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IN THE SUPREME COURT OF THE UNITED STATES

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ERIC GREENE, AKA JARMAINE Q. TRICE, :  
Petitioner :

v. : No. 10-637

JON FISHER, SUPERINTENDENT, STATE :  
CORRECTIONAL INSTITUTION AT :  
SMITHFIELD, ET AL. :

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Washington, D.C.

Tuesday, October 11, 2011

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 1:00 p.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, California; on  
behalf of Petitioner.

RONALD EISENBERG, ESQ., Deputy District Attorney,  
Philadelphia, Pennsylvania; on behalf of  
Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear  
argument next in Case 10-637, Greene v. Fisher.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you, Mr. Chief Justice,  
and may it please the Court:

Any decision announced from this Court  
before a State prisoner's conviction becomes final  
constitutes clearly established law for purposes of  
applying section 2254(d) of AEDPA. For decades, in  
fact, it has been a bedrock rule under Teague and  
Griffith that State prisoners are entitled to the  
benefit of decisions from this Court that come down  
before finality, and that rule has delivered fairness  
and clarity to an area that that this Court has  
acknowledged previously lacked it. There is no  
compelling reason to chart a new course now.

There is no doubt that AEDPA changed Federal  
habeas law in many important ways, but it did not change  
habeas law with respect to retroactivity, for under this  
Court's Teague jurisprudence States already had comity,  
as opposed to other areas. Now --

1 CHIEF JUSTICE ROBERTS: Mr. Fisher, we  
2 wouldn't have this problem, at least not in this case,  
3 if your client had -- had sought cert, right? Because  
4 then presumably when his petition came before the Court,  
5 our normal practice would have been to GVR it, because  
6 the decision would come out the other way under -- under  
7 Gray, right?

8 MR. FISHER: If this Court had GVRed the  
9 case -- if -- yes.

10 CHIEF JUSTICE ROBERTS: No, if he had sought  
11 cert.

12 MR. FISHER: Well, I -- well, I'm not  
13 sure --

14 CHIEF JUSTICE ROBERTS: You can't very well  
15 GVR it until he seeks cert.

16 MR. FISHER: Of course.

17 CHIEF JUSTICE ROBERTS: And I think it's  
18 kind of a glaring factual nuance to the case, kind of,  
19 that he didn't seek cert. And he also didn't seek State  
20 collateral review. I mean, if he had tried one of those  
21 or both of those, we -- we probably wouldn't be here.

22 MR. FISHER: Well, let me take those one at  
23 a time, Your Honor. First with -- with -- with the GVR  
24 request, if he had had counsel that would have advised  
25 him to seek cert, he may well have done it and this

1 Court may have GVRed, but realize that this Court isn't  
2 bound to do that. This Court has discretionary  
3 jurisdiction, and I don't think this Court wants to take  
4 on the responsibility of -- of deciding every single  
5 case that falls into a twilight zone situation.

6 You are going to have cases, like this one  
7 very well would have in light of what the Pennsylvania  
8 -- the State filed in its own Supreme Court -- wrapped  
9 up in procedural arguments, harmless error allegations,  
10 perhaps alternative State grounds. And this Court often  
11 has decided that habeas is a better place to work that  
12 out, not GVR. Now, it may well have GVRed, but it -- I  
13 don't think the Court wants to take on that  
14 responsibility.

15 JUSTICE BREYER: Why? I mean, normally a  
16 lawyer just looks to see what the docket is. And when  
17 there's a case that seems to affect his case, he asks  
18 for cert. And our practice normally, since I have been  
19 here, is where it implicates the case you hold it until  
20 the case is decided; then a writing judge or other  
21 people look through it and see if in fact it really does  
22 affect it and if it does, we GVR.

23 I mean, as a practicing lawyer here, have  
24 you discovered instances where we failed to do that, do  
25 you think?

1           MR. FISHER: Well, I can think of -- let me  
2 take it one step at a time. I think there are cases  
3 that this Court doesn't GVR. Because they are so  
4 procedurally complicated, the Court leaves it.

5           In fact, I can think of one case right now  
6 in California. After Melendez-Diaz there was a case  
7 called Geyer that came out of the California courts,  
8 that this Court did -- held for Melendez-Diaz but did  
9 not GVR, in part because I think the State was making  
10 harmless error allegations there. And now the States  
11 and California are trying to figure out what to do in  
12 light of that. So that's one example, but --

13           CHIEF JUSTICE ROBERTS: Normally I think if  
14 it looks like a mess procedurally, or whatever, the  
15 normal assumption is you let the lower court figure it  
16 out. Send it back, and I -- I think the research is  
17 that in actually most cases in which we GVR, the court  
18 reinstates the judgment below for one reason or -- or  
19 another; but the idea that we parse through them  
20 carefully -- I think if it's arguable, send it back and  
21 let the lower court sort it out.

