UNTYING THE KNOT: A SOLUTION FOR CONFUSION IN FEDERAL HABEAS REVIEW OF PENNSYLVANIA STATE COURT CAPITAL CONVICTIONS

Maura Caffrey[*]

I. INTRODUCTION

Imagine a large conference room in either city hall or within the Third Circuit's space in the federal courthouse in Philadelphia. Seven Pennsylvania Supreme Court justices and all Third Circuit judges in active status are seated around the table with hot coffee brewing and a few law clerks scattered in chairs behind the judges and justices.

Tension is in the air as this very novel but important meeting gets underway. Everyone present has experienced the difficulties in adjudicating post-conviction claims in both state and federal court. The state Supreme Court justices are understandably showing a mixture of envy and anger that their adjudications of criminal convictions are not infrequently overturned—not by the U.S. Supreme Court as they know the Constitution allows[1]—but by lower court federal judges who are not generally supposed to interfere in state proceedings.[2]

One state court justice whispers to a colleague, "We have really tied ourselves in a knot. I'm not sure what to do."

The federal judges acknowledge they have the power to overturn state court convictions, but really do not like doing it. However, they cite Supreme Court decisions overruling circuit court refusals to reverse state supreme courts, and one of them says, repeating a well-known truism, "We don't like getting reversed."

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* Maura Caffrey is a litigation associate at Cravath, Swaine & Moore LLP. From 2006–2007, she clerked for Judge Michael M. Baylson of the Eastern District of Pennsylvania. Many thanks to Judge Baylson for his insightful comments and assistance in drafting this Article.

1 U.S. CONST. art. III, § 2, cl. 2 ("In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.").

2 *See infra* note 5 (describing *Rooker-Feldman* doctrine).

Another state court justice speaks up. "We've got to untie this knot; does anyone have some suggestions?"

Has such a conference taken place? Certainly, no. Are the chances of it taking place likely? Probably not. Would it be a good idea if it did take place? Perhaps. Why the fantasy? What to do?[3]

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Habeas corpus is a unique area of the law where, pursuant to statute,[4] federal courts have been given the power to act, for all practical purposes, as appellate courts for state proceedings.[5] Over a number of years, serious conflicts have arisen between the Pennsylvania Supreme Court and federal courts within the Third Circuit—most often in capital cases—in their respective interpretations of federal constitutional rights and the application of waiver and exhaustion principles in collateral proceedings. These conflicts have resulted in many federal courts reviewing state court decisions de novo, holding evidentiary hearings and making factual determinations in cases that are more than twenty years old, and quite often, reversing decisions of the highest court of the state.

This Article results from the author's work as a judicial law clerk from 2006–2007 where the application of federal habeas jurisprudence to two Pennsylvania capital cases required a prolonged and detailed analysis of state court proceedings that had taken place over twenty years earlier. Just the gathering of the record presented a Herculean task. Identifying and applying the facts found by the state courts to the record required another extensive amount of research and review. Only after these tasks had been completed could the ul-

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3 The justices of the Supreme Court of Delaware have at least an one annual meeting with the federal district judges in Delaware to discuss post-conviction cases. Among other things, they encourage lawyers to take such cases pro bono and sponsor training seminars.

4 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 1217–26 (codified in scattered sections of 28 U.S.C.).

5 Habeas proceedings, although civil in nature, are a form of post-conviction relief in criminal cases, and are a unique and solitary exception to the well-known *Rooker-Feldman* doctrine which bars lower federal courts from overturning decisions of the highest court of a state. *See In re* Knapper, 407 F.3d 573, 580 n.14 (3d Cir. 2005) ("Habeas corpus petitions are an exception to the jurisdictional bar of Rooker-Feldman."). The *Rooker-Feldman* doctrine derives its name from two Supreme Court Cases: *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and was upheld and clarified in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). Because of *Rooker-Feldman*, the situation which arises in habeas cases cannot arise in other kinds of civil litigation.

timate decision be approached: whether the state court decision was contrary to or an unreasonable application of the Federal Constitution as interpreted by the Supreme Court.[6] Although some decisions of the Third Circuit in this area have been overturned on occasion by the Supreme Court, and are sometimes in conflict with other circuit courts, the Third Circuit holdings were binding on the Judge for whom the author worked.

This Article will review the morass of state and federal post-conviction case law in Pennsylvania, highlighting some particularly salient issues for practitioners and providing some practical approaches to litigating these cases in federal court. Additionally, this Article will identify a number of inconsistencies in Pennsylvania post-conviction jurisprudence that have created great difficulty and confusion for both counsel and judges attempting to apply the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") to state court decisions. Principles of federalism, as well as a practical need to achieve efficient and timely dispositions in the inevitable post-conviction litigation that follows the imposition of the death penalty, cry out for a better resolution of these issues. The "dynamic tension" that has developed between the state and federal proceedings in Pennsylvania has created needless confusion for judges and lawyers alike, resulting in inordinate delays in the final resolution of death penalty cases, which is unfair to the families of victims, the defendant, and the public.[7] This Article also will propose some solutions for the confusion which has arisen, with the ultimate goal being to reduce tension between state and federal court actions, increase the uniformity and predictability of results, prevent federal habeas "retrials," and ensure the timely finality of state criminal convictions.

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6 *See* 28 U.S.C. § 2254(d) (2006).

7 The timeline for the disposition of capital cases is particularly troubling. It is not unusual for a federal habeas case to be filed in federal district court more than twenty years after the murder that gave rise to the state court prosecution. In the interim, records are lost, facts forgotten, and witnesses, who may be called upon to testify if there is an evidentiary hearing in federal court, are unavailable. Although judges undoubtedly are busy, it seems that these cases are not often given the priority they deserve. The Pennsylvania Supreme Court, and likewise the Third Circuit, should consider adopting a rule that these cases be prioritized on the assigned judge's calendar, and perhaps disposed of within a particular timeframe after filing unless the judge can cite valid reasons for not doing so.

II. OVERVIEW OF THE PROBLEMS

This Article explores a number of interrelated problems, the two principal ones being: (1) Pennsylvania's inconsistent enforcement of its Post-Conviction Relief Act ("PCRA")[8] waiver provisions in capital cases (known as "relaxed waiver"); and (2) Pennsylvania's unclear standards governing how to bring a "layered" claim of ineffective assistance of counsel ("IAC").[9] Other related issues that federal habeas courts must confront include: (1) how to treat an IAC claim erroneously deemed "previously litigated" by the state court; (2) to what extent the decision of a lower state court qualifies as an adjudication on the merits for AEDPA purposes; and (3) the appropriate weight to afford a state court plurality decision.

III. BACKGROUND OF AEDPA

A. Exhaustion and Procedural Default

Before filing a habeas petition in federal court, a petitioner must "exhaust" all available state court remedies.[10] In order to satisfy this exhaustion requirement, the petitioner must "fairly present . . . a federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted."[11] Even if the state court fails to decide the merits of a claim, "a properly presented claim will [still] be considered exhausted."[12] However, if the state court refuses to consider a claim because of a violation of state procedural rules, the doctrine of procedural default will preclude a federal habeas court from reviewing the merits of the claim unless the petitioner can establish "cause for the default and actual prejudice," or a "fundamental miscarriage of justice."[13]

The procedural default doctrine applies only when the procedural rule relied on by the state court is "independent of the federal question [presented] and adequate to support the judgment."[14] A

8 42 PA. CONS. STAT. § 9541–9546 (2004).

9 A "layered" claim usually refers to a petitioner's assertion that prior counsel ("L2") was constitutionally ineffective for not arguing on direct appeal that trial counsel ("L1") was ineffective for failing to raise a substantive claim of error.

10 28 U.S.C. § 2254(b)(1)(A) (2006).

11 McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999).

12 Johnson v. Pinchak, 392 F.3d 551, 556 (3d Cir. 2004).

13 Coleman v. Thompson, 501 U.S. 722, 750 (1991).

14 Leyva v. Williams, 504 F.3d 357, 365 (3d Cir. 2007) (alteration in original) (quoting Nara v. Frank, 488 F.3d 187, 199 (3d Cir. 2007)).

state procedural bar is "adequate" if it is "firmly established, readily ascertainable, and regularly followed at the time of the purported default."[15] Additionally, the state court must clearly and expressly state that it is disposing of a specific claim on independent state procedural grounds in order for a federal court to find that the claim was procedurally defaulted.[16] As will be seen, Pennsylvania's application of its procedural rules has often failed this test.

