CASE 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.

RESPONDENT'S MOTION AND AFFIRMATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Joseph Kindler, through counsel, respectfully moves for leave to proceed *in forma pauperis* and submits as follows:

1. This case is before the Court on a petition for writ of certiorari.

2. Respondent, a death-sentenced prisoner, is indigent. He was found to be indigent and *in forma pauperis* relief was granted by the state courts, by the United States District Court for the Eastern District of Pennsylvania and by the United States Court of Appeals for the Third Circuit. Because of his indigence, his lawyers have always been court-appointed.

3. Undersigned counsel was appointed by the Court of Appeals to represent Respondent, and continues to represent him *pro bono*.

4. Respondent is incarcerated on death row and is without funds to secure the services necessary to proceed in this Court (*e.g.*, printing fees, etc.) or to pay any fees.

5. Respondent will shortly provide the Court an Affidavit or Declaration in Support of

a Motion for Leave to File *In Forma Pauperis*.

6. Undersigned counsel affirms that all statements related above are true and correct.

WHEREFORE, Respondent requests that the Court allow him to proceed *in forma pauperis*.

Respectfully submitted,

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Counsel for Respondent, Joseph Kindler

Dated: April 16, 2009

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IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Secretary, Pennsylvania Department of Corrections, *et al.*,

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AFFIRMATION OF MAILING

I, Matthew C. Lawry, a member of the Bar of the United States Supreme Court, hereby affirm under penalty of perjury that on this 16th day of April, 2009, I placed the original and ten copies of the Brief in Opposition to Petition for Writ of Certiorari in the above-captioned case, along with the motion for leave to proceed in forma pauperis, and this affirmation, in the United States Mail for delivery to the United States Supreme Court, 1 First Street, NE, Washington, D.C. 20543, and a copy of each to counsel for Petitioners: Ronald Eisenberg, Esq., Deputy District Attorney, Philadelphia District Attorney's Office, 3 South Penn Square, Philadelphia, PA 19107. The mailing was by first class United States Mail postage prepaid.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Respondent was convicted of first degree murder and sentenced to death. He escaped from prison while his post-verdict motions were pending. After he was recaptured, he sought to appeal his conviction and death sentence. At the time of his escape, Pennsylvania courts frequently reviewed the merits of such appeals once the defendant was recaptured, with limited exceptions for procedural circumstances not present here. By the time of Respondent's attempted appeal, Pennsylvania had a rule treating an escape as an absolute forfeiture of appellate proceedings. Pennsylvania applied that rule to bar Respondent from having the merits of any of his claims considered on direct appeal or in post-conviction proceedings. The Third Circuit applied settled Circuit precedent holding that in such circumstances, the application of the absolute forfeiture rule is not adequate to preclude federal habeas review of the merits.

When a State changes its procedural rule, after an alleged default, from a discretionary rule – which was frequently exercised to excuse the default – to one in which the default constitutes an absolute forfeiture, and then retroactively applies the absolute forfeiture rule, was the absolute forfeiture rule firmly established and consistently applied at the time of the default?

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COUNTERSTATEMENT OF THE CASE

The evidence presented by the Commonwealth at the guilt phase of the trial was summarized by the Pennsylvania Supreme Court in *Commonwealth v. Kindler*, 639 A.2d 1 (Pa. 1994) (App. 79-104).[1] The jury convicted Mr. Kindler of first degree murder, kidnapping and conspiracy. Mr. Kindler was tried together with his co-defendant, Scott Shaw, who was also convicted of first degree murder and other charges. At a joint penalty phase proceeding, Mr. Shaw was sentenced to life and Mr. Kindler was sentenced to death.

Mr. Kindler filed post-verdict motions. On September 19, 1984, while the post-verdict motions were pending and prior to formal sentencing, he escaped from jail. The trial court granted the Commonwealth's motion to dismiss the post-verdict motions, and continued sentencing indefinitely. After Mr. Kindler was recaptured, he moved to reinstate the post-verdict motions. The trial court denied his motion, formally imposed the death sentence, and sentenced him on the remaining counts.

Mr. Kindler appealed to the Pennsylvania Supreme Court. The court ruled that, as a result of his escape, he had no right to review of any issues not encompassed in its limited, statutorily mandated review in capital cases. App. 85-87. Although, at the time of the escape, there was no clearly established fugitive forfeiture or waiver rule that would bar an appeal based on an escape while post-verdict motions were pending, the state high court nevertheless refused to consider any issues raised by Mr. Kindler on appeal. App. 82-83. Finding no error in its automatic review of the conviction and death sentence, the court affirmed. App. 97.

Mr. Kindler filed a petition for state post-conviction relief. The trial court dismissed the petition without holding a hearing. The Pennsylvania Supreme Court affirmed the denial of

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[1]Emphasis herein is supplied unless otherwise indicated.

relief, ruling that the claims presented by Petitioner were previously litigated on direct appeal. *Commonwealth v. Kindler*, 722 A.2d 143 (Pa. 1998) (App. 67-78).

Mr. Kindler filed a timely petition for writ of habeas corpus under 28 U.S.C. § 2254. Following briefing by the parties, the District Court entered a lengthy and thorough Memorandum and Order. *Kindler v. Horn*, 291 F. Supp. 2d 323 (E.D. Pa. 2003) (App. 54-66). The District Court found that there was no state procedural bar adequate to preclude federal habeas review of the merits, and that Mr. Kindler was entitled to relief from his death sentence on his claim under *Mills v. Maryland*, 486 U.S. 367 (1988), and his claim of prosecutorial misconduct in the context of the joint penalty phase proceedings. The District Court denied relief on his remaining claims.

The parties cross-appealed. Following briefing and oral argument, the Third Circuit unanimously affirmed the District Court's ruling on procedural default and affirmed the grant of sentencing relief, on slightly different grounds. While it affirmed the District Court's ruling on the *Mills* claim, the Third Circuit panel overturned the grant of relief for prosecutorial misconduct, but also granted relief on Mr. Kindler's claim that counsel was constitutionally ineffective at capital sentencing. *Kindler v. Horn*, 542 F.3d 70 (3d Cir. 2008) (App. 1-53).

REASONS FOR DENYING CERTIORARI REVIEW

I. THE THIRD CIRCUIT CORRECTLY APPLIED LONGSTANDING PROCEDURAL DEFAULT LAW IN FINDING THAT THE STATE COURT'S APPLICATION OF A FUGITIVE FORFEITURE RULE THAT WAS NOT CLEARLY ESTABLISHED OR CONSISTENTLY APPLIED AT THE TIME OF THE DEFAULT WAS NOT ADEQUATE TO PRECLUDE FEDERAL HABEAS REVIEW OF THE MERITS OF MR. KINDLER'S CLAIMS.

The sole issue raised by Petitioners ("the Commonwealth") in the *Petition for Writ of Certiorari* ("PWC") concerns the Third Circuit's ruling on the procedural default question. Applying longstanding procedural default principles and Third Circuit precedent, the Third Circuit found that the fugitive forfeiture rule applied by the Pennsylvania Supreme Court to preclude review of Mr. Kindler's direct appeal and post-conviction claims was a *new* and *different* rule from that in existence at the time of the alleged default. As a result, the fugitive forfeiture rule was not "firmly established" or "consistently applied" and therefore was not an "adequate" state ground "sufficient to bar review of the merits" in federal court. App. 22.

