No. 08-992

In The Supreme Court of the United States

JEFFREY A. BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL.,
Petitioners,

v.

JOSEPH J. KINDLER,
Respondent.

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

BRIEF FOR PETITIONERS

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July 24, 2009

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Capital Case

Question Presented

After murdering a witness against him and receiving a sentence of death, Kindler broke out of prison, twice. Prior to his recapture in Canada years later, the trial court exercised its discretion under state forfeiture law to dismiss Kindler's post-verdict motions, resulting in default of most appellate claims. On federal habeas corpus review, the court of appeals refused to honor the state court's procedural bar, ruling that, because "the state court . . . had discretion" in applying the rule, it was not "firmly established" and was therefore "inadequate."

Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine – and therefore unenforceable on federal habeas corpus review – because the state rule is discretionary rather than mandatory?

List of Parties

Petitioners

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David DiGuglielmo, Superintendent, State Correctional Institution at Graterford

Joseph P. Mazurkiewicz, Superintendent, State Correctional Institution at Rockview

Respondent

Joseph J. Kindler

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The opinion of the United States Court of Appeals for the Third Circuit, affirming the district court's grant of a conditional writ of habeas corpus, was entered September 3, 2008, is published at 542 F.3d 70, and is reproduced in the Certiorari Petition Appendix at Cert. App. 1-53.

The opinion of the United States District Court for the Eastern District of Pennsylvania, mandating either a new penalty hearing or a sentence of life imprisonment, was entered September 23, 2003, is published at 291 F. Supp. 2d 323, and is reproduced in the Appendix at JA 386-462.

Statement of Jurisdiction

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are the Sixth and Eighth Amendments to the United States Constitution and 28 U.S.C. § 2254.

Statement of the Case

After his conviction for murdering a witness against him, Kindler sawed through a prison bar and escaped to Canada. After his capture there, Kindler escaped again by breaking through a skylight and climbing down the outside of a thirteen-story building. It took more than seven years to get him back. In the

meantime, the state trial judge dismissed Kindler's post-verdict motions as a result of his escape, and the state appellate courts upheld the resulting procedural default.

But not the federal court of appeals. When the case reached federal habeas review, that court held that the procedural default was not an adequate state ground, because Pennsylvania's escape rule was discretionary, and thus could not be "firmly established." Accordingly, the federal court reached the merits of claims the state courts never had occasion to address, vacated Kindler's sentence of death, and ordered a new penalty hearing a quarter century after the original trial.

The crime dates back to 1982. Kindler committed a burglary. With police converging on the scene, Kindler managed to slip away, leaving his accomplice, David Bernstein, to be arrested. Bernstein admitted his role in the crime and identified Kindler as the ringleader. Cert. App. 89.

Kindler learned that Bernstein would be a witness against him in court. Before trial, Kindler proclaimed his intent to kill Bernstein to keep him from testifying. Bernstein, fearing Kindler's violence, made plans to move away. Cert. App. 90-91.

The day before the move, in July 1982, Kindler sent a female friend to Bernstein's apartment to lure him outside. When Bernstein opened the door, Kindler dragged him out and beat him repeatedly with a baseball bat. Then he instructed a cohort to strike the victim with an electric prod. Once the victim was

incapacitated, Kindler dragged him to a car, leaving a bloody trail. Cert. App. 91-92.

Kindler stuffed Bernstein in the trunk of the car and drove him to a river. There he tied a cinder block to Bernstein's neck and held him down to fill his lungs with water. Cert. App. 92.

Alerted about the abduction by a neighbor, police later found the car Kindler had used, along with the bloody baseball bat, the electric prod, and clothing. Bernstein's body eventually surfaced, the cinder block still tied around his neck. He was 22 when he died. Cert. App. 80, 92-94.

Kindler was convicted by a jury in Philadelphia Common Pleas Court, and was sentenced to death in November 1983. Post-verdict motions were filed. But in September 1984, Kindler escaped from the maximum-security wing of the prison where he was being held, by sawing through a steel bar and breaking out a window. Cert. App. 68-69.

The trial court dismissed Kindler's post-verdict motions because of his escape. Kindler was not heard from until the following year, when he was arrested in Quebec. He fought extradition while being held in a prison in Montreal. Cert. App. 69.

But in October 1986, Kindler constructed a rope by tying bed sheets together, broke through a skylight, and escaped again, lowering himself thirteen floors to the ground. An accomplice in the escape lost his grip on the rope and was killed in the fall. Cert. App. 69.

This time Kindler remained at large for two years. His case was featured in an episode of "America's Most Wanted" broadcast on April 17, 1988.[1] Finally, he was identified and arrested in September 1988, in New Brunswick. He fought extradition again. After three years of litigation through the court system, the Supreme Court of Canada rejected Kindler's challenge, by a 4-3 vote, and he was deported in October 1991. Cert. App. 69, 81. *See Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779.[2]

Upon his forced return to Pennsylvania, Kindler sought reinstatement of his post-verdict motions. The trial court denied the request, ruling that Kindler's involuntary reappearance did not entitle him to review. Having reached retirement, the original judge was replaced with a new common pleas judge, who issued an opinion on the matter. The court concluded that there was no abuse of discretion in refusing to

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[1] A DVD containing a copy of the broadcast (Season 1, Episode 11) was lodged with the court of appeals and is available in the record certified to this Court. The broadcast contained an excerpt of an interview with Kindler conducted before his re-escape, in which he explained to a Canadian audience his presence in their dominion: "I knew there was no death penalty here, one, and . . . the closest way out of the country was Canada. It would be hard to go into South America because of passports, and in North American [sic] there's no passport needed to cross the border. So Canada was my first choice."

[2] Kindler filed a complaint against Canada with the United Nations Human Rights Committee. The committee rejected Kindler's arguments in a decision issued after his return to the United States. *Kindler v. Canada*, Comm. No. 470/1991 (U.N. Human Rights Committee) (July 30, 1993), *reprinted in* 14 Hum. Rts. L.J. 307 (1993).

consider Kindler's post-verdict motions in response to his flight to a foreign country. JA 66-70.

Kindler filed a direct appeal to the Pennsylvania Supreme Court. He asserted that the trial court had indeed abused its discretion. The supreme court ruled in 1994 that the trial court had acted properly, and that Kindler had therefore waived all claims but those for which review was mandated by statute. The court then considered these mandatory issues: whether the evidence was sufficient to support the finding of guilt and the aggravating circumstances, and whether the sentence was excessive, disproportionate, or arbitrary. Finding no error, the supreme court affirmed the judgment of sentence. Cert. App. 82-97.

Two years later, in 1996, Kindler filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Relief Act (PCRA). He argued that he was entitled to merits review of all claims. The trial court, after reviewing the circumstances of Kindler's (two) escapes and applying the waiver and previous litigation provisions of the PCRA, 42 Pa. C.S. § 9544, denied the petition. JA 183-92. On appeal, the Pennsylvania Supreme Court affirmed the denial of post-conviction relief in 1998. Cert. App. 71-77.[3]

In 1999, Kindler filed a federal habeas corpus petition in the Eastern District of Pennsylvania. The district court ruled, in 2003, that it was not bound by

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[3] Kindler later filed another post-conviction petition that is unrelated to the current proceedings. That petition was dismissed as untimely and the dismissal was upheld on appeal. *Commonwealth v. Kindler*, 970 A.2d 426 (Pa. 2009).

Kindler's default of his claims in state court, because the state ground was "inadequate." The district court then reviewed Kindler's challenges on the merits, granting sentencing relief under *Mills v. Maryland*, 486 U.S. 367 (1988), and rejecting the balance of the claims. Cert. App. 54-66.

