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 RESPONDENT

LEIGH SKIPPER
Chief Federal Defender
MATTHEW C. LAWRY
Counsel of Record
MARIA K. PULZETTI
JENNIFER L. GIVENS
BILLY H. NOLAS
FEDERAL COMMUNITY DEFENDER OFFICE
Eastern District of Pennsylvania
601 Walnut Street – Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In the Court of Appeals, the Commonwealth asserted that the fugitive-forfeiture procedural bar which the Pennsylvania courts applied in Respondent Kindler's case was an adequate bar because it was "mandatory," *i.e.*, the state courts had no discretion to review his case. The Court of Appeals rejected the Commonwealth's mandatory-bar argument, and held that the bar the state courts applied was not "firmly established and regularly applied" at the times relevant to Kindler's case. Therefore, the bar was not adequate to preclude federal review.

In this Court, the Commonwealth alters its position. Now the Commonwealth asserts that the fugitive-forfeiture bar was "discretionary," not "mandatory," and argues that the Court of Appeals held that a procedural bar which is in any degree "discretionary" is an inadequate bar. The Commonwealth does not define "discretionary" in its Question, and the text of its brief assigns a meaning to the term "discretionary" that bears little resemblance to what the Court of Appeals actually decided. Respondent submits that the appropriate questions this Court should address are these:

> *When a state court makes a procedural bar ruling in the absence of a firmly established and consistently applied procedural bar rule, is the ruling adequate to foreclose federal habeas review?*

QUESTIONS PRESENTED – Continued

When a state changes from a discretionary practice – where discretion frequently was exercised to excuse a default – to one in which the default constitutes a forfeiture, and then retroactively applies the forfeiture rule, is the forfeiture rule adequate to foreclose federal habeas review?

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STATEMENT OF THE CASE

After the jury's death verdict and before formal sentencing, Respondent Joseph Kindler fled to Canada. He was apprehended, returned to Pennsylvania and sentenced by the court. He sought to have issues heard in the trial court and on direct appeal. The practice of the Pennsylvania Supreme Court in capital cases at that time was to review the merits of direct appeal issues, regardless of procedural bars. In non-capital fugitive cases, its practice was to review the merits if the defendant, like Kindler, was back in custody before the appeal had been dismissed. However, the Pennsylvania Supreme Court refused to review Kindler's issues because he fled.

Kindler sought post-conviction review. He raised a new collateral issue – ineffective assistance of counsel at capital sentencing. The practice of the Pennsylvania Supreme Court in capital cases at that time was to review the merits of post-conviction issues, regardless of procedural bars. In non-capital fugitive cases, its practice was to permit post-conviction review in cases where the defendant had fled but was later returned to custody. However, the Pennsylvania Supreme Court refused to review Kindler's post-conviction issues because he fled.

The Commonwealth now seeks a ruling foreclosing all review – direct appeal, state post-conviction, federal habeas – for Kindler.

A. Procedural History

Respondent Kindler was convicted of first degree murder and related charges in November 1983. Trial counsel "did not conduct a penalty phase or mitigation investigation." *Kindler v. Horn*, 542 F.3d 70, 84 (3d Cir. 2008) ("*Kindler IV*").[1] The jury returned a verdict of death.

Trial counsel moved for a new trial.[2] Replacement counsel was appointed, and filed supplements, raising trial court error and prosecutorial misconduct issues. JA 29-45.

On September 19, 1984, before formal sentencing and resolution of the post-verdict motions, Kindler escaped from the county jail and fled to Canada. The Commonwealth moved to dismiss the post-verdict motions. JA 45-49. On October 23, 1984, the trial court dismissed the post-verdict motions due to Kindler's escape and "current status as a fugitive from justice." JA 53.

In September 1991, Kindler was returned to Pennsylvania. He moved to reinstate the post-verdict motions. On October 3, 1991, the trial court denied reinstatement, stating Kindler had "los[t] all legal rights and privileges for post-trial motions." JA 58.

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[1] Within quotations, all emphasis is supplied unless otherwise indicated, and internal quotation marks are generally omitted.

[2] In Pennsylvania, these motions are called "post-verdict motions."

The trial court then formally sentenced Kindler to death.

Kindler appealed on October 22, 1991. Because the trial judge had retired, a replacement judge was assigned to write an opinion supporting the court's previous rulings. JA 68.[3] The replacement judge's opinion upheld the original dismissal due to Kindler's fugitive status, *id.*, and also upheld the denial of reinstatement, while indicating that the "better practice would have been to consider the post-verdict motions, particularly in light of the death sentence imposed. . . ." JA 69.

The direct appeal raised trial court errors and prosecutorial misconduct. Kindler also argued that his claims – whether or not preserved – should be reviewed because in capital cases the Pennsylvania Supreme Court "has traditionally permitted a relaxed standard of waiver. . . ." JA 85; JA 93-94 (similar). The court did not review any of Kindler's issues and did not address his "relaxed waiver" argument. *Commonwealth v. Kindler*, 639 A.2d 1 (Pa. 1994) ("*Kindler I*").

Kindler moved for rehearing, arguing that refusing to review his claims "would fly in the face of the reasoning" of *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), and that in capital cases, the

[3] Under Pennsylvania practice, trial judges issue "opinions" supporting their rulings, which are then reviewed on appeal.

Pennsylvania Supreme Court "has always permitted a relaxed doctrine of waiver with respect to the failure to advance claims in post-verdict motions. . . ." JA 135-36. The court summarily denied rehearing. JA 6.

On January 11, 1996, Kindler filed a petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. §§ 9541 *et seq*. ("PCRA"). Among other issues, he argued that trial counsel had been ineffective for failing to present available mitigating evidence (one of the two claims upon which the Third Circuit later granted relief). JA 140-52. The Commonwealth moved to dismiss, asserting that Kindler's pre-sentencing flight waived his rights, precluding PCRA review. JA 153-71.

The trial court dismissed the PCRA petition, interpreting the direct appeal decision as a ruling that there was a "waiver of all issues." JA 187. The court also stated that claims not raised on direct appeal were "waived." JA 188 n.2.

Kindler appealed, arguing that there was no connection between his flight and the court's ability to review his post-conviction claims; that the Pennsylvania Supreme Court had "irregularly and inconsistently applied" fugitive-forfeiture; and that refusal to consider his claims "would be inconsistent with" the court's practice of "relaxed waiver in capital cases." JA 201. He also argued that his claim of ineffective assistance of counsel at penalty phase had not been previously litigated or waived. JA 211.

The Pennsylvania Supreme Court affirmed the denial of relief. *Commonwealth v. Kindler*, 722 A.2d 143 (Pa. 1998) ("*Kindler II*"). It stated that Kindler's arguments for review were "previously litigated in his 1994 appeal to this Court," *id.* at 147, and that the relaxed waiver practice did not apply because his "act of becoming a fugitive . . . resulted in the forfeiture of the right to review of those claims." *Id.* at 148 n.13.

Kindler sought federal habeas corpus relief. In the District Court, he argued that the state court rulings were not adequate to preclude federal review both because of Pennsylvania's novel application of fugitive-forfeiture in his case, and because of the Pennsylvania Supreme Court's failure to follow its practice of relaxed waiver in capital cases. JA 300-44. The District Court found the state court fugitive-forfeiture ruling inadequate under *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996). *Kindler v. Horn*, 291 F. Supp. 2d 323, 342-43 (E.D. Pa. 2003) (Joyner, J.) ("*Kindler III*"). The District Court therefore did not reach Kindler's arguments concerning the Pennsylvania Supreme Court's relaxed waiver practice. *See id.* at 343 n.7.[4] The District Court granted penalty-phase relief due to Eighth Amendment error under *Mills v. Maryland*, 486 U.S. 367

[4] In *Lewis v. Horn*, 2006 WL 2338409, *4 (E.D. Pa. Aug. 9, 2006), Judge Joyner held that the state court's failure to follow the relaxed waiver practice rendered its procedural default ruling inadequate.

(1988), and prosecutorial misconduct, while denying relief on other claims.

On appeal, the Third Circuit unanimously affirmed on procedural default and on the *Mills* claim; reversed on prosecutorial misconduct; and held counsel was unconstitutionally ineffective at capital sentencing. *Kindler IV*.

B. Pennsylvania Practice

1. The practice of relaxed waiver in capital cases

In 1978, the Pennsylvania Supreme Court established that it would review the merits of all issues in capital cases, because the "overwhelming public interest" in preventing unconstitutional executions precluded ordinary application of waiver rules. *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978). Under the "duty to transcend procedural rules" in capital cases, "waived" claims were to be addressed on their merits. *Id.* The Pennsylvania courts refer to this practice as "relaxed waiver."[5]

In *Commonwealth v. Zettlemoyer*, 454 A.2d 937 (Pa. 1982), the court reiterated *McKenna*'s broad reach, holding it would not apply waiver rules in capital cases because of the "final and irrevocable

[5] Pennsylvania law refers to most procedural failings as "waivers," whether or not they involve an affirmative waiver by the defendant.

nature of the death penalty." *Id.* at 955 n.19. Until late 1998, *see infra*, the Pennsylvania Supreme Court's practice was to review the merits of all claims in capital cases, regardless of whether those claims otherwise could be deemed procedurally barred.

Under this relaxed waiver practice, the Pennsylvania Supreme Court reviewed the merits of the issues raised in the vast majority of capital cases: 51 separate decisions, with relaxed waiver often applied to multiple issues in the same case. *See* Attachment to Brief of Respondent (collecting cases). The relaxed waiver practice was applied in direct appeals, initial post-conviction actions and successive post-conviction actions. Bars arising from "waivers" during trial, penalty phase, post-verdict, direct appeal and post-conviction proceedings were consistently not enforced due to this practice. *Id.*

The state court made only narrow exceptions to the relaxed waiver practice: (1) jury-selection claims under *Witherspoon v. Illinois*, 391 U.S. 510 (1968);[6]

[6] The Pennsylvania Supreme Court stated four times that its relaxed waiver practice did not apply to *Witherspoon* claims. *See Commonwealth v. Jasper*, 610 A.2d 949, 953 n.6 (Pa. 1992); *Commonwealth v. Lewis*, 567 A.2d 1376, 1381 (Pa. 1989); *Commonwealth v. Peterkin*, 513 A.2d 373, 378-79 (Pa. 1986); *Commonwealth v. Szuchon*, 484 A.2d 1365, 1377-80 (Pa. 1984). In every such case besides *Szuchon*, however, the court actually reviewed the waived *Witherspoon* claim on its merits. *See Peterkin*, 513 A.2d at 379; *Lewis*, 567 A.2d at 1380-81; *Jasper*, 610 A.2d at 952-53.

(2) where counsel withdrew an issue;[7] and (3) where the defendant formally waived the right to a direct appeal. In each case in the last category, however, when the defendants subsequently sought post-conviction relief, the Pennsylvania Supreme Court applied relaxed waiver and reviewed the merits of their claims, including claims of trial counsel ineffectiveness. *Commonwealth v. Michael*, 755 A.2d 1274, 1281 (Pa. 2000) (conducting merits review of claims raised post-conviction by petitioner who waived direct appeal); *Commonwealth v. Taylor*, 718 A.2d 743, 746 (Pa. 1998) (similar); *Commonwealth v. Appel*, 689 A.2d 891, 905 (Pa. 1997) (addressing ineffectiveness claims "because of the irrevocable nature of the death penalty").

The Pennsylvania Supreme Court said in Kindler's direct appeal that there were no "allegations of error (direct or collateral) preserved, much like those cases where an Appellant . . . chooses not to raise any issues related to the trial and sentencing hearing. . . ." *Kindler I* at 4. But in post-conviction proceedings, the court treated Kindler quite differently from defendants who formally waived direct appeal. Appel, Taylor, Michael and other defendants who waived direct appeal received merits review of their post-conviction claims, but

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[7] *See Commonwealth v. Gribble*, 703 A.2d 426, 434-35 (Pa. 1997) (counsel withdraws previously filed motion to suppress); *Commonwealth v. Wallace*, 561 A.2d 719, 725 (Pa. 1989) (counsel affirmatively declines cautionary instruction).

Kindler did not. In Kindler's post-conviction proceedings, the court ruled that his claims had been "previously litigated" and determined against him, *Kindler II* at 147, and that he had "forfeit[ed] the right to review of those claims." *Id.* at 148 n.13.

