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

REPLY BRIEF FOR PETITIONERS

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Argument

I. Kindler cannot recast the question presented by misrepresenting events below.

Kindler does not wish to address the question on which this Court granted review. He says he should not have to, because the Commonwealth secured review on a false pretense: that the case involves a discretionary state procedural rule. In fact, charges Kindler, the Commonwealth's position in the Third Circuit was that Pennsylvania's fugitive forfeiture rule was strictly mandatory; only now does the Commonwealth state that the rule was discretionary.

But Kindler's accusation is invented. In federal court the Commonwealth consistently described, and defended, the state's flight rule as discretionary. That is indeed the rule the state courts consistently applied. And it was for that reason – the element of discretion – that the federal habeas court declared the rule inadequate.

A. The Commonwealth's position below.

Kindler begins his brief, in the first sentence of the first printed page, with his claim that petitioners have recently flip-flopped about the nature of Pennsylvania's escape rule. Brief for Resp. at i. The allegation is repeated in both the statement of the case and the argument section of the brief. *See, e.g.*, Brief for Resp. at 25, 48, 49. For a point given such prominence, one might expect quotation from, or at least citation to, the portions of the briefs below where the Commonwealth's argument contradicted its current stance.

But there is none – at all; because none is possible. In reality, from the beginning of the federal habeas litigation, in both the district court and the court of appeals, the Commonwealth's filings acknowledged that "the state's doctrines regarding fugitive status contained some flexibility and permitted some judicial discretion,"[1] and stated plainly that where "a state procedural rule is structured to permit flexibility, it becomes clear that specific instances of flexible application cannot render the rule an 'inadequate' ground."[2] That is hardly a "mandatory-bar argument," as Kindler falsely labels it.

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[1] Initial Brief of Appellants, filed in the court of appeals August 4, 2006, at 56; *see generally* 56-58.

[2] Third-Step Brief of Appellants, filed in the court of appeals June 27, 2007, at 63; *see generally* 34-45, 56-58, 61-66.

See also Response to Amended Petition for Habeas Corpus, filed in the district court September 16, 2002, at 63-64, 77-78; Surreply to Kindler's Reply Memorandum, filed in the district court April 30, 2003, at 33-34, 38-39.

The Commonwealth's briefs are contained in the official record certified to this Court. They are not reprinted in the Joint Appendix, because Kindler raised this allegation for the first time only after the appendix was prepared. Of course, were the charge true, it should have, and no doubt would have, appeared in Kindler's brief in opposition to the petition for writ of certiorari. *See Schiro v. Farley*, 510 U.S. 222, 229 (1994) (Court relies heavily on submissions of the parties at the petition stage; declining to reach argument omitted from brief in opposition, "although we undoubtedly have the discretion" to consider it). The Commonwealth has lodged additional copies of its briefs with the Clerk's Office.

B. The state court rulings below.

Along the same lines, Kindler also attempts to portray the state court rulings as knee-jerk, non-discretionary refusals to allow review of his case. To support this characterization, Kindler declares that the Pennsylvania courts had an established "practice" of reinstating the claims of recaptured fugitives, except him.

There was no such practice. There was simply a rule – stated in at least five different cases in the years leading up to Kindler's escape-and-emigration scheme – that the courts had discretion in regard to former fugitives.[3] In three of these former-fugitive cases, the Pennsylvania courts permitted appeals to proceed;[4] in

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[3] *Commonwealth v. Boyd*, 366 A.2d 934, 935 (Pa. Super. 1976) ("If he thereafter returns, it is a matter of discretion of the court whether or not the circumstances justify a reinstatement.... [T]he trial court did not abuse its discretion in refusing" review); *Commonwealth v. Borden*, 389 A.2d 633, 633-34 (Pa. Super. 1978) ("Appellant has since returned.... We conclude that it would not be an injudicious exercise of our discretion to permit appellant to refile"); *Commonwealth v. Harrison*, 432 A.2d 1083, 1085 (Pa. Super. 1981) (quoting *Borden*'s discretion language; "[w]e find the preceding rationale apposite to the case at bar"); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982) ("when appellant returns to the court's jurisdiction, ... it is within our discretion to remand for reinstatement.... We conclude instead that the trial court did not abuse its discretion in declining to reinstate"); *Commonwealth v. Milligan*, 452 A.2d 1072, 1073 (Pa. Super. 1982) ("we believe that justice would be served by exercising our discretion to permit Appellant to refile").

