No. 10-637

In the Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

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Question Presented

Under AEDPA, can a state court's adjudication of a claim be "contrary to, or an unreasonable application of, clearly established law," where the state court could not have applied the rule of law in question because the rule did not yet exist?

Does the answer change merely because the new rule of law is announced after the state court has ruled, but before its judgment becomes technically "final" upon expiration of the time for filing a certiorari petition?

List of Parties

Petitioner

Eric Greene

Respondents

Jon Fisher, Superintendent, State Correctional Institution at Smithfield

The District Attorney of Philadelphia County

The Attorney General of the State of Pennsylvania

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Statement of the Case

Eric Greene (or Jarmaine Trice, the name he used in state court) robbed a small grocery store with four accomplices. After one of the accomplices dispatched the owner by shooting him in the head, Greene picked up the cash register and walked out of the store with his friends to divide up the proceeds at home.

The perpetrators were arrested later, after another gunpoint robbery, and were tried together. Confessions by two of the perpetrators were edited to remove reference to the identities of the co-defendants. Greene's murder conviction and life sentence were affirmed on direct appeal by the Pennsylvania Superior Court.

After the affirmance, this Court decided a new case about the manner in which confessions must be edited in joint trials. Greene then for the first time raised objection to the manner of editing that was done at his trial, but the state supreme court declined to exercise its discretionary jurisdiction, and the federal habeas courts declined to apply a rule of law that did not come into existence until after the conviction had been affirmed.

Now Greene contends that he was entitled to the benefit of the new rule, even on federal habeas corpus review, because his conviction was not yet technically "final" when the rule was first announced.

The crime and trial.

Greene and his friends drove to Lilly's Market in Philadelphia in December 1993. One stayed behind in the car, with the engine running, while the other four entered the store. At least two were armed. Third Circuit App. 359-61.

The owner, Mr. Francisco Azcona, was crouched down behind the counter, while Mrs. Azcona and her sister stood in view. One of the gunmen went around the counter and fired. The victim held up his hand to block the shot, but the bullet passed through, entered his face, and severed his carotid artery. As the man lay dying, Greene picked up the cash register and carried it outside. He and his cohorts escaped in the getaway car. Joint App. 185-86; Trial Transcript, 2/26/96, 182-83.

Three days later, Greene and three of his accomplices committed another robbery, of a check cashing agency a few blocks away. Police interrupted their escape. Greene and his cohorts aimed their weapons at the officers, and a gun battle erupted. One of the weapons recovered by police proved to be the gun that had killed Francisco Azcona. Joint App. 186-87; Third Circuit App. 465-75, 480-81, 489.

All five participants in the grocery store murder were subsequently arrested and came to trial together. Three co-defendants had given inculpatory, but inconsistent, statements to police. Greene moved for severance on the ground that he would be prejudiced if tried together with the shooter, who was facing the death penalty. He also argued that the confessions could not be redacted. Joint App. 187.

At the pre-trial hearing on the motion, Greene reiterated his concern about spillover prejudice from the capital co-defendant, Joint App. 12-13, and then specified his objection to redaction. He argued that, if all the confessions appeared to indicate that the same person took the cash register, Greene would be contextually implicated as that person, because a civilian witness had identified him as the one who emerged from the store carrying the register. Joint App. 15-16.

The judge proposed a solution. She suggested that the confessions be redacted merely to say that "someone" took the cash register, so as to give no indication whether it was the same person. Greene responded that "your suggestion is brilliant." The judge further offered that different letters of the alphabet, such as X, Y, and Z, could be used to indicate that each confession had named a different person as the register-taker. Greene responded that the idea was "excellent," as long as the detective reading the statements at trial would be specifically instructed to use such letters in place of names. The judge asked if that would take care of the problem. Greene responded, "Agreed," while reminding the judge that he still sought severance because of the capital co-defendant. Joint App. 17-18.

In the end, it was not necessary to use letters. The Commonwealth planned to use only two of the confessions, and only one of those referred to the person taking the cash register. Joint App. 21-26. That statement was redacted to read that, after the shooting, "someone" grabbed the register. Similar phrases, such as "two guys," were used in both statements to replace all other references to specific

roles in the robbery (including the fact that Greene "was the leader" of the group and targeted the store to be robbed). In a few places, blanks were used. Third Circuit App. at 1052-1087.

Greene made no further objection to the method of redaction. During the trial, he contended that the prosecutor's summation had in effect unmasked the redactions by referring to the confessions in the context of the other evidence. Joint App. 113-19.

After a month-long proceeding, Greene was convicted of second-degree murder and sentenced to life imprisonment. Pennsylvania Rule of Appellate Procedure 1925(b) required him to file with the trial court a statement of matters to be complained of on appeal. Greene raised four issues in his statement, including his claim that he was prejudiced by joint trial with a capital co-defendant, and his claim that the prosecutor violated redaction. He made no complaint about blanks, symbols, letters, or anything else regarding the way the judge had edited the statements. Third Circuit Supp. App. 72-73.

The direct appeal in state court.

For non-capital criminal cases, Pennsylvania law provides for one direct appeal as of right, to the Pennsylvania Superior Court. Greene's brief there began with the required Statement of the Questions Involved, and presented three issues. Only the second question addressed severance, referring to the capital co-defendant and to the prosecutor's alleged "polluting" of the redaction. Joint App. 31.

In his Summary of Argument, Greene acknowledged that "[t]he redacted statements did not implicate him, but when the prosecutor argued in her closing as described, she in effect turned the confessions of the co-defendants into 'testimony' against him." Joint App. 40. He made the same point shortly thereafter: "If not polluted by the prosecutor's improper summation, the redacted confessions of the co-defendants would not have implicated him." Joint App. 42.

The main body of the brief was divided into three sections, corresponding to the Statement of the Questions Involved. The second section addressed severance. It consisted of a lengthy introductory passage, followed by four subsections of specific argument. Joint App. 45-70. In the introductory passage, Greene cited *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987) (holding that possibility of "contextual implication," in itself, does not violate confrontation clause, but remanding to consider whether prosecutor's closing argument improperly undid effect of redaction). Joint App. 49-52. Of the following subsections, only the fourth addressed the confessions, focusing on the prosecutor's alleged misconduct in "violating redaction" during closing argument. Joint App. 64-70.[1]

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[1]Greene implies that the severance claim in his Superior Court brief embodied his current federal habeas corpus challenge to the specific manner in which the state trial judge edited the statements. Brief for Petitioner at 4. He lifts fragments of two sentences from the 43-page state court brief, concerning "narrative integrity" and "prejudice." He does not mention the

(continued...)

The Pennsylvania Superior Court issued a written opinion in December 1997, discussing and denying all of Greene's appellate claims. Joint App. 120-31.[2] Green filed a petition for allowance of discretionary appeal to the Pennsylvania Supreme Court. The petition was a somewhat abridged version of his superior court brief. As before, the only references to redaction concerned the prosecutor's alleged undoing of it in closing argument. Joint App. 133, 152-55.

