No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER,

Respondent.

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

BRIEF FOR PETITIONER

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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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BRIEF FOR PETITIONER

Petitioner Eric Greene respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is published at 606 F.3d 85. The opinion of the United States District Court for the Eastern District of Pennsylvania (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 a writ of certiorari to and including November 17, 2010. No. 10A350. This Court granted the petition for a writ of certiorari on April 4, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the federal habeas statute are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

Roughly a quarter century ago, following two previous decades of internal debate and deliberation, this Court established a system of retroactivity with respect to criminal defendants convicted in state courts. Under that system, state prisoners are entitled to the benefit of any decision from this Court announced while on direct review, but generally not after their convictions have become final. This finality cutoff has become a bedrock principle for both direct appeals, *see Griffith v. Kentucky*, 479 U.S. 314 (1987), and federal habeas review, *see Teague v. Lane*, 489 U.S. 288 (1989), creating stability and fairness in retroactivity law where they previously were lacking. The question presented here is whether Congress – without saying so directly, and while focused on a different matter (the standard of review applicable on federal habeas) – partially altered this retroactivity doctrine in the Antiterrorism and Effective Death Penalty Act (AEDPA). In particular, the question is whether AEDPA implicitly deprives state prisoners of their former entitlement to obtain habeas relief based on violations of this Court's cases decided while they were on direct review but after the last state-court decisions rejecting their claims on the merits.

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 other men. All three 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 Commonwealth of Pennsylvania charged petitioner and three other men with, among other things, second-degree murder, three counts of robbery, and conspiracy. The Commonwealth also charged Julius Jenkins with first-degree murder. The Commonwealth 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 Commonwealth to redact the codefendants' statements to remove the prejudicial references to petitioner.

The Commonwealth accordingly redacted the statements – but only barely. In some places, the Commonwealth 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 Commonwealth simply deleted or replaced petitioner's name with the word "blank" or "similar symbols," making it obvious that redactions had occurred. *Id.* at 9a, 78a. The trial court nonetheless accepted these redactions and ruled that they cured the *Bruton* problem because the confessions no longer explicitly referred to petitioner by name.

At the joint trial, petitioner's codefendants did not testify, and the Commonwealth 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, arguing that the *Bruton* doctrine is violated when "redaction would destroy the narrative integrity of the [codefendants'] statements, and prejudice the appellant in the case at bar," and he contended that he "did suffer such prejudice at trial." JA. 51-52.

The Pennsylvania Superior Court affirmed. Relying on the Pennsylvania Supreme Court's prior holding in *Commonwealth v. Miles*, 681 A.2d 1295, 1300 (Pa. 1996), that "the substitution of the letter 'X' for a defendant's name does not violate that defendant's *Bruton* rights," the Superior Court ruled that petitioners' codefendants' confessions as

redacted did not violate the Confrontation Clause because they were "redacted to eliminate specific reference to [petitioner] and the others." J.A. 128.

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. Because *Gray* was decided before petitioner's conviction became final on direct review, it applied to his case under this Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Pennsylvania Supreme Court then granted the petition for allowance of appeal limited to the Confrontation Clause issue. J.A. 156.[1] Petitioner filed a brief explaining that the "redaction of the confessions of two nontestifying codefendants cannot stand constitutional muster," and that "*Gray v.*

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[1] The Pennsylvania Supreme Court order is styled *Commonwealth v. Trice*, 552 Pa. 201 (1998). Petitioner is also known as Jarmaine Q. Trice, and he was referred to by this name in the state-court proceedings.

Maryland (page number will not be assigned for another year and, hence, this U.S. citation will be omitted *infra*), 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), prohibits what transpired herein and absolutely mandates a new trial." J.A. 171. Several months later, however, the Pennsylvania Supreme Court dismissed petitioner's appeal "as having been improvidently granted." J.A. 216. The court offered no explanation for its dismissal.

Following the Pennsylvania Supreme Court's dismissal, petitioner's appointed attorney mailed him a letter advising him that his representation was at an end. *See* 24 Pa. Code § 122(B)(2), Comment (2000) (indigent defense appointments run "through the Supreme Court of Pennsylvania").

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 post-conviction proceedings, petitioner filed a timely petition for federal habeas relief in the United States District Court for the Eastern District of Pennsylvania. He sought relief on several grounds, including the constitutional principles set forth in *Bruton* and *Gray*.

Section 2254(d) of Title 28 of the U.S. Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides that habeas relief is available when a state court's adjudication of a federal constitutional claim "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." 28 U.S.C. § 2254(d)(1). There can be no serious dispute that the Pennsylvania courts' adjudication of petitioner's Confrontation Clause claim was "contrary to" *Gray.* As the district court noted, the prosecution in petitioner's trial, just as in *Gray*, introduced codefendants' confessions that included "blank spaces and similar symbols of deletion." *Id.* at 78a. Yet, unlike *Gray*, the Pennsylvania courts held that such obvious redactions satisfied the Confrontation Clause.

The district court thus observed that the "key to assessing the merits of Petitioner's claim" is retroactivity law. Under the retroactivity doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, a state prisoner seeking federal habeas relief is entitled to the benefit of any decision that applied to him under *Griffith* – that is, any decision that predated the finality of his conviction. If *Teague* continues to control, then *Gray*'s prohibition on obvious redactions applies to petitioner's case. But if Section 2254(d)'s phrase "clearly established Federal law" partially abrogated *Teague* and creates a new retroactivity cutoff at the last state-court decision on the merits, then *Gray* does not apply here because it was announced after the intermediate appellate decision from the Pennsylvania Superior Court.

Adopting a magistrate's report and recommendation, the district court held that Section 2254(d) sets the retroactivity cutoff at the last state-court decision on the merits. Pet. App. 78a. Freed from having to apply *Gray* to petitioner's case, the district court held that the Pennsylvania Superior Court's adjudication of petitioner's Confrontation

Clause claim was not contrary to this Court's precedent at the time of its decision. *Id.* at 74a-75a. It also rejected the remainder of petitioner's claims.

The district court granted petitioner a certificate of appealability limited to his Confrontation Clause claim. *Id.* at 78a-79a.

6. A divided panel of the Third Circuit affirmed. The majority acknowledged that "Greene's petition turns on whether he may invoke *Gray*," Pet. App. 23a, and that AEDPA contains "no clear answer" to that retroactivity issue, *id.* at 21a n.7. The majority nonetheless held that AEDPA abrogated *Teague*'s finality cutoff, such that "the date of the relevant state-court decision is [now] the controlling date." *Id.* at 18a. The "most straightforward" reading of the "clearly established" language in Section 2254(d), the majority asserted, is that it "contemplates that the law or precedent *existed* at the time of the state court's substantive resolution of the petitioner's claim." *Id.* at 25a.

The majority also claimed to find support for this holding in this Court's precedent – specifically, in this Court's statement in *Williams v. Taylor*, 529 U.S. 362 (2000), 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. The Third Circuit acknowledged that two other passages in *Williams* "direct[ly]" state that *Teague*'s retroactivity cutoff remains controlling. Pet. App. 18-19a, 22a, 29a (citing *Williams*, 529 U.S. at 390, 412). The court of appeals also acknowledged that this Court recently deemed the issue an open question because neither *Williams* nor any subsequent case required this

Court to resolve the issue. Pet. App. 23a (citing *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010)). But the Third Circuit opted to follow the dicta in *Williams* referencing "the time of the relevant state-court decision," on the ground that this Court has repeated this language in post-*Williams* cases more often than it has cited the *Teague*-related passages from that decision. *Id.* at 25a-28a.