[4] *Borden*, *Harrison*, and *Milligan*.

two they did not.[5] Three to two is not a "practice." The practice was to exercise discretion.

Kindler tries to muddle matters with his discussions of fugitive forfeiture cases decided *after* his 1984 flight. He wishes to create the impression that these cases were confused and contradictory. As Kindler has acknowledged, however, and as the court below held, "the adequacy of the rule is determined by the law in effect at the time of the asserted waiver." Cert. App. 21.[6] Thus it would not matter whether there were vagaries in the flight rule at later points in time; all that matters is whether the law provided sufficient guidance in 1984, when Kindler created the default by choosing to become a fugitive.

The rule in place then, and the rule applied to Kindler, was one of discretion. The trial court exercised its discretion not to reinstate Kindler's legal claims, and that decision created a default that the succeeding courts simply enforced.[7] Kindler seeks to

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[5] *Boyd* and *Clark*.

[6] Kindler makes this point clearly and repeatedly as recently as his Brief in Opposition, at i, ii, 1, 3, 5, 9, 10, 13, 14, 26; tellingly, it is far less clear in his brief on the merits.

[7] *See* common pleas court opinion at JA 70 (the "order denying defendant's motion to reinstate post-verdict motions did not amount to an abuse of discretion"); opinion on direct appeal at Cert. App. 85 (because the trial judge's response was reasonable, "this appeal comes to us without any allegations of error (direct or collateral) preserved"); common pleas opinion on post-conviction review at JA 187 ("the Supreme Court has already ruled that the defendant's decision to become a fugitive resulted in the waiver of all issues"); opinion on post-conviction appeal at Cert. App. 77 ("To

avoid the import of these rulings by proclaiming each to be an independent "new procedural rule." He proceeds as if the forfeiture imposed by the trial court came with an expiration date, and at every succeeding level of review the next court had to determine from scratch whether forfeiture should be reimposed. In reality, however, there were no new forfeiture rulings, "novel" or otherwise. The state courts merely chose not to change their mind about the underlying default.[8]

Kindler's legal claims thus were forfeited, and stayed forfeited, as the consequence of the trial court's original exercise of discretion. Not surprisingly, the accident of Kindler's eventual apprehension and return, after two brazen breakouts and years of extradition litigation, just did not impress the state courts as a persuasive reason for reinstating the rights that Kindler elected to leave behind.

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grant Appellant the relief he requests in his [post-conviction petition], an evidentiary hearing on claims already *forfeited* by his flight from captivity, would render meaningless all previous rulings of the trial court and of this Court").

[8] *See, e.g., Commonwealth v. Huff*, 658 A.2d 1340 (Pa. 1995). Kindler repeatedly, and improperly, cites this case as establishing a rule that Pennsylvania defendants are entitled to collateral review despite prior flight. In fact the opinion contains no such statement. Rather, this is simply a case where the trial court exercised its discretion to *allow* further review following the defendant's flight, and the *Huff* court enforced that decision – just as the courts in Kindler's case enforced the trial court's discretionary decision to *deny* further review. The reason there was a default in Kindler's case was therefore the same as the reason there was no default in Huff's case: the exercise of discretion by the court from which the defendant fled.

C. The federal court ruling below.

Next Kindler tries to reinvent the Third Circuit's decision below. He insists that, despite its language, the opinion actually had nothing to do with whether discretionary state procedural rules can constitute an adequate state ground.

Kindler advocates this idea on the basis of the Third Circuit's earlier decision in *Doctor v. Walters*, 96 F.3d 675 (3rd Cir. 1996), on which the panel here said it was relying. Kindler contends that the *Doctor* decision – which also excused a Pennsylvania fugitive from the consequences of his forfeiture – did not turn on the escape rule's discretionary nature. *Ipso facto*, says Kindler, neither did the court of appeals decision in this case.

