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Inadequacy in the **Commonwealth**

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Thursday, November 19, 2009

Dr. Robert M. Howard

POLS 4130

American Constitutional Law

Term Paper

On November 2, 2009, oral arguments were heard by the United States Supreme Court in the case of *Beard v. Kindler*, 129 S. Ct. 2381 (U.S. 2009) (United States 2). After appealing the Third Circuit Court's decision in *Kindler v. Horn*, 542 F.3d 70 (U.S. App. 2008), the Commonwealth of Pennsylvania was granted certiorari by the U.S. Supreme Court who will answer the following question in: "Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine -- and therefore unenforceable on federal habeas corpus review -- because the state rule is discretionary rather than mandatory?" (Petitioner 1). Although the petitioner, Jeffrey A. Beard, as well as the respondent, Joseph J. Kindler, both argue that a discretionary state procedural rule is not automatically inadequate under the adequate state grounds doctrine, the two parties argue different ideas to support their claim.

In order to answer this question, there are important elements that first must be taken into consideration; such as the history of the respondent's cases that have brought *Beard v. Kindler*, 129 S. Ct. 2381 to the Court, as well as taking into account the central concept at hand – the adequate state grounds doctrine. From there one can then be free to take a position in the case, in support of either the petitioner or the respondent. However, for the purpose of this paper as well as my own opinion on the matter, I am in favor of the respondent, Joseph Kindler. I will provide evidence and precedent in support of the respondent's claims that the Third Circuit did not hold an umbrella judgment that all discretionary state procedural rules are inadequate, but rather, that the Pennsylvania Fugitive Forfeiture rule as well as the Pennsylvania Relaxed Waiver rule, was inadequate under the adequate state grounds doctrine because it was not firmly established or regularly applied to bar Kindler from federal habeas corpus review. After identifying why the

respondent has the legally correct position in this case, I will close this paper by identifying three judicial decision-making models that will help predict how each of the U.S. Supreme Court justices will vote in this case based on the analysis of each justice's individual judicial philosophy.

In order to understand the question presented to the U.S. Supreme Court as well as one of the components the U.S. Supreme Court justices will think about when deciding this case is an overview of Kindler's cases that have led to *Beard v. Kindler*, 129 S. Ct. 2381, and the question at hand. After being convicted of first degree murder and other related charges, in November of 1983, Kindler moved for a new trial because he had inadequate council (Respondent 2). Then, "On September 19, 1984, before formal sentencing and resolution of the post-verdict motions, Kindler escaped from the county jail and fled to Canada" (Respondent 2). In response to Kindler's fugitive status, "The Commonwealth moved to dismiss the post-verdict motions" (Respondent 2). The Commonwealth's motion for dismissal was decided and "On October 23, 1984, the trial court dismissed the post-verdict motions due to Kindler's escape and 'current status as a fugitive from justice'" (Respondent 2).

When Kindler was returned to Pennsylvania in September 1991, "He moved to reinstate the post-verdict motions" (Respondent 2) that had been dismissed in October 1984 due to his fugitive status. Kindler's motion was denied by the trial court on October 3, 1991, because he "...had los[t] all legal right and privileges for post-trial motions" (Respondent, 2).

Then, on October 22, 1991 Kindler appealed the trial court's ruling that denied his motion for reinstatement of the post-verdict motions (Respondent 2). On appeal, presided by a new judge, the court upheld both of its previous rulings, dismissing Kindler's case because of his fugitive status as well as denying Kindler's motion to reinstate his post-verdict motions

(Respondent 2). In the judge's written opinion for the case, although he upheld the denial of reinstatement, the judge indicated, "...that the better practice would have been to consider the post-verdict motions, particularly in light of the death sentence imposed..." (Respondent 2).

In response to the judge's written opinion, Kindler filed for direct appeal based on "...trial court errors and prosecutorial misconduct. Kindler also argued that his claims - - whether or not well preserved - - should be reviewed because in capital cases the Pennsylvania Supreme Court 'has traditionally permitted a relaxed standard of waiver...'" (Respondent 2, citing *Commonwealth v. Kindler*, 639 A.2d 1 (Pa. 1994)). However, the Pennsylvania court refused to "...review any of Kindler's issues and did not address his 'relaxed waiver' argument" (Respondent 2, citing *Commonwealth*, 639 A.2d 1).

Taking complete advantage of the judicial process, "Kindler moved for rehearing, arguing that refusing to review his claims..." and "...that in capital cases, the Pennsylvania Supreme Court 'has always permitted a relaxed doctrine of waiver with respect to the failure to advance claims in post-verdict motions..." (Respondent 2). The court denied rehearing (Respondent 2).