22           MR. FISHER: Well, let me get back to  
23 Justice Breyer's question, with the assumption that if  
24 he has a lawyer he's going to bring it up here. Of  
25 course, Mr. Greene's right to appointed counsel under

1 Pennsylvania State law ended when the Pennsylvania  
2 Supreme Court dismissed his case.

3 JUSTICE KAGAN: Well, he doesn't --

4 JUSTICE KENNEDY: Let me ask -- let me ask  
5 it. There was a second half of the Chief Justice's  
6 question that you never got to.

7 MR. FISHER: Yes.

8 JUSTICE KENNEDY: But since we are on --

9 MR. FISHER: Yes.

10 JUSTICE KENNEDY: -- the GVR, I have one  
11 more question under the GVR, at least.

12 If you had sought -- if you had been  
13 counsel, you're not -- if you had been Greene's counsel  
14 and you had sought cert from this Court, you would have  
15 sought cert to the supreme -- the Superior Court of  
16 Pennsylvania, to the intermediate court, correct?

17 MR. FISHER: Correct, I think that's right.

18 JUSTICE KENNEDY: Which indicates that that  
19 is the decision that's -- that's involved here. And  
20 once that decision becomes final, then you have a  
21 problem.

22 If -- if -- if the protocol or the practice  
23 or the rules had been that you would seek cert to the  
24 Pennsylvania Supreme Court, then you might have had an  
25 argument about finality, but now you don't. But you can

1 get to that later, because the -- the Chief Justice had  
2 a second part of his question which was collateral.

3 MR. FISHER: Okay. So let me address that.

4 So there -- I don't think it is a given,  
5 Your Honor, that we would have been able -- Mr. Greene  
6 would have been able to bring this claim in the  
7 Pennsylvania State court. The -- the justices on -- the  
8 judges on the Third Circuit disagreed about that and  
9 it's unsettled under Pennsylvania law. But what is  
10 clear is that --

11 JUSTICE GINSBURG: But Respondent said you  
12 could.

13 MR. FISHER: Pardon me? .

14 JUSTICE GINSBURG: The Respondent in the  
15 brief said that if you had sought post-conviction relief  
16 in the State courts, then you could have argued Gray was  
17 the controlling decision, and they would have accepted  
18 that Gray.

19 MR. FISHER: They do say that now, Justice  
20 Ginsburg, and all I can say is we checked as hard as we  
21 could to find an actual case in Pennsylvania in the  
22 procedural posture of somebody going back in the  
23 situation, and we haven't found one --

24 CHIEF JUSTICE ROBERTS: The problem is  
25 that --



1           MR. FISHER: -- that either decides it or  
2 the State takes a position one way or the other. But  
3 there are many States -- you don't have to dwell on,  
4 just on Pennsylvania, because there are States -- we  
5 cite them in our brief -- that would not let somebody  
6 like Mr. Gray go into State court. And indeed, the  
7 amicus brief from the group of States I think is telling  
8 in its silence, that none of the 12 States that signed  
9 on to that brief are willing to say you could bring a  
10 claim like this in collateral review in our own  
11 State courts.

12           CHIEF JUSTICE ROBERTS: I appreciate your  
13 point that you may or may not have been able to bring  
14 it. My -- my concern is that you have, I guess as  
15 someone put it, the perfect storm here. You have a  
16 person who did not file cert, and he could well have  
17 gotten relief if he had, through the GVR process, and  
18 who did not seek State collateral review, and he could  
19 well have -- you say probably wouldn't. But the State  
20 said certainly would have. Somewhere in there. At  
21 least he would have had a fair chance --

22           MR. FISHER: Right.

23           CHIEF JUSTICE ROBERTS: -- or a chance. But  
24 because he didn't seek cert and he didn't file State  
25 collateral relief, we have this more complicated

1 scenario.

2 MR. FISHER: I think that's a fair  
3 statement, Your Honor. And the way you frame it,  
4 though, frames what sounds to me more like an exhaustion  
5 argument than it does about a statutory construction  
6 argument with respect to 2254(d).

7 And this Court has never held either that  
8 you have to seek cert in this court in order to exhaust  
9 State remedies, nor to take a -- to take a claim back to  
10 State collateral review that you have already taken up  
11 through the State direct review system. So if we had an  
12 exhaustion case in the future, maybe somebody would make  
13 that argument. But that's not what is before you today.  
14 What's before you today is the hypothetical that -- that  
15 Mr. Greene actually did seek cert and for some reason  
16 this didn't GVR, or he did seek review in the  
17 Pennsylvania courts and they refused to hear it.

18 And under the State's position, even then  
19 you would bar him from getting the reliance on Gray,  
20 because Gray came down after the Pennsylvania Supreme --  
21 I'm sorry -- the Pennsylvania Superior Court decision.