The Commonwealth asserts that the Third Circuit's ruling raises an important question about the "role of discretion" with respect to procedural default. PWC at 7. But that assertion is based on mischaracterizations both of the rule applied in this case by the state court, and of the Third Circuit's decision on the procedural default question. When this underbrush is cleared away, it becomes clear that the Circuit merely applied longstanding procedural default principles to a long-ago shift by the Pennsylvania Supreme Court in its approach to appeals of recaptured prisoners. Therefore, the Third Circuit's ruling is both manifestly correct as an application of this Court's procedural default law, and insignificant in terms of the criteria governing this Court's exercise of certiorari review. That is particularly true because (a) the lower federal courts are familiar with state procedural rules and thus in the best position to assess adequacy,

see infra at 5 & n.5, and (b) the rule in question was rarely applied and no longer exists in the same form, depriving the adequacy issue of any broad significance. *See infra* at 8-9 n.6.

A. Governing Principles Regarding Procedural Default.

In its current form, the doctrine of procedural default was first applied to federal habeas proceedings in *Wainwright v. Sykes*, 433 U.S. 72 (1977). Since that time, there have been few significant changes in the law of procedural default, contrary to the Commonwealth's assertion, PWC at 7, that development of procedural default law has been "uneven."[2]

"Procedural default" is a doctrine of comity that *sometimes* prevents a federal habeas court from ruling on the merits of a claim when the state court denied that claim on the basis of a state law procedural rule. Not all state procedural rules, however, prevent merits review by the federal habeas courts. Federal merits review may be barred only if, *inter alia*, the state court bar ruling is an "*adequate state ground*." *E.g.*, *Lee v. Kemna*, 534 U.S. 362, 375 (2002); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1986). A state procedural rule is an "adequate state ground" only if it is "firmly established" and "consistently and regularly applied" by the state courts. *Johnson*, 486 U.S. at 587; *see Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (state procedural rule must be "firmly established and regularly followed" to bar federal habeas review); *James v. Kentucky*, 466 U.S. 341, 348 (1984) (rule must be "clear," "firmly established and regularly followed").

In applying these principles, a federal habeas court must make two preliminary determinations. First, the federal court must determine *what* procedural rule the state court applied as its basis for denying relief, because only a procedural rule that was *actually applied* by the state court can ever create a bar against federal merits review – rules that hypothetically *could*

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[2]Indeed, the Commonwealth cites no significant decision regarding the adequate state ground doctrine since *Ford v. Georgia*, 498 U.S. 411 (1991), nor have Respondent's counsel discovered any such decision.

have been applied by the state court, but were not, are irrelevant.[3]

Second, the federal court must determine *when* the state court procedural default occurred. Only procedural rules that are "firmly established and regularly followed" *at the time of the state court procedural default* can be "adequate." In other words, habeas courts look to the state of the law at the time when the petitioner took or failed to take the action that eventually resulted in the state court bar against his claims, *not* the (usually later) date when the state court actually held the claims to be barred.[4] This Court has "repeatedly recognized [that] the courts of appeals and district courts are more familiar than we with the procedural practices of the States in which they regularly sit," and therefore are in the best position to assess adequacy. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (declining to address procedural bar issue).[5]

As described below, and as the Court of Appeals found, there is no "adequate state ground" under these well-established principles of federal law.

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[3] *See Harris v. Reed*, 489 U.S. 255, 262, 265 n.12 (1989) (state court procedural bar rule may bar federal merits review "only if the last state court rendering a judgment in the case rests its judgment on the [rule]"; "if the state court ... chooses not to rely on a procedural bar ..., there is no basis for a federal habeas court's refusing to consider the merits of the federal claim"); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("The mere existence of a basis for a state procedural bar does not [bar federal merits review]; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.").

[4] *E.g.*, *Ford*, 498 U.S. at 423-24 (contemporaneous objection rule not adequate because not firmly established and regularly followed at time, prior to trial, when defendant failed to object); *Terrell v. Morris*, 493 U.S. 1, 2 (1989) (per curiam) (rule requiring claims be raised on direct appeal not adequate because not firmly established and regularly followed at time of direct appeal).

[5] *Accord id.* at 547 (O'Connor, J., dissenting) ("As the Court points out, the Court of Appeals is better suited to evaluating matters of state procedure [relevant to procedural bar issues] than are we"); *Selvage v. Collins*, 494 U.S. 108, 110 (1990) (per curiam) (remanding to Court of Appeals for determination of procedural bar issue because Court of Appeals "is more familiar with [state] law than we are"); *Rummel v. Estelle*, 445 U.S. 263, 267 n.7 (1980) (rejecting state's procedural bar argument by "[d]eferring to the Court of Appeals interpretation of Texas law").

B. Pennsylvania's Treatment of Appeals by Recaptured Fugitives.

Over time, Pennsylvania's treatment of appeals by recaptured fugitives has undergone several marked changes. Much of this history, with which the Third Circuit is intimately familiar, is recounted in *Doctor v. Walters*, 96 F.3d 675, 685-86 (3d Cir. 1996), which was followed by the Third Circuit in *Kindler*.

As of 1984, the leading Pennsylvania decisions regarding the fugitive waiver rule were *Commonwealth v. Galloway*, 333 A.2d 741 (Pa. 1975), and *Commonwealth v. Passaro*, 476 A.2d 346 (Pa. 1984). Review of those cases demonstrates that there was no firmly established rule in 1984 that a fugitive had forfeited or waived his right to appellate review if he was recaptured prior to his appeal having been dismissed or quashed.

In *Galloway*, the defendant escaped while his post-verdict motions were pending. The trial court dismissed the motions with prejudice. Galloway escaped again while his appeal was pending, and the Commonwealth moved to dismiss the appeal. Galloway was again returned to custody, and the Pennsylvania Supreme Court considered both the merits of the appeal and the Commonwealth's motion to dismiss. *Galloway*, 333 A.2d at 742.

The *Galloway* court noted that an appellate court can dismiss the appeal of a defendant who is a fugitive from justice because such a person "by escaping, has placed himself beyond the jurisdiction and control of the court, and, hence, might not be responsive to the judgment of the court." *Id.* The court determined, however, that this rule did not apply to Galloway, because he had been returned to custody:

> *Since Galloway is no longer a fugitive from justice and is now subject to the jurisdiction of this Court*, he will be responsive to any judgment this Court renders. Therefore, this Court has no basis upon which to grant a motion to dismiss the appeal at this juncture. Hence, the Commonwealth's motion to dismiss the appeal will be denied.

Id. The Court then remanded to the trial court to consider Galloway's post-verdict motions. *Id.*

Galloway thus adopted a straightforward "jurisdictional" rule – if the defendant was returned to custody while his appeal was pending, the appeal would go forward. As the Third Circuit noted in *Doctor*, "After *Galloway*, Pennsylvania's ... courts consistently recognized their discretion to hear a properly filed appeal as long as the criminal defendant had returned to the jurisdiction before the appeal was dismissed." *Doctor*, 96 F.3d at 685 (citing *Commonwealth v. Jones*, 564 A.2d 983, 985 (Pa. Super. 1989); *Commonwealth v. Milligan*, 452 A.2d 1072 (Pa. Super. 1982); *Commonwealth v. Harrison*, 432 A.2d 1083 (Pa. Super. 1981); *Commonwealth v. Albert*, 393 A.2d 991 (Pa. Super. 1978); *Commonwealth v. Borden*, 389 A.2d 633 (Pa. Super. 1978); *Commonwealth v. Boyd*, 366 A.2d 934 (Pa. Super. 1976); *Commonwealth v. Barron*, 352 A.2d 84 (Pa. 1975)). Because Mr. Kindler was returned to the jurisdiction before his appeal or even his post-verdict motions were dismissed, under *Galloway* his appeal would have been heard.

In *Passaro*, the defendant escaped while his appeal was pending. The Superior Court granted the Commonwealth's motion to dismiss the appeal, and denied the defendant's motion to reinstate the appeal after he was apprehended. The defendant then appealed to the Pennsylvania Supreme Court. *Passaro*, 476 A.2d at 347-48.

