No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State agrees with petitioner on the three main postulates in his petition for certiorari: that the circuits are squarely split over when the temporal cutoff is for defining "clearly established law" under AEDPA; that this Court should eliminate the uncertainty over this fundamental issue of federal habeas law; and that this case is a good vehicle for doing so. At the same time, the State makes various subsidiary arguments that are incorrect or may be misleading. Petitioner offers the following reply to correct any misconceptions that might arise from the State's brief and to make clear why – as both parties ultimately agree – certiorari is necessary here.

1. *The Circuit Split.* The circuit split is deeper than the State acknowledges. In addition to conflicting with the Sixth Circuit's decision in *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010), *pet'n for cert. pending* (No. 10-851), the Third Circuit's decision here also conflicts – as the Third Circuit itself acknowledged (Pet. App. 19a n.7) – with the First Circuit's decision in *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009).

The State asserts that the First Circuit's discussion of the temporal cutoff for defining clearly established federal law was "only theoretical" because the Massachusetts Supreme Judicial Court decided on remand that the state prisoner's case had become final before this Court issued *Gray v. Maryland*, 523 U.S. 185 (1998), the decision that he (just like petitioner here) sought to have the federal courts apply. State's Br. 13 n.7; *see also* State's Br. 7 n.4. But at the time the case was before the First

Circuit, it was unclear (due to uncertainties involving state law and procedure) whether the prisoner's case had, in fact, become final before this Court decided *Gray*. And if *Gray* counted as clearly established law under AEDPA, the prisoner was entitled to habeas relief because the state court's decision was clearly contrary to that decision. *Foxworth*, 570 F.3d at 431-36. The "pivotal" and "dispositive" issue on which the First Circuit's decision "hinge[d]," therefore, was whether the temporal cutoff for clearly established law is finality (in which case *Gray* might apply) or the last state-court decision on the merits (in which case it would not). *Id.* at 429-30. The First Circuit held that finality is the cutoff date, and so it certified the case to the Massachusetts Supreme Judicial Court for a determination of when finality occurred. *Id.* at 430-32. Even though the Massachusetts Supreme Judicial Court held on certification that finality occurred before *Gray* was decided, there can be no question that the First Circuit's construction of federal habeas law is binding precedent in that court and that it squarely conflicts with the Third Circuit's holding here.

The Third Circuit's decision is also in serious tension – if not outright conflict – with Ninth Circuit law. As the State implicitly concedes (State's Br. 8), the temporal cutoff for defining clearly established law was "decisive" in *Thompson v. Runnel*, 621 F.3d 1007 (9th Cir. 2010). There, the Ninth Circuit granted a state prisoner habeas relief on the basis of a decision from this Court announced before the state prisoner's conviction had become final but after the last state-court decision on the merits. *See id.* at 1016 n.7. The State downplays this decision on the

ground that the Ninth Circuit rested its holding in part on the fact that California did not dispute that finality was the proper cutoff. State's Br. 13 n.7. But the Ninth Circuit also reasoned that the habeas petition was "governed by" the intervening decision from this Court, and the majority implicitly rejected the dissent's argument – identical to the Third Circuit's holding here – that AEDPA rendered that intervening decision inapplicable because it post-dated "the last reasoned state-court decision." *Id.* at 1023-24 (Ikuta, J., dissenting). The Ninth Circuit majority's reasoning also is consistent with two prior Ninth Circuit decisions, each stating that the temporal cutoff is "the time [the prisoner's] conviction became final." *Jackson v. Giurbino*, 364 F.3d 1002, 1005 (9th Cir. 2004) (citing *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (Stevens, J.)); *see also Allen v. Ornoski*, 435 F.3d 946, 955 (9th Cir. 2006) ("The Supreme Court has adopted the definition of new law fashioned in *Teague v. Lane*, 489 U.S. 288 (1989), to determine what qualifies as clearly established law under AEDPA.").

2. *Importance.* The question presented here is very important not only – as the State acknowledges (State's Br. 5) – in terms of clarifying the "fundamental" legal contours of habeas law, but also in purely practical terms.

As the petition explained, the "twilight zone" between the last reasoned state-court decision and finality always lasts several months and usually lasts more than one year. Pet. 17-19. In suggesting that the twilight zone is actually shorter (State's Br. 7), the State omits (a) the period of time it takes a state to respond to a petition asking a state supreme court

to hear a case; (b) the period in which a state supreme court considers whether to grant review of a case; (c) the ninety-day period for filing a petition for certiorari in this Court; and (d) the several months it takes this Court to dispose of a petition when one is filed. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (case is not final until "the time for a petition for certiorari [has] elapsed or a petition for certiorari finally [has been] denied"); *Jimenez v. Quarterman*, 129 S. Ct. 681, 685-86 (2009) (same).