For twenty years following *McKenna*, the relaxed waiver practice was applied to the vast majority of Pennsylvania capital cases. It was applied to review the merits regardless of whether the procedural bar arose from a violation of the rules of appellate or of post-conviction procedure. *See* Attachment to Brief for Respondent. Penalty phase ineffectiveness claims, such as the claim on which the Third Circuit granted relief to Kindler, were reviewed on the merits. The Pennsylvania Supreme Court summed up its relaxed waiver jurisprudence by stating, "[I]t is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver." *Commonwealth v. Morris*, 684 A.2d 1037, 1042 n.11 (Pa. 1996).

Kindler's direct appeal was decided in 1994, during this relaxed waiver era. The briefing in Kindler's post-conviction appeal was completed and the case was submitted for decision on February 27, 1998, while the relaxed waiver practice was in full effect.[8]

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[8] In Pennsylvania, once a case is submitted for decision, no further filings are permitted absent a court order. *See* Pa. R. A. P. 2501(a).

On November 23, 1998, the Pennsylvania Supreme Court drastically changed course in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), holding that despite its prior "practice to decline to apply ordinary waiver rules in capital cases," it would no longer follow that practice in PCRA appeals. *Id.* at 700 (citing *Morris*, 684 A.2d at 1042 n.11). The court explained that it had followed that practice because of the "unique severity and finality of the death penalty," and "to prevent this court from being instrumental in an unconstitutional execution." *Id.* The court complained, however, that the practice "has, in effect, virtually eliminated any semblance of finality in capital cases"; stated that the "benefits of relaxed waiver at the PCRA appellate stage are more than outweighed by the need for finality and efficient use of the resources of this court"; and announced that it would "no longer [apply the relaxed waiver rule] in PCRA appeals." *Id.* In *Kindler II*, decided on December 11, 1998 – less than three weeks after *Albrecht* – the court declined to follow its former relaxed waiver practice. *Kindler II* at 148 n.13.

Post-*Albrecht*, the Pennsylvania Supreme Court continued to follow the relaxed waiver practice in direct appeal capital cases until *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). *See* Attachment to Brief for Respondent. In *Freeman*, the court revisited the relaxed waiver practice in direct appeal cases, and (as in *Albrecht* for post-conviction cases) abandoned it. *Id.* at 402-03. The court explained that the "relaxed waiver rule became common in direct

capital appeals and has been employed to reach a wide variety of claims." *Id.* at 400. The court further explained that the "relaxed waiver practice has since been routinely employed . . . to reach claims that . . . were not raised *at all* in the trial court." *Id.* at 401 (emphasis in original). Even when abolishing the direct-appeal relaxed waiver practice, then, the Court acknowledged its broad application, and the fact that it was a "routinely employed" "practice" for many years.

In post-conviction cases, following *Albrecht*, the Pennsylvania Supreme Court applied the abolition of relaxed waiver retroactively, thus denying review in cases where review was available under its prior practice.[9] The Third Circuit has found such

[9] *See*, *e.g.*, *Commonwealth v. Jones*, 876 A.2d 380, 384 (Pa. 2005) (holding claims procedurally barred under the PCRA because, after *Albrecht*, "the relaxed waiver doctrine is no longer applicable to PCRA appeals"); *Commonwealth v. Brown*, 872 A.2d 1139, 1161-62 (Pa. 2005) (Castille, J., concurring) (*Albrecht* "abrogated relaxed waiver on PCRA review . . . thereby rendering the previously nonwaivable claims defaulted"); *Commonwealth v. Johnson*, 815 A.2d 563, 593 (Pa. 2002) (Eakin, J., concurring and dissenting) (before *Albrecht*'s "abolition of relaxed waiver in PCRA capital appeals" barred claims were reviewed on merits); *Commonwealth v. Wharton*, 811 A.2d 978, 991 n.1 (Pa. 2002) (Saylor, J., concurring) (noting *Albrecht*'s "retroactive abolition of relaxed waiver" and finding it unfair to apply "the more stringent standards subsequently adopted by the Court" in *Albrecht*); *Commonwealth v. Ford*, 809 A.2d 325, 337-38 (Pa. 2002) (Saylor, J., concurring) (before *Albrecht*, relaxed waiver "permitted review of the underlying allegation on its merits" despite procedural bar; since then, a "far more stringent set of rules" has been "implemented by the Court").

retroactive bar decisions to be based upon an inadequate state ground.[10]

Then Circuit Judge, now Associate Justice, Alito addressed this Pennsylvania relaxed waiver practice in *Carpenter v. Vaughn*, 296 F.3d 138 (3d Cir. 2002), and *Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. 2005). He explained that the Pennsylvania Supreme Court did not end its "practice of relaxing waiver rules in death penalty cases until 1998." *Carpenter*, 296 F.3d at 147. Accordingly, there was no adequate bar precluding federal review of Pennsylvania cases from that era, *i.e.*, the *Kindler* era.

In *Bronshtein*, the defendant filed a post-conviction petition, but then waived his right to seek relief. *Bronshtein*, 404 F.3d at 705. His second post-conviction petition was dismissed as untimely. *Id.* at 705-06. Again, Judge Alito explained that although the Pennsylvania time bar appeared to preclude relief, post-conviction bars were not firmly established and generally followed in Pennsylvania capital cases filed prior to *Albrecht*, *i.e.*, during the

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[10] *See*, *e.g.*, *Bond v. Beard*, 539 F.3d 256, 277 (3d Cir. 2008); *Abu-Jamal v. Horn*, 520 F.3d 272, 287 n.15 (3d Cir. 2008); *Holland v. Horn*, 519 F.3d 107, 115 (3d Cir. 2008); *Laird v. Horn*, 414 F.3d 419, 425 (3d Cir. 2005); *Taylor v. Horn*, 504 F.3d 416, 428 (3d Cir. 2007); *Bronshtein v. Horn*, 404 F.3d 700, 708-10 (3d Cir. 2005); *Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005); *Crews v. Horn*, 360 F.3d 146, 153 (3d Cir. 2004); *Carpenter v. Vaughn*, 296 F.3d 138, 147 (3d Cir. 2002); *Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257, 278-79 (3d Cir. 2001); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001).

Kindler era. *Id.* at 708-09 (discussing the relaxed waiver history from *McKenna* to *Albrecht*).

In sum, at the times relevant to Kindler's case, Pennsylvania's practice in capital cases was not to apply procedural bars.

2. Fugitive appeals

a. The Pennsylvania Supreme Court's practice in non-capital fugitive cases

The original practice of the Pennsylvania Supreme Court in fugitive cases was to entertain the merits of appeals by defendants who were back in custody at the time of direct appeal, but to dismiss the appeals of defendants who were not in custody during the direct appeal. The basis for this practice was jurisdictional: the appellate court would not hear an appeal from a defendant who was not within its jurisdiction. *Commonwealth v. Galloway*, 333 A.2d 741, 742 (Pa. 1975) (citing *Smith v. United States*, 94 U.S. 97 (1876)); Pa. R. A. P. 1972(a)(6).[11]

In *Galloway,* after the defendant escaped, his post-trial motions were dismissed with prejudice. But the Pennsylvania Supreme Court did not dismiss his direct appeal, because, unlike in cases such as *Smith* and *Molinaro v. New Jersey*, 396 U.S. 365 (1970),

[11] Rule 1972(a)(6) provides that any party may move to quash an appeal on the grounds that the "appellant is a fugitive."

Galloway had been returned to custody and thus to the court's jurisdiction. *Galloway*, 333 A.2d at 742. The Pennsylvania Supreme Court remanded the case, directing the trial court to consider the merits of the post-verdict motions. *Id.*

Following *Galloway*, the Pennsylvania courts differentiated between (1) cases in which the defendant fled while an appeal was pending, resulting in the appeal being dismissed or quashed, *e.g.*, *In re Dixon*, 422 A.2d 892 (Pa. Super. 1980); *Commonwealth v. Albert*, 393 A.2d 991 (Pa. Super. 1978); *Commonwealth v. Tomlinson*, 354 A.2d 254 (Pa. 1976); *Commonwealth v. Barron*, 352 A.2d 84 (Pa. Super. 1975), and (2) cases in which the defendant fled before appellate proceedings commenced, or was recaptured prior to dismissal of the appeal, resulting in merits review of the appeals and any post-verdict motions. *E.g.*, *Commonwealth v. Milligan*, 452 A.2d 1072 (Pa. Super. 1982) (granting leave to refile post-verdict motions); *Commonwealth v. Borden*, 389 A.2d 633 (Pa. Super. 1978) (same); *Commonwealth v. Harrison*, 432 A.2d 1083, 1085-86 (Pa. Super. 1981) (motion to quash appeal denied where defendant had been recaptured).[12]

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[12] The Commonwealth cites two cases from this era in which leave to refile post-verdict motions was denied: *Commonwealth v. Boyd*, 366 A.2d 934 (Pa. Super. 1976), and *Commonwealth v. Clark*, 446 A.2d 633 (Pa. Super. 1982). No criteria for distinguishing those cases from the ones cited above are set forth in any of the decisions. At best for the

(Continued on following page)

In *Commonwealth v. Passaro*, 476 A.2d 346 (Pa. 1984), consistent with the first category of cases, the Pennsylvania Supreme Court affirmed dismissal of the appeal of a defendant who escaped while the appeal was pending. *Id.* at 348-49. *Passaro* also added new, "decidedly non-discretionary language," *Doctor*, 96 F.3d at 685, which treated the escape as a forfeiture of appellate rights.

The Third Circuit summarized the Pennsylvania rule from *Galloway* through *Passaro* as follows: "[I]f the defendant is returned to custody while his appeal is pending, an appellate court *has the discretion* to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court *lacks the discretion* to reinstate and hear the appeal." *Doctor*, 96 F.3d at 685. In practice, Pennsylvania courts routinely heard the appeals of returned fugitives. *See Milligan*; *Harrison*; *Borden*.

Passaro was decided on May 25, 1984, four months before Kindler escaped on September 19, 1984. There were no clear changes in Pennsylvania fugitive waiver law for several years after *Passaro*. In 1992, after Kindler's 1991 return to custody, sentencing and the filing of his notice of appeal, the Pennsylvania Supreme Court established a new practice of forfeiture of appellate rights:

Commonwealth, the two cases it cites show that the early practice was one of unguided discretion, which was more often exercised to grant review than to deny it.

> A defendant's voluntary escape acts as a per se forfeiture of his right of appeal, where the defendant is a fugitive *at any time after post-trial proceedings commence*. Such a forfeiture is *irrevocable* and continues despite the defendant's capture or voluntary return to custody. Thus, by choosing to flee from justice, appellant *forever forfeited his right to appeal*.

