No. 08-992

In the Supreme Court of the United States

JEFFREY A. BEARD, *Petitioner*,

v.

JOSEPH J. KINDLER, *Respondent*.

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

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, INDIANA, LOUISIANA, MINNESOTA, MISSISSIPPI, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WISCONSIN IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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?

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INTEREST OF AMICI CURIAE

Amici curiae are States responsible for effective enforcement of their criminal laws. They therefore are interested in protecting state rules requiring orderly and timely presentation of claims in their criminal courts and preserving the finality of their criminal judgments. The decision of the Third Circuit Court of Appeals in this case, reviving in remote federal habeas corpus proceedings a claim forfeited by the criminal defendant under a state procedural rule, undermines fair and reasonable state-court procedure and frustrates the finality of state criminal judgments.

SUMMARY OF ARGUMENT

When a state court in fair proceedings decides that a criminal defendant has forfeited review of a federal claim by violating a neutral state procedural rule that afforded him a reasonable opportunity to present such a claim, the state court's decision is an "adequate" basis to impose a procedural bar against review of the claim in later federal habeas corpus proceedings.

A. Federal courts should exercise the greatest restraint before rejecting a state procedural-default ruling and exposing a final state criminal judgment to attack based on belated, stale, or tactically-withheld claims. Federal-state comity, first, enjoins the federal court to presume the good faith of the state courts in enforcing their procedural rules and to avoid unnecessary interference with the efficacy of state-court procedures. Traditional habeas corpus policy, further, reflects the primacy of the States' interest in the finality of criminal judgments. AEDPA, moreover, has reinforced federal deference to state criminal judgments; and intrusive federal rejection of state procedural rulings threatens to undermine the cornerstone reform enacted by Congress in that legislation. In light of these policies, the federal court ordinarily should simply accept a fair state-court procedur-

al decision, at least where it is based on a neutral rule the petitioner could have complied with, as an "adequate" ground for denying habeas corpus relief.

B. In particular, the federal habeas corpus court may not ignore the state procedural ruling, and consider the merits of the defaulted claim, just because the state rule by its terms on in practice allows for judicial discretion or flexibility in its enforcement. No federal interest justifies rejecting fair enforcement of a procedural-default rule that the defendant reasonably could have complied with but took on the risk of flouting instead. To the contrary, discretion, flexibility, and lenity in the state courts' enforcement of procedural-default rules work to the benefit of the federal claimant. In the habeas corpus context, moreover, the procedural rules attacked by petitioners often are those that simply impose some limits on generous "second bite at the apple" collateral challenges to the judgment. Nor should the States be constrained to adopt rigid or mechanistic procedural rules as a price for federal respect for final state-court criminal judgments that rest on fair procedural rules.

C. Federal scrutiny to detect "discretionary" or nonmandatory "inconsistent" enforcement of a State's procedural rules is a bankrupt enterprise anyway. It finds only scant and dubious support in this Court's "adequacy" precedents and even less in habeas corpus precedents. It spawns unreliable litigation that has broadly sabotaged state procedural rules in cases far beyond that of the allegedly aggrieved petitioner. It implies undue suspicion of the state courts and entangles federal courts in untenable second-guessing of state-court resolutions of state-law questions.

ARGUMENT

A FAIR PROCEDURAL-DEFAULT DECISION BASED ON A NEUTRAL RULE THAT AFFORDS THE DEFENDANT A REASONABLE OPPORTUNITY TO PRESENT HIS FEDERAL CLAIM IS "ADEQUATE" TO BAR THE DEFAULTED CLAIM IN HABEAS CORPUS PROCEEDINGS REGARDLESS WHETHER THE RULE IS "DISCRETIONARY" OR A FEDERAL JUDGE THINKS STATE COURTS APPLY IT "INCONSISTENTLY" UNDER STATE LAW

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); accord, *United States* v. *Olano*, 507 U.S. 725, 731 (1993). That principle operates fully at the intersection where state criminal judgments meet the federal writ of habeas corpus. There, it is well established, federal claims forfeited under state procedural law are procedurally "barred" from federal review too. *Coleman* v. *Thompson,* 501 U.S. 722, 729-732 (1991). The bar may be lifted only by a showing of a distinctive kind of "cause and prejudice" or "innocence." *Id.*

At that federal-state "flashpoint of tension," *Duckworth* v. *Eagan*, 492 U.S. 195, 211 (1989) (O'Connor, J., concurring), the procedural-bar principle is "primarily" informed by federalism and comity concerns protecting the States' interest in the finality of criminal judgments. *Coleman*, 501 U.S. at 730, 738-739. The principle also finds special support in the traditional habeas corpus "exhaustion of remedies" policy requiring petitioners to first present their federal claims to the state court in a proper way. *Id.*, at 731. Congress' modern reform of federal habeas corpus in the Anti-Terrorism and Effective Death Penalty Act of 1996 provides new and additional reasons for deferring to state-court judgments and promoting proper litigation of federal claims in state criminal courts.

A federal court, especially a habeas corpus court, should never grudgingly resist presuming the good-faith validity of a state-court procedural-default ruling imposed against a defendant who violated a state rule despite notice and opportunity to present claims such as his in compliance with it. Instead, in resolving the federal question of "adequate grounds," the habeas corpus court should recognize the state-court procedural ruling as "adequate" except in extraordinary circumstances. *See* Arg. A, *post*.

But many federal habeas corpus courts undermine the procedural-bar principle by withholding proper respect for such state-court rulings—like the Third Circuit did in this case. They deign to recognize the procedural-default decision only if the underlying state rule is immune from "discretion" that the federal court might perceive in so-called "irregular" or "inconsistent" applications of the rule in other cases. The Ninth Circuit, taking that view, has fixed in place an on-going wholesale repudiation of California's decades-old rules against unjustifiably delayed habeas corpus petitions, "successive" piecemeal petitions, and petitions based on claims omitted, despite their availability, in the earlier direct appeal. Nothing justifies hostile scrutiny of discretionary practices—practices that tend to benefit, not the State, but the federal claimant instead. *See* Arg. B, *post*.

Further, as illustrated by actual practice, review for "discretionary" and "inconsistent" enforcement of state procedural rules proves wasteful and unreliable—and amounts to untenable second-guessing of state courts on state-law questions. *See* Arg. C, *post*. This Court should put a stop to it.