Similarly, the State is mistaken in suggesting that courts have not grappled with this issue in very many published cases because the issue "arises infrequently." State's Br. 6. In reality, the issue arises quite often. But until very recently, states did not even argue that AEDPA altered the retroactivity cutoff established by *Teague*. For example, Ohio did not press the argument in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010); Michigan did not raise it in *Miller*, *see Miller* BIO at 4, 8; California did not press it in *Thompson*, 621 F.3d at 1016 n.7; and there was "room for doubt" whether Massachusetts actually pressed it in *Foxworth*, 570 F.3d at 429 n.4. A survey of district court and unpublished court of appeals cases from the past few years likewise reveals numerous instances in which the facts of the cases gave rise to the question presented but states either expressly conceded that *Teague*'s finality rule controlled or at least did not argue otherwise.[1] But

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[1] *See, e.g.*, *Lyons v. Weisner*, 247 Fed. App'x 440, 444 (4th Cir. 2007) (state conceded issue; habeas relief granted based on decision from this Court that predated finality but postdated

since this Court highlighted the issue in *Spisak* and expressed "some uncertainty" as to its proper resolution, 130 S. Ct. at 681, states like Pennsylvania here have been arguing that the cutoff for clearly established law is the last state-court decision on the merits, and courts are having to address the issue on a regular basis. (Witness the five federal circuit court decisions on the subject over the past twenty-one months, four of which postdate *Spisak*.[2]) This litigation and uncertainty will not abate until this Court resolves the issue.

3. *Suitability of the Vehicle.* The State correctly acknowledges – echoing the Third Circuit, *see* Pet.

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last reasoned state-court decision); *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); *McBee v. Burge*, 644 F. Supp. 2d 270, 280 n.5 (E.D.N.Y. 2009) (same), *aff'd*, 395 Fed. App'x. 762 (2d Cir. 2010); *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).

[2] In addition to the First, Third, Sixth, and Ninth Circuit decisions discussed above, the Second Circuit, in *Besser v. Walsh*, 601 F.3d 163, 183-84 (2d Cir. 2010), addressed this issue, held that finality was the cutoff, and believed that holding it was outcome determinative. The court later reheard that case en banc and decided that it did need to resolve the issue in that case after all. *See Portalatin v. Graham*, 624 F.3d 69, 81 n.6 (2d Cir. 2010), *pet'ns for cert. pending* (Nos. 10-8464, -8470 & -8502).

App. 23a – that "[t]his case is a suitable vehicle for resolution of this issue." State's Br. 17.

Lest there be any confusion, however, stemming from the State's rendition of the procedural history of this case in the state courts (State's Br. 1-5, 17-19), there can be no doubt that petitioner's Confrontation Clause claim is properly before the federal courts. A state prisoner's federal claim is preserved for review on federal habeas when it was either (a) fairly presented to the state courts, *see Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (per curiam); or (b) rejected by the state courts on the merits, *see Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). The Third Circuit held that *both* of these things happened here. Pet. App. 15a. The State does not directly challenge those holdings. Nor could it.

a. As for fair presentation, the State suggests that there is a difference between arguing that the prosecution's introduction of a nontestifying codefendant's redacted confession violates the Confrontation Clause because of "contextual implication," and arguing that it violates the Clause because it is redacted by "the use of blanks." State's Br. 17-18. The State further contends that petitioner advanced only the former type of argument. *Id.* But the State's two formulations are simply two different ways of characterizing the same argument that this Court accepted in *Gray v. Maryland*, 523 U.S. 185 (1998) – namely, that the introduction of a confession that is redacted by mere blanks violates the Confrontation Clause because the blanks are bound to implicate the defendant in the context of the case. *See id.* at 191-96. At any rate, petitioner did complain in the Pennsylvania Superior Court

specifically about the method of redaction used in his case,[3] and he renewed that argument (with specific citations to *Gray*, since it had been decided at this point) in the Pennsylvania Supreme Court.[4]

b. As for the state courts' having addressed the argument, the State expressly acknowledges – as it did in its answer to petitioner's petition for habeas relief – that the Pennsylvania Superior Court rejected it on the merits. State's Br. 2 n.1; *see also* Pet. App. 9a-10a, 15a, 81a n.4. That court held that the Confrontation Clause was not violated because the codefendants' confessions "were redacted to remove any reference to the other defendants in the case." Pet. App. 9a. The court's failure to express concern about the use of blanks to redact the codefendants' confessions simply means that its holding is irreconcilable with *Gray*, not that its decision somehow did not constitute one on the merits.

4. *The Merits.* The State's arguments on the merits, of course, have little to do with whether certiorari is warranted in this case. Review is

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[3] Petitioner argued in the Pennsylvania Superior Court that the doctrine of *Bruton v. United States*, 391 U.S. 123 (1968), 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." Appellant's Br. to Penn. Super. Ct. 23-24.