22 JUSTICE GINSBURG: Well, apparently the  
23 Pennsylvania Supreme Court thought that he hadn't  
24 properly raised it. I mean, they initially granted  
25 review post Gray, and then they found that the grant was

1 improvident most likely because Greene had not raised  
2 the -- the Gray issue below.

3 MR. FISHER: Well, he very much had raised  
4 the Gray issue below, Justice Ginsburg. You're  
5 absolutely right that the State, faced with really no  
6 alternative but to try to argue waiver, did argue waiver  
7 in the Pennsylvania Supreme Court, which did dismiss the  
8 case. But of course the order doesn't say why it  
9 dismissed the case. And we litigated that very issue in  
10 the lower courts, and the Third Circuit squarely held  
11 that Mr. Greene had in fact preserved his claim in the  
12 Pennsylvania courts and on top of that, the Pennsylvania  
13 Superior Court had reached it and resolved -- understood  
14 him to be raising a Gray type argument and resolved it  
15 by citing a Pennsylvania case that had previously held  
16 that just putting an X in place of -- in place of the  
17 defendant's name -- was good enough to satisfy Bruton.

18 JUSTICE ALITO: How can you -- how can you  
19 square your position with what 2254(d) says, that there  
20 must be an unreasonable application of clearly  
21 established law? What the intermediate appellate court  
22 did was not an unreasonable application or -- let's  
23 assume for the sake of argument it was not an  
24 unreasonable application of clearly established law when  
25 they did it. So how do you get around that one?

1 JUSTICE KENNEDY: And just to follow up on  
2 that question, the statute says it was "adjudicated,"  
3 past tense, and the decision "resulted in," past tense.

4 MR. FISHER: Right. We don't disagree that  
5 it's a backward-looking statute. There is a  
6 retroactivity cutoff. The question is where is it? And  
7 we don't contend, Justice Alito, that it's an  
8 unreasonable application. We contend that there is more  
9 statutory language that is contrary to --

10 JUSTICE KENNEDY: What you said -- you don't  
11 contend that -- what's --

12 MR. FISHER: There's two prongs --

13 JUSTICE KENNEDY: You said you don't contend  
14 that, and I didn't hear -- was an unreasonable? I just  
15 didn't hear it.

16 MR. FISHER: Yes. Justice Alito cited one  
17 prong of 2254(d) which is unreasonable application.

18 JUSTICE ALITO: And the other is it was --

19 MR. FISHER: I think the more natural --

20 JUSTICE ALITO: It was contrary to. How was  
21 it contrary to?

22 MR. FISHER: It was contrary to this Court's  
23 clearly established law as of the date of finality. So  
24 you have a statute that says it has to be -- it resulted  
25 in a decision that was contrary --

1 JUSTICE SCALIA: Yes, the decision -- what  
2 decision did the Supreme Court of Pennsylvania make  
3 other than the decision not to hear the case?

4 MR. FISHER: No, it's the decision from the  
5 Pennsylvania Superior Court, Justice Scalia, that is  
6 contrary to clearly established law as of the date of  
7 finality.

8 JUSTICE GINSBURG: Not as of the date they  
9 made it.

10 MR. FISHER: That's not the date they made  
11 it, no. But the question of contrary to, as this Court  
12 said in Williams and has repeated many times, is whether  
13 the lower court either did one of two things: Decided a  
14 case -- decided the case with a question of law and  
15 decided the question of law opposite of how this Court  
16 has decided it; or decided the case differently than  
17 this Court has in another case on materially  
18 indistinguishable facts.

19 JUSTICE KAGAN: Well, how do you square your  
20 argument with Pinholster? Because I thought that what  
21 we said in Pinholster just last year is no Monday  
22 morning quarterback. We put ourselves in the position  
23 of the Court at the time. We look at what the Court  
24 looked at. We know what the Court knew, and we make the  
25 decision -- and we made the decision on that ground.

1 And it seems to me that your argument just runs smack  
2 into that holding.

3 MR. FISHER: Justice Kagan, no, we don't  
4 think it does, because there has always been a  
5 difference between facts and law. So this Court of  
6 course held in *Pinholster* that you look at the factual  
7 record that existed before the State court, but ordinary  
8 appellate review and principles have always allowed new  
9 law to be considered up to a certain point.

10 So it's consistent with *Pinholster* to say  
11 you take the set of facts, just as you would from a  
12 trial court, but that new law up to the point of  
13 finality is -- can be considered.

14 JUSTICE KAGAN: Well, I understand how there  
15 can be a distinction between facts and law for many  
16 purposes, but *Pinholster* rested on a view of the  
17 statute, which was basically the view that Justice Alito  
18 gave you, which said everything in the statute is framed  
19 in the past tense. What the statute is getting at is --  
20 is the decision at the time the State court made it.