A. Except in Rare Cases, the Federal Habeas Court Should Accept A State Court's Procedural-Default Ruling As "Adequate" to Bar the Forfeited Claim If the Petitioner Had a Fair Opportunity to Raise His Claim in Compliance with the State Rule.

1. Given the unquestioned validity of the procedural-bar principle, the main arguable reason for federal habeas corpus courts to scrutinize the state courts' independent procedural-default rulings for "adequacy" is to ensure that criminal defendants have a fair opportunity to obtain merits review of their federal claims in the "main event" state-court proceedings. See C. WRIGHT, E. MILLER, & A. COOPER, VOL. 16B, FEDERAL PRACTICE AND PROCEDURE 302, 307, 359-374 [§§ 4021, 4024], (2d ed. 1996); *Wainwright* v. S*ykes*, 433 U.S. 72, 88-90 (1977). Absent extraordinary circumstances—such as unconstitutional discrimination or irrationality in the application of the rule in the petitioner's case—that federal interest is satisfied when the State gives the claimant fair notice of the risk of default under the rule and fair opportunity to litigate his federal claim in conformity with it. At least in such circumstances, the state judgment serves as an adequate basis for the federal court to decline to review the federal claim. See VOL. 16B, FEDERAL PRACTICE & PROCEDURE 386-393 [§ 4027]. "Discretion" or perceived "inconsistency" in applying the rule in cases other than the petitioner's has nothing to do with it.

Petitioner Beard's merits brief (pp. 25 et seq.) and the Criminal Justice Legal Foundation's amicus curiae briefs in this case and in Philip Morris USA v. Williams, No. 07-1216, ,demonstrate that this Court's procedural-bar precedents, and the varying explanatory statements they contain, largely may be reconciled as consistent with a comprehensive basic rule. That is: to validate a state procedural ruling as "adequate," it suffices if the federal claimant is afforded (a) reasonable notice that his litigation conduct risks forfeiture of his claims and (b) reasonable opportunity to present his claim for merits review in

conformity with the rule. See *Parker* v. *Illinois*, 333 U.S. 571, 574-575 (1948); *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U.S. 194-195 (1925). Although an inquiry simply into state-court "evasion" to discriminate against federal claims also may be sufficient, cf. *McKnett* v. *St. Louis & S.F. Rwy*, 292 U.S. 230, 233 (1934), a deferential "reasonable notice and opportunity" formulation fully suffices to protect federal interests in any event.

A non-grudging approach, treating as "adequate" a fair state-court procedural-default judgment based on an established and reasonable procedural rule, is most appropriate. "A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system." *Lambrix* v. *Singletary*, 520 U.S. 518, 525 (1997). "Procedural rules, like the substantive laws they implement, are the products of sovereignty and the democratic process." *Lee* v. *Kemna*, 534 U.S. 362, 394 (2002) (Kennedy, J., dissenting). "Most state procedures are supported by various legitimate interests, so established rules have been set aside only when they appeared to be calculated to discriminate against federal law, or, as one treatise puts it, that they did not afford a reasonable opportunity to assert federal rights." *Id.* (citing VOL. 16B, FEDERAL PRACTICE & PROCEDURE 392 [§ 4027]).

Further, the State courts are the ultimate and authoritative expositors of state law. *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1974). So, when a state court adjudges that a state procedural rule works a forfeiture of a criminal defendant's federal claim, a federal court hardly may deny the validity of the ruling as a final resolution of the state-law question. See *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991). And, in the absence of proof by the defendant, the federal court should never assume that such a state procedural-law decision was unconstitutional. See *Johnson* v. *Zerbst*, 304 U.S. 458, 468-469 (1938). It would be illogical for the federal court—bound to accept the state procedural-ground ruling as correct, authoritative, and presumptively constitutional—to nevertheless refuse to

accept it as the final and sufficient word on the procedural point. Absent an extraordinary showing, such as unconstitutionality in the state ruling, the federal court safely may resolve the federal "adequate grounds" question by, at least, validating a fair state procedural decision based on a rule that gave the defendant a reasonable opportunity to obtain a merits ruling on his federal claim.

2. Accepting common state procedural rulings as "adequate" follows, in any event and in particular, from this Court's habeas corpus cases and the policies that undergird them.

a. Even in the absence of an actual state-court ruling, this Court without further inquiry has imposed procedural bars on habeas corpus claims when it appeared they would be subject to default under the facial terms of a state procedural law. E.g., *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 848 (1999); *Gray* v. *Netherland*, 518 U.S. 152, 162 (1996). Also, in *Teague* v. *Lane*, 489 U.S. 288, 297-298 (1988), this Court barred the petitioner's claim in light of his failure to raise it in state trial and appellate proceedings, as required by state law, despite the state-law "fundamental fairness" exception for defaulted claims. The Court, that is, did not inquire further into the state court's administration of that exception to see if the state rule otherwise might prove "inadequate." See also *Engle* v. *Isaac*, 456 U.S. 107, 125 (1982); but see *Wainwright* v. *Sykes*, 433 U.S. at 85-86.

b. Most fundamental, the nature of federal habeas corpus review of final state criminal judgments militates against promulgating additional pre-conditions for recognizing the "adequacy" of state procedural-default judgments based on fair rules. The procedural-bar principle in habeas corpus is "primarily" informed by federalism and comity concerns protecting the States' strong interests in the finality of criminal judgments. *Coleman*, 501 U.S. at 730, 739. Further, disrespect for a state court's procedural rulings conflicts with the traditional habeas corpus policy requiring petitioners to "exhaust" available remedies by properly presenting their federal claims to the state courts. *Coleman* v. *Thompson*, 501

U.S. at 731-732. Now, under AEDPA, the procedural-bar principle has become even more significant. Through AEDPA, Congress meant "to give effect to state convictions *to the extent possible under law*." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (emphasis added). And that AEDPA policy, in turn, informs the interpretation of traditional habeas corpus questions, *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1997), such as that of procedural bar.