B. AEDPA's Deferential Standard of Review

AEDPA significantly enhanced the deference federal habeas courts must afford state court factual and legal determinations. Under AEDPA, a federal court may grant habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings" *only* if the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[17]

A decision is contrary to clearly established federal law if the state court "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [an opposite] result."[18] A federal court may grant habeas relief under the "unreasonable application" clause of Section 2254(d)(1) if the "state court correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case."[19] An objectively unreasonable application differs from an incorrect one, and only the former is sufficient grounds for habeas relief.[20]

With regard to factual determinations, a federal habeas court must presume state court findings of fact are correct.[21] A petitioner

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15 Szuchon v. Lehman, 273 F.3d 299, 327 (3d Cir. 2001).

16 *See* Abu-Jamal v. Horn, 520 F.3d 272, 299 (3d Cir. 2008).

17 28 U.S.C. § 2254(d) (2006).

18 Williams v. Taylor (*Terry Williams*), 529 U.S. 362, 405 (2000).

19 Bell v. Cone, 535 U.S. 685, 694 (2002) (citing *Terry Williams*, 529 U.S. at 407–08).

20 Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

21 28 U.S.C. § 2254(e)(1).

may rebut this presumption only by clear and convincing evidence.[22] Under Section 2254(d)(2), a federal court may grant relief if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[23]

In cases where AEDPA's deferential standard of review does not apply (i.e., where there was no adjudication on the merits in state court), "the federal habeas court must conduct a de novo review over pure legal questions and mixed questions of law and fact, as a court would have done prior to the enactment of AEDPA."[24]

C. A Federal Evidentiary Hearing Under § 2254(e)

Under Section 2254(e), a federal habeas court may grant an evidentiary hearing in limited circumstances:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
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> (A) the claim relies on—
>
> (i) a new rule of constitutional law . . . ; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[25]

In *Williams v. Taylor* (*Michael Williams*),[26] the Supreme Court held that the opening clause of Section 2254(e)(2) ("failed to develop") requires "a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel."[27] Diligence "depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court."[28] If the petitioner has not "fail[ed] to develop" the state court record as defined in *Michael Williams*, the district court has dis-

22 *Id.*

23 *Id.* § 2254(d)(2).

24 Taylor v. Horn, 504 F.3d 416, 429 (3d Cir. 2007) (quoting Appel v. Horn, 250 F.3d 203, 210 (3d Cir. 2001)).

25 28 U.S.C. § 2254(e)(2).

26 529 U.S. 420 (2000).

27 *Id.* at 432.

28 *Id.* at 435.

cretion to convene an evidentiary hearing.[29] In exercising this discretion, the court should "focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim."[30]

D. An "Adjudication on the Merits" Under Section 2254

As previously noted, a federal court will review a properly exhausted claim under AEDPA's deferential standard of review only if the claim was "adjudicated on the merits in [the] State court proceedings."[31] Determining whether a decision qualifies as an adjudication on the merits under Section 2254 can prove particularly difficult where the state court's discussion of the petitioner's claims is unclear, incomplete or non-existent.

Several key principles summarize this concept:

(1) Where the state court rejects petitioner's claim on procedural grounds, there is no adjudication on the merits and a federal court is generally precluded from reviewing the merits of the claim. If, however, the procedural bar identified by the state court is not "adequate" or "independent,"[32] the federal court may consider the claim, ordinarily under a de novo standard of review.[33]

(2) If, in the course of rejecting petitioner's claim on *procedural* grounds, the state court also discusses the merits of the underlying claim, AEDPA's deferential standard of review is appropriate.[34]

(3) If a petitioner fairly presents a claim to the state court but the court completely fails to discuss it in its opinion, there is no adjudication on the merits, and a federal habeas court must apply

29 Campbell v. Vaughn, 209 F.3d 280, 286–87 (3d Cir. 2000).

30 *Id.* at 287.

31 28 U.S.C. § 2254(d) (2006).

32 *See supra* Part III.A.

33 *See* Jacobs v. Horn, 395 F.3d 92, 100 (3d Cir. 2005) ("AEDPA's deferential standards of review do not apply unless it is clear from the face of the state court decision that the merits of the petitioner's constitutional claims were examined in light of federal law . . . . In cases where the AEDPA standards of review do not apply, federal habeas courts apply pre-AEDPA standards of review." (internal quotation marks omitted) (quoting Everett v. Beard, 290 F.3d 500, 508 (3d Cir. 2002)).

34 *See, e.g.*, Jermyn v. Horn, 266 F.3d 257, 279, 281 n.8 (3d Cir. 2001) (finding petitioner's claims were not procedurally barred because the state procedural rule was not "adequate," but applying AEDPA's standard of review because "the correct application of the procedural rule at play . . . require[d] the [state] court to review the underlying merits of a particular federal constitutional claim").

pre-AEDPA standards of review.[35] Likewise, if the petitioner properly exhausts a claim, but the state court does not reach an essential element of the required constitutional analysis, or mischaracterizes the claim, de novo review is appropriate.[36]

(4) As long as the state court properly frames the claim and disposes of it on non-procedural grounds, there is an adjudication on the merits, regardless of the length or quality of the state court opinion.[37] In fact, under Third Circuit precedent, a state court "may render an adjudication or decision on the merits of a federal claim by rejecting the claim without any discussion whatsoever."[38] The other circuits that have addressed this issue have reached similar conclusions, although some have slightly relaxed AEDPA's deferential standard of review where the state court has failed to articulate its reasoning.[39]

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35 Holloway v. Horn, 355 F.3d 707, 718 (3d Cir. 2004) (holding that "pre-AEDPA standards govern" where petitioner "presented his *Batson* claim to the Pennsylvania Supreme Court on direct appeal, but the Court failed to even mention the claim (much less adjudicate the merits) in its disposition").

36 *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 390 (2005) (applying de novo review to the prejudice element of an ineffective assistance of counsel claim where state court only reached the adequacy prong); Appel v. Horn, 250 F.3d 203, 210–11 (3d Cir. 2001) (finding there was no adjudication on the merits where state court misconstrued petitioner's constructive denial of counsel claim as one for ineffective assistance).

37 *See* Wright v. Vaughn, 473 F.3d 85, 91 (3d Cir. 2006) ("While it is necessary for the state court to have adjudicated the claim on the merits, it is not necessary for the state court to have thoroughly explained its analysis in its opinion." (quoting Chadwick v. Janecka (*Chadwick I*), 302 F.3d 107, 116 (3d Cir. 2002), *amended and superceded by* Chadwick v. Janecka (*Chadwick II*), 312 F.3d 597, 606 (3d Cir. 2002)); Rompilla v. Horn, 355 F.3d 233, 248 (3d Cir. 2004) ("[I]f the state court decided the claim, [AEDPA] standards govern—regardless of the length, comprehensiveness, or quality of the state court's discussion."), *rev'd on other grounds*, 545 U.S. 374 (2005).

38 *Rompilla*, 355 F.3d at 247; *see also Chadwick II*, 312 F.3d at 606 (interpreting *Weeks v. Angelone*, 528 U.S. 225 (2000), to stand for the proposition that AEDPA standards of review apply when a "state supreme court rejects a claim without giving any indication of how it reached its decision" (internal quotation marks omitted)); Capers v. Rogers, No. CIV A 05-1567 NHL, 2006 WL 2806361, at *13 (D.N.J. Sept. 28, 2006) ("Even a summary adjudication by the state court on the merits of a claim is entitled to § 2254(d) deference.").

39 *See* Virgil v. Dretke, 446 F.3d 598, 604 (5th Cir. 2006) ("Because we review only the reasonableness of a state court's ultimate decision, the AEDPA inquiry is not altered when . . . state habeas relief is denied without a written opinion."); Weaver v. Bowersox, 438 F.3d 832, 839 (8th Cir. 2006) (holding that a state supreme court decision that "disposes of a claim, even in a conclusory fashion," is an adjudication on the merits for Section 2254 purposes); Allen v. Ornoski, 435 F.3d 946, 955 (9th Cir. 2006) (holding that where state court fails to articulate its reasoning, federal court should "independently review the record to determine whether the state court clearly erred in its application of Supreme Court law" (internal quotation marks omitted) (quoting Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)); Muth v. Frank, 412 F.3d 808, 815 (7th Cir. 2005) ("AEDPA's requirement that a petitioner's claim be adjudicated on the merits by a state

