

No. 10- 10-637 NOV 12 2010

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JOHN A. PALAKOVICH,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from this Court qualifies as "clearly established Federal law" under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Greene respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit in *Greene v. Palakovich*, No. 07-2163.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. 1a) is published at 606 F.3d 85. The relevant district court opinion (Pet. App. 72a) is published at 482 F. Supp. 2d 624.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2010, and subsequently amended on July 22, 2010. A timely petition for rehearing en banc was denied on July 20, 2010. Pet. App. 83a-84a. On October 2, 2010, Justice Alito extended the filing deadline for filing a petition for writ of certiorari to and including November 17, 2010. No. 10A350. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

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
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.

STATEMENT OF THE CASE

This case presents an important question of habeas procedure that this Court reserved last Term in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010): whether a decision from this Court announced before a state prisoner's conviction became final but after his last state-court decision on the merits constitutes "clearly established Federal law" for purposes of AEDPA. The Third Circuit, acknowledging that it was creating a circuit split, held here that it does not.

1. In early 1993, a group of men robbed a grocery store in Philadelphia. One of them shot the store's owner, who died shortly afterwards. The men took the store's cash register with them.

Over the next several months, the police questioned petitioner Eric Greene and a number of other men (some of whom had been arrested in connection with another robbery) about the grocery store incident. Petitioner denied any involvement, but the police obtained confessions from three of the other men. All three men who gave statements identified Julius Jenkins as the shooter and claimed that petitioner was one of the participants. But their

accounts diverged from there. According to one man, petitioner was involved in the robbery but remained in the car the entire time. Another man said petitioner carried the cash register out of the store. This man later amended his statement to change the number of people involved in the robbery from five to six. A third implicated petitioner in the robbery but did not describe petitioner's role.

The State subsequently charged petitioner and three other men with, among other things, second-degree murder, three counts of robbery, and conspiracy. The State also charged Julius Jenkins with first-degree murder. The State proposed a joint trial for all five accused men.

When it became clear that the codefendants who had given statements implicating petitioner in the crimes were not going to testify, petitioner moved to sever his trial from theirs. In support of this motion, petitioner pointed out that the Confrontation Clause, as explicated in *Bruton v. United States*, 391 U.S. 123 (1968), prohibits the prosecution from introducing a nontestifying defendant's confession in a joint trial with a codefendant whom the confession also implicates. Instead of severing the trials, however, the court asked the State to redact the codefendants' statements to remove the prejudicial references to petitioner.

The State accordingly redacted the statements – but only barely. In some places, the State redacted the statements to replace petitioner's name and those of other defendants with neutral pronouns and phrases like “this guy” and “these guys.” Pet. App. 7a-8a. In other places, the State simply deleted or replaced petitioner's name with the word “blank,”

making it obvious that redactions had occurred. Pet. App. 9a. The trial court nonetheless accepted these redactions and ruled that they cured the *Bruton* problem. See *Richardson v. Marsh*, 481 U.S. 200 (1987) (sufficient redactions can cure *Bruton* problems).

At the joint trial, petitioner's codefendants did not testify, and the State introduced their redacted confessions against them. The jury found petitioner guilty, and the court sentenced him to life imprisonment. Pet. App. 9a.

2. Petitioner appealed his conviction to the Pennsylvania Superior Court. Among other arguments, he renewed his Confrontation Clause claim. The Pennsylvania Superior Court affirmed, holding that the codefendants' confessions as redacted did not so clearly implicate petitioner as to violate the Confrontation Clause. Pet. App. 9a-10a.

3. Petitioner then filed a timely petition for allowance of appeal with the Pennsylvania Supreme Court, again pressing his Confrontation Clause claim. While his petition was pending, this Court decided *Gray v. Maryland*, 523 U.S. 185 (1998). In *Gray*, this Court considered a *Bruton* challenge to the admission of a codefendant's confession that – just as in this case – had been redacted to replace the defendant's name in various places with blanks and words signaling obvious deletions. This Court held that “considered as a class, redactions that replace a proper name with an obvious blank, the word ‘delete,’ a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results.” *Gray*, 523 U.S. at 195.