Then, "On January 11, 1996, Kindler filed a petition for relief under Pennsylvania's Post-Conviction Relief Act, 42 Pa. C.S. §§ 9541 *et seq.* ('PCRA')" (Respondent 2). After the Commonwealth motioned to dismiss Kindler's petition for PCRA relief, "...asserting that Kindler's pre-sentencing flight waived his rights, precluding PCRA review. The trial court dismissed the PCRA petition, interpreting the direct appeal decision as a ruling that there was a 'waiver of all issues'" (Respondent 2). In addition to the court's dismissal of the PCRA petition, "The court also stated that claims not raised on direct appeal were 'waived'" (Respondent 2).

Kindler then appealed to the Pennsylvania Supreme Court,

“...arguing that there was no connection between his flight and the court’s ability to review his post-conviction claims; that the Pennsylvania Supreme Court had ‘irregularly and inconsistently applied’ fugitive-forfeiture; and that refusal to consider his claims ‘would be inconsistent with’ the court’s practice of ‘relaxed waiver in capital cases’” (Respondent 2-3).

Denial of Kindler’s relief was affirmed by the Pennsylvania Supreme Court in *Commonwealth v. Kindler*, 722 A.2d 143 (Pa. 1998), with the court stating

“...that Kindler’s arguments for review were ‘previously litigated in his 1994 appeal to this Court,’ ...and that the relaxed waiver practice did not apply because his ‘act of becoming a fugitive . . . resulted in the forfeiture of the right to review those claims’” (Respondent 3, citing *Commonwealth*, 722 A.2d 143 at 147, 148 n.13).

Having exhausted all his appellate options in state court, “Kindler sought federal habeas corpus relief” (Respondent 3). In *Kindler v. Horn*, 291 F. Supp. 2d 323, 342-43 (E.D. Pa. 2003), Kindler argued to the District Court,

“...that the state court rulings were not adequate to preclude federal review both because of Pennsylvania’s novel application of fugitive-forfeiture in his case, and because of the Pennsylvania Supreme Court’s failure to follow its practice of relaxed waiver in capital cases” (Respondent 3).

After considering Kindler’s claims, “The District Court found the state court fugitive-forfeiture ruling inadequate under *Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996)” (Respondent 3). The District Court then “...granted penalty-phase relief due to Eighth Amendment error under *Mills v. Maryland*, 486 U.S. 367 (U.S. 1988) The Commonwealth of Pennsylvania appealed the District Court’s ruling to the Third Circuit (Respondent 3). “On appeal, the Third Circuit

unanimously affirmed on procedural default and on the *Mills* claim; reversed the prosecutorial misconduct; and held counsel was unconstitutionally ineffective at capital sentencing” (Respondent 3, citing *Kindler*, 542 F.3d). This continuous appellate process, starting in 1984, has now reached the United States Supreme Court in the case of *Beard v. Kindler*, 2009, asking the Court, “Is a state procedural rule automatically ‘inadequate’ under the adequate-state-grounds doctrine -- and therefore unenforceable on federal habeas corpus review -- because the state rule is discretionary rather than mandatory?” (Petitioner 1).

Before taking a position on the question or supporting either of the parties, it is crucial to understand concept that the question is based on, the adequate state grounds doctrine. The reason for this doctrine is that it “...prevents a federal court from considering the merits of a prisoner's case where a state court has found that the prisoner's claims are waived by an independent and adequate state procedural rule” (Chen 3). The adequate state grounds doctrine was also created “...to protect federal right from arbitrary infringement by state courts and ensure uniformity of federal law, while respecting state courts’ disposition of state-law issues” (Respondent 10).

In order for a state procedural rule to be adequate and thus bar federal rule, it must be “...firmly established and regularly followed at the time at which it is to be applied” *James v. Kentucky*, 466 U.S. 341, 348-351, 80 L. Ed. 2d 346, 104 (S. Ct. 1830). This means “...rules that are novel fail the adequacy test...” (Respondent 11, citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (U.S. 1991)). “Furthermore, the adequacy of the rule is determine by the law in effect at the time of the asserted waiver, not when the petitioner subsequently seeks review in federal court” (*Doctor v. Walters*, 96 F.3d 675 (3d Cir. 1996)). The reverse side of this doctrine holds that state procedural rules are inadequate and cannot support a judgment if they are “...arbitrary,

unforeseen, or otherwise deprive the litigant of a reasonable opportunity to be heard, ...or impose an undue burden on the ability of litigants to protect their federal rights” (Adequate 3). Understanding the adequate state grounds doctrine as well as the events that have led to this case, it is now appropriate to consider the question that the petitioner asked the Court, “Is a state procedural rule automatically “inadequate” under the adequate-state-grounds doctrine -- and therefore unenforceable on federal habeas corpus review -- because the state rule is discretionary rather than mandatory?” (Petitioner 1).