Judge Ambro dissented. Like the majority, he started from the premise that Section 2254(d) does not contain "an express time cutoff for 'clearly established Federal law.'" Pet. App. 48a. Judge Ambro also noted that passages in *Williams* are "conflicting," and that "[i]n none of the [post-*Williams*] cases cited by the majority . . . was the Supreme Court required to determine the cutoff date." *Id.* at 51a n.7. In light of these realities and in the absence of any other "clear" directive in AEDPA to abandon the *Teague* doctrine, Judge Ambro deduced that "[i]t is the Supreme Court's retroactivity jurisprudence of *Griffith* or *Teague* that determines applicability on collateral review, not AEDPA." *Id.* at 61a. Section 2254(d)'s "clearly established" phrase, on his reading of the statute, merely requires federal court to apply holdings, instead of dicta, to habeas petitions.

Judge Ambro also objected 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 be haphazard, depending 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." *Id.* at 68a.

7. Petitioner filed a timely petition for rehearing en banc. Pet. App. 83a-84a. The Third Circuit denied the petition, with Judge Ambro noting that he would have granted rehearing. *Id.* This Court granted certiorari. 131 S. Ct. 1813 (2011).

SUMMARY OF ARGUMENT

A holding from this Court announced after a state intermediate court decision denying relief on direct review, but before a state supreme court's denial of discretionary review, qualifies as "clearly established Federal law" for purposes of applying 28 U.S.C. § 2254(d).

I. A state prisoner seeking federal habeas relief is entitled to the benefit of any case that this Court decided before his conviction became final.

A. This Court has repeatedly held that statutory amendments, including those in AEDPA, do not change prior law unless there is a specific or clear indication to the contrary in the amendments' text, structure, or legislative history. Prior to AEDPA, this Court construed the federal habeas statute in *Teague v. Lane*, 489 U.S. 288 (1989), to allow a state prisoner seeking federal habeas relief to rely on any case that this Court decided before his conviction became final. Nothing in the text of revised Section 2254 evinces a clear indication to depart from

Teague's retroactivity cutoff. Section 2254(d)(1) alters the *standard of review* applicable on federal habeas; it replaces the prior system of independent review with one requiring deference, and its "clearly established" phrase abrogates federal courts' previous practice of granting relief based on prior dicta instead of holdings. But, as this Court has emphasized both before and after AEDPA, the issue of what standard of review applies in federal habeas proceedings is separate and distinct from the issue of retroactivity. *See, e.g.*, *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in the judgment); *id.* at 303-04 (O'Connor, J., concurring in the judgment); *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam). And nothing in the language of Section 2254(d) deals with retroactivity law. The amended statute's structure and AEDPA's legislative history likewise confirm that Section 2254(d) addresses only the standard of review. To the extent that Congress thought about retroactivity law at all in amending the federal habeas statute, Congress expected *Teague*'s regime to continue to control all retroactivity determinations.

The Third Circuit nevertheless advanced two arguments for holding that a decision predating finality but postdating the last state-court decision on the merits does not qualify as "clearly established" law under Section 2254(d). Neither one satisfies the "clear indication" test – or even withstands scrutiny on its own terms.

First, the Third Circuit asserted that, "[a]s an inferior federal court, [it was] not free to ignore" several previous opinions from this Court repeating Justice O'Connor's statement in dicta in *Williams v. Taylor*, 529 U.S. 362 (2000), 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*." Pet. App. 18a, 25a-27a (emphasis added by Third Circuit) (quoting *Williams*, 529 U.S. at 412). But none of the cases the Third Circuit cited raised the question presented here, and the *Williams* opinion as a whole actually supports the notion that *Teague*'s finality cutoff still controls retroactivity determinations.

Second, the Third Circuit asserted that a federal court cannot sensibly apply Section 2254(d)'s rule of deference to a constitutional claim based on "a Supreme Court decision that did not exist" at the time of the relevant state-court decision. Pet. App. 25a. But this Court has already held in *Harrington v. Richter*, 131 S. Ct. 770 (2011), and *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), that federal courts can and should apply Section 2254(d) even when the relevant state-court decision did not apply, cite, or exhibit awareness of an applicable decision from this Court. In such a situation, a federal habeas court "must determine what arguments or theories" based on the applicable decision "*could have* supported[] the state court's decision," and then apply AEDPA's deferential standard to that hypothetical opinion. *Richter*, 131 S. Ct. at 786 (emphasis added). The same method of analysis pertains here.

B. Changing the retroactivity cutoff from finality to the date of the last state-court decision on the merits would create serious practical and constitutional problems. For starters, it would create a "twilight zone" during direct review. State prisoners' ability to seek federal habeas relief based on decisions announced after state intermediate court

decisions would depend on the happenstance of whether state supreme courts decide to grant discretionary review in their cases and issue decisions on the merits. Creating a prefinality cutoff would also greatly increase the pressure and importance of this Court's GVR practice – seemingly even requiring, under this Court's right-to-counsel jurisprudence, the appointment of an attorney when a GVR is a possibility. The difficulty of navigating these various issues underscores the wisdom of leaving *Teague*'s settled regime in place in the absence of any clear congressional directive to the contrary.

II. Even if Section 2254(d)'s phrase "clearly established Federal law" does contain a new retroactivity rule that is keyed to when the state courts decided the prisoner's claim, that rule should be satisfied when the decision from this Court on which the prisoner seeks to rely was announced before the state high court disposed of his case on direct review. The most that Congress could plausibly have intended to accomplish in AEDPA would have been to ensure that state courts always have a fair opportunity to apply this Court's decisions before prisoners seek federal habeas relief based upon them. Where, as here, a prisoner argued to the state supreme court that he was entitled to relief under a decision from this Court and the state court elected to forego review, such a "fair opportunity" requirement is satisfied.

ARGUMENT

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was the culmination of a thorough reexamination of federal habeas law – both of prior statutes on the topic and of this Court's jurisprudence fleshing out those statutes. In some instances, AEDPA changed previous law. *See, e.g.*, 28 U.S.C. § 2244(d)(1) (new one-year limitations period); *id.* § 2253(c) (new certificate-of-appealability requirement for taking appeals). In other instances, AEDPA codified or incorporated this Court's jurisprudence. *See, e.g.,* 28 U.S.C. § 2254(b) (exhaustion requirement); *Slack v. McDaniel*, 529 U.S. 473, 483, 486 (2000) (holding that 28 U.S.C. § 2244(b) incorporates pre-AEDPA conception of "second or successive" petition). In still other instances, AEDPA is silent on a topic, thus leaving this Court's pre-AEDPA jurisprudence intact. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 536-39 (2006) (procedural default doctrine and its exceptions).

As is relevant to this case, AEDPA amended 28 U.S.C. § 2254 in order to change the standard of review that applies when a federal habeas court reviews a constitutional claim attacking a state-court judgment. Whereas Section 2254 used to provide for de novo review of such judgments (and allowed federal courts to consider dicta and lower court opinions in conducting such review), new Section 2254(d) now provides that a state prisoner may not obtain habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim 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." 28 U.S.C. § 2254(d)(1).

The Third Circuit held in this case that this amendment also altered longstanding retroactivity law – rendering state prisoners no longer entitled to obtain relief based on decisions from this Court issued before their convictions became final but after the last state-court decision on the merits. This holding is incorrect. AEDPA did not supplant finality cutoff established in *Teague v. Lane*, 489 U.S. 288 (1989), so any decision from this Court that predates finality qualifies as "clearly established Federal law" for purposes of Section 2254(d). And even if AEDPA had changed retroactivity law, a state prisoner would still be entitled to the benefit of a decision that, as here, predated a state high court's disposal of the case.