The parties cross-appealed to the Court of Appeals for the Third Circuit. The appeals court held that the state courts could not validly punish Kindler for his (two) escapes by dismissing his claims. The court reasoned that, because state law allowed for discretion to reinstate post-verdict motions following a fugitive's recapture, any exercise of that discretion to deny reinstatement was not the product of a "firm" rule, and therefore could not provide an adequate state ground. Cert. App. 20-23.

Proceeding to the merits, the appeals court was able to apply *de novo* rather than deferential review, *see* 28 U.S.C. § 2254(d), because, once the state procedural default ruling was removed on adequacy grounds, there was no state court merits adjudication to defer to. The appeals court then upheld the district judge in all respects but one: that he should have vacated Kindler's death penalty not just on the *Mills* claim, but also on the ground that trial counsel was ineffective for not finding additional mitigation evidence to present at sentencing.[4] Cert. App. 23-53.

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[4] Although there was never an evidentiary hearing on this claim, the court of appeals accepted at face value various offers of proof submitted by Kindler, in which he alleged, *inter alia,* that he suffered from "narcissistic personality disorder." Cert. App. 37-40.

Summary of Argument

This case aptly illustrates the need for clarification of the adequate state grounds doctrine. The criminal defendant here committed the most naked kind of procedural default, in the most conspicuous sort of way. He broke his way out of prison in a carefully plotted escape, made his way to Canada for the expressed purpose of negating his death sentence, committed new crimes there, broke out of prison again, in a fashion even more egregious than the first time, and then used every available legal process to ensure that he would never have to face the legal process from which he had fled.

And yet, when all these efforts failed (and just barely), the defendant insisted that he should be allowed to restart his state court appeals right where he had left off. The state courts – not surprisingly – said no.

Invoking the adequate state grounds doctrine, however, the federal court of appeals held, on habeas corpus review, that it could disregard the default ruling and decide the merits of the claims that the defendant was disentitled to litigate in state court. The court of appeals interpreted this Court's precedents to compel a finding of "inadequacy" for any state procedural rule that permits the state courts to exercise a degree of discretion. If the state court is free to excuse the onerous consequences of a default in appropriate cases, said the court of appeals, that is not a good thing but a bad thing, because then the state rule is not "firmly established" and "consistently applied." A federal habeas court need not respect it.

This inside-out analysis is characteristic of many adequacy rulings in habeas cases from the lower federal courts; but it is not required by a fair reading of this Court's adequate state grounds decisions. Nothing in the precedents entitles federal courts to punish states, in effect, for exercising forbearance in applying their own procedural rules. Nor is it clear why the federal courts would even *want* to. Few if any rules can appropriately be applied in an absolute fashion. Courts *should* make exceptions. And if they do, it should not be at the Catch-22 cost of nullification, so that the rules become unenforceable even against litigants who have no good excuse for violating them.

Certainly federal courts themselves labor under no such constraints. They are equally guilty of "inconsistency," as they exercise discretion in applying procedural rules all the time. The most common case is the plain error rule, but a more pointed example is the federal fugitive forfeiture rule, which allows for the same kind of "uneven" enforcement that the state courts were accused of here. In our federal system, how can procedural leeway be invaluable in federal courts but "inadequate" in state courts?

The source of this misuse of the adequacy doctrine is a confusion between description and definition. Many of the labels that this Court has used to describe inadequacy, such as "pointless severity," have been accorded an ill-suited status as legal standards. The best reading of the cases, as WRIGHT & MILLER suggests, is that the true measure of an adequate state procedural ground is that it provide reasonable notice of its terms and reasonable opportunity for compliance.

If so, then federal courts can be reasonably assured that the rule operates neutrally, rather than as a pretext for evading federal claims. That is as far as it goes; the purpose of the adequate state grounds doctrine is not to exercise supervisory authority over the state courts. A litigant should be held to his state law default if the law gave him sufficient notice to allow a reasonable person a reasonable chance to comply.

Joseph Kindler, of all people, can have no complaint that he lacked the necessary notice and opportunity. He did not need to know the exact outcome of his flight to know that it would impair his ability to appeal his sentence. He simply chose to "appeal" the sentence in a different way, by going someplace where it would never be enforced. It is hard to imagine a stronger case for a default.

And yet for Kindler, now that the federal courts have thrown out his default, there is nothing but upside from his decision to abscond. Either he was going to get away, or he is going to be treated as if he never left. The story at this point is "heads I win, tails you'll never find me."[5] No reasonable understanding of the adequacy doctrine can support that result.

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[5] *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003).

Argument

I. A discretionary state procedural rule is not automatically "inadequate" under the adequate-state-grounds doctrine.

Consistent with federal practice, the state court exercised its discretion to dismiss Kindler's post-verdict motions while he was a fugitive. That dismissal created a procedural default that the state appellate court applied against Kindler on appeal.

On federal habeas corpus attack, the court of appeals refused to honor the state ruling, as it would normally be required to do. The court held that the default was "inadequate" to bar review of Kindler's legal claims, because the state's fugitive forfeiture rule was discretionary. The federal court did not challenge the manner in which the state court exercised its discretion; it was the simple existence of discretion that rendered the rule unenforceable.

The circuit court's reasoning underscores a deeper uncertainty about the nature of the adequate state grounds doctrine, which should now be rectified. First, however, a further word is necessary about the grounds of the decision below. Kindler has argued that this case is not really about discretion at all. Instead, he says, the problem is that the state sprang a different, "mandatory" rule on Kindler, rather than the "discretionary" rule in place when he elected to depart the jurisdiction.

But review of the opinions demonstrates that, in fact, the state courts applied a discretionary rule, and the federal court ruled on that basis. Pennsylvania

appellate decisions in place at the time of Kindler's escape plainly described the fugitive flight rule as discretionary.[6] That was precisely the standard identified by the common pleas court in its opinion addressing Kindler's forfeiture. JA 70 (no "abuse of discretion"). On appeal, the issue before the state supreme court was similarly framed as whether "it was an abuse of discretion to dismiss [Kindler's] post-verdict motions." Cert. App. 82.[7]

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[6] *See, e.g., Commonwealth v. Boyd*, 366 A.2d 934, 934-35 (Pa. Super. 1976) ("The sole question is whether or not the trial court acted properly in dismissing the post-trial motions and refusing to reinstate and reconsider them when appellant returned.... If he thereafter returns it is a matter of discretion of the court whether or not the circumstances justify a reinstatement of his post-trial motions or applications.... We find that the ... trial court did not abuse its discretion in refusing to consider the motions"); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982) ([W]hen appellant returns to the court's jurisdiction, this court may grant leave to re-file post-trial motions.... While it is within our discretion to remand for reinstatement, as did the [*Commonwealth v.*] *Galloway* [333 A.2d 741 (Pa. 1975)] court, we are not constrained to do so. We conclude instead that the trial court did not abuse its discretion in declining to reinstate appellant's post-trial motions even after he was returned to the jurisdiction").

[7] The Commonwealth urged the state supreme court to apply a mandatory forfeiture rule, and the desirability of such a general rule generated separate opinions from the court. All participating justices, however, agreed that in this case the trial court had discretion and did not abuse it. *See, e.g.,* Cert. App. 84 (question becomes whether trial court "has authority to dismiss"; trial court has "right" to fashion appropriate response, which "can include" dismissal) (lead opinion); Cert. App. 101 "trial court possessed full authority to dismiss" (concurring opinion); Cert. App. 104 ("could be circumstances" justifying reinstatement, but "not present in this case") (concurring opinion).