From the imprecise language of the *Doctor* opinion, however, it is far from clear that discretion had nothing to do with it. Plainly Mr. Doctor himself believed that discretion had everything to do with it, as evidenced by the very first lines of his appellate briefing on the adequacy issue.[9] The *Doctor* panel never had to clarify its position on the matter, though, because it had already disposed of the appeal on an unrelated ground, and its discussion of the fugitive forfeiture rule was dictum, addressed only "in the interests of judicial economy" in the event that the

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[9] "A state rule which is discretionary, rather than mandatory, is not 'adequate' to support a procedural default [citations omitted]. There can be no doubt but that the fugitive forfeiture rule in Pennsylvania is discretionary." Brief for Appellant, Gary Lee Doctor, No. 95-3484, 1996 WL 33577464, *28 (3rd Cir.).

adequacy issue should arise in future litigation. 96 F.3d at 683.

Not that it really matters. *Doctor* is not the case on review here. In discussing *this* case, Kindler carefully interweaves language from the *Doctor* opinion, but skims over the operative language from *this* opinion: that the state courts "*had discretion*" and "*[a]ccordingly*" the Pennsylvania fugitive forfeiture rule was inadequate. *See* Brief for Pet. at 12.[10]

As important as what the opinion below said, moreover, is what it did not say. Kindler posits that the panel merely considered whether the state forfeiture ruling in this case was discretionary or mandatory, to make sure it was consistent with existing state law. There is one problem with that reading: not a single sentence of the Third Circuit opinion here actually addresses whether the state ruling rendered in Kindler's case was discretionary or mandatory. Without any discussion of that point, let alone a determination on it, the court could not possibly have been conducting the kind of "as applied" consistency analysis that Kindler wishes to ascribe to it. Instead, the court's analysis consists of only two points: the state rule is discretionary; the state rule is accordingly inadequate.

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[10] Kindler wishes to disregard another Third Circuit precedent, *Lines v. Larkin*, 208 F.3d 153, 168-69 (3rd Cir. 2000), on the ground that it was not cited in the opinion below. The significance of *Lines*, however, is that it was written by the same judge who wrote the opinion here, using almost exactly the same language used here, to equate discretion and inadequacy. *See* Brief for Pet. at 12 n.8.

Kindler's reluctance to defend the actual holding below is understandable. The court of appeals dismissed, *per se*, a rule that has been well-established for decades in virtually every jurisdiction, and that was applicable here in the most compelling of circumstances. The law does not support that result.

II. Discretionary rules are adequate; reasonable notice and opportunity is the standard.

This was not your average procedural default.

When Joseph Kindler was arrested for operating a burglary ring, he planned and executed the torture murder of the key witness, in order to escape the trial process. When that did not work, he planned and executed a prison breakout, in order to escape the appellate process. When that did not work, he planned and executed another breakout, in order to escape the extradition process. When that did not work, he finally turned to the law – theirs, not ours. Had the Canadian Supreme Court gone one vote the other way, Kindler would be up there still, proud that his planning and persistence did, in the end, succeed.

If the adequate state grounds doctrine can excuse all that, something is seriously wrong with the way the doctrine has come to be applied. Kindler insists that everything is just fine as it is. But his apologetics are unsuccessful.

A. Reasonable notice v. "firmly established."

Kindler has many scary things to say about the Commonwealth's proposal for clarification of the adequacy doctrine: that it is a "radical request" for

"drastic change," for example, that will "replace an entire existing body of law," with "sweeping effects across the entire range of litigation." He protests that the Commonwealth is trying to reduce all of adequacy law to a single phrase. Brief for Resp. at 27, 33, 34, 39.

He protests too much. WRIGHT AND MILLER is perhaps the leading commentary on federal court jurisdiction; the Commonwealth has merely followed its lead. As the treatise makes clear, the notice and opportunity approach is not a new doctrine; it is a distillation of everything the Court has been saying about adequacy for a century. There is nothing wrong with stating a legal principle in a single phrase (subject, of course, to further refinement in future cases), rather than as a twelve-part standard with 27 sub-tests; as his argument makes clear, Kindler too is pushing a single phrase. He likes "firmly established."