While the petition for discretionary review was pending, this Court filed its opinion in *Gray v. Maryland*, 523 U.S. 185 (1998), on March 9, 1998. *Gray* addressed a question that had been noted, but not resolved, in *Richardson v. Marsh*, 481 U.S. at 211 n.5. The *Gray* Court approved redaction that replaces

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[1](...continued)
sentence that followed almost immediately afterward, which identified the prejudice in question as the result of "the prosecutor's unlawful tactics, as detailed, *infra*, in Argument II D." Joint App. 51-52.

Greene also fails to mention the pre-trial hearing, where he specifically *asked* for letters to be used in place of names, and "agreed" to the judge's "brilliant," "excellent" proposals. Nor does he mention the affirmative statements, in the Superior Court brief itself, where he explicitly acknowledged that, "[i]f not polluted by the prosecutor's improper summation, the redacted confessions of the co-defendants would have not have implicated him."

[2]Greene implies that, although he did not present any issue concerning obvious deletions such as letters, the Superior Court passed on that issue, because its opinion included a quote from another opinion that referred to the use of X's. Brief for Petitioner at 4-5. In fact the court's holding here addressed only the use of the neutral pronouns, such as "we" and "they," that removed any reference to the perpetrators' identities. Joint App. 128-29.

names with neutral pronouns, such as "a few other guys," but established a new rule prohibiting redaction with X's, blanks, and similar words or symbols. 523 U.S. at 196-97.

After *Gray*, Greene did not seek to supplement his discretionary appeal petition in order to bring the new case to the attention of the state court. On August 14, 1998, however, the court granted review to consider whether severance should have been granted because of confrontation clause concerns. Joint App. 156.

Greene filed a brief in the supreme court pursuant to the grant of appeal. Now for the first time he mentioned the manner in which the statements had been redacted. He complained that some names were substituted for the phrases "two guys" and "three guys," thus revealing the number of participants. Joint App. 165, 168-69. He noted that some names were replaced with blank spaces. Joint App. 169. He presented a seven-page block quote from the *Gray* opinion. Joint App. 171-78. But he also acknowledged that "the redacted statements did not implicate him explicitly (though they did by implication)," and complained again about the prosecutor's closing argument. Joint App. 167.

In its brief in response, the Commonwealth's primary contention was that "[d]efendant cannot, at this late stage, simply make a wholesale change of his argument in an attempt to benefit from a change in the law." His new claim was "never preserved in the trial court, the Superior Court, or even in his *allocatur*

petition." Joint App. 198.[3] The brief laid out in detail the record showing Greene's agreement to the redaction. Joint App. 192-94, 197-98.

After receiving the Commonwealth's brief, the Pennsylvania Supreme Court issued a one-line order in April 1999, dismissing the appeal as "having been improvidently granted." Joint App. 216.

Greene did not file a certiorari petition in this Court. Nor did he seek post-conviction review of the *Gray* issue in state court.

The federal habeas corpus proceedings.

Instead, he proceeded to federal habeas corpus review under 28 U.S.C. § 2254. The district court concluded that it could consider only established law as it existed at the time the state court had ruled on the claim. *Gray v. Maryland* therefore came too late and could provide no basis for declaring that the state court had acted unreasonably. The court denied relief. Cert. App. 72a-82a.

On appeal to the Third Circuit, the court of appeals agreed, after extensive analysis, that a state court could not unreasonably apply a Supreme Court precedent which it could not have known about at the time of its decision. Cert. App. 25a. The court then considered the merits of the confrontation clause claim

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[3] *Allocatur* is the traditional writ of discretionary review, now designated in Pennsylvania Supreme Court procedure as a "petition for allowance of appeal." *See* Pa. R. App. P. 1115(a)(3) (only questions set forth in the petition for allowance of appeal will be considered if appeal is allowed).

under the clearly established law available to the state court. The court of appeals noted that the confessions as edited were contradictory and confusing, and the evidence at trial was inconsistent not only about the roles of the individual accomplices, but also about their locations and total number. Under the circumstances, held the circuit, Greene was not directly implicated by the statements, and the Pennsylvania Superior Court reasonably determined that the trial judge's redactions and jury instructions complied with the confrontation clause.[4] Cert. App. 5a-9a, 42a-43a.

Greene filed a petition for certiorari in this Court. He urged the Court to follow the views of the Ninth, Sixth, and First Circuits on the question presented. The Court granted review.[5]

Summary of Argument

Congress hit the reset button on the relationship between state and federal judges when it passed the Anti-terrorism and Effective Death Penalty Act. The deference provision of the statute was written to ensure that the lower federal habeas corpus courts

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[4]Because the court of appeals resolved the claim under pre-*Gray* law, it did not reach the question of whether, even assuming *Gray* error, the minimal use of blanks in the redactions would have amounted to "substantial and injurious effect" under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[5]Greene continues to rely on the the Ninth and First Circuit opinions in his merits brief, although he no longer cites the Sixth Circuit opinion. The Ninth Circuit recently denied rehearing en banc on this issue, over the votes of seven dissenting judges. *Thompson v. Runnels*, 2011 U.S. App. LEXIS 11945, 2011 WL 2279451 (9th Cir. 2011) (Callahan, J., dissenting).

could no longer favor their personal views of the law over the considered decisions of state courts reviewing the state's own criminal judgments. An indispensable element of such deference was to prevent the use of habeas review to blindside state court judges with evidence and rules that were not before them at the time.

Petitioner Greene seeks to upset AEDPA's new balance. He argues that § 2254(d) of the statute is merely a standard of review. Any temporal limit on the "clearly established law" required by that standard, he contends, would amount to a rule of retroactivity. But retroactivity, according to Greene, is already covered by the rule of *Teague v. Lane*. Therefore, concludes Greene, the Court must read AEDPA to mean that any pre-finality new rule qualifies as "clearly established law" – even if, in fact, the new rule was *not* established until well after the state court was actually adjudicating the claim.

Greene is wrong. Section 2254(d) is not merely a standard of review. In fact it is a "modified form of res judicata" that generally bars relief on claims that have been adjudicated on the merits in state court. Res judicata, when it attaches, obviously imposes a "temporal limit" on the availability of new law that would otherwise be applicable but for the res judicata bar. And res judicata, when it attaches, accordingly supersedes otherwise applicable rules of retroactivity.

This means that the deference rule will indeed limit the impact of *Teague* in some habeas cases; and in others, such as those in which there was no state court merits determination, it will not. But Congress had every right to create more than one kind of

limitation on the universe of applicable law under § 2254(d) – and it did not have to leave behind a trail of statutory history crumbs to do so.

That leaves the plain language itself. The act requires rejection of habeas claims unless the state court ruling was "unreasonable." Greene says habeas courts can honor this requirement by way of a thought experiment: superimpose a new rule of law on an old state ruling, and then just project forward to imagine what a "reasonable" state court judge would have done had he actually known about the new rule. Reasonable, however, means reasonable under the circumstances. And under the circumstances means the circumstances as they were, not as they might become at some future point.

