No. _____

IN THE

Supreme Court of the United States

JAMAR L. CAMPBELL,

Petitioner,

vs.

ELIZABETH BURRIS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "adequate and independent state procedural grounds" doctrine applicable to *habeas* cases, if a state court refuses to review a federal claim because a defendant violated a procedural rule that is "independent" of federal law and "adequate" to support the judgment, a federal *habeas* court may not thereafter review that federal claim.

In this case, the Third Circuit held that a state court's application of its own procedural rule is "independent" of federal law when the state court reviews the merits of an otherwise waived federal claim for "plain error." In reaching that holding, the Third Circuit joined five other federal courts of appeals that agree on that point of law. Five other federal courts of appeals hold, to the contrary, that the state court's application of its procedural rule is, instead, "dependent" on federal law.

The question presented in this case is as follows:

Whether a state court's application of a state procedural rule is "dependent" upon federal law when the state court reviews the merits of an otherwise waived federal claim for "plain error."

LIST OF PARTIES

Petitioner Jamar L. Campbell is an inmate incarcerated in Delaware pursuant to a sentence of a Delaware state court. Respondent is Elizabeth Burris, acting warden of the facility in which Mr. Campbell is incarcerated. (Ms. Burris succeeded Thomas Carroll as warden. Mr. Carroll's name appears in the captions of the district court's opinion.)

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INTRODUCTION

Petitioner Jamar L. Campbell respectfully requests that a writ of *certiorari* issue to resolve a split among the federal courts of appeals.

Many states have procedural "waiver" rules that, for example, generally prohibit state courts of last resort from reviewing claims that were not raised below. Just the same, these rules may include exceptions, and state courts (as here) often have broad – sometimes unfettered – discretion to apply those exceptions. Particularly in criminal cases, states often exercise their discretion to review a claim that is otherwise waived for "plain" or "fundamental" error.[1] Review under this standard may, and often does, require an analysis of a federal question.

In the view of the Third Circuit, which in this case joined the First, Fourth, Sixth, Seventh and Eleventh Circuits, state courts may review an otherwise waived federal issue on the merits for "plain error" and still claim – successfully – that the decision rests on "independent" state procedural grounds. The five other circuits that have reached this issue – including the Second, Fifth, Eight, Ninth and Tenth Circuits – conclude that reviewing a federal claim on the merits under the "plain-error" component of a state procedural rule is "dependent" upon the resolution of a federal question.

The Third Circuit in this case acknowledged the conflict among the circuits and stated that this Court has yet to resolve whether a "plain-

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[1] Mr. Campbell will use "plain error" as a shorthand throughout this petition to describe state procedural rules that permit a review of the merits of an issue otherwise waived, even though some states may use other terms (*e.g.*, "miscarriage-of-justice" review or "fundamental-error" review).

error" review under a state procedural rule is "independent" of federal law. This Court should grant the petition, resolve the split, and review the Third Circuit's holding that Delaware Supreme Court Rule 8 is "independent" of federal law and "adequate" to support a state-court judgment.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at *Campbell v. Burris*, 515 F.3d 172 (3d Cir. 2007). The opinion of the district court (Appendix B) is unreported but available at *Campbell v. Carroll*, Docket No. 03-916-GMS, 2005 U.S. Dist. LEXIS 26557 (D. Del., Nov. 4, 2005). The opinions of the Delaware Supreme Court on direct appeal (Appendix C) and on appeal from the denial of post-conviction relief (Appendix D) are not released for publication in the permanent law reports but are available at *Campbell v. State*, 801 A.2d 10 (Del. 2002) and *Campbell v. State* 830 A.2d 409 (Del. 2003), respectively.

JURISDICTION

The court of appeals entered its judgment on February 14, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals and the district court had jurisdiction under 28 U.S.C. §§ 1331 and 2254.

STATUTORY PROVISIONS INVOLVED

Section 2254 of the Anti-terrorism and Effective Death Penalty Act (the "AEDPA"), 28 U.S.C. § 2254, and Delaware Supreme Court Rule 8, are excerpted in relevant part in Appendices E and F, respectively.

STATEMENT OF THE CASE

In December 1999, Mr. Campbell was arrested and charged with possession with

intent to deliver cocaine and possession of cocaine within 300 feet of a park. A jury convicted Mr. Campbell of both charges. In August 2001, the Delaware Superior Court sentenced Mr. Campbell to 18 years incarceration. Mr. Campbell has been incarcerated at the Delaware Correctional Facility since his conviction and sentence.