After considering all of the evidence and thoroughly reading the petitioner and respondent’s briefs, along with the relative case law and precedents, in my opinion, the respondent, Joseph Kindler argued the legally correct position in this case. The U.S. Supreme Court should reaffirm the Third Circuit’s ruling in *Kindler*, 291 F. Supp. 2d 323, 342-43, based on this Court’s adequate state ground precedents.

In response to the petitioner’s question, Kindler correctly interpreted the Third Circuit’s judgment, arguing that “...the Third Circuit did not hold in *Commonwealth*, 542 F.3d 70, 84, nor has it ever held, that all ‘discretionary’ state rules are inadequate” (Respondent 10). Kindler went on to explain that

“...the Third Circuit concluded that Pennsylvania’s changing practices in fugitive cases demonstrate that there was no firmly established and regularly applied state bar rule. The Third Circuit’s holding is fully consistent with this Court’s adequate state ground precedents...” (Respondent 10).

Kindler supports the Third Circuit’s judgment, stating, “This Court’s precedents demonstrate that labels like ‘discretionary and ‘mandatory’ are far less important than actual state court practice” (Respondent 10). Kindler continues to support the Third Circuit’s ruling by identifying the

guidelines the Court uses when considering "...the 'practical operation' of the rule in question..." (Respondent 19, citing *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280 (U.S. 1932)). Kindler identifies two questions that need to be answered in the affirmative in order to determine whether or not a discretionary rule is adequate,

"(1) are there any criteria that guide the exercise of the court's discretion? and (2) how has the rule been applied, *i.e.*, has there been a consistent practice of exercising discretion to allow review of the merits, or not?" (Respondent 19).

Kindler goes on to identify what a purely discretionary rule is, a rule "...that provides no criteria for the court's exercise of its discretion - - is more likely than other rules to be inadequate" (Respondent 19). Purely discretionary rules are more likely to be inadequate because they allow for unregulated discretion, making "...it easier to discriminate against disfavored claims or claimants, thus evading federal review" (Respondent 19). After providing solid guidelines in which the Court is able to determine the adequacy of discretionary rules, based on their own precedents, Kindler connects the discretion the trial court used in his case and provides evidence to support his, and the Third Circuit's claim that the state court bar was inadequate. Kindler specifically states that the trial court

"...applied a rule of unfettered discretion. The Pennsylvania Supreme Court proceeded to affirm the denial of direct review and then the denial of post-conviction review, based on either new criteria that it announced for the first time, a new rule of mandatory forfeiture, or both. Since neither of those rules was in existence at the time Kindler fled, neither was 'firmly established or consistently applied'" (Respondent 20, citing *James*, 466 U.S. at 348).

Based on this information, the Third Circuit made the legally correct ruling when the “...correctly found that the state court bar was not adequate to foreclose federal habeas review of the merits of Kindler’s claims” (Respondent 20).

Not only is Kindler legally correct in his interpretation of what makes a discretionary rule inadequate, but he also provides significant evidence of why the Pennsylvania Fugitive Forfeiture rule that the trial court applied in his case(s), was inadequate. In Kindler’s brief, he took the Pennsylvania Fugitive-Forfeiture rule and measured it against the adequate state grounds doctrine to prove that the Third Circuit was correct in their ruling that

“...the fugitive forfeiture rule was not ‘firmly established’ and therefore was not an independent and adequate procedural rule sufficient to bar review of the merits of a habeas petitioner in federal court” (*Kindler*, 542 F.3d 70, 84).

I fully support Kindler’s arguments as well as the evidence and precedents that he cites to prove his claim that “...the Pennsylvania Fugitive-Forfeiture rule was not firmly established or consistently applied” (Respondent 15).

One of the reasons the Pennsylvania Fugitive-Forfeiture rule was not firmly established was because the state court, after considering but not applying a case that was decided in 1993, nine years after Kindler had escaped, the court held that trial courts had the “...‘authority to dismiss’ post-verdict motions in ‘response to an Petitioner’s flight’” (Respondent 15, citing *Commonwealth*, 639 A.2d 1 at 3). The Pennsylvania Supreme Court then, in *Commonwealth*, 639 A.2d 1 at 3, adopted two new criteria for the court to implement when using this authority “...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” (Respondent 15-16). The court then ruled “...that Kindler did not prevail under this new

standard, which he had not been given the chance to address in the trial court or on appeal” (Respondent 16).

In terms of the adequate state grounds doctrine, applying a court decision that was decided after a fugitive’s flight is inadequate because it was a new rule and because it was not present in 1984 and consequently did not inform Kindler that he could default on his appeal if he fled (Respondent 15-16). Kindler cites *Ford*, 498 U.S. at 411, 423-24, which held that “In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. ‘Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights’” (*Ford*, 498 U.S. at 422). Kindler also cites an opinion explaining the issue of discretionary practice by courts and procedural default (Respondent 18). In an opinion authored by Judge Stapleton in *Campbell v. Burris*, 515 F.3d 172 (3rd Cir. 2008), that

“...the issue is not whether the state procedural default rule leaves room for the exercise of some discretion - - almost all do. Rather, the issue is whether, at the relevant point in time, the judicial discretion contemplated by the state rule 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 way” (Respondent 18, citing *Campbell*, 515 F.3d 172 at 182).