The Supreme Court first ruled that the Superior Court acted properly in dismissing the appeal when the defendant was a fugitive. *Passaro*, 476 A.2d at 348. The Supreme Court then ruled that the Superior Court also properly denied reinstatement of the appeal, because the defendant had forfeited his appeal by escaping during the pendency of the appeal:

> [A] defendant who elects to escape from custody forfeits his right to appellate review. It would be unseemly to permit a defendant who has rejected the appellate process in favor of escape to resume his appeal merely because his

escape proved unsuccessful....

Passaro, 476 A.2d at 349.

Reviewing these decisions, the Third Circuit noted that *Passaro* did not overrule *Galloway*, but rather distinguished *Galloway* on the ground that in *Passaro* the appeal had been dismissed while the defendant was a fugitive, whereas in *Galloway* the appeal had not been dismissed. *Doctor*, 96 F.3d at 685. Accordingly, the Third Circuit concluded that, as of *1986*, Pennsylvania fugitive waiver law did not "firmly establish" that the absolute forfeiture rule of *Passaro* applied to a prisoner (like Mr. Kindler) who escaped but was returned to custody prior to the filing of an appeal:

> Pennsylvania's fugitive forfeiture rule after *Passaro* can described as follows: if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal.
>
> It is clear from these decisions, which reflect the state of the law at the time of petitioner's escape, that Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored. Under the *Galloway* rationale a court would have the discretion to hear an appeal filed by such a defendant because the defendant would be in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof.... Therefore, the state courts in this case did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits.

Doctor, 96 F.3d at 685-86.[6]

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[6]Since *Passaro*, Pennsylvania's fugitive waiver rule has undergone several changes. Although not directly relevant to the issue whether the rule applied here was firmly established in 1984, familiarity with these changes may make the *Kindler* decisions more comprehensible. They also show that the rule applied here was extant only during a brief window in the late 1980s and early 1990s. While the Third Circuit's ruling is clearly correct, there is also no need for this

C. The State Court Procedural Ruling in this Case.

As stated above, proper application of the adequate state ground doctrine requires identification of: (1) the rule applied by the state court; and (2) the time of the state court default.

1. On direct appeal, the Pennsylvania Supreme Court noted it had previously established a "general rule" that "defendants who are fugitives from justice *during the appellate process* have no right to any appellate review, even though they have been recaptured and returned to the custody of Pennsylvania." App. 82 (citing *Passaro*). The Pennsylvania Supreme Court, however, made clear that this *Passaro* rule *did not apply to Petitioner*, because he had *not* escaped during the pendency of the appeal:

> Here, however, Appellant's fugitive status did *not* take place *during the pendency of an appeal before us*. Rather, it took place while the trial court was considering Appellant's post-verdict motions and the question becomes whether the trial court

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Court to grant certiorari to review the Third Circuit's application of established procedural default principles to a rarely used rule that no longer exists.

As *Doctor* noted, the application of *Passaro* to a person who escapes during trial court proceedings but is returned to custody prior to direct appeal remained an open question for some time after *Passaro* was decided. In *Commonwealth v. Luckenbaugh*, 550 A.2d 1317 (Pa. 1988) (per curiam), the Court first applied *Passaro* to that situation. *See Commonwealth v. Jones*, 564 A.2d 983, 985-87 (Pa. Super. 1989) (en banc) (*Luckenbaugh* effectively overruled *Galloway*, applying *Passaro* for the first time to a defendant in these circumstances). In *Commonwealth v. Jones*, 610 A.2d 439, 441 (Pa. 1992), the Pennsylvania Supreme Court confirmed this reading of *Luckenbaugh*, holding that escape at any time post-trial is an absolute and irrevocable forfeiture of the right to appeal. In *Commonwealth v. Huff*, 658 A.2d 1340, 1341-42 (Pa. 1995), the Court retreated from this absolute forfeiture rule, finding no irrevocable forfeiture where the defendant escaped and was recaptured prior to sentencing, and the trial court exercised its discretion to consider the defendant's post-verdict motions. In *Interest of J.J.*, 656 A.2d 1355 (Pa. 1995), the Court held in a juvenile case that an appellate court has the discretion to consider an appeal if the defendant has been returned to custody, even if the defendant escaped during the appellate process. As the Court noted in *Commonwealth v. Deemer*, 705 A.2d 827, 829 n.2 (Pa. 1997), *Huff* and *J.J.* effectively overruled the absolute forfeiture rule of *Jones*. In *Deemer*, the Court completed that process, explicitly rejecting *Jones*' "absolute ... forfeiture" rule, and allowing a defendant to pursue an appeal as long as his time for doing so had not expired during the time he was a fugitive. *Deemer*, 705 A.2d at 829. The *Kindler* direct appeal was decided during the brief ascendency of the *Jones* absolute forfeiture rule.

has authority to dismiss such motions as a response to an Appellant's flight.

App. 83.

After reviewing related federal decisions, the Pennsylvania Supreme Court fashioned the following rule for this situation:

> [T]rial courts, when faced with a defendant in fugitive status, ... have every right to fashion an appropriate response which can include the dismissal of pending post-verdict motions. Our review of that action is limited to determining whether the flight has a connection with the court's ability to dispose the defendant's case and whether the sanction imposed in response to the flight is reasonable under the circumstances.

App. 84. Applying that *new* rule, the Pennsylvania Supreme Court found that the trial court had been justified in dismissing Petitioner's post-verdict motions. App. 84-87. Because, under the trial court's bar ruling, Petitioner had failed to "preserve[]" any "allegations of error," the Pennsylvania Supreme Court limited its appellate review to the automatic review mandated by the capital sentencing statute. App. 85-87 and n.4 (citing and quoting 42 Pa. C.S. § 9711(h)). *See also* App. 77-78 n.13 (on post-conviction appeal, Pennsylvania Supreme Court describes the rule applied on direct appeal as one of fugitive forfeiture).

2. As stated above, the "time of the state court procedural default" is when Petitioner took the action that resulted in a state court bar against his claims – *i.e.*, *when he escaped* on *September 19, 1984*. As the Third Circuit explained here and in *Doctor*, the "time of the state court procedural default" under these circumstances is the time of the escape. App. 21-22; *Doctor*, 96 F.3d at 684 (the relevant date for determining "whether the rule was firmly established and regularly applied, [was] *not* in *1993* when the Superior Court relied upon it [to bar the claims], but rather as of the date of the waiver that allegedly occurred *when Doctor escaped in 1986*."); *see also* n.4, *supra*.

D. The Third Circuit Correctly Found that the Procedural Bar Ruling Was Not Adequate to Preclude Federal Habeas Review of the Merits.

As the Third Circuit made clear, its analysis of the procedural default issue in *Kindler* was "controlled by our analysis in *Doctor*." App. 21. The more extensive analysis of the issue in *Doctor* is therefore critical to any accurate understanding of *Kindler*.[7]

As discussed in Part B, *supra*, in *Doctor* the Third Circuit conducted a thorough analysis of Pennsylvania's decisions in the fugitive forfeiture area. Based on that review, the Third Circuit determined that Pennsylvania had applied three different rules.

The first, or *Galloway* rule, allowed a former fugitive's appeal to be heard as long as he was returned to custody before the appeal was dismissed. In *Galloway* itself, the Pennsylvania Supreme Court "held that there was *no basis* to dismiss the defendant's appeal because he was in custody when the case was actually argued and would therefore be subject to the jurisdiction of the court and thus responsive to any judgment entered." *Doctor*, 96 F.3d at 685. Following *Galloway*, Pennsylvania courts had and frequently exercised the "discretion to hear a properly filed appeal as long as the criminal defendant had returned to the jurisdiction before the appeal was dismissed." *Id.* (citing cases).