Mr. Campbell appealed his conviction and sentence to the Delaware Supreme Court. On direct appeal, Mr. Campbell, acting *pro se*, raised nine claims – among them, claims of ineffective assistance of counsel.[2]

The Delaware Supreme Court affirmed the conviction and sentence. The court did not consider the ineffective-assistance claims on direct appeal. The court reviewed Mr. Campbell's non-ineffective-assistance claims for "plain error" under Delaware Supreme Court Rule 8, even though he did not raise them at trial. Rule 8 provides:

> Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

DEL. SUP. CT. R. 8. Although the phrase "plain error" does not appear in the rule, the "interest of justice" exception in Rule 8 has been interpreted by Delaware courts to mean a review for "plain error." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986). "Plain error," in turn, is error that is "so clearly prejudicial to substantial

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[2] Mr. Campbell's counsel withdrew his representation, and Mr. Campbell was permitted to file a *pro se* brief raising issues before the Delaware Supreme Court on direct appeal.

rights as to jeopardize the fairness and integrity of the trial process." The "substantial rights of the claimant" has been interpreted by Delaware courts to mean his "constitutional" rights. *See Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) ("[W]e have reserved the plain error standard to claims affecting substantial rights, i.e. of constitutional dimension, because only such claims can be said to jeopardize the fairness and integrity of the trial process.") (internal quotation omitted)).

Applying Rule 8 and these standards, the court "reviewed the record carefully" and concluded that Mr. Campbell's non-ineffective-assistance claims lacked merit.

Mr. Campbell moved for post-conviction relief, which the trial court denied. On appeal from the denial of post-conviction relief, the Delaware Supreme Court declined to review Mr. Campbell's non-ineffective-assistance claims because it had previously conducted a "plain-error" review of their merits under Rule 8. The court reviewed Mr. Campbell's ineffective-assistance claims on the merits and summarily concluded that Mr. Campbell failed to present "evidence" of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Campbell thereafter filed a petition for a writ of *habeas corpus* in the district court. The district court denied Mr. Campbell's petition and declined to issue a certificate of appealability.

As to his non-ineffective-assistance claims, the district court concluded that Mr. Campbell could not raise them in federal court because the state court reviewed the merits of those claims under Rule 8's "plain-error" component. The *habeas* court found that Rule 8 was an "independent and adequate state ground" that precluded federal *habeas* review. As to his

ineffective-assistance claims, the district court concluded that Mr. Campbell exhausted some, failed to exhaust others, and in either event failed to satisfy his burden under Section 2254 of the AEDPA, 28 U.S.C. § 2254.

Mr. Campbell appealed the denial of his *habeas* petition to the Third Circuit, which granted Mr. Campbell's application for a certificate of appealability and appointed the undersigned as *pro bono* counsel. The certificate listed three issues.[3] The paramount issue was whether Rule 8 constitutes an "adequate and independent" state procedural rule. During oral argument, the three-judge panel of the court of appeals questioned counsel for Mr. Campbell at length regarding the "independence" of Rule 8 in light of Rule 8's "plain- error" component.

After argument, the Third Circuit affirmed the judgment of the district court and concluded, *inter alia*, that Rule 8 was "independent" of federal law. The court followed the First, Fourth, Sixth, Seventh and Eleventh Circuits, which ostensibly conclude that a state court can review an otherwise waived federal claim for plain error and still have its decision deemed "independent" of federal law.

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[3] The Third Circuit certified the following issues for appeal: (1) whether Delaware Supreme Court Rule 8 is an independent and adequate state ground that precludes federal *habeas* review; (2) whether the District Court properly discerned all of the ineffective assistance of counsel claims that Campbell presented to the state court and included in his § 2254 petition; and (3) whether the Delaware Supreme Court's application of *Strickland v. Washington*, 466 U.S. 668, 697 (1984) was unreasonable where it denied Campbell's claims because he "presented no *evidence* that any claimed error on the part of his counsel resulted in prejudice to him." (Emphasis in original).