Commonwealth v. Jones, 610 A.2d 439, 441 (Pa. 1992).[13]

The Pennsylvania Supreme Court's practice concerning direct appeals by fugitives may be summarized as follows: Pennsylvania's original rule was jurisdictional. Under *Galloway* (1975), the appeal would be quashed or dismissed only if the defendant was absent from the court's jurisdiction during an appeal. If the defendant was returned to the jurisdiction of the court prior to dismissal of an appeal, the appeal would go forward and there was discretion to hear all issues. *Passaro* (1984) introduced a

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[13] The Pennsylvania Supreme Court's decision in *Jones* affirmed a lower court ruling, *Commonwealth v. Jones*, 564 A.2d 983 (Pa. Super. 1989), which cited *Commonwealth v. Luckenbaugh*, 550 A.2d 1317 (Pa. 1988), to rule that *Galloway* would not be applied. *Jones*, 564 A.2d at 985. *Luckenbaugh* was a per curiam order in which the Pennsylvania Supreme Court reversed a Superior Court decision, citing *Passaro*. Given this history, the Third Circuit concluded that *Galloway* was controlling at the time of Doctor's escape in 1986, since Doctor had been returned to custody before his direct appeal was decided. *Doctor*, 96 F.3d at 685-86.

concept of forfeiture that applied where the jurisdictional rule also applied, *i.e.*, a defendant who is not in custody during direct appeal forfeits direct appeal review, a defendant who is in custody does not. By *Jones* in 1992, however, the forfeiture concept had been expanded to include all appeals involving fugitive defendants, regardless of whether or when the defendant was returned to the jurisdiction.

b. The Pennsylvania Supreme Court's practice in capital fugitive cases

The first capital case presenting the Pennsylvania Supreme Court with a fugitive waiver issue was decided in 1986 and 1988, two years and four years after Kindler's 1984 flight. *Commonwealth v. Yarris*, 518 A.2d 261 (Pa. 1986) ("*Yarris I*") (denying motion to quash appeal); *Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988) ("*Yarris II*") (direct appeal opinion reviewing merits of all claims). Yarris' post-conviction appeal was decided in 1999, eight years after Kindler's 1991 return to custody. *Commonwealth v. Yarris*, 731 A.2d 581 (Pa. 1999) ("*Yarris III*") (addressing merits of post-conviction claims). On direct appeal in *Yarris*, the Pennsylvania Supreme Court remanded the case for a post-verdict hearing. *See id.* at 584. Yarris escaped while being transported to that hearing. *Id.* The trial court returned the case to the Pennsylvania Supreme Court, which did not quash the appeal. Yarris was recaptured. The Pennsylvania Supreme Court again remanded the case for the post-verdict hearing. *Yarris I*. The Pennsylvania Supreme Court

reviewed all of Yarris' claims on the merits after the hearing, *Yarris II* at 529 n.2, and later reviewed the post-conviction claims on their merits in *Yarris III*.[14]

Reginald Lewis escaped *with* Kindler, while Lewis' direct appeal was pending. The Pennsylvania Supreme Court declined to quash Lewis' appeal, and reviewed the merits of his direct appeal issues. *Commonwealth v. Lewis*, 567 A.2d 1376, 1378 n.1 (Pa. 1989) ("*Lewis I")*. *Lewis I* was issued before Kindler's direct appeal. Lewis was afforded post-conviction merits review, with no fugitive-forfeiture or other bars applied. *See Lewis I*; *Commonwealth v. Lewis*, 743 A.2d 907 (Pa. 2000) ("*Lewis II*"). Lewis subsequently was granted federal habeas relief due to counsel's ineffectiveness at capital sentencing. *Lewis v. Horn*, 2006 WL 2338409 (E.D. Pa. Aug. 9, 2006) ("*Lewis III*").

Several months after Kindler's recapture, sentencing and notice of appeal, the Pennsylvania Supreme Court decided *Commonwealth v. Judge*, 609 A.2d 785 (Pa. 1992). Judge escaped shortly after sentencing; he filed a *pro se* notice of appeal while a fugitive, and was still a fugitive at the time his direct appeal was decided. *Id.* at 786. The court treated his fugitive status as a "forfeit[ure of] his right to raise any claims of error." *Id.* at 787.

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[14] DNA testing subsequently exonerated Yarris; charges were dropped, and he was released in 2004. *Yarris v. County of Delaware*, 465 F.3d 129, 134 (3d Cir. 2006).

In the earlier capital cases (*Yarris* and *Lewis*), the court did not directly address the fugitive waiver issue, but instead proceeded to address the merits of all claims. In *Judge*, the court applied the fugitive-forfeiture concept to a capital case where dismissal was consistent with the traditional jurisdictional rule that there would be no appeal when the defendant was not in custody.

c. The Pennsylvania Supreme Court's rulings in *Kindler*

Kindler became a fugitive while his case was in the trial court, and was returned to the jurisdiction before his appeal commenced. The Pennsylvania Supreme Court decided Kindler's direct appeal in 1994. One year earlier, in 1993, this Court decided *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), which the Pennsylvania Supreme Court felt constrained to address.

In *Ortega-Rodriguez*, this Court reviewed an Eleventh Circuit decision similar to that of the Pennsylvania Supreme Court in *Jones*, and rejected it. Taking up the question "whether a defendant may be deemed to forfeit his right to appeal by fleeing while his case is pending in the district court, though he is recaptured before sentencing and appeal," *Ortega-Rodriguez*, 507 U.S. at 236, this Court held that appellate dismissal is generally inappropriate for pre-appeal flight, because the justifications for appellate dismissal "all assume some connection

between a defendant's fugitive status and the appellate process," and therefore are "necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the [trial] court. . . ." *Id.* at 244. While this Court left district courts free to fashion an appropriate response to pre-appeal flight, it emphasized that the district courts "can tailor a more finely calibrated response" than the "blunderbuss of dismissal," and that "punishment by appellate dismissal introduces an element of arbitrariness and irrationality" into the sentencing process. *Id.* at 247-48.[15]

Confronted with *Ortega-Rodriguez*, the Pennsylvania Supreme Court struggled to come up with a new rule to justify applying the same sanction to Kindler as it had earlier applied to Judge (who, unlike Kindler, had not been returned to custody at the time of the direct appeal). As Kindler argued in his direct appeal petition for rehearing, *see* JA 134-35, had the Pennsylvania Supreme Court followed *Ortega-Rodriguez*, it would have remanded to the trial court to determine whether there was a sufficient connection between his flight and the trial court's process to justify dismissal without reinstatement of the post-verdict motions, and would not

[15] On remand, the Eleventh Circuit denied the Government's motion to dismiss and reversed the conviction based on insufficient evidence. *United States v. Ortega-Rodriguez*, 13 F.3d 1474 (11th Cir. 1994).

have applied any fugitive-forfeiture to events that occurred after his recapture, *i.e.*, his formal sentencing, his direct appeal and his post-conviction proceedings.

Instead, the *Kindler I* plurality cited *Passaro* and *Molinaro* for the concept of fugitive-forfeiture, and cited *Ortega-Rodriguez* as approving the concept of trial courts fashioning an appropriate response to the defendant's flight. *Kindler I* at 3. The plurality then created the following rule:

> [O]ur trial courts, when faced with a defendant in fugitive status, . . . have every right to fashion an appropriate response which can include the dismissal of pending post-verdict motions. Our review of that action is limited to determining whether the flight has a connection with the court's ability to dispose the defendant's case and whether the sanction imposed in response to the flight is reasonable under the circumstances.

Id.[16]

[16] Three of the court's seven Justices joined the plurality opinion, while one did not participate in the decision. The remaining three Justices would all have applied some version of a "compelling reason" rule, allowing a fugitive, following his recapture, to make a showing that his post-verdict motions should be heard. *Kindler I*, 639 A.2d at 8-9 (Cappy, J., concurring); *id.* at 9 (Flaherty, J., concurring). Those Justices concurred in the result on the assumption that Kindler could not

(Continued on following page)

Applying its newly created procedural rule for the first time, the plurality ruled that the flight was connected to the trial court process and that dismissal of post-verdict motions was reasonable. *Kindler I* at 3-4. This rule did not exist when the trial court dismissed the post-verdict motions, or when it denied Kindler's request to reinstate them. But it enabled the plurality to treat Kindler's appeal, like that in *Judge*, as one that "comes to us without any allegations of error (direct or collateral) preserved, much like those cases where an Appellant either chooses not to raise any issues related to the trial and sentencing hearing or as in those cases where the Appellant is a fugitive during the appellate process." *Id.* at 4 (citing *Commonwealth v. Heidnik*, 587 A.2d 687 (Pa. 1991), and *Commonwealth v. Appel,* 539 A.2d 780 (Pa. 1988)). In fact, however, both Appel and Heidnik (through a next friend) received merits review of their post-conviction claims, and Appel later obtained habeas relief in federal court. *See Commonwealth v. Appel*, 689 A.2d 891, 905 (Pa. 1997) (addressing petitioner's ineffectiveness claims "because of the irrevocable nature of the death penalty"); *Appel*

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make such a showing, though Kindler had never been given the opportunity to do so.

The plurality ignored this Court's approval of district courts applying a "more finely calibrated response" to flight than the "blunderbuss of dismissal," and disapproval of "punishment by appellate dismissal" as introducing an "element of arbitrariness and irrationality into sentencing for escape." *Ortega-Rodriguez*, 507 U.S. at 247-48.

v. Horn, 250 F.3d 203 (3d Cir. 2001) (granting habeas relief).

Then, one year after *Kindler I*, the Pennsylvania Supreme Court abandoned the broad rule of *Jones* altogether. *See In re J.J.*, 656 A.2d 1355, 1362 (Pa. 1995) (plurality overrules *Jones* in favor of rule that appellate court has discretion to reinstate fugitive's appeal upon return to custody); *Commonwealth v. Deemer*, 705 A.2d 827, 829 & n.2 (Pa. 1997) (describing and approving the court's retreat from "absolute rule of forfeiture of appellate rights").

As to post-conviction proceedings, in *Commonwealth v. Huff*, 658 A.2d 1340 (Pa. 1995), the court reviewed a case in which the defendant fled prior to sentencing. The defendant did not appeal, but later filed a petition for post-conviction relief. The Superior Court held that the defendant had waived all of his rights by his flight. The Pennsylvania Supreme Court reversed, holding that the trial court had authority to review post-conviction issues despite the defendant's flight, and that the Superior Court erred when it held that his flight "waived all of his appellate rights, including the right to seek review of determinations in *collateral post-conviction proceedings*. . . ." *Id.* at 1342.

Kindler sought PCRA relief on January 11, 1996. In the PCRA proceedings, he presented *inter alia* a new claim – not raised in the post-verdict motions or on direct appeal – that trial counsel did not adequately investigate and prepare for capital

sentencing. Notwithstanding *Huff*, the trial court denied review and the Pennsylvania Supreme Court ruled that the availability of collateral review "was previously litigated in his 1994 appeal to this Court. . . ." *Kindler II* at 147. The court further asserted that the practice of relaxed waiver in capital cases did not apply because "it was not a procedural default that precluded review of his claims, but rather his own act of becoming a fugitive that resulted in the *forfeiture* of the right to review of those claims." *Id.* at 148 n.13.

In short, when Kindler fled, Pennsylvania practice was to hear appeals by fugitives who were returned to custody before the appeal was dismissed, but Kindler's appeal was not heard. *Kindler I*. The Pennsylvania Supreme Court had held in *Huff* that it was error to apply the fugitive-forfeiture doctrine in post-conviction proceedings where (as in Kindler's case) flight occurred before sentencing. Nevertheless, the court held that the fugitive-forfeiture doctrine precluded consideration of Kindler's post-conviction claims. *Kindler II*.

C. The Third Circuit's Decision

The Third Circuit began by noting that a state court procedural bar ruling is "adequate" to preclude federal habeas merits review only if the procedural bar was "firmly established" and "consistently applied." *See Kindler IV*, 542 F.3d at 78-79 (citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) ("firmly

established and regularly followed"); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("consistently or regularly applied")); *see also James v. Kentucky*, 466 U.S. 341, 348 (1984) ("firmly established and regularly followed"). The Third Circuit held that the decisions in *Kindler I* and *Kindler II* did not meet that standard for the adequacy of a procedural bar.

In the Third Circuit – contrary to its position here – the Commonwealth argued that, when Kindler appealed, the Pennsylvania courts *had no discretion* to consider his claims on the merits. *See Kindler IV* at 79. The Third Circuit rejected that argument, finding that in *Kindler*, as in *Doctor*, the no-discretion fugitive-forfeiture rule "was not 'firmly established' and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petition in federal court." *Id.*

The Third Circuit explained that its analysis was "controlled by our analysis in *Doctor*." *Kindler IV* at 79. Addressing the Commonwealth's argument that the fugitive-forfeiture bar was "mandatory," the Third Circuit noted that in *Doctor*, as in *Kindler*, at the time the defendant fled, Pennsylvania's rule was that its 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.* (citing *Doctor*, 96 F.3d at 686). Thereafter, this discretionary practice was replaced by a forfeiture or "no discretion" rule. *See Doctor*, 96 F.3d at 681 n.4 (quoting *Jones*, 564 A.2d at 985).

In *Doctor*, as in *Kindler*, this no-discretion rule was not adequate because it was not in place at the time of the default, *i.e.*, the defendant's flight. "[A]t the time of petitioner's escape, . . . it was not 'firmly established' that Pennsylvania courts lacked jurisdiction to hear an appeal first filed after custody had been restored." *Doctor*, 96 F.3d at 685-86.