Moreover, improper federal-court rejection of fair and neutral state procedural-default rulings—by attaching to them unnecessary and non-constitutional "adequacy" pre-conditions—threatens the cornerstone AEDPA reform of habeas corpus. Under 28 U.S.C. § 2254(d), the federal court must broadly defer to state court adjudications of federal claims "on the merits." But, when a federal court fails to defer to a state-court default decision—even though a procedural ruling rather than a merits ruling—it abets the petitioner in seeking to circumvent the § 2254(d) deferential-review standard that restricts the availability of the writ on his claim. For federal appellate courts have held that, when a state procedural ruling is deemed "inadequate," it obviates the § 2254(d) deference that otherwise would govern claims adjudicated on the merits upon procedurally-correct "fair" presentation to the state court. See *Pirtle* v. *Morgan*, 313 F.3d 1160, 1167-1168 (9th Cir. 2002); *Fisher* v. *Texas*, 169 F.3d 295, 299-303 (5th Cir. 1999); *Moore* v. *Park*, 148 F.3d 705, 708, 710 (7th Cir. 1998). In undermining the exhaustion rule and menacing the deference standard, cavalier or grudging treatment of a state court's procedural-default ruling has become doubly and triply objectionable under AEDPA.[1]

c. That federal courts should accord state procedural decisions utmost respect in habeas corpus cases follows,

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[1] For qualifying *capital* cases, AEDPA provides that, absent narrow exceptions, "the district court shall only consider a claim or claims that have been decided on the merits in the State courts." 28 U.S.C. § 2264(a).

also, from the fact that the underlying state procedural rule in federal habeas corpus cases often will peculiarly be one that merely imposes some limits on "second bites" or "third bites at the apple" in generous post-trial and post-appeal proceedings in state court. Unlike in cases emanating from state civil courts or in direct appeals, many procedural-default judgments that make their way from state criminal courts into federal habeas proceedings are founded in rules against using state collateral proceedings as a "second appeal" or abusing the state habeas corpus writ through "untimely" and "successive" state collateral attacks on the final criminal. That counsels strongly in favor of barring the claim in the absence of a showing of "cause and prejudice." See *McCleskey* v. *Zant*, 499 U.S. 467, 486, 493 (1991); *United States* v. *Frady*, 456 U.S. 152, 165-166, 167-169 (1981). In view of such uniquely enhanced opportunities to challenge the judgment at the state end of the process—and the "cause and prejudice" and "miscarriage of justice" exceptions to any resulting procedural bar at the federal end—there is no need for intrusive scrutiny of "adequacy" in the middle.

3. A rule prescribing a deferential federal attitude towards state procedural-default rulings in state criminal cases finds added support in the attitude of the federal courts toward defaults in federal criminal cases. Federal appellate courts routinely treat a federal defendant's proven violation of established federal procedural rules, such as that requiring a contemporaneous objection to claimed error at trial, as sufficient to bar review of the claim on appeal. See *United States* v. *Olano*, 507 U.S. at 732. State-court procedural rulings are fundamentally like those made by federal courts in federal criminal cases. So, for example, the rules recognized in *McCleskey*, 499 U.S. at 486; *Frady*, 456 U.S. at 167-169, and *Davis* v. *United States*, 411 U.S. 233, 241-242 (1973)—requiring a "cause and prejudice" showing before permitting habeas corpus review of claims that should have been raised by pre-trial objection or in a federal appeal or in a first federal petition—should apply equally and presumptively in habeas corpus review of claims defaulted under similar

state-law rules. For it would offend comity if the federal court were to afford less respect to state-court procedural rulings than it does to its own. *Francis* v. *Henderson*, 425 U.S. 536, 541-542 (1976).

4. The better "adequacy" rule of non-intrusive acceptance of the state decision in cases at least where the defendant had a chance to raise the pertinent kind of federal claim under state procedural law—a rule of great deference—accounts for the possibility of unconstitutionality tainting a state court's procedural decision. Further, twin exceptions, for "cause and prejudice" and proof of the defendant's innocence, remain fully adequate safeguards against injustice.

a. Thus, the deference advocated by amici would conform to *Lee* v. *Kemna*, 534 U.S. 362. There, the in-trial suddenness of the disappearance of the defendant's alibi witnesses made it impossible for his lawyer to strictly comply with the ordinarily adequate state rule requiring written motions for continuances supported by sworn testimony establishing the likely availability of the witnesses at the subsequent trial date. In addition, the default in that case occurred at the "main event" criminal trial rather than in extra-constitutional post-trial or post-appeal proceedings. Amici's argument, also, is consistent with *Cone* v. *Bell*, 129 S.Ct. 1769 (2009). There, the federal court erroneously imposed a bar because the petitioner, having once properly raised his federal claim in state court, went ahead and raised it again. Such retroactive invalidation of his earlier proper attempt to raise the claim in effect deprived him of that first fair opportunity to comply. Further, as this Court ruled, the "twice raised" justification for not re-ruling on the same claim did not amount to a "procedural default" ruling forfeiting the claim under state law in the first place. *Id.* at 1782 ("the Tennessee appellate court did not hold that Cone's *Brady* claim was waived").

b. The better, deferential view of state procedural rulings in habeas corpus cases, of course, admits exceptions for cases, doubtlessly rare, of federal-law violations—such as for unconstitutional discrimination or ir-

rationality in the application of the rule in the petitioner's case. In criminal cases, a state-court procedural ruling normally will not be governed directly by any federal statute or regulation.[2] Given the lesser nature of any arguable liberty interest in state habeas corpus proceedings, see *District Attorney's Office for the Third Judicial District* v. *Osborne*, 129 S.Ct. 2308, 2319 (No. 08-6) (June 18, 2009), direct federal limits on the state courts almost invariably will consist only of the basic guarantees of the United States Constitution. Either way, where a habeas corpus petitioner shows that the state court's procedural ruling violated important federal rights, he justifiably will avoid imposition of any resultant procedural bar in the federal court.

c. And, of course, the procedurally-barred federal habeas corpus petitioner retains an opportunity to show "cause and prejudice" or a "miscarriage of justice" in order to lift the bar and permit review of his claim despite his state-court default. See *Wainwright* v. *Sykes*, 433 U.S. at 90-91. Their availability serves as yet another reason why the federal court's review of the "adequacy" of state procedural rulings should be highly deferential. Because these exceptions enable the federal court to take cognizance of "good cause" and injustice, there is even less reason for federal judges to police the way state courts administer, in their discretion, state procedural rules that also admit similar discretionary exceptions. *See* Arg. B, *post*. Such state-law exceptions often might prove more solicitous of the federal claim and the federal claimant than the exceptions this Court has recognized as effective safety-valves under a well-functioning procedural-default principle.

