No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER, *ET AL.*,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that 28 U.S.C. § 2254 is applied in an even-handed and readily understood way. Amicus has a special interest in ensuring the statute's fair application to its many indigent clients, whose rights to state-funded counsel may expire at a time when they must make important litigation decisions affecting their rights to subsequent habeas relief.

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1 Pursuant to Rule 37, *amicus curiae* states that both parties have consented to the filing of this brief, and that no party authored this brief in whole or in part, and no person or entity, other than *amicus curiae,* its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a) *amicus curiae* certifies that timely notice was made to the counsels of record for both parties.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Third Circuit held in this case that a petitioner may not obtain federal habeas review of a claim based on "clearly established federal law" announced after the last state court ruling in the petitioner's case. Other Circuits will review claims based on rules announced at any time before the petitioners' convictions became final. Amicus concurs with petitioner's reasons for granting a writ of *certiorari*: the Courts of Appeals have reached divergent conclusions about the proper "cutoff date" for the announcement of a new rule available to habeas petitioners,[2] the question presented is of substantial importance because it arises frequently and will shape the conduct of state courts and litigants, and the Third Circuit majority's reasoning misconstrues the federal habeas statute.

Amicus also urges the Court to grant the writ in order to address the practical consequences of the Third Circuit majority's rule for its clients. First, the rule would contradict the retroactivity jurisprudence established in *Teague* v. *Lane*, 489 U.S. 288 (1989), creating confusion and arbitrary application in an area of habeas law that would otherwise be clear and well-understood. Second, the rule would have an unfair impact on indigent petitioners.

Finally, amicus urges the Court to grant *certiorari* to consider whether the Third Circuit majority's

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2 Greene's petition discusses the Circuit split that developed after this Court suggested, in *Smith* v. *Spisak*, 130 S.Ct. 676 (2010), that the appropriate cutoff date might be the date of the last state court decision on the merits. In addition, the Fifth Circuit has held, in a pre-*Spisak* decision in *Williams* v. *Cain*, 229 F.3d 468, 474 (5th Cir. 2000), that the correct date is the date the conviction becomes final.

exegesis of the meaning of "clearly established federal law" was unnecessary because the state court never ruled on the merits of petitioner's claim and, therefore, 28 U.S.C. § 2254(d) did not govern the claim at all

ARGUMENT

I. THE THIRD CIRCUIT'S ANALYSIS WOULD BLUR THE BRIGHT-LINE RETROACTIVITY RULE OF *TEAGUE* V. *LANE*.

The Third Circuit majority, following dicta offered by Justice O'Connor in one part of her opinion in *Williams* v. *Taylor*, 529 U.S. 362 (2000), held that a habeas petitioner may only obtain relief on the basis of a new rule if this Court has announced it by the date of the petitioner's last state court decision on the merits. That rule would add further confusion to the already complicated jurisprudence of federal habeas – by contradicting well-settled retroactivity principles, by arbitrarily discriminating among similarly situated petitioners, and by requiring courts and litigants to address two different cutoff dates to identify the controlling law. Whether the rule would thus undermine the fair and equitable administration of the federal habeas statute is an important consideration that should support a grant of *certiorari*.

A. Important Policy Reasons Support This Court's Retroactivity Jurisprudence, Which Identifies The Date A Conviction Becomes Final As The Boundary Between Old And New Rules.

In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), this Court held that "a new rule for the conduct of

criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Id.* at 328. The Court identified two reasons for its holding. First, "as a practical matter," because it was impossible for the Court to hear every case presenting a particular claim, it would "fulfill [its] judicial responsibility" by directing lower courts to give cases pending on direct review the benefit of the new rule. *Id.* at 323. Second, making new rules retroactive to cases still pending on direct review at the time of their articulation would prevent "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of the new rule. *Id.* (citation omitted; emphasis in original).

The Court addressed the other side of *Griffith*'s bright-line rule in *Teague* v. *Lane*, 489 U.S. 288 (1989), holding that habeas courts would not retroactively apply new post-finality rules to cases on collateral review unless one of two exceptions applied. *Id.* at 311. The Court stressed that collateral attacks should not substitute for direct appeal, and that states have a proper interest in leaving concluded litigation in a state of repose. *Id.* at 310. The Court's statement of its holding used finality, not the pendency of any direct appeal proceedings, as the dividing point between old and new rules: "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.*

B. Section 2254(d)(1) Does Not Discard *Griffith* And *Teague*.

In *Williams* v. *Taylor*, 529 U.S. 362 (2000), a divided Court explained a provision of the Antiterrorism and Effective Death Penalty Act of

1996 ("AEDPA"), codified at § 2254(d)(1), which limits habeas courts' ability to grant relief to cases in which the state court rulings on the merits are "contrary to, or an unreasonable application of, clearly established federal law." In the course of addressing the meaning of the statutory terms, the Court considered whether this provision codified *Teague* or created a separate requirement. In a section of his opinion that did not command a majority, Justice Stevens concluded that § 2254(d) and the *Teague* rule were "functional equivalents" and that "Congress had congruent concepts in mind." 529 U.S. at 379-80. Therefore, he would have held, the phrase "clearly established federal law" did not modify *Teague* or its requirement that federal courts make an "independent evaluation" whether a rule was "clearly established." *Id.* at 383-84.