REASONS FOR GRANTING THE WRIT

The Court should issue a writ to resolve the split on the issue presented in this case: Whether a state court's application of a state procedural rule is "dependent" upon federal law when the state court reviews the merits of an otherwise waived federal claim for "plain error." The federal courts of appeals have been split for some time. As a result of the decision below, the split is now six to five. This Court should bring uniformity to this important and recurring issue.

I. THE THIRD CIRCUIT IMPLICITLY REJECTED THE HOLDINGS OF THE SECOND, FIFTH, EIGHTH, NINTH AND TENTH CIRCUITS THAT PLAIN-ERROR REVIEW OF AN OTHERWISE WAIVED FEDERAL CLAIM IS "DEPENDENT" UPON FEDERAL LAW.

The holding of the court below is in direct conflict with decisions of the Second, Fifth, Eighth, Ninth and Tenth Circuits. In adopting the position previously accepted by the First, Fourth, Sixth, Seventh and Eleventh Circuits, and implicitly disagreeing with five other circuit courts, the Third Circuit has expanded a clear conflict among the courts of appeals on an important and recurring issue.

A. The federal courts of appeals are split.

As recently as 2005, the Second Circuit concluded that an exception to New York's "contemporaneous-objection" rule, which permits courts to review the merits of otherwise waived claims for "fundamental errors that impair the validity of the proceeding," is not "independent" of federal law if the state courts invoke the exception to review the merits of an otherwise waived federal claim. In *Brown v. Greiner*, 409 F.3d 523, 532 (2d Cir. 2005), the Second Circuit

noted that the state court's decision "was dependent on the court's finding that the [constitutional] claim was without merit." *Id.* This exception is similar to a "plain-error" exception.

Likewise, the Fifth Circuit in *Plunkett v. Estelle*, 709 F.2d 1004, 1007 (5th Cir. 1983), held that a state court's review for "fundamental error" of a defendant's objection to the judge's charge to the jury – even though the defendant failed to object at trial – had "no impact" on the federal courts' review of the claim. The Fifth Circuit stated that even if the federal courts' review of the claim would be confined to the level of review conducted by the state court (i.e., a review for "fundamental error"), there was no procedural bar to reviewing the claim because the state court reached the merits. This exception is also similar to a "plain-error" exception.

The Eight Circuit has concluded that reviewing the merits of an otherwise waived federal claim under a "plain-error" exception to a waiver rule is not "independent" of federal law. In *Thomas v. Bowersox*, 208 F.3d 699, 701 (8th Cir. 2000), the court stated that "state court review of a claim for plain error does not preclude later consideration of the same argument in a collateral proceeding in federal court."[4]

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[4] There appears to be a split within the Eighth Circuit that has not been resolved by the court *en banc*. Significantly, the view that a plain-error review of a federal claim is "independent" of federal law was the view of the Eighth Circuit *before* the AEDPA became law on April 24, 1996. *Toney v. Gammon*, 79 F.3d 693, 698-99 (8th Cir. 1996) ("[A] properly limited plain error review by a state court does not cure procedural default."). Since the enactment of the AEDPA, though, the Eighth Circuit follows the position advocated by Petitioner in this case and has stated that (1) plain-error review by state courts

Similarly, the Ninth Circuit has held that a review of a constitutional claim on the merits for "plain error" is not independent of federal law. *Walker v. Endell*, 850 F.2d 470 (9th Cir. 1987):

> [W]e conclude that the purpose of the cause and prejudice determination permits us to consider a claim on federal *habeas* that has been reviewed by a state appellate court on the merits for plain error. Although applying a different standard of review than it would on direct appeal, a state appellate court reviewing for plain error reaches the merits of a petitioner's claim. Our policy of providing an opportunity for state courts to correct constitutional errors before a petitioner may seek relief in federal court permits us to review for error where the state court has in fact undertaken such review. No disrespect of the state court conviction may be implied from a review that a state appellate court itself has undertaken.

Id. at 474. *See also Washington v. Cambra* 208 F.3d 832, 833 (9th Cir. 2000) (same rationale for state-court review of a waived claim for "constitutional error").