So it is worth comparing the two approaches. Kindler claims that a notice and opportunity standard would require federal courts to enforce "paper" rules – rules that have been published or codified, but that are actually applied by the courts in some manner other than their apparent language might suggest. But of course not. A reasonable notice analysis does not preclude consideration of subsequent interpretations of a rule. But neither does it demand inflexibility in those interpretations. The "real" rule is the rule as it develops, both on paper and in practice, to allow for application to particular facts and circumstances.

Kindler's "firmly established" test, on the other hand, demands something very unreal. As he admits, he expects the federal courts to require "consistency *vel non*" from state procedural rulings. Brief for Resp.

at 36. Consistency or not – consistency in and of itself, for its own sake. So if the rule is not "strictly followed," it will be treated as if it does not exist. And if the answer to any particular procedural question is not certain or near certain, the litigant may proceed as if there were no rule at all.

Of course there are few rules like that, state or federal. In real life the answers are seldom certain. Rules are real even if the "right" answer is subject to rational debate and specific circumstances.[11] That is why *reasonable* notice of what is required, and a *reasonable* opportunity to do it, must suffice. Otherwise litigants will be excused from defaults for which they have no excuse.

This case is a conspicuous example. Kindler has been quibbling for decades about whether, at particular moments in time, the Pennsylvania fugitive forfeiture rule was "discretionary" or "mandatory." But for adequacy purposes, what difference does it make? Was Kindler, as he sat in his cell mapping out his escape route to Canada, also calculating his chances of reinstatement of appellate rights seven years later? Would he have just stayed put had he believed that forfeiture was certain rather than highly likely? Should he escape the consequences of his escapes because of that kind of "uncertainty?"

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[11] *See Pace v. DiGuglielmo*, 544 U.S. 408, 415 n.5 (2005) ("few truly mechanical rules exist"; rejecting argument, by the same counsel now representing Kindler, that state post-conviction filing deadlines which allow for the exercise of judicial flexibility should not be enforceable on federal habeas corpus review as "proper filing" requirements).

No mystery, then, that Kindler would urge his "firmly established" standard. It encourages federal courts to contemplate such overnice distinctions, even if they could have made little difference to the litigants. It asks federal courts to assay an ever-expanding universe of opinions and orders, to confirm that they are consistent *vel non*. And it invites federal courts to treat any development of the law as suspiciously "novel," no matter how reasonable it may be.

At this level of scrutiny, federal courts become the ultimate arbiter of state procedural matters – but with no skin in the game. They are free to apply their own rules of procedure as flexibly as they see fit, while the state courts are subject to an unrealistic oversight that the federal courts would never impose on themselves. Kindler says "it works." It certainly has so far for him. As the states' *amicus* brief make clear, though, that is far from true for everyone else.

B. Rare and fettered.

Kindler nonetheless insists that his proposed standard for dissecting the adequacy of state grounds leaves room for discretionary rules. They just have to be the right kind of discretionary rules. By this, Kindler means two things. First, any discretion to relax a procedural requirement must be exercised only infrequently, or else the requirement is not a real one. Second, on those occasions when discretion is exercised, there must not be too much room for it; pre-existing criteria must be in place to ensure that the court is not free to make up its own mind in the circumstances of the case. *See* Brief for Resp. at 54-56.

With these limitations, what Kindler would permit under the adequacy doctrine is no longer really discretion. If courts are to exercise judgment about excusing strict compliance, there can be no quota governing the rate at which they do so. Some courts, for example, may liberally suspend briefing deadlines but apply word limits more strictly; other courts may do just the opposite. But these are policy choices, not inconsistencies. Surely no one is counting up the number of "good cause" exceptions granted under various provisions of the federal rules of procedure. The states are entitled to at least the same courtesy.

Nor is there a legitimate basis for requiring substantive fetters on discretion. Federal rules generally function without them: the court simply decides according to amorphous benchmarks like "if justice so requires" or "as it considers appropriate." *See* Brief for Pet. at 18 n.12. The federal plain error rule, for example, is subject only to such vague guidance, and even then the courts are cautioned that the ultimate decision must be case-specific and fact-intensive. *See* Brief for Pet. at 22-23. The federal fugitive forfeiture rule lacks even that much in the way of court-imposed "criteria." *See* Brief for Pet. at 24-25.