E. Practical Approaches to Briefing Procedural Issues Under AEDPA

As outlined above, the procedural posture of a claim determines the appropriate standard of habeas review, which in many cases is critical to the federal court's disposition of a claim.[40] Therefore, clearly outlining the often convoluted procedural history of a claim can be extremely valuable to a federal court as it sifts through the voluminous state court record. Rather than only providing courts with lengthy, textual descriptions of the state court proceedings, counsel also should distill the most relevant facts and present them to the court in an easily-referenced format such as a table or chart. Listing the claim, the state court (if any) that considered it, the outcome (with a pinpoint citation to the record), and the appropriate standard of federal habeas review, would push the parties to identify specific procedural points of disagreement early on and ultimately streamline the federal review process.[41] Such charts are also a useful

court is not an entitlement to a well-articulated or even a correct decision by a state court."); Webber v. Scott, 390 F.3d 1169, 1177 (10th Cir. 2004) (holding that a state court's summary rejection of petitioner's claims is "entitled to AEDPA deference and will be upheld unless [the federal court's] independent review of the record and pertinent federal law [indicates that the state court's] result contravenes or unreasonably applies clearly established federal law." (internal quotation marks omitted) (quoting Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999)); Francolino v. Kuhlman, 365 F.3d 137, 141 (2d Cir. 2004) ("We have held that a state court decision need not mention a particular argument or explain the reasons for rejecting it, and that a claim was adjudicated on the merits where it was one of the remaining contentions that the Appellate Division stated were without merit." (internal quotation marks and citations omitted)); Wright v. Sec'y for Dep't of Corrs., 278 F.3d 1245, 1254–55 (11th Cir. 2002) (noting agreement with other circuits that have addressed the issue); Bell v. Jarvis, 236 F.3d 149, 163 (4th Cir. 2000) (holding that a summary state court decision is an adjudication on the merits under Section 2254, and should be upheld unless an "independent review of the record and applicable law" indicates that the state court's *result* is contrary to or an unreasonable application of clearly established federal law); Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000) (independently reviewing the record and applicable law to determine whether the *result* reached by the state court in its "summary denial" of petitioner's claim was "inimical" to AEDPA).

40 *But see* Holloway v. Horn, 355 F.3d 707, 719 n.6 (3d Cir. 2004) (reviewing *Batson* claim de novo, but noting that result would be the same under AEDPA's deferential standards).

41 This would be somewhat analogous to the procedure employed by many federal district judges, either pursuant to their own practice order or a local rule requiring parties litigating motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, to designate undisputed facts with pinpoint citations to the underlying record, and the responding party either to admit that the fact is undisputed or to provide pinpoint citations showing otherwise. The Advisory Committee on Civil Rules has voted to recommend a revised Rule 56 to require pinpoint citations for all assertions that a fact is disputed or undisputed.

means of focusing the parties at oral argument and structuring the memorandum opinion later issued by the court.[42]

For example:

CLAIM	PROCEDURAL HISTORY	DISPOSITION	STANDARD OF REVIEW
Claim 1: Admission of prejudicial physical evidence	Raised on direct appeal (Br. at 7).	Rejected on the merits (555 A.2d at 187).	Apply AEDPA deference to Pa. Supreme Court's decision.
Claim 2: *Batson*	Raised on PCRA review (Br. at 3).	Rejected on the merits (Slip op. at 8).	Apply AEDPA deference to PCRA court's decision.
	Raised on PCRA appeal to Pa. Supreme Court (Br. at 4).	Rejected as waived for failure to raise on direct appeal (666 A.2d at 451).	

IV. THE PROBLEMS AND PROPOSED SOLUTIONS

A. *Hypothetical Case*

A hypothetical situation may help to illustrate the various problems and proposed solutions discussed in this Article. Defendant ("D") is charged with first degree murder and represented at trial by Lawyer #1 ("L1"). L1 fails to file a motion to suppress physical evidence; he objects at trial; the objection is overruled without reason and prejudicial evidence is admitted against D. (Claim 1.) During voir dire, L1 raises a *Batson* objection to the ADA's peremptory challenges, but fails to request, and the trial judge does not require, a sidebar explanation from the ADA. (Claim 2.) Additionally, L1 completely fails to investigate D's background and calls no mitigating witnesses to testify at sentencing. (Claim 3.) Finally, the penalty phase jury instructions indicate that the jury unanimously has to find mitigating circumstances before it can consider and give them effect in violation of *Mills v. Maryland*.[43] (Claim 4.) D is convicted and sentenced to death.

On post-trial motions, L1 only raises non-constitutional trial issues (i.e., none of the above claims); all are rejected by the trial judge. New counsel ("L2") represents D on direct appeal. L2 raises Claim 1 (i.e., the trial court erred in admitting the prejudicial physical evidence) and further asserts that L1 was ineffective for not filing a mo-

42 *See, e.g.*, Lambert v. Beard, No. 02-9034, 2007 WL 2173390, at *5 (E.D. Pa. July 24, 2007) (using a chart to outline claims considered by the PCRA court).

43 486 U.S. 367 (1988).

tion to suppress and for failing to raise this issue in post-trial motions. The Pennsylvania Supreme Court rejects the claims on their merits and affirms the conviction and death sentence.

A new attorney ("L3") is appointed to represent D on collateral review and files a timely petition under Pennsylvania's PCRA alleging that: (1) L2 was constitutionally ineffective in the manner in which he pursued Claim 1 on direct appeal; (2) the prosecutor exercised his peremptory strikes in violation of *Batson* (Claim 2); and (3) L1 was ineffective for failing to present mitigating evidence during the penalty phase (Claim 3), and L2 was ineffective for not raising this claim on appeal. The PCRA court discusses all claims raised by D and finds that: (1) the IAC claim regarding the motion to suppress was previously litigated; (2) the *Batson* claim is meritless; and (3) Claim 3 is waived because D failed to raise it on direct appeal, and the related, boilerplate assertion of appellate ineffectiveness was "insufficiently developed" in D's brief.

D appeals all issues to the Pennsylvania Supreme Court, and raises two additional claims: (1) prior counsel was ineffective for having failed to pursue the *Batson* claim; and (2) the penalty phase jury instructions violated *Mills* (Claim 4). A plurality of the Pennsylvania Supreme Court affirms the PCRA court. The Opinion Announcing the Judgment of the Court ("OAJ") finds that: (1) the IAC claim relating to the motion to suppress was previously litigated; (2) the IAC claim relating to mitigating evidence was "insufficiently developed"; and (3) all other claims are waived under the PCRA. D files a federal habeas petition under Section 2254 raising all four substantive claims and related ineffectiveness claims and requests an evidentiary hearing in the district court.

CLAIM	POST-TRIAL MOTIONS (L1)	DIRECT APPEAL (L2)	PCRA COURT (L3)	PCRA APPEAL (L3)
Claim 1: Admission of prejudicial physical evidence	Not raised.	Raised; rejected on merits.		
Related ineffective assistance of counsel ("IAC claim")	Not raised.	Claim of trial IAC raised; rejected on merits.	Claim of appellate IAC raised; rejected as previously litigated.	OAJ affirms PCRA court—rejects claim of appellate IAC on previous litigation grounds.

Claim 2: *Batson* violation	Not raised.	Not raised.	Raised; rejected on merits.	OAJ affirms PCRA court—rejects claim as waived for failure to raise on direct appeal.
Related IAC claim	Not raised.	Not raised.	Not raised.	Raised; rejected as waived.
Claim 3: Failure to present mitigating evidence during penalty phase	Not raised.	Not raised.	Raised; rejected as waived for failure to raise on direct appeal.	OAJ affirms PCRA court—rejects claim as waived.
Related IAC claim	Not raised.	Not raised.	Claim of appellate IAC raised; rejected as "insufficiently developed."	OAJ affirms PCRA court—rejects claim as "insufficiently developed."
Claim 4: ***Mills* claim**	Not raised.	Not raised.	Not raised.	Raised; rejected as waived.

B. Relaxed Waiver

1. Background

For approximately twenty years, the Pennsylvania Supreme Court followed a practice known as "relaxed waiver," whereby in capital cases it regularly reached the merits of claims that were technically barred by state procedural rules.[44] On November 23, 1998, the Pennsylvania Supreme Court announced in *Commonwealth v. Albrecht*[45] that it would no longer apply the relaxed waiver doctrine in PCRA appeals.[46] The court explained that historically, it had "relaxed its waiver rules as to any claim raised on *direct appeal* for which the record permit[ted] review," in light of "the unique severity and finality of the death penalty."[47] This was "justified, in part, on grounds of judicial economy because it reduce[d] the number and necessity of post-conviction . . . petitions."[48] However, the "ever-widening application" of the relaxed waiver doctrine to claims raised for the first time on *col-*

44 *See* Commonwealth v. Brown, 711 A.2d 444, 455 (Pa. 1998) ("This Court generally applies a relaxed waiver rule in capital cases because of the permanent, irrevocable nature of the death penalty."); *see also* Louis M. Natali, Jr., *New Bars in Pennsylvania Capital Post-Conviction Law and Their Implications for Federal Habeas Corpus Review*, 73 TEMP. L. REV. 69, 87–91 (2000) (describing Pennsylvania's practice of relaxed waiver).