21 MR. FISHER: We don't -- again, we don't  
22 disagree at all that it's in the past tense. The  
23 question is where in the past is the cutoff? So what we  
24 say is -- and it's important what this Court did say in  
25 *Pinholster*. In *Pinholster*, it didn't say that the plain

1 language of 2254(d) resolved this. It said that -- I  
2 think I'm going to get this quote right -- that the  
3 structure of the statute compelled the conclusion that  
4 for facts you leave the window. Well, the structure of  
5 this statute as to law compels the opposite conclusion.

6 JUSTICE GINSBURG: Why?

7 MR. FISHER: For a few reasons --

8 JUSTICE GINSBURG: The statute says  
9 adjudication resulted in a decision, and the decision,  
10 the only decision, is the Pennsylvania Superior Court,  
11 because there was a non-decision by the Pennsylvania  
12 Supreme Court, resulted -- that if -- in a decision that  
13 was -- didn't say "is" -- I mean, you would have a much  
14 stronger argument if it had read "resulted in a decision  
15 that is contrary." But when it says "was," that sounds  
16 like at the time of the adjudication.

17 MR. FISHER: Well, Justice Ginsburg, if I  
18 can get this point across. I'm not saying "is," because  
19 then there would be no retroactivity cutoff whatsoever.  
20 I agree that the statute says "was," but it's was as of  
21 when? We say "was" as of the time of finality. The  
22 State wants to read into the statute "was" as of the  
23 time the decision was made. So that's the question you  
24 have.

25 And if you look to the structure of the

1 statute, you will see lots of clues that Congress didn't  
2 intend to change the previous clear retroactivity cutoff  
3 at Teague. And of course, that's a barrier the State  
4 has to overcome here, clear and specific change in law.  
5 If you look at the limitations provision, it references  
6 finality. If you look at various provisions of the  
7 statute that reference retroactivity law, they reference  
8 new rules in retroactivity. And this Court has held in  
9 Tyler v. Cain that Teague is what Congress had in mind  
10 when it did that --

11 JUSTICE SOTOMAYOR: How do you get past  
12 Horn? Horn says that -- that Teague and AEDPA are two  
13 different analyses that each case must undergo. That  
14 you start with, okay, what does Teague say, but you then  
15 look at what AEDPA says, and that each can serve as an  
16 independent bar. So if that's the case, how do you get  
17 around AEDPA's requirement of a past-looking statute  
18 being one that involves the adjudication, and whether at  
19 its time, it was contrary to Supreme Court precedent?

20 MR. FISHER: Justice Sotomayor, we think  
21 Horn is another structural component of the statute that  
22 shows why we win. And let me explain why. Again, we  
23 don't disagree it's a backward-looking statute, but  
24 backward-looking to finality. Now, what Horn held --  
25 Horn rejected a form of the very same argument that the



1 State is making today, which is 2254(d) changes  
2 retroactivity law to establish the cutoff at the time of  
3 the State court decision, not as of finality. This  
4 Court rejected that argument and said, no, Teague and  
5 2254(d) are distinct. And we think the best way to  
6 understand them as distinct is to understand that  
7 2254(d) deals with a standard of review, and Teague  
8 still continues to control finality.

9 Now, in light of Horn -- I'm sorry --  
10 retroactivity. Now in light of Horn on the books, if  
11 the State were right that what 2254(d) was actually  
12 trying to do was also do retroactivity work and prevent  
13 the State courts from, as it put in its brief, from  
14 being "blind-sided," then Teague would serve -- no  
15 longer serve any purpose, and Horn would have had to  
16 come out the other way, because once you say 2254(d) is  
17 actually concerned with setting a cutoff at the time of  
18 the last State court decision for retroactivity  
19 purposes, you don't need Teague any more. So Horn would  
20 have had to come out the other way if the State is  
21 right.

22 Now, let me go back to one other structural  
23 feature of the statute that explains -- that shows that  
24 Congress had in mind that Teague would continue. That's  
25 the one I referenced earlier with respect to

1 retroactivity. Keep in mind the State's argument would  
2 bar not just somebody like Greene from relying on a new  
3 case like Gray, but it would also -- the implication  
4 would be -- it would bar him from relying on a new case  
5 like Roper v. Simmons, Graham v. Florida, or other cases  
6 that alter substantively -- say the Constitution can no  
7 longer cover or punish substantive conduct in a certain  
8 way. Because again, if Teague is out of the picture --

9 JUSTICE KENNEDY: Now, and of course those  
10 are ongoing injuries where the person continues to be  
11 confined.

12 MR. FISHER: Well -- but, no, the State's  
13 rule --

14 JUSTICE KENNEDY: I'm not sure there is an  
15 ongoing injury here. All we are doing is talking about  
16 a trial error. That's -- that's different than --

17 MR. FISHER: It's not different -- under the  
18 State's view of AEDPA, Justice Kennedy. Remember, the  
19 State's view of AEDPA is that if a decision comes down  
20 after the lay state court's decision on the merits, then  
21 the defendant cannot seek relief based on it. And then  
22 page 38 of the red brief, in footnote 12, they try to  
23 deal with this problem, but not in a satisfactory way.  
24 And it's not an abstract problem. If I give this Court  
25 a few citations -- if you'll permit me to give you three

1 citations of working through the lower courts right now  
2 that raise Roper, Graham and Adkins claims, that the  
3 lower court's the only way they have reached them is by  
4 saying that Teague still has -- has a role to play with  
5 respect to 2254(d).