I. Federal Habeas Petitioners Are Entitled To Rely On Decisions From This Court That Came Down Before Their Convictions Became Final.

Well-settled principles of statutory interpretation dictate that *Teague*'s finality cutoff continues to control retroactivity law in the post-AEDPA landscape. What is more, moving the cutoff to the last state-court decision on the merits would create serious practical and constitutional problems that there is no reason to believe Congress wished to force upon this Court.

A. Statutory Interpretation Principles Dictate That Any Decision Predating Finality Qualifies As Clearly Established Federal Law Under AEDPA.

Congress frequently amends parts of federal statutes. In order to foster stability in the law, therefore, this Court assumes that amendments do not alter previous judicial constructions of a statutory regime absent a "specific," *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), or "clear" indication to the contrary in the new statute's text, structure, or legislative history, *United States v. O'Brien*, 130 S. Ct. 2169, 2179-80 (2010) (quoting *Grogan v. Garner*, 498 U.S. 279, 290 (1991)).

Two cases illustrate this principle at work. In *Merrill Lynch v. Curran*, 456 U.S. 353 (1982), this Court held that amendments to the Commodity Exchange Act (CEA) did not disturb the availability of a certain private right of action under the statute because "a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions" from which the federal courts had derived the doctrine. *Id.* at 381-82. Similarly, in *Square D*, this Court assumed that "Congress did not see fit to change" this Court's prior interpretation of a statutory exemption from the Sherman Act's treble damages remedy after "Congress carefully reexamined this area of the law" and enacted new, express exemptions shielding certain activities from antitrust liability. 476 U.S. at 420. In concluding that Congress had left the original treble damages exemption intact, the Court noted the absence of any "specific statutory provision or legislative history indicating a specific congressional intention to

overturn the [Court's] longstanding . . . construction" of the original exemption. *Id.*

In numerous other cases, including two involving AEDPA itself, this Court has invoked this presumption of continuity to hold that statutory amendments did not change this Court's prior interpretation of a statutory regime. *See Holland v. Florida*, 130 S. Ct. 2549, 2561-62 (2010) (categorical rules in AEDPA's statutory limitations provision did not abolish equitable tolling because "prior law" allowed such tolling and the amendments were "silent as to equitable tolling"); *O'Brien*, 130 S. Ct. at 2178 (amendments to criminal statute did not convert a subsection from an element to a sentencing factor because there was no "clear indication" of such intent (quoting *Grogan*, 498 U.S. at 290)); *House*, 547 U.S. at 536-39 (2006) (AEDPA did not alter procedural default doctrine); *Dir. of Revenue v. CoBank ACB*, 531 U.S. 316, 323 (2001) (amendment did not alter prior law because "[n]othing in the [amendments] expressly change[d]" such law); *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[I]f Congress had . . . inten[ded]" to change the law in a certain manner, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the . . . legislative history" of the amendment). In short, when confronting an amended statute, "the applicable principle is that Congress does not enact substantive changes *sub silentio*." *O'Brien*, 130 S. Ct. at 2178.

Applying this analytical framework here, it is apparent that AEDPA did not alter retroactivity law: this Court squarely construed the habeas statute

before AEDPA to set finality as the cutoff, and nothing in AEDPA clearly indicates that Congress intended to alter that rule.

1. This Court's pre-AEDPA law established finality as the retroactivity cutoff and – equally important – emphasized that retroactivity law was distinct from the standard-of-review issue Congress later specifically addressed in AEDPA's amendment to Section 2254.

Two important matters arise when a federal habeas court reviews a state-court criminal conviction: retroactivity and the standard of review. Retroactivity is a "threshold" issue that determines what law is applicable on federal habeas review. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *Teague*, 489 U.S. at 300. The standard of review determines how, in light of the temporally applicable law, to assess the legitimacy of the state court's judgment. *See Williams v. Taylor*, 529 U.S. 362, 400-03 (2000); *Wright v. West*, 505 U.S. 277, 306 (1992) (Kennedy, J., concurring in the judgment).

In the *Teague* decision in 1989, this Court derived the doctrine of retroactivity on habeas from its grant of authority in 28 U.S.C. § 2243, which provided then, as now, that federal courts may issue habeas relief "as law and justice require." *See Danforth v. Minnesota*, 552 U.S. 264, 278 (2008) (describing statutory derivation of retroactivity doctrine). Specifically, this Court held that state prisoners are entitled to the benefit of any Supreme Court decision that came down before their convictions became final. Any such decision, in *Teague*'s retroactivity parlance, is an "old rule." *Whorton v. Bockting*, 549 U.S. 406, 414 (2007).

Prisoners may not, however, benefit from postfinality decisions – termed "new rules," *Teague*, 489 U.S. at 310 – unless they announce "watershed rules of criminal procedure." *Id.* at 311. As Justice Kennedy has explained, the *Teague* doctrine thus serves a "comity interest . . . in not subjecting the States to a regime in which finality is undermined by our changing a rule once thought to be correct but now understood to be deficient." *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment); *accord Teague*, 489 U.S. at 308.

Teague's cutoff of "finality" was carefully conceived and is precisely defined. "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari*, 510 U.S. at 390; *accord Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). At that point, but not before, a state's interest in "leaving concluded litigation in a state of repose" overrides a defendant's competing interest in obtaining a trial that comports with constitutional requirements. *Teague*, 489 U.S. at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)); *see also Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (state interest in repose attaches once convictions have "survived direct review"); *Johnson v. Texas*, 509 U.S. 350, 378 (1993) (O'Connor, J., dissenting) (state interest in repose "come[s] into play only after this Court has denied certiorari or the time

for filing a petition for certiorari from the judgment affirming the conviction has expired").

Accordingly, in a case such as this, in which this Court announces a pertinent decision *before* "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied," *Caspari*, 510 U.S. at 390, but after the last state-court decision on the merits, the *Teague* doctrine directs a federal habeas court to give the state prisoner the benefit of the new decision, even though there is no state-court opinion applying the decision. In such a situation, a federal court must ask the *hypothetical* question "whether a state court considering [the defendant's] claim at the time his conviction became final *would have* felt compelled by existing precedent" to grant relief. *Id.* (emphasis added) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)); *see also, e.g.*, *Jones v. Gomez*, 66 F.3d 199, 201 (9th Cir. 1995) (giving petitioner the benefit of a rule announced after the last state-court decision on the merits but before finality); *Deputy v. Taylor*, 19 F.3d 1485, 1491 n.6 (3d Cir. 1994) (same); *Motley v. Collins*, 18 F.3d 1223, 1230 (5th Cir. 1994) (same).

Not only does *Teague*'s retroactivity regime clearly delineate retroactivity principles, but it has always been separate and distinct from the question of the appropriate standard of review on federal habeas. That is, *Teague* "did not establish a standard of review [of state-court determinations of federal law]. Instead *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final." *Wright*, 505 U.S. at 303-04 (O'Connor, J., concurring in the judgment); *accord id.* at 307

(Kennedy, J., concurring in the judgment) ("*Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity."); *id.* at 291 n.8 (plurality opinion) ("We have no difficulty with describing *Teague* as a case about retroactivity, rather than standards of review . . . .").