Citing these precedents, Kindler proves that the Pennsylvania Fugitive Forfeiture rule was not adequate because the rule that the state court applied in Kindler’s cases was not firmly established and therefore was inadequate to preclude him from federal habeas corpus relief.

Kindler also provides critical evidence in support of his second argument, that the Pennsylvania Fugitive Forfeiture rule was inadequate because it had not been consistently

applied. Kindler points to the Third Circuit's ruling which they based on *Doctor*, 96 F.3d 675 (Respondent 17, citing *Kindler*, 542 F.3d 70, 84). The Third Circuit relied on *Doctor*, 96 F.3d 675, when they decided *Kindler*, 542 F.3d 70, 84, because "...the same sequence of events required the same outcome" (Respondent 18). *Doctor* was fugitive who escaped in 1986 and was returned to custody before "...his appeal was initiated or dismissed" (*Kindler*, 542 F.3d 70, 84). In *Doctor*, 96 F.3d 675, the court ruled "...the fugitive waiver rule as applied in this case was not an independent and adequate state procedural rule...." The court ruled in *Doctor*, 96 F.3d 675, that the fugitive waiver rule was inadequate because

"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" (*Doctor*, 96 F.3d 675).

The Third Circuit established in *Doctor*, 96 F.3d 675, that when *Doctor* escaped in 1986, "...Pennsylvania court's had discretion to hear an appeal '...if the defendant [was] returned to custody while his appeal [was] pending...'" (Respondent 17; *Doctor*, 96 F.3d at 675). In *Kindler*, 542 F.3d 70, 84, the Third Circuit stated that concerning the issue of adequate state rules, that "...the adequacy of the rule is determined by the law in effect at the time of the asserted waiver, not when the petitioner subsequently seeks review in a federal court" (*Kindler*, 542 F.3d 70, 84, citing *Doctor*, 96 F.3d at 684). Since Pennsylvania courts had this discretion in 1986, they also had this discretion two years earlier when *Kindler* escaped. Therefore, because the courts in 1984 did have discretion to hear a fugitive's appeal if the appellate process had not

yet begun, the trial court should have reinstated Kindler's post-verdict motions, but instead, the court applied a mandatory rule and dismissed the post-verdict motions.

The evidence Kindler provides concerning the Third Circuit's judgments in both *Kindler*, 542 F.3d 70, 84 and *Doctor*, 96 F.3d at 684, supports Kindler's argument that the Pennsylvania Fugitive Forfeiture rule was not consistently applied and therefore, was inadequate to bar him of federal habeas review. These inconsistencies, as they were applied to Kindler, made the state procedural rule inadequate to bar Kindler of federal habeas corpus review. One of the inconsistencies in how the state courts applied the Pennsylvania Fugitive Forfeiture rule is that the state courts did not treat similarly situated individuals the same, *i.e.* Doctor and Kindler. In addition to this evidence, Kindler provided another inconsistency in the state courts rulings; that the courts changed from applying a discretionary rule that was present in 1984, to a mandatory rule in 1991.

Kindler argued that the state court was inconsistent in their application of the Pennsylvania Fugitive Forfeiture rule and therefore, the rule was inadequate to bar Kindler from federal habeas corpus review (Respondent 16). Going through how the state courts ruled in Kindler's cases, it is quite clear that the court applied discretion in an inconsistent manner (Respondent 16). In Kindler's, the Respondent's, initial brief to the U.S. Supreme Court, it explains how the state courts

“(a) applied a mandatory rule to dismiss post-verdict motions; (b) applied a rule of standardless discretion to deny reinstatement of post-verdict motions; (c) affirmed the denial of direct review on the basis of two new rules applying different forms of guided discretion; and (d) denied post-conviction review on the ground that the applicability of

fugitive-forfeiture to post-conviction proceedings had previously been litigated, even though post-conviction review had not previously been sought” (Respondent 16).

Reviewing the state courts’ application of discretion, or lack of thereof in some cases, clearly shows that the discretion the court used for this rule was obviously inconsistent and therefore the rule is adequate under the adequate state grounds doctrine.