The Third Circuit then addressed the merits of Kindler's claims. It affirmed the District Court's finding of Eighth Amendment error under *Mills v. Maryland*, 486 U.S. 367 (1988). *Kindler IV* at 80-83. The Third Circuit also concluded that Kindler's appointed counsel provided ineffective assistance at capital sentencing. *Id.* at 84. This was counsel's first capital trial. He acknowledged that he had no experience or training in handling capital cases. He admitted he "did not conduct a penalty phase or mitigation investigation"; failed to request any mitigation records and did not consider a mental health evaluation; and "simply did not think about investigating or presenting evidence concerning family background at the penalty phase." *Id.*

Kindler's jury never heard that: Kindler was raised in a dysfunctional home, with deprivation, neglect, and emotional and physical abuse, which included being beaten "with electrical cords" by his father, leaving him "with welts on his back, and blood showing through his shirt"; Kindler suffers from organic brain damage, including "frontal lobe impairment that can affect judgement, and the ability to control impulsive behavior"; and Kindler has

disorders that cause "significant distress and impairment in Kindler's life," and "constituted an extreme mental or emotional disturbance" at the time of the offense. *Kindler IV* at 84-85. In this Court, the Commonwealth has not challenged the Third Circuit's merits rulings.

SUMMARY OF ARGUMENT

This Court has long applied the adequate state ground doctrine in direct review and habeas cases. Like other federalism doctrines, it maintains a delicate balance. Here, the balance is between potential denial or avoidance of federal review on the one hand, and unwarranted federal intrusion on the other hand. The adequate state ground doctrine is well known to courts and practitioners. It works.

The Commonwealth now proposes a sweeping change in that doctrine. It would replace an entire existing body of law with a deceptively simple "notice and opportunity" approach, although this Court cannot predict the effect of such a change on a wide variety of federal rights and state procedures.

There is no real support for the notion that such a change is needed. Petitioners provide no explanation of how "notice and opportunity" would prevent rarely, inconsistently applied state procedural rules from being used to thwart review of violations of federal rights. Congress did not adopt the Commonwealth's approach when it enacted sweeping changes to federal habeas procedures in 1996.

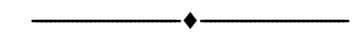
The Commonwealth also asks this Court to overrule the Third Circuit's finding that the state bar at issue was not adequate. Contrary to the Commonwealth's misreading of *Kindler IV* and other relevant Third Circuit precedents, the Third Circuit did not hold in *Kindler IV*, nor has it ever held, that all "discretionary" state rules are inadequate. Rather, the Third Circuit concluded that Pennsylvania's changing practices in fugitive cases demonstrate that there was no firmly established and regularly applied state bar rule. The Third Circuit's holding is fully consistent with this Court's adequate state ground precedents, and that should be the end of the matter.

This Court's precedents demonstrate that labels like "discretionary" and "mandatory" are far less important than actual state court practice. "Discretionary" rules that are rarely or inconsistently enforced in practice will likely be inadequate, because they can easily be used against disfavored litigants, or to treat similarly situated litigants differently. "Discretionary" rules that are usually enforced in practice will likely be adequate regardless of occasional acts of grace. Given Pennsylvania's shifting approaches to fugitive-forfeiture, the bar applied here was not adequate to foreclose federal review under this Court's precedents.

The Third Circuit's ruling is also supported by an alternative ground that Kindler raised in the District Court, Third Circuit and Brief in Opposition to certiorari review, but which the District Court and Third Circuit did not need to address in light of their

holdings that the fugitive-forfeiture bar was inadequate. For twenty years, the Pennsylvania Supreme Court had a practice of relaxed waiver in capital cases. While that practice was in place, the court consistently reviewed all claims raised by capital defendants in the vast majority of cases, both on direct appeal and in post-conviction, regardless of any "waivers" committed by those defendants. Under any fair understanding of the adequate state ground doctrine, those few capital defendants who, like Kindler, received bar rulings during that era should not be deprived of federal review. If this Court reverses the Third Circuit's fugitive-forfeiture decision, it should remand for adjudication of this issue, rather than dismiss the habeas petition as the Commonwealth requests.

The Third Circuit found Sixth and Eighth Amendment errors. The connection, if any, between Kindler's flight and his ineffective assistance of counsel claim – which had not even been raised at the time of his flight or on direct review – is attenuated at best. The Commonwealth does not challenge the Third Circuit's ruling that Kindler's death sentence is unconstitutional, but seeks a ruling from this Court that he may be executed, effectively without review by any court of the merits of that claim or any other constitutional claim. This Court should decline the Commonwealth's request.



ARGUMENT

I. THIS COURT SHOULD REJECT THE COMMONWEALTH'S REQUEST TO REPLACE THE ADEQUATE STATE GROUND DOCTRINE.

A. The Adequate State Ground Doctrine

The purpose of the adequate state ground doctrine is to protect federal rights from arbitrary infringement by state courts[17] and ensure uniformity of federal law,[18] while respecting state courts' disposition of state-law issues.[19] In order to be "adequate," a state rule must be "firmly established and regularly followed." *James v. Kentucky*, 466 U.S. at 348-49; *see also Johnson v. Mississippi*, 486 U.S. at 587 ("consistently or regularly applied"). Thus, rules that are novel fail the adequacy test, *see*, *e.g.*, *Ford v. Georgia*, 498 U.S. at 423 (novel rule not "firmly established and regularly followed"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), as do rules that have not been "consistently and regularly applied." *Johnson*, 486 U.S. at 587;

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[17] *See Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Rogers v. Alabama*, 192 U.S. 226, 231 (1904).

[18] *See Brown v. Western Railway of Alabama*, 338 U.S. 294, 299 (1949); *Murdock v. City of Memphis*, 87 U.S. 590, 631-32 (1875) (discussing importance of uniform construction of federal law).

[19] *See Herb v. Pitcairn*, 324 U.S. 117, 127-28 (1945); *Murdock*, 87 U.S. at 632.

James, 466 U.S. at 346 (rule was "not always clear or closely hewn to"); *Hathorn v. Lovorn*, 457 U.S. 255, 264 (1982) (state rule was not "strictly or regularly" followed). Even otherwise well-established rules may be inadequate. *See*, *e.g.*, *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (rule inadequate where "exorbitant[ly] appl[ied]"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (rule not previously applied with such "pointless severity").

The adequate state ground doctrine developed as a jurisdictional requirement in direct review cases, while the rationale for its application in habeas proceedings is "grounded in concerns of comity and federalism." *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). For a relatively brief period, this Court permitted review of habeas claims that were subject to a state bar, as long as the petitioner had not "deliberately bypassed" state procedures. *Fay v. Noia*, 372 U.S. 391, 399 (1963). Soon, however, this Court conformed habeas and direct review practice. *See Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977) (reinstating adequate state ground doctrine in habeas); *Harris v. Reed*, 489 U.S. 255, 262 (1989) ("*Sykes* made clear that the adequate and independent state ground doctrine applies on federal habeas"); *Coleman*, 501 U.S. at 750.

Coleman explains that applying the same adequate state ground doctrine on direct review and in federal habeas protects the logical integrity of the jurisdictional rationale on direct review – otherwise, federal habeas courts could reach the merits of claims

that this Court could not reach on direct review. Such an "end run" would "undermine the State's interest in enforcing its laws." *Id.* at 731.

Since *Coleman*, this Court repeatedly has reaffirmed that the adequate state ground doctrine applies to direct review and federal habeas cases. *See Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("We first developed the independent and adequate state ground doctrine in cases on direct review from state courts, and later applied it as well in deciding whether federal district courts should address the claims of state prisoners in federal habeas actions");[20] *Cone v. Bell*, 129 S. Ct. 1769, 1780 (2009) (it is "well established" that the independent and adequate state ground doctrine applies in habeas).

B. The Commonwealth's Proposal to Replace the Adequate State Ground Doctrine is Flawed.

The question of the adequacy of a state ground is not unique to habeas cases. The question arises and is governed by the same rules whenever this Court is asked to review any decision of a state court in civil,

[20] The dissenting Justices in *Lee* agreed that the adequate state ground doctrine applies with "equal force" in habeas proceedings, and that state rules which are not firmly established and regularly followed do not bar habeas relief. *See Lee*, 534 U.S. at 388-90 (Kennedy, J., dissenting).

criminal or administrative proceedings.[21] The Commonwealth proposes that this Court replace this well-established body of law with a "simple" rule of "notice and opportunity." Pet. Br. 29.[22] The Commonwealth proposes that this Court change its longstanding rule in a way that will have sweeping effects across the entire range of litigation affecting federal laws and rights, including many that are not remotely involved in this case.

The proposed transformation of the adequate state ground doctrine into a "notice and opportunity" rule would be a drastic change. "Notice and opportunity" has never been the sole measure of adequacy of a state procedural bar. "Notice and opportunity" is a well-known phrase in constitutional jurisprudence.[23]

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[21] *See, e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 123-25 (1990); *Philadelphia Newspapers, Inc. v. Jerome*, 434 U.S. 241 (1978); *Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949); *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378, 397-99 (1990); *Film Corp. v. Muller*, 296 U.S. 207, 210-11 (1935).

[22] This Court has disregarded this sweeping proposal twice before when urged by the same amicus that appears for the Commonwealth in this case. *See* Amicus Curiae Brief, Criminal Justice Legal Foundation, *Philip Morris USA v. Williams*, No. 07-1216 (Aug. 20, 2008); Amicus Curiae Brief, Criminal Justice Legal Foundation, *Lee v. Kemna*, No. 00-6933 (July 2001).

[23] *See*, *e.g.*, *Cole v. Arkansas*, 333 U.S. 196, 201 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.").

If the decisions that require state procedural rules to be "strictly or regularly followed," had meant to say "notice and opportunity," they would have said so. "Notice and opportunity" is a threshold element of due process.[24] If the cases had meant to say that the test of adequacy of a state procedural bar is whether it violates due process, the cases would have so held.

The Commonwealth's proffered support for its radical request is flimsy. Its proposal is based upon one short passage from a treatise on civil procedure. *See* Pet. Br. 29 (quoting C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1996), § 4027 at 392). WRIGHT & MILLER, however, does not suggest the sweeping use of "notice and opportunity" that the Commonwealth now espouses. While WRIGHT & MILLER does praise "fair opportunity to present federal claims" as "the most generally functional test" for one line of adequacy cases, it also recognizes that the "task of judgment" involved in reconciling competing state and federal interests "cannot be discharged by invoking any single phrase, and it is no wonder that various phrases have been used to identify the nature of the inquiry." *Id.*

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[24] *See*, *e.g.*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("elementary and fundamental requirement of due process" is "notice . . . and . . . opportunity" to be heard); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (the "central meaning of procedural due process" is right "to be heard"; in order to "enjoy that right [party] must first be notified.") (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1863)).

1. The limitations of "notice and opportunity"

Relying on "notice and opportunity" as the sole test would achieve only a limited portion of the purposes of the adequate state ground doctrine. The historical and conceptual basis for the requirement of consistency in state procedural rulings that bar the merits of federal claims is not merely to provide litigants fair notice but to prevent state courts from declining to enforce federal rights. *See Ward v. Board of County Comm'rs of Love County*, 253 U.S. 17 (1920); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 454-58; *NAACP v. Alabama ex rel. Flowers*, 377 U.S. at 293-01; *Wright v. Georgia*, 373 U.S. 284 (1963); *Ford*, 498 U.S. at 421-25. A rule that exists on paper but is generally not applied may well be used to avoid federal review of disfavored claims or claimants:

> If inconsistently applied procedural rules sufficed as "adequate" grounds of decision, they could provide a convenient pretext for state courts to scuttle federal claims without federal review. The requirement of regular application ensures that review is foreclosed by what may honestly be called "rules" – directions of general applicability – rather than by whim or prejudice against a claim or claimant.

Bronshtein, 404 F.3d at 708 (per Alito, J.).

The Commonwealth pays lip service to the fact that the adequate state ground doctrine is intended in part to prevent a state from avoiding federal review of the claims of a "disfavored litigant." Pet. Br. 28. But its proposal to limit the adequacy inquiry to "notice and opportunity" would allow just that kind of evasion.