The second, or *Passaro* rule, explicitly stated that this discretion to hear an appeal was eliminated if the appeal was actually dismissed before the fugitive was returned to custody – in that situation, the escape represented an *absolute forfeiture* of the right to appeal. Importantly, however, under *Passaro* the *Galloway* rule still applied if the fugitive was returned to custody before the appeal was dismissed. As *Doctor* explained,

Pennsylvania's fugitive forfeiture rule after Passaro can [be] described as follows:

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[7]Tellingly, the Commonwealth ignores *Doctor*, aside from a citation with a parenthetical in a footnote. PWC at 10 n.3.

> if the defendant is returned to custody while his appeal is pending, an appellate court has the discretion to hear the appeal, but if the defendant is returned to custody after the appeal is dismissed an appellate court lacks the discretion to reinstate and hear the appeal.

Doctor, 96 F.3d at 685.

The third, or *Luckenbaugh* rule, extended the "*Passaro* forfeiture analysis ... to a defendant who escaped and returned to custody during the pendency of his appeal." *Doctor*, 96 F.3d at 686, *citing Commonwealth v. Luckenbaugh*, 520 Pa. 75, 550 A.2d 1317 (1988).

Doctor fled in 1986, *Doctor*, 96 F.3d at 678, while the *Passaro* rule was extant. He was recaptured in 1992, and sentenced. He then attempted to appeal his conviction, but the appeal was dismissed on the basis of the (*Luckenbaugh*) fugitive forfeiture rule. *Id.* As the Third Circuit explained, the procedural bar rule was inadequate, *not* because it involved an exercise of discretion, but because Pennsylvania had *changed* from the *Galloway/Passaro* rule in which appeals in that posture were frequently allowed, to the *Luckenbaugh* absolute forfeiture rule, and retroactively applied that absolute forfeiture rule to dismiss the appeal:

> [A]t the time of [Doctor's] escape, ... Pennsylvania law afforded appellate courts different degrees of discretion depending on the posture of the appeal upon a former fugitive's return to custody. Pennsylvania law had never confronted the situation that arises in the instant case where petitioner's flight had ended and custody had been restored before the appellate process was ever initiated. Thus, it was not "firmly established" that Pennsylvania courts lacked the discretion to hear an appeal first filed after custody had been restored. Under the *Galloway* rationale a court would have the discretion to hear an appeal filed by such a defendant because the defendant would be in custody during the entire pendency of his appeal and subject to the enforcement of any order entered as a result thereof. Furthermore, ... it was unclear, until the Pennsylvania Supreme Court's decision in *Commonwealth v. Luckenbaugh*, 520 Pa. 75, 550 A.2d 1317 (1988), whether the *Passaro* forfeiture analysis even applied to a defendant who escaped and returned to custody during the pendency of his appeal. Therefore, the state courts in this case did not rely on an "adequate" procedural rule to deny petitioner a review of his appeal on the merits.

Doctor, 96 F.3d at 685-86.

The procedural history of *Kindler* is almost identical to *Doctor*. Mr. Kindler escaped from custody in 1984, while *Galloway/Passaro* was extant. Pending post-verdict motions were dismissed. After he was returned to the jurisdiction in 1991, he was sentenced and attempted to appeal. The Pennsylvania Supreme Court extended the *Luckenbaugh* rule to apply to this situation and dismissed the appeal on the basis of the fugitive forfeiture rule. App. 82-87; *see* App. 77-78 n.13.[8]

As the Third Circuit explained, this retroactive extension of *Luckenbaugh* was not adequate to preclude federal habeas review. Critically, because the *Galloway* jurisdictional rule applied at the time of the escape, the absolute fugitive forfeiture rule was inadequate:

> *Galloway* ... underscores a critical distinction between dismissed post-verdict motions and a dismissed final appeal. That distinction arises from the fact that after an appeal is dismissed, a court no longer retains jurisdiction. However, appellate courts can exercise jurisdiction after post-verdict motions are dismissed, and they therefore can exercise discretion to hear the claims of defendant's appeal.... When Kindler escaped in 1984, *Galloway* had not been overruled. Accordingly, the state trial court still had discretion to reinstate his post-verdict motions. Accordingly, we conclude that, under *Doctor,* Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the claims raised in Kindler's habeas petition.

App. 23.

The Third Circuit's ruling is a classic application of this Court's procedural default law.

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[8]Alternatively, the Pennsylvania Supreme Court's decision could be read not as an extension of *Luckenbaugh*, but as a completely *new* rule – applicable to an escape while the proceedings are in the trial court – that permitted the trial court to "fashion an appropriate response" to the escape, including "dismissal of pending post-verdict motions," and limited review of the trial court's ruling "to determining whether the flight has a connection with the court's ability to dispose of the case and whether the sanction imposed in response to the flight is reasonable under the circumstances." App. 84. Such a rule was not even remotely in existence in 1984, and therefore clearly was not "firmly established" at the time of the default. Whether the state court's ruling is viewed as an extension of *Luckenbaugh* or a brand new rule, it is inconsistent with the jurisdictional rationale of *Galloway* and *Passaro* – that the appeal could proceed as long as the defendant was returned to the jurisdiction before his appeal was dismissed.

After the alleged default, Pennsylvania changed its law regarding appeals by fugitives from one of discretion – frequently exercised to *allow* such appeals – to an absolute fugitive forfeiture rule. Pennsylvania then applied its *new* fugitive forfeiture rule as the basis for dismissing Mr. Kindler's appeal. Because that new fugitive forfeiture rule was not in existence – much less firmly established and consistently applied – at the time of the default, it was not adequate to preclude federal habeas review. That is simply black letter law.[9]

E. The Commonwealth's Arguments Are Erroneous.

1. The Commonwealth's primary argument for granting certiorari misstates the Third Circuit's holding in *Kindler* and ignores the controlling precedent of *Doctor*, on which *Kindler* expressly relied.

According to the Commonwealth, in *Kindler* the Third Circuit "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." PWC at 7. As explained above, nowhere in *Kindler* did the Third Circuit hold (squarely or otherwise) that a rule involving the exercise of discretion is *per se* inadequate. To the contrary, citing longstanding Third Circuit precedent, *Kindler* expressly stated the opposite: "A procedural rule that is consistently applied in the vast majority

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[9]*See, e.g., Ford v. Georgia*, 498 U.S. at 424 (state court's retroactive application of a new procedural rule "does not even remotely satisfy the requirement" that a procedural bar rule be "'firmly established and regularly followed' by the time as of which it is to be applied"); *Terrell v. Morris*, 493 U.S. at 2 (per curiam) (reasoning petitioner "could not have known that he would default his... claim" because state court relied upon a rule that postdated his appeal); *Johnson v. Mississippi*, 486 U.S. at 587-89 (state court's ruling that claim was barred because not raised on direct appeal was inadequate, where court had previously ruled that such claims should be raised in collateral proceedings); *James v. Kentucky*, 466 U.S. at 348-49 (state's inconsistently applied rule was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) ("Novelty in [state court] procedural requirements cannot be permitted to thwart [federal court] review.").

of cases is adequate to bar federal habeas review even if state courts are willing to occasionally overlook it and review the merits of a claim for relief where the rule would otherwise apply." App. 21 (citing *Neely v. Zimmerman*, 858 F.2d 144, 148 (3d Cir. 1988)).

