No. _____

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

PETITION FOR WRIT OF CERTIORARI

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Capital Case

Question Presented

The Pennsylvania courts ruled that respondent Kindler forfeited the right to review of most of his appellate claims by breaking out of jail, twice, and escaping to Canada in order to nullify the death sentence he received for killing a witness against him. On habeas review, the federal court of appeals held that the fugitive forfeiture rule was an inadequate state ground. This Court granted review and issued a full opinion vacating and remanding for reconsideration. On reconsideration, the Third Circuit determined that this Court's decisions in this case and in a subsequent case, *Walker v. Martin*, made no relevant change to the doctrine of adequate state grounds, and therefore had no impact at all on the Third Circuit's previous resolution of this case.

Where a state supreme court explicitly holds that escape constitutes a forfeiture of appellate rights and that recapture provides no basis for reinstatement, and a defendant shortly thereafter breaks out of prison, escapes to a foreign country, and remains a fugitive there for years, is the state's fugitive forfeiture rule "inadequate" on the ground that it allegedly "broke from" past decisions?

List of Parties

Petitioners

Jeffrey A. Beard, Secretary, Pennsylvania Department of Corrections

David DiGuglielmo, Superintendent, State Correctional Institution at Graterford

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

Respondent

Joseph J. Kindler

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit on remand, reaffirming its previous holding that the Pennsylvania fugitive forfeiture rule as applied to respondent was an inadequate state ground, was entered April 29, 2011, and is reproduced in the Appendix at App. 1.

The opinion of this Court, clarifying the standard for applying the adequate state grounds doctrine, vacating the court of appeals judgment, and remanding for reconsideration consistent with the opinion, was entered December 8, 2009, is published at 130 S. Ct. 612, and is reproduced in the Appendix at App. 27.

The previous opinion of the court of appeals, affirming the district court's grant of a conditional writ of habeas corpus, was entered September 3, 2008, and is published at 542 F.3d 70. An excerpt is reproduced in the Appendix at App. 45.

The opinion of the United States District Court for the Eastern District of Pennsylvania, mandating either a new penalty hearing or a sentence of life imprisonment, was entered September 23, 2003, and is published at 291 F. Supp. 2d 323. An excerpt is reproduced in the Appendix at App. 82.

Statement of Jurisdiction

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

Constitutional and Statutory Provisions Involved

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

Statement of the Case

In May 1984, the Pennsylvania Supreme Court issued an unusually overt opinion announcing exactly what would happen to defendants who fled after trial: their appellate rights would be forfeited, and their recapture would provide "no basis" for reinstatement of those rights. In September 1984, Joseph Kindler issued an unusually overt response to the state courts: he broke out of prison, escaped to Canada, went on national television there, and then broke out of prison again. After he was recaptured and returned seven years later, the state courts did exactly what they had said they would do. They held Kindler's appellate claims forfeited.

Yet the federal court of appeals has refused twice now, and despite a remand for reconsideration by this Court, to defer to the state's fugitive forfeiture rule. Instead the court of appeals declared the rule "inadequate," reviewed the merits of Kindler's forfeited claims, and granted him the relief he fled to Canada to achieve – annulment of his death penalty.

Escape

Kindler was in prison to begin with because he had been convicted in 1983 for murdering a witness. The victim was 22-year-old David Bernstein. When Kindler learned that Bernstein was scheduled to testify against him in a burglary case, he recruited two assistants, lured the victim out of his apartment, beat him bloody with a baseball bat, shocked him with a cattle prod, stuffed him into the trunk of a car, drove him to a river, tied a cinder block to his neck with a rope, and held him under water until he drowned. App. 28-29, 117-22.

While post-trial motions were pending before the trial judge, the Pennsylvania Supreme Court issued a decisive new opinion addressing the state's fugitive forfeiture rule. The court acknowledged its previous opinion on the issue, dated nine years earlier. In that decision the court had noted "inherent discretion" to impose fugitive forfeiture, but chose to address the appellant's claims there after his apprehension. The new opinion, however, citing fugitive forfeiture authority from this Court, adopted

a tougher line, stating categorically that, "by choosing to flee and live as a fugitive, a defendant forfeits the right to have his claims considered." The court rejected as "unpersuasive" – and, indeed, "unseemly" – the notion that a recaptured defendant be permitted "to resume his appeal merely because his escape proved unsuccessful."

