NO. _____

In the Supreme Court of the United States

JOHN KERESTES, SUPERINTENDENT,
STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL.,
Petitioners,

v.

ANGEL PABON,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

RONALD EISENBERG
Counsel of Record
DEPUTY DISTRICT ATTORNEY
ANNE PALMER
ASSISTANT DISTRICT ATTORNEY
THOMAS W. DOLGENOS
CHIEF, FEDERAL LITIGATION
EDWARD F. MCCANN, JR.
FIRST ASST. DISTRICT ATTORNEY
R. SETH WILLIAMS
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
PHILADELPHIA, PA 19107
(215) 686-5700
ronald.eisenberg@phila.gov

Counsel for Petitioners

February 2, 2012

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Can limited knowledge of English qualify as an "extraordinary circumstance" justifying equitable tolling of the habeas corpus filing deadline?

Following Ninth Circuit precedent, the Third Circuit said yes. Two other circuits also follow this precedent, while three circuits are in conflict.

2. In evaluating requests for certificates of appealability under the habeas corpus statute, may federal courts of appeal disregard the deference requirement and instead apply a *de novo* standard?

Interpreting this Court's decision in *Miller-El v. Cockrell*, the Third Circuit said yes, creating a conflict with two other circuits, which read *Miller-El* directly to the contrary.

LIST OF PARTIES

Petitioners

Linda Kelly, Attorney General, Pennsylvania

R. Seth Williams, District Attorney, Philadelphia

John Kerestes, Superintendent, State Correctional Institution, Mahanoy, Pennsylvania

Respondent

Angel Pabon

TABLE OF CONTENTS

Appendix

TABLE OF CITATIONS

Cases

Statutes

ORDERS AND OPINIONS BELOW

The precedential July 12, 2011 judgment and opinion of the United States Court of Appeals for the Third Circuit, reversing the order of the district court and remanding for further proceedings, is reported at 654 F.3d 385 and is reprinted in the Appendix at App. 5. The October 5, 2011, order of the Third Circuit denying the state's motion for panel rehearing or rehearing en banc is reprinted at App. 3. The district court's January 28, 2008 order dismissing the petition for writ of habeas corpus as untimely is reprinted at App. 47. The magistrate's report and recommendation dated October 23, 2007, which was adopted and approved by the district court's order, is reprinted at App. 51 .

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The timeliness provision of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d), provides in relevant part:

> 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. . . .

Section 2253(c)(2) of the statute, addressing the standard governing certificates of appealability, provides in pertinent part:

> A certificate of appealability may issue . . .only if the applicant has made a substantial showing of the denial of a constitutional right.

Section 2254(d) sets forth the deferential standard for reviewing a state court's adjudication of a claim for habeas relief:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Supplied with an airplane ticket, Angel Pabon flew in from Puerto Rico to work for a syndicate selling illegal narcotics on the streets of Philadelphia. The head of the organization, Elias Pagan, subsequently

recruited Pabon and several other drug associates to eliminate a rival drug dealer named Felix Vargas. The murder was plotted in meetings at Pagan's home on May 30, 1997. There were eight participants in the plan.

Later that night, the conspirators received word that the target had been located at the corner of Franklin and Indiana. Pabon and four cohorts were dispatched to the scene, armed with two semi-automatic handguns and two AK-47 assault rifles.

It was an early summer evening. The victim was sitting in a car, near a crowd of people lined up at an ice cream truck. One of the bystanders was a woman named Lisa Carasquilla, who was seven months pregnant.

The killers drove up. While one of them stayed behind the wheel, Pabon and the others got out and opened fire on the crowd. The intended victim, Vargas, was hit; so were Lisa Carasquilla and two other women. Those two women were not fatally injured. Vargas died almost instantly. Lisa was rushed to the hospital, where doctors were able to save the life of her baby. The mother did not survive.

The shooters went home to celebrate, laughing and high-fiving. Later, learning that police were asking questions, Pabon fled back to Puerto Rico. Eventually, authorities caught up with him there, and he was extradited to Philadelphia. He gave a full, detailed confession in his native language, Spanish.