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[2] But see *Davis* v. *Wechsler*, 263 U.S. 22 (1923); *People* v. *Otto,* 2 Cal.4th 1088, 831 P.3d 1178 (Cal. 1992). Also, in one rare case—*Smith* v. *Texas*, 550 U.S. 297 (2007)—the state court's procedural ruling was based on a misunderstanding of this Court's constitutional decision, validating the defendant's original rule-compliant objection, handed down in the direct appeal in the same case.

B. Federal Habeas Corpus Review for "Discretion" or Perceived "Inconsistency" in the State Court's Application of a Neutral Procedural Rule Serves No Sufficient Federal Interest.

Despite the merits of a rule favoring respect for any fair and reasonable state procedural rule, many federal courts of appeals take an adversarial or intrusive attitude. They endorse, by word or practice, the erroneous notion that a state procedural default decision may be "viewed in federal habeas corpus with a healthy degree of skepticism."*Anderson* v. *Attorney General of Kansas*, 342 F.3d 1140 (10th Cir. 2003). A chronic manifestation of that attitude are federal court demands that, to support procedural bars in federal habeas corpus, state procedural rules may not be "discretionary." *Doctor* v. *Wallace*, 96 F.3d 675, 685-686 (3d Cir. 1996); *Valerio* v. *Crawford*, 306 F.3d 742, 776-778 (9th Cir. 2002). Or, in another way of phrasing the rejection of state rules on account of "discretion," some federal courts improperly police whether the state courts sometimes ignore the procedural rule, forgive its violation, or find it inapplicable for case-specific reasons under general "reasonableness" or "interest of justice"-type standards. They demand that state rules must be "strictly" followed or "regularly" and "consistently" applied—at least insofar as the federal court perceives it from a distance—to "the vast majority of similar claims." See *Williams* v. *Puckett*, 283 F.3d 272, 280 (5th Cir. 2002); *Clay* v. *Norris*, 485 F.3d 1037 (8th Cir. 2006); *LaCrosse* v. *Kernan*, 244 F.3d 702, 704 (9th Cir. 2001). The Ninth and Tenth Circuits have gone so far as to place upon a State the ultimate burden of proving the "adequacy" of a state-court's standard and reasonable procedural rules See *Bennett* v. *Mueller*, 322 F.3d 573, 585 (9th Cir. 2002); *Hooks* v. *Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999).

Contrary to calls for "healthy skepticism," federal court suspicion of state court procedural decisions is unhealthy. Although it is hard to identify a compelling one,

there perhaps might exist other prudential requirements for "adequacy" beyond that of reasonable notice of the default risk and fair opportunity to litigate the federal claim. Regardless, scrutiny of judicial "discretion" in the administration of a state procedural rule, or arguably "inconsistent" applications of the rule that might result from such discretion, are in no event a right part of the inquiry.

1. This Court has never rejected a state procedural-default decision as "inadequate" to bar a federal habeas corpus claim merely on account of "discretionary," or "inconsistent," enforcement of state procedural rules in the state court. Nor has this Court in its habeas corpus procedural-bar cases stayed its hand in imposing a bar until the State had first satisfied a burden of proving "non-discretionary" or "consistent" application of the rule in the run of other state cases.

This Court, it is true, looked at evidence of the state courts' broader enforcement of a procedural rule in *Dugger* v. *Adams*, 489 U.S. 401, 410 n.6 (1989), and *Wainwright* v. *Sykes*, 433 U.S. at 85-86. Cf. *Johnson* v. *Mississippi*, 486 U.S. 578 (1988)[3]. In neither case, however, did the Court reject the state procedural rule. *Sykes* merely noted that the state courts had applied the rule in other cases. *Adams*, observing that the rule in fact had been applied by the state court "in the vast majority of cases," merely explained that cases to the contrary were not "sufficient to undercut the adequacy" of the state-court decision. (In *Adams*, this Court pointed out that the Florida Supreme Court had often imposed forfeiture for belated *Caldwell* v. *Mississippi* claims in particular. But, unlike what the Ninth Circuit for example has done, *see*

[3] Albeit from a Mississippi post-conviction proceeding, *Johnson* was in this Court on direct appeal from the state court. Further, it appears that the procedural rule cited by the state supreme court in that case was novel and contradicted the rule in existence at the time of the defendant's alleged default. So the rule likely would have been inadequate even under the fair notice/hearing standard amici discuss in this case.

pp. 21-23, *post*, this Court never even implied that a general state procedural rule might somehow become *per se* "inadequate" on a wholesale basis for *all* federal claims and for an open-ended period spanning decades.)

2. Nor should federal policy disfavor "discretion" or mercy—over rigidity and "mandatory" application—in the enforcement or relaxation of a state procedural rule. Discretion and potential exceptions are desirable feature that can mitigate the effect of such rules. Conversely, there is no reason why a litigant capable of complying with an established rule needs to know in advance the precise way discretion or excuse might work to mitigate his risk if, with fair notice of the rule, he decides to flout it.

a. A tempering judicial discretion broadly characterizes federal procedural rules. See *United States* v. *Olano*, 507 U.S. at 732 (discussing judicial discretion to relieve failure-to-object default under Fed. R. Civ. Pro. 52(b)); *United States* v. *Frady*, 456 U.S. at 162-163; *Davis* v. *United States*, 411 U.S at 241. In *Day* v. *McDonough*, 547 U.S. 198, 210-211 (2006), and *Granberry* v. *Greer*, 481 U.S. 129 (1987), this Court declined to require federal courts to address, *sua sponte*, statute-of-limitations and procedural-bar defenses when the State's representative fails to timely assert them; but the Court nonetheless allowed for "discretion" to consider those un-raised defenses on a case-by-case basis. Presumably, the State representatives would not prevail on the "gotcha!" argument that, because of that discretion, the federal courts now must always consider the State's un-raised defenses after all. Similarly, AEDPA's "statute of limitations does not begin to run "until the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). Nor has it always been clear, for purposes of applying this Court's exceptions to the procedural-bar principle, precisely what factual circumstance qualify for "cause," see *Reed* v. *Ross*, 468 U.S. 1, 13 (1984), or what standard determines "prejudice," see *United States* v. *Frady*, 456 U.S. at 170. Amici are

unaware of any federal doctrine restricting enforcement of these various federal procedural rules unless the federal court can demonstrate that the rules are not "discretionary" and that it has "strictly" or "regularly and consistently" applied them in the "vast majority" other cases. In fact, the Ninth Circuit has reserved for the federal court discretion to reject a "defaulted" habeas corpus claim on the merits where application of the procedural-bar doctrine appears to be complicated, *Franklin* v. *Johnson*, 290 F.3d 1223, 1232 (9th Cir. 2002)—the very kind of cost-free exercise of discretion to ignore a procedural bar that it treats with undue suspicion when the state court does it.