Four months later, in September 1984, Kindler accepted those terms – and in grandiose fashion. First he smuggled special saw blades into the prison. The blades were capable of cutting the hardened metal bars protecting the cell windows. Then, over a period of several weeks, he organized fellow inmates to take turns sawing through the window bar in one of the cells on Kindler's block. When the work was done, Kindler arranged with another capital defendant, Reginald Lewis, to plug a toilet and create a flood in his cell. That was the signal for other prisoners on the cell block to begin a violent fight. During the melee, inmates tried to throw a guard over the third tier railing to the floor below. As the remaining guards rushed upstairs in response, Kindler and Lewis removed the sawed-out window bar and fled.[1]

In October 1984, the trial judge dismissed Kindler's post-verdict motions under the state's

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[1]Kitty Caparella, *An Escapee's Tale*, PHILA. DAILY NEWS, Dec. 21, 1984, at 29.

fugitive forfeiture rule. But authorities had no idea where Kindler was until the following year, when he happened to be arrested in Quebec because of new crimes he committed there. App. 29, 96-97, 108-09.

In Canada Kindler gave a series of interviews to the press. He described his escape from Pennsylvania as a flight to freedom, during which he struggled to swim miles upstream in the Delaware River, which flows near the Philadelphia prison, until he could meet family members who would spirit him across the border.[2] (The Delaware is also the river in which Kindler drowned David Bernstein.) He explained to a television audience that "I knew there was no death penalty here.... So Canada was my first choice." App. 29.

Canadian *prison*, however, was not what Kindler had in mind. In October 1986, he broke out of jail again, this time from the thirteenth floor of a Montreal detention center. Inmates formed a human pyramid so that Kindler and another murderer could climb up and break through a skylight. They then lowered themselves to the ground, on a rope made of bed sheets tied together. On the way down, Kindler's partner lost his grip and was killed in the fall.[3]

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[2]Kirk Makin, *Canadian Verdict Awaited*, THE GLOBE AND MAIL (Canada), Sept. 12, 1985.

[3]*U.S. Murderer Fighting Extradition Escapes from* (continued...)

Kindler remained at large for two years. Finally, after his story was broadcast on a new program called "America's Most Wanted," he was identified and arrested in September 1988, in the Canadian province of New Brunswick. App. 30, 97, 109.

Back in jail, Kindler maintained that he should not be punished for the breakout because it was his religious duty to escape; as a Roman Catholic, he was required to defend his life against the sentence of death that awaited him in Pennsylvania. The Canadian court imposed what it described as a "somewhat academic," "symbolic sentence" of nine months imprisonment for the escape.[4]

Meanwhile Kindler proceeded with a key aspect of his original plan in choosing Canada as his refuge: he contested extradition on the ground that Canada, as a country without capital punishment, could not properly return him to Pennsylvania absent official assurance that his death sentence would be vacated. Three more years passed as the litigation proceeded through the justice system to the Canadian Supreme

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[3](...continued)
Prison in Montreal, THE GLOBE AND MAIL (Canada), Oct. 24, 1986.

[4]Patricia Poirier, *Escape Called Religious Duty; Conscience Prompted Murderer to Flee, Court Told*, THE GLOBE AND MAIL (Canada), Dec. 2, 1988.

Court, where Kindler's position failed by one vote. He was deported in October 1991. App. 30-31.

Appeal

Upon his forced return to Pennsylvania, Kindler sought reinstatement of the post-verdict motions that had been dismissed after his original escape. The trial judge orally denied the request, ruling that Kindler's entirely involuntary reappearance did not entitle him to review. Having reached retirement age during Kindler's long absence, the trial judge was then replaced with a new judge, who wrote an opinion on the matter. The new judge, applying an abuse of discretion standard, noted that he would have ruled differently, but held that the original judge had not abused his discretion in denying reinstatement of the post-verdict motions. App. 31.

