SUPREME COURT, U.S.
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No. 10-637

IN THE SUPREME COURT OF THE UNITED STATES

ERIC GREENE,
Petitioner

v.

JON FISHER, SUPERINTENDENT, SCI-SMITHFIELD; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal habeas court overturn a state criminal judgment on the ground that the state court did not foresee and follow a future ruling of this Court – decided *after* the state court ruling but before the point of technical "finality" – in light of AEDPA's clear mandate requiring deference to state court determinations that reasonably apply existing United States Supreme Court precedent?

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COUNTERSTATEMENT OF THE CASE

Eric Greene is a Pennsylvania state prisoner who was convicted of second-degree murder, three counts of robbery, and conspiracy. In early December of 1993, he and four other individuals robbed Lily's Market, killing the owner of the store – Francisco Azcona – in front of his wife and sister-in-law.

Greene was one of five co-conspirators tried jointly. Two of the five gave statements to police confessing their involvement. Pre-trial, Greene filed a motion for severance arguing the statements of his two co-defendants were "not suitable for redaction" and "[a]ny attempt at such would serve only to prejudice the defendant." The statements were ultimately redacted using mostly neutral phrases like "the other guy," but at points the names were removed and replaced by only a blank.

During the pre-trial severance hearing, Greene ultimately consented to the redaction proposed by the trial court, calling the court's method "brilliant." He did, however, maintain his position that use of the statements during trial would violate his rights under the Confrontation Clause – not because of the redaction method, but because the statements incriminated him inferentially. That is, he argued that, when the statements were considered in the context of the evidence as a whole, the jury might be able to infer that he was involved.

That argument was unsuccessful because the statements (as redacted) did not in fact match up with the evidence presented at trial. For example, the trial testimony indicated that five individuals were responsible for the robbery. One of the redacted statements, however, indicated there were six men involved in the crime. The second statement (after it was redacted) seemed to indicate that only four men were involved in the crime. Furthermore, both statements asserted that three men went into the store for the robbery, but the testimony at trial indicated that four men went into the store. The absence of a one-to-one correspondence thus made it impossible to "fill in the blanks" in the redaction.

After conviction, Greene appealed to the Pennsylvania Superior Court. The Superior Court is an intermediate appellate court, but, because the Pennsylvania Supreme Court exercises only discretionary review in non-capital criminal cases, the Superior Court is the final court of review for almost all Pennsylvania criminal judgments.

On December 16, 1997, four months *before* this Court's decision in *Gray v. Maryland*, 523 U.S. 185 (1998), the Superior Court rejected Greene's Confrontation Clause claim.[1] *Gray* was issued

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[1]As in the trial court, Greene's brief on appeal did not (continued...)

while Greene's petition for allowance of appeal to the state supreme court was pending. The *Gray* decision held that the use of blanks in redacted statements can raise a *Bruton*[2] problem, even aside from the issue of contextual implication.

Greene did not attempt to supplement his petition in light of the new precedent from this Court. Nonetheless, the Pennsylvania Supreme Court granted the petition for allowance of appeal, limited to the Confrontation Clause issue. However, after both parties filed briefs, on April 30, 1999, the court summarily dismissed Greene's appeal, noting that permission to file the appeal was "improvidently granted."

Greene filed two collateral petitions in state court, which were both denied; he appealed only one of these decisions. He did not ask the state court to apply *Gray* to his case in connection with any of this collateral litigation.

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[1](...continued)
challenge the method used for the redaction, either in relation to the use of "other guy" or as to the use of blanks. The appellate court nonetheless considered both the contextual implication issue actually raised, as well as the trial court's use of neutral terms such as "the other guy." The court did not, however, address the (uncontested) use of blanks in the redacted statements.

[2]*Bruton v. United States*, 391 U.S. 123 (1968).

Greene filed a federal habeas corpus petition on November 8, 2004. On January 26, 2006, the magistrate judge recommended that the petition for writ of habeas corpus be denied as meritless, but recommended that a certificate of appealability on Greene's "confrontation clause" claim be granted. The Commonwealth filed objections. On March 28, 2007, the district court approved and adopted the Report and Recommendation.