45 720 A.2d 693 (Pa. 1998).

46 *Id.* at 700.

47 *Id.* (emphasis added).

48 *Id.*

lateral review had "virtually eliminated any semblance of finality in capital cases, and frustrated the efficient use of [judicial] resources."[49] The court concluded that the "post-conviction appellate stage is an appropriate time to enforce the rules of waiver," and "[h]enceforth," the court would only excuse a PCRA petitioner's waiver "upon a demonstration of ineffectiveness of counsel" in failing to raise the issue.[50] Thus, after *Albrecht*, if a petitioner fails to raise a claim on direct appeal (which he could have raised), the claim is waived and he may only pursue it on collateral review as a claim of ineffectiveness. Because, according to a majority of the Pennsylvania Supreme Court, *Albrecht* only clarified the "existing standard for reviewing appeals from the denial of post conviction petitions in capital cases," the court has applied it retroactively to "all similar cases . . . under review" at the time *Albrecht* was decided.[51]

Five years after *Albrecht*, the Pennsylvania Supreme Court substantially abrogated the relaxed waiver doctrine in the direct appeals context as well. In *Commonwealth v. Freeman*,[52] the court held that "as a general rule on capital direct appeals, claims that were not properly raised and preserved in the trial court are waived and unreviewable."[53] Petitioners may still pursue waived claims under the PCRA "as claims sounding in trial counsel's ineffectiveness or, if applicable, a statutory exception to the PCRA's waiver provision."[54] Unlike *Albrecht*, the rule announced in *Freeman* only applies prospectively and does not "foreclose the possibility that a capital appellant" may, in a "rare" case, establish that a waived claim is of "such primary constitutional magnitude that it should be reached on appeal."[55]

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49 *Id.*

50 *Id.*; *see also* Commonwealth v. Yarris, 731 A.2d 581, 587 (Pa. 1999) (citing *Albrecht* for the proposition that the "statutory language of the PCRA must be strictly adhered to"); Commonwealth v. Banks, 726 A.2d 374, 376 (Pa. 1999) (rejecting argument that, post-*Albrecht*, the PCRA's time limitations for filing a petition should be relaxed because of the "gravity of the sentence imposed upon a defendant").

51 *See* Commonwealth v. Basemore, 744 A.2d 717, 726 (Pa. 2000); Commonwealth v. Pursell, 724 A.2d 293, 303 (Pa. 1999).

52 827 A.2d 385 (Pa. 2003).

53 *Id.* at 402.

54 *Id. See also* Commonwealth v. Moore, 937 A.2d 1062, 1066 (Pa. 2007) (noting that after *Freeman*, "waived claims may be considered, if at all, only as components of a challenge to trial counsel's stewardship").

55 827 A.2d at 402–03.

2. *Implications for Federal Habeas Review*

The abolition of relaxed waiver on PCRA appeal has had substantial implications for federal habeas review and application of the doctrine of procedural default. As previously noted, a state procedural rule is "adequate" to bar habeas review only if it is firmly established and regularly followed at the time of the petitioner's alleged default. In a number of cases, the Third Circuit has held that because the Pennsylvania Supreme Court did not consistently enforce its waiver rules in capital cases prior to 1998, those rules are inadequate to bar habeas review for petitioners whose purported waivers occurred before November 23, 1998.[56] This has resulted in federal habeas courts considering many technically waived claims under a de novo standard of review. Generally, because a petitioner was not diligent in pursuing these claims in state court, there is often no record to aid the federal court in its review, and it may be difficult (if not impossible) to develop a factual record many years after the trial. It also produces an anomalous situation whereby a petitioner receives a *less* favorable standard of review (i.e., Section 2254(d)) for claims he pursued with *more* diligence in state court.

To the extent that capital defendants and their attorneys reasonably relied upon the availability of relaxed waiver in failing to pursue certain claims in state court, the most equitable solution may in fact be to consider the merits of the claims on federal habeas review. Unfortunately, however, the availability of federal de novo review appears to have encouraged a fair amount of gamesmanship in the manner in which petitioners pursue and present their claims. For example, if an attorney develops a new ground for appeal after the state post-conviction review process is complete, under certain cir-

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56 *See, e.g.*, Kindler v. Horn, 542 F.3d 70, 78–80 (3d Cir. 2008) (deciding that Pennsylvania's "fugitive forfeiture rule" was not firmly established at the time of petitioner's alleged default, and therefore could not bar federal habeas review); Holland v. Horn, 519 F.3d 107, 117–19 (3d Cir. 2008) (holding that petitioner's unasserted federal claims were not procedurally defaulted because any waiver occurred before *Albrecht*); Taylor v. Horn, 504 F.3d 416, 428 (3d Cir. 2007) (holding that claims raised for first time in second PCRA petition are not barred by procedural default because petitioner's time to file a second petition expired before November 23, 1998); Albrecht v. Horn, 485 F.3d 103, 116 (3d Cir. 2007) (holding that petitioner's *Mills* claim was not defaulted because "[a]t the time of [petitioner's] direct appeal, and at the time replacement post-conviction counsel abandoned the *Mills* issue, the state Supreme Court was still applying the relaxed waiver rule"); Laird v. Horn, 414 F.3d 419, 425 n.7 (3d Cir. 2005) (same); Bronshtein v. Horn, 404 F.3d 700, 708–09 (3d Cir. 2005) (same); Jacobs v. Horn, 395 F.3d 92, 117–18 (3d Cir. 2005) (same).

cumstances,[57] he may go back to state court, raise the new claim, have the state court find it is waived, and then raise it on federal habeas review where it will be considered de novo because the state procedural bar is "inadequate" under Third Circuit precedent.[58] In fact, Chief Justice Castille of the Pennsylvania Supreme Court recently suggested that PCRA petitioners deliberately proceed in state court with the anticipation that "if and when" they seek federal review, they will argue the following:

> I posed my PCRA claims as claims of direct constitutional error in state court; I was entitled to do so under relaxed waiver or some other theory; the Pennsylvania Supreme Court's findings of procedural default should not be honored; and my underlying claims therefore should be reviewed, on their merits, without deferring to anything the Pennsylvania state courts had to say.[59]

Then-Justice Castille also has accused the Pennsylvania Supreme Court of silently resurrecting relaxed waiver by converting ineffectiveness claims into the underlying (and waived) claim of *substantive* error and then reviewing the merits of the technically waived claim.[60] Pennsylvania's continued inconsistent enforcement of its waiver rules can only compound the already-existing problems identified above: in those cases where the Pennsylvania Supreme Court chooses to strictly enforce its waiver provisions, federal courts will likely find the state procedural bars inadequate to preclude habeas review and consider the undeveloped claims de novo.

3. *Proposed Solutions*

The Pennsylvania Supreme Court should no longer apply *Albrecht* retroactively and, in that narrow class of cases, should consider technically waived claims on their merits or remand them to the PCRA

57 This scenario presumes that relaxed waiver was still in effect when the Petitioner waived his new claim, i.e., when the time for him to file a timely second PCRA petition expired.

58 *See, e.g.*, Williams v. Beard, No. 05-CV-03486 (E.D. Pa. May 8, 2007). After the *Laird v. Horn*, 159 F. Supp. 2d 58 (E.D. Pa. 2001), decision regarding accomplice liability instructions, petitioner raised an identical claim in a second PCRA petition; both the PCRA court and Pennsylvania Supreme Court found it was untimely, but the federal district court judge felt obliged to consider it de novo on habeas review under Third Circuit precedent.