On direct appeal in 1994, the Pennsylvania Supreme Court took a more moderate approach to fugitive forfeiture than it had in 1984 on the eve of Kindler's escape. Citing recent authority from this Court, the state justices ruled that "a trial court has authority" to impose forfeiture, even if the defendant is later apprehended, as long as the flight affected the review process and the sanction "is reasonable under the circumstances." In this case, the state supreme court held, the trial court's decision "was a reasonable response" to Kindler's actions. Accordingly, Kindler had forfeited his right to review of all issues, other than those for which review was

mandated by the state's capital sentencing statute. App. 31-32, 98-99, 111-14.[5]

Kindler waited two years, until 1996, to file a petition for post-conviction relief under the Pennsylvania Post-Conviction Relief Act (PCRA). The trial court, after reviewing the circumstances of Kindler's escapes and applying the waiver and previous litigation provisions of the PCRA, 42 Pa. C.S. § 9544, denied the petition. On appeal, the Pennsylvania Supreme Court affirmed the denial of post-conviction relief in 1998. App. 32, 99-100.

Habeas

In 1999, Kindler filed a federal habeas corpus petition in the Eastern District of Pennsylvania. The district court ruled, in 2003, that it was not bound by respondent's default of his claims in state court, because the state ground was "inadequate." The district court then reviewed Kindler's challenges on the merits. As the Third Circuit has regularly done, the district court granted sentencing relief under *Mills v. Maryland*, 486 U.S. 367 (1988). The court rejected Kindler's guilt-phase claims. App. 33, 89-94.

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[5]The mandatory issues were whether the evidence was sufficient to support the finding of guilt and the aggravating circumstances, and whether the sentence was excessive, disproportionate, or arbitrary. The supreme court found the evidence sufficient and the sentence appropriate, and affirmed the judgment. App. 114-25.

The parties cross-appealed to the Third Circuit. The circuit held that the state courts could not validly punish respondent for his repeated escapes by dismissing his claims. The court reasoned that, because state law allowed for discretion to reinstate post-verdict motions following a fugitive's recapture, an exercise of that discretion to deny reinstatement was not the product of a "firm" rule, and therefore could not provide an adequate state ground. Proceeding to the merits, the appeals court granted sentencing relief on Kindler's *Mills* claim and, for good measure, on the ground that trial counsel was ineffective for not finding more mitigation evidence to present. App. 33-34, 57-81.

This Court granted a writ of certiorari. Overturning the Third Circuit ruling, the Court held that a discretionary state procedural rule can serve as an adequate ground for a procedural default that bars federal habeas review. The Court's rationale was that application of the adequate state grounds doctrine in the habeas context must be motivated by "federalism and comity concerns." Federal rules, like the states', are often phrased in general terms that may not produce completely predictable outcomes. Just as federal judges give force to such rules in their own courts, they must also give force to similar state rules. The Court remanded to the Third Circuit for reconsideration "consistent with this opinion." App. 35-39.

In the interim, this Court provided further guidance in a follow-up decision concerning the adequate state grounds doctrine. Building on its opinion in this case, the Court emphasized the narrow focus of the adequate state grounds doctrine: to determine whether a state rule imposes unforeseeable requirements that have the effect of discriminating against claims of federal rights.

The Third Circuit held that neither of this Court's precedents made any difference. Both opinions, said the circuit, merely reiterated that the standard for assessing adequacy remained exactly what it had always been: "firmly established and regularly followed." App. 10, 19-20.

Under that standard as the court of appeals rigidly construed it, a "break from past decisions" renders a state rule inadequate. App. 6. In this case there was such a break, said the circuit, because the law at the time of Kindler's escape was not what the state supreme court had just said it was, but instead was what it had previously said it was. App. 15-17. And the law applied at the time of Kindler's appeal was "obviously" a "new rule," because it "was hardly discretionary in the usual sense of the term," but instead "amounts to a mandatory rule with narrow conditions." App. 18. The result, therefore, was just what it had been the first time around – reversal of Joseph Kindler's sentence.

Reasons for Granting the Petition

Even in the face of a directive to reconsider its prior ruling, the court of appeals refused to apply the reasoning of this Court's remanding opinion, or a subsequent opinion, that clarified the adequate state grounds doctrine.