The act also requires the habeas court to apply only the "clearly established" law in its deference review. Greene says "clearly established" just means "not dicta." It is true that dicta are not allowed in deference analysis; but that restriction is accomplished by the very next words of the statute – the "law" as it is "determined" by this Court. "Clearly established" is used in the past tense, and the past to which the phrase must refer is the past at the time the state court was attempting to ascertain the law it was supposed to follow.

The act requires habeas courts to defer to state court decisions resulting from an adjudication "on the merits." Greene says a state supreme court's denial of discretionary review should be treated as a "decision" "on the merits"; that way a new rule announced before the "decision," but too late for the real state court adjudication in the intermediate appellate court, will

still be eligible for federal habeas review. The argument amounts to a modest proposal to do away with discretionary jurisdiction in the state courts. The essence of such jurisdiction is the power to decline review *without* expression of opinion on the merits. Not a thing in the logic or language of the statute permits Greene's perplexing insistence that a non-decision can simply be deemed to be a decision on the merits.

Greene's campaign against plain meaning would also require the Court to depart from repeated precedents directly on point. The most recent, *Cullen v. Pinholster*, held that § 2254(d)(1) is "backward-looking," and that evidence not available to the state court therefore cannot be considered in applying the deference rule. That rationale applies even more strongly when it is law, rather than facts, that is unavailable. After all, (d)(1) is *about* "law." The "law" in question is the law that was available to the state court.

And this Court has said exactly that, in a variety of ways, in a continuous line of authority stretching back to the original deference decision in *Williams v. Taylor*. That decision held that the statute goes beyond *Teague* to create a distinction between "unreasonable" and "erroneous." "Unreasonable," said the *Williams* Court, is a common term in the law. And, as the Court had previously made clear, one of the things that it commonly means is that the reasonableness of a decision must be assessed under the circumstances as of the *time* of the decision.

Nor do any legitimate equities support Greene's desire for a different result. Greene says we cannot

trust state courts to apply pre-finality new rules unless they are subject to a federal habeas overseer. But that is a tired view of the state court systems, outmoded even before AEDPA. Indeed, the state courts in Greene's case would likely have provided him with post-conviction review of the new rule in question – but he didn't ask for it. Instead he asks this Court for a rule that would allow him and those like him to proceed directly to federal habeas court, in place of pursuing state court remedies.

Greene argues that such a rule is needed because only a "finality" cutoff can supply true fairness for similarly situated defendants. But any kind of "temporal cutoff" cuts someone off. Even in Greene's own case, his co-defendants received varying results – because their cases became "final" at different times. The real class of similarly situated defendants relevant here is the one defined by AEDPA: those who had state court merits review under the same set of legal rules.

In the end, what Greene expects is a guarantee of error correction for the very small number of cases that fall into what he has called a "perfect storm" of events like those here. If this Court will not provide that guarantee itself, he contends – through certiorari review – then it must make state courts provide it – through artificial "merits" non-decisions – so that federal habeas courts can exercise a final layer of review.

But that is not the review that AEDPA establishes. State courts need not see ahead to cases not yet decided and rules not yet conceived. And federal

courts, looking back in judgment, must adjust their vision accordingly.

Argument

I. The *Teague* attack on AEDPA deference is a diversion.

This is Greene's statutory construction argument:

- Retroactivity requires some "temporal cutoff";
- Section 2254(d) is not about retroactivity;
- It therefore follows that section 2254(d) cannot have any temporal cutoff.

There are fancy names for this kind of illogic – fallacy of the illicit minor, or perhaps fallacy of the undistributed middle – and a fancy case Greene constructs from it. But it is false. The deference provision is a form of res judicata and therefore, like any relitigation bar, sometimes limits the reach of new law that would otherwise receive retroactive effect. That is why AEDPA's purported failure to "alter" the *Teague* rule is meaningless, indeed is misdirection. *Teague* continues to operate as before – whenever the deference provision does not apply instead.

A. Retroactivity v. res judicata.

Although he does not say so openly, the real starting point of Greene's presentation is that any rule preventing application of new law – after a given point in time – must be a rule of retroactivity. *Teague v. Lane*, 489 U.S. 288 (1989), created a rule of

retroactivity for collateral review, of course, and therefore, says Greene, it must be the *only* way in which the habeas statute regulates the use of new law by a federal court reviewing a state criminal judgment. *Teague* occupies the field, silently preempting any other new-law limitation in the act, at least unless Congress expressly dictates otherwise. Section 2254(d) does not qualify as such an explicit effort to trump *Teague* because, Greene asserts, it is just a "standard of review."

But the deference provision is *not* just a standard of review. As this Court noted in *Harrington v. Richter*, 131 S. Ct. 770 (2011), § 2254(d) is a "relitigation bar" – a "modified form of res judicata." *Id.* at 785, 786. The statute stops just "short of imposing a complete bar to federal court relitigation of claims already rejected in state court proceedings." *Id.* at 786. Review is prohibited "unless one of the exceptions to § 2254(d) applies." *Id.* at 787. The "standard of review" on which Greene relies is merely one of these exceptions to the general rule by which the statute gives preclusive effect to state court decisions. The end result, as embodied in the deference provision, is that "habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 786 (internal quotation marks omitted).

There was no need, therefore, for Congress to explicitly target *Teague* in order to give "temporal" effect to § 2254(d). A res judicata rule necessarily operates as a temporal cutoff when it applies; but that does not make it subservient to retroactivity rules. Quite the contrary. Even when new law is given "full" retroactivity – the broadest form – "once suit is barred

by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940).[6] Retroactivity does not foreclose res judicata.

B. Straw men and statutory construction.

The heart of Greene's brief is a detailed accounting of various means by which Congress, in promulgating § 2254(d), did not say anything about changing retroactivity law. First he goes through all the ways in which the statutory language does not overrule *Teague*. Brief for Petitioner at 21-27. Then he goes through all the ways in which the legislative history does not overrule *Teague*. Brief for Petitioner at 27-29.

But these are the answers to an irrelevant question. *Teague* may well be "grounded in" § 2243 of the habeas statute, as the Court stated in *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), two decades after *Teague* was decided. But the retroactivity rule did not thereby commandeer all neighboring sections of the act. The statute's provisions interact and sometimes overlap in effect. A successive petition may be barred under § 2244(b) even if it was timely filed under § 2244(d). An unexhausted claim is unreviewable even if the state court ruling appears to be contrary to controlling law.

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[6] Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*,110 HARV. L. REV. 1055, 1079 n.148 (1997) ("The temporal reach of nominally retroactive rules may be limited by a variety of doctrines, including res judicata").

Similarly, section 2254(d) does not improperly infringe on *Teague* simply because the deference rule comes into play at an earlier point in time, and therefore makes it unnecessary to reach retroactivity in some cases. No special dispensation from Congress is required for this result, beyond the existing words of the statute.

C. Teague *and time limits.*

Greene nonetheless maintains that, if § 2254(d) is given its proper effect, it will "abrogate" the *Teague* retroactivity rule. In reality, *Teague* still has plenty to do under AEDPA.

There are many cases, for example, in which there was no adjudication on the merits in state court. In these cases, § 2254(d) does not apply at all, and *Teague* supplies the time frame for judging the applicability of any relevant new law. In this respect it plays a role akin to that of § 2254(e) under *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) ("At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court").

