GREENE V. FISHER: WILL THE AEDPA TRUMP UNIFORMITY AND EQUITY IN CONSTITUTIONAL DECISION MAKING?

Sean D. O'Brien[*]

I. INTRODUCTION

The so-called Antiterrorism and Effective Death Penalty Act (AEDPA) is before the Supreme Court yet again, this time over the meaning of 28 U.S.C. § 2254(d)(1), which provides that habeas corpus relief

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.[1]

The crux of the problem lies in the absence of statutory language indicating when the Supreme Court's determination must occur in relation to the state court's decision. Does "clearly established federal law" include Supreme Court opinions decided after the

[*] Sean O'Brien is an associate professor at UMKC School of Law, where he teaches courses in Criminal Law, Criminal Procedure, Postconviction Remedies, and Capital Punishment.

1. 28 U.S.C. § 2254(d)–(d)(1) (2006).

state court opinion, but before the opinion becomes final, or is it limited to Supreme Court opinions that predate the filing of the state appellate court's decision? As the Court has already observed, "[I]n a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."[2]

II. *GREENE V. FISHER*: THE FACTS[3]

Eric Greene was found guilty of second-degree murder and related charges in the death of a Philadelphia grocery store owner who was fatally shot during a robbery.[4] The Pennsylvania Superior Court described the crime as follows:

> [Jarmaine] Trice,[5] [Gregory] Womack, and co-defendants Julius Jenkins, Atil Finney, and Naree Abdullah, traveled from Germantown to North Philadelphia in Womack's 1979 Oldsmobile station wagon. Demond Jackson, who asked for a ride, also accompanied them. Womack parked the car around the corner from Lilly's Market. Trice, Jenkins, Finney and Abdullah entered the market while Womack and Jackson stayed in the car. Once inside the store, Jenkins pulled out a gun and announced a holdup. Francisco Azcona, the store owner, was crouched behind a counter; Azcona's wife and sister-in-law were standing behind the counter where the perpetrators could see them. When Jenkins went behind the counter and discovered Mr. Azcona, he fired a single shot, penetrating the victim's jaw and neck. The gunshot wound caused Mr. Azcona to bleed to death. The four men returned to Womack's car, with Trice carrying a cash register. Womack

2. Lindh v. Murphy, 521 U.S. 320, 336 (1997).

3. Greene v. Palakovich (*Greene II*), 606 F.3d 85 (3d Cir. 2010), *cert. granted sub nom*. Greene v. Fisher, 563 U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637).

4. Joint Appendix at 33, *Greene*, 563 U.S. ___, 131 S. Ct. 1813 (No. 10-637), 2011 WL 2472601, at *33 [hereinafter J.A.]. As discussed below, an issue in *Greene* was the lack of published opinion by the lower courts. Since 1979, the Pennsylvania Superior Court and Supreme Court adopted a policy of issuing per curiam decisions without a published opinion. *See* Commonwealth v. Trice, 706 A.2d 1259 (Pa. Super. Ct. 1997). Thus, all references to state court proceedings will be to the Joint Appendix, which contains the state decisions.

5. Eric Greene is also known as Jarmaine Q. Trice, and state court proceedings are styled under that name. He will be referred to by his correct name in this article.

> drove the men to Abdullah's house, where the money from the cash register was divided among the cohorts.[6]

This summary ironed out many discrepancies in the prosecution's case. Greene denied any participation in the crime.[7] None of the robbery victims identified Greene as a participant in the crime.[8] He became a suspect in the Lilly's Market robbery when he and Womack were arrested along with two of their other codefendants, including Jenkins, during a failed attempt to rob the Ace Check Cashing Agency three days after the homicide.[9] A gun found on Jenkins was later determined to be the murder weapon used in the Lilly's Market robbery.[10]

The only direct evidence against Greene came from Demond Jackson, who claimed that he was present at the Lilly's Market robbery only by happenstance.[11] He had bummed a ride from Germantown to either North Philadelphia or West Philadelphia[12] in Womack's station wagon and said he just happened to be in the car when Womack committed the robbery.[13] Jackson was not charged in the crime[14] and was allowed to walk free on unrelated drug charges as well.[15] Unfortunately, the court reporter's notes of Jackson's testimony were lost prior to being transcribed, so exactly what Jackson said is inaccessible to the Pennsylvania appellate courts and to the Supreme Court.[16] He was not charged as a codefendant on this crime or on an unrelated case in which he was shot in the hand during an aborted robbery which, according to Jackson, was committed by a group of men he just happened to be hanging out with at the time.[17]

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6. *See* J.A., *supra* note 4, at 121. The court accepted as true Jackson's claim that he did not share in the proceeds of the robbery. *Id*. at 121 n.1.

7. *Id*. at 160.

8. *Id*. at 181.

9. *Id*. at 186.

10. *Id*. at 78.

11. *Id*. at 34.

12. *See id*. at 34, 76, 136 (naming both "West Philly" and "North Philadelphia" as Jackson's purported destination).

13. *See id*. at 34.

14. *Id*. at 112.

15. *See id*. at 36–37.

16. *Id*. at 33.

17. *Id*. at 37.

Three of Greene's codefendants made statements to the police, and these added to the confusion.[18] All three agreed that Julius Jenkins was the shooter and that Greene participated in the robbery but the similarities end there.[19] Each codefendant statement attributed a different role to Greene.[20] One said Greene waited in the car, another said he carried the cash register out of the store, and a third could not describe Greene's role at all.[21] Jackson said he waited in the car with Womack while the remaining four codefendants robbed the store.[22] In another version, he said that he, Womack, and Greene waited in the car while the other three went into the store.[23] The three codefendant confessions varied on the number of perpetrators, indicating three, four, or five participants, depending on which version of which defendant's confession is credited.[24] Although the evidence was sufficient to convict Greene, it was far from overwhelming, and Greene's denial of the crime is plausible.

