MAY 8 - 2009

No. 08-992

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, 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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Reasons for Granting the Petition

Contrary to respondent's cavil, this case squarely presents the question of whether state procedural rules are "inadequate" if the state court has discretion in applying them.

In the way of all briefs in opposition to certiorari, respondent labors to portray the issue presented as both complicated and unremarkable. He argues that the state procedural rule in question was a moving target that the state courts regularly altered and applied to unsuspecting (albeit fugitive) defendants. He maintains that the federal court of appeals refused to honor the rule not because it was discretionary, but because it was newly mandatory and therefore not "firmly established." He says that the problem of discretion is "a straw man."

Respondent's efforts disregard the language of the state and federal decisions in this very case. The Pennsylvania Supreme Court made very clear that it was applying an *abuse of discretion standard* to the trial court's dismissal of respondent's post-verdict motions. The Third Circuit court of appeals made very clear that the fugitive forfeiture rule it was reviewing was one of discretion, that the rule was *for that reason* not firmly established, and that the state ground was

as a result inadequate. That is why this case demonstrates the need to revisit the "firmly established/consistently applied" standard for implementing the adequate-state-grounds doctrine.

Here is what the state court said about the fugitive flight ruling that barred merits review of most of respondent's claims. On direct appeal, the court framed the issue this way: "Appellant argues that it was an *abuse of discretion* to dismiss his post-verdict motions." App. 82 (emphasis supplied). "[T]he question becomes whether the trial court *has authority* to dismiss such motions as a response to an Appellant's flight. The United States Supreme Court has recently reviewed its own case law which *permits* its appellate courts to dismiss." App. 83 (emphasis supplied).

Thus the state supreme court plainly understood the question to be whether the trial court had abused its discretion in dismissing – *not* whether it was bound to do so by some newly crafted rule of "absolute fugitive forfeiture." And the court answered that question by affirming that the trial court did indeed have such discretion: "[O]ur trial courts, when faced with a defendant in fugitive status, also 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.

These phrases – "abuse of discretion," "has authority," "permits," "right," "can include," "our review ... is limited," "is reasonable under the circumstances" – are simply not consistent with respondent's repeated representation that the state supreme court was imposing a new and "absolute" fugitive forfeiture rule. *See, e.g.*, Brief in Opp. at i, 11, 12, 13, 14. On the contrary, the court spoke in the classic language of discretion.

In doing so, the state supreme court in this case applied precisely the same approach to fugitive flight that had been taken by the intermediate state appellate court in the years preceding the escapes perpetrated by respondent himself, in 1984 and again in 1986.[1]

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[1] *See, e.g., Commonwealth v. Boyd*, 366 A.2d 934, 934-35 (Pa. Super. 1976) ("The sole question is whether or not the trial court acted properly in dismissing the post-trial motions and refusing to reinstate and reconsider them when appellant returned.... If he thereafter returns it is a matter of discretion of the court whether or not the circumstances justify a reinstatement of his post-trial motions or applications.... We find that the ... trial court did not abuse its discretion in refusing to consider the motions"); *Commonwealth v. Clark*, 446 A.2d 633, 634 (Pa. Super. 1982) ([W]hen appellant returns to the court's jurisdiction, this court may grant leave to re-file post-trial motions.... While it

(continued...)

Likewise in federal court. Here is what the court of appeals said about the fugitive flight rule that it found inadequate. Pennsylvania appellate courts "can *exercise discretion* to hear the claims of defendant's appeal.... When Kindler escaped in 1984, ... the state trial court *still had discretion* to reinstate his post-verdict motions. *Accordingly*, we conclude that, under *Doctor* [*v. Walters*, 96 F.3d 675 (3rd Cir. 1996)], Pennsylvania's fugitive waiver law did not preclude the district court from reviewing the merits of the claims raised in

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[1](...continued)
is within our discretion to remand for reinstatement, as did the [*Commonwealth v.*] *Galloway* [333 A.2d 741 (1975)] court, we are not constrained to do so. We conclude instead that the trial court did not abuse its discretion in declining to reinstate appellant's post-trial motions even after he was returned to the jurisdiction").

Respondent himself indirectly acknowledges that this was the state of Pennsylvania law at the time of respondent's escapes: "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." Brief in Opp. at 7 (citations omitted). Respondent appears to believe, however, that the discretion to hear a fugitive's claims did not include the discretion *not* to hear the fugitive's claims. Of course that would be no kind of discretion at all.

Kindler's habeas petition." App. 23 (emphasis supplied).

Thus the court of appeals saw the applicable fugitive forfeiture rule exactly as did the state supreme court: as a matter within the discretion of the trial court. And it was exactly *because* of that discretion ("*Accordingly*, ... ") that the state bar could be ignored: it was not adequate to preclude federal merits review.

Respondent insists that the prior precedent on which the court of appeals relied – *Doctor v. Walters* – somehow transmogrifies the plain language quoted above. *Doctor*, he asserts, holds that Pennsylvania's fugitive waiver rule was recast into an automatic, absolute bar, which was inadequate only because it was applied retroactively, not because it was discretionary. Therefore, contends respondent, the decision in this case must rest on the same ground.

Respondent's understanding of Third Circuit precedent, however, simply is not shared by the Third Circuit itself. Contrary to respondent's invention, *see* Brief in Opp. at 15, there is not a word in the opinion below about any "change" in Pennsylvania's fugitive practice, not a word about any "shift" or "retroactive application" or new "absolute" bar.