Indeed, this Court derived the standard of review applicable on federal habeas from a completely different statute, 28 U.S.C. § 2254, which before AEDPA provided simply that a federal court should grant habeas relief when a state judgment "violat[ed] . . . the Constitution or laws or treaties of the United States." In contrast to its construction of the retroactivity principle derived from Section 2243, this Court construed Section 2254 as *declining* to afford comity to the states, *see Wright*, 505 U.S. at 308, holding instead that federal courts should decide independently – without deferring in any way to a state court's resolution of a constitutional issue – whether the Constitution (as of the point of finality) was violated in the state proceedings. *See Miller v. Fenton*, 474 U.S. 104, 111-12 (1985); *Fay v. Noia*, 372 U.S. 391, 424 (1963); *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Brown v. Allen*, 344 U.S. 443 (1953); *see also Williams v. Taylor*, 529 U.S. 362, 400 (2000) (recounting this law). Furthermore, federal courts sometimes defined the Constitution's requirements according to mere dicta from this Court, *see.*, *e.g.*, *Rickman v. Bell*, 131 F.3d 1150, 1161 n.1 (6th Cir. 1997); *Branch v. Turner*, 37 F.3d 371 (8th Cir. 1994), or according to circuit precedent, *see, e.g.*, *Freeman v. Lane*, 962 F.2d 1252, 1260 (7th Cir. 1992); *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990).

2. Congress clearly sought in AEDPA to revise the standard of review applicable on federal habeas. But there is no clear indication in the text, structure, or legislative history of AEDPA that Congress meant to alter *Teague*'s finality rule in any way.

a. *Text.* Congress left Section 2243 – from which the *Teague* retroactivity rule is derived, *see Danforth*, 552 U.S. at 278 – untouched when it enacted AEDPA. As in *Merrill Lynch*, the fact that Congress left this provision "intact" following a "comprehensive reexamination and significant amendment" of the federal habeas law suggests that Congress "affirmatively intended to preserve" *Teague*'s retroactivity rule. *Merrill Lynch*, 456 U.S. at 381-82.

Nothing about the new language Congress inserted into Section 2254 clearly indicates otherwise. New subsection (d)(1) of Section 2254 forbids a federal court from granting habeas relief based on a claim that a state court adjudicated on the merits unless the adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The new "contrary to, or an unreasonable application of" language affords comity to the states where it was previously lacking by replacing the pre-AEDPA de novo standard of review with one requiring deference. *See Williams*, 529 U.S. at 411-12 (O'Connor, J., for the Court). This deferential standard is "meant to be" "difficult to meet," *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), but has nothing to do with retroactivity.

Nor does the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" speak to retroactivity. Instead, it, too, relates to the degree of deference due to state-court resolutions of constitutional claims. Whereas federal courts before AEDPA sometimes granted habeas relief based on state courts' failure to abide by dicta from this Court or precedent from lower courts, *see supra* at 21, the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" makes clear that habeas relief is permissible only where state-court judgments are inconsistent with applicable *holdings* of *this Court*. *See Williams*, 529 U.S. at 412 (O'Connor, J., for the Court).

To the extent that new Section 2254(d) indicates that Congress contemplated retroactivity law at all in amending the federal habeas statute, the new provision suggests that Congress envisioned maintaining a cutoff of finality. Recall that Section 2254(d) 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 language, of course, presupposes an "adjudication" of the prisoner's claim in state court. But the statute focuses ultimately on the "result[]" of the state-court proceedings – on its "decision," rather than its adjudication or opinion – indicating that it is the outcome of a case, not the state court's treatment of this Court's case law, that a federal court should scrutinze. As this Court recently explained in *Richter*, Section 2254(d)'s inquiry does not even "require that there be an opinion from the state court

explaining the state court's reasoning." 131 S. Ct. at 784; *see also Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (Section 2254(d) does not require "citation" or even "awareness" of this Court's cases). Instead, the decisive question under Section 2254(d) is whether any reasonable "arguments or theories . . . could have supported[] the state court's decision." *Richter*, 131 S. Ct. at 786.

This Court's decision in *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), cements the reality that Section 2254(d) neither displaced nor altered *Teague*'s retroactivity rule. In *Horn*, a state prisoner sought federal habeas relief based on a decision from this Court, *Mills v. Maryland*, 486 U.S. 367 (1988), which postdated the finality of his conviction. A state court, on post-conviction review, had rejected the claim on the merits. Considering the prisoner's claim on federal habeas, the Third Circuit held that the prisoner was entitled to the benefit of *Mills*. The Third Circuit reasoned that Section 2254(d) "has changed the relevant legal principles" of retroactivity doctrine, *Horn*, 536 U.S. at 272, shifting the cutoff from finality to "the time that the state court makes the ruling on the federal constitutional issue that is being scrutinized." *Banks v. Horn*, 271 F.3d 527, 541 (3d Cir. 2001). This rule rendered state prisoners entitled to the benefit of any decision from this Court that predated a state-court opinion rejecting their claim on the merits, even if the decision postdated finality.

The Commonwealth of Pennsylvania petitioned for certiorari. In that petition, the Commonwealth objected to the Third Circuit's suggestion that "*Teague* has been replaced by § 2254(d)'s 'clearly

established' language," and argued that "the Third Circuit's new interpretation of § 2254(d), and its refusal to apply *Teague*, also specifically conflict[ed] with this Court's retroactivity jurisprudence," which was unchanged by AEDPA. Pet. for Cert. at 10-11, *available at* 2002 WL 32135087.

This Court agreed with the Commonwealth. It summarily reversed the Third Circuit, emphasizing that *Teague*'s finality cutoff remained the law, and stating that "the AEDPA and *Teague* inquiries are distinct." *Horn*, 536 U.S. at 272. In other words, when a state prisoner seeks habeas relief based on a decision that postdates finality, Section 2254(d) establishes the proper standard of review, while *Teague*'s finality cutoff continues to determine retroactivity.

The same must be true when a state prisoner seeks relief based on a decision that *pre*dates finality. Indeed, as nonsensical as it would have been to conclude that Section 2254(d) completely displaced *Teague*'s retroactivity doctrine, it would make even less sense to conclude that it silently replaced *part* of *Teague*, while leaving the rest intact.

b. *Structure.* Two aspects of the federal habeas statute's post-AEDPA structure reinforce that Congress did not intend in AEDPA to alter the retroactivity rules for federal habeas.

First, Sections 2244(b)(2) and 2254(e)(2)(A)(ii) allow habeas petitioners to file successive petitions and to introduce new evidence, respectively, if the petitioner's claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." And in

Tyler v. Cain, 533 U.S. 656 (2001), this Court applied the *Teague* exceptions to determine whether, under Section 2244(b)(2), the new rule this Court announced in *Cage v. Louisiana*, 498 U.S. 39 (1990), applied retroactively on collateral review. That the *Teague* doctrine controls these post-AEDPA retroactivity determinations suggests – absent a strong indication to the contrary – that it controls other post-AEDPA retroactivity determinations as well.