Going further, Kindler asserted that, aside from the inadequacy of the Pennsylvania Fugitive Forfeiture rule, another state procedural rule was inadequate, the Pennsylvania Relaxed Waiver (Respondent 20). Kindler raised the following argument “In the District Court, Third Circuit and in his Brief in Opposition to certiorari review...” but since the Third Circuit found that the fugitive rule was inadequate, they did not address this issue (Respondent 20). The Pennsylvania Relaxed Waiver rule, as it was used in capital cases, reviewed the merits of almost all issues that were brought up in capital direct appeals as well as those raised in post-conviction proceedings and regularly applied a “relaxed waiver” to several issues in the same case (Respondent 20). “The Pennsylvania Supreme Court’s deviation from its relaxed waiver practice renders its refusals to consider Kindler’s claims an inadequate state ground. ...“Thus, there is no adequate state ground here even aside from the inadequacy relating to fugitive-forfeiture” (Respondent 20).

Kindler cites precedent upon precedent to support his claim that like the Pennsylvania Fugitive Forfeiture rule, the Pennsylvania Relaxed Waiver rule was also inadequate under the adequate state grounds doctrine. Applying a relaxed waiver in capital cases was first used in 1978 by the Pennsylvania Supreme Court (Respondent 20). The relaxed waiver “...firmly established that a claim of constitutional error in a [Pennsylvania] capital case would not be waived by a failure to preserve it” (Respondent 20, citing *Bronshtein v. Bronshtein*, 404 F.3d 700

at 708 (U.S. App. 2005) (quoting *Szuchon v. Pennsylvania Dept. of Corrections*, 273 F.3d 299 at 326 (U.S. App. 2001))). Kindler goes on to state in his brief that,

“This practice remained in effect for twenty (20) years, including through filing of the briefs and submission of the case to the Pennsylvania Supreme Court in Kindler’s post-conviction appeal. Because the relaxed waiver practice was ‘made broadly available’ to capital defendants by the Pennsylvania Supreme Court, both ‘on direct appeal, [and] in the post-conviction context’” (Respondent 20, citing *Commonwealth v. Ford*, 809 A.2d 325 at 326 (U.S. S. Ct. 2002)).

The fact that Kindler was not granted the relaxed waiver in the courts that had regularly and consistently practiced the application of this waiver shows that the rule was an inadequate state procedural rule.

There are two reasons why the Pennsylvania Relaxed Waiver rule was not consistently applied and therefore was inadequate. The first inconsistency is that, as the evidence above shows, the rule did not treat similarly situated individuals the same. Kindler even provides a specific case that shows this inconsistency, stating “...the court had previously followed the relaxed waiver practice in cases of capital defendants who otherwise could have been subject to fugitive forfeiture” (Respondent 21). In the case of *Commonwealth v. Lewis*, 567 A.2d 1376 at 1378 (Pa. 1989),

“...Reginald Lewis and Kindler escaped at the same time, but the Pennsylvania Supreme Court did not apply the same rule to them. Lewis escaped while his appeal was pending, making his appeal subject to being quashed under Pa. R.A.P. 1972(a)(6), and under decisions going back to *Commonwealth v. Galloway*, 333 A.2d 741 (Pa. 1975)” (Respondent 21).

Even though Lewis and Kindler escaped at the same time, in Lewis's case, "...the Pennsylvania Supreme Court reviewed the merits on appeal and again in post-conviction proceedings" (Respondent 21, citing *Lewis*, 567 A.2d 1376 at 1378). Since the Pennsylvania Supreme Court reviewed Lewis's merits but refused to review Kindler's merits, this shows unequal treatment of similarly situated individuals, which violates the "consistently applied" element of the adequate state grounds doctrine, resulting in an inadequate state procedural rule.

Lewis, 567 A.2d 1376, also addresses the second inconsistency that resulted in the Pennsylvania Relaxed Waiver rule being an inadequate state procedural rule. The fact that Kindler and Lewis escaped at the same time but did not receive the same rule of Pennsylvania's Relaxed Waiver, as well as the appeal made by the Commonwealth for this case, *Beard*, 129 S. Ct. 2381, suggests that the Pennsylvania courts did the very thing that the adequate state grounds doctrine was created to prevent. One of the reasons the adequate state grounds was created, with respect to federal habeas corpus review was to "...[prevent] a federal court from considering the merits of a prisoner's case where a state court has found that the prisoner's claims are waived by an independent and adequate state procedural rule" (Chen 3). There is precedent which holds that "State courts may not avoid deciding federal issues by involving procedural rules that they do not apply evenhandedly to all similar cases" (Maybrown par. 23, citing *Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (U.S. S. Ct. 1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (U.S. S. Ct. 1964))). Though this may appear to be what the Commonwealth was trying to do, it is impossible to prove that the Pennsylvania courts did not apply their relaxed waiver rule because they did not favor the Kindler, the possibility that this was the courts' objective at least raises the question of another inconsistent application of the Pennsylvania Relaxed Waiver rule.

