Nos. 13-3817, 13-3853, 13-3854, 13-3855, 13-4070, 13-4269, 13-4325

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IN RE: PROCEEDING IN WHICH THE COMMONWEALTH OF PENNSYLVANIA SEEKS TO COMPEL THE DEFENDER ASSOCIATION OF PHILADELPHIA TO PRODUCE TESTIMONY AND DOCUMENTS AND TO BAR IT FROM CONTINUING TO REPRESENT DEFENDANT MITCHELL IN COURT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (No. 2:13-cv-1871-MAM)

BRIEF AND APPENDIX OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the only national bar association working solely in the interest of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL was established to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 13,000 members nationwide, joined by 90 state, local, and international affiliate organizations with a total of more than 35,000 members. The Pennsylvania Association of Criminal Defense Lawyers ("PACDL") is a professional association of more than 800 attorneys admitted to practice before the Supreme Court of Pennsylvania who are actively engaged in providing criminal defense representation. Collectively, *amici*'s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges who are committed to preserving fairness and due process in the criminal justice system.

This Court has often permitted NACDL and PACDL to appear as *amici curiae* in important cases, as have the United States and Pennsylvania Supreme

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[1] The Commonwealth of Pennsylvania and the Defender Association of Philadelphia have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. *See* Fed. R. App. P. 29(a), (c)(5).

Courts. *See, e.g.*, *Fernandez v. California*, 134 S. Ct. 1126 (2014); *United States v. Katzin*, 732 F.3d 187 (3d Cir.), *reh'g en banc granted*, 2013 U.S. App. LEXIS 24722 (3d Cir. 2013); *Banks v. Horn*, 316 F.3d 228 (3d Cir. 2003), *rev'd sub nom.*, *Beard v. Banks*, 542 U.S. 406 (2004); *Commonwealth v. Hansley*, 47 A.3d 1180 (Pa. 2012). *Amici* have a particularly significant interest in guaranteeing that death-sentenced prisoners are vigorously represented at all stages of their criminal and postconviction proceedings, in both State and federal court. *See, e.g.*, *Maples v. Thomas*, 132 S. Ct. 912 (2012); *Commonwealth v. Haun*, 32 A.3d 697 (Pa. 2011). Because in this action the Commonwealth seeks to unfairly handicap indigent capital habeas petitioners by denying them the zealous representation of the Federal Community Defender Organization ("FCDO") unit of the Defender Association of Philadelphia in State court Post-Conviction Relief Act ("PCRA") proceedings, *amici curiae* file this brief in support of the FCDO. *Amici* trust that the parties will address fully the technical legal issues raised by the appeal, but write to ensure that this Court decides those issues with a full appreciation of the state of legal representation in Pennsylvania postconviction proceedings and its bearing on meaningful federal habeas review.

SUMMARY OF ARGUMENT

The FCDO's practice of accepting its clients' requests to appear in PCRA proceedings is sensible and sound, and this Court should reject the

Commonwealth's attempt to interfere with it. As *amici* explain herein, *see infra* 5-19, by representing its clients in State court, the FCDO protects its clients' federal habeas claims from dismissal on technical grounds relating to their PCRA proceedings, such as the failure to exhaust state remedies, procedural default, or the filing of an untimely petition. Moreover, by litigating in State court, the FCDO establishes the record and set of claims that will be reviewed in federal court, and thus lays the foundation for their clients' eventual federal habeas petitions.

And there is good reason that the FCDO accepts its clients' requests to litigate these PCRA actions, rather than leave them to appointed State postconviction counsel. Three of Pennsylvania's seven Supreme Court justices recently wrote of there being "much evidence that Pennsylvania's capital punishment regime is in disrepair." *Commonwealth v. McGarrell*, Nos. 77-79 EM 2011, 2014 Pa. LEXIS 738, at *4 (Pa. Mar. 21, 2014) (Saylor, J., dissenting with Todd and McCaffery, J.J.). As *amici* show, *see infra* 20-30, Pennsylvania's capital defense appointment system is fundamentally inadequate, resulting in a great number of attorney errors and problem-plagued attorney-client relationships. Under these circumstances, the FCDO's expert capital defenders provide what is generally the best available PCRA representation and, moreover, assist their clients to avoid the traps that might otherwise deprive them of possible federal habeas relief.

Because the Commonwealth's stance, if adopted, will deprive death-sentenced inmates of the best available PCRA representation, and thereby undermine their chances of success both in State postconviction and in federal habeas proceedings, *amici* respectfully urge this Court to affirm those cases in which the Commonwealth's applications to disqualify the FCDO have been denied, *see* JA3, JA63, JA70, and reverse those which have been remanded to State court, *see* JA104, JA152, JA200, JA245.