Second, Section 2244(d)(1) requires federal habeas petitions to be filed one year from the latest of four dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Consistent with the "standard rule" that limitations periods do not begin running until "a plaintiff has a complete and present cause of action," *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 200-01 (1997) (internal quotation marks and citation omitted), subsections (A), (C) and (D) each identify points in time when law or facts necessary to support a claim for habeas relief become definitively known. The fact that subsection (A) identifies finality, *see Jimenez v. Quarterman*, 129 S. Ct. 681, 685-85 (2009) – and not the last state-court decision on the merits – at the point where the law necessary to support a habeas claim typically becomes locked in confirms that *Teague*'s finality cutoff continues to determine the body of law applicable to such a claim.[2] Furthermore, subsection (C) reinforces the fact that retroactivity doctrine operates independently of the standard of review in Section 2254(d).

c. *Legislative history.* The congressional reports and debates surrounding AEDPA's passage

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[2] One might argue that instead of reflecting Congress' belief that the law applicable to a habeas petition does not become locked in until finality, subsection (A) just evinces Congress' desire to prevent an otherwise ripe habeas claim from proceeding until a prisoner has exhausted his opportunity for relief on direct review from this Court. But if that were so, then Congress would have provided for tolling of claims while direct-review litigation proceeded in this Court, as it did with respect to properly filed state habeas petitions. *See* 28 U.S.C. § 2244(d)(2). The fact that Congress encompassed proceedings in this Court within its affirmative limitations periods demonstrates that it believed that a habeas claim is not ripe until the point of finality.

underscore that Congress's sole objective in amending Section 2254 was to change the standard of review courts must apply when considering state prisoners' petitions for federal habeas relief.

AEDPA was the culmination of years of congressional debate regarding the federal habeas system. *See, e.g.*, H.R. 4018, 103d Cong. (1994) (as reported by H. Comm. on the Judiciary, Mar. 25, 1994) (proposing habeas reform); H.R. 3371, 102d Cong. (1991) (as reported by H. Comm. on the Judiciary, Oct. 7, 1991) (same); H.R. 5269, 101st Cong. (1990) (as reported by H. Comm. on the Judiciary, Sept. 5, 1990) (same). Though certain aspects of the *Teague* decision had been the subject of considerable analysis in those years, *see, e.g.*, H.R. REP. NO. 103-470, at 4 (1994) (criticizing the Court's definition of a new rule under *Teague* as "far too broad"); H.R. REP. NO. 102-242, at 131 (1991) (criticizing the *Teague* exceptions), no one had ever criticized the ability under existing habeas law of prisoners to receive the benefit of decisions from this Court announced after their last state-court decision on the merits but before finality. In fact, neither AEDPA's conference report, nor the 1996 House and Senate debates mention *Teague* at all. *See* H.R. REP. NO. 104-518 (1996) (Conf. Rep.); 142 CONG. REC. H3599 (Apr. 18, 1996), S3427 (Apr. 17, 1996), H2247 (Mar. 14, 1996), H2129 (Mar. 13, 1996).

Instead, all of the discussion and debate surrounding Section 2254 involved the standard of review applicable on federal habeas. *See* H.R. REP. No. 104-518, at 111 (explaining that AEDPA's amendments require federal courts to accord "deference" to state court determinations); 142 CONG.

REC. H3602-04 (Apr. 18, 1996) (statement of Sen. Kennedy) (criticizing Section 2254's requirement of deference to state court decisions); *id.* (statement of Rep. Hyde) (supporting "the deference that a Federal judge must give in a habeas proceeding to a State court decision"); 142 CONG. REC. S3439-42 (Apr. 17, 1996) (statement of Sen. Moynihan) (criticizing Section 2254's requirement of deference to state court decisions); 142 CONG. REC. H2247-49 (Mar. 14, 1996) (statement of Rep. Hyde) (explaining AEDPA's revision of the habeas statute as requiring "deference" to state court decisions).

As this Court noted in another case involving a claim that a statutory amendment altered important and well-settled law, "if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point" in the legislative history. *Chisom*, 501 U.S. at 396; *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress . . . intended to enact" a "significant change."). The fact that no Member of Congress so much as mentioned retroactivity law reinforces that AEDPA was not meant to alter that law.

d. *Empirical evidence.* The states' own post-AEDPA behavior confirms that there is no clear indication that AEDPA altered *Teague*'s finality cutoff. If AEDPA had been clear in creating a different, stricter cutoff for "clearly established Federal law," one would have expected the states to have raised the issue immediately after AEDPA's passage, just as the states immediately argued that

AEDPA had changed the standard of review on habeas. For over a decade, in case after case, they did not.[3] The retroactivity question became the subject of significant dispute only when the First Circuit raised and decided it *sua sponte* in *Foxworth v. St. Amand*, 570 F.3d 414, 432 (1st Cir. 2009), and this Court expressed "some uncertainty" on the subject in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010). The states' decade-plus of silence on this question belies any present assertion that AEDPA clearly or specifically altered the retroactivity cutoff for the application of this Court's decisions.

3. Despite the absence of any clear indication that Congress intended to partially abrogate *Teague* in Section 2254(d), the Third Circuit gave two reasons for holding that Section 2254(d) precludes a state prisoner from obtaining federal habeas relief based on a decision from this Court that predates finality but postdates the last reasoned state-court

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[3] *See Thompson v. Runnel*, 621 F.3d 1007, 1016 n.7 (9th Cir. 2010) (state conceded that prisoner was entitled to benefit from decision that predated finality but postdated last reasoned state-court decision; habeas relief granted); *Lyons v. Weisner*, 247 Fed. App'x 440, 444 (4th Cir. 2007) (same); *Rogers v. Hauck*, 2009 WL 3584923, at *13 n.4 (D.N.J. Oct. 26, 2009) (habeas petition implicated issue, but state apparently did not contest that finality was the cutoff); *Daly v. Burt*, 613 F. Supp. 2d 916, 924, 938-39 (E.D. Mich. 2009) (same); *Khan v. Fischer*, 583 F. Supp. 2d 390, 392 n.1 (E.D.N.Y. 2008) (same); *Belton v. Blaisdell*, 559 F. Supp. 2d 128, 148 n.22 (D.N.H. 2008) (same); *Cvijetinovic v. Eberlin*, 617 F. Supp. 2d 620, 635 (N.D. Ohio 2008) (same), *rev'd on other grounds*, 617 F.3d 833 (6th Cir. 2010); *Gerrard v. Parrish*, 2007 WL 151729, at *10 (D.N.J. Jan. 17, 2007) (same).

decision. First, while the Third Circuit acknowledged that this Court expressly reserved this issue two years ago in *Spisak*, it believed that, "[a]s an inferior federal court, [it was] not free to ignore" several previous opinions from this Court repeating Justice O'Connor's statement in *Williams*, 529 U.S. at 412, 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*." Pet. App. 18a, 25a-27a (emphasis added by Third Circuit). Second, the Third Circuit asserted that a federal court cannot sensibly apply Section 2254(d)'s rule of deference to a constitutional claim based on "a Supreme Court decision that did not exist" at the time of the relevant state-court decision. *Id.* Neither of these rationales withstands scrutiny.

a. Justice O'Connor's passing reference in *Williams* to "the time of the relevant state-court decision" does not indicate, much less hold, that Section 2254(d) altered *Teague*'s retroactivity framework. Nor do any of this Court's subsequent citations to Justice O'Connor's phraseology supplant *Teague*'s finality cutoff.

