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No. \_\_\_\_\_  
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IN THE  
SUPREME COURT OF THE UNITED STATES

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JEFFREY A. BEARD, et al.  
Petitioners

v.

JOSEPH J. KINDLER,  
Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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*Philadelphia District  
Attorney's Office  
3 South Penn Square  
Philadelphia, PA 19107  
(215) 686-5700*

RONALD EISENBERG  
Deputy District Attorney  
(*counsel of record*)  
THOMAS W. DOLGENOS  
Chief, Federal Litigation  
ARNOLD GORDON  
1<sup>st</sup> Asst. District Attorney  
LYNNE ABRAHAM  
District Attorney

## Capital Case

### Question Presented

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

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

**List of Parties**

*Petitioners*

Jeffrey A. Beard, Secretary, Pennsylvania  
Department of Corrections

David DiGuglielmo, Superintendent, State  
Correctional Institution at Graterford

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

*Respondent*

Joseph J. Kindler

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FEDERAL PRACTICE AND PROCEDURE  
(2<sup>nd</sup> ed. 1996)

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## **Opinions Below**

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

The opinion of the United States District Court for the Eastern District of Pennsylvania, mandating either a new penalty hearing or a sentence of life imprisonment, was entered September 23, 2003, and is published at 291 F. Supp. 2d 323. An excerpt is reproduced in the Appendix at App. 54-66.

## **Statement of Jurisdiction**

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

## **Constitutional and Statutory Provisions Involved**

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

### Statement of the Case

Respondent – a capital murderer convicted of torturing and killing a witness against him in another case – broke out of prison, escaped to Canada, and broke out of prison again. A total of seven years passed before he was finally apprehended and extradited. In the meantime, the state trial judge dismissed respondent's post-verdict motions as a result of his escape, and the state appellate courts upheld the resulting procedural default.

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

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

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

The day before the move, in July 1982, respondent sent a female friend to Bernstein's apartment to lure him outside. When Bernstein opened the door, respondent dragged him out and beat him repeatedly with a baseball bat. Then he instructed a cohort to strike the victim with an electric prod. Once the victim was incapacitated, respondent dragged him to a car, leaving a bloody trail. App. 91-92.

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

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

Respondent was convicted by a jury and sentenced to death in November 1983. Post-verdict motions were filed. But in September 1984,

respondent escaped from the maximum- security wing where had been held, by sawing through a steel bar and breaking out a window. App. 68-69.

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

But in October 1986, respondent constructed a rope by tying bed sheets together, broke through a skylight, and escaped again, lowering himself thirteen floors to the ground. A co-conspirator lost his grip on the rope and was killed in the fall. App. 69.

This time respondent remained at large for two years. Finally, after his face was broadcast on "America's Most Wanted," he was identified and arrested in September 1988, in New Brunswick. He fought extradition again. After three years of litigation, the Canadian Supreme Court rejected respondent's challenge, and he was extradited in October 1991. App. 69, 81.

Upon his forced return to Pennsylvania, respondent filed a direct appeal to the Pennsylvania Supreme Court. He asserted that the trial court had abused its discretion in dismissing his post-verdict motions in response to his flight to a foreign country. The supreme court

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ruled in 1994 that the trial court had acted properly, and that respondent had therefore waived all claims but those for which review was mandated by statute. The court then considered these mandatory issues: whether the evidence was sufficient to support the finding of guilt and the aggravating circumstances, and whether the sentence was excessive, disproportionate, or arbitrary. Finding no error, the supreme court affirmed the judgment of sentence. App. 82-97.

Two years later, in 1996, respondent filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Relief Act (PCRA). He argued that he was entitled to merits review of all claims. The trial court, applying the waiver and previous litigation provisions of the PCRA, 42 Pa. C.S. § 9544, denied the petition. On appeal, the Pennsylvania Supreme Court affirmed the denial of post-conviction relief in 1998. App. 71-77.

In 1999, respondent filed a federal habeas corpus petition in the Eastern District of Pennsylvania. The district court ruled, in 2003, that it was not bound by respondent's default of his claims in state court, because the state ground was "inadequate." The district court then reviewed respondent's challenges on the merits, granting sentencing relief under *Mills v. Maryland*, 486 U.S. 367 (1988), and rejecting the balance of the claims. App. 54-66.