b. The same kind of discretion and lenity characterize state procedural-default rules too. For example, although California allows criminal defendants to bring collateral habeas corpus challenges to their convictions, those challenge must be made "without substantial delay" after the defendant reasonably should have been aware of the bases for his claim. After that, claims unjustifiably raised in late or successive petitions are barred. Some case-by-case judgment necessarily informs the determination whether a claim was unreasonably delayed—or whether other circumstances make out an exception to the rule. See *In re Clark*, 5 Cal. 4th 750, 855 P.2d 729 (1993). And, as in this case, Pennsylvania and Wisconsin allow for discretion in judicial enforcement of their rules barring review of the defendant's claims when he escapes from custody after conviction. Ohio Appellate Rule 5(A), as another example, provides for judicial discretion to allow the defendant to file a late appeal.

All this should be encouraged. Yet federal courts instead have refused to honor state-court decisions imposing procedural defaults under these rules because of what should be seen as laudable discretion in adjudging or forgiving violations. See *Morales* v. *Calderon*, 85 F.3d 1387, 1391-1393 (9th Cir. 1996); *Kindler* v. *Horn*, 542 F.3d 70 (3d Cir. 2008); *Braun* v. *Powell*, 227 F.3d 908, 913-914 (7th Cir. 2000); *Dietz* v. *Money*, 391 F.3d 804, 811 (6th Cir. 2004).

If respondent were to succeed in his perverse attack on the kind of "discretion" that might mitigate the effect of a defendant's decision to flout a state procedural rule, habeas corpus petitioners will be enabled in challenging the effect of all sorts of well-established and reasonable state rules. See, e.g., Ala. Crim. Pro. R. 32, 35 ("good cause" and "diligence" standards for second-appeal and successive petitions); Colo. R. Crim. Pro. 35(c)(2) ("interest of justice"); *People* v. *Scheer*, 184 Colo. 15, 20, 518 P.2d 833, 835 (1974) ("special circumstances" excusing successive petition); Colo. Rev. Stats. Ann. § 16-5-402(1) ("justifiable excuse" or "excusable neglect'" for statute-of-limitations violation); Conn. Practice Book § 23-29(3) (successive-petition bar inapplicable for claim not "reasonably available" earlier); Del. Superior Ct. Crim R. 61(i)(2, 5) ("cause and prejudice" and "fundamental miscarriage of justice" exceptions to successive-petition bar); Fla. R. Crim. Pro. 3.850(b) (limitations-period bar excused for claim undiscovered despite "diligence"); Ga. Stats. § 9-14-47.1 (successive-petition bar lifted if facts could not "reasonably" have been asserted in first petition); Hawaii Penal R. 40(a) ("extraordinary circumstances" for second petition); Idaho Code §§ 19-4901(b), 19-4908 ("reliability" and "diligence" components of exception to no-second-appeal rule; "insufficient reason" precludes successive petition); 725 Ill. L. C. S. § 5/122-1 ("no culpable negligence" and "fundamental fairness" exceptions to statue-of-limitations and successive-petition rules); Indiana Post-Conviction R. PC 1(8) ("sufficient reason" for second petition); Iowa Code Ann. § 822.8 ("sufficient reason" exception for successive petition); Kan. Stats. Ann. § 60-1507(c) (court not "required" to consider successive petition); Ky. R. Crim. Pro. 11.42(10) (limitations-period bar lifted for facts defendant could not "reasonably" have known); La. Crim. Pro. Code, Art. 930.4 ("interests of justice" exception to no-second-appeal rule; "inexcusably omitted" standard for successive petitions); 15 Me. Rev. Stats. Ann. § 2128 (no second appeal unless "excusable"); Md. Code Crim. Pro. 7-103, 7-104 ("interest of justice" exception to successive-

petition rule; "extraordinary cause" exception for statute of limitations); Mass. R. Crim. Pro. 30(c)(2) (judicial "discretion" to allow successive petition); *Spears* v. *State*, 725 N.W.2d 696, 700 (Minn. 2006) (limited-situation "fairness" exception for successive-petition and second-appeal procedural-bars if default was not deliberate and "inexcusable."); Miss. Stats. § 99-39-21 ("cause and prejudice" requirement for second appeal); Mont. Code Ann. § 46-21-105 (no successive petition unless claims "could not reasonably have been raised" in first petition); Nev. Rev. Stats. § 34.724 (statute-of-limitations bar lifted where delay not defendant's "fault"); N.J. R. of Ct. 3:22-4 (successive-petition and second-appeal bars lifted for "fundamental injustice"); N.Y. Crim. Pro. L. § 440.10(c) ("interest of justice" discretion to lift successive-petition bar); Vt. Stats. Ann. § 7134 (court "not required to entertain successive petitions"); Wisc. Stats. § 974.06(4) (no successive post-conviction motions unless "sufficient reason" shown); Wash. Rev. Code § 10.73.140 (successive petitions barred unless "good cause" shown why not raised earlier"); see also Ohio Rev. Code § 2953.23.