Finally, in *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003), the Tenth Circuit acknowledged the split of authority among the circuits and concluded that the "substance of the plain-error disposition" determines whether the

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of a federal claim allows federal courts to conduct the same review; and (2) this approach is consistent with the AEDPA. *See James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999) (noting that plain-error review by federal court, mirroring how the state court reviewed the claim, is consistent with the deferential standard of review under the AEDPA for state-court decisions).

state court's procedural decision is "independent" of federal law:

> A state court may deny relief for a federal claim on plain-error review because it finds the claim lacks merit under federal law. *In such a case, there is no independent state ground of decision and, thus, no basis for procedural bar. See Hux v. Murphy*, 733 F.2d 737, 739 (10th Cir. 1984) (following approach we adopt here, though without consideration of analytical complexities subsequently added by Harris and AEDPA). Consistent with that conclusion, the state court's disposition would be entitled to § 2254(d) deference because it was a form of merits review.

Id. at 1205-06 (emphasis added).[5] *See also Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003) ("Because the state court denied relief on the

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[5] The Tenth Circuit stated that "Courts addressing this question have arrived at very different answers."

> The Sixth and Seventh Circuits apply procedural bar to state plain error review. *See Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001); *Thomas v. Gilmore*, 144 F.3d 513, 518 (7th Cir. 1998). The Ninth Circuit holds otherwise, concluding that state court plain error review is a merits determination that allows the federal court also to conduct a merits review. *See Walker v. Endell*, 850 F.2d 470, 474 (9th Cir. 1987). The Eighth Circuit has inconsistent case law. See *Simmons v. Taylor*, 195 F.3d 346, 348 (8th Cir. 1999) (citing *Sweet v. Delo*, 125 F.3d 1144, 1152 (8th Cir. 1997)). The Second Circuit appears to side with the Sixth and Seventh Circuits, but qualifies its position by holding that if the state plain-error review incorporated federal law, the resultant disposition would not rest on the "independent state ground" necessary to support a procedural bar. *See Roy v. Coxon*, 907 F.2d 385, 389-91 (2d Cir. 1990).

Cargle, 317 F.3d at 1205-06 & n.7.

merits of the federal claim on plain-error review, procedural-bar principles do not apply.").

Decisions of the First, Fourth, Sixth, Seventh, Eleventh and now the Third Circuits are in direct conflict with the Second, Fifth, Eighth, Ninth, and Tenth, as the Third Circuit tacitly acknowledged. *Campbell v. Burris*, 515 F.3d 172, 178 (3d Cir. 2007) ("[W]hile the United States Supreme Court has not definitively resolved the matter, there is ample court of appeals case law on whether invocation of similar 'plain error' review of alleged violations of the federal constitution in order to mitigate the effect of a state procedural default rule will suffice to deprive a state court ruling of its "independent" character. We agree with our sister Courts of Appeals for the First, Fourth, Sixth, Seventh, Tenth[6] and Eleventh Circuits that it does not.").

The First Circuit has held that reviewing an otherwise waived federal claim on the merits to determine whether a "miscarriage of justice" occurred is independent of federal law. *See Gunter v. Maloney*, 291 F.3d 74, 80 (1st Cir. 2002). The court in *Gunter* stated that the "mere fact that a state appellate court engages in a discretionary, and necessarily cursory, review under a 'miscarriage of justice' analysis does not in itself indicate that the court has determined to waive an independent state procedural ground for affirming the conviction." *Id.*

The Fourth Circuit shares a similar view. It has concluded that reviewing an otherwise

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[6] The Third Circuit listed the Tenth Circuit as espousing a view that was consistent with the First, Third, Fourth, Sixth, Seventh and Eleventh Circuits. On closer review, however, the Tenth Circuit's view is more closely aligned with the Second, Fifth, Eighth and Ninth Circuits.

waived federal issue to determine whether the claimed error "so infected the trial with unfairness as to make the resulting conviction a denial of due process" is independent of federal law. *Daniels v. Lee*, 316 F.3d 477, 487 (4th Cir. 2003).

In the Sixth, Seventh and Eleventh Circuits, a state court's review on the merits of an otherwise waived federal claim for "plain error" is independent of federal law. *Scott v. Mitchell*, 209 F.3d 854, 865-66 (6th Cir. 2000) (Ohio's "plain-error" exception); *Neal v. Gramley*, 99 F.3d 841, 844 (7th Cir. 1996) (Illinois' "plain-error" exception); *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir. 1988) ("the mere existence of a 'plain error' rule does not preclude a finding of procedural default").