Pabon was tried before a jury with the ringleader, Pagan, and three other cohorts. Two members of the

conspiracy, George Roman and Arisbel Ortiz, testified for the state and identified the roles played by Pabon and the others. The jury also heard Pabon's detailed confession. In addition, there was forensic evidence squarely placing Pabon at the scene: his fingerprints were found on the killers' car.

There was also a second confession admitted into evidence. This confession was given by Jose DeJesus, one of the co-defendants. Before trial, the judge went through the confessions line by line with the five defense attorneys, redacting the statements to eliminate all possible references to the other co-defendants.

In particular, the judge considered the ending of DeJesus's statement, when he was asked if he had anything to add. He said that "Elias should be arrested for this." He was referring to the ringleader, Elias Pagan, who had not yet been apprehended: "he paid it off. He even gave me the Gran National [a car] for helping to do this besides the money that Guatauba [another conspirator, not on trial] paid me."

In order to eliminate this reference to co-defendant Pagan, the judge changed "Elias" to "another," and struck all the language after "another should be arrested for this." Pabon's lawyer did not object to the manner of this redaction, or to any of the other redactions arranged among counsel and the court. The judge instructed the jury, on numerous occasions, that DeJesus's statement could be used only against him, and not against any of the other defendants.

Pabon was convicted of two counts of first-degree murder and aggravated assault, one count of criminal

conspiracy, and related crimes. The sentences imposed in September 1999 included consecutive life terms for each murder and a consecutive term of six to twenty years for his conspiracy conviction.

On direct appeal, despite his failure to raise such an objection at trial, Pabon claimed that his confrontation rights were violated under *Bruton v. United States*, 391 U.S. 123 (1968). He argued that DeJesus's confession – although redacted according to counsel's agreement – may nevertheless have incriminated him by contextual implication if the jury concluded from the other evidence that Pabon was one of the unnamed participants mentioned in the redacted statement.

The intermediate state court rejected the claim on the merits, relying on the trial court's lengthy opinion. App. 67-72. The state supreme court denied discretionary review on May 14, 2002. Direct review concluded on August 12, 2002, upon the expiration of the ninety-day period for seeking a writ of *certiorari* from this Court.

At that point Pabon had one year to file a petition for federal habeas corpus review under 28 U.S.C. § 2244(d). Nine months of that period went by before Pabon filed a *pro se* petition for state post-conviction relief, on May 12, 2003, which he litigated with the assistance of appointed counsel. Under 28 U.S.C. § 2244(d)(2), the state collateral petition tolled the federal habeas filing period, which would leave Pabon only three months once the state litigation was completed. The state courts found no merit to the collateral claims, which were unrelated to the *Bruton*

claim previously litigated. On August 8, 2006, the state supreme court again denied further review.

At that point, the federal clock again began to run. Instead of filing a habeas corpus petition, however, Pabon filed a pro se petition for writ of certiorari in this Court on October 26, 2006. Such petitions do not toll the federal habeas filing deadline. The certiorari petition was denied on March 26, 2007.

Even then, Pabon did not act promptly to pursue his federal habeas rights. Instead he waited another six months, until September 20, 2007 – more than a year after the expiration of the deadline – to file a habeas petition in federal court.

The assigned magistrate judge, the Honorable L. Felipe Restrepo, ruled that a response from the state was unnecessary and issued a report and recommendation concluding that the petition should be dismissed as untimely. App. 51. The magistrate noted that Pabon did not seek tolling or allege any circumstances in support of such a claim. App. 54-55, 57-59. Nor was he diligent, given his lengthy delay in filing his petition. The magistrate also recommended that a certificate of appealability (COA) be denied. App. 61-62.

Only after Judge Restrepo recommended dismissal did Pabon – for the first time – claim that he was late because of his lack of knowledge of English. He asserted that the language problem was exacerbated by the fact that he had been in the prison's restricted housing unit for five years (apparently as a result of his own misconduct) and lacked access there to legal materials and assistance in Spanish. In particular, he

complained that the prison law library did not contain a Spanish-language version of the AEDPA habeas act, and that he was not provided notice in Spanish of AEDPA's one-year deadline. Third Circuit App. at A42-A49.