The parties cross-appealed to the Court of Appeals for the Third Circuit. The appeals court (per McKee, J.) held that the state courts could not validly punish respondent for his repeated escapes by dismissing his claims. The court reasoned that, because state law allowed for discretion to reinstate post-verdict motions following a fugitive's recapture, any exercise of that discretion to deny reinstatement was not the product of a "firm" rule, and therefore could not provide an adequate state ground. Proceeding to the merits, the appeals court upheld the district judge in all respects but one: that he should have vacated respondent's death penalty not just on the *Mills* claim, but also on the ground that trial counsel was ineffective for not finding more mitigation evidence to present. App. 1-53.

### Reasons for Granting the Petition

**A state procedural rule is not "inadequate" *per se* under the adequate-state-grounds doctrine, and thus unenforceable on federal habeas corpus review, merely because the rule allows for the exercise of discretion in its application to particular facts and circumstances.**

This is a case raising a significant question about the contours of the "adequate state grounds" doctrine. Under that principle, federal courts

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generally will not review state court rulings in cases involving issues of federal law, if the actual ground for decision rested on a point of state law that was adequate to support the ruling.

Development of the doctrine, however, has been uneven, and its application has required this Court's continued attention. *See, e.g., Philip Morris USA v. Williams*, No. 07-1216 (U.S.), argued December 3, 2008; *Cone v. Bell*, No. 07-1114 (U.S.), argued December 9, 2008.

This case has the potential to help clarify this important area of the law, because it presents a discrete but commonly-arising adequate-state-grounds issue: the role of discretion. *See* 16B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4026 ("Evasion and Discretion Tests of Adequacy") (2<sup>nd</sup> ed. 1996). Relying on prior circuit precedent, the Third Circuit Court of Appeals held squarely that a state court's power to exercise discretion in applying a rule of procedure renders that rule inadequate, *per se*, to support the state court judgment. Thus, at the time of respondent's escape,

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.

App. 22.

The circuit court's view of the law made it unnecessary to consider anything else about the state rule – in particular, whether its application in any way would have misled a litigant into thinking that he could safely disregard it. To be sure, Pennsylvania courts in this period did not mechanically and uniformly impose forfeiture on all fugitives. There were several published appellate decisions exercising discretion to allow reinstatement of post-verdict motions (albeit in circumstances far less egregious than those here).<sup>1</sup> In other cases, appellate courts upheld trial court dismissals of post-verdict motions after escape, even if the defendant was eventually returned.<sup>2</sup> Thus, while a fleeing felon like respondent might have entertained some slim hope that his multiple

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<sup>1</sup>*Commonwealth v. Galloway*, 333 A.2d 741 (Pa. Super. 1975); *Commonwealth v. Borden*, 389 A.2d 633 (Pa. Super. 1978); *Commonwealth v. Milligan*, 452 A.2d 1072 (Pa. Super. 1982).

<sup>2</sup>*E.g. Commonwealth v. Boyd*, 366 A.2d 934 (Pa. Super. 1976); *Commonwealth v. Lewis*, 446 A.2d 295 (Pa. Super. 1982); *Commonwealth v. Clark*, 446 A.2d 633 (Pa. Super. 1982).

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escapes would be excused if he were ever caught, he could hardly have counted on it.

As the court of appeals understands the adequate-state-grounds doctrine, however, none of that mattered. The various Pennsylvania flight cases were cited to the federal court, but were mostly unmentioned in the opinion below. There was no need to do so. Under the court's rationale, the manner in which the state courts exercise their discretion to apply a bar does not matter. It was the mere existence of discretion, *by its very nature*, that rendered the state rule inadequate.

That viewpoint has been soundly criticized:

The possible implication . . . that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, "discretionary" terms. . . . [In applying the adequate-state-grounds doctrine, this] Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts.

16B WRIGHT, MILLER, & COOPER at 385-86, 403.