And it was exactly because of such discretion that the federal court of appeals declared the state rule inadequate. Discussing a prior panel opinion that had reviewed Pennsylvania fugitive law, *Doctor v. Walters*, 96 F.3d 675 (3rd Cir. 1996), the court explained that there

> we concluded that 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. *Id*. at 686. *Accordingly*, the fugitive forfeiture rule was not "firmly established" and therefore was not an independent and adequate procedural rule.... When Kindler escaped in 1984, ... the state trial court still *had discretion* to reinstate his post-verdict motions. *Accordingly*, we conclude that, under *Doctor*, Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the claims raised in Kindler's habeas petition.

Cert. App. 22-23 (emphasis supplied).[8]

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[8] Kindler has complained that the *Doctor* opinion did not actually turn on the discretionary aspect of Pennsylvania's flight rule. But that assertion, whether or not accurate, is irrelevant. Whatever the panel's intentions about *Doctor*'s scope when it was decided thirteen years ago, the Third Circuit has since made plain its position that a state procedural rule allowing for the exercise of discretion will not be honored in federal court. *See Lines v. Larkin*s, 208 F.3d 153, 168-69 (3rd Cir. 2000) ("when Doctor escaped, Pennsylvania courts recognized that they *had the discretion* to [excuse the default]. *Accordingly*, we held that Pennsylvania's fugitive forfeiture rule was not an adequate and independent state rule") (emphasis supplied). That is the principle that was applied here.

The court of appeals, like several other courts of appeal, refused to enforce a just and reasonable rule, simply because the state courts had the discretion to apply it on the facts and circumstances of particular cases.[9] That understanding of the adequacy doctrine is wrong.

A. This Court's adequacy cases provide no proper basis for such a result.

As this Court has long held, state courts have the power to prescribe their own rules of practice, and those rules "are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of" state law. *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 195 (1925).

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[9] *See, e.g., Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (once highest state court announced that state procedural requirement must henceforth be enforced "as a rule," state courts "were no longer acting with any discretion" in applying the requirement; procedural bar would now be considered adequate); *Deitz v. Money*, 391 F.3d 804, 811 (6th Cir. 2004) (under state law, motion to grant leave to appeal is "solely within the discretion" of the court; "[a] rule that grants such discretion to the courts is not firmly established and regularly followed so as to be adequate" state ground); *McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995) (under state law, state court had "power . . . to address plain error"; *"[t]hus*, the state court's refusal to entertain McKenna's complaints on collateral review, at best, represents a refusal to exercise discretion to hear the claim. This is insufficient for the State to invoke the procedural bar doctrine")(emphasis supplied); *Sechrest v. Ignacio*, 549 F.3d 789, 803 (9th Cir. 2008) (*Because* the [state court] exercised a 'general discretionary power' to address defaulted constitutional claims in capital cases, the [state court] did not 'adhere regularly' to [the state rule]. We *therefore* concluded that [the state rule] was an inadequate state procedural bar") (emphasis supplied).

"Thus, ordinarily when a state court litigant has committed a procedural default – that is, has failed to raise a federal question in accordance with state procedural rules – the state court will refuse to decide the federal question," and review will be barred in federal court as well. Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 576 (4th ed. 1996).

Over the last century, however, the Court has decided "a small set of cases forming a limited exception to the general rule." *Id*. In these cases, the state procedural default has been held "inadequate" to support the state court judgment, thereby empowering the federal court to reach the merits of the federal claim.[10] The Court has employed a number of different formulations to identify this "inadequacy." A simpler, more workable approach is possible, as argued in section II below. But in any case, none of the precedents support the court of appeals' sweeping holding that discretionary procedural rules are inadequate *per se*.

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[10] In federal habeas corpus cases, such as this one, there is also an additional way to overcome a state procedural default: the "cause and prejudice" rule. The rule allows the habeas court to decide the merits if there was cause for the default and prejudice from the alleged violation of federal law, or if there was a miscarriage of justice such as actual innocence. *See, e.g., Murray v. Carrier*, 477 U.S. 478 (1986); *Coleman v. Thompson*, 501 U.S. 722 (1991). Of course, there is no need to engage in cause-and-prejudice analysis if the habeas court can first deem the state procedural ruling "inadequate."

1. "Discretion" cases.

Among the "small set" of adequacy cases, only a few refer to the state rules in question as discretionary. Properly read, these cases establish that the existence of such discretion does not render the rule inadequate, and therefore unenforceable, whenever a defaulted claim reaches federal court.

The earliest adequacy case to discuss a discretionary rule is *Williams v. Georgia*, 349 U.S. 375 (1955). A criminal defendant made a late challenge to the jury array, after he learned that the court had used a special method to exclude blacks when summoning prospective jurors. Georgia precedent gave the courts discretion to consider such motions in exceptional or extraordinary cases, but here the court refused to do so.

This Court stated that, in light of such discretion, it could consider whether the state court was, in effect, attempting to *avoid* the federal claim. 349 U.S. at 383. The Court then proceeded to do so, looking at a number of cases in which the Georgia courts had in fact granted similarly untimely motions. 349 U.S. at 384-89. What mattered was not the existence of discretion in itself, but the discriminatory manner in which the state courts had employed it.[11]

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[11] *See also Wolfe v. North Carolina*, 364 U.S. 177, 188, 194-95 (1960) (state court's refusal to exercise "wide discretion" to go outside record was not done arbitrarily to evade federal claim); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297-301 (1964) (state court's finding of default held inadequate where, in previous cases, court had regularly exercised its discretion to excuse noncompliance with brief-formatting rule allegedly violated here).

To the same effect is *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). A complaint challenged racial discrimination in a community park. The state court held the claim defaulted because the appellant had not given his opponent reasonable opportunity to review the transcript to be certified for appeal. This Court noted without discussion that the state procedural requirement was not consistently applied, and therefore amounted to a discretionary rule that did not bar federal review. 396 U.S. at 233-34.

A more complete explanation is provided in Justice Harlan's separate opinion. Although it is labeled as a dissent, Justice Harlan in fact agreed with the Court's disposition of the adequate state grounds question. But he provided a more rigorous analysis. He recognized that procedural rules employing words like "reasonable" in fact produce "such flexible standards that the [court] has the 'discretion' to decide a close case either of two ways." But that is how common law develops: "[t]his kind of 'discretion' is nothing more than the judicial formulation of the law." Accordingly, Justice Harlan rejected any implication that a "decision made pursuant to a broad standard cannot provide an adequate state ground." 396 U.S. at 244-45.

That did not mean, however, that the state was off the hook. Justice Harlan proceeded to explore the manner in which the state court had previously construed its rule. Prior cases revealed that the state court had regularly upheld, as "reasonable," much *less* notice than was provided in this case. Justice Harlan concluded that, while the underlying rule of court was not new, the standard of strictness invoked here could

not reasonably have been anticipated by the litigant. *That* is why the state ruling was inadequate. 396 U.S. at 245-47.

Justice Harlan's views were echoed in this Court's most recent case to touch on the discretion question, *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378 (1990). The state appellate court had ruled that a due process taxation challenge was waived because it was not preserved below. In so ruling, the state court declined to apply an exception – for "important questions of public policy" – that would have excused the default.