Justice O'Connor, writing for a majority, disagreed. In her view, § 2254(d) had "only a slight connection" to *Teague*. Her explanation of the differences, however, focused not on timing but on the substantive meaning of the requirements that the law be "clearly established," and that the state court ruling be "contrary to" or an "unreasonable application of" that law. *Id.* at 403-12, 413. She addressed the timing of the "clearly established" law only incidentally and inconsistently. On one hand, she introduced her discussion of the differences between *Teague* and § 2254(d)(1) with a reference to "the relevant state court decision," *id.* at 412, implying that a court could grant relief only on the basis of a rule clearly established by that date. On the other hand, she joined another part of Justice Stevens's opinion, which stated that "[t]he threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the

time his state-court conviction became final." *Id.* at 390.

In subsequent decisions, this Court has emphasized that *Teague* survives § 2254(d)(1), *see Horn* v. *Banks*, 536 U.S. 266 (2002), but it has never decided whether "old" rules under *Teague* and "clearly established" rules under § 2254(d)(1) have different timelines.

C. The Third Circuit's Interpretation Of Clearly Established Federal Law Would Create A Class Of Petitioners Theoretically Entitled To Retroactive Application Of New Rules But Unable To Obtain Habeas Relief, And Would Add Unwarranted Complexity To Habeas Litigation.

Under the Third Circuit majority's approach, a petitioner who exhausted a constitutional claim in state court, but was not vindicated by a new ruling of this Court until after the last relevant state court decision, could not obtain habeas relief even though he or she was entitled to retroactive application of the rule under *Teague*. While Justice O'Connor's majority opinion in *Williams* and the per curiam opinion in *Horn* v. *Banks* make clear that the tests of *Teague* and § 2254(d)(1) are distinct and that a habeas court must apply both tests, they should apply in a temporally parallel way, with the same cutoff date. That would avoid the anomalous and unjust result that a petitioner entitled to benefit from a retroactive rule could not obtain relief because the legal event on which he or she relied – the announcement of the new rule – occurred after the last state court decision in the case.

Indeed, the Third Circuit majority's approach to the collateral application of *Gray* v. *Maryland*, 523 U.S.

185 (1998), would thwart the policies underlying *Griffith*. It would be unjust for this Court to have plucked Gray from a pool of similarly situated defendants – including the petitioner in this case – and to have granted relief to Gray without granting relief to the others. *Griffith*, 479 U.S. at 323; *see Foxworth* v. *St. Armand*, 570 F.3d 414, 432 (1st Cir. 2009) ("The construct advocated by the respondent would allow a state court to subvert *Griffith* and deny criminal defendants the benefit of new Supreme Court precedent by the simple expedient of summarily affirming a lower court's decision."). As the dissenting judge in the Third Circuit observed, the panel majority's approach would create a "twilight zone between the last state-court decision on the merits and the date of finality." Pet. App. 50a n. 6 (Ambro, J., dissenting).

Further, the rule applied by the Third Circuit majority would make an already confusing habeas statute both more confusing and more arbitrary. Before reaching the merits and in addition to addressing questions of timeliness, exhaustion, and default, courts and litigants would have to determine whether the controlling law was announced both before finality and, even if so, before the last state-court decision. *Cf. Kapral* v. *United States*, 166 F.3d 565, 572 (3d Cir. 1999) ("[I]t would make little sense for § 2255's one-year limitation on collateral proceedings to begin to run before a legal event that may give rise to a claim for collateral relief – i.e., the announcement of a new rule – has occurred.").

NACDL has a strong interest in ensuring the evenhanded construction and application of AEDPA, and in preserving the ability of its members' clients to obtain federal habeas review to which they are entitled. The Third Circuit's construction of "clearly

established federal law" would arbitrarily deny review to petitioners who should receive it.

II. THE THIRD CIRCUIT'S RULE WOULD PLACE AN UNFAIR BURDEN ON INDIGENT PETITIONERS, WHO ARE GENERALLY UNREPRESENTED DURING ALL OR PART OF THE TIME BETWEEN THE LAST STATE COURT DECISION ON THE MERITS AND THE DATE THE CONVICTION BECOMES FINAL.