ARGUMENT

This case is about whether the Commonwealth is empowered to disqualify death-sentenced inmates' preferred counsel from appearing in PCRA proceedings, notwithstanding that Pennsylvania law authorizes their representation. *See* Pa. R. Crim. P. 904(H)(1)(c) (providing that a PCRA court need not appoint counsel for death-sentenced petitioner if he "has engaged counsel who has entered, or will promptly enter, an appearance for the collateral review proceedings"). But a party's "choice of counsel is entitled to substantial deference," *Hamilton v. Merrill Lynch*, 645 F. Supp. 60, 61 (E.D. Pa. 1986); and while the "right to counsel of choice is (like most rights) not absolute . . .[,] none of [its] limitations are imposed at the unreviewable discretion of a prosecutor—the party who wants the [petitioner] to lose." *Kaley v. United States*, 134 S. Ct. 1090, 1107 (2014) (Roberts, C.J., dissenting) (citations omitted). Indeed, as *amici* contend, this Court

should be particularly skeptical of the Commonwealth's attempt to disqualify petitioners' counsel of choice in these cases, where such disqualification would impede the FCDO's efforts to secure federal habeas relief for its clients and deny death-sentenced inmates the dedicated, expert assistance that the FCDO is uniquely capable of providing. *Cf. Wheat v. United States*, 486 U.S. 153, 163 (1988) (when reviewing a motion to disqualify defense counsel, court must consider whether prosecution is "'manufactur[ing]' a conflict in order to prevent a defendant from having a particularly able defense counsel at his side"). Accordingly, the Court should enter judgment in favor of the FCDO.

I. Vigorous State postconviction assistance is critical to the FCDO's mission of securing death-sentenced inmates federal habeas relief.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), *see, e.g.*, 28 U.S.C. § 2254, as construed by the United States Supreme Court, has severely limited the power of federal courts to grant habeas relief based on constitutional errors in State criminal proceedings. Today, "state post-conviction proceedings are the primary venue for the litigation of non-record claims," such as ineffective assistance of counsel, violations of the *Brady* doctrine, and allegations of juror misconduct. Carol S. Steiker & Jordan M. Steiker, *Report to the ALI Concerning Capital Punishment*, 89 Tex. L. Rev. 367, 387 (2010). Thus, "[AEDPA] ensure[s] that state proceedings are the central process, not just a

preliminary step for a later habeas proceeding." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011).

AEDPA has also profoundly increased the importance of providing adequate counsel to death-sentenced prisoners seeking State postconviction relief. For, as one leading commentator has described the situation, "given the deference federal courts are statutorily required to bestow on state court decision making, the inadequacy of state post-conviction representation dramatically undermines the possibilities for vindicating federal rights in subsequent federal habeas litigation." Jordan M. Steiker, *Improving Representation in Capital Cases: Establishing the Right Baselines in Federal Habeas to Promote Structural Reform in States*, 34 Am. J. Crim. L. 293, 298 (2007) (footnote omitted). Indeed, in the absence of adequate representation, "state post-conviction currently serves less as a forum for the vindication of federal constitutional rights than as a means of insulating federal errors from subsequent federal court review." *Id.*

Meaningful federal habeas review depends substantially on the actions of petitioner's State postconviction counsel. To access federal habeas, State postconviction counsel must exhaust her client's claims in State court; obtain a State judgment on the merits rather than a dismissal for a procedural default; and file her client's State postconviction application within the limitations periods set by AEDPA and State law. Moreover, because AEDPA requires federal habeas

courts to defer to State court decisionmaking based on the factual record and legal arguments that a petitioner advances in his State proceedings, the extent and quality of federal habeas review is directly affected by the case that counsel presents in State court.

Accordingly, as the Supreme Court has recognized, "[a]n attorney's assistance *prior to the filing of a capital defendant's habeas corpus petition* is crucial, because 'the complexity of our jurisprudence in this area makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.'" *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994) (quoting *Murray v. Giarattano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring)) (emphasis added, ellipses omitted). More to the point, vigorous representation in State postconviction proceedings — of precisely the sort that the FCDO provides— is of paramount importance to mounting a successful habeas challenge in federal court.

A. Exhaustion

Before a petitioner may present a federal claim under § 2254, he must have "exhausted the remedies available in the courts of the State," 28 U.S.C. § 2254(b)(1)(A), and "give[n] the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights," *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (internal quotation marks omitted). Thus, AEDPA limits federal

habeas review to those legal claims fully litigated in State court, including through the State's discretionary review process. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Moreover, a federal habeas petition will be dismissed if every claim is not exhausted. *Rose v. Lundy*, 455 U.S. 509, 519 (1982).