In sum, the conflict in the circuits is clear and direct. The courts of appeals that have reached the issue have held steadfast to their conclusions even as the law of other circuits has developed to the contrary. The split evidences an engrained disagreement on an issue of law, and this Court should grant review to bring uniformity to the issue.

B. The split may be an unintended consequence of competing principles in this Court's decisions.

The Court has discussed the "independence" of state-court decisions. As a general rule, when a state court reviews the merits of a federal claim, the federal court may do the same, as there is no reason to defer to a state court's decision on federal law. *See Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989) ("[I]f the state court under state law chooses not to rely on a procedural bar ... then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim.").

When state rules have dual components – a procedural component and an exception that permits review of the merits anyway – the analysis becomes only slightly more complicated. As a general rule, if it is unclear whether the state court relied on state or federal law, federal *habeas* courts may presume that the state relied on federal law and therefore review the claim. *Harris*, 489 U.S. at 260-62 (adopting a "plain statement" requirement to determine whether a state court decided the case based on state or federal law).

Consistent with these principles, the Court has held that application of a built-in exception to a waiver rule that permits review of an otherwise waived federal claim is dependent upon a ruling on federal law and therefore cannot form the basis to deny a federal *habeas* court the ability to review the claim. *Stewart v. Smith*, 536 U.S. 856 (2002) (*per curiam*); *Ake v. Oklahoma*, 470 U.S. 68 (1985); *Engle v. Isaac*, 456 U.S. 107,135 n.44 (1982) ("If Ohio had exercised its discretion to consider respondents' claim, then their initial default would no longer block federal review."); *County of Ulster v. Allen*, 442 U.S. 140, 150-152 & n. 10 (1979).

The Court, on the other hand, has said that a state court "need not fear reaching the merits of a federal claim in an *alternative* holding ... as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision." *Harris*, 489 U.S. at 264-265 & n.10. Likewise, the Court in *Coleman v. Thompson*, 501 U.S. 722 (1991), has suggested that a state may decide whether a constitutional right will be violated *if* it refuses to review a claim. *Id.* at 741-42 ("[T]he Virginia Supreme Court will only grant an extension of time if *the denial itself* would abridge a constitutional right.") (emphasis added).

The holdings of the Second, Fifth, Eight, Ninth and Tenth Circuits conform to the view in *Stewart*; *Ake; Engle* and *County of Ulster*. The First, Third, Fourth, Sixth, Seventh and Eleventh Circuits are more closely aligned with the view of *Harris* and *Coleman* (even though the courts have arguably applied the holdings in those cases incorrectly).

Because five circuit courts seem to follow one line of this Court's reasoning and six others seem to follow a different line, the Court should step in and resolve the disparity.

C. The split on this important and recurring issue is intolerable.

Many states have some form of an exception to a waiver rule.[7] As a result of the Third Circuit's decision in this case (joining five circuits and implicitly rejecting five others), any state court within the Third Circuit may invoke those rules, simply by citing them, and greatly limit the ability of the federal courts in *habeas* cases to decide federal questions. For example, if

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[7] *See, e.g.*, CONN. PRACTICE BOOK § 60-5 ("The Court may in the interests of justice notice plain error not brought to the attention of the trial court."); HAW. R. APP. PROC. 28, 40.1 (appellate courts, and supreme court on certiorari, "at [their] option, may notice a plain error not presented [at trial]"); KS. SUP. CT. R. 8.03 ("the [appellate] court may, however, at its option, address a plain error not presented [at trial]."); MD. R. PRO. 4-325 ("An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object [at trial]."); MO. SUP. CT. R. 84.13 ("Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court ...."); NEB. REV. STAT. § 25-1919 ("The Court of Appeals or Supreme Court may at its option consider a plain error not specified in appellant's brief."). This is just a sampling of state rules worded most closely to DEL. SUP. CT. R. 8 which, like Rule 8, permit discretionary review of a claim despite a procedural misstep.

a state court invokes a procedural rule that allows plain-error review of an otherwise waived federal claim, a state court can review federal claims and circumvent subsequent review by a federal court. The Court should intervene to determine whether state courts should be able to exercise such influence over the ability of federal courts to decide federal questions.