Pabon also provided the court with self-selected correspondence, including a letter from his state post-conviction lawyer, Sondra Rodriguez, dated November 30, 2004. Third Circuit App. at A54. The letter contained two paragraphs in Spanish and another in English, explaining that Ms. Rodriguez did not really speak Spanish, and asking Pabon to write her in English. There was also a subsequent letter from counsel, dated December 22, 2006, providing detailed instructions (in English) on how to prepare a certiorari petition in this Court. *Id.* at A52-53.

Pabon additionally supplied the court with documentation of his litigation between September 2006 and January 2007 of a grievance he filed, in English, following the prison's denial of his demand for legal and/or translation assistance. Third Circuit App. at A56. Pabon did not explain how, despite his English language difficulty, he was able to file a pro se state post-conviction petition, a pro se certiorari petition, and a pro se prison grievance, but was not able to file his federal habeas corpus petition.

The district court, the Honorable Eduardo C. Robreno, overruled Pabon's objections and adopted the conclusion of Magistrate Judge Restrepo that the habeas petition was untimely. App. 47. Although Pabon's state post-conviction counsel had protested that she did not know Spanish, Judge Robreno noted that she evidently had some Spanish-speaking ability

and was able to communicate with her client. In any case, held the court, Pabon was not entitled to equitable tolling because, even if lack of English proficiency could be deemed "extraordinary," he failed to show that it actually prevented him from filing a timely habeas petition. App. 49-50. The court also held that probable cause did not exist to issue a certificate of appealability. App. 50.

The Third Circuit nevertheless granted a certificate of appealability, on the question of whether Pabon's lack of knowledge of English provided a basis for equitably tolling the limitations period. App. 45. The Commonwealth's appeal brief pointed out that there can be no COA on purely procedural grounds, and that the habeas petitioner must also make a substantial showing of a constitutional violation. The court granted Pabon supplemental briefing to assert such a claim. Pabon responded by arguing – for the first time – that his rights were violated by the single, neutral redaction of his co-defendant's confession that concerned a reference not to Pabon himself, but to Elias Pagan, the head of the drug gang. App. 45-46.

In a published opinion, the Third Circuit then reversed the district court's dismissal of the habeas petition. *Pabon*, 654 F.3d at 404; App. 43-44. Following precedent originating in the Ninth Circuit and later adopted in the Second, the court of appeals ruled as a matter of law that lack of proficiency in English can constitute an "extraordinary circumstance" for tolling purposes.[1] The court

[1]"Our court has not yet addressed whether a language
(continued...)

awarded Pabon an evidentiary hearing to prove, as matters of fact, his allegations regarding the asserted language barrier.

In addition to the procedural issue, the court of appeals also addressed whether Pabon's substantive claim met the standard for granting a certificate of appealability. The court held that, in making the COA determination, it could not be hampered by AEDPA's requirement that deference applies to federal habeas review of state court rulings. Rather, a COA should be granted under a *de novo* standard of review.[2]

Freed from the deference mandate, the court of appeals concluded that Pabon's redaction claim amounted to a substantial showing of a debatable constitutional violation. Despite the fact that the

---

[1](...continued)
deficiency may constitute an extraordinary circumstance for the purposes of equitable tolling. We find it persuasive that the Second and Ninth Circuit Courts of Appeals have both determined that equitable tolling might be warranted when a non-English speaking petitioner could not comply with AEDPA's statute of limitations because the prison did not provide access to AEDPA-related materials, translation, or legal assistance in his or her language." 654 F.3d at 399-400; App. 34.

[2]"The Commonwealth argues that we should use the AEDPA standard for deciding the merits of *habeas* claims brought by state prisoners in our COA determination. *See* 28 U.S.C.§ 2254(d) (claims "adjudicated on the merits in State court" must have "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" for relief to be granted). This attempt to raise our standard of review at the COA stage is precisely what the Supreme Court rejected in *Miller-El* [*v. Cockrell*, 537 U.S. 322 (2003)]." 654 F.3d at 392 n.9; App. 18-19.

redaction actually referred to a different defendant, Elias Pagan, and despite the fact that there were a total of eight participants, the circuit court found a "likelihood" that the redacted phrase – "another should be arrested for this" – would be misunderstood by the jury to refer to Pabon. *Id*. at 395-97 & n.15, App. 25-28.