6           And the three citations, if I can give them  
7 very quickly, are Arroyo 362 F.Supp. 2nd 869, Holiday  
8 339 F.3d 1169, and Simms 2007 Westlaw 1161696. Again,  
9 that's another structural feature of the statute that  
10 the State simply can't get around with this -- with its  
11 view. Now, some of the lower courts haven't quite  
12 focused on this, and in fact, it's because for many,  
13 many years after AEDPA was passed, States didn't even  
14 make the argument that you have before you today. All  
15 the way through Smith v. Spisak, which came to this  
16 court just a couple of years ago, the State of Ohio for  
17 example was not even making this argument, which is  
18 quite odd -- if you step back for a moment and realize  
19 that the State's position today is that the plain text  
20 of AEDPA is so clear that there is no possible way you  
21 could read it in any other direction.

22           JUSTICE GINSBURG: Mr. Fisher, what about  
23 the -- the purpose of AEDPA was to require the Federal  
24 courts to respect the State courts' decisions. And  
25 there's only been one decision in this picture, and that

1 decision was the Pennsylvania Superior Court. And we  
2 are not giving much respect to that decision, which did  
3 not have the benefit of Gray, if we're going to say, no,  
4 we have to look at that decision as though Gray were  
5 already on the books.

6 MR. FISHER: Justice Ginsburg, let me answer  
7 that question by starting, if I may, before AEDPA,  
8 because before AEDPA under Caspari and Teague there is  
9 no doubt whatsoever that that is what a Federal habeas  
10 court would have done, is say the cutoff is finality.  
11 Because, remember, finality doesn't exist in a vacuum.  
12 It exists against the Griffith rule. So what Federal  
13 courts had always asked is, did the defendant not get  
14 credit for a case that he's entitled to under Griffith?

15 So the question is did AEDPA change that  
16 rule. And Justice Ginsburg, you asked about the purpose  
17 or spirit of AEDPA. We think what the spirit of AEDPA  
18 is, is to give States deference and to give them comity  
19 where they otherwise didn't have it at the time. And so  
20 it changed the standard of review, it changed the  
21 statute of limitations, but it didn't need to change  
22 Teague. It didn't need to change retroactivity because,  
23 as this court had explained in Teague itself, in Justice  
24 Kennedy's long opinion in Wright v. West concurring, the  
25 very purpose of Teague was to give States the comity

1 that -- of not foisting new law upon them.

2           So you do end up, of course, in this  
3 situation, which is I think we called it earlier the  
4 twilight zone or perfect storm situation. But this is  
5 something that this Court saw coming under Teague and  
6 long ago, even though even under those cases this Court  
7 said the purpose of retroactivity law is not to hold the  
8 State responsible for something new.

9           So the question is why do we have this  
10 twilight zone under Teague and why should it continue  
11 today, and the answer again is because Teague doesn't  
12 exist in a vacuum; it works in tandem with Griffith.  
13 Remember, what Griffith said is that it violates basic  
14 norms of constitutional adjudication for a defendant to  
15 not get the credit for a decision that this court  
16 announces before his State conviction becomes final.

17           So Teague is necessary as the other side of  
18 the coin to make Griffith work. And to undo all of that  
19 and to go back to an unsettled state of retroactivity  
20 law, whether it's Linkletter or something else, is going  
21 to really cause problems. Let me give you one other  
22 image that the States' situation --

23           JUSTICE GINSBURG: Well, I don't understand  
24 the problem. If you look at the Pennsylvania Superior  
25 Court decision and say, as of that time it was no

1 violation of any clearly established law, period. Why  
2 is that complicated?

3 MR. FISHER: Here's why, Justice Ginsburg.  
4 Take the typical case, and maybe you will put in your  
5 mind, for example, the Martinez oral argument you had  
6 last week. A typical case works its way through the  
7 State courts. There is going to be an appeal as of  
8 right in the State intermediate court, where all the  
9 claims the defendant brings can be addressed.

10 Then what might happen quite often is the  
11 State Supreme Court is going to hear, like this Court  
12 does, maybe one or two of those claims and address them  
13 on the merits. Then he's going to go into State  
14 collateral review and bring an IAC claim, an ineffective  
15 assistance of counsel claim, and maybe whatever other  
16 claim he couldn't have brought earlier.