The Pennsylvania Supreme Court then granted the petition for allowance of appeal limited to the Confrontation Clause issue. *Commonwealth v. Trice*, 552 Pa. 201 (1998).¹ Petitioner filed a brief explaining that the redacted statements were clearly inadmissible under *Gray*. Appellant's Br. 16, 24, *Commonwealth v. Trice*, 556 Pa. 265 (1998), available at 1998 WL 34114494. Eight months after granting the petition, however, the Pennsylvania Supreme Court dismissed petitioner's appeal "as having been improvidently granted." *Commonwealth v. Trice*, 556 Pa. 265 (1999). The court offered no explanation for its dismissal.

4. Later that year, the time for filing a petition for certiorari to this Court expired and petitioner's conviction became final. Pet. App. 10a-11a.

5. After unsuccessful state habeas proceedings (in which he represented himself), petitioner filed a timely petition for federal habeas relief in the United States District Court for the Eastern District of Pennsylvania. He sought relief under several grounds, including the principles set forth in *Bruton* and *Gray*.

Section 2254 of Title 28 of the U.S. Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), allows federal courts to grant habeas relief if a state court's adjudication of a federal constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable

¹ Petitioner is also known as Jarmaine Q. Trice, and he was referred to by this name in the state-court proceedings.

application of, *clearly established Federal law*, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1) (emphasis added).

The district court observed that the “key to assessing the merits of Petitioner’s claim” was whether a decision that this Court issued before a prisoner’s conviction became final but after the last state-court decision on the merits counts as “clearly established Federal law” under AEDPA. Pet. App. 77a. If so, then *Gray* would apply for purposes of petitioner’s case. But if not, then the state courts’ adjudication of petitioner’s *Bruton* claim would be much easier to defend.

The district court initially referred this legal issue to a magistrate, who concluded that two passages of this Court’s opinion in *Williams v. Taylor*, 529 U.S. 362 (2000), offered conflicting guidance on the issue. In Part III of the majority opinion, written by Justice Stevens, this Court characterized “clearly established Federal law” as “a rule of law that was clearly established *at the time his state-court conviction became final.*” *Williams*, 529 U.S. at 390 (emphasis added). In Part II of the majority opinion, however, this Court said through Justice O’Connor that “clearly established Federal law” “refers to the holdings, as opposed to the dicta, of this Court’s decisions *as of the time of the relevant state-court decision.*” *Id.* at 412 (emphasis added).

Faced with these differing formulations, the magistrate decided to follow Justice O’Connor’s formulation, and reasoned that the “relevant state-court decision” in this case was the intermediate appellate decision rejecting petitioner’s claim on the merits. Pet. App. 78a. Freed from having to apply

Gray to petitioner's case, the magistrate then recommended that the district court deny the petition. Pet. App. 74a-75a.

The district court adopted the magistrate's report and recommendation. At the same time, it granted petitioner a certificate of appealability limited to his Confrontation Clause claim, explaining that "reasonable jurists could disagree as to the appropriate point in time upon which to identify the 'clearly established law.'" Pet. App. 78a-79a; *see also* Pet. App. 82a.

6. A divided panel of the Third Circuit affirmed. The majority began by noting the "uncertainty identified by the Supreme Court" in *Spisak*, 130 S. Ct. at 681, over "whether 'clearly established Federal law' under 28 U.S.C. § 2254(d)(1) is determined based on the 'time of the relevant state-court decision,' the time [the] state-court conviction became final,' or some combination thereof." Pet. App. 16a, 17a n.6 (quoting *Williams*, 529 U.S. at 390, 412). The court of appeals described the question as a "thorny" and "vexing" one to which "there is no clear answer." Pet. App. 2a, 16a, 21a n.7; *see also* Pet. App. 18a ("confusion surrounds" the issue). The majority further recognized that in this case, the issue "cannot, no matter how one views the facts or law, be avoided." Pet. App. 43a.

Acknowledging that it was creating a split with the First Circuit, Pet. App. 19a n.7 (citing *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009)), the majority adopted the formulation from Justice O'Connor's part of the opinion in *Williams*, and held that "the date of the relevant state-court decision is the controlling date." Pet. App. 18a. The majority

asserted that the text of AEDPA and post-*Williams* precedent supported its conclusion. Pet. App. 18a-28a. But the majority conceded that this Court would have to be the final arbiter of the issue: “We believe that we have reached the best conclusion given the guidance we have to date. Ultimately, only the Supreme Court can resolve such uncertainty as exists.” Pet. App. 43a.