The state sought *en banc* rehearing of the decision, which was denied on October 5, 2011.

REASONS FOR GRANTING THE WRIT

I. Limited knowledge of English – like ignorance of law, illiteracy, or lack of education – does not constitute an extraordinary circumstance justifying equitable tolling of the habeas corpus statute of limitations.

This Court should resolve the circuit split.

The Third Circuit's published decision in this case deepens a conflict that divides the circuits, contradicts longstanding case law that rejects claims of ignorance as a basis for tolling statutes of limitation, and effectively creates a federal mandate that requires prisons to supply professional translators and foreign-language legal materials to inmates who might potentially wish to seek habeas review. This Court's intervention is necessary.

Petitioners seeking equitable tolling of the one-year deadline for filing habeas petitions, set forth in 28 U.S.C. § 2244(d), must prove "extraordinary circumstances" and diligence. *Holland v. Florida*, 130

S.Ct. 2549, 2552 (2010); *Lawrence v. Florida*, 549 U.S. 327, 336 (2007); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). In approving English language difficulty as a basis for such tolling, the Third Circuit joins two other circuits, while three take the opposite view.

The first court of appeals to endorse language-based tolling under § 2244(d) was the Ninth Circuit, in *Mendoza v. Carey*, 449 F.3d 1065, 1070-71 (9th Cir. 2006). There the court held that a prison library's "lack of Spanish-language legal materials" and a prisoner's "inability to obtain translation assistance before the one-year deadline" may toll the AEDPA deadline.

Relying on *Mendoza*, the Second Circuit followed suit in *Diaz v. Kelly*, 515 F.3d 149, 154 (2nd Cir. 2008), holding that a ""prisoner who cannot read English" may be entitled to equitable tolling.[3]

Other circuits, however, have explicitly rejected claims of poor English as a basis for habeas tolling. The Seventh Circuit has ruled, in *Montenegro v. United States*, 248 F.3d 585, 594 (7th Cir. 2001), *overruled in part on other grounds*, *Ashley v. United States*, 266 F.3d 671 (7th Cir. 2002), that language barriers are not an extraordinary circumstance justifying habeas tolling, even when coupled with other obstacles such as prison transfers.

---

[3] *See also Ramos-Martinez v. United States*, 638 F.3d 315, 324 (1st Cir. 2011) (lack of familiarity with English language, in combination with numerous other factors, may theoretically be sufficient to excuse federal prisoner's failure to file timely habeas petition under 28 U.S.C. § 2255, which contains one-year filing deadline parallel to §2244(d)).

Similarly, the Eleventh Circuit rejects the contention that the AEDPA deadline "should be equitably tolled due to [alleged] difficulties with the English language." *United States v. Montano*, 398 F.3d 1276, 1280 n.5 (11th Cir. 2005).

And the Tenth Circuit court of appeals also has disavowed the Ninth Circuit's *Mendoza* rule for language barrier tolling. In *Yang v. Archuleta*, 525 F.3d 925 (10th Cir. 2008), the court explained that it had taken a seemingly contrary position" to *Mendoza*, analogizing the issue to its decision in *Laurson v. Leyba*, 507 F.3d 1230 (10th Cir. 2007), which "rejected the proposition that another type of language deficiency, petitioner's dyslexia, constituted extraordinary circumstances sufficient to warrant equitable tolling." *Yang*, 525 F.3d at 929. As to non-native English speakers, the court found persuasive the circuit's "unpublished decisions [that] have consistently and summarily refused to consider such a circumstance as extraordinary, warranting equitable tolling." *Id.*

While the *Yang* court ultimately declined to say that a language barrier can *never* lead to equitable tolling, later Tenth Circuit cases rely on *Yang* as precluding tolling on this ground. *United States. v. Galindo*, 406 Fed. Appx. 322, 324 (10th Cir. 2011) ("lack of knowledge regarding the law, including ignorance resulting from language barriers, does not toll the statute of limitations") (*citing Yang*, at 929–30); *Gutierrez-Ruiz v. Trani*, 378 Fed. Appx. 797, 799 (10th Cir. 2010) ("a petitioner's lack of proficiency in the English language, in conjunction with a lack of access to legal materials in his first language and a

translator, are not extraordinary circumstances") (*citing Yang*, at 927, 930).[4]