Instead, this is what the court of appeals had to say about its prior opinion in *Doctor*: "On federal habeas review, the Commonwealth argued that the state courts' application of the fugitive waiver doctrine precluded federal habeas relief. We disagreed because the rule was not being consistently or strictly applied when Doctor escaped in 1986. *Id.* at 684-686. After surveying decisions of the Pennsylvania courts we concluded that Pennsylvania courts *had discretion* to hear an appeal filed by a fugitive who had been returned to custody before an appeal was initiated or dismissed. *Id.* at 686. *Accordingly*, the fugitive forfeiture rule was not 'firmly established' and *therefore* was not an independent and adequate procedural rule sufficient to bar review of a habeas petitioner in federal court." App. 21-22 (emphasis supplied).[2]

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[2]Nor is this the only time that the Third Circuit has characterized its *Doctor* decision in such terms. Indeed the court previously has used virtually identical language to describe *Doctor*: "[A]n examination of Pennsylvania cases established that when Doctor escaped, Pennsylvania courts recognized that they *had the discretion* to hear an appeal so long as custody of the fugitive-appellant 'had been restored before the appellate process was ever initiated,' *id.* at 685-6, as was the case there. *Accordingly*, we held that Pennsylvania's fugitive forfeiture rule was not an adequate and independent state rule." *Lines v. Larkin*, 208 F.3d 153, 168-69 (3rd Cir. 2000) (emphasis supplied).

Plainly, the Third Circuit believes that the state rule in question was not being consistently or strictly applied because the state courts "*had discretion.*" And the consequence of such discretion ("*Accordingly, ...*") is that the rule cannot be considered firmly established, and is ("*therefore*") an inadequate state ground.

Thus, despite respondent's attempts to depict the case as an unimportant excursion into old and outmoded procedural minutiae, the real issue here remains both current and compelling: the federal court of appeals explicitly equates discretion with inadequacy.

For that reason, respondent's remonstration that Pennsylvania no longer has a discretionary fugitive waiver rule is of no moment. It is true that, years after the decision in this case, the Pennsylvania courts retreated from a discretionary rule in favor of a series of categorical requirements that depend entirely on the stage of the proceedings at which the defendant flees or is recaptured. *See Commonwealth v. Deemer*, 705 A.2d 827 (Pa. 1997). But the whole problem with the circuit's approach to adequate state grounds analysis is that it forces the states to abandon all flexibility if they are to have any hope that their rules will ever be enforced by federal courts.

Thus the stakes here have never been about the status of Pennsylvania's fugitive dismissal rule

in itself. The consequence of a flawed adequacy standard is that it tends to undermine an entire spectrum of state procedural requirements. And indeed in recent years the Third Circuit has repeatedly refused to honor a variety of Pennsylvania rules of procedure.[3]

Respondent nonetheless insists that there is no real cause for concern, because any discussion of discretion in the adequate-state-grounds context is really just a way of ensuring that state rules are being consistently applied. But a "consistency"

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[3] *See, e.g., Holland v. Horn*, 519 F.3d 107 (2008); *Fahy v. Horn*, 516 F.3d 169 (2008); *Leyva v. Williams*, 504 F.3d 357 (2007); *Holiday v. Varner*, 176 Fed. Appx. 284 (2006) (unpublished); *Jermyn v. Horn*, 266 F.3d 257 (2001).

Pennsylvania Supreme Court Justices have not failed to notice "the federal courts' seeming receptiveness to theories allowing them to ignore Pennsylvania state court procedural defaults.... To the extent we would concern ourselves with the coin-flip that is federal habeas review, the result can be very bad law, since every state court response to a particularly egregious, unusual circumstance will be argued, in federal court, as proof that state rules of procedural default are uneven and should not be honored." *Commonwealth v. Steele*, 961 A.2d 786, 837-38 (Pa. 2008) (Castille, J., concurring, with McCaffery, J.); *see also Commonwealth v. Gibson*, 951 A.2d 1110, 1150 (Pa. 2008) ("The threat of dismissive federal responses to flexible state procedural rules can lead to state legislatures and courts adopting ever-more inflexible rules") (Castille, J., concurring, with McCaffery, J.).

test for adequacy – or a "firmly established" test, or a "regularly followed" test – is no different in essence than a discretion test. All of these standards subvert common, useful tools of judicial flexibility, such as plain error and miscarriage of justice, and invite federal courts to second-guess, in the smallest detail, the state courts' application of their own procedural rules.

That is why Wright & Miller attack the discretion test for adequacy and propose instead what is basically a due process approach. *See* 16B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4026, 4027 (2nd ed. 1996). If the state rule provides reasonable notice and opportunity to permit preservation of legal claims, then the failure to comply with the rule is an adequate ground to bar federal review.

Under such an approach, it should have been an easy matter to uphold the state default imposed here. To comply with Pennsylvania's fugitive forfeiture rule, respondent had to do only one simple thing – *not escape*. Instead he undertook considerable effort to do just that. Then he broke out of prison again – *after* his post-verdict motions had been dismissed as a result of his first flight. There was simply no way respondent could have believed that this conduct would be without consequence to his legal rights. If the adequate-state-grounds principle can be understood, even in such a case, to negate the state court default, then

there is a clear need for further examination of the doctrine.

Conclusion

For the reasons set forth above and in the certiorari petition, petitioners respectfully request that this Court grant the writ.

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