Because of the exhaustion requirement, what a federal habeas petitioner may assert turns on the case that counsel previously presented in State postconviction proceedings. Thus, it is essential that State postconviction counsel raise every colorable claim so as to preserve it for federal habeas — as the FCDO takes great pains to do. *See, e.g.*, *Commonwealth v. Spotz*, 18 A.3d 244, 257-58 & n.5 (Pa. 2011) (describing how FCDO "raised twenty issues, many of which have multiple parts" in PCRA appeal). For when faced with unexhausted claims, a petitioner and his counsel's options are constrained and daunting. Federal habeas counsel can excise the unexhausted claims from the petition, although that risks precluding future federal review of the withdrawn claims, since any attempt to raise them later would be subject to AEDPA's tight restrictions on successive petitions. *See* 28 U.S.C. § 2244(b)(2); *see generally* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699, 735-59 (2002) (describing and criticizing AEDPA's restriction of successive petitions). Alternatively, if counsel can demonstrate "good cause" for petitioner's failure to exhaust, she can file a mixed petition and move the district

court to stay proceedings while she returns to State court to exhaust her client's claims. *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). But that option is available only if petitioner did not default his unexhausted claims, thus rendering any attempt at exhaustion futile. *See Roman v. DiGuglielmo*, 675 F.3d 204, 209 (3d Cir.), *cert. denied sub nom.*, *Roman v. Wenerowicz*, 133 S. Ct. 287 (2012).

Of course, the best practice is to avoid having to choose between those two undesirable options by exhausting all of petitioner's claims in the PCRA process — precisely what the FCDO does in its PCRA cases, and what it would be barred from doing were the Commonwealth to prevail in this matter.

B. Procedural Default

State postconviction counsel's exhaustion of claims is a necessary, but insufficient, condition for obtaining federal habeas review. Rather, under the procedural default doctrine, federal habeas review is typically unavailable when a State court rejects petitioner's claim not on the merits, but on an independent and adequate State law ground, *Dretke v. Haley*, 541 U.S. 386, 392 (2004) — for example, because petitioner failed to comply with a State filing deadline, *e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 727, 751 (1991), or improperly preserved a claim for appeal, *e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 88-90 (1977). "If that happens the petitioner ordinarily will not obtain a decision by any court, federal or

state, addressing his federal claims on the merits." *Holland v. Horn*, 519 F.3d 107, 112 (3d Cir. 2008) (citation omitted).

Because of the procedural default doctrine, "[i]t is not uncommon for death-sentenced inmates to forfeit substantial claims on state habeas." Steiker & Steiker, *Report to the ALI*, 89 Tex. L. Rev. at 412. Indeed, claims are defaulted in as many as 42% of capital habeas petitions filed in the nation's federal district courts. *See* Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Final Technical Report: Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, Nat'l Inst. of Justice, at 48 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (last visited Apr. 6, 2014). Because federal courts do not hesitate to enforce the procedural default doctrine, it is critical for State postconviction counsel to raise and properly preserve their clients' claims in State court. Again, this is exactly what the FCDO does in its PCRA cases. *See, e.g.*, *Taylor v. Horn*, 504 F.3d 416, 424-25, 428 (3d Cir. 2007) (describing the FCDO's efforts to file a second PCRA petition to preserve federal habeas claims and prevent their procedural default).

As with the failure to exhaust, the options for curing procedural default in federal habeas are few. Thus, the procedural default doctrine permits federal review only "when a habeas applicant can demonstrate cause and prejudice for the

procedural default," *Dretke*, 541 U.S. at 393 — an exception the Court has construed narrowly. *See McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991). For example, the Supreme Court has held that a petitioner is excused from procedural default where his State postconviction counsel waives a constitutional claim in State court that "is so novel that its legal basis is not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16 (1984); *see, e.g.*, *United States v. Roberson*, 194 F.3d 408, 415 (3d Cir. 1999) (finding cause where "[t]he Federal Reporters . . . did not contain a single case" supporting petitioner's defaulted claim). But this novel-claim exception is rarely applied; to satisfy it, the defaulted constitutional claim must have sought to "explicitly overrule one of [the United States Supreme Court's] precedents" or "overturn a longstanding and widespread practice to which th[e] Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *Reed*, 468 U.S. at 17 (internal quotation marks and alterations omitted). By contrast, where State postconviction counsel fails to raise a claim "simply because he thinks [State courts] will be unsympathetic" to it, his procedural default will not be forgiven. *Engle v. Isaac*, 456 U.S. 107, 130 (1982); *see, e.g.*, *United States v. Jenkins*, 333 F.3d 151, 155 (3d Cir. 2003) (finding no cause where petitioner failed to raise claim that the Supreme Court eventually accepted in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

Further, while an attorney's error may constitute cause and prejudice, that is only where the error was so severe that it amounted to the ineffective assistance of counsel as defined by *Strickland v. Washington*, 466 U.S. 668 (1984), establishing which "is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Thus, the Court has held that an attorney's mere negligence or inadvertence is generally insufficient to excuse procedural default. *Maples*, 132 S. Ct. at 922; *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986). And because ineffective assistance of counsel establishes cause and prejudice only in those proceedings where the Sixth Amendment right to counsel attaches — namely, trial and direct appeal[2] — the "ineffective assistance of post-conviction counsel cannot constitute 'cause' because the Sixth Amendment does not entitle a defendant to post-conviction counsel, and thus, the petitioner bears the risk of attorney error in such proceedings." *Johnson v. Pinchak*, 392 F.3d 551, 563 (3d Cir. 2004) (citing *Coleman*, 501 U.S. at 752-54) (internal quotation marks omitted). Therefore, if State postconviction counsel defaults a claim, it is likely permanently forfeited.[3]

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[2] Even then, of course, a claim that a procedural default occurred because of counsel's ineffectiveness at trial or on direct appeal would have to be exhausted before it could be considered on federal habeas. *Murray*, 477 U.S. at 489.