There may be other situations in which there was a merits adjudication on state collateral review, or in which the state court on direct review assumed the existence of a new rule that was not actually adopted by this Court until after final judgment in the state case. *See Cullen v. Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring in part and dissenting in part). In all these circumstances, *Teague* will provide the ground for decision. If that amounts to an abrogation

of the judge-made *Teague* rule, "partial" or otherwise, so be it; that is what statutory amendments do. AEDPA changed habeas.

II. The statutory provisions, and this Court's precedents, are clear.

While § 2254(d) is a res judicata provision, Congress did not simply incorporate common law res judicata principles by reference. Rather, the deference provision is a "modified form" of res judicata. Its proper operation can be understood only by giving fair meaning to its actual language and the precedents of this Court that have applied it. Greene would instead radically rewrite both.

A. Greene would undercut every important element of § 2254(d).

Greene invokes various principles of statutory construction. He should have started with the first: plain meaning. In every instance, he tries to replace the natural and customary usage of the language with a result-oriented contrivance.

1. "Unreasonable application."

The statute commands that state courts may not be reversed on habeas unless they acted unreasonably when they applied federal law. This is a major hurdle for Greene's position. As this Court has observed over and over, how can a judge possibly be tarred as "unreasonable" for not knowing about a rule that does not yet exist?

Not a problem, says Greene. We can just *pretend* that the new rule existed at the time of the state adjudication, and then just *imagine* what a reasonable court would have done with that new rule, had it in fact existed at the time the court was deciding. After all, contends Greene, isn't that what we do when the state court has not issued an opinion? Isn't that what this Court itself did in *Smith v. Spisak*, 130 S. Ct. 676 (2010), when it rejected the defendant's *Mills* claim[7] even though *Mills* was only decided after the state court had ruled?

No, and no. There is a difference between hypothetical and *contra-factual*. It is one thing to apply an objective rather than a subjective standard – to determine whether a given result lies within a wide range of reasonable outcomes, even if the magistrate in question may not have had the right thoughts in his head. It is quite another thing to judge a judge against a scenario that is *flatly untrue* – to put a finger on the clock hands, wind forward, and act as if the future was always here.

The Court has recognized that this is not how reasonableness review is done. In creating a standard for reckoning the effective assistance of counsel, this Court has been very clear. An attorney's decisions must be assessed on the basis of the universe of information available to him at the time: what he knew or should have known. *Strickland v. Washington*, 466 U.S. 668, 689-91 (1984). Consider only the "norms prevailing *when the representation took place*." *Bobby v. Van Hook*, 130 S. Ct. 13, 16

[7] *Mills v. Maryland*, 486 U.S. 367 (1988).

(2009) (emphasis supplied). Respect the court's "limited role in determining whether there was manifest deficiency in light of information *then available to counsel*." *Premo v. Moore*, 131 S. Ct. 733, 741 (2011) (emphasis supplied). Above all else, "eliminate the distorting effects of *hindsight*." *Strickland*, 466 U.S. at 689 (emphasis supplied).

That is at the very essence of the endeavor. Yet Greene proposes precisely the opposite for state court judges. Surely AEDPA was not intended to give less deference to the entire state judicial establishment than it would to a novice young lawyer who just passed the bar.

There is an additional artifice in Greene's argument. It may well be possible, as a purely intellectual exercise, to imagine what a state court would have done with precedent-to-be, and either to agree or disagree with that imaginary result. As a matter of law, however, such an exercise is not permitted under AEDPA. The statute is not symmetrical. Subsection (d) is a limitation on the *grant* of relief, not the denial of relief. A habeas court is free to reject a claim on the most convenient ground, *see, e.g.*, 28 U.S.C. § 2254(b) (claim may be denied on merits even if unexhausted), just as an appellate court is free to affirm a judgment for any reason.

That is all this Court did in *Spisak*. The defendant there was not entitled to relief, even on the generous assumption that *Mills* applied to his case. There was no need to reach the unbriefed issue of whether *Mills* came too late to matter.

Now Greene tries to turn that unremarkable outcome into a rule that a federal habeas court can, in effect, *reverse* for any reason. To that end he misuses the Court's recent opinion in *Harrington v. Richter*, 131 S. Ct. at 786, quoting it for the proposition that "a habeas court must determine what arguments or theories . . . *could have* supported[ ] the state court's decision." Brief for Petitioner at 35 (emphasis added by Greene). He italicizes the wrong words. Under AEDPA, the question is whether reasonable analysis could have *supported* the state court's decision – not whether it could have undermined, invalidated, or thwarted the state court's decision. If *either* result is reasonable, the claim fails.

That is what "unreasonable application" means.

2. "Clearly established."

Greene faces a second impediment, in the statute's mandate that the state court ruling may be gauged only against a legal framework that is "clearly established." Greene again insists that this language is no real concern. The one and only thing it could mean, he contends, is that the applicable law must consist of actual holdings, as opposed to dicta. According to Greene, "clearly established" has nothing at all to do with the "temporal cutoff" issue he presents.

But this assertion ignores the case that anticipated the question on which certiorari has now been granted. In *Spisak*, both the parties and the court below assumed that *Mills* applied, although it was not decided until after the state supreme court ruling. This Court questioned that assumption, both at

argument and in the opinion, stating the issue this way: "whether *Mills* was clearly *established* for the purpose of reviewing the Ohio Supreme Court's opinion." 130 S. Ct. at 681. The italics are the Court's. Plainly the Court believes that the emphasized language does have something to do with the matter.

Any other reading would leave "clearly established" meaningless. If Congress had merely wished to preclude the use of dicta, as Greene suggests, it could have left out this phrase altogether. The remaining words would then provide that state court judgments could be overturned on the basis of "*law,* as *determined* by the *Supreme Court of the United States."* A statement of obiter dictum is – by definition – not "law." Dicta can be suggested, even pronounced; but in no genuine sense can they be "determined" – any more than they can be "established." *See Tyler v. Cain*, 533 U.S. 656, 664 (2001) (in the context of § 2254(d)(1), "determined" is a synonym for "held").

And if, in the past, lower federal courts invoked dicta from this Court to grant habeas relief, then the "law" on which they were relying was really just their own interpretations of the dicta, which then became "law" only in the sense that the lower federal courts held them to be so. The reason they can no longer do that is not because of "clearly established"; it is because of "Supreme Court of the United States."

Thus the actual statute plainly goes further than Greene admits. It does not limit federal habeas courts merely to "law," as determined by this Court; it requires that the law must have been "clearly established" – *established*, in the past tense. The only point in the past to which the grammar could logically

refer is the point at which the state court was adjudicating the claim. If Congress had instead been referring to the later point in time at which the state court judgment became final, the words "clearly established" would be superfluous, because *Teague* would supply the necessary cutoff. If Congress had been referring to the even later point in time at which the federal habeas court is reviewing the state court decision, the extra language would be nonsensical, because *Teague* would long before have drawn the line. The truth is the contrary of Greene's argument: the *Teague* rule is further sign that "clearly established" limits deference review to the law available to the state court.