2. The significance of consistent state court application of procedural rules

The Commonwealth contends that federal courts should not look at the consistency *vel non* of state court practice and that most of this Court's precedents can be explained under its "notice and opportunity" rule. Pet. Br. 28-32. Neither contention is well founded. In fact, this Court almost always considers the consistency of state court practice in determining whether a state court procedural ruling is adequate.[25] Abandoning consideration of actual

[25] *See Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-95 (1925) (state appellate rule adequate where state courts had "uniformly held" constitutional claims must be raised in state supreme court); *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958) (state appellate rule required challenge to specific sections of ordinance; rule had not been consistently applied in practice to challenges to entire statutes); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 456 (Court was "unable to reconcile" Alabama court's ruling "with its past unambiguous holdings" and its "consistent" "practice"); *Wolfe v. North Carolina*, 364 U.S. 177, 188-91 (1960) (state court ruling was supported by its "consistent[ ] and repeated[ ]" holdings in

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state court practice in favor of a "notice and opportunity" rule would reverse many decisions, both in habeas and direct review cases. For example, in *Staub*, *Flowers*, *Barr*, *Hathorn*, *James* and *Johnson*, the state courts relied on codified or otherwise generally applicable rules. Thus, the petitioners in those cases had notice of the rule and an opportunity to comply with it – but in practice, the state courts had not consistently or regularly relied on the rule to deny review.

The danger that state courts may use arbitrary and inconsistent application of procedural rules to deny federal rights is not a historical curiosity; it

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prior cases, and therefore was adequate); *NAACP ex rel. Alabama v. Flowers*, 377 U.S. at 297 (state appellate rule forbade arguing unrelated errors together; in practice, rule had not previously been applied "with the pointless severity shown here"); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (state court found petitioner violated rule of appellate practice requiring specific exceptions; rule inadequate where, in five other cases, state court had reviewed merits of identical exceptions); *Hathorn*, 457 U.S. at 263 (state court denied issue first raised in rehearing petition as untimely; in practice, state court "regularly" granted similar petitions in past); *James*, 466 U.S. at 348-49 (distinction between "admonitions" and "instructions" on which state court relied was not a "firmly established and regularly followed state practice" although it was included in Kentucky law); *Johnson*, 486 U.S. at 587-89 (ruling that challenge to validity of petitioner's prior conviction should have been raised on direct appeal was not adequate where the "weight of Mississippi law is to the contrary"); *Dugger v. Adams*, 489 U.S. 401, 410 (1989) (post-conviction bar rule adequate because state court applied it in the "vast majority of cases").

remains real. State court judges, who often are elected, are subject to partisan and financial pressures that could lead them to favor or disfavor certain litigants. *See*, *e.g.*, *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252, 2257-59 (2009) (describing circumstances in which West Virginia Supreme Court Justice, who received substantial election support from officer of corporation that was subject to award of $50 million in damages, participated in decision reversing the award). It goes without saying that criminal defendants, especially capital defendants, are disfavored litigants in many states. In habeas cases, this Court has very recently rejected as inadequate state court procedural bar rulings that had no fair or substantial support. *See Cone*, 129 S. Ct. at 1780 (state court ruling that claim was "previously determined" "rested on a false premise"); *Lee*, 534 U.S. at 382 (novel application of existing rule to circumstances "Missouri courts had not confronted before").

Indeed, since doing away with its practice of relaxed waiver in capital cases, the Pennsylvania Supreme Court frequently has relied on novel "rules" or novel applications of existing rules to deny merits review in capital cases. *See*, *e.g.*, *Commonwealth v. Steele*, 961 A.2d 786, 797 n.11, 798-01 (Pa. 2008) (court describes its pleading and briefing rules as "confusing, inconsistent and constantly shifting," but applies them to deny review), *id.* at 838-39 & n.3 (Saylor, J., dissenting) (no meaningful distinction between petitioner's briefing and that in other cases

in which claims were reviewed on merits); *Commonwealth v. Simmons*, 804 A.2d 625, 632-33 (Pa. 2001) (plurality denies merits review of some issues based on a new briefing rule); *id.* at 641-43 (Saylor, J., dissenting) (unfair to apply new briefing rule to defendant after brief was filed); *Simmons v. Beard*, 356 F. Supp. 2d 548, 558 (W.D. Pa. 2005) (at oral argument, Commonwealth conceded state court briefing rule was not firmly established or regularly followed); *see also Commonwealth v. Ford*, 809 A.2d 325, 328 (Pa. 2002) (Saylor, J., concurring) (calling it "unjust" for court to penalize litigants who failed to brief their claims "according to a far more stringent set of rules subsequently implemented by the Court").

The adequate state ground doctrine both protects against state court avoidance of the claims of disfavored litigants, and prevents unwarranted federal intrusion into matters that are governed by state law. The Commonwealth's demand for drastic changes in that doctrine threatens to upset that balance.

3. Congress has declined to modify the adequate state ground doctrine.

Although Congress enacted sweeping revisions of the habeas statute in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress did not express any intent to modify this Court's established adequate state ground doctrine with one exception (discussed below). In the AEDPA, Congress modified this Court's jurisprudence with respect to: timeliness

of federal habeas petitions, *compare Garlotte v. Fordice*, 515 U.S. 39, 46-47 (1995) (petition may be dismissed on showing of prejudicial delay in filing), *with* 28 U.S.C. § 2244(d) (one year statute of limitations); exhaustion, *compare Rose v. Lundy*, 455 U.S. 509 (1982) ("mixed" petition should be dismissed without prejudice), *with* 28 U.S.C. § 2254(b)(2) (mixed petition may be summarily dismissed on merits); the consequences of a failure to develop facts in state court, *compare Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (claim may be dismissed for failure to develop facts in state court, absent showing of cause and prejudice), *with* 28 U.S.C. § 2254(e)(2) (to overcome failure to develop, petitioner must show cause and prejudice plus innocence); and the extent of any deference to state court legal rulings, *compare Brown v. Allen*, 344 U.S. 443, 458 (1953) (no deference), *with* 28 U.S.C. § 2254(d)(1) (deferential standard of review).

This Court has applied the adequate state ground doctrine to habeas proceedings since 1977 (*Sykes*). This Court reiterated the adequacy standard many times thereafter.[26] This Court again reiterated in 1991 (*Coleman*) its view that the doctrine applies in habeas proceedings. The AEDPA, passed in 1996, did not alter the established adequate state ground

[26] *See Ulster County Court v. Allen*, 442 U.S. 140, 148 (1979); *Harris v. Reed*, 489 U.S. 255, 262 (1989).

doctrine, demonstrating no Congressional intent to change the habeas remedy in that regard.[27]

Even more telling is the limited action Congress actually took. In Chapter 154 of the AEDPA, Congress enacted a framework by which states that "opted in" by taking specified actions to improve representation of death sentenced inmates in state post-conviction proceedings would receive benefit in the form of reduced federal habeas review. 28 U.S.C. § 2261 *et seq.*; *see Lindh v. Murphy*, 521 U.S. 320, 328 (1997).[28] One of those benefits was that in such states, a state court bar decision would be upheld in federal habeas unless the claim was not previously available or the State had violated due process – *i.e.*, if the petitioner had lacked "notice and opportunity" in state court. *See* 28 U.S.C. § 2264(a) (in qualifying states, federal court will only consider capital habeas claims that were "decided on the merits in the State courts," with exceptions where the state decision violates the petitioner's constitutional rights or the claim was not previously available); 1 R. HERTZ & J.

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[27] AEDPA did not alter application of existing procedural default principles in non-Chapter 154 jurisdictions, and the lower federal courts have rejected any such suggestion. *See Ortiz v. Stewart*, 149 F.3d 923, 931 (9th Cir. 1998) (Congress did not intend to "abolish pre-AEDPA procedural default law or affect its applicability with regard to states not governed by Chapter 154"); *Truesdale v. Moore*, 142 F.3d 749, 753 n.2 (4th Cir. 1998) (same).

[28] Pennsylvania has not "opted in." *Death Row Prisoners v. Ridge*, 106 F.3d 35 (3d Cir. 1997).

LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 3.3c at 160 (4th ed. 2005) (§ 2264(a) is best understood as a "strict procedural default rule"). The Court should not adopt the Commonwealth's proposed rule where Congress declined to do so.

II. THE STATE COURT FUGITIVE-FORFEITURE RULE WAS NOT FIRMLY ESTABLISHED OR CONSISTENTLY APPLIED; THE THIRD CIRCUIT CORRECTLY FOUND IT WAS NOT ADEQUATE TO PRECLUDE FEDERAL REVIEW.

The Commonwealth contends that Kindler's state court direct appeal and post-conviction proceedings were dismissed under established Pennsylvania rules, and that the Third Circuit wrongly held all "discretionary" bar rules to be inadequate. The Commonwealth errs. The Third Circuit, which was "more familiar than [the United States Supreme Court] with the procedural practices of the States in which [it] regularly sit[s]," *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997), correctly found that the state court bar rulings on direct appeal and post-conviction were not adequate to preclude federal habeas review.

A. The State Court Rulings Were Not "Firmly Established and Consistently Applied."

It is remarkably unclear what rule or rules the Pennsylvania courts applied here. The trial court

dismissed the post-verdict motions on the basis of a non-discretionary rule. JA 68 (trial court believed it was required to deny post-trial motions as long as defendant was fugitive). The trial court then denied reinstatement of the post-verdict motions, apparently applying a rule of unfettered discretion. JA 69 (applying abuse of discretion standard).

On direct appeal, the Pennsylvania Supreme Court plurality said that there was a rule, "applicable to capital cases," that "defendants who are fugitives from justice during the appellate process have no right to any appellate review. . . ." *Kindler I* at 3. The court then recognized that *that* fugitive-forfeiture rule *did not apply* in this case, because Kindler's "fugitive status did not take place during the pendency of an appeal before us." *Id.* Therefore, "the question *becomes* whether the trial court has authority to dismiss such motions as a response to an Appellant's flight." *Id.* After considering this Court's decision in *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) – but not adopting the standards set forth therein – the plurality ruled that trial courts have "authority to dismiss" post-verdict motions in "response to an Appellant's flight." *Kindler I* at 3. The plurality then adopted two new criteria for the exercise of that authority – "whether the flight has a connection with the court's ability to dispose of the case and whether the sanction imposed in response to the flight is reasonable under the circumstances." *Id.* The plurality held that Kindler did not prevail under

this new standard, which he had not been given the chance to address in the trial court or on appeal.

In contrast, the concurring Justices stated that Kindler's flight "had little or no direct effect on his appellate rights." *Kindler I* at 8 (Cappy, J., concurring). The concurring Justices nevertheless believed the trial court had both the authority to dismiss the post-verdict motions and also discretion to grant reinstatement of the motions on a showing of a "compelling reason" for doing so. *Id.* The concurring Justices believed Kindler had failed to meet this new standard, *id.*, which had not previously been articulated or applied by the trial court, and which Kindler had been given no opportunity to address.

Then, post-conviction, the Pennsylvania Supreme Court ruled that Kindler "was ineligible for PCRA relief" because his eligibility for such relief "was previously litigated in his 1994 direct appeal." *Kindler II* at 147. In other words, although the question of eligibility for post-conviction relief was not raised or litigated on direct appeal, the court's ruling not only foreclosed review on direct appeal, but also any review in future, as yet uninitiated proceedings. This was inconsistent with the court's ruling in *Huff*, which had held that flight during the direct appeal stage did not preclude post-conviction merits review in proceedings initiated after the defendant was returned to custody. It was also inconsistent with the cases to which the Pennsylvania Supreme Court analogized *Kindler*, where defendants

who formally waived their direct appeals subsequently received merits review in post-conviction proceedings.

Parsing through these rulings, the state courts apparently (a) applied a mandatory rule to dismiss post-verdict motions; (b) applied a rule of standardless discretion to deny reinstatement of post-verdict motions; (c) affirmed the denial of direct review on the basis of two new rules applying different forms of guided discretion; and (d) denied post-conviction review on the ground that the applicability of fugitive-forfeiture to post-conviction proceedings had previously been litigated, even though post-conviction review had not previously been sought.

These rulings are inadequate to bar federal review for reasons similar to those in *Ford v. Georgia*. There, the Georgia courts clarified the proper reading of the Georgia rule regarding the timing for raising a *Batson* objection, doing so in Ford's own appeal. The rule, as so clarified, was a "sensible rule." *Ford*, 498 U.S. at 422. But the adequacy of state rules – even "sensible" rules – "depends on the timely exercise of the local power to set procedure." *Id.* at 423. This Court's adequate state ground precedents require that a state procedural bar "must have been firmly established and regularly followed by the time as of which it is to be applied." *Id.* at 424. Because the rule applied by the Georgia courts was "unannounced at the time of petitioner's trial," it was an "inadequate"

state ground. *Id*. (citing *James v. Kentucky*, 466 U.S. 341 (1984)).[29]

In this case, like *Ford*, neither the guided discretion approach of *Kindler I* nor the irrevocable forfeiture approach applied in *Kindler II* were announced at the time of Kindler's flight, nor even at the time when he sought reinstatement of his post-verdict motions. Even in a non-capital case, then, the rules applied in *Kindler I* and *Kindler II* were not "firmly established and regularly followed by the time as of which [they were] applied."