When the case came here, the litigant challenged the adequacy of the default, in view of the state's failure to apply its "public policy" exception. Although this Court did not explicitly refer to the exception as "discretionary," the exception clearly amounted to the kind of flexible standard that Justice Harlan spoke of in *Sullivan*. And, consistent with the Harlan viewpoint, the Court upheld the default ruling as adequate, despite the fact that it was made pursuant to a broad standard that could easily have supported a decision either way. Indeed, the state court *had* ruled the other way, in this very case, on a different claim; the state court chose to review that claim on the merits despite an acknowledged default. But the discretionary power to make such distinctions – even if the state court had "erred as a matter of state law" – did not render the state procedural rule inadequate. 493 U.S. at 398-99.

Plainly, this Court's "discretion" cases do not support the conclusion of the court of appeals that discretion equals inadequacy.

2. "Firmly established" cases.

In discrediting Pennsylvania's fugitive flight rule, the federal court of appeals did not mention any of this Court's discretion decisions, relying instead on cases from a different line of adequacy precedent. Specifically, the court of appeals cited *Johnson v. Mississippi*, 486 U.S. 578 (1988), and *Ford v. Georgia*, 498 U.S. 411 (1991), for the proposition that state rules must be "firmly established" and "consistently and regularly" applied. Cert. App. at 20.

But the court of appeals did not attempt to explain why a state rule of procedure fails this test merely because the state courts retain discretion to mitigate the rule in appropriate cases. Many federal rules of procedure allow for the exercise of considerable discretion,[12] but surely they are not, *ipso facto*, unfirmly established or inconsistently applied. Indeed, if state procedural rules really were invoked without any discretion to make exceptions in appropriate circumstances, they would undoubtedly be attacked as "exorbitant applications," *Lee v. Kemna*, 534 U.S. 362, 376 (2002), of "pointless severity," *NAACP v. Alabama*

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[12] *See, e.g.*, Fed. R. Crim. P. 7(e) (court may permit amendment of information unless "substantial right" of defendant is prejudiced); Fed. R. Crim. P. 26.2(e) (if government disobeys order to produce witness statement, court must grant mistrial "if justice so requires"); Fed. R. App. P. 3(a)(2) ("An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal"); Fed. R. App. P. 26(b) ("For good cause, the court may extend the time prescribed by these rules or by its order to perform any act [with certain specific enumerated exceptions], or may permit an act to be done after that time expires").

ex rel. Flowers, 377 U.S. 288, 297 (1964), in an "arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

Nothing in the cases cited by the court of appeals commands such an absurd result. In *Johnson v. Mississippi*, the state default ruling was held inadequate because it would have been impossible for the litigant to raise the claim earlier, and because prior state law specifically directed him not to do so. 486 U.S. at 587-89. In *Ford v. Georgia*, the state default ruling was held inadequate because the state court had invented an entirely new time requirement two years after the litigant's trial, and applied it retroactively against him. 498 U.S. at 422-25. That sort of "inconsistency" does not remotely require the disregard of state rules merely because they allow for the exercise of discretion.[13]

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[13] In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), this Court addressed a circuit split concerning an analogous issue, regarding the application of 28 U.S.C. § 2244(d)(2). *Compare Siebert v. Campbell*, 334 F.3d 1018, 1025 (11th Cir. 2003) ("only rules that are 'firmly established and regularly followed' qualify as adequate state grounds. . . . [T]his standard likewise applies to state procedural rules in the 'properly filed' inquiry under § 2244(d)(2)"), *with Brooks v. Walls*, 279 F.3d 518, 523-24 (7th Cir. 2002) (state procedural bar with discretionary plain error exception is nonetheless an adequate state ground, just as state timeliness rule with discretionary plain error exception is nonetheless a "proper filing" requirement under § 2244(d)(2)).

Pace resolved the split by requiring federal habeas courts to honor state court rulings imposing defaults for untimely post-conviction filings, whether the deadlines were more or less strictly administered by the states. 544 U.S. at 414, 417 ("When a postconviction petition is untimely under state law, 'that is the end of the matter' for purposes of § 2244(d)(2)"); *accord Allen v.*

3. "Legitimate state interest" cases.

In *Henry v. Mississippi*, 379 U.S. 443 (1965), the Court announced a new descriptor for inadequacy, declaring that the ruling in question must serve a "legitimate state interest" (or at least "substantially" serve it). *Id*. at 447-48. This concept was derived from the Court's decision in *Fay v. Noia*, 372 U.S. 391, 433 (1963) (state has no interest, "under the guise of applying the adequate state-ground rule," in enforcement of defaults on federal habeas corpus review).

Fay v. Noia was overruled thirty years ago in *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Henry* has been cited only intermittently in succeeding decades. In its most recent major discussion of the adequate-state-grounds doctrine, *Lee v. Kemna*, 534 U.S. 362 (2002), the Court expressly disavowed any reliance on *Henry*. *Id*. at 386.

Even assuming the continuing validity of the *Henry* line of adequacy cases, however, there would be no basis under it for refusing effect to state procedural rules that call for discretionary application. That is because such rules plainly do serve a legitimate interest, just as they do in federal court. "There are

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Siebert, 128 S. Ct. 2, 4 (2007) ("The fact that Alabama's [time bar] ... is subject to equitable tolling . . . renders it no less a 'filing' requirement ... ; it only makes it a less stringent one.... Under the Court of Appeals' approach, federal courts would have to delve into the intricacies of state procedural law in deciding whether a postconviction petition rejected by the state courts as untimely was nonetheless 'properly filed' under § 2244(d)(2). Our decision in *Pace* precludes such an approach").

many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure." 16B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4026, at 385-86 (2nd ed. 1996).

Indeed it is unclear why it would be in anyone's interest to disfavor discretion. It mostly helps the litigant – by providing exceptions to rigid rules that would otherwise cause a default. There is no way to remove it, or even restrain it, without redoubling the number of defaults. "If, in order to insulate its decisions from reversal by [federal courts], a state court must strip itself of the discretionary power to differentiate between different sets of circumstances, the rule operates in a most perverse way." *Henry v. Mississippi*, 379 U.S. at 463 n.3 (Harlan, J., dissenting).[14] The holding of the court below cannot

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[14] *See also Hutchison v. Bell*, 303 F.3d 720, 738-39 (6th Cir. 2002) ("to find that the repeated application of [judicially created "due process" exception to state post-conviction filing deadline] renders the Tennessee statute of limitations an inadequate basis to deny postconviction relief would have the unfortunate effect of discouraging a practice that provides states the opportunity to remedy unconstitutional convictions in cases involving later-arising claims"); *Prihoda v. McCaughtry*, 910 F.2d 1379, 1385 (7th Cir. 1990) ("The difficulty of drawing lines, especially under standards such as 'sufficient reason,' makes uncertain application inevitable. Uncertainty is not enough to disqualify a state's procedural ground as one 'adequate' under federal law. If it were, states would be induced to make their rules draconian rather than allow prisoners the latitude now available"); *Rogers-Bey v. Lane*,

be justified on "legitimate state interest" grounds.

B. A per se *inadequacy attack on discretionary state procedural rules is incompatible with federalism.*

Prior precedent is not the only impediment to the result below. The principle of federalism recognizes that the states are co-equal sovereigns. A declaration by a federal court that a state procedure is "inadequate" should be a cautious departure from the rule. It would be troubling enough if the Court were to undermine, through the adequacy doctrine, the justifiable judgment of the state courts to employ elements of discretion in their procedural rules. But that is especially so where, at the same time, federal courts themselves are employing the same kind of discretion to excuse procedural defaults. In our federal system, the singling out of state discretion as inadequate, while federal courts are free to exercise their own, should be obviously unacceptable.