[3] The only exception to this rule was recently announced in *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), and *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012), which hold that, where State postconviction counsel fails to raise a substantial Sixth Amendment ineffective assistance claim, that default may be excused if State postconviction proceedings were the first opportunity for petitioner to allege that ineffective assistance claim *and* State postconviction counsel's default was itself

Finally, a defaulted claim will be reviewed where it is necessary to prevent a fundamental miscarriage of justice — but the Supreme Court has reserved this exception for the "extraordinary case" where the claimed "constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995) (internal quotation marks omitted); *see also Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (holding that exception applies where petitioner demonstrates "clear and convincing evidence that but for constitutional error . . . no reasonable juror would have found [petitioner] eligible for the death penalty"). And, as the Court has observed, "in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup*, 513 U.S. at 324.

This jurisprudence establishes the indispensability of State postconviction counsel to preserving their clients' claims for federal habeas review. In sum, State postconviction counsel are responsible for litigating every colorable claim that

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constitutionally ineffective. *See, e.g.*, *Glenn v. Wynder*, 743 F.3d 402, 2014 U.S. App. LEXIS 3085, at *19 & n.7 (3d Cir. 2014) (considering *Martinez* claim for ineffective assistance claim defaulted at petitioner's PCRA hearing); *Stanley v. Fisher*, No. 11-cv-3040, 2013 U.S. Dist. LEXIS 176595, at *7 n.1 (E.D. Pa. Dec. 17, 2013) (same). The narrowness of *Trevino* and *Martinez* cannot be overstated, however. Procedural default will still be forgiven only if State postconviction counsel's mistake was constitutionally ineffective under the highly deferential *Strickland* standard *and* the defaulted ineffective assistance claim was substantial. *Trevino*, 133 S. Ct. at 1921. Moreover, this exception does not extend to claims that State postconviction counsel defaulted after the initial PCRA proceeding, such as on appeal. *E.g.*, *Vaughter v. Fisher*, No. 12-cv-493, 2014 U.S. Dist. LEXIS 38137, at *33 (E.D. Pa. Mar. 24, 2014). And *Martinez* and *Trevino* are expressly limited to defaulted Sixth Amendment claims, and do not reach other defaulted postconviction challenges.

might be alleged in a federal habeas petition; they must take steps to cure procedural defaults arising from the trial or direct appeal stages, such as by exhausting gateway Sixth Amendment claims or investigating petitioner's actual innocence; and, perhaps most importantly, they must be sure not to default petitioner's claims in State postconviction proceedings. Accordingly, it is entirely sensible that the FCDO would undertake representation of its clients in State postconviction proceedings, where its lawyers can not only zealously litigate their clients' claims, but also take care to shield them from irreversible default in federal habeas. In that way, the FCDO's representation in these PCRA cases is both directly related and profoundly important to its subsequent federal habeas representation.

C. Timeliness

Federal habeas petitions must be filed within one year of entry of the final State judgment of conviction, although that limitations period may be tolled for the time "during which a properly filed application for State post-conviction or other collateral relief with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). In conditioning tolling on "a properly filed application," AEDPA requires that the application's "delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). Thus, AEDPA requires, among other factors, that the petitioner file his

application within the State's statute of limitations — which, in Pennsylvania, is one year. *See* 42 Pa. C.S. § 9545(b); *Commonwealth v. Yarris*, 731 A.2d 581, 587 (Pa. 1999) (concluding that petitioner's PCRA claims were untimely filed under Pennsylvania's one-year limitations period); *see generally Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005) ("When a postconviction petition is untimely under state law, that is the end of the matter for purposes of § 2244(d)(2)." (internal quotation marks and alteration omitted)).

It is therefore imperative that State postconviction counsel timely and properly file her client's PCRA petition in State court, lest she risk totally forfeiting federal habeas review. Indeed, federal habeas counsel has few options for curing an improperly filed State postconviction application. In the best possible scenario, federal counsel will be assigned the case before AEDPA's one-year limitations period expires, in which event he may file "a 'protective' petition in federal court and ask[] the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted." *Pace*, 544 U.S. at 416 (citing *Rhines*, 544 U.S. at 278). But that stay-and-abeyance is available only if there is "good cause" to hold open the federal proceedings, which is unlikely to be found where State postconviction counsel was merely neglectful of the filing deadline or dilatory. *Cf. id.* (observing that "good cause" will be found where there is "reasonable confusion" about State filing requirements).

