, the possibility of evasion or discrimination may not have vanished entirely but is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. 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. Flexibility and discretion in the application of default rules should be encouraged, not discouraged.

In any case, if the state courts really did exercise discretion so as to discriminate on the basis of race or against fundamental rights, it would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such presumptions should only be used where they produce the correct result most of the time.[34] Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

Given the Supreme Court's evolving jurisprudence of "adequate state grounds" and inconsistent language, it is hardly surprising that the field has produced a large number of decisions that appear hostile to state rules of procedure.[35] *Kindler*, noted above, took a step in the right direction, effectively disapproving language in *Sullivan v. Little Hunting Park, Inc*.[36] that Justice Harlan in dissent had called "unclear and confusing,"[37] and a "loose use of the word 'discretionary.'"[38] In *Kindler*, the petitioner was a twice-escaped fugitive returned to custody. The Pennsylvania courts held that his escapes forfeited certain claims challenging his conviction and sentence that he once had been entitled to bring. This is referred to as the "fugitive forfeiture" rule. The Third Circuit Court of Appeals noted, however, that the Pennsylvania courts had *discretion* to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. "Accordingly," the court ruled, "the fugitive forfeiture rule was not 'firmly established' and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petition in federal court."[39] The state trial court still had discretion to reinstate Kindler's post-verdict motions, so the Third Circuit concluded that Pennsylvania's fugitive waiver law did not preclude the federal court from reviewing the merits of the claims raised in his federal habeas petition.[40]

Providing some limited clarification of the adequacy landscape, the Supreme Court reversed the Third Circuit and held that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review.[41] The Court continued:

> Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine. To the contrary, a discretionary 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. See Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1140(1986) ("[R]efusals to exercise discretion do not form an important independent category under the inadequate state ground doctrine").[42]

The *Kindler* Court said its ruling was uncontroversial and noted, citing the State of California's brief, that the states seem to value discretionary rules as much as the federal government does. It then concluded that "in light of the federalism and comity concerns that motivate the adequate state ground doctrine in the habeas context, it would seem particularly strange to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts."[43]

The true significance of *Kindler* lies in its recitation of the notion that a discretionary rule can be "firmly established" and "regularly followed"—refuting the gravamen of Kindler's claim, namely that petitioners can suffer from infrequent or discriminate application of discretion. The Court answered Kindler's complaint by noting that a rigid and uniform rule "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."[44] The result, the Court stated, 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."[45] The Court's opinion suggests that there is no federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. Nor is there is any federal interest in denying effect to any state procedural rule which is not "strictly" applied in the sense of iron-clad severity because such a formulation provides a perverse incentive for states to make their default rules more severe and less flexible than the state might otherwise choose.

But the *Kindler* Court did not follow the Commonwealth's suggestion to undertake an effort to state a new, clear standard for inadequacy. The procedural default at issue in *Kindler*—escape from prison—was according to the Court, "hardly a typical procedural default, making this case an unsuitable vehicle for providing broad guidance on the adequate state ground doctrine." However, a single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not.

II. A Standard Based on Fair Notice and Reasonable Opportunity

We suggest that a workable and coherent standard for an adequate state ground doctrine is available and can be gleaned from existing relevant jurisprudence. That standard can be formed by combining the "fairly . . . apprised" language from *NAACP v. Alabama ex rel. Patterson*,[46] with *Central Union*'s "reasonable opportunity."[47] That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim.[48] Nothing more is required.

Courts have long discussed the notions of fair notice. As long as an inherently fair rule is clear in advance of the process or procedures facing the petitioner, no one can complain. Of course, a rule unfairly applied retroactively is intolerable. For example, a state may legitimately specify in advance which of two possible remedies a claimant must pursue, but it cannot "bait and switch."[49] Similarly, there is a federal interest in protecting federal rights from *unforeseeable* applications of existing rules. A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim.[50] Fair notice means that a procedure that appears to be in clear compliance cannot suddenly be declared to be a default.

Nearly all of the cases where the Supreme Court has declared a state procedural rule to be inadequate fit within the standard we propose. For example, in *James v. Kentucky*, the state court declared the defendant's claim to be defaulted because he had asked for a jury "admonition" rather than an "instruction," but the state's case law at the time of the trial was too confused to give fair notice of that distinction.[51] A "reasonable notice" standard corrects the unfairness of this situation without the problematic practice of probing whether a state rule is "regularly followed."