When standards do develop over time through case law, moreover, that does not mean that prior exercises of discretion were illegitimate because they were "standardless." Yet that is in effect what Kindler contends. He says that the forfeiture ruling in his own case was an unfair, novel application of the rule, because the Pennsylvania courts had not previously suggested that returned fugitives might want to provide a compelling reason for reinstatement of their

claims. Brief for Resp. at 21-22, 44. Are we truly to believe, however, that Kindler had a compelling reason that would somehow excuse his double escape, but he did not think he could mention it absent specific "compelling reason" precedent? If so, what was his reason? It has been 25 years. Perhaps by now Kindler might have explained why any court with discretion to reinstate would conceivably have wanted to do so in the circumstances of his case.

It is clear what Kindler is really after: an adequacy standard that will "enable reviewing courts to determine (without guesswork) whether the stated reasons actually apply in a given case." Brief for Resp. at 56. Except that, in the end, the reviewing courts in question will not be state courts; they will be federal courts. Because the only way to determine whether state procedural rulings are *consistent* is to determine whether they are *correct* – "whether the stated reasons actually apply in a given case." That is not what the adequate state grounds doctrine is for.

C. Evasive and elected.

Kindler demurs. He contends that state courts might use procedural grounds to rule against capital and other criminal defendants. An intrusive, rigid adequacy standard is therefore exactly what is needed, because it might help combat such "evasion." The adequacy doctrine, however, does not regulate state procedural rulings in criminal cases; it protects disfavored claims, not "disfavored" classes of criminals. The question is whether the state courts use their procedural rules as a pretext for denying federal rights.

Kindler suggests no evidence that there is a current crisis in this regard, and his own case proves just the opposite. The Pennsylvania courts have granted sentencing relief to at least 16 capital defendants on the very same federal constitutional issues that supposedly support relief here. *See* Brief for Pet. at 28-29 n.21. Nor has there been "discrimination" even on the basis of fugitive status. Of the four Pennsylvania capital murderers who escaped, two defendants (one white, one black) were subject to the forfeiture rule, and two defendants (one white, one black) received full merits review. *See* Brief for Pet. at 39-40.[12]

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[12] Kindler suggests that the hostility of the state courts to federal claims is highlighted by the fact that he and his fellow escapee, Reginald Lewis, both received relief once they got to federal court. But that would not explain the many other capital defendants who were granted relief in state court. In any case, the district court's grant of relief in Lewis's case has now been reversed by the Third Circuit and the matter remanded for further proceedings. *Lewis v. Horn*, Nos. 06-9007, 06-9008, 2009 U.S. App. LEXIS 20451 (3rd Cir., filed Sept. 14, 2009).

As for Kindler, the "*Mills*" claim on which he received relief, *see Mills v. Maryland*, 486 U.S. 367 (1988), is now before this Court in another case, raising virtually the same issues. *Smith v. Spisak*, 129 S. Ct. 1319 (2009) (scheduled for argument October 13, 2009). The remaining sentencing claim addressed by the panel here – a mitigation ineffectiveness issue – was discussed only as dictum in order "to provide guidance in future cases." Cert. App. 35. Perhaps that is why the panel took the liberty of stating its views about new mitigation evidence that had been presented only by way of defense affidavits, and has never been the subject of an evidentiary hearing.

An additional Pennsylvania capital escapee, Roger Judge, has also received relief in federal district court, but on the basis of the

Nevertheless, says Kindler, there is a reason we must presume that state courts are using procedural rulings to evade federal claims: because in many states, judges are elected. Brief for Resp. at 38. This is a remarkable contention – even putting aside the fact that the Pennsylvania judges who have repeatedly granted relief to capital defendants were all elected.

In a democracy, it is impossible to hermetically seal off even appointed judges from the political process, particularly in light of the possibility of elevation to a higher office. But that has not been thought an appropriate basis for imposing more restrictive legal standards for either substantive or procedural rulings. Federal judges would be rightly insulted at any suggestion that they be stripped of discretion, on the presumption that it will be abused for political purposes. State judges – who are subject not to federal supervisory authority, but to federal constitutional requirements in a federalist system of government – would have even more cause for objection.[13]

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same adequacy arguments and the same *Mills* issue presented in this case.