It is quite clear that the Pennsylvania courts applied an inadequate state procedural rule in Kindler's cases when they precluded federal habeas corpus review based on the Pennsylvania Fugitive Forfeiture rule and the Pennsylvania Relaxed Waiver rule. I agree with the Respondent that the Pennsylvania courts' application of those two rules were inadequate to bar Kindler from federal habeas corpus review. However, that was not the question that was presented to the U.S. Supreme Court justices. Before analyzing and predicting how each of the justices will rule in this case, there are three judicial decision-making models to consider that identify what justices think about when deciding on a case. Each of these models, the legal, attitudinal, and separation of powers, will help to assess how each justice will rule.

The legal decision-making model "...[seeks] to predict Supreme Court decisions using legal concepts" (Solum sec. 2). "'Legal' models of judicial behavior insist on the primacy of legal doctrine and rule application in determining judicial outcomes" (Heise 839). This judicial decision-making model also states that judges "...use the text of the Constitution as the basis for predicting the outcome of constitutional cases or the text of federal statutes..." for "...questions of statutory interpretation" (Solum sec. 2). Using the legal model, "...this judge aims to interpret the law accurately, without concern for the desirability of the policies that result" (Baum ch.1).

The second judicial decision-making model is the attitudinal model. In this model, "...judicial decisions can, at least in some circumstances, be explained and predicted by the attitudes of judges" (Solum sec. 2). Another part of this model states that "...judges decide cases in light of their sincere ideological values..." and consider those values next to "... the factual stimuli presented by the case" (Segal par. 3). This model holds that one can predict how a judge will rule by considering the judge's ideological views and then placing that judge at

specific point on an ideological line from left to right, with the left most point representing very liberal judges and the right most point representing very conservative judges (Solum sec. 2). Depending on the ideology, judges will act and vote in different ways. For example, "...a conservative judge generally will not decide issues that he or she believes are within the province of legislatures" ("John Paul," West's par. 8). A justice on the conservative end "...typically votes to enhance government power in a conflict between government interests and individual rights" ("John Paul," West's par. 8). On the other end, a liberal judge "...tends to favor individual interests and will look beyond the bounds of a statute and past interpretations of the Constitution to decide social policy questions" ("John Paul," West's par. 8). Although theorists that support the attitudinal model "...[acknowledge] some degree of influence by socioeconomic background variables..." they believe that "It is a judge's ideology – a variable not dictated by socioeconomic background – that influences judge's decisions" (Heise 836).

The last judicial decision-making model to consider is the separation of powers model, also referred to as the strategic model. The separation of powers model maintains that "...judicial decision are best understood as exercises of strategic behavior" (Heise 843). The assumption of this model

"...is that justices, like all economic actors, are forward-looking players with well-defined and stable policy preferences. In their interactions with other policy actors, justices are strategic; when formulating their actions, they consider the potential reactions of their policy competitors – namely Congress, the president, the agencies, and the lower courts" (Bergara 247-248).

The strategic behavior that justices practice “...refers to judges’ actions to maximize their overall benefits in light of their expectations concerning the choices of other actors involved in the decisional process” (Hettinger 125).

In order to determine how the United States Supreme Court will vote on the question they were asked, “Is a state procedural rule automatically “inadequate” under the adequate-state-grounds doctrine -- and therefore unenforceable on federal habeas corpus review -- because the state rule is discretionary rather than mandatory?” (Petitioner 1), it is necessary to consider how each individual justice will vote on this question. Although there are nine justices on the United States Supreme Court, each with their own judicial philosophy, background, and personality, in the case of *Beard v. Kindler*, 129 S. Ct. 2381, “Justice Samuel A. Alito, Jr., took no part in the Supreme Court’s decision to review the case” (Justices par. 7) therefore he will not be considered in this analysis. Keeping the petitioner’s question in mind, the analyses and predictions of the justices will be discussed in order of seniority, beginning with the honorable Chief Justice John G. Roberts, Jr..

Although Chief Justice Roberts is affiliated with the Republican Party, he considered “...conservative by temperament but not necessarily by ideology” (Roberts par. 1). Known to be “...a ‘judicial minimalist,’” Roberts he emphasizes “...respect for precedent rather than a broader, more controversial approach like originalism” (John G. par. 6). Minimalists, like Roberts, “...don’t want the courts getting into deep first principle type questions on contentious social issues. They prefer that the law be changed through narrow rulings and small nudges rather than precedent-setting earthquakes” (Pomper par.14). Roberts has shown a “...consistent commitment to the jurisprudence of judicial restraint,” that he believes is required by “...the institutional role of the courts in our federal system and the scheme of separation of powers” (Whelan par. 9; qtd. in Whelan par. 10).