In briefing to the Third Circuit, the Commonwealth defended Greene' conviction on three distinct grounds – (1) petitioner's confrontation clause claim was meritless, because before *Gray* the state court's method of redaction was not an objectively unreasonable application of United States Supreme Court precedent; (2) in any event, any "error" did not have a substantial and injurious effect on the verdict; and (3) the claim presented to the federal court on habeas review was not fairly presented to the state court and so was procedurally defaulted. On May 28, 2010, the Third Circuit Court of Appeals affirmed the decision of the district court, finding that the AEDPA standard of review precluded it from considering *Gray* in the

evaluation of the confrontation clause claim.[3] One judge dissented.

Greene now seeks review in this Court.

FACTORS BEARING ON THE REQUEST FOR REVIEW

The question presented arises infrequently and the decision below was clearly correct, but there is a two-circuit conflict and "uncertain" precedent, and the issue implicates the fundamental nature of deferential habeas review. Respondents do not oppose the grant of the petition.

Petitioner has overstated many of the arguments in favor of granting review of the decision below. On balance, however, respondents agree

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[3]The court rejected the Commonwealth's fair presentation argument in a summary fashion, stating that the "factual and legal substance" of the claim was before the state court, and since the state court dismissed on a "substantive" basis and not a "procedural" basis, the claim was exhausted. *Greene v. Palakovich*, 606 F.3d 85, 93 (3rd Cir. 2010). Later in the opinion, however, the court acknowledged that Greene's habeas claim under *Gray* was based on "a 'discrete legal ground,'" distinct from the issue adjudicated on direct appeal. *Id.* at 103 n.12.

that the case presents an issue that requires clearer guidance, and that, if wrongly resolved, will jeopardize a core principle of AEDPA's reform of federal habeas review.

A. The question presented arises infrequently.

Petitioner argues that cases like this one – where this Court announces a dispositive new rule of constitutional law in the narrow window between the last state court decision on the merits and the date that the judgment becomes final – are commonplace. Essentially, petitioner's calculus is that there are a lot of criminal defendants, that this Court keeps issuing "new rules," and that it takes a very long time before state court rulings become final.

These contentions add up to less than petitioner claims.

First, the pronouncement of "new rules" under *Teague v. Lane*, 489 U.S. 288 (1989), is the exception rather than the rule. And not all such new rules apply to a large class of defendants. Of those that are affected, many will still not be able to show error, or error that is not harmless. Thus, the class of criminal defendants that can hope to prevail by virtue of any new rule is confined.

That class is dramatically reduced by the relative brevity of the pre-finality period at issue here. Petitioner argues that cases can remain pending for months and years while the state court considers a petition for discretionary review or reargument. Potentially – but only if such a petition is timely filed to begin with; and the time periods for doing so are typically quite short. In Pennsylvania, for example, if a litigant does not seek allowance of appeal in the state supreme court within 30 days, the judgment of the state superior court will become final. Pa. R. App. P. 1113(a). Petitions for reargument must be filed within just 14 days. Pa. R. App. P. 2542(a).[4] Moreover, as a matter of Pennsylvania and federal law, defendants do not even have to seek discretionary review in state court in order to exhaust their claims for purposes of federal habeas review. *See Wenger v. Frank*, 266 F.3d 218, 224-25 (3d Cir. 2001) (Alito, J.).

The number of cases presenting the necessary confluence of events, therefore, is fairly small.

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[4]Petitioner cites a First Circuit case, *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009), in which the court of appeals speculated that a prisoner's motion had remained pending, thus delaying "finality" under state law, for six years. On remand, the state supreme court concluded that, in fact, the motion became final twenty days after the last state court decision, not six years later. *Foxworth v. St. Amand*, 929 N.E.2d 286 (Mass. 2010).

In the fifteen-year period since the enactment of the AEDPA, petitioner can identify only three cases where the issue was even arguably decisive – the present case, *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010), and *Thompson v. Runnel*, 621 F.3d 1007 (9th Cir. 2010). Though petitioner cites other cases to suggest this issue recurs "frequently," the consideration of the "new" law discussed in each did not affect the outcome of the case. *Smith v. Spisak*, 130 S. Ct. 676 (2010) (assuming that *Mills* could be considered, the state court conclusion was not error); *Portalin v. Graham*, 624 F.3d 69 (2nd Cir. 2010) (en banc) (specifically finding that the court need not resolve the issue because reliance on *Blakely* did not change the outcome of the case); *Foxworth v. St. Amand*, 929 N.E.2d 286 (Mass. 2010) (the "new" law was not decided before the case became final).