As this Court noted in its previous opinion in this case, "[t]he procedural default at issue here ... is hardly a typical procedural default." *Beard v. Kindler*, 130 S. Ct. 612, 619 (2009); App. 38. But the reason the default is atypical is not because it is difficult to discern. The default is atypical because it is *so obvious*.

It should have been especially obvious after this Court issued two major new opinions on the adequate state grounds doctrine. The first opinion, in this case, made clear that federal habeas courts have no plenary power to enforce precision in state procedural rules; rather, as a matter of "federalism and comity," a habeas court must give deference to state rules that function in the same manner as federal rules. 130 S. Ct. at 618; App. 37.

The Court expanded on the point in a second opinion issued the following Term, while this case was still under reconsideration by the Third Circuit. In that opinion the Court made clear that the habeas court's limited task is simply to determine whether

the state rule imposes unforeseeable requirements such that it "discriminates" against the assertion of federal claims. *Walker v. Martin*, 131 S. Ct. 1120, 1130 (2010).

Yet the Third Circuit on remand found nothing in either of this Court's opinions that required it even to rethink the case, let alone to reach a different result. The appeals court insisted that *Kindler* and *Martin* were just the same old same-old: mere reiterations of the "the long-existing standard" for applying the adequate state grounds doctrine. App. 19. Thus the court did not defer to the state supreme court's understanding of its own rule. The court did not look to the parallel development of the federal fugitive forfeiture rule. The court did not consider whether the Pennsylvania rule in any way operated to put federal claims at a disadvantage. Instead the circuit adopted its own revisionist history of the state rule, declared it a break from the past and therefore not "firmly established," and once again threw out Kindler's well-deserved sentence for torturing and murdering a judicial witness.

This dismissive response to the precedent provided by this Court should be corrected. The unusual nature of the default here makes the case all the more worthy of review. If the Third Circuit is unwilling to honor a legitimate default even in circumstances that cry out for it, then it is clear that the court remains wedded to a misperception of its

role in applying the adequate state grounds doctrine in the habeas context.

A. Beard v. Kindler*: deference to general state procedural rules that are "substantially similar" to federal rules.*

In *Beard v. Kindler* this Court granted review in order to reexamine the operation of the adequate state grounds doctrine in the particular context of discretionary state procedural rules. The Court's "narrow" holding was that such rules can serve as an adequate ground to bar federal habeas review. 130 S. Ct. at 618; App. 35.

But that was just the first paragraph of the Court's analysis. The rest of the opinion provided the rationale for the holding. The Court noted that application of the adequate state grounds doctrine on habeas review must be motivated by "federalism and comity concerns." State procedural rules, like federal rules, are often phrased in general terms to allow the rule to develop in response to "numerous, variable and subtle factors." "It would seem particularly strange," therefore, "to disregard state procedural rules that are substantially similar to those to which we give full force in our own courts," 130 S. Ct. at 618; App. 36-37. As Justice Kennedy further explained in his concurring opinion, "a proper constitutional balance ought not give [a] federal court[ ] latitude in the interpretation and elaboration

of its law that it then withholds from the States." 130 S. Ct. at 620; App. 43.

Thus, while *Kindler* may not have thrown out the "firmly established" standard, it certainly provided a new understanding of what the standard meant and how it should be applied. That is presumably why the Court remanded "for further proceedings consistent with this *opinion*." 130 S. Ct. at 619; App. 39 (emphasis supplied).

The court of appeals declined to take that message. When the Commonwealth urged the circuit to consider the core requirement of the state's rule, as it developed through case law, and to look at the similar development and operation of the federal forfeiture rule, the response was adamant. "We disagree," held the appeals court. App. 19. "The standard remains whether the state rule is firmly established and regularly applied." App. 20.

Indeed the circuit court effectively went even further, suggesting that there was no real basis for reconsideration at all. Ignoring the relevant language from its own prior opinion, which this Court quoted in its opinion,[6] the circuit denied that it had

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[6]"The [Third Circuit] thus determined that '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 (continued...)

ever held the state rule inadequate on the ground that it was discretionary. App. 17. In other words, the issue on which this Court granted certiorari and wrote a full opinion *did not exist.* That would make this Court's decision, quite literally, an advisory opinion issued in violation of Article III jurisdictional constraints.