Perhaps the most common example of default discretion in the federal courts is the plain error rule, Fed. R. Crim. P. 52(b). The rule itself says nothing at

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896 F.2d 279, 284 (7th Cir. 1990) (Manion, J., concurring) ("The fact that the state court has the discretion to disregard procedural defaults where plain error exists does not mean the state loses its right to stand on its procedural rules on collateral attack when the state court decides that no plain error exists. If a state court's review for plain error allowed federal courts to review the merits of issues that would otherwise be procedurally barred, states might become reluctant to exercise their discretion to correct plain errors. This is a result we ought not encourage").

all about how to identify plain error. Over decades, the judicial development of the law has provided some guidance. Just last Term, in *Puckett v. United States*, 129 S. Ct. 1423 (2009), this Court reiterated four steps for plain error determination. That step approach, however, by no means eliminates the possibility of inconsistency. The second step requires that the error be "clear," while the third step requires that it "substantially" affect the defendant's rights – both modifiers of sufficient breadth as to allow abundant wiggle room. The fourth step, meanwhile, explicitly requires the court to exercise "discretion" in deciding whether to excuse the default, even if the first three steps have been surmounted. 129 S. Ct. at 1429.[15]

Not surprisingly, that sort of latitude breeds significant variation in application of the plain error rule, as *Puckett* itself suggests. 129 S. Ct. at 1428 (noting circuit conflict on plain error in plea bargain violation claims). Other instances abound. "*Booker*" errors,[16] for example, have generated considerably different results among the circuits attempting to apply various aspects of the plain error standard.[17]

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[15] "The fourth prong is meant to be applied on a case-specific and fact-intensive basis. We have emphasized that a *per se* approach to plain-error analysis is flawed." 129 S. Ct. at 1433.

[16] *United States v. Booker*, 543 U.S. 220 (2005) (invalidating federal sentencing guidelines).

[17] *See*, *e.g.*, *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1305-06 (11th Cir. 2005) (rejecting Second Circuit approach); *United States v. Paladino*, 401 F.3d 471, 484-85 (7th Cir. 2005) (rejecting Eleventh Circuit approach); *United States v. Gonzales-Huerta*, 403 F.3d 727, 736-37 (10th Cir. 2005) (rejecting Second and Seventh Circuit approach).

While some of these differences may eventually be reconciled, no one would conclude that the federal plain error rule is invalid because it allows for inconsistent outcomes.

But the most important example of federal procedural discretion, for purposes of this case, is the federal fugitive flight rule. As this Court has made clear, the rule cannot operate in a mandatory fashion. Instead, cases must be examined on their individual circumstances – much like the Pennsylvania rule that the court below held inadequate. *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (overturning circuit court's rule of automatic dismissal for pre-sentence escapes, but upholding authority of district courts to exercise discretion to punish such escapes).

The lower federal courts have thus been left with broad license to make those fugitive forfeiture decisions. Of course that means that results will vary, and distinctions, where they exist, will not always be made apparent.[18] That will be the case in any system of discretion. This Court itself has chosen a variety of responses when litigants have fled while cases were

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[18] *E.g., United States v. Eskandarian*, 172 Fed. Appx. 163 (9th Cir. 2006) (unpublished) (summarily dismissing appeal); *United States v. Welch*, 155 Fed. Appx. 369 (9th Cir. 2005) (unpublished) (same); *United States v. Guerrier*, 428 F.3d 76, 79 (1st Cir. 2005) (summarily declining to dismiss); *United States v. Freelove*, 816 F.2d 479, 480 (9th Cir. 1987) (dismissing but with automatic right of reinstatement); *United States v. Torres*, 221 Fed. Appx. 646 (9th Cir. 2007) (dismissing but with opportunity to seek reinstatement in court's discretion); *see United States v. Awadalla*, 357 F.3d 243, 247 (2nd Cir. 2004) (cases provide "surprising shortage of guidance").

pending here. *See*, *e.g.*, *Eisler v. United States*, 338 U.S. 189 (1949) (deferring action); *Molinaro v. New Jersey*, 396 U.S. 365 (1970) (dismissing immediately); *United States v. Sharpe*, 470 U.S. 675 (1985) (deciding merits). Yet there is no suggestion that federal practice is inherently unfair just because judges have liberty to decide individual cases on individual facts.

The same must be true for the states. Federalism demands as much respect for state rules of discretion as for federal rules of discretion. Pennsylvania's fugitive disentitlement practice was not inadequate *per se*.

II. The adequacy doctrine requires simply that state rules provide reasonable notice and opportunity to raise federal claims.

Absent the *per se* rule applied by the court of appeals, there is still a question about the appropriate analysis for assessing the adequacy of the default ruling in this case. Despite a long line of adequacy doctrine decisions, the Court "has never articulated a coherent modern rationale, and it is not easy to weave a pattern from the threads of its opinions." 16B WRIGHT & MILLER, § 4020, at 292. Many of the approaches stated in the cases "have lain fallow, to be revived at unpredictable intervals." *Id.*, § 4028, 2009 supplement at 50. Some of the Court's pronouncements (*e.g.*, "arid ritual," "pointless severity") are more of a metaphor for inadequacy than a means of actually measuring it.

A new effort to state a standard for inadequacy is especially important now. For most of the history of the doctrine, the only court ever to apply it was this

one. With the explosion of habeas corpus litigation, that has changed. For every adequacy question this Court decides, there will be hundreds in the lower courts. The potential for misapplication is multiplied.[19]

But there is a way to clarify the adequacy doctrine. "[T]he most generally functional test is that state law must afford a fair opportunity to present federal claims." 16B WRIGHT & MILLER, § 4027, at 387. That simple standard for adequate state grounds would carry out the core function of the doctrine, in a manner consistent with the bulk of the Court's adequacy precedent.

A. Evasion of Federal Rights.

To find the most appropriate articulation of the adequacy inquiry, it is best to begin with a look at the doctrine's purpose. Plainly, it is not the business of the federal courts to make value judgments about the wisdom of state procedural rules or rulings. The adequate state grounds doctrine exists to determine whether a state law ruling *really is* a state law ruling, or whether it is instead a means of evading or avoiding a properly presented federal claim. If the state court denies a federal claim *because* of rather than regardless of its merits, that ruling is not, in reality, a

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[19] And the impact of that multiplication is magnified under the current habeas statute. The general rule is that a claim defaulted in state court is barred from review in federal habeas court, while a claim adjudicated in state court is subject to deference review in federal habeas court. *See* 28 U.S.C. § 2254. If the default is ruled inadequate, however, the federal court is free to address the claim without deference.

procedural one. Such a ruling is subject to federal review – not because the ruling was unfair, but because it was, in effect, on the merits of a federal claim.

The Court has made this clear from the beginning. Possibly the first case to speak on the adequacy question was *Chapman v. Goodnow's Administrator*, 123 U.S. 540 (1887). There the Court noted that it was not reviewing the merits of the ground that was dispositive below, because it was not a federal question. "All we have to consider is, whether it was the *real ground of decision*, and not used to give color only to a refusal" to decide the federal claim presented. 123 U.S. at 546-47 (emphasis supplied). "[A] right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action." *Id*. at 548. *See also Rogers v. Alabama*, 192 U.S. 226, 231 (1904) (relying on *Chapman* language).

The Court has continued into modern times to refer to such evasion as the essence of an inadequate state ground. *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (federal claim "cannot be evaded"); *Williams v. Georgia*, 349 U.S. 375, 383 (1955) (we must decide "whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right"); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (where state ground not adopted in order to evade constitutional issue, this Court accepts decision, right or wrong); *Hathorn v. Lovorn*, 457 U.S. 255, 265 n.15 (1982) (state court ruling reviewable because it either decided merits of federal question or invoked procedural rule to avoid federal question).