17 Under the State's rule, you have three  
18 different retroactivity cutoffs for different claims  
19 that are brought and adjudicated at the different parts  
20 of that regime. You have a retroactivity cutoff at the  
21 intermediate court for certain claims, a retroactivity  
22 cutoff at the Pennsylvania -- I'm sorry; the State  
23 Supreme Court for certain other claims; and a  
24 retroactivity cutoff in finality for certain other  
25 claims. And we think that's just unwieldy and, not only

1 that, it's just difficult.

2 CHIEF JUSTICE ROBERTS: Well, but it seems  
3 to me that AEDPA contemplates that. It refers to any  
4 claim that was adjudicated on the merits in State court  
5 proceedings. So naturally you would have a different  
6 result with respect to claims that were adjudicated on  
7 direct review and any claim that was pushed over to  
8 collateral review.

9 MR. FISHER: It does tell you to go on a  
10 claim by claim basis, that's right. And therein lies  
11 the difficulty. With our system you simply look at the  
12 date of finality for purposes of any claim being  
13 adjudicated on Federal habeas. Under the State system  
14 you have to go claim by claim with different dates and  
15 have arguments, as this court did in Pinholster, for  
16 example, about whether this claim is the same claim that  
17 was brought, or the State supreme court decided this  
18 claim but not the other claim, and whether the States --

19 CHIEF JUSTICE ROBERTS: Well, I'm sorry, but  
20 i mean, my point is that it seems a pretty weak  
21 criticism of a result that it requires you to go claim  
22 by claim, when the statute specifically requires you to  
23 go claim by claim.

24 MR. FISHER: No, I --

25 CHIEF JUSTICE ROBERTS: The objection there

1 it seems to me would have to be with Congress.

2 MR. FISHER: I'm not objecting to the  
3 claim-by-claim nature of the approach. I'm just saying  
4 it would be unwieldy and administratively difficult and  
5 therefore I think you can question whether Congress  
6 would have contemplated not just going claim by claim  
7 for purposes of adjudication, but for purposes of  
8 retroactivity analysis. And it just is going to create  
9 problems that I don't think anyone would argue, and I  
10 don't think the State has even intended that Congress  
11 had any of this in mind when it passed this.

12 JUSTICE BREYER: I'm having trouble  
13 following it. It may be my fault. But the -- suppose  
14 the Supreme Court has now some kind of interpretation of  
15 something that's new. Now, there are going to be a wide  
16 range of people that that many might apply to whose  
17 convictions became final or just about final in State  
18 courts at different times. So it's obviously always  
19 going to be somewhat unfair and somewhat arbitrary that  
20 it applies to some and not to others. So what is the  
21 problem here? What -- the reading of the statute on the  
22 other side says: I'll tell you who it applies to or who  
23 it doesn't apply to. It doesn't apply to people who are  
24 the last State court decision was made before the  
25 Supreme Court made its decision. That's it. Now,



1 that's arbitrary somewhat, but you have to cut and draw  
2 a line somewhere.

3 MR. FISHER: I think, Justice Breyer --

4 JUSTICE BREYER: What's the problem? Why is  
5 that complicated?

6 MR. FISHER: You are right there is  
7 arbitrariness built into any cutoff. The State makes  
8 this point in its brief. But by disjoining habeas law  
9 from Griffith, you are going to create a whole new level  
10 of arbitrariness that we think is undesirable and  
11 unnecessary.

12 So for example, in a situation like this  
13 everything is going to turn on whether a State supreme  
14 court grants review and ultimately disposes an issue on  
15 the merits. And many State supreme courts might take  
16 the view that, well, hey, if the State supreme court --  
17 if the U.S. Supreme Court has just decided this issue  
18 and we don't have any new law to make here, this isn't  
19 worth our time. So we're just going to let it go.

20 JUSTICE BREYER: Or the person would say:  
21 Look, the State supreme court has -- we are under a  
22 decision here the exact opposite of what the United  
23 States Supreme Court held; will you please either take  
24 our case and hear it or at least send it back to the  
25 lower court? And wouldn't most State supreme courts do

1 it?

2 MR. FISHER: I think many State supreme  
3 courts -- I think there is a possible two questions you  
4 asked. One is whether State supreme courts in that  
5 situation would themselves GDR back to the immediate  
6 court. Pennsylvania by our estimation doesn't seem to  
7 do that. And many State supreme courts don't do it.  
8 They don't have to do it. And again you have the  
9 problem, if you are going to rely on somebody to bring  
10 the case up to this Court and say that's the only way  
11 that he can get benefit of the new decision, I think  
12 this Court -- I know it's counterintuitive, but you are  
13 going to have to take a hard look, not just at fairness  
14 and equity, but at this Court's right to counsel  
15 jurisprudence, and ask yourself whether somebody under  
16 the Halbert test who has a right to have a decision on  
17 the merits of that claim and that's the only time it can  
18 be litigated, therefore has to have the right to counsel  
19 because he couldn't otherwise navigate the process.