[13] The issue has nothing to do with this Court's recent decision in *Caperton v. A.T. Massey Coal Co*, 129 S. Ct. 2252 (2009), on which Kindler attempts to rely. The question there was whether a $3,000,000 contribution from a specific political supporter made it unlawful for a judge to preside in a specific case in which that supporter sought to overturn a $50,000,000 judgment. The question here is whether this Court should adopt a general presumption of bias, and accordingly impose a blanket intrusion on state courts' authority over their own procedural rules, because some states choose to select judges through popular election.

In any case, Kindler's contentions about state courts are not only offensive; they are overbroad. If state judges are inherently biased against criminals raising federal claims, then *every* habeas doctrine – not just adequate state grounds, but exhaustion, deference, filing deadlines, *etc*. – should be altered to ensure merits review in federal court. Some might favor such a policy; but Congress, which writes the habeas act, has gone exactly the other way.[14]

Even if the goal, moreover, were to re-engineer habeas law in order to make it more friendly for state criminals, the adequacy doctrine would be the worst place to start. Kindler's proposed standard for adequacy review would not eliminate state procedural defaults; it would only eliminate state procedural defaults based on the exercise of discretion.

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[14] Kindler tries to turn this reality on its head with his preemption-by-silence argument. He contends that Congress did nothing to change the adequate state grounds doctrine when it enacted AEDPA in 1996, and therefore this Court is bound to preserve the doctrine in perpetuity, exactly as it was understood on the statute's effective date.

In the habeas context, however, the adequate state grounds doctrine is merely an element of the procedural default rule. That rule has never been the subject of Congressional action, either in AEDPA or previously. The rule is a creature of this Court's case law. The Court has agreed to consider modifications to the procedural default standard, even after AEDPA. *See, e.g., Dretke v. Haley*, 541 U.S. 386, 394 (2004) (whether to adopt actual innocence exception for non-capital sentencing claims; "the various exceptions to the procedural default doctrine are judge-made rules"). Clearly, the Court is free to reexamine its adequate state grounds precedent as it may do with any precedent.

Mandatory rulings would remain. The result would be *more* defaults, not fewer.

Apparently recognizing this dilemma, Kindler resorts to mere chutzpah: he blames the Commonwealth, asserting that his forfeiture should be forgiven in federal court because the state is just trying to execute him without any review at all. But it was not the Commonwealth's idea to short-circuit the challenge to Kindler's sentence; he arranged all that by himself. He essentially said to the state courts, "so long, suckers," and now demands to know where his appeals went. They went across the border with him. That was the "appeal" he chose.

Yet Kindler really goes even farther with this argument. What he is necessarily saying is that there cannot be *any* fugitive forfeiture rule for capital murderers, discretionary or not, because then the state will be able to execute them without review. He implies, with his discussions of *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), that the Constitution condemns such a rule. Indeed his rationale would prohibit *all* procedural default rules in capital cases, because any of them might prevent relief on that one claim that would have saved the defendant from his sentence.

Of course that is not the law. There is no constitutional bar on fugitive forfeiture rules even if they are mandatory, *see Goeke v. Branch*, 514 U.S. 115 (1995), and there is no constitutional bar on procedural defaults even when the sentence is capital, *see Coleman v. Thompson*, 501 U.S. 722 (1991).

Kindler's argument, however, does illustrate the anomaly arising from a "firmly established" standard for adequate state grounds. A defendant who mounts a frontal constitutional challenge to a state court procedural bar, as in *Goeke v. Branch*, must exhaust the claim in state court. And if he prevails, his relief will be to receive the state review that the state improperly denied him under the unconstitutional rule.

But if, instead, a criminal defendant chooses to say nothing in state court, and to wait to federal court to challenge the state rule on adequacy grounds, he need only identify some kind of "inconsistency" in the application of the rule. He can then proceed directly to *de novo* merits review by the federal habeas judge. As a consequence, the litigant receives greater advantage, with less trouble, by asserting that a state rule has been applied "inconsistently" than by establishing the rule's outright unconstitutionality.