The lack of adequacy is even more apparent in a capital case. Under Pennsylvania's relaxed waiver practice, the merits were reviewed in capital direct appeal and post-conviction cases regardless of "waivers." Thus, while failure to raise an issue on post-verdict motions would ordinarily "waive" the issue, in capital cases, appellants (like Kindler) could raise and receive review of issues on direct appeal that were "waived" at the post-verdict motions stage. *See* Attachment to Brief for Respondent. The question whether flight at the post-verdict motions stage could act as a "super-waiver" to which the relaxed waiver practice would not apply was neither addressed nor resolved until *Kindler I*. *See Yarris II*, 549 A.2d at 529

[29] In *James*, the Court held inadequate a ruling barring review on the basis of a distinction between jury admonitions and instructions that was not firmly established and regularly followed. *James*, 466 U.S. at 348-49.

n.2; *Lewis I*, 567 A.2d at 1378 n.1 (both declining to address the waiver question and proceeding to review the merits).

Similarly, as to the post-conviction proceedings, the Pennsylvania Supreme Court had never held prior to *Kindler II* that pre-sentencing flight waived the right to seek post-conviction relief; indeed, it held to the contrary in *Commonwealth v. Huff*, 658 A.2d 1340 (Pa. 1995), which was the law when Kindler filed for post-conviction relief on January 11, 1996. The novel ruling in *Kindler II* denied state court consideration of the ineffective assistance of counsel claim on which the Third Circuit ultimately granted relief. There is no connection whatsoever between Kindler's flight during pre-sentencing/post-verdict proceedings, in which no penalty phase ineffective assistance claim had been raised, and the post-conviction proceedings, in which he raised the claim for the first time.

Even if the rules announced and applied in *Kindler I* and *Kindler II* can be deemed "sensible," a state's announcement and application of new procedural rules that were not previously "firmly established and consistently applied" is not an adequate state ground.

B. The Commonwealth's Attack on the Third Circuit is Flawed.

The Third Circuit correctly held that the rulings in *Kindler I* and *Kindler II* were not adequate to

foreclose federal habeas review because they were neither "firmly established" nor "consistently applied" prior to the announcement of those very decisions. The Commonwealth attacks the Third Circuit's decision as supposedly "interpret[ing] 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." Pet. Br. 7.

The Commonwealth's attack on the Third Circuit is ironic and erroneous. In the Third Circuit, the Commonwealth asserted that the state court rule was adequate – and that this case was different from *Doctor* – because the state courts supposedly had "no . . . discretion to reinstate Kindler's post-verdict motions. . . ." *See Kindler IV* at 79. Below, then, the Commonwealth contended that the fugitive-forfeiture bar here was "mandatory," not "discretionary." The Third Circuit rejected that argument, explaining that, at the relevant time periods, the state court in *Kindler* "had discretion to reinstate his post-verdict motions," *id.* at 80, just as the state court in *Doctor* had the "discretion to hear an appeal filed by a defendant" whose "flight had ended and custody had been restored before the appellate process was ever initiated." *Doctor*, 96 F.3d at 685-86. The Third Circuit's rejection of the Commonwealth's attempt to distinguish *Doctor* resolved the issue before it. Accordingly, the Third Circuit held: "[U]nder *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." *Kindler IV* at 80.

Now, the Commonwealth complains that the Third Circuit's focus on whether the state rule was "discretionary" means that the Third Circuit held that all "discretionary" rules are inadequate. But the Third Circuit's focus on "discretion" is an artifact of the inconsistent manner in which the Commonwealth has approached the procedural issues in this case, not a holding that all state rules involving any degree of discretion are inadequate.

1. The Third Circuit's actual decisions in *Doctor* and *Kindler*

The Third Circuit's analysis of the procedural default issue was "controlled by [its] analysis" in the non-capital case of *Doctor v. Walters*. *Kindler IV* at 79. *Doctor* surveyed Pennsylvania's treatment of appeals by fugitives who had been returned to custody, and found that until after the time of Doctor's escape in 1986, Pennsylvania courts *had discretion* to hear an appeal "if the defendant [was] returned to custody while his appeal [was] pending. . . ." *Doctor*, 96 F.3d at 685. By the time Doctor actually appealed, however, Pennsylvania courts "*had 'no discretion* to consider an appeal by a convicted defendant who escapes or absconds from the jurisdiction, regardless of when he returns.'" *Id.* at 681 n.4 (quoting *Commonwealth v. Jones*, 564 A.2d 983, 985 (Pa. Super. 1989)). In 1993, the state appellate court in

Doctor refused to review his claims because the court "believed it lacked the discretion to consider the appeal of a defendant who had fled at any time." *Doctor*, 96 F.3d at 684. Application of that no-discretion rule was inadequate because, at the time of Doctor's flight, "it was not 'firmly established' that Pennsylvania courts lacked discretion to hear an appeal first filed after custody had been restored." *Id.* at 686.

The Third Circuit ruled in *Kindler IV* that the same sequence of events required the same outcome. When Kindler fled in 1984, "the state trial court still had discretion to reinstate his post-verdict motions." *Kindler IV* at 80. Just as in *Doctor*, the state court's practice changed from a discretionary practice of hearing appeals filed after custody was restored to a more restrictive practice. *Id.*

The Commonwealth would have it that *Kindler IV* said the opposite of *Doctor* – that the rule was inadequate *because* it was discretionary. Pet. Br. 12 & n.8. Although the Third Circuit did not spell out its reasoning in *Kindler IV* in the same detail as it did in *Doctor*, it did not need to, because it was applying *Doctor*. *Kindler IV* at 79. The Commonwealth could only be correct about the holding of *Kindler IV* if the Third Circuit misread its own decision in *Doctor*, believing that *Doctor* meant "discretionary rules are inadequate," when it said, "changing from a discretionary rule to a mandatory rule made the mandatory rule inadequate."

Recognizing that *Doctor* undercuts its argument, the Commonwealth now asserts that, in *Lines v. Larkins*, 208 F.3d 153 (3d Cir. 2000), the Third Circuit somehow "made plain its position that a state procedural rule allowing for the exercise of discretion will not be honored in federal court," and that this *Lines*-derived "principle" was applied in *Kindler IV*. Pet. Br. 12 n.13. This contention is meritless.

The Third Circuit did not cite or discuss *Lines* in *Kindler IV*. It relied upon *Doctor*, *Ford v. Georgia*, and *Johnson v. Mississippi*. Further, although Lines did flee the jurisdiction, the Third Circuit's decision in *Lines* did not turn on the adequacy of fugitive-forfeiture, but on whether Lines could show cause and prejudice for his failure to present his claims to the Pennsylvania Supreme Court. *See Lines*, 208 F.3d at 160. In *Lines*, the Third Circuit discussed *Doctor* and fugitive-forfeiture, but it prefaced that discussion by stating that *Doctor* "is neither controlling nor helpful to the present inquiry. . . ." *Id.* at 167. Given that the discussion in *Lines* is pure dicta (on a question that was "neither controlling nor helpful"), it is unsurprising that neither *Kindler IV* nor any other Third Circuit decision has cited *Lines* as an authority on fugitive-forfeiture or even more generally as an authority with respect to the adequate state ground doctrine.

2. The Third Circuit did not hold that all "discretionary" rules are inadequate.

The Third Circuit did not believe that all discretionary rules are *per se* inadequate. For one thing, it said so: "A procedural rule that is consistently applied in the vast majority of cases is adequate to bar federal habeas review even if state courts are willing to occasionally overlook it and review the merits of a claim for relief where the rule would otherwise apply." *Kindler IV* at 79. Indeed, *Campbell v. Burris*, 515 F.3d 172, 181 (3d Cir. 2008), an opinion authored by Judge Stapleton, who was on the panel in *Kindler IV*, *rejected* the "proposition that a state procedural rule is rendered *per se* inadequate merely because it allows for some exercise of discretion by state courts. . . ." *Id.* at 181. As Judge Stapleton explained in *Campbell*:

> The issue is not whether the state procedural default rule leaves room for the exercise of some judicial discretion – almost all do. Rather, the issue is whether, at the relevant point in time, the judicial discretion contemplated by the state rule is being exercised in a manner that lets people know when they are at risk of default and treats similarly-situated people in the same manner.

Campbell, 515 F.3d at 181.

The Third Circuit's approach in *Kindler IV* is actually very similar to its approach a few months earlier in *Campbell*. Here, as in *Campbell*, the Third

Circuit asked whether the state courts were applying a firmly established and consistently applied rule. In both *Doctor* and *Kindler IV*, the Third Circuit found there was no firmly established and consistently applied rule guiding the state court decisions:

> On federal habeas review [in *Doctor*], the Commonwealth argued that the state courts' application of the fugitive waiver doctrine precluded federal habeas relief. We disagreed because the rule was not being consistently or strictly applied when Doctor escaped in 1986. . . . After surveying decisions of Pennsylvania courts 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. . . . Accordingly, the fugitive forfeiture rule was not 'firmly established' and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petitioner in federal court.

Kindler IV at 79.[30]

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[30] Petitioners contend that other courts of appeals have held that a discretionary state procedural rule is *per se* inadequate, Pet. Br. 13 n.9, but that contention fails to withstand scrutiny. Three of the cited cases simply hold that a rule must be firmly established and consistently applied to be an adequate bar. *Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995) (bar that previously was not regularly applied adequate because now being regularly applied); *Deitz v. Money*, 391 F.3d 804, 811 (6th Cir. 2004) (rule not adequate where not consistently applied to

(Continued on following page)

C. The Adequate State Ground Doctrine and "Discretionary" Rules

Contrary to the Commonwealth's view, the adequacy of a state-court bar does not turn on whether it is labelled "discretionary" or "mandatory." This Court considers the "practical operation" of the rule in question, rather than just the "descriptive words which may be applied to it." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (1932).

In particular, there are at least two questions concerning the "practical operation" of any "discretionary" rule that should be addressed in determining whether the rule is adequate: (1) are there any criteria that guide the exercise of the court's discretion? and (2) how has the rule been applied, *i.e.*, has there been a consistent practice of exercising discretion to allow review of the merits, or not?

A purely discretionary rule – one that provides no criteria for the court's exercise of its discretion – is

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similarly situated litigants); *Sechrest v. Ignacio*, 549 F.3d 789, 803 (9th Cir. 2008) (rule not consistently applied where state practice was to address merits in capital cases). The other case cited by Petitioners, *McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9th Cir. 1995), is even further from the mark. In *McKenna*, the state supreme court described the claim at issue as possibly procedurally defaulted but then addressed it on the merits. Because the procedural ruling was "necessarily entwined" with the merits ruling, the Ninth Circuit held that the state court had not clearly indicated reliance on the procedural ground. *Id.* at 1489.

more likely than other rules to be inadequate. This is so because rules allowing for unfettered discretion make it easier to discriminate against disfavored claims or claimants, thus evading federal review. *See Williams v. Georgia*, 349 U.S. 375, 383 (1955) (state court may not "avoid[ ] the federal right" by using its discretion to "decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner"); *cf. Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (unfettered exercise of peremptory challenges is a practice "that permits 'those to discriminate who are of a mind to discriminate' ") (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

Nevertheless, even a purely discretionary rule is not necessarily inadequate. If the state court's consistent practice is to enforce a "discretionary" rule, with only occasional acts of grace, then there is little reason to fear discrimination against particular claims or claimants, or an attempt to avoid a decision on the federal right asserted. *Compare Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 399 (1990) (state court's discretionary practice was adequate, in absence of showing that state courts "apply this exception in an irregular, arbitrary or inconsistent manner"); and *Adams*, 489 U.S. at 410 (state court rule adequate where it was "faithfully applied" in the "vast majority of cases"), *with Flowers*, 377 U.S. at 297 (state courts "have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here"); and *Williams*, 349 U.S. at 383-84 (in

"practice," state courts granted review in similar circumstances).