The sentence in which Justice O'Connor referred to the "the time of the relevant state-court decision" was not at all about retroactivity. Rather, the point of the sentence was to emphasize that the statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of this Court's decisions." 529 U.S. at 412; *see also Carey v. Musladin*, 549 U.S. 70, 79 (2006) (Stevens, J., concurring in the judgment) (explaining that the import of this sentence was its "dictum about

dicta"). The sentence's concluding phrase "as of the time of the relevant state-court decision" merely referenced the general notion that "new rules" do not apply on habeas. As with sentences in *Teague* itself and in numerous other opinions excerpted in the margin, the temporal reference was imprecise but in no way signaled a change in retroactivity law.[4]

Justice O'Connor confirmed as much in the same paragraph of her portion of the *Williams* opinion. Explicitly addressing the interaction between AEDPA and *Teague*, she explained that:

> With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). . . . The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source

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[4] *See, e.g.*, *Teague*, 489 U.S. at 310 (key is whether state prisoners "*trials and appeals* conformed to *then-existing* constitutional standards") (emphasis added); *Gray v. Netherland*, 518 U.S. 152, 166 (1996) (*Teague* requires "applying constitutional standards *contemporaneous with the habeas petitioner's conviction*") (emphasis added); *Lockhart v. Fretwell*, 506 U.S. 364, 387 (1993) (Stevens, J., dissenting) ("In *Teague v. Lane*, the Court . . . h[eld] that the claims of federal habeas petitioners will, in all but exceptional cases, be judged under the standards prevailing *at the time of trial*.") (emphasis added); *Saffle*, 494 U.S. at 488 (*Teague* requires that "state courts conduct criminal proceedings in accordance with the Constitution as interpreted *at the time of the proceedings*") (emphasis added).

> of clearly established law to this Court's jurisprudence.

529 U.S. at 412. Lest there be any doubt that Justice O'Connor expected *Teague*'s finality cutoff to continue in force, she also joined the portion of the majority opinion authored by Justice Stevens, in which this Court explained that "[t]he threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established *at the time his state-court conviction became final*." *Id.* at 390 (emphasis added).

At any rate, the question of retroactivity was not before the Court in *Williams*, because the petitioner in that case sought to rely on a decision – *Strickland v. Washington*, 466 U.S. 668 (1984) – that was announced long before his state-court proceedings even began. *See Williams*, 529 U.S. at 390. Nor was the timing question before this Court in any of the four other cases the Third Circuit cited, in which this Court cited Justice O'Connor's "relevant state-court decision" language. *See Carey*, 549 U.S. at 74; *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).[5] Given that

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[5] After the Third Circuit issued its opinion, this Court likewise stated in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) that "State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" 131 S. Ct. at 1399 (quoting *Lockyer*, 538 U.S. at 71-72). But just as in *Lockyer* and the other cases cited above, the issue of the retroactivity of this Court's decisions was not before the Court in that case. *See id.*

the difference between *Teague*'s finality rule and a rule setting the retroactivity cutoff at the "relevant state-court decision" would have no immediately apparent consequence in a case focused on a different question, this Court's repetitions of Justice O'Connor's "relevant state-court decision" language from *Williams* in cases that did not raise the issue should hardly restrict this Court here. *Cf. Lingle v. Chevron U.S.A.*, 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 dealing with a different issue.).

b. The Third Circuit's conclusion that Section 2254(d) would not work properly if finality remains the rule is likewise erroneous. Under *Teague*, when this Court announces a decision between the last state-court decision on the merits and finality, federal courts must assess the state-court judgment in light of what the state court "would have" said had it applied the intervening decision. *Caspari*, 510 U.S. at 390. That directive works just as well under a deferential standard of review as it does in a de novo regime. Indeed, this Court has already held that Section 2254(d)'s rule of deference applies to all state-court decisions rejecting federal claims on the merits, regardless of whether the state courts applied or even were aware of existing decisions from this Court. *See Richter*, 131 S. Ct. at 784 (Section 2254(d) applies to federal habeas review of state-court summary orders); *Packer*, 537 U.S. at 8 (per curiam) ("Application of Section 2254(d) 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."). As this Court explained, where a state court opinion makes no mention of one or more of this Court's cases, a federal habeas court "must determine what arguments or theories" based on those case(s) "*could have* supported[] the state court's decision," and then apply AEDPA's deferential standard to that hypothetical opinion. *Richter*, 131 S. Ct. at 786 (emphasis added). Precisely the same method of analysis applies in this case.

Indeed, this Court performed just this exercise, without any apparent difficulty, in *Spisak*. There, this Court assessed whether the Ohio Supreme Court's adjudication of a prisoner's Eighth Amendment claim resulted in a decision that was contrary to, or an unreasonable application of, this Court's decision in *Mills*, even though *Mills* had been issued after the state court's decision. *See Spisak*, 130 S. Ct. at 684. Numerous lower courts have conducted the same analysis with respect to other intervening decisions from this Court.[6]

To be sure, the "backward-looking" nature of Section 2254(d) means that federal habeas review is "limited to *the record* that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (emphasis added). The factual record must be fixed at the time

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[6] *See, e.g.*, *Thompson*, 621 F.3d at 1016 n.7; *Lyons*, 247 Fed. App'x at 444; *Rogers*, 2009 WL 3584923, at *13 n.4; *Daly*, 613 F. Supp. 2d at 924, 938-39; *Khan*, 583 F. Supp. 2d at 392 n.1; *Belton*, 559 F. Supp. 2d at 148 n.22; *Cvijetinovic*, 617 F. Supp. 2d at 635; *Gerrard*, 2007 WL 151729, at *10.

of the state-court adjudication whose result is under review in order to ensure that defendants submit evidence (and make arguments based on such evidence) in a timely manner. Under any system of appellate review, parties may not introduce new evidence that postdates the decision under review. *See, e.g.*, *C.N. v. Willmar Pub. Schs.*, 591 F.3d 624, 629 n.4 (8th Cir. 2010); *Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003). *Pinholster* simply extends this principle to federal habeas review of state-court judgments.

But the universe of applicable law is not similarly limited. This Court made clear in *Griffith* that parties on appeal may rely on newly decided cases in support of previously raised claims. 479 U.S. at 328; *see also Powell v. Nevada*, 511 U.S. 79, 84 (1994). And this Court likewise recognized long ago in *Teague* that it makes sense to apply this principle to federal habeas review. *See* 489 U.S. at 304.

B. Setting The Cutoff At The Date Of The Last State-Court Decision On The Merits Would Create Numerous Practical And Constitutional Problems.

The Third Circuit's new pre-finality cutoff would be problematic for at least two reasons. First, it would result in the "selective application of new rules" announced on direct review, in contravention of *Griffith*'s "principle of treating similarly situated defendants the same." 479 U.S. at 323. Second, the Third Circuit's pre-finality cutoff would place increased constitutional pressure on this Court's grant, vacate, and remand (GVR) practice.

1. The Third Circuit majority's interpretation of Section 2254(d) would "subvert *Griffith*," *Foxworth v. St. Amand*, 570 F.3d 414, 432 (1st Cir. 2009), by creating a "twilight zone" in which state courts are able – intentionally or unintentionally – to strip defendants of their ability to seek federal habeas relief based decisions from this Court that predate finality of their convictions. Pet. App. 62a (Ambro, J., dissenting). In *Griffith*, this Court held that "basic norms of constitutional adjudication" require courts to apply "a new rule for the conduct of criminal prosecutions . . . retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. at 323, 328. Fixing the cutoff for "clearly established Federal law" at the last reasoned state-court decision would violate this principle by producing arbitrary results among state prisoners seeking vindication of their constitutional claims.

For one thing, a defendant's ability to seek federal habeas review based on a decision from this Court that postdates a state intermediate appellate court's ruling would depend on whether the state high court grants discretionary review. And a state supreme court's decision whether to grant discretionary review (as in this Court) is subject to many factors unrelated to the question whether the law entitles defendant to relief. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 613-14 (1974). Indeed, a state high court may well deny discretionary review precisely *because* an intervening decision from this Court has just clarified uncertainty in the law that existed at the time of the state intermediate court's decision – obviating the need for a state high court opinion. *See O'Sullivan v. Boerckel*, 526 U.S. 838,

846 (1999) (noting that a state supreme court may choose to expend its resources only on "questions of broad significance" and not on error correction).[7] Under such circumstances, a state high court may be content to leave the defendant, if he wishes, to pursue federal habeas relief. *Cf. Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in the denial of certiorari) (explaining that denial of review is appropriate when "habeas review presents an appropriate and adequate forum for . . . resolving petitioner's contentions").