Judge Ambro dissented. He noted that before AEDPA, this Court had made clear in *Teague v. Lane*, 489 U.S. 288 (1989), and *Griffith v. Kentucky*, 479 U.S. 314 (1987), that a state prisoner could seek habeas relief based on any decision issued before his conviction became final. He also noted that the text of amended Section 2254(d) does not contain “an express time cutoff for ‘clearly established Federal law.’” Pet. App. 48a. Consequently, Judge Ambro concluded that Congress did not intend to alter the previously settled law on the point: “It is the Supreme Court’s retroactivity jurisprudence of *Griffith* or *Teague* that determines applicability on collateral review, not AEDPA.” Pet. App. 61a.

Judge Ambro further complained that the majority’s new temporal cutoff would create a “twilight zone” of arbitrariness for criminal defendants in state court. Pet. App. 62a. While *Teague*’s finality rule minimizes disparate treatment of similarly situated prisoners, outcomes under the majority’s rule would depend haphazardly on whether a state supreme court decided to exercise discretionary authority to hear a case implicating a new decision from this Court. Under such a regime, Judge Ambro explained, some state prisoners inevitably would be “unfairly treated relative to other

similarly situated individuals who were lucky enough to have the state courts apply the new rule.” Pet. App. 68a.

7. Petitioner filed a timely petition for rehearing en banc. *See* Pet. App. 83a-84a. The Third Circuit denied the petition, with Judge Ambro noting that he would have granted rehearing. *Id.*

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question of federal habeas procedure in the post-AEDPA world: What is the temporal cutoff for when decisions from this Court count as “clearly established Federal law”? Specifically, is a decision that this Court handed down before a state prisoner’s conviction became final but after his last state-court adjudication on the merits “clearly established Federal law”?

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court gave conflicting guidance on this issue, stating in one part of the opinion that the cutoff for applying “clearly established Federal law” is finality, and in another part that the cutoff is the “relevant state-court decision.” *Id.* at 390, 412. Last Term, this Court referenced these two divergent formulations and stated that they created “some uncertainty” over how to apply AEDPA when a state prisoner seeks federal habeas relief based on a decision that satisfies one formula but not the other. *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010); *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1174 n.2 (2010) (per curiam) (referencing both formulations without choosing between the two). It therefore is not surprising that federal courts of appeals are now openly split on the question. Some circuits, consistent with this Court’s pre-AEDPA

construction of federal habeas law in *Teague v. Lane*, 489 U.S. 288 (1989), continue to set the cutoff at the date on which a state-court conviction became final. In this case, by contrast, the Third Circuit adopted as the controlling date the time of the last state-court decision on the merits, holding that a decision from this Court that preceded not only finality but also the state supreme court's refusal to hear the prisoner's claim did not count as "clearly established Federal law" because it postdated the state intermediate court's decision on the merits.

As the Third Circuit itself strongly suggested in this very case, *see* Pet. App. 43a, this Court should resolve this conflict of authority. This basic procedural issue has already confronted numerous federal courts, and it will continue to arise in the context of an array of substantive constitutional claims. The question is outcome determinative in this case. Finally, the Third Circuit's holding that AEDPA changed longstanding retroactivity law is incorrect.

I. The Courts Of Appeals Are Divided Over The Temporal Cutoff For Whether A Decision From This Court Counts As "Clearly Established Federal Law" Under AEDPA.

A. Background

Section 2254 of Title 28 of the U.S. Code has long allowed state prisoners who demonstrate that their constitutional rights were violated in state-court proceedings to obtain federal habeas relief. Interpreting and applying this statute in *Teague v. Lane*, 489 U.S. 288 (1989), this Court held that a federal court adjudicating a state prisoner's petition

for habeas relief must apply any relevant decisions from this Court that were handed down before the prisoner's conviction became "final." *See id.* at 310 (plurality opinion); *accord Whorton v. Bockting*, 549 U.S. 406, 416 (2007). Finality is a straightforward concept: A case becomes "final" when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). At the same time, prisoners generally may not benefit from decisions that are issued after their convictions become final. *See, e.g., Teague*, 489 U.S. at 310.

Congress amended Section 2254 as part of AEDPA. The statute now provides, in pertinent part, that federal courts may not grant habeas relief concerning a claim that a state court adjudicated on the merits unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

This Court confronted AEDPA's amendments to Section 2254 in *Williams v. Taylor*, 529 U.S. 362 (2000). There, this Court clarified the level of deference that AEDPA requires federal courts to give to a state court's interpretation and application of federal law. *Id.* at 403-04. Timing was not an issue, however, because the relevant Supreme Court decision, *Strickland v. Washington*, 466 U.S. 668 (1984), was decided long before Williams' state-court proceedings.