In contrast, "discretionary" rules that articulate criteria to guide the court tend to assure that the court's decisions will be made and can be reviewed in a principled manner. Such rules are much more likely to be adequate, as they tend both to guide and channel the court's exercise of its discretion, and to enable reviewing courts to determine (without guesswork) whether the stated reasons actually apply in a given case.

Here, the trial court apparently applied a rule of unfettered discretion. The Pennsylvania Supreme Court proceeded to affirm the denial of direct review and then the denial of post-conviction review, based on either new criteria that it announced for the first time, a new rule of mandatory forfeiture, or both. Since neither of those rules was in existence at the time Kindler fled, neither was "firmly established or consistently applied." *James*, 466 U.S. at 348. The Third Circuit correctly found that the state court bar was not adequate to foreclose federal habeas review of the merits of Kindler's claims.

III. THE THIRD CIRCUIT'S RULING IS SUPPORTED ON THE ALTERNATIVE BASIS THAT THERE WAS NO ADEQUATE STATE GROUND BECAUSE OF THE PENNSYLVANIA RELAXED WAIVER PRACTICE IN CAPITAL CASES.

In the District Court, Third Circuit and in his Brief in Opposition to certiorari review, Kindler argued a separate reason why the bar ruling of the Pennsylvania courts in his case is not adequate. Because the Third Circuit held that the fugitive-forfeiture rule applied against Kindler was not adequate under *Doctor*, it did not reach this argument.

Under its practice in capital cases, the Pennsylvania Supreme Court reviewed the merits of virtually all issues raised in capital direct appeals and post-conviction proceedings, often applying "relaxed waiver" to multiple issues within the same case. *See* Attachment to Brief for Respondent (including 51 such cases). The Pennsylvania Supreme Court's deviation from its relaxed waiver practice renders its refusals to consider Kindler's claims an inadequate state ground, providing an alternative basis to support the Third Circuit's decision. Thus, there is no adequate state ground here even aside from the inadequacy relating to fugitive-forfeiture.

The Pennsylvania Supreme Court first articulated its practice of relaxed waiver in capital cases in 1978. *McKenna*, *supra*. This relaxed waiver practice "firmly established that a claim of

constitutional error in a [Pennsylvania] capital case *would not be waived* by a failure to preserve it." *Bronshtein*, 404 F.3d at 708 (quoting *Szuchon*, 273 F.3d at 326).[31] This practice remained in effect for twenty (20) years, including through filing of the briefs and submission of the case to the Pennsylvania Supreme Court in Kindler's post-conviction appeal. Because the relaxed waiver practice was "made broadly available" to capital defendants by the Pennsylvania Supreme Court, both "on direct appeal, [and] in the post-conviction context," *Ford*, 809 A.2d at 337 (Saylor, J., concurring), the potential application of a fugitive-forfeiture rule to a capital defendant was not "firmly established," and the state court's refusal to consider the merits in Kindler's case was not the application of an adequate bar.

This is particularly true with respect to the state court's reliance on a new rule treating a capital

[31] Every Third Circuit judge who has addressed the Pennsylvania Supreme Court's relaxed waiver approach in capital cases has held that, as a result, there is no adequate state bar in Pennsylvania capital cases from the *Kindler* era. *See Bond v. Beard*, 539 F.3d 256, 277 (3d Cir. 2008); *Abu-Jamal v. Horn*, 520 F.3d 272, 287 n.15 (3d Cir. 2008); *Holland v. Horn*, 519 F.3d 107, 115 (3d Cir. 2008); *Laird v. Horn*, 414 F.3d 419, 425 (3d Cir. 2005); *Taylor v. Horn*, 504 F.3d 416, 428 (3d Cir. 2007); *Bronshtein v. Horn*, 404 F.3d 700, 708-10 (3d Cir. 2005); *Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005); *Crews v. Horn*, 360 F.3d 146, 153 (3d Cir. 2004); *Carpenter v. Vaughn*, 296 F.3d 138, 147 (3d Cir. 2002); *Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001); *Jermyn v. Horn*, 266 F.3d 257, 278-79 (3d Cir. 2001); *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001).

defendant's escape during post-verdict proceedings as a waiver of the claims raised in those proceedings. *See Kindler I* at 3-4. Until *Freeman* was decided in 2003, the Pennsylvania Supreme Court routinely reviewed the merits of claims on direct appeal in capital cases, even though the appellants technically waived those claims by failing to raise them in post-verdict motions.[32] In *Kindler I,* on direct appeal, the Pennsylvania Supreme Court stated that claims were waived because the trial court properly dismissed the post-verdict motions. Under the relaxed waiver practice, however, Kindler's claims should have been heard on appeal *even though they were not properly preserved on post-verdict motions*. Not until the decision in *Kindler I* had the court ever hinted that this application of the relaxed waiver practice –

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[32] *See*, *e.g.*, *Freeman*, 827 A.2d at 401 (prospectively abrogating use of relaxed waiver rule on direct appeal; observing that the "relaxed waiver practice has . . . been routinely employed . . . to reach claims that . . . were not raised at all in the trial court"); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986) ("This is apparently the first stage of the proceedings at which appellant raises this argument. Because of the relaxed rule of waiver which we apply to cases involving imposition of the death penalty, we will review the claim") (citation omitted)); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-21 (Pa. 1984) (same for penalty phase issues not preserved at trial or raised on appeal); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 955 n.19 (Pa. 1982) ("This issue was not raised in post-verdict motions and is, accordingly, waived. However, [in capital cases] we will not adhere strictly to our normal rules of waiver. . . . Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved").

consistently followed since *Zettlemoyer* – was not available to defendants who had post-verdict motions dismissed because they were fugitives.

Moreover, the court had previously followed the relaxed waiver practice in cases of capital defendants who otherwise could have been subject to fugitive-forfeiture. For example, Reginald Lewis and Kindler escaped *at the same time*, but the Pennsylvania Supreme Court did not apply the same rule to them. Lewis escaped while his appeal was pending, making his appeal subject to being quashed under Pa. R.A.P. 1972(a)(6), and under decisions going back to *Galloway*. Nevertheless, the Pennsylvania Supreme Court reviewed the merits on appeal, *Lewis I*, 567 A.2d at 1378 n.1, and again in post-conviction proceedings. *Lewis II*.[33]

Similarly, the Pennsylvania Supreme Court reviewed Nicholas Yarris' direct appeal and post-conviction claims on the merits, although he also escaped while his appeal was pending. *See Yarris III*,

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[33] This disparate treatment could render the bar here inadequate even apart from the other considerations discussed herein. *Cf. Romano v. Gibson*, 239 F.3d 1156, 1169-70 (10th Cir. 2001) (no adequate state ground where state court barred petitioner's claims but addressed merits of claims raised by petitioner's co-defendant in separate appeal, where both petitioner and co-defendant violated the same procedural rule); *Roper v. Weaver*, 550 U.S. 598, 601-02 (2007) (certiorari dismissed as improvidently granted; Court exercises discretion to "prevent . . . virtually identically situated litigants from being treated in a needlessly disparate manner").

731 A.2d at 584 (describing procedural history). Again, Yarris' appeal was subject to being dismissed under Pa. R.A.P. 1972(a)(6) and *Galloway*, but his claims were considered on the merits.

The logical explanation for *Lewis* and *Yarris* is that the Pennsylvania Supreme Court followed its relaxed waiver practice in those cases, overlooking any waiver consequences of the flights of those defendants. The Commonwealth proffers a different explanation – that the Pennsylvania Supreme Court treated Lewis and Yarris differently from Kindler, pursuant to the "flexible, discretionary standard for fugitive forfeiture," because they were recaptured more quickly than Kindler. Pet. Br. 39. This argument, however, ignores Pennsylvania's actual fugitive-forfeiture practice. Simply put, from *Passaro* on, Pennsylvania did *not* have a "flexible, discretionary standard" in cases where flight occurred during the pendency of appellate proceedings. The results in *Lewis* and *Yarris* make sense only in light of the Pennsylvania Supreme Court's practice of merits review in capital cases.

For similar reasons, *Commonwealth v. Judge*, 609 A.2d 785 (Pa. 1992), does not help the Commonwealth's argument. Judge fled post-sentencing, and actually filed his appeal while he was a fugitive. *Id.* at 786. The Pennsylvania Supreme Court expressly applied the fugitive-forfeiture holding of *Passaro*, *id.*, which it did *not* apply in *Kindler I*. *See Kindler I*, 639 A.2d at 3 (*Passaro* rule applies to "defendants who are fugitives from justice during the appellate

process"; "Here, however, Appellant's fugitive status did not take place during the pendency of an appeal before us."). Given that *Judge* and *Kindler* are so different procedurally, *Judge* does not show that Pennsylvania's failure to follow its practice of merits review in *Kindler* was firmly established and consistently applied.[34]

Pennsylvania's failure to follow its practice of relaxed waiver in capital cases provides an alternative

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[34] The Commonwealth may also argue that relaxed waiver was a "discretionary" practice, echoing recent statements by Chief Justice Castille. *See Freeman*, 827 A.2d at 400 n.9. However, *Freeman* also acknowledged that relaxed waiver was a "routinely employed" "practice." Indeed, while Chief Justice Castille asserted that there were "many instances" in which the court had "declined to invoke" relaxed waiver, he cited only six. Two of those (*Peterkin* and *Szuchon*) involved *Witherspoon* claims, which traditionally were treated as exceptions to relaxed waiver, while *Abu-Jamal* does not support the "discretionary" description. *Abu-Jamal* was reviewed on its merits, as the *Freeman* court itself acknowledged: in *Abu-Jamal*, the "relaxed waiver doctrine . . . *obliged* this court to review a *Batson* claim raised for the first time on direct appeal." *Freeman*, 827 A.2d at 395. Two other examples also involved exceptions to the standard practice: where a defendant made, but then withdrew, a motion to suppress, *Commonwealth v. Gribble*, 703 A.2d 426, 434-35 (Pa. 1997), and where counsel affirmatively decided not to request a cautionary instruction. *Commonwealth v. Wallace*, 561 A.2d 719, 725 (Pa. 1989). The last case cited was one where the court understood the substantive law to hold that there was no error without an objection. *Commonwealth v. Spotz*, 759 A.2d 1280, 1291 n.14 (Pa. 2000). The relaxed waiver practice is discussed in Statement of the Case, § B.1, *supra*, and the cases applying relaxed waiver are collected in the Attachment to this Brief.

ground that supports the rulings of the Third Circuit and the District Court. Should this Court find error in the Third Circuit's fugitive-forfeiture ruling, it should remand the case for further proceedings, including consideration of whether the Pennsylvania Supreme Court's rulings were adequate to preclude federal review in light of Pennsylvania's practice of relaxed waiver in capital cases.

CONCLUSION

For the reasons set forth above, Respondent prays that the Court affirm the judgment of the United States Court of Appeals for the Third Circuit. Alternatively, the Court should remand for further consideration.