If the AEDPA limitations period has expired, however, then federal habeas counsel will find herself in the unenviable position of arguing for the application of equitable tolling. The Supreme Court has held, however, that mere "[a]ttorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel." *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). Rather, to toll AEDPA's statute of limitations, State postconviction counsel's error must have been so extreme that it amounted to an effective abandonment of her client, or so egregious that the attorney was "'not operating as his agent in any meaningful sense of that word.'" *Maples*, 132 S. Ct. at 923 (quoting *Holland v. Florida*, 560 U.S. 631, 659 (Alito, J., concurring)); *see Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001). Accordingly, equitable tolling is unlikely to be available for the typical untimely habeas petition.

Thus, because it is so difficult to rectify untimely or improperly filed PRCA applications, properly filing a PCRA petition in the first instance is immensely important to obtaining federal habeas relief. And, as with preventing unexhausted and defaulted claims, dismissal on limitations grounds is one more procedural snare that the FCDO ably avoids by serving as counsel in State court upon their clients' request.

D. AEDPA's Standard of Review

Because of AEDPA's procedural restrictions and poor State postconviction lawyering, "most prisoners' complaints about wrongful convictions, illegal sentences, and other errors for which there is a constitutional remedy are never addressed on the merits. Even in death penalty cases, the great majority of substantive claims alleging constitutional violations, illegal state misconduct, and other serious errors are procedurally barred." Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 Harv. C.R.-C.L. L. Rev. 339, 350 (2006). The effective State court representation that the FCDO provides is important to more than escaping AEDPA's various procedural traps, however; it is also crucial to obtaining federal habeas relief under the statute's deferential standard of review.

Unlike PCRA proceedings, in which petitioner's legal claims are reviewed *de novo*, *e.g.*, *Commonwealth v. Mallory*, 941 A.2d 686, 694 (Pa. 2008), AEDPA limits federal habeas relief to State court decisions that are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or are "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). As the Supreme Court has construed that standard, "[a] state court's determination that a claim lacks merit

precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision," *Harrington*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)), based on the facts and arguments that were "before the state court that adjudicated the claim on the merits," *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). *See also* 28 U.S.C. § 2254(e)(1) (providing that, in federal habeas, "a determination of a factual issue made by a State court shall be presumed to be correct"). Accordingly, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 131 S. Ct. at 786.

The upshot of federal habeas courts' deference to State court decisionmaking is that petitioners often must make their best and most persuasive cases in State postconviction proceedings, before the start of substantive federal habeas proceedings. For under AEDPA, "even as to the most sacrosanct of the constitutional criminal procedure rights . . . , the duty of constitutional enforcement is largely delegated to State courts." Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 Wash. & Lee L. Rev. 85, 113 (2012). That is, "[b]y limiting federal habeas corpus review of the factual and legal determinations of state courts, AEDPA . . . give[s] state courts the last word on questions of both guilt and sentence — and the last word on the state level is spoken during the postconviction process." Eric M. Freedman, Giarratano *Is a Scarecrow: The Right*

to Counsel in State Capital Postconviction Proceedings, 91 Cornell L. Rev. 1079, 1098 (2006).

The performance of State postconviction counsel therefore casts an enormous shadow over federal habeas corpus proceedings. The merits of petitioner's factual and legal claims will be limited to the facts and legal arguments that they adduce; and federal habeas review will be limited to the reasonableness of the State postconviction courts' adjudication of the claims they present. State postconviction counsel, therefore, not only determine which challenges to their clients' convictions and sentences are cognizable in federal habeas; they also create the universe of facts and argument that a federal court will examine in determining whether to grant habeas relief. Accordingly, because its clients' federal habeas cases are determined by State postconviction counsel's lawyering, the FCDO often logically concludes that, if its clients so desire and if federal grant and private resources so permit, its clients' interests in preserving federal claims will be served best by having FCDO attorneys assume representation in PCRA proceedings. As set forth below, that conclusion is especially sound in light of the inadequacies of Pennsylvania's system for the appointment of PCRA counsel.

II. The systemic failure of Pennsylvania to provide effective, properly resourced, capital defense counsel militates in favor of continuous representation by FCDO attorneys.

Although Pennsylvania appoints lawyers for capital defendants and death-sentenced inmates, *see* Pa. R. Crim. P. 904(H)(1), Pennsylvania has a strikingly poor record of appointing adequate defense counsel. Indeed, the systemic inadequacies of Pennsylvania's capital postconviction defense services have been widely known, but left unaddressed, for decades. *See* Task Force of the Supreme Court of Pennsylvania and Third Circuit of the United States, *Report of the Joint Task Force on Death Penalty Litigation in Pennsylvania* (1990) (finding that Pennsylvania had "a problem of major proportions" in its delivery of defense services in capital cases, including "[p]roviding competent representation of counsel" at all levels of state litigation); *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System*, chs. 5 & 6 (2003) (finding that delivery of indigent defense services in capital cases was "inadequate throughout the Commonwealth"), *available at* http://www.pa-interbranchcommission.com/_pdfs/FinalReport.pdf (last visited Apr. 6, 2014); American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report*, at xv (2007) (concluding that "[t]he Pennsylvania indigent system falls far short of complying with the *ABA Guidelines on the Appointment and Performance of*

Defense Counsel in Death Penalty Cases"), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/pennsylvania/finalreport.authcheckdam.pdf (last visited Apr. 6, 2014).