Thus evasion of a federal ruling *is* a federal ruling. In rare cases the Court has an actual indication of evasion in the form of discriminatory refusal to adjudicate the federal claims of a disfavored litigant.[20] Generally, however, it would be difficult or impossible to determine directly whether a particular state default ruling is the product of hostility to the underlying federal claim.[21] Accordingly, the Court's

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[20] *Compare NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 456-57 (1958) (state ground inadequate where same procedural rule was applied with opposite result to identical federal claim raised by Ku Klux Klan), *with Walker v. City of Birmingham*, 388 U.S. 307, 319-20 (1967) (no inadequacy where state court applied procedural rule in identical manner against civil rights group and white supremacist group); *see also Michel v. Louisiana*, 350 U.S. 91, 101-02 (1955) (no evidence that state rule applied differently against blacks and whites; otherwise "we might have a very different case here").

[21] Although there is no possible suggestion of any such hostility in this case. The Pennsylvania Supreme Court regularly reviews, on the merits, the federal claims on which the federal court of appeals granted relief to Kindler: an alleged violation of *Mills v. Maryland*, 486 U.S. 367 (1988); and a claim of ineffective presentation of mitigation evidence at sentencing. Indeed, the state court has itself granted relief on *Mills* claims to at least four capital defendants, *Commonwealth v. Begley*, 780 A.2d 605, 644-45 (Pa. 2001); *Commonwealth v. Young*, 572 A.2d 1217, 1228-29 (Pa. 1990); *Commonwealth v. Billa*, 555 A.2d 835, 844 (Pa. 1989); *Commonwealth v. Chambers*, 807 A.2d 872, 881-83 (Pa. 2002) (counsel ineffective for failing to raise *Mills* claim), and has granted or upheld mitigation ineffectiveness relief on at least a dozen occasions, *Commonwealth v. Gorby*, 909 A.2d 775, 788-92 (Pa. 2006); *Commonwealth v. Zook*, 887 A.2d 1218, 1230-35 (Pa. 2005); *Commonwealth v. Malloy*, 856 A.2d 767, 784-88 (Pa. 2004); *Commonwealth v. Ford*, 809 A.2d 325, 330-34 (Pa. 2002); *Commonwealth v. Smith*, 675 A.2d 1233-35 (Pa. 1996); *Commonwealth v. Perry*, 644 A.2d 705, 709 (Pa. 1994);

adequacy case law functions as a prophylactic means of ensuring against evasion. The purpose of the prophylactic is not to police the state courts' procedural rulings, but to distinguish between federal and genuinely state grounds. The former are subject to review; and the latter are binding, right or wrong.

B. Reasonable Notice.

Given these parameters, "[t]he most workable of all the general tests is found in the requirement that state courts afford a reasonable opportunity to assert federal rights, without placing unreasonable obstacles in the way." 16B WRIGHT & MILLER,§ 4027, at 392. The Court has offered a number of stock phrases to denote inadequacy, without defining their interrelationship. This one simple idea of reasonable notice and opportunity encompasses them all. If a litigant has reasonable notice of a state procedural requirement and reasonable opportunity to meet it, then there is no legitimate concern that the rule was trumped up to frustrate federal rights. The default is the litigant's doing, not the product of discrimination.

Commonwealth v. Williams, 950 A.2d 294, 300-05 (Pa. 2008); *Commonwealth v. Sattazahn*, 952 A.2d 640, 656-57 (Pa. 2008); *Commonwealth v. Sneed*, 899 A.2d 1067, 1077-84 (Pa. 2006); *Commonwealth v. Jones*, 912 A.2d 268, 291-94 (Pa. 2006); *Commonwealth v. Collins*, 888 A.2d 564, 579-84 (Pa. 2005); *Commonwealth v. Moore*, 860 A.2d 88, 98-100 (Pa. 2004).

To be sure, the state supreme court does not grant such relief quite as regularly as the local federal habeas courts, which have overturned virtually every Pennsylvania capital sentence they have adjudicated. But if that is any evidence of hostility, it is not on the part of the state courts.

Many of the Court's adequacy cases, from early on, sound this theme fairly explicitly. There is nothing in the adequacy doctrine "which justifies this Court in ignoring or setting aside a required form of practice . . . if 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." *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925).[22]

But other rubrics used by the Court really amount to the same thing. "Arbitrariness," for example, *see Staub v. City of Baxley* 355 U.S. 313, 320 (1955), "novelty," *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), and "retroactiv[ity]," *see Ford v. Georgia*, 498 U.S. 411, 424 (1991), all suggest a rule or ruling from out of left field. And the Court's most often-quoted comment on inadequacy, *see Davis v. Wechsler*, 263 U.S. 22, 24 (1923) ("Whatever springes the State may set . . ."), provides another example: a "springe" is a trap or snare intended to catch by surprise. WEBSTER'S NEW INTERNATIONAL DICTIONARY 2441 (2nd ed. 1950).

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[22] *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681-82 (1930) (state ground inadequate where newly announced rule gave defaulted party no opportunity to present claim); *Parker v. Illinois*, 333 U.S. 571, 575 (1948) ("petitioner plainly had a reasonable opportunity to have his federal questions passed upon by the state court"); *Reece v. Georgia*, 350 U.S. 85, 89 (1955) (state rule of practice "presupposes an opportunity to exercise that right"); *Michel v. Louisiana*, 350 U.S. 91, 93 (1955) (the test is whether the defendant had reasonable opportunity to have federal issue heard by state court); *Walker v. City of Birmingham*, 388 U.S. 307, 319 (1967) (state practice gave litigant "fair notice" of its existence).

That lack-of-notice notion is similarly present in the "firmly established" cases, in their various permutations: *e.g.*, "strictly or regularly followed," *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); not "irregularly" applied, *Hathorn v. Lovorn*, 457 U.S. 255, 265 (1982); "firmly established and regularly followed," *James v. Kentucky*, 466 U.S. 341, 348 (1984); "consistently or regularly applied," *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). *Barr* in particular makes the point: it was a companion case to *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), which described inadequate state grounds as "unforeseeable" judicial constructions that give litigants no warning. Thus the same day the Court first used the phrase "strictly or regularly followed," it was careful to define inadequacy in terms that are actually more like reasonable notice.

It is time to boil things down. The difficulty with all these formulations floating around is that they are often treated as formal legal tests. If they really are tests, then how many are there, and how do they relate to each other? Is "firmly established" different than "consistently applied?" If a rule followed in the "vast majority" of cases is adequate, what about a rule invoked less often?

Questions like these have led the lower courts into a wild-goose chase. Many attempt to engage in a complete canvass of every state case or order issued under a particular practice or procedure. Dozens of decisions may have to be reviewed – both published

and unpublished – to see how the state courts are "really" applying the rule.[23]

These angels-on-pinhead inquiries are not just onerous; they are intrusive. They inevitably put the federal court into the position of second-guessing the state court's judgments down to the smallest detail. How else to decide if the state court is acting inconsistently over an entire run of cases, without looking at every fact that might properly distinguish one of those cases from another?

The same problems arise with the "legitimate state interest" language sprung upon the law by *Henry v. Mississippi*. Of course no legitimate state interest is served by a state rule that is patently arbitrary, or pointlessly severe, or plainly untenable. But that is a truism. "Legitimate state interest" adds nothing to any of these questions. A discriminatory state ruling is inadequate whether or not it is also labeled as against the state's interest. Standing alone, *Henry* untethered is just an invitation to substitute one judge's views for another's.