Respectfully submitted,

LEIGH SKIPPER
Chief Federal Defender
MATTHEW C. LAWRY
Counsel of Record
MARIA K. PULZETTI
JENNIFER L. GIVENS
BILLY H. NOLAS
FEDERAL COMMUNITY DEFENDER OFFICE
Eastern District of Pennsylvania
601 Walnut Street – Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

ATTACHMENT TO BRIEF OF RESPONDENT

Under the relaxed waiver practice, the Pennsylvania Supreme Court consistently reviewed claims that would otherwise have been deemed waived for a variety of reasons. The court applied relaxed waiver and reviewed the merits of claims in the following circumstances:

1. Failure of trial counsel to make a contemporaneous objection:

> *Commonwealth v. Gibson*, 720 A.2d 473, 481 n.2 (Pa. 1998); *Commonwealth v. Williams*, 720 A.2d 679, 684 n.12 (Pa. 1998); *Commonwealth v. Wayne,* 720 A.2d 456, 469 n.13 (Pa. 1998); *Commonwealth v. Spotz*, 716 A.2d 580, 591 (Pa. 1998); *Commonwealth v. Brown,* 711 A.2d 444, 455-56 (Pa. 1998); *Commonwealth v. Clark*, 710 A.2d 31, 40 (Pa. 1998) (trial counsel failed to request reconsideration of ruling denying request for appointment of second attorney and failed to renew request for second attorney); *Commonwealth v. Harris*, 703 A.2d 441, 445 n.5, 446 n.7, 9 (Pa. 1997); *Commonwealth v. Gribble*, 703 A.2d 426, 436-37 (Pa. 1997); *Commonwealth v. Elliott*, 700 A.2d 1243, 1252 n.21 (Pa. 1997); *Commonwealth v. Washington*, 692 A.2d 1024, 1030 n.11 (Pa. 1997); *Commonwealth v. Marinelli*, 690 A.2d 203, 214 n.19 (Pa. 1997); *Commonwealth v. Gibson*, 688 A.2d 1152, 1161-63 n.15, 19, 23 (Pa. 1997); *Commonwealth v. Miles*, 681 A.2d 1295, 1301 n.8 (Pa. 1996); *Commonwealth v. Hill,* 666 A.2d 642, 648 (Pa. 1995); *Commonwealth v. LaCava*, 666 A.2d 221, 228 n.8 (Pa. 1995); *Commonwealth v. Paolello*, 665 A.2d 439, 453

n.11 (Pa. 1995); *Commonwealth v. Miller*, 664 A.2d 1310, 1320 n.17 (Pa. 1995); *Commonwealth v. May*, 656 A.2d 1335, 1343 n.7, 1344 n.9 (Pa. 1995); *Commonwealth v. Williams*, 640 A.2d 1251, 1261 (Pa. 1994); *Commonwealth v. Billa*, 555 A.2d 835, 842 (Pa. 1989); *Commonwealth v. Yarris*, 549 A.2d 513, 521 (Pa. 1988); *Commonwealth v. Nelson*, 523 A.2d 728, 736 (Pa. 1987); *Commonwealth v. Baker*, 511 A.2d 777, 790 n.10 (Pa. 1986); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986); *Commonwealth v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984).

2. Failure to raise the claim in post-verdict motions:

Commonwealth v. Speight, 677 A.2d 317, 326 n.15 (Pa. 1996); *Commonwealth v. Cook,* 676 A.2d 639, 649 n.26 (Pa. 1996) (court considered ineffectiveness of trial counsel claim on direct appeal even though new post-verdict counsel failed to raise the claim); *Commonwealth v. Johnson*, 668 A.2d 97, 102 n.12, 103 nn.14-15, 104 n.18, 106 n.20 (Pa. 1995); *Commonwealth v. Wharton*, 665 A.2d 458, 462 n.6 (Pa. 1995) (court considered claim that was raised in post-verdict motions, but was not argued to, or decided by, the sentencing court); *Commonwealth v. Miller*, 664 A.2d 1310, 1322, 1323 n.22 (Pa. 1995); *Commonwealth v. Walker*, 656 A.2d 90, 98-99 (Pa. 1995); *Commonwealth v. Crispell*, 608 A.2d 18, 22 n.1 (Pa. 1992); *Commonwealth v. Chester,* 587 A.2d 1367, 1382 n.9 (Pa. 1991); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-721 (Pa. 1984).

3. Failure of appellate counsel to properly raise or brief the issue:

> *Commonwealth v. Spotz*, 716 A.2d 580, 585 n.5 (Pa. 1997); *Commonwealth v. Hall,* 701 A.2d 190, 200, 202 n.14, 207 n.17 (Pa. 1997) (court considered claim of prosecutorial misconduct even where appellant failed to explain why the prosecutor's comments were improper; court also considered an ineffectiveness claim where counsel did not properly frame the issue as a Sixth Amendment claim); *Commonwealth v. Gibson,* 688 A.2d 1152, 1160 n.13 (Pa. 1997); *Commonwealth v. Johnson,* 668 A.2d 97, 106 n.20 (Pa. 1995); *Commonwealth v. Simmons,* 662 A.2d 621, 636 (Pa. 1995) (court considered claim even though appellant improperly supported his argument by simply referring the court to the transcript of a pre-trial motions hearing); *Commonwealth v. Holcomb*, 498 A.2d 833, 837 n.6 (Pa. 1985) (practice in capital cases to address "significant issues perceived sua sponte by this Court"); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-723 (Pa. 1984) (court considered claims of ineffectiveness that had not been raised until oral argument on direct appeal).

4. Petitioner's failure to raise post-conviction claim at trial and/or direct appeal:

> *Commonwealth v. Christy,* 656 A.2d 877, 881 n.2 (Pa. 1995) (state court considered *Ake v. Oklahoma* claim even though it was not clear that *Ake* applied retroactively and even though the *Ake* claim was not considered on direct appeal); *id.* at 885 n.14, 886 n.15 (court considered a PCRA claim of

> prosecutorial misconduct even though the claim was not raised on direct appeal); *Commonwealth v. Banks,* 656 A.2d 467, 470 n.7 (Pa. 1995) (same); *Commonwealth v. DeHart*, 650 A.2d 38, 48 (Pa. 1994) (court granted relief on post-conviction claim despite the fact that "it was not previously raised below"); *Commonwealth v. Lesko*, 501 A.2d 200, 207 (Pa. 1985).

5. Claims raised for the first time in successive PCRA petitions:

> *Commonwealth v. Morales*, 701 A.2d 516, 520 n.13, 528-29 (Pa. 1997) (granting relief on claim of prosecutorial misconduct not raised at trial, on direct appeal, or in first post-conviction claim; even if waiver not overcome by ineffective assistance claim, "this Court's practice has been to address all waived issues which have been raised in PCRA death penalty petitions"); *Commonwealth v. Szuchon*, 693 A.2d 959, 962-64 (Pa. 1997); *Commonwealth v. Travaglia*, 661 A.2d 352, 356 n.6 (Pa. 1995) ("it is this Court's practice to address all issues arising in a death penalty case, irrespective of a finding of waiver"; addressing merits of issues raised in second PCRA petition).

Following *Albrecht*, the Pennsylvania Supreme Court applied relaxed waiver in the following direct appeal cases:

> *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1081 (Pa. 2001) ("[A]s we apply a relaxed waiver rule in the direct appeal of cases involving the death penalty, we will address the merits of the issue as

> presented in its current form"); *Commonwealth v. Natividad*, 773 A.2d 167, 178 (Pa. 2001) (same); *Commonwealth v. Bridges*, 757 A.2d 859, 874 n.16 (Pa. 2000) (same); *Commonwealth v. Kemp*, 753 A.2d 1278, 1285 (Pa. 2000) (same); *Commonwealth v. Fletcher*, 750 A.2d 261, 270 (Pa. 2000) (same); *Commonwealth v. Carson*, 741 A.2d 686, 697 (Pa. 1999) (same); *Commonwealth v. Mason*, 741 A.2d 708, 718 n.9 (Pa. 1999) (same); *Commonwealth v. Clark*, 710 A.2d 31, 40 (Pa. 1998) (same).

Following *Albrecht*, the Pennsylvania Supreme Court applied *Albrecht* retroactively in PCRA cases, while acknowledging that its prior practice had been to review all issues in capital cases:

> *Commonwealth v. Ligons*, 971 A.2d 1125, 1137 (Pa. 2009) ("[W]e no longer apply the relaxed waiver doctrine in capital PCRA appeals") (citing *Albrecht*, 720 A.2d at 700); *Commonwealth v. Steele*, 961 A.2d 786, 796 (Pa. 2008) (same); *Commonwealth v. Tedford*, 960 A.2d 1, 15 (Pa. 2008) (same); *Commonwealth v. Rainey*, 928 A.2d 215, 224 (Pa. 2007) (same); *Commonwealth v. Jones*, 912 A.2d 268, 278 (Pa. 2006) (same); *Commonwealth v. Fletcher*, 896 A.2d 508, 520 (Pa. 2006) (same); *Commonwealth v. Zook*, 887 A.2d 1218, 1227 (Pa. 2005) (same); *Commonwealth v. Washington*, 880 A.2d 536, 539 (Pa. 2005) (same); *Commonwealth v. Hall*, 872 A.2d 1177, 1182 (Pa. 2005) (same); *Commonwealth v. Jones*, 876 A.2d 380, 384 (Pa. 2005) (holding claims procedurally barred under the PCRA because, after *Albrecht*, "the relaxed waiver doctrine is no longer applicable to PCRA

appeals"); *Commonwealth v. Brown*, 872 A.2d 1139, 1156 (Pa. 2005) (*Albrecht* was "the seminal case . . . where this Court eliminated the capital case relaxed waiver rule on PCRA review"); *id.* at 1161-62 (Castille, J., concurring) (*Albrecht* "abrogated relaxed waiver on PCRA review . . . thereby rendering the previously nonwaivable claims defaulted"); *Commonwealth v. Reyes*, 870 A.2d 888, 893-94 (Pa. 2005) (same); *Commonwealth v. Hughes*, 865 A.2d 761, 816 (Pa. 2005) (Castille, J., concurring and dissenting) (*Albrecht* was "the seminal decision . . . which eliminated the relaxed waiver rule on capital PCRA review precisely because that judicial rule wrongly subverted the PCRA's statutory waiver"); *Commonwealth v. Cox*, 863 A.2d 536, 555 n.1 (Pa. 2004) (same); *Commonwealth v. Crews*, 863 A.2d 498, 504 (Pa. 2004) ("[B]etween the filing of his first and second [PCRA] petitions, relaxed waiver was abolished in capital PCRA cases. [*Albrecht*] Thus, when first PCRA counsel failed to raise certain issues, appellant was not on notice that counsel's failure would lead to an eventual time-bar of those claims."); *Commonwealth v. Gribble*, 863 A.2d 455, 468 (Pa. 2004) (same); *Commonwealth v. Wilson*, 861 A.2d 919, 928 n.8 (Pa. 2004) (same); *Commonwealth v. Harris*, 852 A.2d 1168, 1171 n.9 (Pa. 2004) (same); *Commonwealth v. Rush*, 838 A.2d 651, 655-56 (Pa. 2003) (same); *Commonwealth v. Freeman*, 827 A.2d 385, 398, 401 (Pa. 2003) (after *McKenna*, relaxed waiver rule became "such a matter of routine that it [was] invoked to capture a myriad of claims, no matter how comparatively minor or routine"); *Commonwealth v. Clayton*, 816 A.2d

217, 221 (Pa. 2002) (same); *Commonwealth v. Johnson*, 815 A.2d 563, 593 (Pa. 2002) (Eakin, J., concurring and dissenting) (before *Albrecht*'s "abolition of relaxed waiver in PCRA capital appeals" procedurally barred claims were reviewed on merits); *Commonwealth v. Grant*, 813 A.3d 726, 733 n.10 (Pa. 2002) (same); *Commonwealth v. Wharton*, 811 A.2d 978, 991 n.1 (Pa. 2002) (Saylor, J., concurring) (noting *Albrecht*'s "retroactive abolition of relaxed waiver"; explaining that relaxed waiver "doctrine had been generally extended in [the PCRA] area and permitted review of the underlying allegations on their merits" even when procedurally barred; and finding it unfair to apply "the more stringent standards subsequently adopted by the Court" in *Albrecht*); *Commonwealth v. Marshall*, 810 A.2d 1211, 1231 (Pa. 2002) (Castille, J., concurring and dissenting) (relaxed waiver rule was "judicial negation of the PCRA's waiver provisions"); *id.* at 1232 (criticizing lead opinion's "relaxed waiver approach" of addressing barred claims on merits as "consistent with the approach taken in . . . the cases pre-dating *Albrecht*"); *Commonwealth v. Ford*, 809 A.2d 325, 337-38 (Pa. 2002) (Saylor, J., concurring) (before *Albrecht*, relaxed waiver "permitted review of the underlying allegation on its merits" despite procedural bar; since then, a "far more stringent set of rules" has been "implemented by the Court"); *id.* at 348 (Eakin, J., dissenting) ("The doctrine of 'relaxed waiver' was eliminated by *Albrecht*"); *Commonwealth v. Pirela*, 726 A.2d 1026, 1030 n.5 (Pa. 1999) (noting that the court "recently held" in *Albrecht* that the "practice" of relaxed waiver "will be

discontinued"); *Commonwealth v. Laird*, 726 A.2d 346, 354 (Pa. 1999) ("the relaxed waiver rule" that formerly applied in capital cases "will no longer be applied to PCRA appeals in death penalty cases"); *Commonwealth v. Wallace*, 724 A.2d 916, 920-21 (Pa. 1999) ("under *Albrecht*, the relaxed waiver rule is no longer applicable in PCRA appeals"); *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999) (after *Albrecht*, "we now require strict adherence to the statutory language of the PCRA").