Had the court of appeals paid proper mind to this Court's opinion instead of minimizing it, the rest would have been easy. The Pennsylvania Supreme Court made it easy, by providing ample warning on the eve of Kindler's flight. In *Commonwealth v. Passaro*, 476 A.2d 611, 613 (Pa. 1984), "[t]he issue before the Court [wa]s the entitlement of a convicted defendant whose direct appeal has been quashed in consequence of his escape from custody during the pendency of that appeal to reinstatement of his appeal following his recapture."

The supreme court gave an unequivocal answer to the question. Relying on what it called the "forceful" language in *Molinaro v. New Jersey*, 396 U.S. 365 (1970), the court held that, "by choosing to flee and live as a fugitive, a defendant forfeits the right to have his claims considered." 476 A.2d at 615-16. The defendant's subsequent recapture provides

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[6](...continued)
court from reviewing the merits of the claims raised in Kindler's habeas petition.' 542 F.3d at 80." *Beard v. Kindler*, 130 S. Ct. at 617; App. 33-34.

"no basis" for undoing that result. "The question is ... whether his apprehension, which he in no way intentionally assisted, should entitle him to rights already forfeited. We can ascertain no reason in logic or any policy which would support such a conclusion." *Id.* at 616-17. The court thereby rejected the view of the single concurring justice, who contested the impact of *Molinaro*, and would have allowed "discretion" to reinstate if the defendant could show "a compelling reason for having his claim heard." *Id.* at 617 (Zappala, J., concurring).

The date of the opinion was May 25, 1984 – four months before Kindler finished sawing through his Philadelphia prison bars.

Yet the Third Circuit dismissed *Commonwealth v. Passaro* – in a footnote – as irrelevant. The federal court held that *Passaro* was limited by the Pennsylvania Supreme Court's *prior* opinion – some nine years earlier – in another flight case, *Commonwealth v. Galloway*, 333 A.2d 741 (Pa. 1975). In that case the supreme court ruled that it *could* review the claims of a recaptured fugitive. Instead of resolving the conflict in the usual way – by following the later precedent – the Third Circuit chose instead to split the difference. It declared that *Passaro* applied only to dismissed appeals, while *Galloway* controlled in the trial court, up to the point where an appeal was filed. Since Kindler managed to escape while his post-verdict motions were still pending before the trial judge, *Galloway* was the applicable

rule, and Kindler was entitled to exactly what *Passaro* renounced: reinstatement of rights already forfeited. App. 16-17.

The problem is that this distinction between *Galloway* and *Passaro* was entirely invented by the federal court of appeals. It appears nowhere in any decision of the Pennsylvania Supreme Court. In fact the premise on which the Third Circuit bases its distinction – that *Galloway* involved trial stage flight, and *Passaro* involved appellate stage flight – is not even true. The defendant in *Galloway* escaped *twice:* once at the trial stage, and then again during appeal. Thus there is no factual distinction between the two cases.[7]

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[7]Indeed, at the time of the events in question here, *not even the Third Circuit itself* believed that there was any meaningful distinction between *Galloway* and *Passaro*. In *Feigley v. Fulcomer*, 833 F.2d 29, 32 (3rd Cir. 1987), decided while Kindler was at large in Canada, the court of appeals held that

> [w]e need not speculate about the nuances of difference between *Galloway* and *Passaro*.... Feigley does not contend that he escaped with the intention to return in the future and in reliance on *Galloway* resubmit his claims to the Pennsylvania courts.... [I]t is not necessary that the petitioner have knowledge of the precise impact of his decision to escape. It is enough that he obviously knew that by attempting an escape which he hoped would be permanent, he was deliberately bypassing the entire legal system.

(continued...)