The prosecution tried all five defendants jointly, even though the death penalty was sought only against Jenkins.[25] Prior to trial, Greene moved to sever his trial from the remaining defendants, arguing that admitting his nontestifying codefendants' statements to police would deprive him of his Sixth Amendment right to confront and cross-examine witnesses against him in violation of *Bruton v. United States*.[26] The trial court denied the motion and instead ordered the codefendant statements redacted to omit Greene's name.[27] In some instances, words such as "other guys," "we," "he," "someone," "someone

18. *See id*. at 36–38.

19. *See id*.

20. *See Greene II*, 606 F.3d 85, 88 (3d Cir. 2010), *cert. granted sub nom*. Greene v. Fisher, 563 U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637).

21. *Id*.

22. J.A., *supra* note 4, at 36.

23. *Id*. at 35–36.

24. *See id*. at 36–38.

25. *Id*. at 79.

26. *Id*. at 127–28 (citing Bruton v. United States, 391 U.S. 123 (1968)). To avoid the *Bruton* issue, the state court could sever the trials of the codefendants or forbid any use of the confessions. *Id*. at 145 (citing Commonwealth *ex rel*. Berkery v. Myers, 239 A.2d 805, 807–08 n.4 (Pa. 1968)).

27. *Id*. at 79.

else," and "they" were substituted for codefendant names, and in other instances a blank was inserted in lieu of Greene's name.[28]

In codefendant Finney's confession, Finney stated that he and "two guys" went into the store, where "two guys stayed up front and I stayed to the back."[29] The police asked for their names, and the version of Finney's reply that went to the jury read, "one is and the other is."[30] Asked to identify photos of those involved, codefendant Finney's statement was read to the jury as follows:

> ANSWER: Number three is. Number six is. Number eight is.
>
> QUESTION: Do you know a guy named blank? I know a *blank*.
>
> QUESTION: Can you identify this picture?
>
> ANSWER: Yes. That's him. Identified photo number of photo of *blank*.[31]

Codefendant Womack's confession was redacted in a similar manner.[32] When asked who is the shooter, the reply was, "[H]is name is *blank*."[33] When asked for the names of the other participants in the crime, Womack told, and the jury heard, "We call him *blank*."[34] The trial court instructed the jury that each statement could be considered as evidence only against the person who made it.[35]

The prosecution argued that these measures were sufficient to safeguard Greene's confrontation rights.[36] Greene disagreed, arguing that Jackson's testimony and other evidence would cause the jury to infer that the codefendant statements were in fact referring to Greene.[37] Further, Greene argued, this inference was strengthened by the use of blanks, which informed the jury that

28. *Id*. at 91–92.
29. *Id*. at 169.
30. *Id*.
31. *Id*. (emphasis added).
32. *Id*. at 92.
33. *Id*. at 170 (emphasis added).
34. *Id*. (emphasis added).
35. *Id*. at 79 n.6, 88–89.
36. *See id*. at 96.
37. *See id*. at 168–70.

the statements were redacted and invited the jury to puzzle about whose name to put in each blank.[38] Greene also contended that the redactions were rendered ineffective when, during closing arguments to the jury, the prosecution pointed at Greene as he argued that the codefendants' confessions corroborated Greene's guilt, prompting him to move for a mistrial, which was denied.[39] The jury found Greene guilty of second degree murder, and he appealed to the Pennsylvania Superior Court.[40]

III. *GREENE V. FISHER*: STATE APPELLATE PROCEEDINGS

It is the chronology of appellate proceedings that created the specific issue before the Court. On December 16, 1997, the Pennsylvania Superior Court affirmed Greene's conviction, reasoning that Greene's confrontation rights under *Bruton* were protected by the redaction of his name from the codefendants' statements and by giving the jury a proper limiting instruction.[41] The court specifically relied on Pennsylvania precedent that "[t]he substitution of the letter 'X' for a defendant's name does not violate that defendant's *Bruton* rights if a proper limiting instruction is given . . . ."[42] This is an imprecise paraphrasing of the Supreme Court's holding "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, *but any reference to his or her existence*."[43]

On December 26, 1997, Greene invoked a discretionary procedure for seeking review in the Pennsylvania Supreme Court on several issues, including his *Bruton* claim.[44] On March 9,

38. *Id*. at 21–27, 176.

39. *Id*. at 69–70, 114, 153, 170.

40. *Id*. at 80.

41. *Id*. at 127–28.

42. *Id*. at 128 (citing Commonwealth v. Miles, 681 A.2d 1295, 1300 (Pa. 1996)).