The split also represents different views on comity and federalism, the linchpins of the doctrine of adequate and independent state procedural grounds. Under the Third Circuit's view (shared by five other circuits), if a state court reviews a federal claim on the merits for "plain error," the decision is somehow still independent of federal law even when, in fact, a state court decides a federal question. This rationale suggests that comity for state-court decisions is paramount to the federal courts' having the ability to decide federal questions in a *habeas* case. The Court should determine whether comity should be read so broadly that, in *habeas* cases filed by state inmates, the federal courts have in essence lost their time-honored authority to be the arbiters of what federal law means.

The split, moreover, is intolerable. There are more than one million prisoners incarcerated by the states.[8] All state prisoners have the right to pursue federal *habeas* remedies. Each year, many thousands of *habeas* petitioners (often *pro se*) may or may not lose their right to pursue federal *habeas* review depending on the law of the circuit they are in. If a state court decides a federal question despite a procedural default, a

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[8] William J. Sabol *et al.*, Bureau of Just. Stat., U.S. Dep't of Just., Bulletin No. NCJ 217675, Prison and Jail Inmates at Midyear 2006, at 2 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf.

habeas petitioner should be able safely to assume that a federal court may thereafter decide that federal question. However, if a *habeas* petitioner is in one of twenty-two states in the First, Third, Fourth, Sixth, Seventh or Eleventh Circuits,[9] he would be barred from presenting a federal claim to a federal court, even though it was decided by state courts under a plain-error standard. If a *habeas* petitioner is in one of twenty-eight states in the Second, Fifth, Eight, Ninth and Tenth Circuits, he would not.[10] Such a broad and entrenched disparity with respect to federal *habeas* jurisprudence is intolerable.

II. THE THIRD CIRCUIT ERRED IN ITS CONCLUSION THAT DELAWARE SUPREME COURT RULE 8 IS AN "INDEPENDENT" STATE RULE.

The Third Circuit's decision conflicts with *County of Ulster*, *Engle*, and *Ake* because a decision by the Delaware Supreme Court under Rule 8's plain-error component is a merits-based decision on a federal question.

As explained by the Delaware Supreme Court itself, Rule 8 allows review of any claim for "plain error," which includes "constitutional" claims. Under Delaware law, "plain error" is

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[9] The states in these circuits include Maine, Massachusetts, Rhode Island, New Hampshire, Pennsylvania, New Jersey, Delaware, West Virginia, Virginia, North Carolina, South Carolina, Maryland, Ohio, Kentucky, Tennessee, Michigan, Wisconsin, Illinois, Indiana, Alabama, Georgia and Florida.

[10] The states in these circuits include New York, Connecticut, Vermont, Texas, Louisiana, Mississippi, North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Missouri, Arkansas, California, Washington, Montana, Idaho, Oregon, Nevada, Arizona, Alaska, Hawaii, Wyoming, Oklahoma, Utah, Colorado, New Mexico and Kansas.

error that is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." The "substantial rights of the claimant" has been interpreted by Delaware courts to mean his "constitutional" rights. *See Bullock v. State*, 775 A.2d 1043, 1061 (Del. 2001) ("[W]e have reserved the plain error standard to claims affecting substantial rights, i.e. of constitutional dimension, because only such claims can be said to jeopardize the fairness and integrity of the trial process.") (internal quotation omitted)).

For this reason, Rule 8's "plain-error" review is not, *per se*, "independent" of federal law as the Third Circuit suggested, nor is it "independent" as applied in Mr. Campbell's case. The Third Circuit acknowledged that Mr. Campbell raised "federal constitutional claims" in his *habeas* papers (virtually the same ones he raised in state court), which the Delaware Supreme Court reviewed under Rule 8's plain-error component. *Campbell*, 515 F.3d at 175 ("His petition and accompanying memorandum of law alleged ineffective assistance of counsel on a number of grounds and an assortment of six other violations of his federal constitutional rights.").

The state court's decision in this case may have been independent of federal law if (1) it explicitly stated its state procedural ruling governed and that, *in the alternative*, Mr. Campbell's claims lacked merit, *see Harris*, or (2) the court explicitly stated that it would determine whether declining to review the merits would work a prospective constitutional violation. *See Coleman*. However, the Delaware Supreme Court never explicitly stated that Rule 8 procedurally barred Mr. Campbell's claims. Nor did the Delaware Supreme Court decide, pursuant to *Coleman*, whether application of

Rule 8's procedural bar of his claims would result in some constitutional violation.

Consequently, Rule 8 is not "independent" of federal law, either *per se* or as applied in this case.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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