3. "Adjudicated on the merits."

Perhaps Greene's biggest problem is that the object of AEDPA's deference requirement is a state court adjudication "on the merits." Greene wants the deference provision to focus on the denial of discretionary review by the highest state court. But how can a denial of discretionary review be on the merits?

Greene's answer is to propose another fiction: habeas courts can just *pretend* that the denial is a merits disposition. If a new rule comes down after a decision by the state intermediate appellate court, but before the judgment becomes final, the federal habeas court will simply apply the rule *as if* the state's discretionary review process were itself a merits adjudication.

Greene suggests that this is not much of an intrusion; after all, he would still allow the state high

court a number of options in this situation. The court could grant review, or make a procedural default ruling, or remand to the intermediate court. Petitioner's certiorari reply brief at 9-10.

But none of Greene's options include the one act that characterizes discretionary review – the unreviewable power simply to step aside and leave the resolution below as the last decision in the case. A court with discretionary jurisdiction may choose to deny review for any number of reasons that have nothing to do with whether the litigant is entitled to relief: because the lower courts are not in conflict, for example; because a different case presents the same issue in a clearer fashion; even just because the court's calendar is full for the term. In Greene's world, however, any such disposition would have exactly the same effect under § 2254(d) as if the high court had taken the case and ruled on the merits.

Presumably, at least *this* Court would still be entitled to employ true discretionary review (although more on that below). The Court has been most insistent about the nature of the process: "[a]s we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. The[re are a] variety of considerations that underlie denials of the writ." Ironically, the name of the case in which the Court said these words is *Teague v. Lane*, 489 U.S. at 296 (internal quotations and citations omitted). Even more ironic: in the name of *Teague*, Greene now declares that Congress must have intended AEDPA to strip every state high court of the power that this Court exercises routinely. That does not sound like comity.

Yet Greene insists he has a textual basis for exactly this result. Section 2254(d) bars relief on a claim that was adjudicated on the merits, unless the adjudication resulted in a decision that was contrary to or an unreasonable application of clearly established federal law. Greene contends that the statute uses the words "adjudication" and "decision" to describe two different stages of appellate review. An "adjudication" must be the thing an intermediate state appellate court does, and a "decision" must be the thing a state supreme court does. Brief for Petitioner at 23-24, 48-49. Voilà – the applicable law becomes the law as of the time of the state supreme court "decision," even though the decision wasn't a decision at all, but simply a decision not to decide.

This is spurious on several levels. Greene spends the bulk of his brief arguing that Congress was not even thinking about "temporal cutoffs" in § 2254(d); that was all left to *Teague*. Yet now we are to believe that the statute carefully distinguishes between "adjudication" and "decision" for the precise purpose of enshrining Greene's views about the appropriate body of law to be employed in deference review.

And Congress supposedly did this even though, in the vast majority of cases, the distinction would be completely meaningless. For that great bulk of cases, there will be no new rule of constitutional law that intervenes between the last reasoned state court ruling and the point where the judgment becomes final. For those cases – the typical cases – the language as Greene now interprets it would make no sense at all.

Meanwhile, in that unusual case, like this one, in which there is an intervening new rule, Greene's

reading would turn the logical functioning of the statute inside out. The state court that considered and resolved the merits of the claim – the intermediate appellate court – would get no deference, because its ruling would be deemed a mere "adjudication." The state court that "import[ed] no expression of opinion upon the merits of the case" – the highest state court – would get full deference, because its denial of discretionary review would be deemed a "decision." But such deference would be empty, because the "decision" was really a non-decision.

All these mental contortions are necessary only if the purpose of statutory construction is to reach a pre-determined policy result. A truer approach would simply follow the plain meaning of the language. An "adjudication" is "the legal *process* of resolving a dispute; the *process* of judicially deciding a case." BLACK'S LAW DICTIONARY at 42 (7th ed. 1999) (Bryan A. Garner, editor) (emphasis supplied). A "decision" is "a judicial determination *after* consideration of the facts and the law, esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case." *Id.* at 414 (emphasis supplied). That is all AEDPA meant by "adjudication" and "decision": a process followed by a result. And that is why this Court has used the words interchangeably in applying the provision.[8]

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[8] *See, e.g., Berghuis v. Thompkins*, 130 S. Ct. 2250, 2258 (2010) ("a federal court cannot grant a petition for a writ of habeas corpus unless the state court's *adjudication* of the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law'") (emphasis supplied); *McDaniel v. Brown*, 130 S. Ct. 665, 674 (2010) (per curiam) ("As respondent

(continued...)

There is no secret code. Section 2254(d) requires deference to the last ruling on the merits, under the established law as the state court could reasonably have understood it at the time.

B. Greene would overrule a full decade of this Court's deference decisions, from the last to the first.

In addition to doctoring the plain language of the statute, Greene's position would require the Court to abandon, or reinvent, more than half a dozen of its prior rulings.

1. *Cullen v. Pinholster*.

The ink is barely dry on one of the Court's most important examinations of § 2254(d) – *Cullen v. Pinholster*. Greene, however, is already ready to mischaracterize the opinion's rationale. He describes the Court as holding that "the 'backward-looking' nature of Section 2254(d) means that federal habeas review 'is limited *to the record* that was before the

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[8](...continued)
acknowledges, in order to prevail on this claim, he would have to show that the state court's *adjudication* of the claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law"') (emphasis supplied); *Medellin v. Texas*, 544 U.S. 660, 664-65 (2005) ("with respect to any claim the state court 'adjudicated on the merits,' habeas relief in federal court is available only if such *adjudication* 'was contrary to, or an unreasonable application of, clearly established Federal law"') (emphasis supplied); *Bell v. Cone*, 535 U.S. 685, 698 (2002) ("we find no merit in respondent's contention that the state court's *adjudication* was contrary to our clearly established law") (emphasis supplied).

state court that adjudicated the claim on the merits.'" Brief for Petitioner at 35 (emphasis added by Greene). Therefore, says Greene, *Pinholster* indicates that *only* the "factual record must be fixed at the time of the state-court adjudication" – but *not* "the universe of applicable law." Brief for Petitioner at 35-36.

This is a misleading account of the case. What the Court actually said about "backward-looking" is this: "Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made." 131 S. Ct. at 1398.

In other words, it is the statutory provision *as a whole* that is backward looking. It is the state-court decision *as a whole* that must be examined as of the time it was made. That is why "it follows," said the Court, *id.*, that deference review may consider only the facts that were available to the state court. The statute is not backwards looking because it is limited to the then-existing factual record; rather, the statute is limited to the then-existing factual record because it is backward-looking.

For exactly the same reason, "it follows" that deference review may consider only the *law* that was available to the state court. Perhaps, before *Pinholster*, the scope of the factual record under § 2254(d) was subject to reasonable debate. After *Pinholster*, however, there is simply no rational argument about the universe of applicable law. If the statute limits even the applicable facts because we must examine "the state-court decision at the time it

was made," then it plainly limits the applicable law in the same way.