Nonetheless, federal appeals courts are in disarray on the question. Many decisions, like the Third Circuit's here, have pronounced a general rule that state procedural bars permitting an exercise of discretion are, for that reason, inadequate to support the judgment and preclude federal habeas review.<sup>3</sup>

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<sup>3</sup> *E.g.*, *Doctor v. Walters*, 96 F.3d 675, 685-86 (3<sup>rd</sup> Cir. 1996) (where state law did not clearly prohibit exercise of discretion to hear defaulted appellate claims, state courts' refusal to do so was not based on adequate procedural rule); *Fearance v. Scott*, 56 F.3d 633, 642 (5<sup>th</sup> Cir. 1995) (once state law eliminated court's discretion to consider successive post-conviction petitions, procedural bar became adequate state ground); *Deitz v. Money*, 391 F.3d 804, 811 (6<sup>th</sup> Cir. 2004) ("A rule that grants such discretion to the courts is not firmly established and regularly followed so as to be adequate" state ground); *McCalvin v. Yukins*, 444 F.3d 713, 724 (6<sup>th</sup> Cir. 2006) (if trial judge had discretion to grant untimely suppression motion under state law, then state law did not supply adequate procedural ground for barring federal habeas review); *McKenna v. McDaniel*, 65 F.3d 1483, 1488-89 (9<sup>th</sup> Cir. 1995) (where state court had power to address plain error, its "refusal to exercise discretion to hear the claim" was not adequate state ground); *Valerio v. Crawford*, 306 F.3d 742, 776-78 (9<sup>th</sup> Cir. 2002) (state court's "commendable" exercise of discretion to excuse certain defaults in capital cases rendered all procedural bars in capital cases inadequate); *Biehle v. Kerby*, 1994 U.S. App. LEXIS 8032, 7-9 (10<sup>th</sup> Cir. 1994) (unpublished) (because state court has discretion to address defaulted claims, state court's ruling that claim here was defaulted is inadequate ground).

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Other decisions – from some of the same circuits, including the Third – say just the opposite:

In the final analysis, Campbell’s argument on “adequacy” boils down to his insistence that a discretionary procedural rule such as Rule 8 cannot be “adequate” for purposes of procedural default. . . . If accepted, this proposition that a state procedural rule is rendered *per se* inadequate merely because it allows for some exercise of discretion by state courts would all but vitiate the long-standing doctrine of procedural default in the federal habeas context.

*Campbell v. Burris*, 515 F.3d 172, 181 (3<sup>rd</sup> Cir. 2008).<sup>4</sup>

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<sup>4</sup>See also *Hutchison v. Bell*, 303 F.3d 720, 738-39 (6<sup>th</sup> Cir. 2002) (“to find that the repeated application of [judicially created “due process” exception to state post-conviction filing deadline] renders the Tennessee statute of limitations an inadequate basis to deny postconviction relief would have the unfortunate effect of discouraging a practice that provides states the opportunity to remedy unconstitutional convictions in cases involving later-arising claims”); *Scott v. Mitchell*, 209 F.3d 854, 868-69 (6<sup>th</sup> Cir. 2000) (state court’s willingness to relax enforcement of default in some capital cases, out of abundance of caution, does not mean “that we are justified here in ignoring its sovereign decision founded upon its own procedural rule”); *Prihoda v. McCaughtry*, 910 (continued...)

The unsettled state of the law concerning adequacy and discretion is at least in part a product of some of the expansive language that this Court has employed in its adequate-state-grounds jurisprudence. *See, e.g., James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (state rule was not “firmly established”); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (state rule must be “strictly or regularly followed”); *Sullivan v. Little Hunting Park*, 396 U.S. 229, 234 (1969) (rule, “more

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<sup>4</sup>(...continued)