43. Richardson v. Marsh, 481 U.S. 200, 211 (1987) (emphasis added).

44. J.A., *supra* note 4, at 132, 144. *See* 42 PA. CONS. STAT. ANN. § 724 (West 2004) (providing a procedure for seeking discretionary allowance of appeals from superior and commonwealth courts); *id*. § 5105 (establishing right of

1998, while Greene's petition for allowance of appeal was pending in the Pennsylvania Supreme Court, the Supreme Court of the United States decided *Gray v. Maryland*,[45] which applied the *Bruton* standard in a manner helpful to Greene's claim that his Sixth Amendment right of confrontation was not adequately protected by the redactions to his codefendants' confessions.[46] Like Greene, Kevin Gray was tried jointly with his codefendant Anthony Bell, who gave the police a confession that implicated Gray in the homicide.[47] Just as in Greene's case, Gray's objections under *Bruton* were overruled, and Bell's confession was redacted by substituting the words "deleted" or "deletion" whenever Gray or a third alleged coactor Juaquin Vanlandingham were mentioned.[48] The Court in *Gray* granted certiorari to decide a question left open by *Richardson v. Marsh*: "namely, whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still falls within *Bruton's* protective rule."[49] The Court answered the question in the affirmative, explaining:

> Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that, in our view, the law must require the same result.[50]

When a codefendant's statement is redacted in this manner, any cautionary instruction "will provide an obvious reason for the blank[,]" especially if the prosecutor argues "that Jones, not someone else, helped Smith commit the crime."[51] Further, an obvious deletion "encourag[es] the jury to speculate about the reference," and thus "may overemphasize the importance of the

appeal).

45. 523 U.S. 185 (1998).
46. *Id*. at 197.
47. *Id*. at 188.
48. *Id*.
49. *Id*. at 192.
50. *Id*.
51. *Id*. at 193.

confession's accusation—once the jurors work out the reference."[52] The blanks do not fool anybody, least of all jurors, and they violate *Bruton* because "[t]hey are directly accusatory."[53] Of course, the underlying constitutional evil is that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination."[54]

The Pennsylvania Supreme Court on August 14, 1998—five months after *Gray* was decided—granted Greene's petition for allowance of appeal, limited to the Sixth Amendment confrontation issue presented by the admission of statements by Greene's nontestifying codefendants.[55] Greene's timely-filed brief quoted extensively from *Gray*,[56] as did the responsive brief filed by the State.[57] Having been fully advised on the Sixth Amendment issue as interpreted in *Gray,* the Pennsylvania Supreme Court, without explanation, on April 29, 1999—more than thirteen months after *Gray* was decided—entered an order that said only, "Appeal dismissed as having been improvidently granted."[58]

IV. *GREENE V. FISHER*: FEDERAL PROCEEDINGS AND THE DECISION BELOW

Eric Greene petitioned for federal habeas corpus relief in the Eastern District of Pennsylvania, alleging a dozen constitutional violations at his trial, including the Sixth Amendment Confrontation Clause violation based on the admission of his codefendants' confessions.[59] Although the district court denied habeas corpus relief, it could not be more clear that it considered the deference clause of the AEDPA dispositive of Greene's *Bruton*

52. *Id*.
53. *Id*. at 194.
54. Bruton v. United States, 391 U.S. 123, 136 (1968).
55. J.A., *supra* note 4, at 156.
56. *Id*. at 171–73.
57. *See id*. at 201–14.
58. *Id*. at 216.
59. Greene v. Palakovich (*Greene I*), 482 F. Supp. 2d 624, 628 (E.D. Pa. 2007), *aff'd*, 606 F.3d 85 (3d Cir. 2010), *cert. granted sub nom*. Greene v. Fisher, 563 U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637).

claim.[60] As noted earlier, that provision authorizes federal habeas corpus relief if the state court's decision was "contrary to" or "an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."[61] According to the district court, because *Gray* had not been decided when the Pennsylvania Superior Court filed its opinion affirming Greene's conviction, it could not be considered in assessing the reasonableness of the state court's decision on Green's *Bruton* claim because *Gray* postdated "the time of the relevant state court decision."[62] On the other hand, the district court acknowledged, other jurists believe that the relevant time frame for determining what is "clearly established federal law" is the date upon which "the state decision became final."[63] The court further noted that Third Circuit authority is split on this very issue.[64]

The district court granted a certificate of appealability on the standard of review applicable to Greene's *Bruton* claim because whether *Gray* could be factored into the habeas court's decision "is key to assessing the merits of Petitioner's claim," especially since the statements of Greene's codefendants were redacted in the same manner found constitutionally impermissible in *Gray*.[65] The district court also explicitly rejected the State's arguments that any Sixth Amendment violation was harmless error and that Greene had procedurally defaulted his *Gray* claim.[66]

The United States Court of Appeals for the Third Circuit affirmed the district court's denial of habeas corpus relief,

60. *See id*. at 648 ("[U]nder the AEDPA standard of review, Petitioner cannot obtain habeas relief under 28 U.S.C. § 2254(d)(1).").

61. Antiterrorism & Effective Death Penalty Act 28 U.S.C. § 2254(d)(1) (2006).

62. *Greene I*, 482 F. Supp. 2d at 629 (quoting Williams v. Taylor*,* 529 U.S. 362, 412 (2000)).

63. *Id*. *(*quoting *Williams*, 529 U.S. at 380 (Stevens, J., concurring)).

64. *Id*. at 629. *Compare, e.g*., Fischetti v. Johnson, 384 F.3d 140, 148 (3d Cir. 2004) (stating that the AEDPA requires the court to determine "what the clearly established Supreme Court decisional law was at the time petitioner's conviction became final"), *with* Johnson v. Carroll, 369 F.3d 253, 257 (3d Cir. 2004) (identifying "the time the state court renders its decision" as the point at which "clearly established federal law" is determined).

65. *Greene I*, 482 F. Supp. 2d at 629.