The "reasonable notice" prong of our proposal is derived from *Central Union Tel. Co. v. Edwardsville*.[52] The standard suggests a sensible and clear element for a procedural bar—whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court."[53] An example of a rule that generally provides fair notice but was applied in a way as to deprive the appellant of a reasonable opportunity can be found in *Hathorn v. Lovorn*.[54] That case involved a rule against making arguments for the first time on petition for rehearing, a widely followed and generally unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconstitutional statute through drastic and unexpected surgery, thereby raising a different federal question from the one originally presented.[55] As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

A single, simple, clear standard in this area is long overdue. That standard must respect the state court process, comity, and federalism and yet protect federal interests. Fair notice of procedural rules and a reasonable opportunity to make the claim fits the bill.

Endnotes

1 130 S. Ct. 612 (2009).

2 *Id*. at 618.

3 *Id*. at 619.

4 No. 07-1216, *cert. dismissed as improvidently granted*, 129 S. Ct. 1436 (2009).

5 *Id*.

6 *See* Coleman v. Thompson, 501 U.S. 722, 729 (1991) (citing Fox Film Corp. v. Muller, 296 U.S. 207 (1935).

7 Lee v. Kemna, 534 U. S. 362, 375 (2002).

8 Miranda v. Arizona, 384 U.S. 436 (1966).

9 Wainwright v. Sykes, 433 U.S. 72, 74 (1977).

10 *Id*. at 76-77.

11 *Id*. at 90-91.

12 *Id*. at 91.

13 Coleman v. Thompson, 501 U.S. 722, 730 (1991).

14 James v. Kentucky, 466 U.S. 341, 348 (1984).

15 *See, e.g.,* Townsend v. Knowles, 562 F.3d 1200 (9th Cir. 2009); King v. LaMarque, 464 F.3d 963 (9th Cir. 2009).

16 King v. LaMarque, 464 F.3d.

17 *Id*.

18 No. 08-15752 (9th Cir., Nov. 20, 2009), *cert. pending sub. nom.* Walker v. Martin, No. 09-996.

19 Townsend v. Knowles 562 F.3d.

20 *Cf.* Lewis v. Jeffers, 497 U.S. 764, 780-781 (1990) (quoting Godfrey v. Georgia, 446 U.S. 420, 450 (1980) (White, J., dissenting)).

21 536 U.S. 214 (2002).

22 *Id*. at 226 (emphasis added).

23 *See* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003).

24 Ward v. Board of Comm'rs, 253 U.S. 17, 22 (1920).

25 Staub v. City of Baxley, 355 U.S. 313, 320 (1958).

26 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 457 (1958).

27 NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 297 (1964).

28 Brown v. Western R. Co. of Ala., 338 U.S. 294, 298 (1949).

29 Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234 (1969).

30 Barr v. City of Columbia, 378 U.S. 146, 149 (1964).

31 Cent. Union Tel. Co. v. Edwardsville, 269 U.S. 190, 194-195 (1925); Parker v. Illinois, 333 U.S. 571, 574 (1948) (quoting and following *Central Union*).

32 *See* Glennon, 61 Tenn. L. Rev., at 895 (noting "state court efforts to use their procedural rules to impede the civil rights movement").

33 *See also* Stone v. Powell, 428 U.S. 465, 493-494 n.35 (1976).

34 *See* Coleman v. Thompson, 501 U.S. 722, 730 (1991).

35 For commentary, see, e.g., Fallon, Meltzer & Shapiro, *supra* note 23; Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 944 (1965).

36 Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969).

37 *Id.* at 243.

38 *Id.* at 245.

39 Kindler v. Horn, 542 F.3d 70, 79 (3d Cir. 2008) (citing Doctor v. Walters, 96 F.3d 675, 684-686 (3d Cir. 1996)).

40 *Kindler*, 542 F.3d at 80.

41 Beard v. Kindler, 130 S. Ct. 612, 618 (2009).

42 *Id*.

43 *Id*. (referring to Francis v. Henderson, 425 U.S. 536, 541-542 (1976)).

44 *Id*. (citing United States v. McCoy, 517 F.2d 41, 44 (7th Cir.) (Stevens, J.), *cert. denied*, 423 U.S. 895 (1975)).

45 *Id*. (citing Henry v. Mississippi, 379 U.S. 443, 463 n.3 (1965) (Harlan, J., dissenting)).

46 *See supra* note 26.

47 *See supra* note 31.

48 *See* 16B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure 386-387, 392 (2d ed. 1996).

49 *See* Reich v. Collins, 513 U.S. 106, 111 (1994).

50 *See* Walker v. Birmingham, 388 U.S., 307, 320 (1977) (finding that petitioners were "on notice" of the correct procedure and not "entrapped or misled").

51 466 U.S. 341, 346-348 (1984).

52 Cent. Union Tel. Co. v. Edwardsville, 269 U.S. 190, 194-195 (1925).

53 *Id*.

54 457 U. S. 255 (1982).

55 *Id.* at 258-259.