In particular, Pennsylvania does not adequately fund capital defense, whether at the trial, direct review, or postconviction stages. As three Pennsylvania Supreme Court justices recently observed, "Pennsylvania has long been on notice that leaders of national, state, and local bar associations do not believe that capital litigation is being conducted fairly and evenhandedly in the Commonwealth, not the least because of the ad hoc fashion by which indigent defense services are funded from the local government level." *McGarrell*, 2014 Pa. LEXIS 739, at *2 (Saylor, J., dissenting with Todd and McCaffery, J.J.). Pennsylvania, in fact, "[i]s the *only* state that does not appropriate or provide for so much as a penny toward assisting the counties in complying with *Gideon*'s mandate" in either capital or non-capital cases. Joint State Government Commission, *A Constitutional Default: Services to Indigent Criminal Defendants In Pennsylvania* 2 (2011), *available at* http://jsg.legis.state.pa.us/resources/documents/ftp/documents/Indigent%20Defense.pdf (last visited Apr. 6, 2014) (emphasis in original).

Indeed, the Commonwealth offers *no* funding for capital case representation at *any* stage of criminal proceedings, instead leaving all such expenses to local governments. 16 Pa. C.S. § 9960.7. Moreover, the funding provided to

postconviction counsel is often minimal and subject to mandatory caps or discretionary limits set by trial court judges. *See, e.g.*, *Commonwealth v. King*, 57 A.3d 607, 615 (Pa. 2012) (analyzing a claim of denial of counsel where a county capped the fee for capital case trial representation at $5,000, including pretrial preparation); *Commonwealth v. Williams*, 950 A.2d 294, 310 (Pa. 2008) (noting one county's "$3,500 fee cap, and [a] $500 limitation on investigative services"). The resulting problems have been recognized by the courts; thus, the Pennsylvania Supreme Court, in *King*, stated:

> We are not unsympathetic to the plight of a court-appointed defense attorney laboring under minimal funding and a dearth of relevant experience in a capital case — and even more significantly, to such an attorney's client, who has the most to lose from such a circumstance. Additionally, we do not mean to discount the possibility that an attorney in that situation may ultimately render actual ineffective assistance stemming, at least in part, from her inexperience and the county's funding limitations.

57 A.3d at 617 (footnote omitted); *see also id.* at 633 (Castille, C.J., concurring) ("The fact that most appointed counsel meet the challenge does not mean that compensation levels are, or have been, appropriate or reasonable."); *id.* at 636 (Saylor, J., concurring) ("I am unable to agree with the suggestion that the presumption of effectiveness by and large reflects the actual state of capital defense representation in Pennsylvania. . . . [W]e have seen more than enough

instances of deficient stewardship to raise very serious questions concerning the presumption's accuracy.").

The most detailed assessment of funding for capital case *trial* lawyers, that undertaken in Philadelphia County, condemned the inadequate resources and fees, observing that the rates "were woefully inadequate when first implemented . . . [and] are even more so today," and that Philadelphia's fee structure "is completely inconsistent with how competent trial lawyers work, particularly in cases such as these which typically involve enormous preparation time and are frequently best resolved by a non-trial disposition." *Commonwealth v. McGarrell*, 2012 Pa. LEXIS 2854, at *17-18 (Pa. Feb. 21, 2012) (report and recommendation of Lerner, J.) (footnote omitted). Notably, the proposed remedy was to increase fees for *trial* counsel, with no corresponding support for post-trial and postconviction attorneys. *Id.* at *27-28. A subsequent order raised fees solely for appointed Philadelphia *trial* counsel. Notice of Administrative Governing Board, http://www.courts.phila.gov/pdf/notices/2012/Notice-Capital-Defense-Counsel-Criminal-Defense-Bar.pdf (last visited Apr. 6, 2014).

To date, no fee increase has been recommended or implemented for appointed PCRA counsel. Nor is there a plan to establish a state-funded public defender service, or some other resource center for appointed capital PCRA attorneys. Rather, other than the ability to informally "network" with other capital

case counsel and attend educational programs offered by the PACDL and other voluntary bar associations, the sole resource center for Pennsylvania PCRA attorneys is a nonprofit entity with a single attorney and mitigation social worker. *See* http://atlanticcenter.org/home.html (last visited Apr. 6, 2014).