66. *Id*. at 630–31.

reaching the same conclusion that the relevant temporal focus under § 2254(d)(1) is the time of the state court's decision.[67] Further, the court reasoned, the Pennsylvania Supreme Court's decision to dismiss Greene's appeal after briefing was not a decision within the meaning of § 2254(d) "because it had no precedential value" under Pennsylvania law.[68] Noting that *Teague v. Lane*[69] provides that the finality of the state court decision is the relevant date for determining whether new rules announced by the Supreme Court apply on habeas corpus review, the Third Circuit nevertheless concluded that "considering the statutory text and post-*Williams* Supreme Court precedent, our view is that using the date of the relevant state-court decision to determine 'clearly established Federal law' is the most logical approach to applying § 2254(d)(1)."[70]

The primary foundation for the court's conclusion is a statement made in Justice O'Connor's opinion for the Court addressing the meaning of the "unreasonable application" clause of § 2254(d):

> Throughout this discussion the meaning of the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" has been put to the side. *That statutory phrase refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.* In this respect, the "clearly established Federal law" phrase bears only a slight connection to our *Teague* jurisprudence. With one caveat, *whatever would qualify as an old rule under our* Teague *jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States*" under § 2254(d)(1).[71]

Ignoring Justice O'Connor's language explicitly tying the "clearly established" language to *Teague's* definition of old rule (i.e., one decided before the state court decision on direct appeal became final), the Third Circuit concluded that only decisions

67. *Greene II,* 606 F.3d 85, 95 (3d Cir. 2010), *cert. granted sub nom*. Greene v. Fisher, 563 U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637).

68. *Id*. at 92 n.1.

69. 489 U.S. 288 (1989).

70. *Greene II*, 606 F.3d at 95.

71. Williams v. Taylor*,* 529 U.S. 362, 412 (2000) (emphasis added).

that exist "as of the time of the relevant state-court decision" constitute clearly established federal law.[72] Further, that decision was determined to be the opinion of the Pennsylvania Superior Court, not the order of the Pennsylvania Supreme Court.[73]

The court of appeals noted that other circuits have reached the opposite conclusion by focusing on the last sentence of the above-quoted portion of Justice O'Connor's opinion.[74] "It cannot be denied that Justice O'Connor's approach, in light of her reference to old rules under *Teague*, can be read to permit the use of the date the conviction became final."[75] However, the Third Circuit rejected that interpretation because Justice O'Connor disagreed with Justice Stevens's view that § 2254(d)(1) simply codified *Teague*'s retroactivity standard.[76] Therefore, according to the court of appeals, Justice O'Connor's language "suggests a desire on her part to undercut *Teague* and the significance of the date that a petitioner's conviction became final."[77]

The Third Circuit conceded that the issue is far from clear because the *Williams* majority framed the threshold issue in a way that is diametrically at odds with the dicta in Justice O'Connor's opinion.[78] The Court wrote that the "threshold question under the AEDPA is whether [a petitioner] seeks to apply a rule of law that was clearly established *at the time his state-court conviction became final*."[79] Nevertheless, in several subsequent cases the Court has said, in dicta, that the relevant inquiry for purposes of § 2254(d)(1) is whether the controlling Supreme Court case existed "at the time the state court renders its decision."[80] The divided Third Circuit panel perceived that

72. *Greene II*, 606 F.3d at 95.

73. *Id*. at 92.

74. *Id*. at 95.

75. *Id*. at 96 n.7.

76. *Id*.

77. *Id*.

78. *Id*. at 95 n.7.

79. Williams v. Taylor, 529 U.S. 362, 390 (2000) (emphasis added).

80. *E.g.*, Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003). *See also* Carey v. Musladin, 549 U.S. 70, 74 (2006); Yarborough v. Alvarado, 541 U.S. 652, 660–61 (2004); Wiggins v. Smith, 539 U.S. 510, 520 (2003). None of these cases involved the applicability of a Supreme Court case decided after the state court opinion

the issue was not an easy one:

> Perhaps the resolution of this issue by the Supreme Court would be a simple task, but resolution of the issue in the Courts of Appeals based on existing Supreme Court precedent is akin to trying to piece together a jigsaw puzzle that has been sprinkled with pieces from other puzzles. All the pieces, no matter how they are arranged, simply do not fit.[81]

Ultimately, the Third Circuit concluded that "[a] state court cannot unreasonably apply a Supreme Court decision that did not exist at the time of its decision."[82] Because the Pennsylvania Superior Court's decision was not unreasonable in light of *Bruton* and *Marsh,* Greene was not entitled to habeas corpus relief.[83]

Judge Ambro dissented from the panel's denial of Greene's Sixth Amendment Confrontation Clause claim, citing multiple points of disagreement with the majority.[84] In his view, "choosing the date of the relevant state-court decision . . . leaves a twilight zone between the cutoff set by the majority here and the retroactivity analysis of the Supreme Court's decisions in *Griffith v. Kentucky* and *Teague v. Lane*."[85] Although Greene had a right under *Griffith* to have *Gray* apply on his direct appeal, the majority opinion leaves him "without later recourse to federal habeas review to correct that error."[86] According to Judge Ambro, Greene is simply "asking us to apply a case that should have been applied on direct review."[87] Section 2254(d)(1) does not choose any cutoff date, according to Judge Ambro, because that issue was already well-settled by the retroactivity jurisprudence of *Griffith* and *Teague.*[88]

The rationale of *Griffith* and *Teague* apply with equal force to § 2254(d)(1). Under *Griffith,* the "failure to apply a newly

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was filed but before it became final.

81. *Greene II*, 606 F.3d at 95 n.7.

82. *Id*. at 98.

83. *See id*. at 106.