Different parts of the majority opinion nevertheless contained passages indicating different

temporal cutoffs for determining what constitutes “clearly established Federal law” under AEDPA. Part III of the majority opinion, written by Justice Stevens, stated that “clearly established Federal law” refers to Supreme Court decisions at the “time a state-court decision became final.” *Id.* at 390. Part II of the majority opinion, written by Justice O’Connor, stated – consistent with Part III – that any decision from this Court that “would qualify as an old rule under our *Teague* jurisprudence will constitute ‘clearly established Federal law’” under AEDPA. *Id.* at 412. Another sentence in the same paragraph, however, suggested that “clearly established Federal law” referred to Supreme Court holdings “as of the time of the relevant state-court decision,” *id.* – a point in time that normally precedes *Teague’s* finality cutoff date by several months.

Nothing in this Court’s opinion signaled any appreciation that this last formulation diverged from the others. (To the contrary, Justice O’Connor joined both portions of the opinion, suggesting that she did not realize that the formulations diverged.) Nor did this Court attempt to reconcile the various formulations. Accordingly, federal courts of appeals have read *Williams* as giving “inconsistent guidance” concerning the temporal cutoff for determining what constitutes “clearly established Federal law.” *Brown v. Greiner*, 409 F.3d 523, 533 n.3 (2d Cir. 2005); *see also Portalatin v. Graham*, ___ F.3d ___, 2010 WL 4055571, at *9 n.6 (2d Cir. Oct. 18, 2010) (en banc) (same); *Miller v. Stovall*, 608 F.3d 913, 929 (6th Cir. 2010) (Boggs, J., dissenting) (noting the “contradictory statements” in *Williams*); Pet. App. 22a n.7 (“[R]esolution of the issue in the Courts of

Appeals based on existing Supreme Court precedent is akin to trying to piece together a jigsaw puzzle that has been sprinkled with pieces from other puzzles.”).

In *Smith v. Spisak*, 130 S. Ct. 676 (2010), this Court itself acknowledged “some uncertainty” over where to fix the temporal cutoff for clearly established law under AEDPA. *Id.* at 681. Assuming, like both parties in that case, that finality was the proper cutoff date, this Court applied a decision that predated finality but postdated the last state-court decision on the merits. *Id.* But this Court stopped short of holding that finality was the legally proper cutoff date, concluding that it was unnecessary to resolve the issue because the prisoner was not entitled to relief even if the new decision applied. *Id.*; see also *Thaler v. Haynes*, 130 S. Ct. 1171, 1174 n.2 (2010) (per curiam) (referencing both formulations without choosing between the two).

B. The Circuit Split

In the several months since this Court noted “some uncertainty” over the issue in *Spisak*, several federal courts of appeals have confronted cases in which state prisoners sought relief based on decisions from this Court that preceded finality but postdated the last state-court decisions on the merits of their claims. The circuits are now intractably split over the proper temporal cutoff for when a decision from this Court qualifies as “clearly established law” under Section 2254(d).

1. Several courts of appeals have held – as the dissenting judge urged the Third Circuit to do here (Pet. App. 43a-69a) (Ambro, J., dissenting) – that the date of finality serves as the proper cutoff for

deciding what counts as clearly established federal law.

The Sixth Circuit provided four reasons for adhering to the date of finality as the cutoff rather than adopting the date of the relevant state-court decision. See *Miller v. Stovall*, 608 F.3d 913, 919-21 (6th Cir. 2010). First, the Sixth Circuit observed that prior to AEDPA, *Teague* had set a clear cutoff for applying new Supreme Court decisions to habeas petitioners, and that Congress did not evince any intent to change that cutoff. *Id.* at 920-21. Second, the Sixth Circuit noted that Justice O'Connor joined the part of Justice Stevens' opinion for this Court describing finality as the cutoff. *Id.* at 919. Third, the Sixth Circuit pointed out that even the part of *Williams* that Justice O'Connor wrote explained that any decision from this Court that would qualify as an "old rule" under *Teague* would also qualify as "clearly established" under AEDPA. *Id.* at 919-20. Finally, the Sixth Circuit reasoned that applying federal law up to the point at which a conviction becomes final respects principles of comity, finality, and federalism – at least when the petitioner has provided a state court of last resort with an opportunity to apply new governing federal law. *Id.* at 921.