F.2d 1379, 1385 (7<sup>th</sup> Cir. 1990) (“The difficulty of drawing lines, especially under standards such as ‘sufficient reason,’ makes uncertain application inevitable. Uncertainty is not enough to disqualify a state’s procedural ground as one ‘adequate’ under federal law. If it were, states would be induced to make their rules draconian rather than allow prisoners the latitude now available”); *Rogers-Bey v. Lane*, 896 F.2d 279, 284 (7<sup>th</sup> Cir. 1990) (Manion, J., concurring) (“The fact that the state court has the discretion to disregard procedural defaults where plain error exists does not mean the state loses its right to stand on its procedural rules on collateral attack when the state court decides that no plain error exists. If a state court’s review for plain error allowed federal courts to review the merits of issues that would otherwise be procedurally barred, states might become reluctant to exercise their discretion to correct plain errors. This is a result we ought not encourage”); *Murray v. Hvass*, 269 F.3d 896, 899-900 (8<sup>th</sup> Cir. 2001) (state court’s failure to exercise its discretion to review defaulted claim in “interests of justice” was simply a conclusion that justice did not warrant exception to general rule here; “this determination is entitled to respect by our court,” and was not inadequate state ground).

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properly deemed discretionary than jurisdictional,” does not bar review).<sup>5</sup>

Removed from context, these phrases have taken on a talismanic quality, with unfortunate results. Many federal habeas courts have become, in effect, the “rules police,” roving through state procedural requirements looking for any degree of wiggle room. Discretionary rules provide an easy target. It is the essence of discretion that it exists on a spectrum. Imprecision is tolerated in order to encourage equitable treatment of particular circumstances that may be difficult to quantify. Under adequate-state-grounds analysis, however, at least as performed by the court of appeals here, such rules are done for. There is simply no way they can be “strictly followed.”

The true inquiry should not focus on any such shibboleths. The better question in this context is simply whether the state rule provides the defendant adequate notice and opportunity to conform his conduct to it. That does not require certainty. A lawyer or litigant need not have the capacity to calculate outcomes with scientific precision. If there is a reasonable likelihood that non-compliance will cause a default, and the

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<sup>5</sup>See also Brief *Amicus Curiae* of the Criminal Justice Legal Foundation, *Philip Morris USA v. Williams*, No. 07-1216 (U.S.).

defendant nevertheless fails to comply, he should be bound by the consequences. "Adequacy" review should require no more.

This is a compelling case in which to make these points. The notion that a discretionary state rule is automatically inadequate is especially misplaced in the context of fugitive forfeiture. As a class, post-trial defendants contemplating escape are exceedingly unlikely to make decisions based on an evaluation of the probability of overcoming procedural defaults upon their return to custody. By definition, they do not intend to return.

Indeed, this respondent demonstrates dramatically that a state fugitive forfeiture rule creates no unfair uncertainty merely because it is discretionary. It is hard to imagine that any judge would exercise discretion to reinstate respondent's appellate rights under the circumstances here, or that any judge who denied reinstatement would be found to have abused that discretion.

This was, after all, no spur-of-the-moment, impulsive dash for freedom. Rather, respondent's escape from the Philadelphia prison's maximum-security block was laboriously planned and executed by sawing through the steel bar in the window of an adjacent cell. Once outside the walls, he was on his way to Canada – the nearest

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jurisdiction that might refuse to extradite a capital murderer. App. 68-69.

The fact that this is a capital case only exacerbates respondent's position. Given the sentence, there was no means to sanction the flight other than forfeiture. A prison term for the crime of escape would have been meaningless.

To make matters worse, when he got to Canada, and was eventually recaptured, respondent did not exactly settle in to serve his time and pursue his legal avenues of relief. Instead, *he escaped again*. This escape was even more egregious than the first: after making a rope of bed sheets, he climbed thirteen stories to the ground, leaving behind a fellow inmate who fell to his death. The second escape, moreover, was *after* the trial judge had already dismissed his post-verdict motions as a result of the first escape. So respondent would have known full well that further flight attempts could hardly help his appeal prospects. App. 69.

Respondent could not possibly have believed, in light of all this, that he would be entitled to walk back into the Pennsylvania courts to pick up just where he had left off. More importantly, he could not possibly have contended that he escaped *in reliance* on any such expectation. There is no satisfactory test for adequate state grounds that could nullify the fugitive forfeiture here.