84. *See id*. at 106–19 (Ambro, J., dissenting).

85. *Id*. at 107 (citing Griffith v. Kentucky, 479 U.S. 314 (1987) and Teague v. Lane, 489 U.S. 288 (1989)).

86. *Id*.

87. *Id*. at 108.

88. *Id*.

declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[89] Lower courts have a responsibility to apply new rules to cases that are not yet final because it is physically impossible for the Supreme Court to take up every case. If lower courts are relieved of that responsibility, only those cases accepted by the Court as vehicles for deciding new constitutional standards would be affected, "permitting a stream of similar cases subsequently to flow by unaffected by that new rule."[90] Such a result "violates the principle of treating similarly situated defendants the same."[91] For purposes of identifying the class of people who should benefit from a new rule, "[f]inality is the key date"[92] because up to that point the Supreme Court could still reach down and selectively grant relief based on the new rule. Judge Ambro viewed the Supreme Court's jurisprudence as drawing a clear dichotomy between "old rules," i.e., cases decided before the prisoner's conviction became final, and "new rules," i.e., cases decided but not dictated by precedent after the prisoner's conviction became final.[93] Under this analysis, *Gray* is an old rule that should govern the adjudication of Greene's Sixth Amendment Confrontation Clause claim. Judge Ambro's interpretation finds explicit support in Justice O'Connor's opinion for the Court in *Williams*.[94] "[W]hatever would qualify as an old rule under [the Court's] *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)."[95]

89. *Id*. at 112 (quoting *Griffith,* 479 U.S. at 322).

90. *Id*. (quoting *Griffith*, 479 U.S. at 323).

91. *Id*.

92. *Id*. at 113.

93. *Id*. at 114–15 n.9.

94. *See* Williams v. Taylor, 529 U.S. 362, 401 (2000).

95. *Id*. at 412. Justice O'Connor, writing for the Court was joined by Justices Rehnquist, Scalia, Kennedy, and Thomas. Thus, all nine Justices in *Williams* agreed that Supreme Court cases decided before the prisoner's conviction became final qualify as "clearly established federal law" under § 2254(d)(1). *Id.*

V. REASONS GREENE SHOULD PREVAIL IN THE SUPREME COURT

Judge Ambro's view makes sense. It is consistent with the Supreme Court's jurisprudence, which guarantees diligent habeas petitioners the benefit of constitutional rules that apply to them,[96] treats similarly situated prisoners equally,[97] and preserves the state court's primary role and duty to enforce the Constitution.[98] The Third Circuit's rule accomplishes none of those things.

It is beyond question that Greene was entitled to the benefit of *Gray* under *Teague*'s retroactivity doctrine; his appeal was not yet final when *Gray* was decided.[99] Furthermore, Greene was diligent in the pursuit of his Sixth Amendment Confrontation Clause claim. After the Pennsylvania Superior Court denied his claim, Greene filed a petition to allow appeal in the Pennsylvania Supreme Court.[100] When *Gray* was decided, Greene stayed the course that he had put in motion a few weeks before. The Pennsylvania Supreme Court allowed his appeal, and Greene filed a brief which included an extensive analysis of why he should be granted a new trial based on *Gray*.[101] The procedure he invoked is explicitly authorized by Pennsylvania law,[102] and

96. *See* Wainwright v. Sykes, 433 U.S. 72, 76 (1977) (recognizing that habeas petitioners have a right to raise federal constitutional claims).

97. *Cf*. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (noting that the Equal Protection Clause requires state governments to treat similarly situated individuals in a similar manner).

98. *See* Fitts v. McGhee, 172 U.S. 516, 532 (1899) (finding that states are under a duty to enforce the mandates of the Constitution).

99. Under *Allen v. Hardy*, a conviction is final when certiorari is denied on direct review; if no petition for writ of certiorari is filed, the conviction becomes final on the last day on which a timely petition for writ of certiorari could have been filed. 478 U.S. 255, 255 n.1, 257–58 (1986).

100. *Greene II*, 606 F.3d 85, 91 (3d Cir. 2010), *cert. granted sub nom*. Greene v. Fisher, 563 U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637).

101. See *id*. at 92 n.1.

102. Pennsylvania law provides that "final orders of the Superior Court and final orders of the Commonwealth Court . . . may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter." 42 PA. CONS. STAT. ANN. § 724 (West 2004). Such an appeal is unrestricted in scope and "shall extend to the whole record." *Id*. § 5105.

there was no impediment whatsoever to the Pennsylvania Supreme Court's ability to decide the issue. Further, under *O'Sullivan v. Boerckel,*[103] it was a step Greene was required to take to exhaust his state remedies before attempting to obtain relief from a federal court:

> Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.[104]

Greene was obligated, therefore, to "use the State's established appellate review procedures before he present[ed] his claims to a federal court,"[105] and his petition to allow appeal in the Pennsylvania Supreme Court "is a normal, simple, and established part of the State's appellate review process."[106] Thus, Greene did his part to obtain the benefit of *Gray*. "Section 2254(c) requires only that state prisoners give state courts a *fair* opportunity to act on their claims."[107]

The same law that obliged Greene to present his Sixth Amendment Confrontation Clause claim in a petition to allow appeal places a corresponding obligation on the Pennsylvania Supreme Court:

> State courts, like federal courts, are obliged to enforce federal law. Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. This rule of comity reduces friction between the state and federal court systems by avoiding the "unseem[liness]" of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional

103. 526 U.S. 838 (1999).

104. *Id*. at 845.