Under the Third Circuit's regime, however, this sensible method of managing a state high court's workload would no longer be equitable. Once the state high court denied review, the defendant would be precluded from seeking federal habeas relief based on the intervening decision, even though he completed his state-court proceedings *after* the person whose case this Court used to establish the new rule and would have been entitled to benefit from that new rule had the state court granted discretionary review.

Even if a state supreme court presented with an intervening decision from this Court did grant review, the Third Circuit's rule would still allow the state court to deprive the defendant of his ability to seek federal habeas relief by dismissing the case as

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[7] This Court follows a similar rationale when it denies or dismisses certiorari in a case because an intervening statutory change has effectively resolved a conflict of authority. *See* Eugene Gressman et al., Supreme Court Practice 247 (9th ed. 2007) (collecting examples).

improvidently granted. It is not farfetched to think that some resource-strapped state courts – after reviewing briefs on the merits and even hearing oral argument – might decide as a means of docket management to dismiss, rather than reject with written decisions, some prisoners' appeals in which they are not inclined to upset decisions below. *See Richter*, 131 S. Ct. at 784 (recognizing that a state court has an incentive "to concentrate its resources on the cases where opinions are most needed"). Under *Teague*, there is no difference – even in a "twilight zone" scenario – between these two ways of resolving a case; either way, the prisoner can later seek federal habeas relief based on the intervening decision. Yet under the Third Circuit's rule, the choice between the two different ways of disposing of cases would – just like the faulty system of retroactivity that *Teague* replaced – "le[a]d to unfortunate disparity in the treatment of similarly situated defendants on collateral review." *Teague*, 489 U.S. at 305.

Contrary to the Third Circuit's suggestion, Pet. App. 37a, the availability of state collateral review cannot solve these problems. States have no obligation to provide any system of collateral review. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). Many of the states that have such systems preclude prisoners from pressing claims that they have previously litigated. And states may enforce these bars on relitigation even when intervening decisions would bolster those claims. *See, e.g.*, Pet. App. 34a n.12 & 63a n.13 (Ambro, J., dissenting) (debating whether Pennsylvania law would bar such claims);

Ala. R. Crim. P. 32.2(a)(2) (providing without exception that state habeas petitioner "will not be given relief under this rule based on any ground which was raised or addressed at trial") *Thomas v. State*, 298 S.W.3d 610, 615 (Tenn. Crim. App. 2009) (suggesting that bar on previously litigated claims applies even when an intervening decision from this Court created a "change in the method of analysis on the issue"). Thus, federal habeas review is the only guaranteed form of collateral review available to apply this Court's decisions issued in the pre-finality "twilight zone."

2. The Third Circuit's rule would also raise serious administrative and constitutional issues concerning state prisoners' ability to seek orders GVR'ing state-court decisions in light of intervening case law.

As an initial matter, the Third Circuit's rule precluding state prisoners from obtaining federal habeas relief based on intervening decisions would make this Court's GVR practice – something that has always been considered "discretionary," *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) – mandatory in situations involving "twilight zone" claims. *Griffith* holds that when a defendant seeks certiorari in this Court based on an intervening decision, the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. Yet this Court need not grant plenary review in every case; this Court "fulfill[s] [its] judicial responsibility by instructing the lower courts" in a GVR "to apply the new rule retroactively to cases not yet final." *Id.* at 323; *accord Lawrence*, 516 U.S. at

167. While these passages might themselves have been read to constitutionally require this Court's GVR practice, this Court continued to deem the practice "flexib[le]," *Lawrence*, 516 U.S. at 168, while state prisoners have been able to pursue federal habeas relief based on any pre-finality decision. Yet the Third Circuit's pre-finality cutoff would deprive state prisoners of that right, leaving them with only one avenue to litigate constitutional claims dependent on intervening decisions: a petition for certiorari to this Court on direct review. Accordingly, this Court would be required to assess the merits of every such petition and to either grant plenary review or at least GVR all meritorious claims.

It would follow, under rudimentary notions of fairness (and seemingly, as well, under this Court's right-to-counsel jurisprudence), that the Third Circuit's pre-finality cutoff would require providing such state prisoners with counsel to seek certiorari. Many states, including Pennsylvania, currently do not appoint counsel for purposes of seeking certiorari in this Court. *See* 24 Pa. Code § 122(B)(2), Comment (2000) (indigent defense appointments run only "through the Supreme Court of Pennsylvania"). This Court, of course, does not appoint such counsel either. But criminal defendants are entitled to counsel to pursue appellate review when two circumstances are present: (1) the appellate court's disposition is one that necessarily turns on "the merits of claims" raised in the petition; and (2) the affected defendant-appellants "are generally ill equipped to represent themselves." *Halbert v. Michigan*, 545 U.S. 605, 617 (2005); *see also Douglas v. California*, 372 U.S. 353 (1963). Both conditions

would be present as a consequence of the Third Circuit's pre-finality cutoff.

First, as just explained, in reviewing a state prisoner's petition for certiorari based on an intervening decision, this Court would be required to "look[] to the merits of the claim[]" and to engage in "error-correction," at least to the extent of vacating and remanding incorrect decisions. *Halbert*, 545 U.S. at 617-19. It makes no difference that certiorari review is "formally categorized" as discretionary. *Id.* at 619; *see* 28 U.S.C. § 1257(a). All that matters is whether certiorari review would "provide[] the first, and likely the only, direct review the defendant's conviction and sentence [would] receive" under the governing law. *Halbert*, 545 U.S. at 619. Such would be the case in "twilight zone" scenarios as a result of the Third Circuit's rule.

Second, as this Court has emphasized, a criminal defendant is generally ill-equipped to represent himself when making arguments that a lawyer has not previously made on his behalf. *Halbert*, 545 U.S. at 620-21; *compare Ross*, 417 U.S. at 614-15 (no right to counsel where defendant's "claims had once been presented by a lawyer and passed upon by an appellate court"). This is particularly true with respect to invoking this Court's certiorari jurisdiction and GVR practice. The GVR process is an arcane pocket of appellate procedure; in fact, this Court's own *Guide for Prospective Indigent Petitioners for Writs of Certiorari* does not even mention it. To say the least, navigating this process "is a perilous

endeavor for a layperson," *Halbert*, 545 U.S. at 621, particularly when one's liberty is at stake.[8]

* * *

As in *INS v. St. Cyr*, 533 U.S. 289, 305 (2001), "[t]he necessity of resolving such [] serious and difficult constitutional issue[s] – 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 altered habeas law. The carefully crafted *Teague/Griffith* regime has sensibly and effectively governed the complex realm of retroactivity law for over twenty years. Given that there is no clear indication that Congress sought to tinker with it in AEDPA, this Court should refrain

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[8] Of course, insofar as, under the Third Circuit's rule, the right to counsel would apply to the certiorari stage, the failure of a court-appointed lawyer to raise a claim that would have entitled the defendant to a GVR and a victory on remand would typically constitute ineffective assistance of counsel. *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 374, 382 (1986) (the failure, without any reasonable strategic basis, to raise a readily available and winning argument constitutes ineffective assistance of counsel). This, in turn, would require this Court to develop a remedial jurisprudence that would allow state prisoners, such as petitioner, who were denied effective assistance of counsel (or any counsel at all) to have their right to seek certiorari on direct review (for purposes of obtaining a GVR, and an adjudication on the merits in state court) reinstated. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (state prisoners are entitled on federal habeas review to reinstatement of right to appeal if they lacked counsel at that stage and were prejudiced thereby); *Rodriquez v. United States*, 395 U.S. 327, 329 (1969) (same with respect to federal prisoners).

from doing so and unleashing a potential cascade of difficulties.