Similarly, the First Circuit has held that finality is the cutoff, relying in large part on this Court's statement in Justice O'Connor's portion of the opinion in *Williams* that any decision from this Court that qualifies as an "old rule" under *Teague* would qualify as "clearly established Federal law" under

AEDPA. *Foxworth v. St. Amand*, 570 F.3d 414, 431 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1710 (2010).² The *Foxworth* court called this passage “a frank recognition that the AEDPA has neither altered nor eroded the marker laid down by *Teague*.” *Id.*

Following this Court’s lead in *Spisak*, the Ninth Circuit also has assumed that AEDPA’s cutoff date is finality, at least when a state does not contest the issue. *Thompson v. Runnel*, ___ F.3d ___, ___, 2010 WL 3489837, at *6 n.7 (9th Cir. Sept. 8, 2010). But unlike this Court in *Spisak*, the Ninth Circuit granted habeas relief based upon that assumption, turning aside a dissenting judge’s objection that, regardless of whether a state raises the issue, AEDPA precludes such relief whenever the relevant decision from this Court postdated the last state-court decision on the merits. *Compare id.* at *10 with *id.* at *12 (Ikuta, J., dissenting).

2. Acknowledging that it was creating a split with the First Circuit (the decisions just described from the Sixth and Ninth Circuits had not yet come down), *see* Pet. App. 19a n.7, the Third Circuit held here that AEDPA requires courts to abandon the cutoff date established in *Teague* and to apply only law that existed at the time of the last state-court decision on the merits. Pet. App. 24a-25a. Specifically, the majority reasoned that the language in Section 2254(d) focusing on whether a state court adjudicated the claim at issue “on the merits” and on

² The habeas petitioner sought certiorari in *Foxworth* because he lost in the court of appeals on other grounds. He did not raise the question presented here.

whether the relevant state-court “decision” was contrary to clearly established law “contemplates that the law or precedent *existed* at the time of the state court’s substantive resolution of the petitioner’s claim.” Pet. App. 25a. The majority also claimed support for this holding in this Court’s post-*Williams* cases that cite the formulation from Justice O’Connor’s portion of that opinion, although the majority recognized that none of those cases contain any actual “analysis” of the issue. Pet. App. 25a-28a.

Although the Third Circuit stands alone in setting AEDPA’s temporal cutoff for “clearly established law” at the date of the last state-court decision on the merits, other circuit judges have agreed with the holding. In particular, the dissent in the Ninth Circuit’s *Thompson* case argued that the cutoff should be “the time of the relevant state-court decision.” *See Thompson*, 2010 WL 3489837, at *12 (Ikuta, J., dissenting). The dissent in the Sixth Circuit’s *Miller* case likewise expressed “serious doubts” about that court’s decision to adhere to the finality cutoff established in *Teague*, which in his view “penalize[s] state courts for making *correct* decisions that merely fail to predict the future.” *Miller*, 608 F.3d at 931-32 (Boggs, J., dissenting).³

³ In two other cases, which predated *Spisak* and involved slightly different questions of timing, individual judges on the Eleventh and Fourth Circuits also asserted that the date of the last state-court decision on the merits should control. *See Newland v. Hall*, 527 F.3d 1162, 1198 n.62, 1200 n.64 (11th Cir. 2008) (opinion of Tjoflat, J.) (arguing that the Eleventh Circuit should adopt this rule “largely because the [Supreme] Court has clearly favored using this definition in cases after *Williams*”);

3. This split of authority is now firmly entrenched. The courts of appeals have issued decisions conflicting with the Third Circuit's holding both before and after the decision at issue here. Moreover, the Sixth Circuit denied rehearing en banc in *Miller* on September 22, 2010, rebuffing the State of Michigan's request that it adopt the Third Circuit's rule. Two months earlier, the Third Circuit rejected petitioner's request for rehearing en banc in this case, declining to consider aligning itself with the other circuits to have spoken on the issue. Pet. App. 83a-84a. Only this Court can resolve this legal disagreement.

II. The Question Presented Is Of Substantial Importance.

The question of what federal law applies in adjudicating a habeas petition is a basic one that this Court should resolve as soon as possible.