As the Pennsylvania Supreme Court understood, the real dispute was not about the exact stage at which the defendant happened to flee; it was about whether to permit discretion to reinstate forfeited rights if the defendant happened to get caught. That was the point of contention between the majority and concurring opinions in *Passaro*, and that was the issue that played out in a series of state supreme court cases decided over the next decade.[8]

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[7](...continued)

Only after a decade had passed – years after Kindler's escape, extradition, and appeal – did the Third Circuit change its mind and concoct its current conglomeration of the *Galloway* and *Passaro* opinions. *Doctor v. Walters*, 96 F.3d 675 (3rd Cir. 1996).

Of course, neither Kindler nor the Pennsylvania courts could have known that the Third Circuit would subsequently break from its previous decision and impose a novel interpretation of the Pennsylvania rule.

[8]*See, e.g., Commonwealth v. Ciotti*, 483 A.2d 852 (Pa. 1984) (reversing Superior Court – the intermediate appellate court – for failing to quash fugitive's appeal; Zappala, J., concurring in result but reiterating his position in *Passaro*); *Commonwealth v. Luckenbaugh*, 550 A.2d 1317 (Pa. 1988) (reversing Superior Court for reinstating appeal of defendant who fled during post-verdict motions but was later recaptured; citing *Passaro*; Zappala, J., dissenting); *Commonwealth v. Craddock*, 564 A.2d 151 (Pa. 1989); (affirming Superior Court opinion at 535 A.2d 1189, holding that defendant forfeited his claims by fleeing during jury deliberations, although he was recaptured one month later); *Commonwealth v. Maxwell*, 569 (continued...)

None of that, however, could legitimately have mattered to Joseph Kindler in the summer of 1984. There was no need to "speculate about the nuances of difference between *Galloway* and *Passaro.*" *Feigley v. Fulcomer*, 833 F.2d at 32; the general rule was apparent. Whatever the past or future course of development of Pennsylvania fugitive forfeiture doctrine, Kindler was on notice, loud and clear, that his escape options were in conflict with his legal options. He decided to go with cut-and-run.

Ironically, it was Kindler's own appeal – once his flight finally failed – that marked a shift toward lenience in Pennsylvania law. This time around the Pennsylvania Supreme Court looked not only to *Molinaro*, but to a more recent flight case, *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993), decided by this Court during the years between

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[8](...continued)
A.2d 328 (Pa. 1989) (dismissing appeal where defendant fled during appeal and was recaptured next day; Zappala and Nix, JJ., dissenting from court's reliance on *Passaro*); *Commonwealth v. Judge*, 609 A.2d 785 (Pa. 1992) (forfeiting claims of escaped fugitive in reliance on *Passaro*; Zappala, J., dissenting on basis of his concurrence in *Passaro*); *Commonwealth v. Jones*, 610 A.2d 439 (Pa. 1992) (escape at any time after trial acts as irrevocable, per se forfeiture, citing *Passaro*; Zappala and Cappy, JJ., dissenting, would allow reinstatement for compelling reasons); *In Interest of Thomas*, 626 A.2d 150 (Pa. 1993) (recapture provides no basis for reinstatement of appeal rights, reaffirming *Passaro*; Cappy, J., dissenting).

Kindler's escape and his appeal. While the state court recognized that the supervisory decision in *Ortega-Rodriguez* was not binding on the states, it chose to follow this Court's lead and adopt *Ortega*'s more forgiving approach to former fugitives. Accordingly, the state supreme court did not require a mandatory penalty, holding instead that forfeiture was appropriate only where the flight had affected the appellate process and the sanction was reasonable under the circumstances. App. 111-13. In the end, therefore, Kindler actually *benefitted* from the development of state law that began after his escape.

But that was not good enough for the Third Circuit. In the federal court's view, the state rule was still not *sufficiently* discretionary. The court complained that "the rule applied to bar Kindler's appeal was hardly discretionary in the usual sense of the term," because the state court guided that discretion by requiring reasonableness and a connection between the flight and the appellate process. According to the circuit court, such guidance is a *bad* thing, because it allegedly "amounts to a mandatory rule with narrow conditions." "Worse," continued the court, the "appellate standard of review is sharply deferential," making it too hard to reverse a lower court's decision to impose (but also, of course, not to impose) forfeiture. App. 18-19.