The Commonwealth attempts to support its description of *Kindler*'s holding by quoting a passage out of context and removing the passage's citation to *Doctor*. *Compare* PWC at 7-8, *quoting* App. 22 (without citation to *Doctor*), *with* App. 22 (citing *Doctor*, 96 F.3d at 686). Properly read in context, *Kindler* first explained that because the Pennsylvania courts were applying the (*Galloway*) discretionary rule when Doctor escaped in 1986, but had changed to the (*Luckenbaugh*) forfeiture rule at the time of Doctor's appeal, "the fugitive forfeiture rule was not 'firmly established' and therefore was not an ... adequate procedural rule sufficient to bar review of the merits ... in federal court." App. 22. The Third Circuit then rejected the Commonwealth's attempt to distinguish *Doctor*, ruling that because "*Galloway* had not been overruled" when Kindler escaped in 1984, "the state trial court still had discretion to reinstate his post-verdict motions," App. 23, and therefore, again, the fugitive forfeiture rule was not "firmly established" at the time of Mr. Kindler's appeal.

When properly understood, the Commonwealth's entire argument for granting certiorari is a straw man. The Third Circuit *did not hold* that state procedural rules involving the use of discretion are *per se* inadequate to bar federal court review of the merits. Rather, it held that when a state court rule *changes* from one of discretion (frequently exercised in the defendant's favor) to an absolute bar, and does so *after* the alleged default, the absolute bar rule is inadequate.

2. Having set up a straw man "holding" erroneously attributed to the Third Circuit – that a state rule involving the exercise of discretion is *per se* inadequate – the Commonwealth

proceeds to argue that there is a conflict between the Circuits and even within the Third Circuit concerning the role of discretion in adequacy analysis. PWC at 10-11 & n.4. But this "conflict" is as evanescent as the supposed "holding" of *Kindler*.

a. The Commonwealth claims *Campbell v. Burris*, 515 F.3d 172 (3d Cir. 2008), "say[s] just the opposite" of *Doctor* and *Kindler*. PWC at 11. Actually, in *Campbell* the Third Circuit cited *Doctor* with approval, explaining in a parenthetical that in *Doctor*, "because the rule on its face provided little or no guidance regarding the application of the rule to the present facts," the Court had examined Pennsylvania decisions "to determine whether the rule, at the time of its application to petitioner, was 'firmly established and regularly applied.'" *Campbell*, 515 F.3d at 179 (discussing *Doctor*, 96 F.3d at 684-85). Far from recognizing a conflict between its holding and that of *Doctor* (upon which the *Kindler* panel relied) the *Campbell* panel *explicitly endorsed* the approach of *Doctor* (and thus of *Kindler*).[10]

In *Campbell*, Judge Stapleton further explained the approach taken by the Third Circuit in *Doctor*, *Kindler* and *Campbell*. As all three decisions noted, to be adequate, state court rules should be applied evenhandedly, allowing for occasional exceptions. *See Doctor*, 96 F.3d at 684 (citing *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982), and *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989)); *Campbell*, 515 F.3d at 181 (citing cases); App. 21 (citing *Neely v. Zimmerman*, 858 F.2d 144, 148 (3d Cir. 1988)). *Campbell* then described how to analyze whether a state rule involving the exercise of discretion is adequate:

> The issue is not whether the state procedural default rule leaves room for the exercise of some judicial discretion – almost all do. Rather, the issue is whether, at the relevant point in time, the judicial discretion contemplated by the state rule

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[10]Given that Judge Stapleton was the author of *Campbell* (decided February 14, 2008), and was a member of the unanimous *Kindler* panel (decided September 3, 2008) it would be passing strange if *Campbell* actually said "just the opposite" of *Kindler*.

is being exercised in a manner that lets people know when they are at risk of default and treats similarly-situated people in the same manner.

Campbell, 515 F.3d at 181.

Campbell and *Kindler* followed the same approach on the adequacy question. The only difference between them is that the rule involved in *Campbell* was firmly established and consistently applied, whereas the rule in *Kindler* was not.[11]

b. The Commonwealth's argument that some Circuits are willy nilly treating

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[11] In Mr. Kindler's case, Pennsylvania manifestly did *not* "treat[] similarly-situated people in the same manner." *Campbell, supra*. Reginald Lewis and Mr. Kindler escaped *at the same time, see* NT 10/23/84 at 17-18, 38, 41-43, 54, but the Pennsylvania Supreme Court did not apply the same rule to them. Mr. Lewis escaped after sentencing, while his appeal was pending. Nevertheless, after requesting briefing on the issue of whether the appeal should be quashed, the court declined to address it, noting that it was a "*question of first impression*" that would be better addressed "in a case wherein the appellant's escape *actually results in a disruption of the appellate process*." *Commonwealth v. Lewis*, 567 A.2d 1376, 1378 n.1 (Pa. 1989). The court then proceeded to merits review of Mr. Lewis' direct appeal claims, and later reviewed his state post-conviction claims. *Commonwealth v. Lewis*, 743 A.2d 907 (Pa. 2000). Mr. Kindler did not receive merits review of any of his claims. This disparate treatment would render the bar here inadequate even apart from the other considerations discussed herein. *See Romano v. Gibson*, 239 F.3d 1156, 1169-70 (10th Cir. 2001) (no adequate state ground where state court barred petitioner's claims but addressed merits of claims raised by petitioner's co-defendant in separate appeal, where both petitioner and co-defendant violated the same procedural rule).

Moreover, in 1986, the Pennsylvania Supreme Court allowed the direct appeal of Nicholas Yarris, another death sentenced prisoner, to go forward despite the fact that Mr. Yarris had escaped *while his appeal was pending*. In 1983, after Mr. Yarris' post-verdict motions were denied and he was formally sentenced to death, he filed his direct appeal to the Pennsylvania Supreme Court. *See Commonwealth v. Yarris*, 731 A.2d 581, 583 (Pa. 1999) (describing procedural history). New counsel, appointed for the appeal, asked the Pennsylvania Supreme Court to remand for an evidentiary hearing as part of the appeal. *Id.* On March 15, 1984, the Pennsylvania Supreme Court remanded for a hearing, which was scheduled for February 20, 1985. *Id.* at 584. Mr. Yarris *escaped while being transported to the hearing. Id.* While he was at large, the lower court returned the record to the Pennsylvania Supreme Court "so that consideration of [his] direct appeal could proceed." *Id.* The Commonwealth then moved to quash the appeal. The Pennsylvania Supreme Court denied the motion to quash, and went on to decide the appeal *on the merits. Id.*; *see Commonwealth v. Yarris*, 518 A.2d 261 (Pa. 1986) (denying motion to quash); *Commonwealth v. Yarris*, 549 A.2d 513 (Pa. 1988) (deciding merits of direct appeal). The Pennsylvania Supreme Court *declined to apply* any fugitive waiver rule, and decided Mr. Yarris' appeal on the merits.

any state court exercise of discretion as an inadequate procedural rule similarly evaporates upon review of the decisions cited by the Commonwealth in PWC at 10 n.3.

i. The Fifth Circuit decisions in *Fearance v. Scott*, 56 F.3d 633 (5th Cir. 1995), and *Lowe v. Scott*, 48 F.3d 873 (5th Cir. 1995), on which *Fearance* relied, are not about "discretion." In *Lowe*, the Fifth Circuit ruled that because Texas had not consistently or regularly applied an abuse of the writ bar to successive petitions, the bar was not adequate to preclude habeas review under decisions such as *Johnson v. Mississippi*, 486 U.S. at 587. *Lowe*, 48 F.3d at 876. In 1994, Texas announced that it would henceforth apply the abuse of the writ bar. Petitioners who violated the rule after Texas changed its application faced an adequate bar, because it was now being consistently and regularly applied. *Fearance*, 56 F.3d at 642.