Given the facts concerning Chief Justice Roberts's judicial philosophy and his record of reliance on precedent, Roberts mostly likely adheres to the legal model of judicial decision-making. However, "In every major case since he became the nation's seventeenth Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff" (Toobin). With that in mind, in regards to *Beard v. Kindler*, 129 S. Ct. 2381, Chief Justice Roberts will likely vote no to the question, due to his strong reliance to precedent, holding that a state procedural rule is not automatically inadequate under the adequate state grounds doctrine because it is discretionary. Furthermore, although it goes against his judicial history on the Court, in regards to affirming the Third Circuit's judgment, Roberts will affirm the Third Circuit's judgment based on precedent, voting in favor of the respondent Joseph Kindler.

Justice John Paul Stevens may be a Republican, but there is much dispute as to what his political ideology really is ("John Paul," NNDB sec. 2). Some say he is one of the "...one of the Court's most liberal members..." (NNDB par. 4). However, others argue that "...he has a pragmatic, independent streak to delve into the interplay of the facts of the case and the constitutional values at state" ("John Paul," Oxford par. 5). As to how Justice Stevens handles the cases that come before him, he generally examines "...the facts of each case carefully on his own merits" ("John Paul," OYEZ par. 6). Another noteworthy fact is that Justice Stevens, "...can usually be counted on to rule in favor of the defendant and against the government in a criminal case brought under one of the provisions of the Fourth, Fifth, or Sixth Amendments" ("John Paul," Oxford par. 7). In terms of judicial decision-making models, Justice Stevens falls somewhere between the legal model and the attitudinal model, but leans more to the latter. As a

result, Justice Stevens will most likely vote no to the question presented and will affirm the Third Circuit's judgment.

Justice Antonin Scalia is a justice with very strong convictions. "A self-proclaimed 'originalist,' Scalia has made a career of fighting what some call judicial activism, in an effort to interpret the U.S. Constitution as it was written by the drafters and not according to the changing times" ("Antonin," Who2? par. 1). Scalia is "Known for his conservative judicial philosophy and narrow reading of the Constitution..." ("Antonin," West's par. 1). Branded an originalist, Justice Scalia is also, "...a prominent proponent of 'textualism,' the idea that one should focus on the text of the U.S. constitution or a law and its original meaning when seeking to interpret it, and that decisions of judges should be based on that original meaning" ("Antonin," Columbia). Following the Constitution and laws so closely, Justice Scalia falls under the legal decision-making model with strong originalist views. Justice Scalia will likely uphold the precedent at the time that Kindler escaped, thereby affirming the Third Circuit's judgment. In regards to the question presented, Scalia will vote no.

Justice Anthony M. Kennedy "...is often referred to as a moderate conservative" ("Anthony," Oxford par. 4). Kennedy decisions in the court on a "...narrow case-by-base..." approach and refuses "...to resort to sweeping conclusions and rhetoric" ("Anthony," OYEZ par. 4). Justice Kennedy's moderate conservative approach puts him under the legal decision-making model. However, because of changes in the Court, beginning in 2007, Justice Kennedy has become the "...main swing vote on the Court" ("Anthony," Columbia). That being said, although difficult to predict, Kennedy will probably vote, like his fellow conservatives Roberts and Scalia, no to the question and affirm the Third Circuit's judgment.

Justice Clarence Thomas, “A quiet presence on the court, he generally follows a predictable pattern in his opinions – conservative, restrained, and suspicious of the reach of the federal government into the realm of state and local politics” (“Clarence,” Britannica). In terms of Justice Thomas’s jurisprudence, it “...involves a unique blend of natural law and natural rights philosophy with the doctrine of originalism...” (“Clarence,” Oxford par.2). Where judicial philosophy is concerned, “Thomas has argued for an originalist or textualist view of the Constitution faithful to that document's text and history” (“Clarence,” Cambridge sec. 5). Thomas, a conservative, has come to be associated with the conservatives on the far right of the Court (“Clarence,” OYEZ par. 9). With his originalist views, the legal judicial decision-making model best identifies Thomas’s approach to deciding how to vote on cases. Maintaining his conservative judicial pattern, as well as his attention to legal precedent, expect Thomas to vote no to the question and will affirm the judgment made in the Third Circuit of the United States Court of Appeals.

Justice Ruth Bader Ginsburg follows Justice Thomas in rank of superiority but not in ideology. Referred to as “...one of the two most liberal justices on the Court...” her “...judicial philosophy does not allow her to stake out truly liberal positions on the Court, even in dissent” (“Ruth,” Oxford par. 11). Although known to be liberal, Justice Ginsburg “...is a judicial moderate in all areas, except those involving gender discrimination...” (“Ruth,” Oxford par. 11). “A member of the Court’s minority moderate-liberal bloc...” Justice Ginsburg favors “...caution, moderation, and restraint” (“Ruth,” Britannica). Even though she is a member of the Democratic Party with a liberal judicial ideology, Justice Ginsburg will “...not hesitate to vote with her conservative colleagues” (“Ruth,” OYEZ par. 6). In terms of how she makes her decisions on the Court, “She avoids historical debates about the meaning of the law...” (“Ruth,”

Oxford par. 8). This evidence suggests that Justice Ruth Bader Ginsburg exercises the attitudinal judicial decision-making model when formulating her opinions on the Court. Accordingly, Justice Ginsburg almost certainly vote no to the question presented to the Court and affirm the Third Circuit's judgment.