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[23] *See, e.g., Powell v. Lambert*, 357 F.3d 871, 875-79 (9th Cir. 2004) (examining published and unpublished state court opinions to determine "actual practice"; "unpublished decisions are a particularly useful means"; burden of proving consistency is on the state); *Crawford v. Minnesota*, 498 F.3d 851, 854-55 (8th Cir. 2007) (reviewing at least a dozen state court decisions); *Wright v. Quarterman*, 470 F.3d 581, 587-88 (5th Cir. 2006) (reviewing over 30 state court decisions); *Franklin v. Anderson*, 434 F.3d 412, 420-21 (6th Cir. 2006) (reviewing almost 40 state court decisions); *Spears v. Mullin*, 343 F.3d 1215, 1254 (10th Cir. 2003) (reviewing unpublished decisions).

The best solution is a single test based on reasonable notice and opportunity. *Lee v. Kemna* illustrates the value of that approach. While the *Lee* Court relied on nomenclature from a number of prior adequacy decisions, the factors relevant there fit even more cleanly within the standard suggested here.

In that case the state court found that a criminal defendant had failed to preserve his request for a continuance when witnesses suddenly vanished in the middle of a trial, because he did not formally write out the request with reasons stated. The procedural rules in question, however, appeared, on their face, to apply to pre-trial motions, not emergency mid-trial requests; no prior precedent suggested otherwise, nor did the trial judge or the opposing party; and the litigant had already made the necessary points to the court, without any way to know that he was supposed to repeat them all over again in order to preserve his claim. *See* 534 U.S. at 387. Thus he did not have reasonable notice of the requirements held against him, or a reasonable opportunity to meet them.

That should be the test. It provides federal courts some assurance that the default is real, and state courts some assurance that they can set their own rules of practice. That is the whole task of the adequate state grounds doctrine.

C. Certitude.

One last point about the standard must be emphasized. Reasonable notice does not mean certitude. If you ignore a *likely* consequence of non-compliance because it is not the *only possible* consequence, you are still responsible for your default.

The adequate state grounds doctrine is not a federal insurance program for reckless litigants.

That is a point that the court of appeals got very wrong. In the court's view, "the state rule must speak in unmistakable terms." If not, then it is inadequate and may be disregarded on federal review. Cert. App. 20. But few if any rules are "unmistakable" – no more so in federal court than in the states. The terms in which the rule should speak are those that would permit "ordinarily competent attorneys [to] secure determination of the right" in question. 16B WRIGHT & MILLER, § 4027, at 386-87.

This Court has addressed the matter in prior adequacy cases. In *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190 (1925), the litigant complained about a state statute requiring a particular method of preserving constitutional claims. The argument was that the statute had previously been applied only to state constitutional claims; this was the first case in which the rule had been held applicable to federal constitutional claims as well.

Although the statute might reasonably have been construed either way, this Court rejected the claim of inadequacy. The state court's interpretation was not "forced or strained . . . . When so declared by the state court it should bind us unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it. This is no such case." 269 U.S. at 195. *See also Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 n.9 (1930) ("Had there been no previous construction of the statute by the highest court, the plaintiff would, of course, have had to assume the risk that the ultimate

interpretation by the highest court would differ from its own").

Courts of appeals have made the same point more recently, for example in applying the new deadline for filing habeas corpus petitions. "The petitioners' argument that the deadline was unclear also makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest." *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000).[24]

That rationale applies here as well. If state law reasonably calls for certain conduct, and offers a reasonable way to carry it out, then responsible litigants do not take a chance. They just do it. Those

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[24] *See Lattimore v. DuBois*, 311 F.3d 46, 54 (1st Cir. 2002) ("[w]rong guesses, even reasonable ones, as to precisely how a new statute of limitations will be authoritatively applied do not entitle a disappointed petitioner to relaxation of rules once adopted"); *Flores v. Quarterman*, 467 F.3d 484, 486-87 (5th Cir. 2006) (legitimate uncertainty about proper filing date did not justify lateness; "Flores should have elected to err on the side of caution and abide by the earlier of the two possible deadlines"); *see also United States v. Herrera*, 584 F.2d 1137, 1149 (2nd Cir. 1978) ("All the Due Process clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden, and thus not lull the potential defendant into a false sense of security, giving him no reason even to suspect that his conduct might be within its scope"); *United States v. Thomas*, 864 F.2d 188, 195 (D.C. Cir. 1988) ("courts do not require . . . that a person contemplating a course of behavior know with certainty whether his or her act will be found to violate the proscription"); *DiCola v. FDA*, 77 F.3d 504, 509 (D.C. Cir. 1996) ("It is therefore fanciful for DiCola to say that he can only 'guess' at the meaning of the [proscription]; he will usually have a pretty good idea").

who do not should not be able to claim refuge under the adequacy doctrine.

III. Kindler had more than reasonable notice that his flight "remedy" would jeopardize his legal remedies.

Under the proper standard, the adequacy of the default ruling here is evident. Kindler did not need an engraved invitation requesting the pleasure of his continued presence in this country. Existing law was enough to advise him that he better stay in his cell if he wanted to challenge his sentence through the courts. Kindler simply chose a different avenue of relief, and kept choosing it at every chance.

Kindler has argued, and the court of appeals agreed, that the adequacy of Pennsylvania's fugitive forfeiture rule must be assessed as of the time of the default, Cert. App. 21, which occurred "[w]hen Kindler escaped in 1984," Cert. App. 23. That is correct as far as it goes. The law should provide reasonable notice of its requirements before a litigant does something to violate them.

But at this point in their analysis, Kindler and the court below engage in a subtle anachronism. They assess the state of the law in 1984 as it applied to a *former* fugitive – one who has already been returned to custody. That is a status that Kindler did not achieve until *1991*. At the time of his 1984 default, he obviously *was not* a former fugitive and, as far as he could help it, he was *never going to be* a former fugitive. He fled to Canada, went to extreme lengths to break out of prison a *second* time, and then fought

extradition for years before he was dragged back within the jurisdiction of Pennsylvania courts.

So the notice to which Kindler was reasonably entitled at the time of his default was notice about the consequences of *escape*, not apprehension. That was a simpler question, and the law provided an (inescapably) clear answer. Pennsylvania cases, relying on over a century of decisions of this Court, have consistently refused to entertain challenges to a judgment of sentence by a fugitive who is still at large.[25] In 1984, that was all Kindler needed to know. It did not matter that his (double) escape efforts might eventually fail, because *reasonable* notice does not include caveats about contingencies that Kindler had no intention of ever facing.[26]

In any event, Pennsylvania's fugitive forfeiture rule was plainly adequate as applied to Kindler even if he were viewed, retroactively, as a "former" fugitive. As noted, Pennsylvania law at the time provided that, if

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[25] *See, e.g., Commonwealth v. Galloway*, 333 A.2d 741, 743 (Pa. 1975); *Commonwealth v. Barron*, 352 A.2d 84 (Pa. Super. 1975); *Commonwealth v. Tomlinson*, 354 A.2d 254 (Pa. 1976); *Commonwealth v. Albert*, 393 A.2d 991 (Pa. Super. 1978); *In the Interest of Dixon*, 422 A.2d 892 (Pa. Super. 1980); *Commonwealth v. Harrison*, 432 A.2d 1083, 1085-86 (Pa. Super. 1981); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982); *Commonwealth v. Passaro*, 476 A.2d 346 (Pa. 1984).