These criticisms of the state rule are simply dumbfounding. The limitations on forfeiture adopted

in Kindler's case worked to the *advantage* of defendants, not to their detriment. And the fact that a rule has "conditions" does not mean there is no discretion. Especially when the "conditions" come down to the wide-open question of whether the sanction is reasonable. That broad standard is exactly what *creates* the opportunity for discretion. Similarly, the fact that a reviewing court must be "sharply deferential" to an exercise of discretion does not mean there is no discretion. The whole point about discretion is that different judges can come to different conclusions. The limited review is exactly what *protects* the exercise of discretion.

But the real mind-boggler is why it even matters. Why must we ascertain the degree of discretion in a state's fugitive forfeiture rule in order to assess its adequacy? As the Third Circuit itself recognized once upon a time, an escaping prisoner *isn't planning on coming back.* He makes no calculations about whether he will have a compelling reason to seek reinstatement if he is recaptured. And even if clever Mr. Kindler was the exception to that rule, even if he had pondered from the beginning the excuse he would offer to justify his escape, what difference would it make? What was he going to say? That it was his "religious duty?" That didn't even work in Canada.

All these difficulties could have been avoided simply by following this Court's admonition in *Kindler*: habeas courts may not disregard state

procedural rules that are substantially similar to federal rules given full force in federal court.

The obvious analogue for this case is the federal fugitive forfeiture rule. For nearly a hundred years, the rule as enunciated by this Court consisted solely of a small handful of one- and two-paragraph opinions in which the Court announced that it had discretion to dismiss the appeal of a fugitive, without discussing any guidelines for the exercise of such discretion. In each case the Court, without further explanation, then deferred dismissal to allow the fugitive an opportunity to surrender himself. *Smith v. United States,* 94 U.S. 97 (1876); *Bohanan v. Nebraska,* 125 U.S. 692 (1887); *Eisler v. United States,* 338 U.S. 189 (1949).

Then in *Molinaro v. New Jersey*, 396 U.S. 365 (1970), the Court for the first time flatly declared that flight "disentitles" the defendant from a determination of his claims. This time, without prior warning, the Court dismissed the case immediately, with no opportunity to purge the forfeiture through surrender.

Then, a quarter century later, recognizing that many lower federal courts had understood *Molinaro*'s disentitlement language to be mandatory, the Court altered course again in *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993). This time the Court cautioned that forfeiture is not automatic, while leaving entirely to the lower courts the task of

developing more specific standards, if they so desired. *Id.* at 250 n.23, 251 n.24.

Yet no one, to the Commonwealth's knowledge, has ever suggested that federal fugitives lack sufficient guidance as to the consequences of escape, and may therefore renew their appeals with impunity in the unfortunate event that they are recaptured. If the federal courts honor their own rule, with all its uncertainties, how can they possibly reject Pennsylvania's?

B. Walker v. Martin*: deference to state procedural rules that provide "foreseeable requirements" and do not "discriminate against claims of federal rights."*

This Court again addressed the adequate state grounds doctrine in *Walker v. Martin*, 131 S. Ct. 1120 (2011). The specific context, as in *Beard v. Kindler*, was a discretionary state procedural rule. As in *Kindler*, however, the Court's reasoning went beyond the particular rule in question, enlarging on the Court's earlier opinion in this case. The Third Circuit ignored all of it.

Like *Kindler*, *Martin* is an explication of the Court's "firmly established" test for assessing adequacy. But the Court added or, perhaps more accurately, restored significant elements that have been lacking in the analyses carried out by many lower federal courts. Uncertainty, cautioned the

Court, is not enough to render a rule inadequate. 131 S. Ct. at 1130. Citing WRIGHT & MILLER,[9] the Court described "novel" state rules as those that impose "unforeseeable requirements without fair or substantial support in prior state law." *Id.* The danger of such unforeseeable requirements, as the *Martin* Court repeatedly stressed, is that they may be used to "discriminate" against assertions of federal rights. *Id.* at 1125, 1130, 1131.