But this is not the only point on which Greene's position is irreconcilable with the Court's recent *Pinholster* precedent. He would also contradict the case in a second, more silent, fashion. Crucial to Greene's claim is his contention that it is perfectly appropriate to assess the state court decision, even on the basis of law that did not yet exist, by simply imagining what a reasonable court would have done with the new law. Brief for Petitioner at 12, 34-35. As it happens, this argument exactly mirrors, without attribution, a portion of the *Pinholster* dissent. 131 S. Ct. at 1419.

Greene does not note, however, that the Court explicitly considered and rejected this point in *Pinholster*. "What makes the consideration of new evidence strange is not how 'different' the task would be, but rather the notion that a state court can be deemed to have unreasonably applied federal law to evidence it did not even know existed. We cannot comprehend how exactly a state court would have any control over its application of law to matters beyond its knowledge. Adopting [this] approach would not take seriously AEDPA's requirement that federal courts defer to state-court decisions and would effectively treat the statute as no more than a 'mood' that the Federal Judiciary must respect." 131 S. Ct. at 1399 n.3.

The Court's reasoning applies with even greater force to new law than it does to new facts. Indeed Greene can take no comfort even from the dissent in *Pinholster*. The central concern of the dissenters,

relying on §§ 2254(d)(2) and (e)(2), was that the structure of the statute treated facts differently than law for purposes of deferential review. 131 S. Ct. at 1419-20 (Sotomayor, J., dissenting); *id.* at 1411 (Alito, J., concurring in part). Greene's view lacks even that statutory support, and he is left with nothing more than the "strange ... notion that a state court can be deemed to have unreasonably applied federal law [that] it did not even know existed." *Id.* at 1399 n.3. Adopting this approach would not take seriously the Court's decision in *Pinholster*.

2. The "regrettably imprecise" cases.

This Court has repeatedly stated exactly the opposite of Greene's position here: the reasonableness of the state court determination is to be assessed under the law as of the time the determination was made. Greene is a bit stingy in acknowledging these cases. He mentions six of them; in fact there are at least nine. Whatever the number, though, Greene dismisses them all. He says the Court did not really have to decide this issue in any of those opinions, and that they therefore merely reflect the use of "regrettably imprecise language" that somehow found its way into the case law and can now be safely ignored. Brief for Petitioner at 34.

The origin of the problem, Greene contends, is Justice O'Connor's supposedly slapdash statement for the Court in *Williams v. Taylor*, 529 U.S. 362, 412 (2000): clearly established law for purposes of § 2254(d) is limited to "this Court's decisions as of the time of the relevant state-court decision." Ever since, according to Greene, the Court has simply echoed back this statement, which was no more authoritative than

the remark made to opposite effect by Justice Stevens in a different part of the *Williams* opinion.

To be sure, the Court has on occasion quoted Justice O'Connor's opinion directly. *See, e.g., Carey v. Musladin*, 549 U.S. 70, 74 (2006). More commonly, however, the Court has used new language to reinforce this basic principle of AEDPA:

- "'Clearly established law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."
  Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003).[9]

- "The amendments to 28 U.S.C. § 2254, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), circumscribe our consideration of Wiggins' claim and require us to limit our analysis to the law as it was 'clearly established' by our precedents at the time of the state court's decision."
  Wiggins v. Smith, 539 U.S. 510, 520 (2003).[10]

- "These principles were plain enough at the time the State Supreme Court decided respondent's appeal."

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[9] *See also Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (quoting *Lockyer*).

[10] *See also* the dissent in *Wiggins*: "the Court relies upon a case ... that *postdates* the Maryland court decision.... [That case] was not clearly established Supreme Court precedent *as of the time of the state court's decision*." 539 U.S. at 542-43 (Scalia, J., dissenting) (all emphasis in original).

Bell v. Cone, 543 U.S. 447, 453 (2005).[11]

- "In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that" the petitioner's claim was without merit.
  Schrirro v. Landrigan, 550 U.S. 465, 478 (2007).

- "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law."
  Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011).

And most recently, the Court explicitly relied on and extended this principle in order to reach the holding in *Cullen v. Pinholster*. Quoting from *Lockyer v. Andrade*, the *Pinholster* Court reasoned that, since "[s]tate-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision,'" so also must state-court decisions be measured against the existing factual record as of the time the state court renders its decision. The Court characterized *Lockyer* as one of its "precedents interpreting [§ 2254(d)(1)]." 131 S. Ct. at 1399.

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[11] *See also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 277-78 (2007) (Roberts, C.J., dissenting): "What is pertinent under AEDPA, however, is whether federal law was clearly established by our decisions when the state court acted.... AEDPA requires state courts to reasonably apply clearly established federal law. It does not require them to have a crystal ball."

All this should certainly complicate Greene's effort to play down this entire line of authority as mere dicta. But he has an additional obstacle. If these many and carefully worded statements were not the considered judgment of the Court about the proper interpretation of the deference provision, if they were just accidental asides, then why did the Court keep echoing Justice O'Connor's opinion? Why didn't it ever echo Justice Stevens' opinion?

3. *Williams v. Taylor*.

The answer goes back to the beginning – *Williams v. Taylor*, the Court's first detailed analysis of § 2254(d). The case is a contest between two conflicting views of AEDPA.

Justice Stevens, in dissent, would have held that Congress meant no more than to "prohibit[ ] reliance on 'new rules'" in accordance with *Teague*, 529 U.S. 379-80, that the statute does not distinguish "between what is 'wrong' and what is 'unreasonable,'" *id.* at 387 n.13, and that a federal habeas court cannot defer to state court rulings that the federal judge thinks are "in error," *id.* at 387. The new statutory provisions merely "express a 'mood.'" *Id.* at 386.

Justice O'Connor's opinion, for the Court, held that § 2254(d) goes beyond the *Teague* rule, *id.* at 411-12, by establishing "that an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." *Id.* at 412 (emphasis in original). The opinion described this as "the most important point." *Id.* at 410. And one of the most important ways in which *unreasonable* is different from *incorrect* or *erroneous* is that it limits the

applicable law to "this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

That concept – the repudiation of retrospective judgment – is an essential attribute of what it means to assess reasonableness rather than erroneousness. "The term 'unreasonable' ... is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Id.* at 410. They are particularly familiar with its meaning from Justice O'Connor's opinion in *Strickland v. Washington*. As the Court held there, "[a] fair assessment ... requires that every effort be made to ... reconstruct the circumstances ... and to evaluate the conduct from counsel's perspective *at the time*." A court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed *as of the time of* counsel's conduct." 466 U.S. at 689-90 (emphasis supplied).

So it is no accident that, in *Williams*, Justice O'Connor's opinion referred to the law *as of the time of* the relevant state court decision. The opinion may not have been contemplating the precise circumstances presented here. But those circumstances are just an illustration of the general rule: there is no second-guessing in AEDPA. Not, at least, under the prevailing position in *Williams*. And that is why the later cases keep reiterating Justice O'Connor's approach instead of Justice Stevens'. The Justice Stevens approach lost.