[26] *See Michel v. Louisiana*, 350 U.S. 91, 98-99 (1955) ("We do not believe that the mere fugitive status existing here excuses a failure to resort to Louisiana's established statutory procedure available to all who wish to assert claimed constitutional rights.... [The defendant], by his own action, failed to avail himself of Louisiana's adequate remedies").

an escaped convict was recaptured during the post-verdict stage, the trial court had discretion to dismiss post-verdict motions or decide them on the merits. Accordingly, the flight rule did not dictate unequivocal results in individual cases.

But reasonable notice does not require that it must. The only notice Kindler needed was notice sufficient to alert a prudent person to avoid the default. Kindler, of course, could easily have done so, by the simple expedient of not sawing through that prison bar, and not climbing down that thirteen-story rope he made out of bedsheets.

Kindler failed to take these steps not because the state rule was inadequate in spelling out exact outcomes, but because he made his own choice of remedies. He knew at the time of his first escape that the trial judge could dismiss his post-verdict motions, and he knew at the time of his second escape that the trial judge *had* dismissed his post-verdict motions. But he also "knew there was no death penalty" up there in Canada, and that was the form of relief he decided to seek. It almost worked.[27]

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[27] As the Third Circuit itself observed in a related context concerning Pennsylvania's fugitive forfeiture rule,

> "Feigley does not contend that he escaped with an intention to return in the future and in reliance on [state law] resubmit his claims to the Pennsylvania courts. Moreover, . . . it is not necessary that the petitioner have knowledge of the precise impact of his decision to escape. It is enough that he obviously knew that by attempting an

Yet Kindler insists he should not be held to the consequences of his decision. He argues that he could not have known he would forfeit claims by escaping (twice), because two other Pennsylvania capital defendants also escaped during the 1980's, and their claims were heard on the merits. *See* Brief in Opp. at 17 n.11.

The disposition of these other cases, however, could not possibly have influenced Kindler's own determination to flee. The decisions reviewing those cases on the merits came years *after* Kindler's (two) escapes. *Commonwealth v. Lewis*, 567 A.2d 1376, 1378 n.1 (Pa. 1989); *see also Commonwealth v. Lewis*, 598 A.2d 975 (Pa. 1991); *Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988); *see also Commonwealth v. Yarris*, 731 A.2d 581, 584 (Pa. 1999).

In any case, the whole point of a flexible, discretionary standard for fugitive forfeiture is that it takes account of individual circumstances, circumstances that Kindler neglects to flesh out. Reginald Lewis, the first defendant in question, was gone for less than *two weeks*.[28] He was found in an adjacent state, before he could leave the country, at which point the prosecution withdrew its motion to quash his appeal. The entire brief period of his absence occurred after the appeal had been timely filed

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> escape which he hoped would be permanent, he was deliberately bypassing the entire legal system."

Feigley v. Fulcomer, 833 F.2d 29, 32 (3rd Cir. 1987).

[28] Robert J. Terry, "*FBI Arrests Escapee of Death Row*," PHILA. INQUIRER, October 2, 1984, at B4.

and long before it was scheduled for argument. Nicholas Yarris, the other defendant, was at liberty for less than a month.[29] He also did not leave the country, and his short absence served only to delay a hearing that he had requested. Kindler had no right to assume that, in the circumstances of his case, he would be treated as leniently as these other two.

But there was also a fourth man, not mentioned by Kindler. Roger Judge was a capital defendant who escaped (on his second try) in 1987. Like Kindler, he succeeded in getting across the border to Canada. He spent the next *eleven years* there, committing new crimes, serving time, and fighting extradition to the United States. And like Kindler, Judge's legal claims were deemed forfeited while he was at large, and the default was upheld after his capture. *See Commonwealth v. Judge*, 609 A.2d 785 (Pa. 1992); *Commonwealth v. Judge*, 797 A.2d 250 (Pa. 2002).[30]

These are not circumstances that give any weight to Kindler's claim of inadequacy. He knew what he was doing, and he did it anyway. If he was never caught, his sentence was self-vacated. If he was caught, there was no way to punish him with prison time, because he was already facing execution. The

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[29] Joanne Sills, "*Cops Hunt Escaped Murderer*," PHILA. DAILY NEWS, February 16, 1985, at 5; "*Pennsylvania Fugitive Arrested for Car Theft in Daytona Beach*," OCALA (FLA.) STAR-BANNER, March 14, 1985, at 3B.

[30] Judge is now in federal habeas court, represented by the same counsel as Kindler. He is attacking *his* forfeiture as inadequate, bolstered, of course, by the Third Circuit's ruling in this case. *See Judge v. Beard*, 611 F. Supp. 2d 415 (E.D. Pa. 2009).

only potential consequence was forfeiture and, once the federal habeas courts took care of that by annulling the default as "inadequate," the remaining result of Kindler's flight was to provide him the benefit of relief on a legal claim, *see Mills v. Maryland*, 486 U.S. 367 (1988), that did not exist at the time of his escape.

Kindler contends that he might have received application of *Mills* in any case. He points to a handful of Pennsylvania capital appeals that took many years to resolve, and speculates that, had he not fled, his direct appeal just might have dragged on long enough – from 1984 until 1988 – to bring him within the new rule established by *Mills*. *See* Brief in Opp. at 21.

In reality, however, the vast majority of Pennsylvania capital appeals decided during the period of Kindler's flight took considerably less than fours years to resolve[31] In the normal course, his case would have been over and done with, and the judgment final, well before he could take advantage of

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[31] *See, e.g., Commonwealth v. Lark*, 543 A.2d 491 (Pa. 1988) (25 months); *Commonwealth v. Holland*, 543 A.2d 1068 (Pa. 1988) (26 months); *Commonwealth v. Crawley*, 526 A.2d 334 (Pa. 1987) (23 months); *Commonwealth v. Jermyn*, 533 A.2d 74 (Pa. 1987) (18 months); *Commonwealth v. Clayton*, 532 A.2d 385 (Pa. 1987) (18 months); *Commonwealth v. Fahy*, 516 A.2d 689 (Pa. 1986) (35 months); *Commonwealth v. Frey*, 517 A.2d 1265 (Pa. 1986) (25 months); *Commonwealth v. Griffin*, 515 A.2d 865 (Pa. 1986) (22 months); *Commonwealth v. Cross*, 496 A.2d 1144 (Pa. 1985) (38 months); *Commonwealth v. Pursell*, 495 A.2d 183 (Pa. 1985) (16 months); *Commonwealth v. Morales*, 494 A.2d 367 (Pa. 1985) (19 months); *Commonwealth v. Beasley*, 479 A.2d 460 (Pa. 1984) (25 months).

this new development in the ever-developing law of capital litigation.

Mills in itself, moreover, was not the only blessing that Kindler secured with his flight. By relocating abroad, and then receiving a pass on what should have been a forfeiture of his claims in state court, Kindler was also able to obtain *de novo* review of both his *Mills* claim and his mitigation ineffectiveness claim. *See* 28 U.S.C. § 2254(d). Yes, the state could have avoided that fortuity – but only by giving the prisoner a pass to begin with and reviewing his claims on the merits, as if nothing had happened, as if he had not sawed his way out of his Philadelphia prison cell, as if he had not climbed his way out of his Montreal prison cell, as if he had not argued to every Canadian court and even to the United Nations that he should *never* be returned to this country to face his sentence.

The adequate state grounds doctrine should not be understood to require such an outcome. Reasonable notice of the state rule was provided, and a reasonable opportunity to comply with it. That should be enough for adequacy.

Conclusion

For these reasons, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254. State Custody; Remedies in Federal Courts:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(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.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(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.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

(A) the claim relies on --

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable

to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.