ii. The Sixth Circuit's decision in *Deitz v. Money*, 391 F.3d 804 (6th Cir. 2004), also does not generate any sort of conflict. There, the defendant had filed in state court to reopen his direct appeal or allow a delayed appeal, alleging that trial and appellate counsel had failed to perfect the appeal despite petitioner's requests. The Ohio courts first granted leave to reopen the appeal, then withdrew leave and denied the motion for a delayed appeal, citing defendant's failure to make the required showing, despite the fact that he had "describe[d] in considerable detail his claim of ineffective assistance of counsel ...." *Id.* at 811. In *Deitz*, the Sixth Circuit found that Ohio's rules were not consistently applied, distinguishing *Hutchison v. Bell*, 303 F.3d 720 (6th Cir. 2002) (cited in PWC at 11 n.4) on the ground that the Ohio rule involved the exercise of "unfettered" discretion, and relying on the fact that similarly situated defendants had been granted leave to reopen an appeal. *Id.*[12] Again, the distinguishing factor was not

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[12]The Commonwealth also cites *McCalvin v. Yukins*, 444 F.3d 713, 724 (6th Cir. 2006). PWC at 10 n.3. The cited passage, however, is from Judge Cole's dissenting opinion, not the majority. The dissenting opinion of a single judge does not support the Commonwealth's

"discretion," but consistent application of the rule.

iii. Similarly, the Ninth Circuit decisions cited by the Commonwealth (*McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir. 1995), and *Valerio v. Crawford*, 306 F.3d 742 (9th Cir. 2002)), do not rely solely on the fact that the state courts had the discretion to overlook a procedural rule, but on the fact that the courts so repeatedly *exercised* their discretion to allow successive petitions that a bar was not "consistently applied." *See Valerio*, 306 F.3d at 776-78 (discussing prior Nevada decisions and prior Ninth Circuit decisions, including *McKenna*). As the Ninth Circuit concluded, "The number and the variety of cases in which the Nevada Supreme Court addressed constitutional claims on the merits in capital cases, despite unexcused failures to present these claims in earlier proceedings, lead us to conclude that the court *exercised* a general discretionary power to address them." *Id.* at 778.

iv. Finally, the Commonwealth cites a brief unpublished Tenth Circuit opinion, *Biehle v. Kerby*, 25 F.3d 1055, 1994 WL 175682 (10th Cir. 1994) (Table, Text in WESTLAW). Again, *Biehle* noted the discretionary nature of the rule in question, *and* the fact that New Mexico courts had *frequently* overlooked violations of the technical rule in question, before concluding that the rule in question "is not regularly and evenhandedly applied and is, therefore, inadequate." *Biehle*, 1994 WL 75682 at *3.[13]

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argument.

[13]The decisions the Commonwealth relies upon to support what it terms the "opposite" proposition, *see* PWC at 11 & n.4, may all easily be harmonized with the above decisions, to the extent they are relevant at all. *Hutchison*, 303 F.3d at 738, and *Scott v. Mitchell*, 209 F.3d 854, 868-69 (6th Cir. 2000), are simply decisions in which the Sixth Circuit found that the state courts had a consistently enforced procedural rule, as opposed to the exercise of "unfettered discretion," *Hutchison*, *supra*, while allowing for "isolated examples of discretion." *Scott*, *supra*. Again, *Prihoda v. McCaughtry*, 910 F.2d 1379, 1384-85 (7th Cir. 1990), turned on the consistency of the state courts' application of their rule. *Rogers-Bey v. Lane*, 896 F.2d 279 (7th Cir. 1990), which has been abrogated by *Coleman v. Thompson*, 501 U.S. 722 (1991), *see Willis v. Aiken*, 8

Neither in *Kindler* nor in the other decisions cited by the Commonwealth have the lower federal courts held that any rule involving the use of discretion is *per se* inadequate. Rather, those courts have properly reviewed the manner in which that discretion is exercised. In some cases – like *Campbell*, which the Commonwealth presents as an appropriate decision – the rule is consistently enforced, with occasional acts of grace. Such rules (assuming they were firmly established at the time of the default) will be considered adequate. In other cases – like *Kindler* and *Doctor*, which the Commonwealth criticizes – the rule either was not firmly established at the time of the default or was only rarely enforced. Such rules are not adequate to bar federal review of the merits. There is no significant controversy about any of this. The Commonwealth simply does not like the result in *Kindler*.

3. The Commonwealth argues that this case is a particularly good one for taking up the question of the adequacy of discretionary rules, because this case involves an escape by a death sentenced prisoner. PWC at 14-15. However, the view asserted by the Commonwealth – that an escape should necessarily result in a forfeiture, particularly in a capital case – has not been the view taken by the Pennsylvania courts. As discussed in Part B, *supra*, the Pennsylvania courts frequently allowed appeals by recaptured fugitives, except for a brief window in the late 1980s and early 1990s. And this is particularly true in capital cases. Moreover, given that what

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F.3d 556 (7th Cir. 1993), is simply irrelevant. In *Rogers-Bey*, the state court had both applied a waiver rule and reviewed the petitioner's claim for plain error. The majority ruled that the state court decision did not clearly rely on a procedural bar. *Rogers-Bey*, 896 F.2d at 281-82. In his concurrence, Judge Manion disagreed with this aspect of the majority's analysis, *id.* at 284 (Manion, J., concurring), but neither the majority nor Judge Manion addressed the adequacy or consistent application of the state's rule. Finally, in *Murray v. Hvass*, 269 F.3d 896 (8th Cir. 2001), the Eighth Circuit, like the Sixth Circuit in *Hutchison* and *Scott*, simply found that the state courts had consistently applied their rule, despite occasional exercises of discretion to allow merits review.

is at issue here is a rarely used rule that has never been consistently applied, this case is decidedly not a good vehicle for reviewing a long established and rarely questioned body of law.

4. The Commonwealth argues that Mr. Kindler got a "windfall" from his flight because the Third Circuit granted him relief under *Mills v. Maryland*, 486 U.S. 367 (1988), which was decided after his trial, and because it also relied on recent decisions of this Court in granting Mr. Kindler relief on an ineffective assistance of counsel claim. PWC at 16 and 16-17 n.7. The Commonwealth errs.

The Commonwealth asserts that if Mr. Kindler had not escaped, "his direct appeal would likely have been over, and the judgment final, before *Mills* was even decided." PWC at 16. This is pure speculation – no such retrospective prediction is feasible. For example, the conviction of a death row inmate who was sentenced in 1983, and who *did not escape*, did not become final until 1989, *see Commonwealth v. Hughes*, 555 A.2d 1264 (Pa. 1989); the conviction of a death row prisoner who was sentenced in 1985, and who *did not escape*, did not become final until 1995, *see Commonwealth v. Jones*, 651 A.2d 1101 (Pa. 1994), *cert. denied*, 516 U.S. 835 (1995). Reginald Lewis – another capital inmate who was sentenced in June 1984 and escaped with Petitioner but soon recaptured – had his direct appeal denied on the merits on December 22, 1989. *See Commonwealth v. Lewis*, 567 A.2d 1376 (Pa. 1989).

The Commonwealth piles speculative mountains on top of each other by suggesting that, had Mr. Kindler's ineffective assistance claim been reviewed prior to this Court's decisions in *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), his claim would have been denied. None of those decisions, however, altered analysis of ineffective assistance claims under *Strickland v. Washington*, 466 U.S. 668 (1984). Each decision found that the state court decisions being reviewed had

unreasonably applied *Strickland*. *See Rompilla*, 545 U.S. at 389 (state court's conclusion that counsel's investigation was adequate was an "objectively unreasonable" application of *Strickland*); *Wiggins*, 539 U.S. at 522 (noting that this Court "made no new law" in *Williams*); *id.* at 527 (the "Maryland Court of Appeals' application of *Strickland*'s governing legal principles was objectively unreasonable"); *Williams*, 529 U.S. at 395-98 (state court's decision was contrary to and an unreasonable application of *Strickland*). The argument that Mr. Kindler received a "windfall" because a state court reviewing his ineffective assistance claim on the merits would not have reasonably applied *Strickland* is remarkably odd.