Petitioner stumbles against the problem himself in arguing that his case presents a "perfect storm of facts" making it an "ideal vehicle" for certiorari. Yes, there was a "perfect storm": a new rule announced by this Court at just the right time, presenting just the right facts, that might actually have affected the resolution of petitioner's claim. But "perfect storms" do not happen that often.

B. The decision below was clearly correct.

Petitioner's attack on the holding of the court of appeals primarily comes down to his claim that it is inconsistent with *Teague v. Lane*: under *Teague*, a new rule is applicable if it is announced before the state court ruling becomes final; under the Third Circuit view, a new rule is applicable only if it is announced before the state court ruling is decided.

Surprisingly, however, petitioner fails even to cite this Court's controlling precedent on the relationship between *Teague* and the AEDPA statutory question at issue here. In *Horn v. Banks*, 536 U.S. 266 (2002), the Court made clear that "the AEDPA and *Teague* inquiries are distinct [citations omitted]. Thus in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn*, 536 U.S. at 272. The AEDPA standard of review "bears only a slight connection to . . . *Teague*." *Williams v. Taylor*, 529 U.S. 420, 429-30 (2000).

The supposed conflict with *Teague*, therefore, is imagined. Under § 2254(d)(1), the habeas court must determine whether the state court unreasonably applied clearly established United States Supreme Court precedent. Petitioner does not even

begin to explain how a state court can act unreasonably by not accounting for precedent that has not yet been promulgated and that will break new ground when it is eventually written.

Petitioner insists that a precedent does not have to exist in order to be clearly established. But that is a head-spinning thought. Only in a twilight zone could a rule be binding before it has even been conceived. It is apparent that a lawyer's performance cannot be unreasonable if he fails to anticipate a change in the law.[5] Surely AEDPA provides at least the same consideration for state court judges.

In support of his position, petitioner spends considerable attention attempting to parse two one-sentence statements in *Williams v. Taylor*, 529 U.S. 362 (2000). The two sentences, however, were written by two different justices, in two completely different Parts of the Court's fractured opinion, on matters that were irrelevant to the Court's holding. It is unlikely that the justices were addressing even

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[5]*See, e.g., Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir. 1996), *relying on Morse v. Texas*, 691 F.2d 770, 772 n.2 (5th Cir 1982); *Brunson v. Higgins*, 708 F.2d 1353 (8th Cir. 1983); *Honeycutt v. Mahoney*, 698 F.2d 213, 216-17 (4th Cir. 1983).

each other in these particular sentences, let alone the question now before the Court.[6]

Finally petitioner argues that the Third Circuit's ruling here, which simply follows the plain

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[6]In any case, since *Williams v. Taylor* the Court has stated over and over that the reasonableness of the state court determination is to be assessed under the law as of the time the determination was made. *See Schriro v. Landrigan*, 550 U.S. 465, 478 (2007) ("[i]n short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude . . . ."); *Bell v. Cone*, 543 U.S. 447, 453 (2005) ("[t]hese principles were plain enough at the time the State Supreme Court decided respondent's appeal."); *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) ("[w]e look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'"); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (referencing as the relevant period "the time the Maryland Court of Appeals rendered the decision at issue in this case . . . ."); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) ("clearly established Federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). *See also Brown v. Payton*, 544 U.S. 133, 149 (2005) (Souter, J., dissenting) ("[a]t the time the Supreme Court of California took up Payton's direct appeal of his death sentence for homicide, it was settled law that . . ."); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 277-278 (2007) (Roberts, C.J., dissenting) ("What is pertinent under AEDPA, however, is whether federal law was clearly established by our decisions when the state court acted. *Williams, [529 U.S.] at 412, 120 S.Ct. 1495.* AEDPA requires state courts to reasonably apply clearly established federal law. It does not require them to have a crystal ball").

language of the statute, will create "perverse incentives," inviting nefarious state supreme court justices to deny discretionary review in order to deprive deserving defendants of the benefits of new rules of law.