[4] Petitioner argued that "the redaction method used herein clearly left every indication of redaction and, therefore, did not satisfy the standard set forth in *Gray*." Appellant's Br. to Penn. S. Ct. 24, *available at* 1998 WL 34114494; *accord id.* at 16.

necessary primarily to resolve the circuit split over a basic question of federal habeas law. Nevertheless, flaws in the State's arguments show that certiorari also is warranted to reverse the decision below.

The State argues that the temporal cutoff for defining clearly established law should be the date of the last state-court decision on the merits because: (a) this Court's decision in *Horn v. Banks*, 536 U.S. 266 (2002), holds that *Teague* and AEDPA mandate "distinct" inquiries that "bear[] only a slight connection" to each other; (b) the earlier cutoff date is necessary to give deference to state courts; and (c) a later cutoff date would "compel[]" state high courts to grant review whenever this Court has announced a new rule in the interim since the last state-court decision. State's Br. 9-13 (internal quotation marks and citations omitted). None of these arguments is convincing.

a. *Horn* validates petitioner's position, not the State's. Petitioner's central point is that AEDPA cannot be read to alter *Teague*'s prior construction of the federal habeas statute because AEDPA does not contain "a clear indication from Congress of a change in policy." Pet. 22 (quoting *Grogan v. Garner*, 498 U.S. 279, 290 (1991)); *see also United States v. O'Brien*, 130 S. Ct. 2169, 2178 (2010). *Horn*'s statements that AEDPA is distinct and unconnected to *Teague* simply reinforce the point that while AEDPA established a new substantive standard for deferring to state-court decisions, it was not meant to upend *Teague*'s finality cutoff date.

b. This Court's own decision in *Spisak* – in which it afforded AEDPA deference to a state-court decision issued before an intervening decision from this Court,

see 130 S. Ct. at 684 – demonstrates that it is unnecessary to set the cutoff for clearly established law at the time of the relevant state-court decision in order to give AEDPA deference to state courts' rejections of federal constitutional claims. "Under § 2254(d), a habeas court must determine what arguments or theories supported *or, as here, could have supported,* the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (emphasis added). As this Court made clear in *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam), and again in *Harrington*, 131 S. Ct. at 784, 786, applying that test does not require the state court to have mentioned – or even to have been aware of – an allegedly controlling decision from this Court; rather, it merely requires a federal court to imagine a state-court opinion rejecting that decision as controlling, and then ask whether that hypothetical opinion would have been unreasonable. By the same token, AEDPA's test does not require this Court's decision to have existed at the time of the state-court's decision.

c. Nothing about keeping the cutoff date at finality compels state high courts to grant review when this Court issues a new decision after a state intermediate court rejects a defendant's appeal. A state high court faced with such a situation has several choices. First, it can grant review and address the claim on the merits. Second, it can vacate the intermediate court's decision and order that court to reconsider the case in light of this

Court's intervening decision. *See, e.g.*, *People v. Raby*, 775 N.W.2d 144 (Mich. 2009). Third, it can deny review, leaving the defendant, if he wishes, to seek relief from the federal courts – either by way of seeking certiorari in this Court (in which *de novo* review would apply) or habeas relief in a federal district court (in which AEDPA deference would apply). If a state high court chooses the third option and a federal district court later determines, in light of this Court's intervening decision, that no fair-minded jurist could have rejected the defendant's argument, then habeas relief is perfectly appropriate. That is the essence of the federal habeas statute.

The State insinuates that this framework penalizes a state high court when it foregoes review based on a procedural impediment to reaching a defendant's claim on the merits. State's Br. 12. It does not. If a state high court wishes to invoke a procedural reason for denying review, it is perfectly free to do so, and federal courts will honor that invocation. *See Ylst*, 501 U.S. at 803; *Harris v. Reed*, 489 U.S. 255, 264-65 (1989). Even if a state high court does not provide any reason for denying review, this Court held long ago that a federal court on habeas review may find a claim procedurally defaulted when the state intermediate court rejected the prisoner's claim on the merits but a procedural glitch became apparent in briefing to the state high court. *See Ylst*, 501 U.S. at 804-05; *Coleman v. Thompson*, 501 U.S. 722, 740 (1991).

The problem for the State is simply that it cannot make such a showing here. As the Third Circuit held, Pet. App. 15a, and as elaborated above, *supra* pp. 6-7, petitioner fairly presented that claim to the

Pennsylvania courts. Nothing in the Pennsylvania Supreme Court's order dismissing petitioner's appeal suggests otherwise. *Commonwealth v. Trice*, 727 A.2d 1113 (Pa. 1999). Under these circumstances, neither AEDPA nor any other tenet of federalism is implicated by a federal court's reaching the merits of a prisoner's claim and applying all of this Court's decisions that existed at the time his conviction became final – or, at the very least, when the state high court elected not to address his claim.

CONCLUSION

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

Respectfully submitted,

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