3. Language in this Court's civil and direct-appeal jurisprudence outside the habeas corpus criminal context— see, e.g., *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 234 (1969) ("discretionary"); *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964) ("not strictly or regularly followed"); *Williams* v. *Georgia*, 349 U.S. 375, 383 (1955) ("matter of discretion")—does not compel the conclusion that "discretionary" state procedural rules giving rise to so-called "inconsistent" decisions are "inadequate" to bar federal habeas corpus review of a "defaulted" federal claim. Transporting civil-case or direct-appeal "adequacy" principles into habeas corpus proceedings is not automatic. See, e.g. *Coleman* v. *Thompson*, 501 U.S. at 741. The nature of habeas corpus requires the relaxation of many legal principles that otherwise would work more indifferently to the States' interests in other contexts. For example, the "harmless error" standard is strict on direct appeal but more forgiving on habeas corpus. See *Fry* v. *Pliler*, 551 U.S. 112 (2007). Also, unlike in direct

appeals, constitutional rights newly recognized or expanded by the courts rarely apply retroactively to support relief in habeas corpus cases. See 28 U.S.C. § 2254(d); *Teague* v. *Lane*, 489 U.S. at 299-316 (plurality op.); see also *Stone* v. *Powell*, 428 U.S. 465, 474-495 (1976) (Fourth Amendment exclusionary-rule claims not cognizable in habeas corpus).

It would be worse than ironic to transform language about "discretion" and "consistent" application into a rule of inadequacy in modern habeas corpus cases. The argument for doing so may be traced to race-tinged civil-rights cases from the 1950's and 1960's where recalcitrant courts trotted out novel procedural "rules" as pretexts for defeating unpopular federal claims or claimants. Given certain societal progress in racial matters since then, see *Northwest Austin Municipality District* v. *Holder*, 129 S.Ct. 2504, 2511-2512 (No. 08-322) (June 22, 2009), any need for such scrutiny has diminished. As this Court recognizes, and as Congress recognized in AEDPA, state courts are "co-equal" parts of our national judicial system and give serious attention to their responsibilities to enforce the federal constitution. *Sawyer* v. *Smith*, 497 U.S. 227, 241 (1990).

Upon proof of unconstitutional state process, of course, the state procedural bar would fail. *See* Arg. A, *ante*. But there is no constitutional infirmity in "discretion" or "inconsistency" in state judicial decisions applying state law to case-specific facts. *Engle* v. *Isaac*, 456 US at 121 at n. 21; *Beck* v. *Washington*, 369 U.S. 541, 554-555 (1961); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1947). Invidious-discrimination concerns that might have affected the civil-rights-era precedents should not be employed now to condemn modern state-court procedural decisions for the opposite reason of state-court leniency toward federal claimants. Instead, where the defendant has fair notice of the rule and the risk of forfeiture it presents, and a fair opportunity to comply, federal courts should laud state-court "discretion" and occasional acts of lenity that may further promote the vindication of federal rights.

4. Such a "no good deed goes unpunished" prescription for state procedural law is objectionable for related reasons. It would discourage flexible consideration of case-specific circumstances that otherwise might reasonably be accepted by a state court as excusing or mitigating a defendant's procedural violation. And it would set up a perverse incentive for States to clamp down by enacting rigid and mechanical rules that admit of no judgment or discretionary exception. See, e.g., *Fearance* v. *Scott*, 56 F.3d 633, 642 (6th Cir. 1995) (state procedural default rule became "adequate" once state law eliminated judicial discretion to consider "successive" habeas corpus petitions).

For example, like in the federal system and like in many other States, California affords a criminal defendant appellate review of his conviction but requires claims based on the appellate record to be raised in the direct appeal and not later in a collateral habeas corpus proceedings. *In re Dixon*, 41 Cal.2d 756, 759, 264 P.2d 513 (1953); see *United States* v. *Frady*, 456 U.S. at 167. Yet, in a case in which the California Supreme Court deemed to be defaulted previously-available appellate-record claims raised by the defendant only in a later *second* habeas corpus petition, the Ninth Circuit rejected the state-court procedural ruling on the asserted ground that the scope of a "special circumstances" exception to the rule was insufficiently clear. *Fields* v. *Calderon*, 125 F.3d 757, 760 (9th Cir. 1997). The Ninth Circuit did this even though the rule made the risk of default palpable and nothing prevented the defendant from raising his claim in his direct appeal fifteen years earlier. The case returned to the district court for another ten years, and only became final with the denial of Fields' certiorari petition last year. *Fields* v. *Ayers*, 128 S.Ct. 1875 (2008). California's legitimate interests—in finality and in orderly state-court procedures promoting timely presentation of claims when they are fresh and when reliable re-trials remain practical—would have been better served by a mechanistic no-exception rule.

5. To put it bluntly: Federal scrutiny for mere "discretion" or "inconsistent" application of a reasonably clear state-law rule serves little if any purpose, and is insufficient to override the finality interests that characterize habeas corpus. Where a state criminal defendant or habeas corpus petitioner has fair notice of a procedural pre-requisite for preserving review of his federal claim, yet flouts the rule, he has no legitimate complaint when the state court predictably invokes the rule in his case. Whether he or a federal court believes that other litigants escaped forfeiture in seemingly similar circumstances cannot justify the petitioner's decision to ignore the rule as if in daring the state court to enforce it.

a. Respondent might argue that uncertainty in the enforcement of a rule might make it impossible for a litigant to determine what he needs to do to comply with it. But, as amici acknowledge, to be "adequate" a procedural rule must give the litigant an opportunity—including reasonable notice—to obtain merits review of his federal claim in compliance with the rule. In an extreme case of abandonment or "unforeseeable" and "freakish" enforcement of a rule, it might not qualify as affording fair notice. See *Prihoda* v. *McCaughtry*, 910 F.3d 1379, 1385 (7th Cir. 1999); see also *Judd* v. *Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001).

But that does not mean that procedural rules requiring "reasonableness" or "diligence" from the litigant in presenting his claim in a timely way rather than belatedly are "inadequate." Our legal system often requires "reasonable" conduct from citizens—for example, holding them liable in tort for "unreasonable" negligence, and holding them criminally culpable for violence even where they honestly but "unreasonably" act in the perceived need to defend themselves from attack. A "reasonableness" standard does not suddenly become indefensible in a procedural rule rather than in a substantive rule.