Yet the court below not only forgave respondent's default – it effectively awarded him a windfall for his flight. That is because, while respondent was on his sojourn, the substantive law was changing, in his favor. The primary ground on which the court of appeals granted respondent sentencing relief was a putative violation of *Mills v. Maryland*, 486 U.S 367 (1988). *Mills* has been the subject of intense litigation in the Third Circuit, and the ruling here, applying circuit precedent, was deeply flawed.<sup>6</sup> But all that should have been irrelevant. Had respondent remained within the jurisdiction of the Pennsylvania courts following his conviction in 1984, his direct appeal would likely have been over, and the judgment final, before *Mills* was even decided. There would never have been any *Mills* claim.<sup>7</sup>

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<sup>6</sup>See Petition for Writ of Certiorari of Jeffrey A. Beard, *Beard v. Abu-Jamal*, No. 08-652 (U.S.), filed November 14, 2008, pending .

<sup>7</sup>Respondent may also have profited from his escape in relation to a second legal claim.

After granting relief on the *Mills* issue, the court of appeals went on to address an alternative ground: that trial counsel was ineffective for not finding additional mitigating evidence to present at sentencing. Without the benefit of any evidentiary hearing on the claim, the court credited the affidavits of newly presented mitigation witnesses, who alleged, *e.g.*, that respondent had abusive parents, a head  
(continued...)

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The irony of “adequacy” relief for respondent’s procedural default is compounded by this Court’s decision in *Goeke v. Branch*, 514 U.S. 115 (1995). There the Court considered a fugitive forfeiture imposed in circumstances like those here. Although *Goeke* addressed a Fourteenth Amendment Due Process claim rather than

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<sup>7</sup>(...continued)

injury, and “narcissistic personality disorder.” App. 37-40.

The court acknowledged that trial counsel was no slacker but “a skilled and forceful advocate,” who presented five mitigation witnesses to testify about respondent’s positive traits and potential value to society. But the court nonetheless credited counsel’s post-conviction declaration that it never even occurred to him to investigate further. The court also held that counsel’s obvious competence at the trial actually helped prove his ineffectiveness: “the skillful manner in which [counsel] presented the limited evidence that he did have illustrates the potential force of the mitigation evidence that he did not have.” App. 41-42.

In the court’s view, however, the crucial issue was prejudice. On this point the balance tipped in respondent’s favor on the basis of a trio of recent precedents, *Rompilla v. Beard*, 545 U.S. 374 (2005), *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v. Taylor*, 529 U.S. 362 (2000). App. 42-43. Had respondent presented his mitigation ineffectiveness claim a decade earlier, before these cases were decided, it is far from clear that he would have prevailed. *See Strickland v. Washington*, 466 U.S. 668, 699 (1984) (although counsel failed to perform any investigation of his client’s family or psychiatric history, “the lack of merit of respondent’s [prejudice] claim is . . . stark”).

adequate state grounds, the underlying contentions were much the same: that the imposition of forfeiture on a defendant who had been recaptured before appeal was arbitrary and served no legitimate state interest. Applying the “*Teague*” bar,<sup>8</sup> the *Goeke* Court rejected the claim, holding that there is simply no authority for such a proposition.<sup>9</sup>

*Goeke* points to a serious anomaly in the operation of the adequate state grounds doctrine in habeas cases like this one. A defendant who mounts a frontal constitutional challenge to a state court procedural bar, on the ground that it is not consistent with due process, must exhaust the claim in state court, overcome *Teague*, and clear the AEDPA deference hurdle. 28 U.S.C. § 2254(d). A defendant who makes the same sort of arguments, but in the guise of an “adequacy” challenge, need do none of that. Yet if he prevails,

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<sup>8</sup>*Teague v. Lane*, 489 U.S. 288 (1989).

<sup>9</sup> See also *Estelle v. Dorough*, 420 U.S. 534, 539 n.8 (1975) (rejecting equal protection challenge to fugitive disenfranchisement “statute [that] allows the court in its discretion to reinstate . . . appeals. In the past, the court has both granted leave to reinstate and refused it under a test of ‘good cause shown.’”); see also *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (exercising supervisory power to overturn circuit court’s rule of mandatory dismissal for presentence escapes, but upholding authority of district courts to exercise discretion to punish such escapes).