The consequences of Pennsylvania's systemic underfunding of capital defense have been predictably dire. As explained in Part I, *supra*, effective representation of a death-sentenced petitioner in State postconviction proceedings requires counsel to thoroughly investigate and pursue every colorable claim, both to potentially obtain State relief as well as to assure the availability of federal habeas review. Inadequate resources, however, limit State postconviction counsel's ability to fully investigate their clients' claims and properly raise them in their PCRA applications. The results, as this Court has repeatedly seen, are waived claims that are often rendered ineligible for subsequent federal habeas review. *See, e.g.*, *Glenn*, 743 F.3d 402, 2014 U.S. App. LEXIS 3085, at *18-20 (PCRA counsel defaulted ineffective assistance claims); *Marrero v. Horn*, 505 F. App'x 174, 176-78 (3d Cir. 2012) (holding that petitioner's claims were procedurally defaulted, despite the FCDO's unsuccessful attempt to intervene in PCRA proceedings and obtain a remand to exhaust waived claims); *Cristin v. Brennan*, 281 F.3d 404, 411 (3d Cir. 2002) (State postconviction counsel defaulted claims by failing to appeal PCRA trial court ruling); *Whitney v. Horn*, 280 F.3d 240, 252-53 (3d Cir. 2002)

(holding that ineffectiveness claim omitted from PCRA petition was procedurally defaulted). *See also Holland v. Horn*, 519 F.3d at 113, 118-19 (holding that State postconviction counsel waived constitutional claim, but finding no procedural default because Pennsylvania's firm waiver rule had not been clearly established at time of PCRA proceedings); *Taylor*, 504 F.3d at 428 (same); *Jacobs v. Horn*, 395 F.3d 92, 117-18 (3d Cir. 2005) (same).

Indeed, appointed counsel's failures to investigate and preserve their clients' PCRA claims mirror the sorts of repeated errors in capital trials and sentencing that are attributable to inadequate funding and resources, including the failure to properly investigate and present mitigation evidence, *see* App. of *Amici Curiae* (listing cases in which relief was granted for mitigation-related failures of counsel); the failure to properly investigate guilt/innocence phase defenses, *see, e.g.*, *Rolan v. Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006); *Jacobs*, 395 F.3d at 103-04; and the failure to perfect or litigate direct appeals, *see, e.g.*, *Commonwealth v. Wholaver*, 903 A.2d 1178, 1184 (Pa. 2006); *Commonwealth v. Walter*, CP-18-CR-0000179-2003 (Clinton C.P. Nov. 29, 2011). Significantly, it is empirically well established that greater resource allocation for capital defense trial counsel corresponds to better outcomes. In Philadelphia County, for example, representation by Defender Association attorneys "increases the probability that a homicide defendant will secure a sentence of a term of years, as opposed to a life sentence, by sixty-two

percent;" more impressive still, "since the Association began representing one out of every five homicide defendants in 1993, no jury has ever returned a death verdict against a defendant represented by a lawyer of the organization." Thomas G. Saylor, *Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence*, 23 Widener L.J. 1, 34 (2013) (citing James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L.J. 154 (2012)). There is little reason to doubt that greater resources — *i.e.*, of the type that the FCDO can commit to a given case — will produce similarly improved outcomes in State postconviction proceedings.

Pennsylvania's inadequate funding also limits the ability of appointed postconviction counsel to spend substantial amounts of time with their clients, as is essential to effective representation. *See* Bradley A. MacLean, *Effective Capital Defense Representation and the Difficult Client*, 76 Tenn. L. Rev. 661, 661 (2009) ("Effective defense representation in a capital case . . . depends on the nature and quality of the relationship between the lawyer and the client."). Indeed, the American Bar Association's *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) ("ABA Death Penalty Guidelines") — "standards to which [the United States Supreme Court] long ha[s] referred as guides to determining what is reasonable" attorney performance, *Wiggins v. Smith*,

539 U.S. 510, 524 (2003) (internal quotation marks omitted) — provide that "post-conviction counsel . . . should maintain close contact with the client regarding litigation developments." *Id.* 10.15.1(E)(1). Specifically, postconviction counsel should discuss "the progress of and prospects for the factual investigation, and what assistance the client might provide to it," *id.* 10.5(C)(1), including "litigation deadlines and the projected schedule of case-related events," *id.* 10.5(C)(6). Further, developing a strong attorney-client relationship is essential to counsel's investigation, especially in terms of seeking sensitive mitigation evidence that is often the key to such a challenge. *See* MacLean, *Effective Capital Defense*, 76 Tenn. L. Rev. at 666. Finally, maintaining close contact is necessary to "monitor the client's mental, physical and emotional condition for effects on the client's legal position," ABA Death Penalty Guidelines 10.15.1(E)(2), which is an essential part of postconviction representation given the stress of death row and the higher rates of severe mental or emotional illnesses and disabilities among death-sentenced inmates. *See* Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 Akron L. Rev. 529, 532 (2011).