5. The Commonwealth attempts a strained analogy to *Goeke v. Branch*, 514 U.S. 115 (1995) (per curiam). PWC at 17-19.[14] In *Goeke*, the habeas petitioner alleged that dismissal of an appeal on the basis of a Missouri fugitive forfeiture rule (which was apparently firmly established and consistently applied) violated substantive due process. This Court held that the due process claim was barred by the nonretroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *Goeke*, 514 U.S. at 119-21.

The distinctions between the *Teague* ruling in *Goeke* and the adequacy issue in this case are obvious. *Teague* is of course a rule governing substantive claims for relief, while the adequate state ground doctrine is merely one aspect of procedural default law. Moreover, a ruling that fugitive forfeiture rules violate substantive due process would sweep aside all such rules (including ones that are firmly established and consistently applied), while the decision here simply allowed federal review of Mr. Kindler's substantive claims, given that the fugitive forfeiture rule at issue was neither firmly established nor consistently applied. *Goeke* is

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[14]This argument is so weak that in some 280 pages of Third Circuit briefing, the Commonwealth never cited *Goeke*. If not waived, the argument is meritless.

irrelevant.

6. Finally, the Commonwealth attempts another strained analogy, this time to *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Allen v. Siebert*, 128 S. Ct. 2 (2007).[15] *Pace* and *Allen* held that when a state court finds a state petition to have been untimely, the state petition was not "properly filed," and therefore does not toll the running of the AEDPA statute of limitations under 28 U.S.C. § 2244(d)(2). *Pace*, 544 U.S. at 417; *Allen*, 128 S. Ct. at 4.

While some Circuit Courts may have seen an analogy between the "properly filed" requirement and the adequate state ground doctrine, this Court has made clear that the principles and precedents that apply to the issues of statutory tolling and procedural default are markedly different. In *Artuz v. Bennett*, 531 U.S. 4 (2000), this Court noted that the "question whether an application has been 'properly filed' [under § 2244(d)(2)] is quite separate from the question whether the claims *contained in the application* are meritorious and free of procedural bar," *id.* at 9 (emphasis original), and held that a state petition containing procedurally barred claims tolls the statute. *Id.* at 8-10.

Artuz puts to rest any notion of a correspondence between construction of § 2244(d)(2) and the adequate state grounds doctrine. Indeed, the adequate state ground doctrine long predates the AEDPA. It derives from and applies to this Court's certiorari review as well as to federal habeas review. *See Lee v. Kemna*, 534 U.S. 362, 375 (2002) ("We first developed the independent and adequate state ground doctrine in cases on direct review from the state courts, and later applied it as well 'in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions'") (quoting *Coleman v. Thompson*, 501 U.S. 722, 729

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[15]As with *Goeke*, the Commonwealth never cited *Pace* in its extensive Third Circuit briefs. Although *Allen* was only a straightforward application of *Pace*, the Commonwealth cited *Allen* post-argument as "supplemental" authority.

(1991)). It would be odd indeed for § 2244(d)(2) analysis to control this Court's exercise of its certiorari jurisdiction, and equally odd to have one adequate state ground doctrine for certiorari and another one for habeas. The Commonwealth's strained argument is without merit.

II. THE THIRD CIRCUIT'S RULING IS SUPPORTED BY AN ALTERNATIVE GROUND NOT REACHED BY THAT COURT – THAT THERE WAS NO ADEQUATE STATE GROUND BASED ON PENNSYLVANIA'S CAPITAL CASE RELAXED WAIVER DOCTRINE.

In the Third Circuit, Mr. Kindler argued a separate reason why the rule applied by the state courts was not "adequate" – the application of Pennsylvania's capital case relaxed waiver rule. Because the Third Circuit found that the rule was not adequate under *Doctor*, there was no need for it to reach the relaxed waiver issue.[16] The operation of the capital case relaxed waiver rule, however, fully supports the Third Circuit's decision. Because of the different treatment historically afforded waiver in Pennsylvania capital cases, there is no adequate state ground here even aside from *Doctor*.

The Pennsylvania Supreme Court first articulated its capital case relaxed waiver rule in 1978, when it proclaimed that an "overwhelming public interest" in preventing unconstitutional executions precluded ordinary application of waiver rules in Pennsylvania capital cases. *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978). The Pennsylvania Supreme Court explained that it would not allow waiver rules to "be exalted to a position so lofty as to require this Court to blind itself to the real issue – the propriety of allowing the state to conduct an illegal execution of a citizen." *Id.* at 180-81. It concluded that it had a "duty to transcend procedural

[16] *Galloway*, *Passaro* and the other fugitive waiver or forfeiture decisions discussed in *Doctor* and *Kindler* all involved non-capital cases.

rules" in capital cases, and to address waived claims on their merits. *Id.*[17]