II. At The Very Least, A Federal Habeas Petitioner Should Be Entitled To Rely On A Decision From This Court That Was Announced Before A State Supreme Court Disposed Of His Cases On Direct Review.

Even if Section 2254(d)'s phrase "clearly established Federal law" does somehow contain a new retroactivity rule (with respect to prefinality decisions from this Court, but not, under *Horn*, to postfinality decisions) that is keyed to when the state courts last decided defendant's claim, that rule should be satisfied here. Specifically, so long as a decision from this Court on which the prisoner seeks to rely was announced before the state high court considered and disposed of his case on direct review – and especially if that disposal came after reviewing full briefing on the merits – the prisoner should be able to seek habeas relief based on the new decision. No more stringent retroactivity rule could plausibly be necessary to satisfy the comity principles underlying federal habeas review of state judgments. And such a rule is linguistically compatible with the text of AEDPA.

A. The Comity Interests Underlying Federal Habeas Review Of State Convictions Require Only That State Courts Have A Fair Opportunity On Direct Review To Apply This Court's Decisions.

This Court has long recognized that federal habeas law concerning the review of a state-court

judgment should "promote[] comity" but "not unreasonably impair the prisoner's right to relief." *Rose v. Lundy*, 455 U.S. 509, 522 (1982). That being so, the premise underlying retroactivity law on federal habeas is that state-court judgments need not comport with constitutional rules announced after the state-court litigation "concluded," but must be "consistent with . . . constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306 (quotation marks and citation omitted); *see also Wright*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment) (state-court judgments should not be "undermined by [this Court's] changing a rule [that was] thought correct" at the time the case was in the state courts); *Teague*, 489 U.S. at 306. In other words, state courts should generally have a fair opportunity to decide prisoners' claims. But when they had such an opportunity, comity is not offended by a federal court's reviewing the state courts' resolution of the claim.

This principle that "state courts should have the first opportunity to review [state prisoners'] claim[s] and provide any necessary relief" also underlies the exhaustion doctrine, which dictates that federal habeas courts may not review state convictions unless and until state prisoners have exhausted all available state remedies, including the possibility of seeking discretionary review. *Boerckel*, 526 U.S. at 844; *see also Ex parte Hawk*, 321 U.S. 114, 117 (1944). But, as with retroactivity law, comity in the exhaustion context goes only so far. This Court has held that comity "requires only that state prisoners give state courts a *fair* opportunity to act on their claims," and nothing more. *Boerckel*, 526 U.S. at

844. Hence, the exhaustion requirement is satisfied even when "a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam).

Insofar as Congress modified prior habeas law when it enacted AEDPA, it did so consistent with the "goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [state prisoners] claim[s]." *Jimenez*, 129 S. Ct. at 686 (quotation marks omitted). As is specifically relevant here, AEDPA – like this Court's pre-AEDPA jurisprudence – reflects "Congress's intent to channel prisoners' claims first to the state courts." *Pinholster*, 131 S. Ct. at 1398-99. Accordingly, if Congress had sought to alter retroactivity law in new Section 2254(d), there is no reason to believe that Congress would have intended to do anything more than replace the previous finality cutoff with a new one that strictly respects this "fair opportunity" principle.

A rule that defines "clearly established Federal law" as including any holding from this Court announced before a state high court disposed of the case is all that is plausibly necessary to satisfy the fair opportunity principle. State courts have a fair opportunity to apply a decision from this Court when two things are true: (1) the decision (per retroactivity doctrine) is announced before a state supreme court disposes of a petition for review; and (2) the defendant (per the exhaustion doctrine) fairly presents to the state supreme court the claim to which the decision is relevant.

To be sure, state supreme courts are under no obligation to hear constitutional claims presented in petitions for discretionary review. But an *obligation* to decide a claim is different than a *fair opportunity* to decide it. And a state supreme court presented with a properly preserved constitutional claim and new authority from this Court that supports it unquestionably has a fair opportunity to decide that claim, especially when (as here) it grants review and reviews full merits briefing before disposing of the case. In contrast to subsequent proceedings that may be available under state law, such as petitions for rehearing or petitions for mandamus, discretionary review in a state supreme court on direct appeal is "a normal, simple, and established part of [a] State's appellate review process" in which state courts regularly cure constitutional errors. *Boerckel*, 526 U.S. at 844-45.

Here, the Pennsylvania Supreme Court granted review expressly to review petitioner's Confrontation Clause claim. J.A. 156. Upon receiving that order, petitioner submitted a merits brief explaining that the "redaction of the confessions of two nontestifying codefendants cannot stand constitutional muster," and that "*Gray v. Maryland*" – the intervening case upon which is habeas petition is now based – "prohibits what transpired herein and absolutely mandates a new trial." J.A. 171. Conditioning petitioner's ability to rely on *Gray* in federal habeas upon whether the Pennsylvania Supreme Court elected to exercise its fair opportunity to decide this claim would "unreasonably impair the [petitioner's] right to relief," without doing anything necessary to advance comity interests. *Rose*, 455 U.S. at 522.

B. This Rule Is Compatible With The Text Of Section 2254(d).

Section 2254(d) provides that a state prisoner may not obtain habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." On its face, Section 2254(d) requires two things. First, it requires a state court to have "adjudicated" the claim on the merits. Second, it requires a state-court "decision" to be contrary to, or an unreasonable application of, clearly established federal law.

The Third Circuit assumed that Section 2254(d) requires these two rulings to be one and the same (such that a decision of this Court must predate the state court's adjudication on the merits in order to constitute clearly established law for purposes of federal habeas review). Pet. App. 24a. But that is not so. When a state intermediate court rejects a claim on the merits and then the state high court, as here, denies discretionary review notwithstanding an intervening decision from this Court that plainly shows that the intermediate court's decision is erroneous, both textual requirements of Section 2254(d) are satisfied. The intermediate court decision is an "adjudication" on the merits, and the denial of discretionary review (especially after reviewing full briefing on the merits) is a "decision" whose substantive result is contrary to federal law – insofar as if the state supreme court had addressed the merits, it would have been compelled, under

Griffith, to apply the intervening decision and to grant relief, *see Powell*, 511 U.S. at 84.

Nor is there any good reason to equate Section 2254(d)'s requirement of an "adjudication" with its requirement that the state court's "decision" be contrary to clearly established law. The purpose of the former phrase is to contrast claims that the state court system resolved on the merits from those that it either resolved on procedural grounds, or ignored or did not reach. *See, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 85 (1977) (contrasting claims rejected on procedural grounds from those resolved on the merits); *Pinholster*, 131 S. Ct. at 1410-11 (contrasting issues resolved on the merits from those that state courts "did not reach"). The purpose of the latter phrase ("a decision") is entirely different: to direct the federal habeas court to measure the outcome of the state-court proceedings against the relevant body of federal law. Only the latter purpose even arguably brings retroactivity law into play.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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STATUTORY APPENDIX

Chapter 153 of Title 28 of the United States Code, 28 U.S.C. §§ 2241-2255*, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:*

§ 2243. ISSUANCE OF WRIT; RETURN; HEARING; DECISION.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. FINALITY OF DETERMINATION.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, 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.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed,

if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(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 –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(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.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an

appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.