The Third Circuit majority's rule would have an onerous impact on indigent petitioners. Under its interpretation of "clearly established federal law," a petitioner could only obtain review on the basis of a new rule announced after the last state court decision, but before the conviction was final, by petitioning this Court for *certiorari*. But the right to state-funded counsel generally expires before a conviction becomes final. Thus, only indigent petitioners blessed with considerable forensic skill and luck could have any hope of vindicating their rights under newly announced rules.

Petitioner Greene was prosecuted and convicted in Pennsylvania. That state, like others, provides counsel for indigent defendants for all avenues of direct appeal, through the seeking of discretionary review (and further proceedings if review is granted) in the Pennsylvania Supreme Court. *See* Pa. R. Crim. P. 122 & comment (counsel retains appointment through final judgment, including appeal through Supreme Court of Pennsylvania);

Commonwealth v. *Liebel*, 825 A.2d 630, 633 (Pa. 2003).[3]

Many other states do not provide counsel to indigent defendants seeking discretionary review in the highest state court, but only provide counsel through the first appeal as of right.[4] Although many

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3 *See also Kargus* v. *State*, 162 P.3d 818, 824 (Kan. 2007) (concluding that Kansas Legislature intended that a defendant's right to counsel in direct appeal of felony conviction extends to all levels of state appellate process, including filing of petition for review); N.J. Ct. R. 2:7-2(a) (providing counsel to indigents for appeal from the conviction and "such post-conviction proceedings or appeal therein as would warrant the assignment of counsel"); Wash. Rev. Code Ann. §10.73.150 (providing counsel for indigents to pursue state court discretionary review in some circumstances); *State ex rel. Schmelzer* v. *Murphy*, 548 N.W.2d 45, 47-48 (Wis. 1996) (defendant has statutory right to counsel for petition for discretionary review).

4 *See Birdsong* v. *State*, 929 So.2d 1027, 1028 (Ala. Crim. App. 2005) (criminal defendant not entitled to counsel on discretionary appeal to Alabama Supreme Court); *Small* v. *State*, 920 A.2d 1024, 1026-27 (Conn. App. 2007) (no Sixth Amendment right to counsel for discretionary review following first appeal of right); *People* v. *Love*, 727 N.E.2d 680, 683 (Ill App. 2d Dist. 2000) (constitutional right to counsel applies through trial and first appeal of right, and no further); *Moore* v. *Commonwealth*, 199 S.W.3d 132, 136 (Ky. 2006) (constitutional right to counsel limited to first direct appeal and not to discretionary appeals or collateral attacks); *Hathaway* v. *State*, 741 N.W.2d 875, 880 (Minn. 2007) (petitioner's right to counsel under state constitution satisfied by assistance of counsel in one appeal); *State* v. *Mata*, 730 N.W.2d 396, 481-82 (Neb. 2007) (right to counsel does not extend to discretionary appeals to state's highest court); *State* v. *Carter*, 757 N.E.2d 362, 363 (Ohio 2001) (right to appointed counsel in criminal matter extends to first appeal as of right, and no further); *Douglas* v. *State*, 631 S.E.2d 542, 543 n.1 (S.C. 2006) (no constitutional right to effective assistance when seeking discretionary appellate review); *Ex parte Riley*, 193 S.W.3d 900, 902 (Tex. Crim. App.

states, including Pennsylvania, appoint counsel to prisoners to pursue postconviction or collateral relief, the appointment generally does not occur until after the prisoner has filed the collateral pleading, well after direct review has concluded and the conviction is final.[5]

Thus, in some states, a prisoner will be completely unrepresented after intermediate appellate review. Even in states like Pennsylvania that provide counsel through the end of discretionary state review, the representation ends when the *certiorari* process begins, an interval that often lasts more than six months.[6] Further, even states that appoint counsel for collateral review generally do so only after the filing of the state post-conviction petition, well after the conviction is final.

As a result of the porous condition of the states' provisions for appointed counsel, the Third Circuit majority's cutoff date would unjustly disadvantage indigent petitioners. The rule would provide only one

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2006) (while defendant has right to file petition for discretionary review, no right to appointed counsel to assist in filing petition).

5 *See* 42 Pa. C.S.A. § 2545(b)(1), (3) (petition must be filed within one year of date judgment becomes final at conclusion of discretionary review in Supreme Court of United States); Pa. R. Crim. P. 904(B) (providing for appointment of counsel for indigent defendant following initiation of post-conviction proceedings); *Commonwealth* v. *Smith*, 818 A.2d 494, 498-501 (Pa. 2003) (indigent first-time post-conviction petitioner entitled to assistance of counsel); *see also, e.g.*, 16A A.R.S., Crim. Pro. R. 32.4 (c)(2) (providing for appointment of counsel for initial postconviction petitions); Tenn. Code Ann. § 40-30-106 (court may appoint postconviction counsel upon determination that petitioner is indigent and in need of counsel).