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[17] After *McKenna*, the Pennsylvania Supreme Court repeatedly applied this capital case relaxed waiver rule, held that *procedural bars would not be applied in Pennsylvania capital cases*, and indicated that it would review all claims for relief raised in death penalty proceedings. *See, e.g., Commonwealth v. Morales*, 701 A.2d 516, 520 n.13 (Pa. 1997) ("this Court's practice has been to address all waived issues" in death penalty cases); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 88 n.9 (Pa. 1998) (noting "this court's tradition of entertaining all claims raised in a capital case, whether on direct appeal or collateral attack, irrespective of waiver"); *Commonwealth v. Jermyn*, 709 A.2d 849, 856 n.20 (Pa. 1998) ("this court has addressed all issues arising in a death penalty case, irrespective of a finding of waiver"); *Commonwealth v. Banks*, 656 A.2d 467, 470 n.7 (Pa. 1995) (addressing waived claims because "it is this Court's practice to address all issues arising in a death penalty case irrespective of a finding of waiver"); *Commonwealth v. Morris*, 684 A.2d 1037, 1042 n.11 (Pa. 1996) (same); *Commonwealth v. Travaglia*, 661 A.2d 352, 356 n.6 (Pa. 1995) ("it is this Court's practice to address all issues arising in a death penalty case, irrespective of a finding of waiver"); *Commonwealth v. Szuchon*, 693 A.2d 959, 962-64 (Pa. 1997) (same); *Commonwealth v. Christy*, 656 A.2d 877, 881 n.2, 885 n.14, 886 n.15 (Pa. 1995) (death penalty is "extraordinary circumstance" that trumps waiver rules); *Commonwealth v. Beck*, 560 A.2d 1370, 1374 (Pa. 1989) ("We ... relax the rule of waiver in capital punishment cases specifically in order to get to the truth."); *Commonwealth v. Brown*, 711 A.2d 444, 455-56 (Pa. 1998) ("This Court generally applies a relaxed waiver rule in capital cases because of the permanent, irrevocable nature of the death penalty."); *Commonwealth v. Spotz*, 716 A.2d 580, 585 n.5, 591 (Pa. 1998) (reviewing waived claim on merits because of "our practice to relax waiver rules in capital cases"); *Commonwealth v. Wharton*, 665 A.2d 458, 462 (Pa. 1995) (same); *Commonwealth v. Hill*, 666 A.2d 642, 648 (Pa. 1995) (same); *Commonwealth v. Williams*, 640 A.2d 1251, 1261 (Pa. 1994) (same); *Commonwealth v. Chester*, 587 A.2d 1367, 1382 n.9 (Pa. 1991) (same); *Commonwealth v. Nelson*, 523 A.2d 728, 736 (Pa. 1986) (same); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986) (same); *Commonwealth v. Frey*, 475 A.2d 700, 707 n.4 (Pa. 1984) (same); *Commonwealth v. Simmons*, 662 A.2d 621, 636 (Pa. 1995) (same); *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 854 (Pa. 1989) (same); *Commonwealth v. Baker*, 511 A.2d 777, 790 n.10 (Pa. 1986) (same); *Commonwealth v. Walker*, 656 A.2d 90, 98-99 (Pa. 1995) (same); *Commonwealth v. Gibson*, 688 A.2d 1152, 1160-63 nn.13, 15, 19, 23 (Pa. 1997) (same); *Commonwealth v. Gibson*, 720 A.2d 473, 481 n.2 (Pa. 1998) (same); *Commonwealth v. Wayne*, 720 A.2d 456, 469 n.13 (Pa. 1998) (same); *Commonwealth v. Williams*, 720 A.2d 679, 684 n.12 (Pa. 1998) (same); *Commonwealth v. Clark*, 710 A.2d 31, 40 (Pa. 1998) (same); *Commonwealth v. Hall*, 701 A.2d 190, 200, 202 n.14, 207 n.17 (Pa. 1997) (same); *Commonwealth v. Washington*, 692 A.2d 1024, 1030 n.11 (Pa. 1997) (same); *Commonwealth v. Marinelli*, 690 A.2d 203, 214 n.19 (Pa. 1997) (same); *Commonwealth v. Gribble*, 703 A.2d 426, 436-37 (Pa. 1997) (same); *Commonwealth v. Elliott*, 700 A.2d 1243, 1252 n.21 (Pa. 1997) (same); *Commonwealth v. Speight*, 677 A.2d 317, 326 n.15 (Pa. 1996) (same); *Commonwealth v. Cook*, 676 A.2d 639, 649 n.26 (Pa. 1996) (same); *Commonwealth v. May*, 656 A.2d 1335, 1343 n.7, 1344 n.9 (Pa. 1995) (same); *Commonwealth v. Miller*, 664 A.2d 1310, 1320 n.17, 1322, 1323 n.22 (Pa. 1995) (same); *Commonwealth v. Johnson*, 668 A.2d 97, 102 n.12, 103 nn.14-15, 104 n.18, 106 n.20, 107 n.21 (Pa. 1995); *Commonwealth v. DeHart*, 650 A.2d 38, 48 (Pa. 1994) (same; granting relief on claim first raised on appeal from denial of post-

As Judge (now Justice) Alito explained in *Bronshtein v. Horn*, 404 F.3d 700 (3d Cir. 2005), *McKenna* thus "firmly established that a claim of constitutional error in a [Pennsylvania] capital case *would not be waived* by a failure to preserve it." *Id.* at 708 (quoting *Szuchon v. Lehman*, 273 F.3d 299, 326 (3d Cir. 2001)). This capital case relaxed waiver rule remained in effect until "[t]wenty years later," when "the state supreme court changed course" in *Commonwealth v. Albrecht*, 720 A.2d 693 (Pa. 1998), and began to apply ordinary waiver rules in capital post-conviction cases. *Bronshtein*, 404 F.3d at 709. Thus, at the time of the state court default here (the 1984 escape), the relaxed waiver rule was in full effect.[18] Because the relaxed waiver doctrine was "made broadly available" to capital defendants by the Pennsylvania Supreme Court, both "on direct appeal, [and] in the post-conviction context," *Commonwealth v. Ford*, 809 A.2d 325, 337 (Pa. 2002) (Saylor, J., concurring), the potential application of a fugitive waiver or forfeiture rule to a capital defendant was not "firmly established." Thus, the waiver rule applied here is not adequate.

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conviction relief); *Commonwealth v. Crispell*, 608 A.2d 18, 22 n.1 (Pa. 1992) (same); *Commonwealth v. Billa*, 555 A.2d 835, 842 (Pa. 1989) (same); *Commonwealth v. Harris*, 703 A.2d 441, 445 n.5, 446 n.7, 9 (Pa. 1997) (same); *Commonwealth v. Miles*, 681 A.2d 1295, 1301 n.8 (Pa. 1996) (same); *Commonwealth v. LaCava*, 666 A.2d 221, 228 n.8 (Pa. 1995) (same); *Commonwealth v. Paolello*, 665 A.2d 439, 453 n.11 (Pa. 1995) (same); *Commonwealth v. Yarris*, 549 A.2d 513, 521 (Pa. 1988) (same); *Commonwealth v. Carpenter*, 515 A.2d 531, 536 n.4, 538 n.8 (Pa. 1986) (same); *Commonwealth v. Holcomb*, 498 A.2d 833, 837 n.6 (Pa. 1985) (same); *Commonwealth v. Lesko*, 501 A.2d 200, 207 (Pa. 1985) (addressing merits of waived claim first raised in post-conviction); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 942 n.3, 955 n.19 (Pa. 1982) (declining to allow waiver in capital cases because of "final and irrevocable nature of the death penalty" and "for the reasons stated in" *McKenna*); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-21 (Pa. 1984) (same).

[18] *Albrecht* only eliminated relaxed waiver in post-conviction cases. The Pennsylvania Supreme Court continued to apply relaxed waiver on direct appeal until 2003. *See Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003) (abolishing relaxed waiver on direct appeal).

This is particularly true to the extent that the Pennsylvania Supreme Court relied on a new rule treating an escape during post-verdict proceedings as a waiver of the claims raised in those proceedings. *See* App. 85-86. Beginning with *Zettlemoyer*, and continuing until 2003, the Pennsylvania Supreme Court routinely reviewed the merits of claims on direct appeal in capital cases, even though the appellants technically waived those claims by failing to raise them in post-verdict (now post-sentence) motions.[19] Although in *Kindler,* on direct appeal, the Pennsylvania Supreme Court stated that Respondent's claims were waived because the trial court properly dismissed the post-verdict motions, under the relaxed waiver rule, he had a right to have his claims heard on appeal *even though they were not properly preserved on post-verdict motions*. Not until the decision here had the Pennsylvania Supreme Court ever hinted that this application of the relaxed waiver rule – consistently followed since *Zettlemoyer* – was not available to defendants who had post-verdict motions dismissed because they were fugitives.

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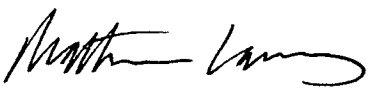
[19]*See, e.g.*, *Freeman*, 827 A.2d at 401 (prospectively abrogating use of relaxed waiver rule on direct appeal; observing that the "relaxed waiver practice has ... been routinely employed ... to reach claims that ... were not raised at all in the trial court"); *Commonwealth v. Pirela*, 507 A.2d 23, 27 n.2 (Pa. 1986) ("This is apparently the first stage of the proceedings at which appellant raises this argument. Because of the relaxed rule of waiver which we apply to cases involving imposition of the death penalty, we will review the claim") (citation omitted)); *Commonwealth v. Stoyko*, 475 A.2d 714, 720-21 (Pa. 1984) (same for penalty phase issues not preserved at trial or raised on appeal); *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 955 n.19 (Pa. 1983) ("This issue was not raised in post-verdict motions and is, accordingly, waived. However, [in capital cases] we will not adhere strictly to our normal rules of waiver. ... Accordingly, significant issues perceived *sua sponte* by this Court, or raised by the parties, will be addressed and, if possible from the record, resolved").

CONCLUSION

For the reasons set forth herein, this Court should deny the Commonwealth's petition for writ of certiorari.

Respectfully submitted,



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