20 JUSTICE KAGAN: I don't understand --

21 MR. FISHER: If I could reserve --

22 JUSTICE KAGAN: -- that, Mr. Fisher, because  
23 you want to do this in Federal habeas, where there is no  
24 right to counsel either. So what difference does it  
25 make?

1 MR. FISHER: Well, there is at least a  
2 back-up, a back-up that doesn't exist today -- or I'm  
3 sorry, that wouldn't exist under the State's rule. So  
4 the difference it would make would be he would have a  
5 second chance to bring the claim where if he brought it  
6 the district courts often would appoint counsel.

7 If I could reserve the balance of my time.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 Mr. Eisenberg.

10 ORAL ARGUMENT OF RONALD EISENBERG

11 ON BEHALF OF THE RESPONDENTS

12 MR. EISENBERG: Mr. Chief Justice and may it  
13 please the Court:

14 Every relevant word in the statute and every  
15 relevant precedent to this Court points to the same  
16 place, to the law as it existed at the time of the State  
17 court decision. That's the body of law that must be  
18 used in deference analysis. Now --

19 JUSTICE SOTOMAYOR: One part of your  
20 argument that -- one part of your argument that troubles  
21 me is what if those 12 States that don't have the right  
22 to collateral review -- what do we do with the two  
23 Teague exceptions?

24 MR. EISENBERG: Your Honor, as we addressed  
25 in our brief at footnote 12, as Petitioner referred, we

1 believe that Teague exceptions clearly would survive  
2 review. The reason for that is really a two-step  
3 process. Number one, in most States -- and perhaps  
4 hypothetically there will be somewhere where this isn't  
5 true, but Petitioner hasn't identified -- has identified  
6 no more than two that I can see in its brief.

7 In most States the defendant will receive  
8 review of the Teague exception on State collateral  
9 review. We want him -- AEDPA calls on him --

10 JUSTICE SOTOMAYOR: Don't worry about the  
11 States that do.

12 MR. EISENBERG: Okay.

13 JUSTICE SOTOMAYOR: I asked -- my  
14 hypothetical was assuming there are some that don't.

15 MR. EISENBERG: Of course, Justice  
16 Sotomayor. As to those relatively few States that  
17 hypothetically might not, the defendant goes to Federal  
18 court and, because this is a Teague exception -- and  
19 they are exceptions because they are exceptional. He  
20 has a number of existing habeas doctrines to rely on:  
21 Causing prejudice, actual innocence, inadequate State  
22 grounds. And he is quite likely in the Teague exception  
23 case to be able to get through the default of not having  
24 had an adjudication in State court and he will have not  
25 only review in Federal court, but he will have de novo

1 review in Federal court, because there was no ruling on  
2 the merits. So not only will he have Federal court  
3 review, but it won't be deferential review in that  
4 circumstance.

5           If the State did allow the review of the  
6 Teague exception, then he will have deferential review.  
7 And in fact this question has been debate by the Court  
8 before. It came up in oral argument in Whorton v.  
9 Bockting. One of the amicus briefs in that case  
10 actually addressed the question empirically, looked at  
11 one of the most recent candidates for first Teague  
12 exception status which was the mental retardation rule  
13 of Adkins v. Virginia, and in the appendix to the brief  
14 found that no state had barred review of the Adkins  
15 claim even though it was not even officially declared  
16 yet to be a Teague exception.

17           We think that is what would happen with  
18 these exceptions. Of course, this case doesn't concern  
19 a Teague exception and so really the only question here  
20 is whether a ruling in favor of the State would  
21 inadvertently determine that question for future  
22 purposes. I think our argument is adequate at least to  
23 show that the question remains why it can be safely left  
24 for another day.

25           JUSTICE ALITO: Your answer is that the

1 State in that situation, the State courts in that  
2 situation would entertain the claim. But what if they  
3 didn't?

4 MR. EISENBERG: If they didn't, Your Honor,  
5 then the defendant can surmount whatever procedural bar  
6 that would constitute when he got the federal habeas in  
7 the Teague exception case.

8 JUSTICE ALITO: How?

9 MR. EISENBERG: By arguing -- the most  
10 likely Teague exception would be a first exception; not  
11 the second exception; not the watershed rules which are  
12 few and far between if any still remain to be  
13 discovered. That exception fits very neatly with the  
14 actual innocence --

15 JUSTICE KENNEDY: What is that cause and  
16 prejudice?

17 MR. EISENBERG: Actual innocence.

18 JUSTICE KENNEDY: Oh, actual innocence.

19 MR. EISENBERG: Actual innocence because --

20 JUSTICE SOTOMAYOR: But we haven't decided  
21 whether actual innocence.

22 MR. EISENBERG: Actual innocence, Your  
23 Honor, is well established as a way to get around a  
24 procedural default on Federal habeas.

25 JUSTICE SOTOMAYOR: Whether it's well

1 established is another issue.