This division among the circuits requires this Court's resolution. For equitable tolling purposes, there is simply no rational distinction between prisoners who are not native English speakers and prisoners who never learned to read, or who can read but are not that smart, or who are of average intelligence but do not have a full legal library at their fingertips, or who have access to but just do not understand the complexities of habeas corpus law because they are not habeas corpus lawyers, or who have a habeas corpus lawyer but the lawyer happens to make a mistake. The rationale applied by the Third Circuit to Pabon – it's not his fault that he doesn't know _____ (English/law/etc.) – could be applied to almost every prisoner in the criminal justice system.

Yet such deficiencies of ignorance or mistake have never been grounds for equitable tolling of statutes of limitation. *See Lawrence*, 549 U.S. at 336-37 ("garden variety" mistake, even by counsel, will not toll Section

---

[4]The Eighth Circuit has also held, in a decision not designated for publication, that non-fluency in English is not a basis for equitable tolling of the habeas deadline. *Mendoza v. Minnesota*, 100 Fed. Appx. 587 (8th Cir. 2004).

The Fourth and Sixth Circuits have addressed the issue but have not decided it, given records showing that the petitioners before the court actually did speak English. *See Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) ("Cobas wrote a detailed letter to his appellate attorney in English [and] was clearly able to communicate"); *United States v. Sosa*, 364 F.3d 507, 512-13 (4th Cir. 2004) (rejecting tolling in Section 2255 case for prisoner whose English was clearly adequate).

2244(d)); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("miscalculation" by attorney); *c.f. Holland*, 130 S.Ct. at 2564 (confirming that "the case before us does not involve, and we are not considering, a 'garden variety claim' of attorney negligence"); *accord Maples v. Thomas*, 2012 WL 125438, at *10-*11 (U.S., Jan 18, 2012) (reiterating *Holland* distinction between attorney negligence and abandonment). *See also Johnson v. United States*, 544 U.S. 295, 311 (2005) (*pro se* status); *accord Pliler v. Ford*, 542 U.S. 225, 231 (2004); *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984); *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980); *Johnson v. United States*, 544 U.S. 295, 311 (2005).

Were the law otherwise, statutes of limitation would cease to exist as we know them. Every deadline would function merely as an invitation to a claim that the petitioner or plaintiff isn't to blame. Evidentiary hearings would be necessary in almost every case; and the crucial evidence – i.e., exactly what level of knowledge or ability resides in the petitioner's head – would rest almost exclusively in the petitioner's control.

Even past performance would seldom be dispositive, as this case demonstrates. During the same period he was supposed to be filing his federal habeas petition, Pabon filed a pro se state post-conviction petition, a pro se certiorari petition in this Court, and a pro se prison grievance. None of it mattered to the Third Circuit. How do we know, after all, who really wrote those other things? How do we know Pabon didn't have help? How do we know that assistance was available to him when it came time to

file his habeas petition? Under the Third Circuit's approach, only a remand can tell for sure.

But the heavy burden of the Third Circuit's rule will not fall only on the courts. State and federal prisons will also be facing significant new obligations. The court of appeals was quite clear that the problem is not merely the language barrier faced by foreign speakers; it is the "denial of access to translation or legal assistance." 654 F.3d at 400; App.35-36. Equitable tolling will be required where the prisoner did not file on time because "the prison did not provide access to AEDPA-related materials, translation, or legal assistance in his or her language." 654 F.3d at 399-400; App. 34. And "his or her language" does not just mean Spanish. Spanish is likely the most common foreign tongue among habeas petitioners; but in the melting pot of America, it is hardly the only one. *See, e.g., Yang v. Archuleta*, 525 F.3d at 927 (seeking equitable tolling due to lack of translation into Hmong).