The Third Circuit was fully aware of *Martin*, which was issued over two months before the circuit's most recent decision in this case. Indeed the court of appeals cited *Martin*, both at the beginning and the end of its analysis. But on each occasion the circuit treated this Court's opinion as support for the proposition that the adequacy doctrine remains *completely unchanged.* App. 10, 19-20. As with this Court's opinion in *Kindler*, the court of appeals refused to engage with the actual reasoning of the precedent it was bound to apply.

Then again, there wouldn't have been much to say. Kindler can hardly claim that the Pennsylvania fugitive forfeiture rule, whatever its precise status at any exact moment in time, imposed any unforeseeable requirements on him. The only requirement the rule ever imposed on litigants was

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[9] 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4026 (2nd ed. 1996).

not to escape from prison. Kindler surely knew how to do that.

Nor could he conceivably make out a claim that a rule providing for fugitive forfeiture discriminates against assertions of federal rights. Again, Kindler could have completely avoided any possibility of such a forfeiture by doing one simple thing: staying put. And, as noted when this case was previously before this Court, the Pennsylvania Supreme Court has frequently entertained federal claims identical to those on which the Third Circuit would grant sentencing relief here. Indeed, the state supreme court has itself granted relief on those claims in at least sixteen cases.[10]

All Kindler had to do to secure review of his federal claims was follow the state rule. All the Third Circuit had to do to uphold the state court default was follow this Court's precedent.

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[10]*See* Brief for Petitioners at 28-29 n.21, *Beard v. Kindler*, 130 S. Ct. 612 (2009) (No. 08-992); Reply Brief for Petitioners at 14, *Beard v. Kindler*, 130 S. Ct. 612 (2009) (No. 08-992).

C. *Deference for adequate state grounds is at least as important as deference for merits rulings under § 2254(d).*

As this Court held over a century ago, escape is "a contempt of authority, to which no court is bound to submit." *Allen v. Georgia*, 166 U.S. 138, 141 (1897). Except, apparently, for the Pennsylvania courts. Thanks to the Third Circuit's unwarranted invocation of the adequate state grounds doctrine, the state courts were stripped of their ability to penalize a capital defendant's flight. They were reduced, like the judge in Montreal, to the "academic" act of imposing a symbolic prison sentence that Kindler would never have to serve.

This past Term the Court has gone to unusual lengths to enforce the deference provision of the federal habeas corpus act, 28 U.S.C. § 2254(d). *See, e.g.*, *Premo v. Moore*, 131 S. Ct. 733 (2011); *Harrington v. Richter*, 131 S. Ct. 770 (2011); *Felkner v. Jackson*, 131 S. Ct. 1305 (2011); *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).[11] As this case illustrates, it is essential that the Court enforce

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[11]Although perhaps the Court's efforts have not been dramatic enough to affect the Third Circuit's application of § 2254. *See, e.g.*, Petition for Writ of Certiorari, *Beard v. Lambert*, No. 11-38 (U.S., filed July 5, 2011); Petition for Writ of Certiorari, *Wetzel v. Abu-Jamal*, No. 11-____ (U.S., filed July 8, 2011).

similar deference under the adequate state grounds doctrine.

Indeed, improper nullification of a state procedural rule will in many instances prove even more intrusive than the overturning of an individual state court merits ruling in violation of § 2254. A declaration of inadequacy often means the abrogation of an entire class of procedural defaults, affecting dozens of cases on federal habeas review. While this Court's recent opinions in *Kindler* and *Martin* address the problem, the Third Circuit, in this and other cases, appears ready to distinguish away these precedents into irrelevance.[12]

If a federal court can rewrite state supreme court decisions to its liking, brush aside the mandate of this Court to reconsider its prior ruling, and wipe out the most egregious of all procedural defaults, that is not deference; it is habeas gone wild. Review is warranted.

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[12] *See, e.g., Nolan v. Wynder*, 363 Fed. Appx. 868, 872 n.3 (3rd Cir. 2010) (unpublished) (*Beard v. Kindler* "does not alter" the prior standard); *Williams v. Beard*, 637 F.3d 195, 221 (3rd Cir. 2011); *Lark v. Secretary, Pennsylvania Dept. of Corrections*, 2011 U.S. App. LEXIS 12107, *45-46 (3rd Cir., filed June 16, 2011).

Conclusion

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

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