This aberration raises a significant question about the role of adequate state grounds review in federal habeas litigation. Perhaps, as suggested by the Criminal Justice Legal Foundation, *amicus* brief at 29-30, adequacy analysis has become extraneous in the habeas context, and procedural defaults should be left to the by now well-developed, case-specific, cause-and-prejudice standard. At the very least, it is clear that the aggressive adequacy approach advocated by Kindler is inappropriate.

III. "Relaxed waiver" is a red herring.

When post-*Furman*[15] capital cases began reaching the Pennsylvania Supreme Court in the 1980's, the scope of warrant, stay, and post-conviction procedures was still uncertain. Accordingly, in the interests of justice, the court on many occasions agreed to consider claims that were not properly preserved. *See Beard v. Banks*, 542 U.S. 406, 413 (2005) (noting Pennsylvania Supreme Court's "past discretionary practice of declining to apply ordinary waiver principles in capital cases"). Eventually this practice became known as "relaxed waiver."

Kindler contends that, for adequate state grounds purposes, relaxed waiver acted as a sort of super-solvent on Pennsylvania procedural rules. Because the state supreme court frequently reached unpreserved claims, argues Kindler, Pennsylvania capital defendants were entitled to presume that no rules would ever be invoked against them. The court's exercise of discretion meant that ordinary waiver principles were not applied in a consistent fashion, and thus it rendered *all* rules inadequate. This would include, in Kindler's view, any kind of rule that conditioned post-trial review on not escaping from prison. Consequently, even if the Pennsylvania fugitive forfeiture rule was not, in itself, inadequate, it could still have been trumped in capital cases by relaxed waiver, and is therefore unenforceable on federal habeas corpus review.

There are some problems with Kindler's theory.

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[15] *Furman v. Georgia*, 408 U.S. 238 (1972).

A. Escape is not a procedural misstep.

The Pennsylvania Supreme Court made clear on appeal in this case that the relaxed waiver doctrine does not apply to a forfeiture resulting from the act of becoming a fugitive. Cert. App. 77-78. Kindler contends that this Court must disregard that statement of state law by the state's highest court. Treating his escape as a procedural peccadillo – equivalent to the failure to make a contemporaneous objection – he argues that, at the time of the breakouts, he had no reason to believe that the fugitive forfeiture rule would not be relaxed; how was he supposed to know? Therefore the application of the rule against him constituted an inadequate state ground.

But Kindler did not need the state supreme court to say so in order to realize that breaking out of prison is something very different than mere failure to leave a forwarding address. Escape is a crime in itself, a felony. The default it produces is a forfeiture by wrongdoing, not by oversight. Under Kindler's rationale, he should have been free not only to appeal, but to challenge the admission of out-of-court statements by the victim concerning their criminal enterprise, had he been able to make any before Kindler caught up with him. The fact that he murdered the victim precisely to keep him from testifying would not, in Kindler's view, stand in the way of such a confrontation clause claim: are not *all* forfeitures overcome by relaxed waiver?

Kindler says it was perfectly natural for him to assume that he could have his escape and eat it too. But even a child knows not to count on getting away

with that. There was no "inadequacy" in the state court's failure to relax fugitive forfeiture for Kindler.

B. Relaxed waiver was never a legal entitlement, and certainly was not in 1984.

Even aside from the unique status of a forfeiture by wrongdoing, Kindler could not reasonably have relied on relaxed waiver to pardon all his procedural violations. As this Court has recognized, relaxed waiver was simply "the possibility that a state court might, in its discretion, decline to enforce an available procedural bar." *Beard v. Banks*, 542 U.S. at 413. Kindler emphasizes the frequency with which the Pennsylvania Supreme Court exercised that discretion. But such forbearance did not give capital defendants an enforceable right to flout the rules, any more than a litigant is entitled to file a late brief on the ground that the court in question has generally granted extensions in the past.

Even Kindler seems to have gotten that point, as his own actions prove. He says that, because of relaxed waiver, he thought he did not have to comply with procedural requirements. But the truth is that, from the moment he was convicted in 1984, Kindler diligently complied with virtually every procedural requirement in Pennsylvania post-trial practice. He filed post-verdict motions, a written petition to reinstate those motions, a notice of appeal and appellate brief, a collateral review petition, and numerous other documents, all within the required time and format.