The more likely perverse results, however, run the other way. Under petitioner's approach, a state high court would be compelled to grant review whenever a new rule has been announced in the interim since the last state court decision. If it did not take review, the state judgment would be subject to virtually automatic nullification in federal court, because the state's failure to apply the new rule would be deemed unreasonable per se.

But if a state supreme court *must* allow discretionary review or risk almost certain extinction of the state judgment, then review is no longer discretionary. Like this Court, state courts have good cause to exercise their review powers in a discretionary fashion. In this case, for example, the Pennsylvania Supreme Court, after ordering briefing, discovered that petitioner had never actually challenged the use of blanks in the redacted statements, and had in fact agreed to them. That should have been more than adequate reason to dismiss the appeal as improvidently granted. Yet by doing so, according to petitioner, the state supreme court effectively waived its opportunity to apply the new rule, and thereby

rendered the ruling of the intermediate state court – which did not even know there was going to be a new rule – unreasonable under § 2254(d).

That could hardly be called deference.

C. The number of conflicting circuit court cases is small, but the conflict is real.

Petitioner contends that at least three circuits – the Sixth, the Ninth, and the First – have issued dispositive decisions that conflict with the ruling of the Third Circuit in this case. In fact only one precedential court of appeals opinion is in conflict with the decision here: *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010).[7]

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[7]Petition for Writ of Certiorari pending, *Stovall v. Miller*, No. 10-851, filed December 21, 2010.

The Ninth Circuit opinion on which petitioner relies, *Thompson v. Runnel*, 621 F.3d 1007, 1015 n.7 (9th Cir. 2010). did not address the issue on the merits, instead ruling that the court could simply adopt petitioner's view for purposes of that case, because the state had not argued the question.

In the First Circuit opinion, *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009), the court's discussion of the issue was only theoretical, because the new rule in question there was announced after the case had become final – not during the "window" that defines the question presented

(continued...)

While the conflicting precedents are few, the conflict is genuine. There are also a number of court of appeals opinions that have addressed the issue in dictum, often taking conflicting views even within the same circuit.[8] There is no way to reconcile the cases without this Court's intervention.

The effect of the split, moreover, is magnified by this Court's recent opinion in *Smith v. Spisak*, 130 S. Ct. 676 (2010). That case involved the application of *Mills v. Maryland*, 486 U.S. 367 (1988), a new rule announced after the decision of the state supreme court, but before that decision became final. The *Spisak* Court acknowledged the existence of an issue in this regard, but stated that there was "some uncertainty" as to its proper resolution. 130 S. Ct. at 681. Resolution proved

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[7](...continued)
here.

[8]*Compare Harris v. Stovall*, 212 F.3d 940, 945 n. 2 (6th Cir. 2000), *with Miller v. Stovall*, 608 F.3d 913, 919-20 (6th Cir. 2010); *Newland v. Hall*, 527 F.3d 1162, 1198 n. 62 (11th Cir. 2008) (plurality) (Tjoflat, J.), *with Schwab v. Crosby*, 451 F.3d 1308, 1324 (11th Cir. 2006), *with Crawford v. Head*, 311 F.3d 1288, 1315 n.2 (11th Cir. 2002); *Jiminez v. Walker*, 458 F.3d 130, 146 (2d Cir. 2006), *and Harris v. Kuhlmann*, 346 F.3d 330, 341, 345 (3d Cir. 2003), *with Besser v. Walsh*, 601 F.3d 163, 184 (2d Cir. 2010), *rev'd sub nom Portalin v. Graham*, 624 F.3d 69, 81 n. 6 (2nd Cir. 2010) (en banc) (noting the absence of case law, but finding it unnecessary to reach the issue).

unnecessary there, because the state prevailed even on the assumption that the *Mills* rule was applicable.