Justice Stephen G. Breyer "...is regarded as a cautious, moderate jurist..." ("Stephen," Oxford). Justice Breyer may be on the liberal side of the Court, but he "...remains a non-ideological moderate. He examines each case on its merits and has few fixed positions ("Stephen," Oxford). Although considered "...a cautious, moderate jurist..." Justice Breyer has his own opinions about originalism ("Stephen," Columbia). In 2005, Breyer wrote Active Liberty: Interpreting Our Democratic Constitution,

"...which argues that the intent of the U.S. Constitution is to facilitate the citizens' ability to govern themselves effectively while protecting individual liberties, and that a judicial approach that seeks to be faithful to the original intent of the constitution by focusing on its words alone risks being unfaithful to the documents purpose" ("Stephen," Columbia).

This information suggests that Justice Breyer makes decisions more along the lines of the attitudinal decision-making model. Along with his colleagues, Breyer will vote no to the question and affirm the Third Circuit's judgment.

The final U.S. Supreme Court justice to consider is Justice Sonia Sotomayor. When asked about her judicial philosophy, Justice Sotomayor responded saying,

"It is simple: fidelity to the law. The task of a judge is not to make law, it is to apply the law. And it is clear, I believe, that my record ... reflects my rigorous commitment to interpreting the Constitution according to its terms, interpreting statutes according to their terms and Congress's intent and hewing faithfully to precedents established by the

Supreme Court and by my Circuit Court. In each case I have heard, I have applied the law to the facts at hand" (Mears 1).

Known to be a "...moderate jurist..." studies of her opinions have showed her to rule more conservatively in criminal cases and more liberal when she dissents ("Sonia," OYEZ). Praised by President Obama for the empathy she applies when deciding cases, critics took issue with the very thing that the President applauded ("Sonia," OYEZ par. 3). "Political conservatives voiced strong objections, viewing "empathy" as a euphemistic excuse to ignore legal precedent in favor of liberal policy" ("Sonia," OYEZ par. 3). Michael C. Dorf addressed this issue in an article on FindLaw.com, and stated that "Neither legal realism nor empathy alone constitutes the whole of Judge Sotomayor's judicial philosophy" (Dorf sec. 5). Under these circumstances and because Justice Sotomayor is a new justice on the Court, it appears that she falls between the legal and attitudinal models of judicial decision-making. Although she has a unique way of making her judicial decisions, she will likely vote no to the question, upholding the Third Circuit's judgment.

With the facts of the case and only eight of the nine U.S. Supreme Court justices reviewing the case of *Beard v. Kindler*, 129 S. Ct. 2381, the majority of the Court will almost certainly vote no to the question, "Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine -- and therefore unenforceable on federal habeas corpus review - - because the state rule is discretionary rather than mandatory?" (Petitioner 1). Because both the petitioner and the respondent also answer this question in the negative, as well as in consideration of precedent, the U.S. Supreme Court will be unanimous in their vote and affirm the Third Circuit's judgment.

In the case of *Kindler v. Horn*, 542 F.3d 70, the Third Circuit's judgment was correct that the Pennsylvania Fugitive Forfeiture rule was inadequate to bar Joseph Kindler federal habeas corpus review because the rule was not firmly established or consistently applied. Based on the series of events and when they took place, the adequate state grounds doctrine, numerous precedents and evidence in support of his claims, Joseph Kindler's arguments correctly answered the legal question presented to the Court in *Beard v. Kindler*, 129 S. Ct. 2381, when he said no, state procedural rules that are discretionary are not automatically inadequate. Kindler also accurately cited numerous precedents that supported his assertion that both the Pennsylvania Fugitive Forfeiture rule as well as the Pennsylvania Relaxed Waiver rule, was inadequate to bar him from federal habeas corpus relief, which is why I completely agree with and support Kindler's arguments in this case. Furthermore, I maintain that, based on the three judicial decision-making models – legal, attitudinal, and separation of powers – and each justice's judicial philosophy, the eight justices taking part in this case will unanimously uphold the Third Circuit's judgment by voting no to the question that was presented, which asked: "Is a state procedural rule automatically "inadequate" under the adequate-state-grounds doctrine -- and therefore unenforceable on federal habeas corpus review -- because the state rule is discretionary rather than mandatory?" (Petitioner 1).

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