59 Commonwealth v. Steele, 961 A.2d 786, 837 (Pa. 2008) (Castille, C.J., concurring).

60 *See* Commonwealth v. Brown, 872 A.2d 1139, 1158–77 (Pa. 2005) (Castille, J., concurring); Commonwealth v. Hughes, 865 A.2d 761, 815–17 (Pa. 2004) (Castille, J., concurring and dissenting); Commonwealth v. Marshall, 810 A.2d 1211, 1229–33 (Pa. 2002) (Castille, J., concurring and dissenting).

court for further development.[61] As then-Justice Castille recognized in his concurrence and dissent in *Commonwealth v. Marshall*,[62] the "unspoken concern" that animates the Pennsylvania Supreme Court's recent return to relaxed waiver, has "less to do with what *Albrecht* said about relaxed waiver generally and more to do with an understandable discomfort with the necessary and unavoidable consequences of applying [*Albrecht* retroactively]."[63] Justice Saylor also has suggested on a number of occasions that *Albrecht* should only apply prospectively, and has argued that its retroactive application "has contributed to the [Pennsylvania Supreme] Court's present difficulty in achieving a consensus concerning the appropriate principles to be applied in its absence."[64] In fact, in *Bronshtein v. Horn*,[65] the Third Circuit stated that it would have been less likely to find the state procedural bars inadequate if the Pennsylvania Supreme Court had adopted a "transitional rule" for those cases pending at the time *Albrecht* was decided.[66]

Nonetheless, a majority of the Pennsylvania Supreme Court continues to adhere to *Albrecht*'s retroactive application on the grounds that relaxed waiver was a truly "discretionary" doctrine and the court "cannot simply ignore that the PCRA deems waived claims unreviewable."[67] The "discretionary" nature of relaxed waiver is doubtful: in *Albrecht* itself, the Pennsylvania Supreme Court stated that it had been its "*practice* to decline to apply ordinary waiver principles in capital cases."[68] Rather than simply clarifying the appropriate standard of review for capital PCRA petitions, *Albrecht* required that petitioners

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61 This would be similar to how the Pennsylvania Supreme Court has dealt with the abolition of relaxed waiver on direct appeal announced in *Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). *See supra* notes 52–55 and accompanying text (describing prospective application of *Freeman*).

62 810 A.2d 1211.

63 *Id.* at 1231 (Castille, J., concurring and dissenting).

64 Commonwealth v. Ford, 809 A.2d 325, 338 (Pa. 2002) (Saylor, J., concurring); *see also Steele*, 961 A.2d at 839 n.3 (Saylor, J., dissenting) ("I continue to believe that we made a mistake in directing retroactive application of *Albrecht*.").

65 404 F.3d 700 (3d Cir. 2005).

66 *Id.* at 709 ("Our analysis of the question of procedural default would proceed along a different path if the Pennsylvania Supreme Court, when it abandoned the doctrine of 'relaxed waiver,' had adopted . . . a rule imposing a special filing deadline for those cases in which a PCRA petitioner's one-year filing period expired prior to the end of the 'relaxed waiver' era.").

67 *Marshall*, 810 A.2d at 1231–32 (Castille, J., concurring and dissenting).

68 720 A.2d at 700 (internal quotation marks omitted) (emphasis added); *see also Ford*, 809 A.2d at 337 (Saylor, J., concurring) (acknowledging that relaxed waiver was "made broadly available" by the court); *cf.* Rollins v. Horn, No. Civ.A.00-1288, 2005 WL 1806504, at *3 n.4 (E.D. Pa. July 26, 2005) (collecting cases where Pennsylvania Supreme Court applied the relaxed waiver doctrine).

"plead and prove entitlement to [post-conviction] relief through a layered ineffectiveness standard" and thus effectively "altered the standard of proof."[69] Moreover, to the extent relaxed waiver was discretionary (and therefore unpredictable), this would militate in favor of *prospective* application in order to avoid the inequitable consequences of holding death-sentenced petitioners to an unclear and shifting standard of proof.

Unfortunately, recent cases indicate that the Pennsylvania Supreme Court is not going to alter its position on this issue in the near future. In *Commonwealth v. Tedford*,[70] the court reinforced the retroactive application of *Albrecht*, and rejected the argument that the Third Circuit's findings that certain state procedural bars are "inadequate" should have any bearing on the state court's analysis. Specifically, Chief Justice Castille, writing for the majority, stated:

> The fact that a Third Circuit panel says that a salutary state procedural default . . . will not be respected and the fact that the Circuit misconstrues the scope of the former relaxed waiver doctrine cannot control our interpretation and enforcement of the PCRA. . . . [W]e reject the notion that the PCRA waiver provision does not apply to appellant's claims because the Third Circuit allegedly believes that no capital claim is waivable.[71]

4. *Application to the Hypothetical (Claims 2, 3, and 4)*

In the hypothetical situation set forth above, a federal district judge reviewing D's habeas petition must, under Third Circuit precedent, consider the merits of the claims deemed waived by the Pennsylvania Supreme Court, i.e., Claims 2, 3 and 4.[72] Because Claim 3 was never adjudicated on the merits in the state proceedings, the federal habeas court should review it de novo. If D requested a hearing in state court to develop this claim, he did not "fail" to develop the state court record, and the federal court has discretion under Section 2254(e) to hold an evidentiary hearing.[73] A federal hearing on this

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69 *Ford*, 809 A.2d at 338 (Saylor, J., concurring).

70 960 A.2d 1 (Pa. 2008).

71 *Id.* at 15; *see also* Commonwealth v. Steele, 961 A.2d 786, 796 n.9 (Pa. 2008) ("[W]e have consistently applied the strict waiver rule in PCRA capital appeals where the petition was filed before *Albrecht*.").

72 This assumes that D's direct appeal was complete (i.e., his purported waiver occurred) before the Pennsylvania Supreme Court decided *Albrecht*.

73 *See* Wilson v. Beard, 426 F.3d 653, 665–66 (3d Cir. 2005) ("If a petitioner requests a hearing to develop the record on a claim in state court, and if the state courts (as they did here) deny that request on the basis of an inadequate state ground, the petitioner has not

claim would be particularly appropriate because no state court has ever considered the merits of the claim, and in all likelihood, there is no factual record to aid the federal court in its review.[74]

The federal court also must review the *Batson* claim (Claim 2), and the related ineffectiveness claim on the merits despite the state court's finding of waiver. However, unlike Claim 3, the PCRA court actually considered the merits of the *Batson* claim, and so the federal court does not necessarily have to review it de novo.[75] Likewise, with respect to the *Batson* IAC claim, the federal court may consider the findings of the PCRA court on the underlying substantive claim of error in assessing counsel's effectiveness. Depending upon the quality of the state court record and D's diligence in pursuing the IAC claim below, a federal evidentiary hearing may be necessary on the ineffectiveness issue. In this hypothetical, however, D raised the *Batson* IAC claim for the first time on PCRA appeal to the Pennsylvania Supreme Court. Thus, it would be well within the district court's discretion to find that D failed to develop this claim and decline to hold an evidentiary hearing under Section 2254(e).

Finally, as to the *Mills* claim (Claim 4), the district court must review it de novo, as the Pennsylvania Supreme Court rejected it on inadequate waiver grounds, and there is no lower state court merits determination. However, much like the *Batson* IAC claim, D did not raise this claim until PCRA appeal, and so the district judge may conclude that an evidentiary hearing is inappropriate under Section 2254(e).

C. *Layered Claims of Ineffective Assistance of Counsel*

1. *Background*

A closely related problem is the significant lack of clarity as to how to bring a layered claim of ineffectiveness (that is, how to properly allege on post-conviction review that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to do "x"). After relaxed waiver was abolished on PCRA review in *Albrecht*,

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'failed to develop the factual basis of [the] claim in State court proceedings' for purposes of § 2254(e)(2)." (alteration in original)).

74 How a federal judge should treat the appellate IAC claim (which the PCRA court and Pennsylvania Supreme Court held was "insufficiently developed") is discussed *infra* in Part IV.C.4.

75 *See infra* Part IV.D (discussing whether a merits determination by a lower state court constitutes an adjudication on the merits within the meaning of Section 2254(d)).

this issue became particularly important because now, if counsel fails to bring a claim on direct appeal, the only remaining cognizable claim is appellate ineffectiveness (both the underlying claim of error and trial counsel ineffectiveness having been waived if counsel could have raised them, but did not, on direct review).[76]

For some time, the Pennsylvania Supreme Court held that a boilerplate allegation of appellate ineffectiveness was sufficient to overcome any waiver and rendered ineffective assistance claims reviewable on their merits.[77] However, the court stressed that the question of waiver is distinct from whether a petitioner has sufficiently developed his ineffectiveness claims in his brief to enable the court to conduct an effective appellate review.[78] In *Commonwealth v. Williams*, the court cautioned that this distinction would "likely undergo further development over time in the context of specific cases."[79]

Two years later, in *Commonwealth v. McGill*,[80] the Pennsylvania Supreme Court definitively set forth the standard for layering claims of ineffectiveness. To *preserve* a claim of appellate ineffectiveness, PCRA counsel must: (1) *plead* in his PCRA petition that L2 was ineffective for failing to argue that L1 was ineffective; and (2) *present argument* as to L2's representation in his brief (i.e., develop each prong of the ineffectiveness test).[81] The court recognized that in the past it had not been clear on this issue and so "remand to the PCRA court may be appropriate for cases currently pending in the appellate courts where

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76 This does not pose a problem for cases where the direct appeal was filed after *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). In *Grant*, the Pennsylvania Supreme Court held that ineffectiveness claims ordinarily should be raised for the first time on collateral review. *Id.* at 738. Before *Grant*, appellants were required "to raise challenges to the effectiveness of counsel at the earliest opportunity, i.e., the first stage of the litigation when appellant was represented by an attorney different than the one whose effectiveness was to be challenged" (generally, this stage is direct appeal). Commonwealth v. Dennis, 950 A.2d 945, 950 (Pa. 2008). After *Grant*, PCRA petitioners may *directly* assert claims of trial counsel ineffectiveness on collateral review, rather than plead them through the lens of appellate ineffectiveness in order to avoid the PCRA's waiver provision.