Nor can prison officials hope to avoid the effort and expense of providing these services by relying on informal assistance from "jailhouse lawyers" and translators. No, said the Third Circuit; that "would yield the perverse result of leaving prisoners at the mercy of fellow inmates." 654 F.3d at 401 n.24; App. 38. Apparently, only professional translation services will do.

These new impositions on prisons are not just completely impractical; they are also completely inconsistent with existing law. Post-conviction petitioners are not even entitled to lawyers or law books. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)

(no right to counsel when "mounting collateral attacks"); *Kane v. Garcia Espitia*, 546 U.S. 9, 10 (2005) (*per curiam*) (no right of access to law library). By what reasoning are they now entitled to professional translators?

Review is warranted.

II. In evaluating requests for certificates of appealability under the habeas corpus statute, federal courts of appeal may not disregard the deference requirement and apply *de novo* review instead.

This Court should resolve the circuit split and dispel the confusion caused by ambiguity in *Miller-El v. Cockrell*.

This Court should also grant review to address the circuit conflict arising from inconsistent language in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), concerning the standard for the issuance of certificates of appealability.

Section 2253(c)(2) of the federal habeas statute provides that "[a] certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." *Accord, Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Section 2254(d)(1), in turn, provides that federal habeas relief is unavailable for claims "adjudicated on the merits in State court," unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" for federal habeas relief to be granted.

In *Miller-El*, this Court appeared to hold clearly that the Section 2253(c) COA standard incorporates AEDPA deference. The opinion of the Court states that "[w]e look to the District Court's *application of AEDPA to petitioner's constitutional claims* and ask whether that resolution was debatable amongst jurists of reason." 537 U.S. at 336 (emphasis added). Later, the Court explained regarding COA determinations that "[a]t this stage, ... we only ask *whether the District Court's application of AEDPA deference*, as stated in §§ 2254(d)(2) and (e)(1), to petitioner's *Batson* claim was debatable amongst jurists of reason." 537 U.S. at 342 (emphasis added).[5]

The Fifth and Tenth Circuits, relying explicitly on this language from *Miller-El*, have held that the deference requirement is integral to Section 2253(c) determinations. *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004) (AEDPA deference "must be incorporated into our consideration of a habeas petitioner's request for COA"); *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004) (at the COA stage "we ask only whether the District Court's application of

[5]Justice Scalia authored a concurring opinion on this point. He stated that he was writing separately "to explain why I believe *the Court's willingness to consider the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) limits on habeas relief in deciding whether to issue a certificate of appealability* (COA) is in accord with the text of 28 U.S.C. § 2253(c)." 537 U.S. at 348 (Scalia, J., concurring) (emphasis added). Justice Scalia further observed that, "[i]n applying the Court's COA standard to petitioner's case, we must ask ... *whether reasonable jurists could debate petitioner's ability to obtain habeas relief in light of AEDPA*." *Id.* at 350 (emphasis added).

AEDPA deference ... to a claim was debatable amongst jurists of reason").

Elsewhere in the *Miller-El* opinion, however, there is language that draws into question the applicability of Section 2254(d) to determinations under Section 2253(c). The opinion states that the court of appeals used "too demanding a standard on more than one level." 537 U.S. at 341. "It was incorrect for the Court of Appeals, when looking at the merits, to merge the independent requirements of §§ 2254(d)(2) and (e)(1)" because, among other reasons, "*[s]ubsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief rather than to the granting of a COA*." 537 U.S. at 341-42 (emphasis added).

The Court's opinion then states that the court below "was incorrect for an even more fundamental reason," namely, that "[b]efore the issuance of a COA, the Court of Appeals had no jurisdiction to resolve the merits of petitioner's constitutional claims." *Id*. at 342. Rather, "[d]eciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA" because on Section 2253(c) review, "*[t]he question is the debatability of the underlying constitution claim, not the resolution of that debate*." 537 U.S. at 342 (emphasis added).

Now the Third Circuit – ignoring the "pro"-deference language in *Miller-El* and focusing instead on the "anti"-deference language in *Miller-El* – has held that deference has no place in the COA process. Instead, the task of the court of appeals is simply to decide, *de novo*, whether there is a debatable constitutional violation. In effect, the circuit court

must pretend that the state courts have not already ruled on the claim, and that the district court has not already determined that the state ruling was not unreasonable.