105. *Id*.

106. *Id*.

107. *Id*. at 844 (citing Castille v. Peoples, 489 U.S. 346, 351 (1989) and Picard v. Connor, 404 U.S. 270, 275–76 (1971)).

violation in the first instance.[108]

Greene gave the Pennsylvania Supreme Court a fair opportunity to exercise its obligation to adjudicate his confrontation claim in light of *Gray*. Had it done so, and ruled adversely to Greene, then under the ruling of the Third Circuit, *Gray* would be part of the landscape of clearly established federal law against which the state court's decision would be measured. Thus, whether Greene obtained the benefit of *Gray* under the Third Circuit's analysis depended on the decision of the Pennsylvania Supreme Court to accept or reject his claim,[109] a purely fortuitous circumstance over which he had no control. In fact, neither the district court nor the court of appeals faulted Greene in any way for his behavior up to this point.[110] Greene did exactly what he should have done under federal and state law to enforce his entitlement to have his confrontation claim adjudicated in light of *Gray*.

When *Gray* was decided, Greene's petition for allowance of appeal was already on file so the time limit within which to petition for certiorari had not even begun to run.[111] If Greene had not been required to invoke the jurisdiction of the Pennsylvania Supreme Court, he could have filed a petition for writ of certiorari in the Supreme Court while *Gray* was still pending, [112] and under the facts of his case a summary grant-vacate-remand (GVR) order would have been a reasonable possibility, though not guaranteed. "As a practical matter, of course, [the Court] cannot hear each case pending on direct review and apply the new rule."[113] Thus, under the Third Circuit's analysis, among the

108. *Id*. at 844–45 (citing Rose v. Lundy, 455 U.S. 509, 515–16 (1982), Duckworth v. Serrano, 454 U.S. 1, 3–4 (1981) (per curiam), and Darr v. Burford, 339 U.S. 200, 204 (1950)).

109. Why is the Pennsylvania Supreme Court's unexplained dismissal of Greene's appeal not a "decision" for purposes of § 2254(d)(1)? *See infra* text accompanying notes 138–41.

110. *See Greene II*, 606 F.3d 85, 92–93 (3d Cir. 2010), *cert. granted sub nom*. Greene v. Fisher, 563 U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637).

111. *See id*. at 91.

112. In addition to *O'Sullivan,* the Supreme Court Rules require that claims be presented to the "state court of last resort" prior to the filing of a petition for writ of certiorari. SUP. CT. R. 13.1.

113. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).

class of prisoners whose state appeals had been decided adversely but were not yet final, only those few lucky lottery winners who score a GVR order would get the benefit of the new rule on federal habeas. Because his postdecision motion was still pending when *Gray* came down, Greene was not even in a position to buy a ticket.

The Third Circuit suggested that Greene could have obtained the benefit of *Gray* by asserting his Confrontation Clause claim for a *third* time in a petition for postconviction relief under Pennsylvania law.[114] There are multiple flaws in that analysis. First, as pointed out by Judge Ambro, Pennsylvania has a robust doctrine, based on statute and case law, that precludes the postconviction relitigation of issues resolved on direct appeal.[115] Second, having once fairly presented the factual and legal basis for his confrontation claim, Greene was under no obligation to present it to the state courts a second or third time. "[S]tate prisoners must give the state courts *one* full opportunity to resolve any constitutional issues by invoking *one* complete round of the State's established appellate review process."[116] There is no dispute that Greene fairly presented his confrontation claim multiple times: first in the trial court, then in the Pennsylvania Superior Court on direct appeal, and again in his petition for allowance of appeal in the Pennsylvania Supreme Court. Beyond question, Greene gave the Pennsylvania Courts a fair opportunity to adjudicate his Sixth Amendment claim. "It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied."[117] This is not a case in which the habeas petitioner failed to follow state or federal procedural rules with respect to his claim.

A serious problem with the Third Circuit's analysis is that it does not treat similarly situated prisoners equally. Another

114. *See Greene II*, 606 F.3d at 102–04.

115. *See id*. at 116 n.13 (Ambro, J., dissenting) (citing 42 PA. CONS. STAT. ANN. § 9543(a)(3) (West 2007) (prohibiting relief on any claim that has been "previously litigated or waived") and Commonwealth v. Small, 980 A.2d 549, 569 (Pa. 2009)).

116. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (emphasis added).

117. Picard v. Connor, 404 U.S. 270, 275 (1971).

prisoner in Greene's situation in a state with no allowance for postdecision motions could have filed a petition for writ of certiorari and obtained a summary GVR order in light of *Gray*. The same would be true of a prisoner whose postdecision motions had been filed and decided, and the time for filing a petition for writ of certiorari had not yet lapsed. He or she would then get the benefit of *Gray* on federal habeas review under § 2254(d)(1). Other prisoners might get the benefit of a reasoned decision on the merits of their claims through postdecision motions in state appellate courts, depending on the quirks of local procedures and proclivities of appellate judges. When a federal constitutional right is at issue, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[118] This is so because

> [s]elective application of new rules violates the principle of treating similarly situated defendants the same. As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is "the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: "The time for toleration has come to an end."[119]

In Justice Powell's words, it "hardly comports with the ideal of 'administration of justice with an even hand,'" when "one chance beneficiary—the lucky individual whose case was chosen as the occasion for announcing the new principle—enjoys retroactive application, while others similarly situated have their claims adjudicated under the old doctrine."[120] Even if the new rule is a clear break with precedent, unforeseeable to the state appellate courts, the Court has consistently selected the finality of direct review as the cutoff point for new rules because of the "'actual inequity that results' when only one of many similarly

118. *Griffith*, 479 U.S. at 322.