1. This question recurs frequently. It has arisen over the past several months as a result of a number of substantive decisions from this Court, including *Missouri v. Seibert*, 542 U.S. 600 (2004) (*Miranda* rights); *Blakely v. Washington*, 542 U.S. 296 (2004) (right to jury trial); *Crawford v. Washington*, 541 U.S. 36 (2004) (Confrontation Clause); *Gray v. Maryland*, 523 U.S. 185 (1998) (same); and *Mills v. Maryland*, 486 U.S. 367 (1988) (mitigating evidence

Frazer v. South Carolina, 430 F.3d 696, 721 n.4 (4th Cir. 2005) (Luttig, J., dissenting) (arguing that "not everything that is an old rule under *Teague* is clearly established for purposes of AEDPA").

in capital cases). *See Spisak*, 130 S. Ct. 676 (*Mills*); Pet. App. 1a (*Gray*); *Foxworth*, 570 F.3d 414 (same); *Portalatin*, ___ F.3d at ___, 2010 WL 4055571 (*Blakely*); *Thompson*, 2010 WL 3489837 (*Seibert*); *Miller*, 608 F.3d 913 (*Crawford*).

Moreover, this issue will continue to arise. Over the past few Terms, this Court has announced several important new rules of criminal procedure that apply across a wide range of state criminal prosecutions. *See Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Giles v. California*, 128 S. Ct. 2678 (2008). And if past is prologue, this Court will announce other new rules in the future.

There can be no doubt that many state prisoners will find themselves caught between state-court decisions on the merits and finality when these new rules are issued, and will eventually seek to rely on them to obtain federal habeas relief. Thousands of state prisoners file petitions for federal habeas relief each year.⁴ And the “twilight zone” between a

⁴ In each of the last five years, prisoners filed more than 20,000 petitions for writs of habeas corpus in United States district courts. *See* Administrative Office of the United States Courts, 2009 Annual Report of the Director: Judicial Business of the United States Courts at t.C-2A (2010), *available at* <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf>. The vast majority of these petitions were filed by state prisoners. *See* Bureau of Justice Statistics, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 at 2 t.1 (2001), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=882>.

prisoner's last state-court decision on the merits and finality of conviction, Pet. App. 62a (Ambro, J., dissenting), may last well over a year. For example, the gap in this case between the intermediate state court's decision and finality lasted nineteen months. See Pet. App. 9a-11a. In *Miller*, it was fifteen months. *Miller*, 608 F.3d at 917, 918 n.1. And in *Spisak*, it was nearly eleven months. See Pet. App. 50a n.6 (Ambro, J., dissenting).⁵ These are substantial periods of time in jurisprudential terms.

2. The answer to this temporal cutoff question also shapes the conduct of state courts and state prisoners. State supreme courts, in particular, need to know whether their decisions to deny or grant discretionary review will affect state prisoners' ability to obtain habeas relief. Under the traditional finality rule, a state supreme court's decision whether to hear a case does not significantly affect the playing field for federal habeas. But under the Third Circuit's rule, state-court discretionary review practices would take on a whole new gravity. A state supreme court's refusal to hear a case would fix the available law on federal habeas at a significantly

⁵ A moment's reflection reveals why this "twilight zone" can last so long. State supreme courts typically exercise discretion to hear only a fraction of the criminal cases that come to them, so the last state court decision on the merits is usually from a state intermediate appellate court. Following such a decision, a prisoner sometimes requests rehearing by the intermediate court. A prisoner then asks the state supreme court to review the case, and may later seek rehearing of some kind. He may finally seek certiorari in this Court. Each of these several steps usually lasts several months, during which parties write briefs and courts consider them.

earlier date – the date of the intermediate state-court decision – thereby foreclosing reliance on Supreme Court jurisprudence that might otherwise dictate relief. Furthermore, many state supreme courts, including the Pennsylvania Supreme Court, lack any established practice comparable to this Court’s “grant, vacate, and remand” (GVR) system to deal with intervening decisions from this Court. Thus, only a state supreme court’s decision to grant plenary review, and then to issue an opinion on the merits, would enable a state prisoner to invoke intervening decisions from this Court.

For their part, state prisoners (and those who represent them) also need to know the cutoff date for applying “clearly established Federal law” under AEDPA. Some state prisoners who have lost in state court do not seek certiorari in this Court, even when this Court has issued a potentially helpful intervening decision. There might be any number of tactical reasons for doing this: The prisoner may, for example, think that he will obtain more absolute relief in state habeas on some other claim, or the state court might have given an alternative reason for denying relief that the prisoner needs to challenge in federal habeas as well. Or a decision to forego seeking certiorari might not be tactical at all: In many states (including Pennsylvania), appointments of counsel run only through the state-court system and do not include seeking certiorari in this Court. *See, e.g.*, 24 Pa. Code § 122(B)(2) (2010), Comment (appointment runs “through the Supreme Court of Pennsylvania”).