Accordingly, there are now two competing standards for the issuance of certificates of appealability, both of which are purportedly dictated by this Court's decision in *Miller-El*. There should only be one standard, and there is only one standard that makes any sense.

The requirement for a certificate of appealability is one of the reforms introduced by the AEDPA package of amendments to the habeas corpus statute. Like most of the AEDPA provisions, it is a *limitation* on prior law. A habeas petitioner who loses in the district court can no longer appeal as of right. He must first undergo a screening process that is supposed to winnow out unworthy claims for relief.

It would be irrational to employ a standard for that winnowing process that is *more forgiving* than the standard by which the district court was bound. This Court has made clear that section 2254(d) of the habeas corpus act is a "relitigation bar" – a "modified res judicata rule." *Harrington v. Richter*, 131 S. Ct. 770, 785, 786 (2011). Claims that have been adjudicated on the merits in state court are *ineligible for relief* on habeas review, unless the adjudication was unreasonable. "If this standard is difficult to meet, that is because it was meant to be." *Id.*

Under the Third Circuit's approach here, however, the standard for getting into the appellate court is easier than the standard for getting out of the district

court. A claim that will never be eligible for relief – because the state court adjudication was not unreasonable – is nevertheless eligible for appellate review. The court of appeals is essentially authorizing itself to issue an advisory opinion addressing an irrelevant issue: whether the state court acted erroneously even if not unreasonably.

That should not be the standard for the issuance of a certificate of appealability. The Court should clarify that the correct standard is the one the Court appeared to announce in *Miller-El*: "whether the District Court's application of AEDPA deference ... was debatable amongst jurists of reason." 537 U.S. at 342.

This case surely illustrates the downside of abandoning deference at the COA stage. The Third Circuit found the "likelihood" of a *Bruton* violation based on the redaction of one sentence in the confession given by Jose DeJesus, Pabon's co-defendant: "another should be arrested for this." By the word "this," DeJesus was in fact referring to the plot as a whole, which was set in motion by the gang leader, Elias Pagan. Pagan, the mastermind, had kept his hands clean by staying home during the actual shooting, dispatching others to do the job for him. He was only arrested several months after the other defendants. The jury knew all this.

Yet the court of appeals disregarded the natural reading of the statement, instead contriving its own contra-factual interpretation. The court hypothesized that the jury might have understood DeJesus to be referring not to the overall murder plan, but only to the shooting of the pregnant woman, Lisa Carasquilla. Since Pabon was one of the shooters, perhaps the jury

would make a guess that he shot Carasquilla. 654 F.3d at 396-97 & n.13; App. 25-28.

There are many flaws in this speculation, but the most salient is this. The trial evidence showed that Pabon was armed with a handgun; but Lisa Carasquilla was hit by only one bullet, which came from a rifle. Trial court opinion at 4, 7-8; Third Circuit Supp. App. at SA6, SA 9-10. Thus the jury knew that Pabon did not shoot Carasquilla. The Third Circuit's *de novo* determination about the *Bruton* claim was based on a supposition that could not be true.

Not that it should have mattered in any case. Pabon's guilt did not depend on who his bullets hit or didn't hit. He was culpable because he carried out the conspiracy with specific intent to kill. The jury demonstrated that they understood this by convicting him of both counts of murder and aggravated assault.

Had the court of appeals applied the proper deference, the COA determination would have been straightforward and true to the statute. Instead of guessing about what the redacted statement might have meant, the court would simply have considered whether jurists could reasonably debate about the reasonableness of the state courts' *Bruton* ruling. The claim would have been eligible for further review only if it were at least debatably eligible for ultimate relief. That is how the certificate of appealability process is designed to work.

The Court should grant review.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

RONALD EISENBERG
Counsel of Record
Deputy District Attorney
ANNE PALMER
Assistant District Attorney
THOMAS W. DOLGENOS
Chief, Federal Litigation
EDWARD F. MCCANN, JR.
First Asst. District Attorney
R. SETH WILLIAMS
District Attorney

District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107-3499
(215) 686-5700
ronald.eisenberg@phila.gov