Under Kindler's version of relaxed waiver as a "rule" that voided all other rules, he did not have to do

any of that. He could have just waited until the state eventually scheduled an execution date, at which point he could have raised any issue he wished, and stretched it out for as long he wished, secure in the knowledge that the courts would entertain his claims under the relaxed waiver regime. Instead he was scrupulous about all but one rule – the one about not escaping during the review process. The one that the state courts would be *least* likely to excuse in the exercise of their discretion. The notion that he picked *that* rule to violate, in reliance on relaxed waiver, is ludicrous.

In any case, whatever expectations Kindler might have acquired, as the relaxed waiver practice developed over time, are irrelevant here. Kindler devotes a substantial portion of his brief to his view of the history and ramifications of relaxed waiver as it spanned two decades of Pennsylvania jurisprudence. There is also an "Attachment" to the brief, with several additional pages of argument and citation relating to relaxed waiver.[16]

As Kindler has regularly noted, however, the adequacy of a state procedural ground must be assessed under state law *as it existed at the time of the default*. Kindler's default – his flight – began in 1984. Of the 90 relaxed waiver cases discussed in the "Attachment" to his brief, 89 were decided *after* he fled. The one remaining case, *Commonwealth v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984) (emphasis supplied), said only that "there is a *limited* relaxation of the waiver rules in death penalty cases" for "*significant*

[16] *But see* Sup. Ct. Rule 24.3.

issues."[17] That narrow language would have been awfully thin ice on which to base an expectation that every kind of default, including even a prison breakout or two, would automatically be absolved.

C. Rulings like this one destroyed relaxed waiver.

Kindler contends that he is doing a favor for the disfavored by seeking an adequacy standard that would make state procedural defaults onerous to defend and easy to overcome. In practice his approach has just the opposite effect. Relaxed waiver has been a case study.

The Pennsylvania Supreme Court began its relaxed waiver experiment in the hope of preventing a miscarriage of justice in those few cases where a meritorious claim would otherwise slip through the cracks. As the federal courts increasingly relied on relaxed waiver to declare state procedural rulings in capital cases "inadequate," the state court took note.[18]

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[17] *Accord Commonwealth v. Zettlemoyer*, 454 A.2d 937, 955 n.19 (Pa. 1982); *Commonwealth v. Stoyko*, 475 A.2d 714, 720 (Pa. 1984).

[18] *See, e.g., Commonwealth v. Steele*, 961 A.2d 786, 837-38 (Pa. 2008) (Castille, C.J., concurring, with McCaffery, J.) (remarking on "the federal courts' seeming receptiveness to theories allowing them to ignore Pennsylvania state court procedural defaults.... [T]he result can be very bad law, since every state court response to a particularly egregious, unusual circumstance will be argued, in federal court, as proof that state rules of procedural default are uneven and should not be honored"); *Commonwealth v. Gibson*,

In the end, the court was rendered incapable of enforcing many rules as they applied to the class of litigants – capital defendants – with the greatest incentive to defy them. Now there is no more relaxed waiver. The state court abolished it to restore a degree of order to the capital litigation process.

The same progression is inevitable elsewhere. State judges (elected though they may be) are able to get the message: eliminate discretion, latitude, and leniency in the operation of procedural requirements, because diversity of outcomes will be interpreted on federal habeas review as inconsistency of application. But courts still need rules in order to function properly. If they are not permitted to use flexible rules, they will make inflexible rules rather than have no rules.

A proper formulation of the adequate state grounds doctrine can avoid the boomerang effect. If a rule is deemed adequate where it provides reasonable notice and opportunity for compliance, the state courts will be free to exercise discretion under proper circumstances, to the benefit of deserving defendants. Joseph Kindler just is not one of those.

Conclusion

For these reasons and those in the Brief for Petitioners, petitioners respectfully request that this

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951 A.2d 1110, 1150 (Pa. 2008) ("The threat of dismissive federal responses to flexible state procedural rules can lead to state legislatures and courts adopting ever-more inflexible rules") (Castille, C.J., concurring, with McCaffery, J.).

Court reverse the judgment of the United States Court of Appeals for the Third Circuit, and deny the petition for writ of habeas corpus.

Respectfully submitted,

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