Now Greene styles his claim as if it is a missing piece, an issue overlooked in the Court's prior precedents. But the truth is that both sides in *Williams* understood the stakes. Both knew that the

majority view of "unreasonable application of clearly established law" would draw the line at a different point than final judgment. When Greene contends that "unreasonable" does not mean contemporaneous, when he argues that *Teague* is the only "temporal cutoff" in the statute, he is not addressing an open question. He is challenging first principles.

III. AEDPA is not "unfair."

Greene and his friends of court, the criminal defense attorneys, complain that AEDPA is unfair unless it is interpreted as they urge. Even assuming the Court were free to ignore the statute's words and wished to overrule its prior precedent, they would be wrong.

A. The state courts are not evil and ignorant.

Greene maintains that the Court must, as a policy matter, treat new law as old law if it comes out after the merits adjudication but before final judgment. Otherwise, he warns, state supreme courts will "strip" defendants of their fundamental right to federal habeas review, either "intentionally or unintentionally." Brief for Petitioner at 37. Apparently we are to envision the state courts sitting in their chambers, twirling their mustachios as they deny discretionary appeals. And when they are not intentionally "evad[ing]" and "flout[ing]" their constitutional duties, Amicus Brief for Petitioner at 15, they achieve the same end through indolence, "depriv[ing] the defendant of his ability to seek federal habeas relief by dismissing the case ... as a means of docket management." Brief for Petitioner at 38-39.

But we are long past the time when the habeas corpus statute may be understood to regard the state judiciary as an inferior species. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (recognizing, even before AEDPA, that "federal and state courts are equally bound to guard and protect rights secured by the Constitution"); *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993) (rejecting argument "that state-court judges are ignoring their oath [and] violating their Article VI duty to uphold the Constitution"); *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (per curiam) (federal habeas courts must presume that state courts know and follow the law); *Danforth v. Minnesota*, 552 U.S. at 280 ("States are independent sovereigns with plenary authority").

Nor does this particular case give any ground for suspicion of the state courts. Contrary to Greene's implication, the Pennsylvania Supreme Court's treatment of his appeal was appropriate and unsurprising. The court initially granted Greene's petition for discretionary appeal shortly after this Court's decision in *Gray v. Maryland*. Joint App. 156. After learning, however, that Greene had never raised below the issue actually addressed in *Gray*, Joint App. 183-215, the state supreme court dismissed the appeal as improvidently granted. Joint App. 216. Greene contends that he really did preserve the *Gray* issue, but that is not the point. The point is that the state court had reasonable grounds – just as this Court would – to conclude that Greene's case was not a proper vehicle for discretionary review. That conclusion was hardly evidence of bad faith. Had the court been interested in depriving Greene of his alleged rights, it would simply have denied review from the beginning.

Greene's aspersions on the state courts are all the more ill-fitting in light of the opportunity for collateral review for his claim. The Pennsylvania Supreme Court has held, as a matter of state law, that similarly situated defendants may receive post-conviction review for the application of intervening law that would otherwise be blocked by a previous litigation bar. *Commonwealth v. Cruz*, 851 A.2d 870 (Pa. 2004) (granting collateral relief after co-defendant received benefit of new state constitutional ruling on direct appeal); *see also Commonwealth v. Hargrove*, 254 A.2d 22, 23 n.* (Pa. 1969) (rejecting waiver bar on post-conviction review for claim arising from retroactive federal constitutional ruling); *Commonwealth ex rel. Berkery v. Myers*, 239 A.2d 805, 810 (Pa. 1968) (rejecting final litigation bar for retroactive change in law). The reason Greene did not receive state post-conviction review under *Gray v. Maryland* is not because the Pennsylvania courts are inhospitable; it is because Greene did not even try.

Yet he boldly declares – citing one Alabama rule, one Tennessee case, and no Pennsylvania authority – that the states cannot be trusted to provide collateral review for new rules that arise after the last state court decision, but before final judgment. Brief for Petitioner at 39-40. Some states, after all, might elect to bar review in such situations. And even those that offer the right might snatch it back at any moment.

True enough – that would be their prerogative as independent sovereigns. In their own post-conviction procedures, the states can choose to go beyond AEDPA and enforce new rules that did not exist as of the time of the merits decision on direct appeal – or not. The states can even choose to go beyond *Teague* to apply

new rules that did not exist until after the judgment became final – or not. And even if the states do so extend themselves, the application of the new rules will be unreviewable in federal habeas court, because the new rules were applied in state court by virtue of state law, not federal law. *Danforth v. Minnesota*, 552 U.S. at 288 ("the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law").[12]

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[12]The *Teague* exceptions, however, provide a limitation on these principles. If this Court declares a new rule retroactive on collateral review – because it is a watershed rule or because it renders conduct beyond criminal law-making authority – then the claim would be cognizable on state collateral review.

Indeed Pennsylvania, like the federal habeas corpus act, has a specific statutory provision for such cases. Pennsylvania Post-Conviction Relief Act, 42 Pa. Con. Stat. § 9545(b)(iii) ("the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively").

A *Teague* exception applied on state collateral review would be the law "as of the time of the relevant state-court decision," *Williams v. Taylor*, 529 U.S. at 412, and therefore would be subject to federal habeas corpus review under § 2254(d). Under that provision, relief could not be granted unless the state court's adjudication was an unreasonable application of the law. *See Cullen v. Pinholster*, 131 S. Ct. at 1412-13 (Breyer, J., concurring in part).

If the state courts nonetheless barred review, the petitioner would be able to overcome the default and secure federal habeas corpus review through the doctrines of cause and prejudice, actual innocence, or inadequate state grounds. In these circumstances the review would be de novo.

But none of that is reason to abandon the plain meaning of § 2254(d); just the opposite. Greene's rewrite of the provision would provide a powerful incentive *not* to seek state collateral review in cases like his, even where it is clearly available. In Greene's habeas world, the claim based on the new rule becomes complete when the highest state court fails to grant discretionary review. That is, in effect, the merits adjudication. And on federal habeas review, that non-adjudication "adjudication" will be presumptively unreasonable, because the state court will be deemed to have "[chosen] to ignore" the new rule. Brief for Petitioner at 46.

A detour through state post-conviction review at that point would expose the petitioner to a real merits ruling, now subject to real deference in federal court, or even to the possibility of some kind of procedural default ruling. Why risk it? Greene didn't.

B. Finality isn't "fair" either.

Greene asks the Court to impose these costs on comity in the interest of equity. Only the *Teague* rule, he says, with its "final judgment" cutoff, can protect against disparate treatment by state courts at the discretionary review stage.

As it turns out, however, *Teague* has little to do with alleged inequities in state court. The denial of discretionary review by a state supreme court does not constitute final judgment under *Teague*; finality does not occur until this Court completes the discretionary review process, many months later. The possibility of disparate outcomes for similarly situated defendants is no different here than in the state courts.