Under the Third Circuit’s rule, in short, state prisoners with claims affected by intervening

decisions would *always* want to – indeed, need to – seek certiorari (and a GVR) in this Court. Otherwise, they would forever forego the ability to obtain the benefit of this Court’s new decision. This Court should clarify whether such filings are now necessary as soon as possible.

III. This Case Is An Ideal Vehicle For The Court To Resolve This Issue.

As the Third Circuit acknowledged, this case presents “the perfect storm of facts” for deciding the cutoff date for “clearly established Federal law” under Section 2254(d). Pet. App. 23a.

Greene’s habeas petition “turns on whether he may invoke [this Court’s decision in] *Gray*.” Pet. App. 23a; *see also* Pet. App. 77a (describing the cutoff question as the “key to assessing the merits of Petitioner’s claim”). And this Court decided *Gray* before petitioner’s conviction became final (and before the Pennsylvania Supreme Court decided not to review his case), but after the last reasoned state-court decision affirming his conviction. Accordingly, this case squarely presents the question of AEDPA’s temporal cutoff date such that it “cannot . . . be avoided.” Pet. App. 43a; *see also* Pet. App. 23a (this case presents “the inescapable obligation” to decide the issue).

IV. The Third Circuit’s Decision Misconstrues AEDPA.

The Third Circuit’s holding that AEDPA altered retroactivity law for federal habeas claims is incorrect.

1. The text and structure of AEDPA, along with this Court's precedent, make clear that a state prisoner may still seek habeas relief based on a decision from this Court that was announced before his conviction became final.

It is "not only appropriate but also realistic to presume that Congress [i]s thoroughly familiar" with this Court's jurisprudence when it legislates. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). Accordingly, this Court consistently has refused to disturb settled interpretations of statutory provisions "[a]bsent a clear indication from Congress of a change in policy." *Grogan v. Garner*, 498 U.S. 279, 290 (1991); accord *United States v. O'Brien*, 130 S. Ct. 2169, 2178 (2010); *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001); *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1998); *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991); *Dir., OWCP v. Perini N. River Assoc.*, 459 U.S. 297, 319-21 (1983).

Teague, which "was an exercise of this Court's power to interpret the federal habeas statute," *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), formed the jurisprudential backdrop to AEDPA with respect to state prisoners' ability to claim the benefit on federal habeas of one of this Court's decisions. *Teague* established that state prisoners could seek relief based on new constitutional rules of criminal procedure announced before their convictions became final, but they generally cannot do so based on decisions that postdated finality. *Teague*, 489 U.S. at 310.

There is no clear indication in the text of Section 2254 that Congress intended to alter this well-

established retroactivity doctrine. On the contrary, to the extent that the text and structure of Section 2254(d) shed any light on Congress' goals, they confirm that Congress expected to retain *Teague's* cutoff date. Subsection 2254(d)(1) allows a federal court to grant habeas relief if the state court's "adjudication of the claim *resulted* in a decision that was contrary to . . . clearly established Federal law" (emphasis added). This ultimate focus on the "result[]" of the state-court proceedings, rather than the reasoning employed in the adjudication, indicates that it is the outcome of a case, not the state court's reasoning, that AEDPA directs courts to measure against "clearly established Federal law." Hence, so long as a pertinent decision from this Court came down while a state prisoner's case was still on direct review in state court (and so long as the prisoner properly preserved the issue all along), it does not matter whether the last state tribunal to reach the merits considered that precedent.

The structure of Section 2254(d) reinforces this point. Subsection 2254(d)(2) explicitly provides that federal courts should evaluate a state court's determination of facts "in light of the *evidence presented in the State court proceeding*" (emphasis added). The text of Subsection 2254(d)(1), by contrast, does not limit a federal court's legal analysis to what federal law was available to the state court at the time of the proceeding. "[W]here Congress includes particular language in one section of a statute but omits it in another," courts should assume Congress intended the two to be construed differently. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*,

464 U.S. 16, 23 (1983) (citation omitted)); *see also Lindh v. Murphy*, 521 U.S. 320, 330-38 (1997) (drawing a similar negative implication respecting other provisions of AEDPA).