119. *Id*. at 323 (emphasis omitted).

120. Hankerson v. North Carolina., 432 U.S. 233, 247 (1977) (Powell, J., concurring) (internal citations omitted) (quoting Desist v. United States, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting)).

situated defendants receives the benefit of the new rule."[121]

It is true, and the respondent in *Greene* argues vigorously, that the state's interest in finality of its criminal judgments is impaired by the application of a new rule. This is the basis of the Court's retroactivity doctrine of *Teague,* which elevated retroactivity to a threshold issue in federal habeas corpus proceedings:

> The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."[122]

Acknowledging states' strong interest in finality of criminal judgments, and the burden of collateral review, the Court in *Teague* reasoned that the cutoff point for deciding what law applies to a habeas petitioner's claim is the one advocated by Greene in his case: "[N]ew constitutional rules of criminal procedure will not be applicable to *those cases which have become final* before the new rules are announced."[123]

The importance of avoiding arbitrary distinctions is reflected in the Court's decisions on substantive issues of criminal law as well. For example, in *Montejo v. Louisiana,*[124] arguably the most

121. *Griffith*, 479 U.S. at 327–28 (quoting United States v. Johnson, 457 U.S. 537, 556 n.16 (1982)).

122. Teague v. Lane, 498 U.S. 288, 310 (1989) (alterations in original) (internal citations omitted); *see also* Brown v. Allen, 344 U.S. 443, 534 (1953) (Jackson, J., concurring) (finding that state courts cannot "anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them").

123. *Id*. (emphasis added).

124. Montejo v. Louisiana, 556 U.S. ___, 129 S. Ct. 2079 (2009).

important consideration for the Court was to fashion a rule on which an individual's right to counsel in an interrogation setting did not turn on the happenstance of the local mechanism for appointing counsel. Accordingly, the Court rejected a proposed rule that

> would achieve clarity and certainty only at the expense of introducing arbitrary distinctions: Defendants in States that automatically appoint counsel would have no opportunity to invoke their rights and trigger *Michigan v. Jackson*, while those in other States, effectively instructed by the court to request counsel, would be lucky winners. That sort of hollow formalism is out of place in a doctrine that purports to serve as a practical safeguard for defendants' rights.[125]

The same result would occur as a result of *Greene*. Missouri, for example, has a procedure by which a prisoner in exactly Greene's position can seek the benefit of a new retroactive rule announced by the Supreme Court,[126] while Pennsylvania does not. It is inconceivable that the Court will invite the potential for the arbitrary and inequitable treatment of litigants that has and will continue to result from the Third Circuit's rule. There is no principled distinction between Eric Greene and Kevin Gray, yet only one gets the benefit of a decision based on the law in effect before his decision became final.

Last, but not least, the Court should reject the Third Circuit's decision because it undermines the states' "initial responsibility for vindicating constitutional rights."[127] Under our federal system, federal and state courts are "equally bound to guard and protect rights secured by the Constitution."[128] The exhaustion doctrine grows out of the recognition that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state

125. *Id*. at ___, 129 S. Ct. at 2084 (citation omitted).

126. *See, e.g.*, *In re* Parkus, 219 S.W.3d 250, 254 (Mo. 2007) (en banc) (per curiam) (sustaining a death-sentenced prisoner's motion to recall the mandate of the appellate court as a result of the retroactive decision in Atkins v. Virginia, 536 U.S. 304 (2002)).

127. Engle v. Isaac, 456 U.S. 107, 128 (1982).

128. *Ex parte* Royall, 117 U.S. 241, 251 (1886).

courts to correct a constitutional violation."[129] The Court anticipated that "[a]s the number of prisoners who exhaust all of their federal claims increases, state courts may become increasingly familiar with and hospitable toward federal constitutional issues . . . ."[130] Requiring state courts to exercise their primary obligation to enforce the Constitution reduces piecemeal litigation and provides "for a more focused and thorough review [of a prisoner's claims]."[131] The exhaustion doctrine also preserves scarce federal judicial resources by allowing fact development to occur in state court, and there will be cases in which the state court's ruling may avoid the necessity of federal habeas corpus review altogether.[132]

The policy underlying the exhaustion doctrine is frustrated when state courts, through no fault of the prisoner, bypass opportunities to adjudicate fairly and properly presented constitutional claims, as the Pennsylvania Supreme Court did here. Of course, a state is free to refuse to provide a forum for prisoners to seek the application of postdecision, prefinality Supreme Court decisions.[133] However, "[a] state may disable its own courts from revisiting criminal convictions without putting a similar damper on federal courts."[134] In one case in which a habeas petitioner repeatedly and properly presented his claims to the state court for decision, the Eighth Circuit Court of Appeals observed, "We do not know what else he could have done, as a practical matter, to present the claim to that Court for decision on the merits. We therefore hold that the claim was fairly presented, and that the merits are now open for decision on

129. Rose v. Lundy, 455 U.S. 509, 518 (1982) (quoting Darr v. Burford, 339 U.S. 200, 204 (1950)).

130. *Id*. at 519 (citations omitted).

131. *Id*. at 520.

132. *See, e.g*., Simpson v. Camper, 974 F.2d 1030, 1031 (8th Cir. 1992) (per curiam) (citing State v. Simpson, 836 S.W.2d 75, 83 (Mo. Ct. App. 1992) (per curiam) (dismissing federal habeas proceedings as moot because, after federal proceedings were held in abeyance for the exhaustion of state remedies, the petitioner prevailed in state court)).