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he achieves substantially the same result: relief from his default, and the virtual annulment of the state procedural bar in future habeas cases. Because “adequacy” analysis essentially embodies a due process or equal protection inquiry, it should not be used as an end run around the normal requirements of federal habeas corpus review.

One additional line of cases from this Court has implications for the issues presented here. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), the Court addressed a circuit conflict concerning AEDPA’s “proper filing” requirement, 28 U.S.C. § 2244(d)(2). The dispute turned on the enforceability, on federal habeas review, of various state post-conviction filing deadlines.

Many such deadlines contain exceptions or other provisions that arguably permit courts to exercise some degree of discretion in applying their state time bars. Before *Pace*, one group of circuits had held that, if state courts could exercise such discretion, then the filing deadlines were not really time bars at all, and late petitions could still be considered “properly filed.” Circuits on both sides of the split acknowledged the analogy between that time bar issue and the discretionary state grounds question at issue here.<sup>10</sup>

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<sup>10</sup> Compare *Siebert v. Campbell*, 334 F.3d 1018, 1025 (continued...)

*Pace* resolved the split by requiring federal habeas courts to honor state filing deadlines, whether they were more or less strictly administered by the states. 544 U.S. at 414, 417 (“[W]e hold that time limits, no matter their form, are ‘filing’ conditions. . . . When a postconviction petition is untimely under state law, ‘that is the end of the matter’ for purposes of § 2244(d)(2)”); accord *Allen v. Siebert*, 128 S. Ct. 2, 4 (2007) (“The fact that Alabama’s [time bar] . . . is subject to equitable tolling . . . renders it no less a ‘filing’ requirement . . . ; it only makes it a less stringent one. . . . Under the Court of Appeals’ approach, federal courts would have to delve into the intricacies of state procedural law in deciding whether a postconviction petition rejected by the state courts as untimely was nonetheless ‘properly filed’ under § 2244(d)(2). Our decision in *Pace* precludes such an approach”).

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<sup>10</sup>(...continued)

(11<sup>th</sup> Cir. 2003) (“only rules that are ‘firmly established and regularly followed’ qualify as adequate state grounds. . . . [T]his standard likewise applies to state procedural rules in the ‘properly filed’ inquiry under § 2244(d)(2)”), with *Brooks v. Walls*, 279 F.3d 518, 523-24 (7<sup>th</sup> Cir. 2002) (state procedural bar with discretionary plain error exception is nonetheless an adequate state ground, just as state timeliness rule with discretionary plain error exception is nonetheless a “proper filing” requirement under § 2244(d)(2)).

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This deference to state court rulings should inform federal habeas review under the adequate state grounds doctrine as well. States should not be forced to choose between strict, non-discretionary enforcement of their procedural rules, or none at all. The ruling of the court of appeals below should be reviewed.

### Conclusion

For these reasons, petitioners respectfully request this Court to grant the writ of certiorari.

*Philadelphia District  
Attorney's Office  
3 South Penn Square  
Philadelphia, PA 19107  
(215) 686-5700*

RONALD EISENBERG  
Deputy District Attorney  
*(counsel of record)*  
THOMAS W. DOLGENOS  
Chief, Federal Litigation  
ARNOLD GORDON  
1<sup>st</sup> Asst. District Attorney  
LYNNE ABRAHAM  
District Attorney

App. 1

**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos: 03-9010 & 03-9011

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JOSEPH J. Kindler,

Appellee/Cross-Appellant

v.

MARTIN HORN, Commissioner,  
Pennsylvania Department of Corrections,  
\*DAVID DIGUGLIELMO, Superintendent of  
the State Correctional Institution at Graterford,  
JOSEPH P. MAZURKIEWICZ, Superintendent  
of the State Correctional Institution at Rockview,

Appellant/Cross-Appellees

\*(Amended Per Clerk's Order dated 1/6/05.)

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Appeal from the District Court  
for the Eastern District of Pennsylvania  
(Civil Action No. 99-cv-00161)  
District Judge: Honorable J. Curtis Joyner

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