6 *Compare, e.g., Commonwealth* v. *Padilla*, 253 S.W.2d 482 (Ky. June 19, 2008) (denying reh'g) *with Padilla* v. *Kentucky*, ___ U.S. ___, 129 S.Ct. 1317 (Feb. 23, 2009) (grt'g cert.).

very narrow avenue of review that would require skill and speed to navigate. Unrepresented, and generally incarcerated, petitioners would have to learn of the new rule in time to seek *certiorari*. In addition, they would have to possess sufficient legal knowledge to understand that, although this Court had just announced the new rule, the only way to claim its benefit was to present the identical claim to this Court instead of filing a habeas petition.[7]

The unjust impact of the Third Circuit majority's cutoff rule on indigent petitioners is an important consideration that, with the other reasons set forth above, should support a grant of *certiorari*.

III. BECAUSE A CLAIM BASED ON A NEW RULE ANNOUNCED AFTER THE LAST STATE COURT DECISION, OF NECESSITY, COULD NOT RECEIVE A STATE COURT RULING ON THE MERITS, A HABEAS COURT WOULD REVIEW THAT CLAIM *DE NOVO* AND THE THIRD CIRCUIT'S EXEGESIS OF THE PHRASE "CLEARLY ESTABLISHED FEDERAL LAW" UNDER 28 U.S.C. § 2254(D) WAS UNNECESSARY.

The Third Circuit's decision implicates another important question of statutory construction which neither the panel majority nor the dissent discussed. 28 U.S.C. § 2254(d) limits a habeas court's ability to grant relief "with respect to any claim that was

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7 The Third Circuit's cutoff rule would have practical implications. First, any state that cared at all about fairness would have to change its appointment-of-counsel rules to ensure that appellate counsel followed the case all the way to finality. Moreover, the rule would prompt habeas petitions from indigent prisoners in Greene's position asserting ineffective assistance of counsel on direct review

adjudicated on the merits in State court proceedings." If the state court did *not* adjudicate the claim on the merits, however, a habeas court must review it *de novo* (as long as the petitioner encounters no other obstacles to relief such as untimeliness, non-exhaustion, or default). *See, e.g., Porter* v. *McCollum*, __ U.S. ___, 130 S. Ct. 447, 452 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's Strickland claim *de novo*."); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003)). In petitioner Greene's case, the state courts never ruled on the merits of his *Gray* claim, and he should have received *de novo* review of the claim in the federal courts.

The intermediate appellate court that ruled on petitioner's *Bruton* claim applied *Richardson* v. *Marsh*, 481 U.S. 200 (1987), and held that the redactions of the codefendants' statements effectively cured the Confrontation Clause problem. Pet. App. 9a-10a. *Richardson* reserved judgment on the question later resolved in *Gray* v. *Maryland*: the admissibility of a codefendant's confession in which the defendant's name has been replaced with a symbol or neutral pronoun. *See Richardson,* 481 U.S. at 211 n. 5. *Gray* announced a new rule of criminal procedure establishing that such redactions are ineffective to cure a Confrontation Clause violation. *See Garcia* v. *United States*, 278 F.3d 1210 (11th Cir. 2002) (*Gray* rule not retroactively available under *Teague*); *United States* v. *Gio*, 58 F. Supp. 2d 920, 924 (N.D. Ill.1999) ("the rule in *Gray* is a new constitutional rule of criminal procedure"); *Nichols* v. *McCullough* ,2003 WL 22939367, 10 (E.D. Pa. 2003) ("To the extent that *Gray* could be said to command a different result than *Bruton* and *Richardson,* we find

that it would amount to a new rule of law that cannot be applied here.").[8] Petitioner was entitled to benefit from *Gray* because his conviction was not yet final when it was announced. Yet, because the Pennsylvania Supreme Court dismissed his case, determining that it had improvidently granted discretionary review, he never received a ruling on the merits of the *Gray* claim he presented in that court.

Consequently, the Third Circuit` unnecessarily ruled against petitioner on the ground that *Gray* was not "clearly decided" at the time of the last state court decision, as §2254(d) would require if that section of the habeas statute governed his claim. The Circuit failed to consider whether §2254(d) was operative at all. Because no state court ruled on the merits of petitioner's *Gray* claim, it was not. Furthermore, because petitioner timely exhausted his state remedies on that claim by raising it promptly and in a procedurally appropriate manner in the state Supreme Court, he was entitled to *de novo* review of the claim on habeas review.

Whether §2254(d) applies to petitioners in Eric Greene's position is an important question that should support a grant of *certiorari.*

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8 *Cf. United States* v. *Sanin,* 252 F.3d 79, 80 (2d Cir. 2001) (*Gray* did not announce new rule and was thus unavailable in collateral attack pursuant to 28 U.S.C. § 2255).

CONCLUSION

Respectfully submitted,

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