133. *See* Marisa Armanino & Elana Newberger, *Habeas Relief for State Prisoners*, 37 GEO. L. J. ANN. REV. CRIM. PROC. 872, 883–88 (2008).

134. Prihoda v. McCaughtrey, 910 F.2d 1379, 1385 (7th Cir. 1990).

federal habeas corpus."[135] In essence, the refusal to decide is itself a decision. Indeed, the Court in *Harrington v. Richter* treats summary rulings as decisions for purposes of §2254(d)(1).[136]

It is difficult to understand the Third Circuit's rationale for concluding that the Pennsylvania Supreme Court's summary dismissal of Greene's appeal is not a "decision." The fact that it has no precedential value under Pennsylvania law does not lead to the conclusion that no decision was made; states commonly decide criminal cases in unpublished memoranda having no precedential effect.[137] Indeed, the Superior Court's decision in Greene's case is unpublished, as are the opinions of virtually every state trial court in the country, yet those decisions are clearly considered adjudications on the merits. Under the Court's existing habeas jurisprudence, the Pennsylvania Supreme Court's summary post-*Gray* dismissal of Greene's appeal is a rejection of the merits of his confrontation claim. As the Court explained in *Ylst v. Nunnemaker*, "[t]he essence of unexplained orders is that they say nothing. We think that a presumption which gives them *no* effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play."[138] In light of the Third Circuit's incontrovertible finding that "Greene fairly presented the factual and legal substance of his Confrontation Clause claim to the Pennsylvania state courts,"[139] the conclusion that *Ylst* dictates is that the Pennsylvania Supreme Court summarily affirmed the Superior Court's decision after being fully advised of the Court's holding in *Gray*. It is difficult to understand how the decision of the Pennsylvania Supreme Court to dismiss Greene's appeal is

135. Clemmons v. Delo, 124 F.3d 944, 948–49 (8th Cir. 1997) (footnote omitted).

136. 562 U.S. ___, ___, 131 S. Ct. 770, 785 (2011) ("[Section] 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.'").

137. *See* Pennsylvania v. Kelliher, 472 A.2d 1091, 1095 (Pa. Super. Ct. 1984) ("[T]he fact that [an order] is not to be cited for precedential value does not in any way detract from or minimize its legitimacy.").

138. 501 U.S. 797, 804 (1991) (emphasis added).

139. *Greene II*, 606 F.3d 85, 93 (3d Cir. 2010), *cert. granted sub nom*. Greene v. Fisher, 563 U.S. ___, 131 S. Ct. 1813 (Apr. 4, 2011) (No. 10-637).

not a decision for purposes of § 2254(d)(1). If certiorari had been granted to decide whether the summary denial of a claim properly presented to a state's highest court after an adverse ruling on the merits of the claim by an intermediate appellate court constitutes a decision under § 2254(d)(1), the answer would most certainly be in the affirmative.

The Court's recent habeas opinions express a clear desire to get federal courts out of the habeas business to the extent the Constitution will allow.[140] However, even this conservative Court has indicated that there are limits to what it will tolerate in the guise of streamlining, watering down, or eliminating the Writ of Habeas Corpus.[141] On choice of law issues, the Court has drawn a firm, bright line between direct appeal and collateral review and adhered to it in case after case. The equitable and policy considerations for doing so apply with equal force to Greene's predicament. "The prisoner always loses" is not a rule of statutory construction, even under the AEDPA. The Court's respect for the equitable roots of habeas corpus will not accept a

140. *See* Munaf v. Geren, 553 U.S. ___, 128 S. Ct. 2207, 2219 (2008) (holding it was an abuse of discretion for the district court to grant a preliminary injunction without even considering the merits of an underlying habeas petition); Bowles v. Russell, 551 U.S. ___, 127 S. Ct. 2360, 2366 (2007) (holding that a petitioner's untimely notice of appeal deprived the court of appeals of jurisdiction).

141. *See, e.g.*, Holland v. Florida, 560 U.S. ___ , 130 S. Ct. 2549, 2560 (2010) (holding that the AEDPA's one year statute of limitations is subject to equitable tolling); Boumediene v. Bush, 553 U.S. ___, 128 S. Ct. 2229, 2257 (2008) (finding that Congress suspended the Writ of Habeas Corpus when it attempted to eliminate habeas jurisdiction over Guantanamo detainees); House v. Bell, 547 U.S. 518, 555–56 (2006) (allowing a prisoner who is probably innocent to proceed on federal habeas notwithstanding procedural barriers); Rhines v. Weber, 544 U.S. 269, 277–78 (2005) (preserving the discretion of district courts to hold proceedings in abeyance while prisoners exhaust state remedies to prevent their claims from being time barred at the conclusion of state proceedings); Williams v. Taylor, 529 U.S. 420, 434 (2000) (finding that a prisoner who pursues his claims diligently in state court will not be barred from pursuing them on federal habeas); Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998) (allowing a successive habeas corpus petition to raise a claim of incompetence to be executed that could not have been raised in the prisoner's first petition, notwithstanding explicit language in the AEDPA forbidding second petitions). The common theme running through these and similar cases is that the Great Writ remains a powerful safeguard of individual rights. Diligent prisoners will get their day in court, even under the AEDPA.

rule that applies different versions of the same constitutional right to similarly situated prisoners. In spite of the Court's consistently conservative interpretation of the AEDPA, the smart money is on Greene to win.