Because of inadequate resources, however, many appointed postconviction counsel have limited access to their clients. Death-sentenced prisoners are housed in one of three state prisons, often at great distances from the county of conviction

(and county where appointed counsel is located). *See* Pennsylvania Department of Corrections, *Pennsylvania's Death Penalty: DOC Position Statement* 3 (stating that "all execution cases are assigned to administrative custody status and are housed at SCI's Graterford [in Skippack] and Greene [in Waynesburg]," while "[f]emale capital cases are housed at SCI Muncy"), *available at* http://www.cor.state.pa.us/portal/server.pt/community/death_penalty/17351 (last visited Apr. 6, 2014). Without court funding to travel to those state prisons, or a court order for the prisoner to be transported to the county of prosecution, attorney-client contact is limited at best. Thus, there is a documented history of counsel failing to visit with clients in capital cases. *See, e.g.*, *Commonwealth v. Elliott*, 80 A.3d 415, 424 & n.4 (Pa. 2013) (noting claim that trial counsel failed to meet with Elliott in the pretrial period, while finding said claim waived); *Commonwealth v. Brooks*, 839 A.2d 245, 249-50 (Pa. 2003) (granting relief in capital case where counsel never met with client before trial).

By contrast, better-resourced capital public defenders, such as the FCDO, have been shown to have greater contact with their clients. A study of homicide case outcomes in Philadelphia, tracking and contrasting cases where defendants were represented by the Defender Association of Philadelphia as opposed to court-appointed private counsel, showed that appointed private counsel (who handle 80% of indigent defense homicide cases) met with clients many fewer times than the

Defender counsel. Anderson & Heaton, *How Much Difference*, 122 Yale L.J. at 195-196. This was attributable in part to caseload, "with attorneys who do take homicide appointments generally tak[ing] on many more of them than it would be possible to handle well," and in part to attitude, with some appointed private attorneys expressing reluctance or unwillingness to meet frequently with their clients. *Id.*

Finally, in addition to having the resources and commitment necessary for a meaningful attorney-client relationship, the FCDO builds comfort and trust with its clients by appearing in PCRA proceedings and providing continuity of representation in the entire postconviction context, State and federal. Such continuity has been shown to enhance the overall quality of postconviction representation, as well as to reduce costs and delays. *See* JA326-327 (Committee on Defender Services, Judicial Conference of the United States, *Report on Death Penalty Representation* (1995)); Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 744-45 (2007) (contending that, with adequate funding and continuity of representation, investigation of State and federal postconviction claims could be performed together, thus eliminating delays).

Notwithstanding the presence of talented, committed and knowledgeable attorneys across the Commonwealth, among potential Pennsylvania postconviction

counsel there is no cadre with greater experience, resources, and commitment to capital defense than the FCDO. *See Spotz*, 18 A.3d at 332 (Castille, C.J., concurring) ("[T]he [FCDO's] commitment of . . . manpower alone is beyond remarkable, something one would expect in major litigation involving large law firms."); *see generally* Anderson & Heaton, *How Much Difference*, 122 Yale L.J. at 190-200 (describing Defender Association of Philadelphia's greater expertise, resources, and dedication to capital litigation as compared to appointed private counsel). And in light of the Commonwealth's fundamentally inadequate capital defense system, it is often the case that only the involvement of FCDO counsel will ensure adequate representation of death-sentenced defendants in PCRA proceedings. The Commonwealth's application to disqualify that office would, then, stack the deck against capital defendants. "Unless the imposition of the death penalty consistently rests on the most scrupulous regard for fair procedure . . . , it may well teach a lesson that aggravates the very dangers it was intended to deter." *Harris v. Alabama*, 513 U.S. 504, 523 (1995) (Stevens, J., dissenting). If granted the power to strategically prevent worthy FCDO attorneys from appearing in PCRA proceedings, the Commonwealth will compromise the very legitimacy of the capital punishment system that it is bound to uphold and defend. Accordingly, the Commonwealth's claims should be rejected.

CONCLUSION

Because the Commonwealth's stance, if adopted, will deny death-sentenced inmates their preferred and highly qualified counsel of choice, and thereby directly undermine their chances of obtaining federal habeas relief, *amici* NACDL and PACDL urge this Court to enter judgment in favor of the FCDO.

Respectfully submitted,

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Dated: April 7, 2014

CERTIFICATIONS

1. Certification of Bar Membership

I hereby certify that I, Lawrence S. Lustberg, am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Certification of Word Count, Identical Text, and Virus Check

I hereby certify that this brief complies with the type and volume limitations set forth in Fed. R. App. P. 32(a)(7). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using a proportionally spaced typeface using Microsoft Word with 14-point font. According to the word count feature of Microsoft Word, this brief contains 6,954 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The text of the electronic version of this brief is identical to the text in the paper copies, and Sophos Endpoint Security & Control virus-scan, Version 9, has been run on the file, and no virus was detected.

3. Certification of Service

I hereby certify that on April 7, 2014, I caused the foregoing Brief to be electronically filed with the Clerk of the United States Court of Appeals for the Third Circuit through the Court's CM/ECF system, and to have ten (10) paper copies of the Brief delivered to:

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I hereby certify that on April 7, 2014, I caused the foregoing Brief to be served upon the counsel of record for Petitioner-Appellant and Respondents-Appellees through the Notice of Docketing Activity issued by this Court's CM/ECF system.

/s/ Lawrence S. Lustberg____
Lawrence S. Lustberg, Esq.

Dated: April 7, 2014