77 *See, e.g.*, Commonwealth v. Lambert, 797 A.2d 232 (Pa. 2001); Commonwealth v. Williams, 782 A.2d 517 (Pa. 2001); Commonwealth v. Marrero, 748 A.2d 202 (Pa. 2000).

78 *Lambert*, 797 A.2d at 242; *see also* Commonwealth v. Wharton, 811 A.2d 978 (Pa. 2002) ("[N]otwithstanding this Court's abrogation of relaxed waiver on PCRA appeal, we have indicated that we will continue to afford some degree of latitude in construing the *pleadings* in capital PCRA appeals. In keeping with this latitude, we will not deem appellant's tacked on claims of counsel ineffectiveness to be waived on grounds that he did not properly identify the claims as such or properly develop them in his brief." (citations omitted)).

79 782 A.2d at 525.

80 832 A.2d 1014 (Pa. 2003).

81 *Id.* at 1022.

the petitioner has failed to preserve, by pleading and/or presenting, a layered ineffectiveness claim in a manner sufficient to warrant merits review."[82] However, the court stated it would not permit a remand "based on the failure of a PCRA petitioner to thoroughly plead and prove a claim that [L1] was ineffective" because the standard for trial counsel ineffectiveness had been well-settled for some time.[83]

2. *Implications for Federal Habeas Review*

The Pennsylvania Supreme Court's admitted lack of clarity on this issue has created substantial confusion for advocates attempting to bring layered ineffectiveness claims in both state and federal court. From a federal habeas perspective, a key issue is whether the state court's decision that a petitioner has inadequately developed an ineffectiveness claim is procedural or substantive in nature (this, of course, is important for determining the scope of federal habeas review). For cases decided before *McGill*, the "inadequate development" ground was clearly substantive in nature, as the Pennsylvania Supreme Court repeatedly stated that boilerplate assertions of ineffectiveness did not waive claims, but rather failed on the merits under *Strickland*'s ineffectiveness standard.[84]

After *McGill*, however, the failure to present adequate argumentation on a layered claim of ineffectiveness seems more like a procedural basis for rejecting a claim: the court has stressed that in order to "*preserve*" an ineffectiveness claim, a petitioner must now plead and

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82 *Id.* at 1024; *see, e.g.*, Commonwealth v. Bennett, 930 A.2d 1264, 1268 (Pa. 2007) ("[W]e provided for liberal amendment of PCRA petitions following our decision in [*McGill*] . . . ."); Commonwealth v. Gorby, 909 A.2d 775, 786 n.12 (Pa. 2006) ("[A]n appropriate response to an undeveloped claim in cases preceding *McGill* was a remand to provide an opportunity for adequate development under clarified standards.").

83 832 A.2d at 1025; *see also* Commonwealth v. Dennis, 950 A.2d 945, 955–56 (Pa. 2008) (noting that the "*McGill* remand" is "proper unless an appellant has failed, in pleading trial counsel's ineffectiveness, to satisfy the [ineffectiveness] test with respect to trial counsel").

84 *See, e.g.*, Commonwealth v. Lambert, 797 A.2d 232, 243 (Pa. 2001) (holding that petitioner's boilerplate allegations of ineffectiveness were sufficient to "overcome any waiver" but "doom[ed] his . . . claims to failure" on the merits (internal quotation marks omitted)). *But see* Holloway v. Horn, 355 F.3d 707, 718–19 (3d Cir. 2004) (finding there was no adjudication on the merits where the Pennsylvania Supreme Court found that petitioner's failure to "make a record for review of [his] *Batson* challenge" made it "impossible to determine if [his] claim ha[d] arguable merit" (emphasis omitted) (quoting Commonwealth v. Spence, 627 A.2d 1176 (Pa. 1883))).

present argument on each prong of the ineffectiveness test.[85] If this ground for rejecting a claim is considered procedural in nature, a federal habeas court very likely will find that the state procedural bar is "inadequate" to preclude habeas review because of the "confusing, inconsistent and constantly shifting" nature of the Pennsylvania Supreme Court's jurisprudence in this area.[86] This presents federal courts with problems similar to those identified in the relaxed waiver context—i.e., having to review undeveloped claims de novo without the benefit of a state court record.[87]

Additionally, in *McGill*[88] the court specifically noted that it would not remand cases in order for petitioners to adequately plead and prove claims of *trial* counsel ineffectiveness because that standard had been clearly established since *Commonwealth v. Pierce*.[89] Despite this clear pronouncement, the Pennsylvania Supreme Court has inconsistently applied it in practice. In *Commonwealth v. Marinelli*,[90] the court considered a technically waived claim of *trial* counsel ineffectiveness on its merits, precisely because petitioner had filed his second PCRA petition "at a time when the degree of specificity required to achieve substantive review of an ineffectiveness claim was still unsettled."[91] Both Chief Justice Cappy and Justice Saylor correctly pointed out in their concurring opinions that this approach squarely conflicted with the majority's statements regarding trial counsel ineffectiveness in

85 *See, e.g.*, Commonwealth v. Gwynn, 943 A.2d 940, 950 n.9 (Pa. 2008) (rejecting post-*McGill* claim of appellate counsel ineffectiveness because it "was not developed beyond a mere boilerplate allegation, and therefore merit[ed] no review").

86 Commonwealth v. Steele, 961 A.2d 786, 797 n.11 (Pa. 2008) (quoting Brief for Appellant at 7–8). In *Steele*, the majority deemed the ineffectiveness claims "waived for lack of development." *Id.* at 797. The dissent pointed out that these claims were not distinguishable from claims "garnering merit review [by the court] in the recent past." *Id.* at 839 n.3 (Saylor, J., dissenting). *See also* Holiday v. Varner, 176 F. App'x 284, 287 (3d Cir. 2006) (stating that the court was not "convinced" there was a clearly established procedural rule for pleading layered ineffectiveness claims at the time the PCRA petition was filed).

87 Federal courts also would encounter difficulties even if they considered the "inadequate briefing" ground to be an adjudication on the merits within the meaning of Section 2254(d). The Pennsylvania Supreme Court often disposes of ineffectiveness claims on this basis in a summary fashion, leaving federal courts with very little to consider under AEDPA's deferential standards of review.

88 832 A.2d 1014.

89 527 A.2d 973 (Pa. 1987); *see also* Commonwealth v. Jones, 912 A.2d 268, 294 (Pa. 2006) (collecting cases where the court declined to remand "in light of the appellant's failure to prove the ineffectiveness of *trial* counsel" (emphasis added)).

90 910 A.2d 672 (Pa. 2006).

91 *Id.* at 680.

McGill.[92] In his concurring opinion in *Marinelli*, Justice Saylor further stated that, from that point on, he would no longer afford petitioners leeway in layering their ineffectiveness claims: "capital counsel should be specifically admonished that, if they wish for their clients' claims to be considered as layered or derivative claims in any post-*McGill* brief, they must frame, structure, and develop them as such, per *McGill*."[93]

3. Proposed Solutions

The Pennsylvania Supreme Court's inconsistent and unpredictable application of its own standards inevitably will result in federal habeas courts finding procedural bars inadequate and continuing to review undeveloped claims de novo. In light of its historically inconsistent application of ineffectiveness standards on PCRA appeal, the Pennsylvania Supreme Court should (in pre-*McGill* cases) attempt to resolve ineffectiveness claims on the merits to the extent possible or more liberally remand cases to the PCRA court for further development of the factual record. Although this may prolong the duration of a case, it will ultimately enhance the quality and ease of federal habeas review (as the federal court will have a more developed state court record to consider) and is more in line with AEDPA's goal of affording deference to state court decisions and preventing federal "retrials."[94] Additionally, the PCRA courts should, in the first instance, make clear, detailed findings of fact and conclusions of law on the record, which will then allow the Pennsylvania Supreme Court to engage in a more "meaningful appellate review."[95] Regardless of the specific approach adopted, the Pennsylvania courts must *consistently* apply their standards to prevent federal courts from finding state procedural bars "inadequate" and reviewing claims de novo.