This Court's precedent further demonstrates that – contrary to the Third Circuit's holding – a decision from this Court need not have “*existed* at the time of the state court's substantive resolution of the petitioner's claim” (Pet. App. 25a) in order for a federal court to apply it in a federal habeas proceeding. In *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), the Ninth Circuit granted habeas relief based in part upon a state court's failure to cite a controlling decision from this Court. *Id.* at 8. This Court reversed, explaining that avoiding AEDPA's pitfalls “does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.” *Id.*

If it does not matter under AEDPA whether a state court is aware of a relevant case from this Court, it follows that it is irrelevant whether a case existed at the time of the state-court decision. Rather, what matters is whether the state-court proceedings “resulted in a decision” that – measured against the proper body of this Court's case law – was contrary to, or an unreasonable application of, clearly established law. And *Teague* makes it clear that finality marks the cutoff for compiling the proper body of this Court's case law for that inquiry.

Viewed holistically and in context, the part of the *Williams* opinion that Justice O'Connor wrote comports with this conclusion. That part states that any decision from this Court that “would qualify as

an old rule under [this Court's] *Teague* jurisprudence will constitute 'clearly established Federal law' under AEDPA. *Williams*, 529 U.S. at 412. To be sure, Justice O'Connor also added that "clearly established Federal law" refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* But the point of that passage was to fend off any suggestion (*see, e.g., Carey v. Musladin*, 549 U.S. 70, 78-79 (2006) (Stevens, J., concurring in the judgment)) that *dicta* could count as "clearly established" law. There is no indication that Justice O'Connor meant to diverge from the explanation respecting AEDPA's temporal cutoff that she offered in the earlier part of her opinion and the formulation the Court offered in the part of the opinion that Justice Stevens delivered (which she herself joined). After all, it may not have been clear to someone focused on some other aspect of AEDPA – as this Court's Justices were in *Williams* – that the two temporal formulations might lead to divergent results. *Cf. Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531, 542 (2005) ("On occasion, [an incorrect] doctrinal rule or test finds its way into our case law" by way of "regrettably imprecise" language in an opinion focused on a different issue.).

2. The Third Circuit's holding not only contravenes statutory text, structure, and precedent; it also subverts constitutional values.

a. The Third Circuit's rule would undermine this Court's holding in *Griffith v. Kentucky*, 479 U.S. 314 (1987). There, this Court held that "basic norms of constitutional adjudication" entitle individuals whose convictions are not yet final to the benefit of new

opinions from this Court. *Id.* at 322, 328. *Griffith* is grounded in the fundamental principle of “treating similarly situated defendants the same.” *Id.* at 323. If this Court selects one defendant’s case and establishes a new rule of criminal procedure, other defendants who are simultaneously making similar arguments on direct appeal should also get the benefit of that new rule.

But as the First Circuit has explained, fixing the cutoff for clearly established law at the time of a state intermediate court decision would “subvert *Griffith*” by allowing state supreme courts to “deny criminal defendants the benefit of new Supreme Court precedent by the simple expedient of” denying review. *Foxworth*, 570 F.3d at 432. Indeed, the Third Circuit’s rule “would give state courts a perverse incentive to avoid addressing constitutional claims in contemporaneous terms while insulating their actions from subsequent federal habeas review.” *Id.*

b. The Third Circuit’s construction of AEDPA also would raise a serious issue under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. The availability of habeas corpus has evolved, and generally expanded, since 1789. Over 140 years ago, Congress first extended the Great Writ to state prisoners. And ever since *Teague*, it has been clear that the writ guarantees state prisoners the benefit of any decisions that this Court announces before their convictions became final.

In light of this legal evolution and the settled expectations it has created, this Court “has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the

present scope of the writ.” *Boumediene v. Bush*, 553 U.S. 723, 746 (2008). Indeed, in *Felker v. Turpin*, 518 U.S. 651 (1996), this Court assumed, in an opinion written by Chief Justice Rehnquist, that “the Suspension Clause of the Constitution refers to the writ as it exists [for state prisoners] today, rather than as it existed in 1789.” *Id.* at 663-64.

If the Third Circuit’s construction of AEDPA were correct, however, it would preclude state prisoners from obtaining habeas relief even in cases where it became clear while they were still on direct review in state court that the state-court proceedings had violated their federal constitutional rights. This result would force the issue of whether the Suspension Clause protects the longstanding availability of habeas relief from statutory infringement. “The necessity of resolving such a serious and difficult constitutional issue – and the desirability of avoiding that necessity – simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent” before holding that Congress has curtailed the scope of federal habeas law. *INS v. St. Cyr*, 533 U.S. 289, 305 (2001). No such clarity is present here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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