Spisak's statement of "uncertainty," however, has already encouraged some lower court judges to adopt the flawed view advocated by petitioner here. *See, e.g., Greene v. Palakovich*, 606 F.3d at 110 (Ambro, J., dissenting); *Thompson v. Runnel*, 621 F.3d at 1015 n.7. Ironically, that view is apparently inconsistent with the sentiments that led to the discussion of this issue at oral argument in *Spisak*.[9] Nonetheless, until this Court

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[9]MR. CORDRAY: Thank you, Mr. Chief Justice, and may it please the Court:

Because this case arises under the deferential standards of the AEDPA statute, Mr. Spisak must show that the Ohio Supreme Court's decision was contrary to Mills v. Maryland or that it unreasonably applied Strickland v. Washington.

JUSTICE SOTOMAYOR: Why? I -- I have been trying to figure out why the State court would know in its decisionmaking that Mills commanded a different result when Mills was issued after the State denied its petition for rehearing.

MR. CORDRAY: It's a bit of a conundrum, Your Honor, because Mills was issued after the Ohio Supreme Court's decision here, but before it became final on direct review when cert was denied by this Court in March of 1989.

(continued...)

[9](...continued)

JUSTICE SOTOMAYOR: Well, finality in that sense is generally looked at in terms of AEDPA statute of limitations. Why should the same rule apply to the question of whether a State has acted contrary to or unreasonably in light of Supreme Court precedent when the precedent didn't exist at the time it was rendering its decision? How can a court act?

* * *

JUSTICE ALITO: [Y]ou say that -- that the State court's decision was contrary to or involved an unreasonable application of clearly-established Federal laws determined by the Supreme Court of the United States, i.e., Mills v. Maryland, when Mills v. Maryland hadn't been decided.

MR. BENZA: In Terry Williams v. Taylor, this Court recognized in the opinion authored by Justice O'Connor that the issue for contrary to or unreasonable application is going to be governed by the application of Teague.

JUSTICE ALITO: And are there -- are there not quite a few instances of contrary statements in our opinions?

MR. BENZA: As to the application of Mills? Or --

JUSTICE ALITO: As to the -- as to the time when the -- the law has to be clearly established by a decision in that court.

MR. BENZA: No . . . .

(continued...)

eliminates the "uncertainty," *Spisak* casts an undeserved shadow over the court of appeals panel decision below. The only way to guarantee that the correct result here remains the law, and that the AEDPA deference provision remains intact, is through this Court's review.

D. This case is a suitable vehicle for resolution of this issue.

Respondents agree that the present case is an appropriate one in which to make clear that a state court cannot act unreasonably in failing to follow a precedent of this Court that did not exist at the time of the state court ruling. The "suitable vehicle" question, however, is more complex than the brief treatment given it by petitioner. Petition for Certiorari at 21.

That is because petitioner never presented his "new rule" claim to the state courts. He argued only a claim arising under the old rule, concerning contextual implication. The rule later established

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[9](...continued)

> JUSTICE ALITO: This Court has not said that clearly established Federal law refers to this Court's decision as of the time of the relevant State court decision[?]

Smith v. Spisak, 2009 U.S. Trans. LEXIS 50, 1-3, 41-43 (U.S. Trans. 2009).

by *Gray v. Maryland*, concerning the use of blanks in redacted statements, was never identified by petitioner.

Normally, that should make this a bad case for this Court's discretionary review, because petitioner should not properly benefit from the ruling he seeks even if he were to achieve it. The failure of fair presentation here, however, is not mere error or oversight. Rather, it is *inherent* in cases raising the legal issue on which petitioner desires a writ of certiorari.

Litigants do not routinely argue for relief on the basis of rules that do not yet exist, because – like state court judges – they cannot reliably predict the ways in which legal ground will be broken in the future. As a result, most of the cases that would require resolution of the § 2254(d) question presented here will be cases in which the defendant did not raise a "new rule" claim until after the new rule was announced.

The lack of fair presentation, therefore, is not a prudential impediment to review, but an indication of the need for it. What happened here is typical: the state courts are being challenged for unreasonably determining an issue that was never actually before them. All the more reason to resolve the question reserved in *Spisak* and hold clearly that a federal habeas court may not overturn a state criminal judgment on the ground that

the state court did not foresee a future decision of this Court that creates a "new rule."

CONCLUSION

For these reasons, respondents do not oppose the grant of the petition for a writ of certiorari.

Respectfully submitted,

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