It is also important for lawyers to reevaluate the manner in which they plead claims of ineffectiveness at both the state and federal stag-

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92 *Id.* at 690 (Cappy, C.J., concurring); *id.* at 690–91 (Saylor, J., concurring); *see also Jones*, 912 A.2d at 277–78, 296 (majority adopting same approach to waiver, and Saylor cross-referencing his concurrence in *Marinelli*).

93 910 A.2d at 691 (Saylor, J., concurring).

94 *See generally Michael Williams*, 529 U.S. 420, 437 (2000) ("Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.").

95 Commonwealth v. Beasley, 967 A.2d 376, 387 (Pa. 2009) (remanding for PCRA court to address all claims and provide "developed, independent reasoning"); Commonwealth v. Dennis, 950 A.2d 945, 964 (Pa. 2008) (noting "limitations imposed" by the PCRA court's sparse opinion and remanding for more precise findings).

es of the litigation. Rather than presenting extensive argumentation on the substantive claim of error and then attaching a one-line allegation of ineffectiveness (an admitted "relic of relaxed waiver briefing"),[96] counsel must recognize that ineffectiveness claims and claims of error are substantively different and address them as such. This is important not only for avoiding a finding of waiver in state court but also for ensuring that federal review of ineffectiveness claims (whether de novo or deferential) is meaningful.[97]

4. *Application to the Hypothetical (Claim 3)*

Assuming D's PCRA petition was filed before *McGill*, a federal district judge should find that the "inadequate briefing" ground identified by the state courts is substantive in nature, and consider D's claim of appellate ineffectiveness regarding Claim 3 under AEDPA's deferential standard of review. However, because the state courts rejected the appellate IAC claim as insufficiently developed and the underlying substantive claim as waived, there is very little for the federal court to defer to, and an evidentiary hearing may be warranted.

D. *Ineffectiveness Claims and "Previously Litigated" Findings*

1. *Background*

Another related problem is that, for many years, the Pennsylvania Supreme Court treated substantive claims of error and related ineffectiveness claims as one and the same for purposes of determining whether a claim was "previously litigated" under the PCRA. Pursuant to this practice, if a petitioner raised a substantive claim on direct ap-

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96 Commonwealth v. Brown, 872 A.2d 1139, 1163 n.3 (Pa. 2005).

97 Chief Justice Castille recently explained his belief that PCRA appeal counsel *deliberately* brief ineffectiveness claims in this fashion because they are more concerned with "laying the groundwork for anticipated federal habeas corpus relief." Commonwealth v. Steele, 961 A.2d 786, 836–37 (Pa. 2008) (Castille, C.J., concurring). According to Chief Justice Castille, counsel know that when they proceed to federal court, they can argue that the state court's finding of waiver with respect to the underlying claim is inadequate to bar federal habeas review and the federal court should consider the claim de novo. Thus, they "view compliance with *Strickland* (and the PCRA itself) as a comparative waste of time (and briefing space)." *Id.* at 838. Moreover, the less they say about ineffectiveness in the PCRA court, "the easier it will be to claim in federal court that appellant was not obliged to raise his waived 'constitutional' claims [on PCRA review] under the derivative guise of *Strickland*." *Id.* To the extent this is the case, it is important that practitioners realize that briefing issues in this cursory fashion in state collateral proceedings ultimately results in a more protracted and less meaningful federal habeas review process.

peal, the PCRA court would find that the ineffectiveness claim was previously litigated and refuse to review it on its merits. In *Commonwealth v. Collins*,[98] the Pennsylvania Supreme Court abandoned this practice, concluding that "a Sixth Amendment claim raises a distinct issue for purposes of the PCRA and must be treated as such."[99] Likewise, after *Collins*, if a petitioner raises a claim of *trial* counsel ineffectiveness on direct review, and a claim of *appellate* counsel ineffectiveness on collateral review with respect to the same underlying issue, the court will treat the appellate IAC claim "as a distinct ineffectiveness claim and . . . conduct a substantive review."[100] Of course, if petitioner attempts to relitigate the "very issue" that was previously litigated, "it will be barred pursuant to 42 Pa. C.S. § 9544."[101]

2. *Implications for Federal Habeas Review and Proposed Solution*

Federal habeas courts must determine which standard of review to apply to an ineffectiveness claim that the state court erroneously deemed "previously litigated" under pre-*Collins* case law. Applying AEDPA deference to the state court's decision on the underlying claim of error (to the extent this decision relates to the ineffectiveness claim under consideration) comports most with AEDPA's goal of affording substantial deference to state court decisions. Further, in *Albrecht v. Horn*,[102] the Third Circuit suggested that where the state supreme court had reviewed a substantive claim of error in the context of ineffective assistance, the argument that a federal habeas court should review the underlying claim of error de novo would be meritless.[103] Thus, in light of both Third Circuit case law and practical con-

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98 888 A.2d 564 (Pa. 2005).

99 *Id.* at 573; *see also* Commonwealth v. Gwynn, 943 A.2d 940, 945 (Pa. 2008) ("[C]ourts must treat ineffectiveness claims raised under the PCRA as wholly independent of the underlying claim of error, and must review them under the . . . ineffectiveness standard . . . ."). If a PCRA court rejected ineffectiveness claims as previously litigated prior to *Collins*, the Pennsylvania Supreme Court "may remand those claims for further analysis consistent with *Collins*," but need not do so if the claims are "obviously deficient for other reasons" (e.g., they are "lacking in arguable merit"). Commonwealth v. Tedford, 960 A.2d 1, 14, 37 (Pa. 2008).

100 Commonwealth v. Carson, 913 A.2d 220, 263 (Pa. 2006).

101 Commonwealth v. Rios, 920 A.2d 790, 801 n.2 (Pa. 2007).

102 485 F.3d 103 (3d Cir. 2007).

103 *Id.* at 116; *see also* Lambert v. Beard, No. 02-9034, 2007 WL 2173390, at *10 n.16, *41 n.50 (E.D. Pa. July 24, 2007) (considering the "direct appeal decision under § 2254(d), to the extent it relates to the ineffectiveness claim presently before this Court"); Alford v. Johnson, No. Civ.A.00-683, 2006 WL 516768, at *6 (E.D. Pa. Mar. 1, 2006) (reviewing the superior court's opinion on the substantive claim of error "insofar as it is relevant to the in-

siderations, AEDPA deference seems most appropriate in these circumstances.

3. Application to the Hypothetical (Claim 1)

In D's case, a federal district court must review Claim 1 (dealing with admission of prejudicial physical evidence) and the trial counsel IAC claim under AEDPA's deferential standard of review, as they were both adjudicated on the merits in state court. The related claim of *appellate* counsel IAC, however, was erroneously rejected as previously litigated. Under the principles discussed above, the federal court should review the merits of the appellate IAC claim by applying AEDPA deference to the state court's decision on the underlying claim of error to the extent that decision is relevant to the ineffectiveness claim presently before the court. To the extent an evidentiary hearing is necessary,[104] the court would have discretion to convene one as it does not appear that D failed to develop this claim below (having raised the underlying claim of error and trial counsel ineffectiveness on direct appeal, and appellate IAC on PCRA review).

E. Merits Determinations by Lower State Courts

1. Background and Implications for Federal Habeas Review

If a lower state court disposes of a claim on its merits, but a higher state court rejects it on procedural grounds which are "inadequate" to bar federal habeas review, should a federal habeas court review the claim de novo or "look through" the last state court decision and apply AEDPA deference to the merits opinion of the lower state court? The Third Circuit first identified this issue in *Wright v. Vaughn*,[105] but, following the Second Circuit's lead, "bypassed" it and "assumed without deciding that there was an adjudication on the merits in the state courts."[106] The few district courts to have addressed the issue have

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effective assistance claims" before the court). *But see* Caballero v. Folino, No. 04-2190, 2008 WL 650024, at *6 (E.D. Pa. Mar. 10, 2008) (applying de novo standard of review to ineffectiveness claim that was deemed previously litigated by the state superior court).

104 Because both the underlying claim of error and claim of trial counsel ineffectiveness were adjudicated on their mertits on direct appeal, the district court very likely would not need to hold an evidentiary hearing in order to decide the appellate IAC claim.

105 473 F.3d 85 (3d Cir. 2006).