Still less might a general "reasonableness" or "interest of justice" standard undermine "adequacy" when those standards describe merely what "exceptions" might apply to mitigate or excuse a violation of an other-

wise sufficient rule giving fair notice of required procedure. No imperative requires the federal court to override a state law procedural ruling imposed against a litigant who, with notice of the risk that a violation will work a forfeiture of his claim, ignores or flouts the rule as if to dare the state court to enforce it. Yet, in *Smith* v. *Black*, 970 F.2d 1383, 1387 (5th Cir. 1992), the federal court relieved the petitioner from his state-law default, despite a clear written rule requiring objection at trial and the raising of trial-record issues on appeal rather than in habeas corpus, because the state supreme court did not invoke the rule in some other cases raising the same underlying claim.

Constitutional fair-notice considerations protect a defendant from criminal conviction and imprisonment under "unexpected and indefensible" judicial constructions of a state penal statute. *Rogers* v. *Tennessee*, 532 U.S. 451, 462 (2001) A defendant and eventual habeas corpus petitioner does not require significantly different or greater protection for his choice to push the envelope and to risk flouting a state procedural rule giving him notice of the potential cost.

b. It might be said that, where a State fails to treat its own procedural rules seriously, there is no reason the federal courts should treat them seriously either. Or that, where a state has completely or virtually abandoned enforcement of a procedural-default rule, a litigant might be unfairly deceived into believing that violating the rule entails no substantial risk of forfeiture. But neither the mere exercise of discretion, nor so-called "inconsistent" applications of rule that continues to be enforced to any significant degree, can demonstrate that a state court has abandoned its rule or fails to take it seriously. A defendant cannot be deceived by mere "discretion" or "inconsistency" in a rule that is enforced often enough to give him fair notice that non-compliance risks default.

Nevertheless, the Ninth Circuit in *Insyxiengmay* v. *Morgan*, 403 F.3d 657, 666-667 (9th Cir. 2005), refused to respect the Washington Supreme Court's ruling that the petitioner's post-conviction pleading was filed too late

under the state statute of limitations. Nothing in the state rule could have misled the petitioner into believing he could afford to delay until the very end of the one-year limitations period and then merely deliver his petition to prison authorities rather than file it in court. But the Ninth Circuit held that the procedural ruling was inadequate because the State, on which the Circuit had imposed the burden of proof, did not negate the possibility that the limitations period perhaps might be extended under some kind of "mail-box rule"—speculation that the Washington Supreme Court ultimately debunked under the "plain language" of the state appellate rules. See *In re Carlstad*, 150 Wash.2d 583, 590-593, 80 P.3d 587, 590-592 (Wash. 2003).

c. Nor is there good reason to believe that discretionary state procedural-default rules might be aimed peculiarly at federal rather than state claims. Respondent Kindler would be hard pressed to show that the States have adopted procedural rules disadvantaging the litigation of federal claims specifically. To the contrary, a state court's enforcement of a procedural-default rule against a criminal defendant's federal claim would most naturally sweep up related state claims, affording the defendant more protection than the federal constitutional minimum, at the same time. Nothing inherent or common in state procedural-default rules, and nothing in the mere exercise of judicial discretion in administering them, would tend to exert an adverse disparate impact on federal claims in particular.

C. Federal-Court Scrutiny of Whether a State Procedural Rule Proves "Discretionary" or "Inconsistent" In Application Results in Wasteful Litigation and Entangles the Federal Court in Untenable Second-Guessing of State-Law Rulings.

An unfriendly standard of review, demanding that state judgments reflect "mandatory" or "strict application" or the federal court's view of "consistency" and "regularity" under the state's discretion-mitigated proce-

dural law, predictably produces strange and "exorbitant" results.

1. That is the case in, for example, the Ninth Circuit. In 1940, the California Supreme Court announced that a petitioner may not challenge his conviction in piecemeal "successive' petitions. *In re Connor*, 16 Cal.2d 701, 705, 108 P.2d 10 (Cal. 1940). In 1953, the state court announced that petitioners may not raise, in collateral habeas corpus, claims that could and should have been raised, based on the available trial record, in the direct appeal. See *Dixon,* 41 Cal.2d at 759, 264 P.2d at 514. In 1985, the California Supreme Court announced that habeas corpus petitions must be filed without "substantial delay"; and, in 1993, the state court indicated that a petition would be "presumptively timely" if filed within 90 days after the reply brief in the direct appeal. See *Clark*, 5 Cal.4th at 784, 855 P.2d 729. Each of these rules admits some "exceptions" that call for judicial consideration of reasonable justification.

But, the Ninth Circuit has invalidated these rules, for procedural-bar purposes, on grounds of alleged uncertainty about when a petition becomes "untimely" and alleged "inconsistency" in the application of the "exceptions." See *Fields* v. *Calderon*, 125 F.3d 762-763; *Morales* v. *Calderon*, 85 F.3d at 1390-1393; *Siripongs* v. *Calderon*, 35 F.3d 1308, 1318 (9th Cir. 1994). Although the invalidation of these rules purportedly applies to defaults circa 1993 and before, the actual impact is worse. Because the Ninth Circuit has never subsequently honored state procedural decisions based on any of these rules, it in effect has neutralized them on a wholesale and continuing basis, for all cases and all claims spanning approximately the last two decades or more. Nothing in this Court's jurisprudence supports such a pervasive across-the-board and on-going nullification of the procedural-bar effect of a State's basic appellate and habeas corpus rules.

The road to proving anew that these rules have become "adequate" is tortuous indeed. *Martin* v. *Walker,* U.S. Dist. Ct. No. CIV S-99-0223 (E.D. Cal.) illustrates this. After Martin's murder conviction had been upheld

on appeal, the California Supreme Court denied further direct review in 1997 and then denied habeas corpus relief in 1998. When Martin raised new "unexhausted" claims in a later federal petition, the federal court stayed the proceedings to give Martin another opportunity to present those new claims in state court first. But Martin hardly could have explained and justified his three-and-one-half year post-appeal delay, for he was raising new claims of ineffective trial and appellate counsel even though he earlier had proved able to raise similar claims of ineffective trial and appellate counsel. As it happened, he offered no explanation at all. So the California Supreme Court rejected his claims on grounds of procedural default. The district court, in turn, imposed a procedural bar against those claims.