For example, two litigants, both raising the same legal claim, may both lose their direct appeals on the same day. Both decide to seek review in this Court. One petitioner diligently files his certiorari petition in half the allotted time, on the 45th day. The other petitioner gets a 60-day extension, as does his respondent. The Court denies review in the first case before it even sees the second petition. That petition is granted, a new rule is declared – and only the second petitioner, the dilatory one, receives its benefit. The first is out of luck, because his conviction was already "final." Will he feel better if we tell him about the "twilight zone?"

Thus disparity is inevitable. What Greene calls "arbitrary" is the result of drawing any lines at all. Cases move at different speeds – as events in his own case illustrate. Two of his four co-defendants completed their direct appeals before Greene; their cases reached final judgment before *Gray* was decided. Direct appeals for the other two were delayed; their cases were adjudicated in the Pennsylvania Superior Court after *Gray* was decided.[13]

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[13]The direct appeal of co-defendant Julius Jenkins was decided by the Pennsylvania Superior Court on July 28, 1997. *Commonwealth v. Jenkins*, 701 A.2d 779 (Pa. Super. 1997) (mem.). He did not seek discretionary review in the Pennsylvania Supreme Court within the allotted 30 days, and his conviction became final on August 27, 1997.

The direct appeal of co-defendant Gregory Womack was decided by the superior court on December 16, 1997, together with Greene's. *Commonwealth v. Womack*, 706 A.2d 1261 (Pa. Super. 1997) (mem.). He did not seek allowance of appeal in the state supreme court, and his conviction became final on January 15,

(continued...)

Now Greene says he wants to be treated like the last two rather than the first two. But there is no way to do that. What he is really asking for is the creation of a special category that was not available to any of his co-defendants, or to almost any other state prisoner. His would be a privileged class in which he alone gets federal court merits review under law that was not part of the state court merits review.

That is "fair" to no one but Greene. No matter what line is drawn, some people are going to fall on the other side of it. AEDPA just draws the line at a

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[13](...continued)
1997.

The direct appeal of co-defendant Atil Finney was still in progress when the *Gray* rule was announced, but Finney (one of the two statement-givers) had not raised a redaction claim. The superior court denied relief on June 24, 1999. *Commonwealth v. Finney*, 742 A.2d 203 (Pa. Super. 1999) (mem.).

The direct appeal of co-defendant Naree Abdullah was also still in progress when the *Gray* rule was announced. The superior court applied the new rule but determined that, under all the circumstances, there was no *Gray* error. *Commonwealth v. Abdullah*, 779 A.2d 1213 (Pa. Super. 2001) (mem.). Abdullah subsequently sought federal habeas relief. The district court held that the state court's adjudication of the *Gray* issue was not unreasonable. *Abdullah v. Warden SCI Dallas*, 2010 U.S. Dist. LEXIS 11049 (E.D. Pa. 2010), adopting United States Magistrate Judge's report and recommendation reported at 2007 U.S. Dist. LEXIS 99135 (E.D. Pa. 2007). The case is now on appeal in the Third Circuit, No. 10-1518.

different point – at least for unusual cases like this one – than would pre-AEDPA law.[14]

C. Habeas is not error correction.

At bottom, the appeal of Greene's position is the promise of correcting all the constitutional errors that will suddenly arise as new rules are discovered in the inopportune interlude between merits review and finality of judgment. The question is whether the

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[14]Much as he protests about proper line-drawing, Greene's own has been less than rigorous. Throughout his brief, Greene has chosen to blur the distinction between final judgment and denial of state court review. Compare, for example, the first paragraph in the summary of argument, seeking a cutoff "*before a state supreme court's denial of discretionary review*," with the second paragraph, arguing for a cutoff "*before [the] conviction became final*." Brief for Petitioner at 10 (emphasis supplied).

Similarly, compare the first sentence on page 13, arguing that the ability to seek federal habeas review should not "depend on the happenstance of *whether state supreme courts decide to grant discretionary review*," with the second sentence, arguing that there should be no "*prefinality cutoff*." Brief for Petitioner at 13 (emphasis supplied).

See also, for example, page 38, arguing for a *Teague* finality cutoff on the ground that federal review should not be precluded "*[o]nce the state high court denied review*." Brief for Petitioner at 38 (emphasis supplied).

Not until page 44 of his brief does Greene acknowledge (albeit only indirectly) that the *Teague* finality rule does not actually coincide with the complaint he has been making about state supreme court capriciousness. At that point *Teague* drops out of the case, and Greene is left only with his tortured treatment of the words "adjudication" and "decision" – a word that must now be read to mean "non-decision," else the entire framework falls.

federal habeas corpus statute should be reinterpreted to grant that promise.

In that regard, the Court has been clear about the nature of habeas review. AEDPA is not for "ordinary error correction"; its function is to "guard against extreme malfunctions in the state criminal justice systems." If the bar for relief is therefore set high, "that is because it was meant to be." *Harrington v. Richter*, 131 S. Ct. at 786.

Greene takes quite a different approach to error correction. Indeed he suggests that this Court has a constitutional obligation to ensure application, to all cases pending on direct appeal, of new rules that are announced before the end of the certiorari stage. He proposes a corresponding obligation to appoint counsel to prepare certiorari petitions to ensure that such cases are brought to the Court's attention. Brief for Petitioner at 40-43.

The way to relieve this Court of this onerous obligation to do error correction, Greene contends, is to draft the 50 state supreme courts to do error correction. That way their "decisions" (*i.e.*, grants and denials of discretionary review) can be reviewed by the lower federal habeas courts, so that *they* can do error correction.

This is a lot of error correction. But it is not the way the habeas process works in a federal system. There is always a theoretical possibility that some deserving claim will fall through the cracks if Greene's view does not prevail here. But it is a slim possibility requiring a whole series of ifs: if a defendant properly preserves his objection in state court; if a new rule

validating that objection comes down at just the wrong time; if the state supreme court denies discretionary review; if the state's collateral review structure bars further appeal; if rejection of the claim would have been an unreasonable application of the law to the specific facts of the case; if the violation had substantial and injurious effect. If all of these things happen, a prisoner in Greene's shoes will not get federal habeas relief that he would otherwise have received.

But that would be only one of the many theoretical ways, and a relatively rare one, in which AEDPA allows for uncorrected "errors." Even in the usual case, in which there is no intervening new rule, only an unreasonable application of the law results in relief; garden-variety "incorrect" state court rulings will stand. Even more limiting is AEDPA's definition of "the law" as the precedents of this Court. If the state court ruling is directly contrary to unanimous circuit precedent, but not to this Court's precedent, the state court's "erroneous" ruling will survive. Such "errors" do not offend AEDPA. On the contrary – the deference rule that shields these state court decisions "is part of the basic structure of federal habeas jurisdiction." *Harrington v. Richter*, 131 S. Ct. at 787.

Greene would supplant that structure. He would give federal judges ex post facto authority to reverse state judges for making "errors" that were not errors when they were "made." Under AEDPA, however, the lower federal habeas courts cannot fly in like the hindsight police to save the day after the fact. If a state court adjudicating the merits of a claim could not possibly have known it was violating a rule of law – because the rule did not even exist – then the

adjudication was not an "unreasonable application of clearly established law." On this point, the words of the statute are plain enough.

Conclusion

For these reasons, respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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