106 *Id.* at 90–91.

applied AEDPA deference to the last state court decision *to have actually addressed the merits of the claim.*[107]

2. *Proposed Solutions*

Applying AEDPA's deferential standard of review to the last state court decision to have considered the merits of a claim is the most appropriate approach in light of the "look-through" presumption adopted by the Supreme Court in *Ylst v. Nunnemaker*,[108] in the procedural default context, and its subsequent application in the Third Circuit. In *Ylst*, the Court held that in determining whether an unexplained state court order rests primarily on federal law, the federal court should look at the "last *explained* state-court judgment," and apply a rebuttable presumption that the later unexplained order rests upon the same grounds.[109] Thus, if the "last reasoned opinion" found a procedural default, a federal habeas court should, in the absence of "strong evidence" to the contrary, presume that a "later [unexplained] decision rejecting the claim did not silently disregard that [procedural] bar and consider the merits" of the claim.[110]

Third Circuit case law suggests that, at least in certain circumstances, the federal court of appeals is willing to treat a lower state court decision as the focal point of the AEDPA inquiry. In *Barkley v. Ortiz*,[111] a non-precedential opinion issued the same day as *Wright v. Vaughn*, the Third Circuit (relying on *Ylst*) applied AEDPA's deferential standards of review to a trial court opinion where the higher state court, "without discussion, merely stat[ed] that [petitioner's] argument was without merit."[112] More recently, in *Fahy v. Horn*, the Third Circuit agreed with the district court that the PRCA court's decision was an adjudication on the merits, where the petitioner had waived his right to appeal his claims to the Pennsylvania Supreme Court.[113]

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107 *See, e.g.*, *Lambert*, 2007 WL 2173390, at *8 (applying AEDPA's standards of review to claims which the state supreme court held were waived on the basis of inadequate procedural grounds, but were adjudicated on the merits by the PCRA court); Rollins v. Horn, No. Civ. A. 00-1288, 2005 WL 1806504, at *29 n.23 (E.D. Pa. July 26, 2005) (same).

108 501 U.S. 797 (1991).

109 *See id.* at 802–06.

110 *Id.* at 803–04.

111 209 F. App'x 120 (3d Cir. 2006).

112 *Id.* at 123–24 & n.1 (internal quotation marks omitted); *see also* Smalis v. Pappert, 152 F. App'x 252, 255 (3d Cir. 2005) (adopting the same approach).

113 Fahy v. Horn, 516 F.3d 169, 197 (3d Cir. 2008) (partially affirming *Fahy v. Horn*, No. Civ.A. 99-5086, 2003 WL 22017231, at *34 (E.D. Pa. Aug. 26, 2003) (finding that the PCRA court's opinion "constitutes an 'adjudication on the merits' of the claims consid-

There is no principled reason why the same approach should not be applied in cases where the last state court to consider a claim rejected it on "inadequate" procedural grounds. Reviewing such a claim de novo—in spite of a merits determination by a lower state court—would not comport with the increased deference AEDPA requires federal courts to afford state court decisions, and would undermine AEDPA's goal of "prevent[ing] federal habeas retrials and [ensuring] that state-court convictions are given effect to the extent possible under law."[114] Furthermore, as discussed in Part IV.B.2, under the Third Circuit's relaxed waiver jurisprudence, a petitioner may receive a more favorable standard of review in federal court (i.e., de novo) for claims pursued with less diligence during the state proceedings. Applying AEDPA's deferential standard of review in cases where the higher state court rejected the claim as waived, but a lower court addressed it on the merits, may serve to ameliorate this anomalous situation.

3. *Application to the Hypothetical (Claim 2)*

In D's case, the PCRA court reviewed the merits of the *Batson* claim, but the Pennsylvania Supreme Court rejected it on inadequate procedural grounds. Under the principles discussed above, a federal habeas court should consider the claim on the merits and review the PCRA court's decision under AEDPA's deferential standards.

F. *Plurality Decisions (OAJs)*

1. *Background*

Another important issue is the proper treatment of a state court plurality opinion (sometimes referred to as an "Opinion Announcing the Judgment of the Court" or "OAJ") under AEDPA and the Third Circuit's relaxed waiver jurisprudence. In recent years, the Pennsylvania Supreme Court has issued a substantial number of plurality decisions in capital PCRA appeals. Justice Saylor has explicitly recognized this trend, and opined that the "number of divided opinions in

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ered therein")); *cf.* Nara v. Frank, 488 F.3d 187, 200–01 (3d Cir. 2007) (rejecting the argument that the PCRA court's findings regarding petitioner's competency were not an "adjudication on the merits" because Section 2254(e)'s presumption of correctness does not require an adjudication on the merits, *and* because the *PCRA judge* "plainly did reach the merits of [the] incompetency claim").

114 Bell v. Cone, 535 U.S. 685, 693 (2002) (internal quotation marks omitted).

this area" is due in part to *Albrecht*'s retroactive elimination of relaxed waiver.[115] Under Pennsylvania law, the "ultimate order of a plurality opinion; i.e. an affirmance or reversal, is binding on the parties in that particular case, [but] legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority."[116]

2. Implications for Federal Habeas Review, Proposed Solutions, and Application to the Hypothetical (Claims 2 and 4)

The issue for federal habeas courts is whether OAJs should be treated as adjudications on the merits under AEDPA. Plurality opinions are closely analogous to summary affirmances and should be treated as such on habeas review.[117] Thus, applying the "look-through" presumption of *Ylst*, federal habeas courts should determine whether the last *reasoned* state court decision (i.e., the PCRA court's opinion) rested on substantive or procedural grounds and proceed accordingly.

Complications arise, however, when courts attempt to implement this "summary affirmance analogy" against the backdrop of the Third Circuit's relaxed waiver jurisprudence. Consider our hypothetical: D raised the *Batson* claim (Claim 2) for the first time in the PCRA court and the court rejected it on its merits; the Pennsylvania Supreme Court then affirmed in a plurality opinion on the grounds that the claim was waived because petitioner failed to raise it on direct appeal. Petitioner also raised the *Mills* claim for the first time on PCRA appeal to the Pennsylvania Supreme Court and the OAJ rejected it as waived for failure to raise it in the PCRA trial court. Putting aside the issue of "relaxed waiver" for the moment, a federal habeas court should, under the principles articulated above, treat the OAJ as a summary affirmance of the PCRA court and apply AEDPA's deferential standard of review to all claims adjudicated on the merits below (in this example, the *Batson* claim). Claims not raised before the PCRA court, such as the *Mills* claim, would be defaulted.

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115 *See* Commonwealth v. Ford, 809 A.2d 325, 338 (Pa. 2002) (Saylor, J., concurring).

116 *In re* O.A., 717 A.2d 490, 496 n.4 (Pa. 1998).

117 *See, e.g.*, Lambert v. Beard, No. 02-9034, 2007 WL 2173390, at *7 n.13 (E.D. Pa. July 24, 2007) (reasoning that "because the Pennsylvania Supreme Court's opinion on PRCA appeal . . . did not represent the majority's opinion," it was "appropriate to view the OAJ as a summary affirmance of the PCRA court"); Simmons v. Beard, 356 F. Supp. 2d 548, 557 (W.D. Pa. 2005) (reviewing a state court plurality decision "in the same manner that [it] would review a summary disposition of a claim").

Now enter relaxed waiver. Third Circuit case law[118] tells us that the procedural bars identified by the Pennsylvania Supreme Court are inadequate to bar federal habeas review. If the decision of the state supreme court had *not* been a plurality opinion, a federal habeas court clearly would have to review the merits of both the *Batson* claim (possibly applying AEDPA deference to the PCRA court's decision) and the *Mills* claim (under a de novo standard). However, in the case of a plurality opinion, a tension exists between the logical impulse to treat the OAJ as a summary affirmance of the PCRA court (which did not consider *Mills*), and case law holding that petitioner's failure to raise the *Mills* claim before the PCRA court is not an adequate bar to federal habeas review. In all fairness to petitioner, the fact that the state supreme court happened to issue a plurality opinion should not dictate the scope of the federal court's review and preclude consideration of the *Mills* claim when a federal habeas court would otherwise review the claim de novo. Thus, although the "summary affirmance analogy" is generally useful in dealing with state court plurality decisions, courts may not always be able to rely upon it in the context of relaxed waiver.

V. CONCLUSION

There are no easy solutions to the problems outlined in this Article. However, given the importance of what is at stake in capital cases, it is imperative that counsel and judges work together to improve the collateral review process. At a minimum, both state and federal courts must be cognizant of the broader impact of their decisions (the interplay between Pennsylvania's relaxed waiver jurisprudence and the federal doctrine of procedural default is a prime example). Although anticipated federal treatment of state decisions certainly should not dictate the outcome of PCRA review, the Pennsylvania courts cannot continue to adjudicate cases as if their decisions represent the "end of the road" for the capital petitioner. Equally important, post-conviction counsel should carefully develop and pursue claims in state courts (rather than treat the state review process as a mere stepping stone to federal court) so that the inevitable federal habeas review that follows will be as efficient, deferential, and meaningful as possible.

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118 *See supra* notes 56, 58.