But, under its decision in *Bennett* v. *Mueller*, 322 F.3d 573, the Ninth Circuit reversed and placed the burden on the State to show that its timeliness rule was clear after *Clark* "and that it has been consistently applied." Given the "logic" stemming from the faulty premise that "discretion" resulting in alleged "inconsistency" renders a rule "inadequate," the State's representatives understandably were constrained to attempt a painstaking analysis of a large swath of state-court rulings in other cases. See *Powell* v. *Lambert*, 357 F.3d 871, 872 (9th Cir. 2004). The State investigated a sample of 370 habeas cases dismissed by the supreme court near the time of Martin's default, culling those filed by petitioners who, like Martin, also had filed previous appeals. Delving further into the sub-set of petitions filed, like Martin's, more than three-and-one-half years after the direct appeal, the State identified which ones had been denied by the supreme court with citations to the *Clark* "timeliness" rule and which ones had not. Then the State pored over the underlying details of the latter set of cases to demonstrate what case-specific circumstances explained the absence of an explicit invocation of the timeliness rule by the state court. (California has undertaken similar demonstrations. See, e.g., *Stanley* v. *Woodford*, No.CIV S-95-1500 (E.D. Cal.), *Kipp* v. *Ylst*, No. CV-03-8571 (C.D.

Cal.). The case is pending on appeal again.

It remains unclear, regardless how "consistent" state judicial decisions truly are, whether California ever could satisfy some federal courts. For, as in *Dennis* v. *Brown*, 361 F.Supp.2d 1124 (N.D. Cal. 2005), a federal court need only choose to demand written explanations from the California Supreme Court's procedural rulings in the hundreds of habeas corpus cases that crowd its docket. With such an impractical demand, the district court in *Dennis* has helped cement the Circuit's on-going wholesale refusal to honor state court decisions on basic state-court procedural questions.

Such untenable and wasteful litigation over "consistent application" is not unique to the Ninth Circuit. Other circuits have engaged in broad yet superficial calculations involving myriad state rulings to ward off or slay the chimera of "inconsistency." E.g., *Wright* v. *Quarterman*, 470 F.3d 581, 587-588 (5th Cir. 2006); *Franklin* v. *Anderson*, 434 F.3d 412, 420-421 (6th Cir. 2006); *Spears* v. *Mullin*, 343 F.3d 1215, 1254 (10th Cir. 2003).

Indeed, even where federal courts approve a state procedural rule as "consistently" applied, they leave the door open for new attacks based on later samples of state cases showing alleged relapse into "discretionary" and "inconsistent" results. See *Ortiz* v. *Stewart*, 149 F.3d 923, 932 (9th Cir. 1998); *Emory* v. *Johnson*, 139 F.3d 191, 201 (5th Cir. 1997). So, unjustifiable inquiry into the immaterial question of "consistent application" invites the worse prospect of permanent floating and open-ended relitigation based on arbitrary and infinite "moving average" snapshots of state court practice. If comity means anything, the State should not be forced to play a sudden-death game of "whack-a-mole" to vindicate the procedural rulings of its courts.

2. "Searching for 'regularity' in the state's employment of excuses and exceptions," further, "would embroil the federal court deeply in questions of state law and procedure." *Prihoda* v. *McCaughtry*, 910 F.3d at 1385. And that enterprise is off limits to federal habeas corpus courts. *Estelle* v. *McGuire*, 502 U.S. at 67.

Scott v. *Schriro*, 567 F.3d 573 (9th Cir. 2009), is an example of this. There, the Ninth Circuit refused to honor an Arizona preclusion ruling based on a state rule of court providing that, "[a]fter the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause." The state court held that such an amendment could be authorized by the rule only *before* issuance of a dispositive order, not to vacate such an order dismissing the petition. The Ninth Circuit, however, held that the rule did not constitute an adequate state procedural bar because—under its own view of Arizona law—"[t]he only condition to amendment of a filed petition is the existence of good clause. Whether a court has or has not ruled on the original petition is not mentioned as a condition to amendment." *Id.* at 581-582.

Amici question whether this Court would view analogous Rule 15 of the Federal Rules of Civil Procedure as allowing a federal litigant to amend his complaint even after the district court had dismissed the proceedings. More to the point, the Ninth Circuit's rejection of the state ruling in *Scott* was based, improperly, on its own second-guessing of the Arizona court on a matter of Arizona law. See *Brown* v. *Secretary of the Department of Corrections*, 200 Fed. App. 885 (11th Cir. 2006) (unpublished op.) (federal court rejects state ruling on asserted ground that state court had incorrectly applied its own law); compare *Insyxiengmay* v. *Morgan*, 403 F.3d at 666-667 (federal court's view of Washington procedural rule) with *In re Carlstad*, 80 P.3d at 590-592 (Washington Supreme Court's contrary view).

Improper second-guessing on state-law questions necessarily occurs, moreover, whenever a federal court rejects a state procedural ruling by purporting to determine that discretion in state procedural rules has resulted in their "inconsistent" application. Such review is tantamount to re-determining whether the state courts had abused their discretion, as informed by state-law standards, in determining that the rule dictates forfeiture on the facts of the case at hand even though it might

not have done so on slightly different facts in other cases. It would be rather like concluding from a sampling of judicial opinions that, because a federal court in some cases suppresses evidence of a defendant's statements and in other cases admits it, the court has "inconsistently" applied the Fifth Amendment's prohibition against coerced confessions. Just as federal habeas corpus review of state court decisions for "abuse of discretion" is inappropriate as a ground for granting relief, see *Duncan* v. *Henry*, 573 U.S. 364, 366 (1995) (per curiam); *Schell* v. *Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc), it is too flimsy to support rejecting the state court's exercise of discretion as "inadequate" to support the state judgment and thus to expose a final state judgment to remote habeas corpus attacks based on delayed, withheld, or stale claims.

* * *

The comity-offending demand for non-discretionary or mandatory enforcement of state rules, as a price for federal respect for state-court procedural rulings, implies undue suspicion of the state courts, results in unreliable interpretations of state-law decisions, and undermines AEDPA's goals of "streamlining federal habeas corpus proceedings," *Rhines* v. *Weber*, 544 U.S. 269, 277 (2005), and giving "effect to state convictions to the extent possible under law," *Williams* v. *Taylor*, 523 U.S. at 404. Discretionary or not, the Pennsylvania procedural ruling, under which respondent forfeited his post-judgment claims on account of his escape and flight, is an adequate basis to support the state judgment and to trigger a procedural bar in the federal habeas corpus proceedings.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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