2 MR. EISENBERG: I don't mean actual  
3 innocence as being an independent free-standing habeas  
4 claim. I mean as a gateway to merits review. That is  
5 well established. And the first Teague exception by  
6 definition deals with people who essentially didn't  
7 commit the crime. The nature of the exception is that  
8 the State did not have the constitutional power to make  
9 that a crime.

10 JUSTICE ALITO: What if it was a case like  
11 Gideon v. Wainwright?

12 MR. EISENBERG: That would be the watershed  
13 exception rule, Your Honor. Again I believe that the  
14 states would generally and have empirically entertained  
15 those claims. If the state did not -- I believe if the  
16 defendant would have the right to say that because of  
17 the watershed nature of the rule, the State's failure to  
18 entertain the claim was an inadequate state ground for  
19 blocking review in Federal court. And I think that  
20 would be an appropriate application of the doctrine.

21 I think as Justice Kagan stated earlier, or  
22 suggested by her question, Pinholster really does  
23 resolve this claim, even in addition to the language of  
24 the case.

25 Petitioner argues the facts in law are

1 different. And they might be to some extent but  
2 actually law is an easier question for the issue that is  
3 presented here. And Pinholster did not simply tell us  
4 that new facts couldn't be considered, but the premise  
5 of the decision was that since new law couldn't be  
6 decided, neither could new facts. The statute is  
7 phrased in the past tense. As the Court said, the  
8 entire statute is backward looking. There was no --  
9 nothing about the statute --

10 CHIEF JUSTICE ROBERTS: I'm sorry. If I  
11 could just go back to your Pinholster point. Your  
12 friend makes the argument that of course in a typical  
13 appellate case, you don't go back and revisit the facts,  
14 but that appellate court is expected to apply the law at  
15 the time it renders its decision. So there is that  
16 distinction between law and facts that seems to cut in  
17 his favor.

18 MR. EISENBERG: Well, Your Honor, the only  
19 decision that was rendered in this case did apply the  
20 law as it existed at the time.

21 CHIEF JUSTICE ROBERTS: I'm talking more  
22 generally, the idea that Pinholster adequately applies  
23 to this situation. It applies to facts, therefore it  
24 applies to law. The distinction in that context between  
25 law and facts, the general context strikes me as one



1 that supports his argument that there are at least not  
2 tied at the hip and have to be treated the same way.

3 MR. EISENBERG: Your Honor, I think that  
4 Pinholster was somewhat more specific than that. It  
5 stated that -- the statute was backwards looking in its  
6 entirety, certainly with no exceptions for law. After  
7 all, (d)1 is about law. It doesn't mention the word  
8 facts or evidence; it mentions only the word "law." And  
9 the Court had to move from that to its decision about  
10 facts.

11 Number 2, in Pinholster the Court  
12 specifically said that it was relying on prior  
13 precedence. And it used the word "precedent" to  
14 describe the prior decision.

15 For the proposition that our case has  
16 emphasized that review under 2254(d)1 focuses on what a  
17 State court knew and did. State court decisions are  
18 measured against this Court's precedent as of the time  
19 the State court renders its decision. The jumping off  
20 point, so to speak, for the Court's extension of the  
21 principle the effect that we are debating today to the  
22 area of new facts. And I don't think there is any way  
23 to reconcile that holding with the Petitioner's argument  
24 or with the language of the statute.

25 Now the Petitioner argues that this is

1 necessary in order to give the defendant his rights  
2 under Griffith v. Kentucky. But as I think the Chief  
3 Justice's questions illustrate, he had those rights. He  
4 was entitled to seek review on direct appeal as long as  
5 it lasted of whatever new rules came out before the  
6 point of finality. He was entitled to seek  
7 discretionary review in the State Supreme Court. He was  
8 entitled to seek discretionary review in this Court.  
9 Had he done so, I think --

10 CHIEF JUSTICE ROBERTS: What is the State  
11 hypothetical, and I don't mean to give you an  
12 opportunity for a self-serving answer, but would the  
13 State have done if he filed a petition and said: my  
14 case was controlled by Gray; you the Supreme Court  
15 should grant, vacate and remand. Are you aware of  
16 situations where the State has agreed with such a  
17 request?

18 MR. EISENBERG: Yes, Your Honor. In fact,  
19 we think there are hundreds of cases in which the State  
20 court has granted, vacated, and remanded. I know that  
21 Petitioner said that --

22 CHIEF JUSTICE ROBERTS: No, no. I'm talking  
23 about your office's position in responding to a petition  
24 for cert. Have you ever said: Yes, Gray controls,  
25 that's different, you, the Supreme Court?

1                   MR. EISENBERG: I'm not sure I have seen any  
2 cases like that other than this one where this as you  
3 said perfect storm actually occurred. In this case  
4 that's not what we said, and that's because we thought  
5 that there had been an affirmative abandonment of the  
6 method of redaction claim by defendant. But if the  
7 State court as it did here decides not to grant review,  
8 then of course the defendant is free to come to this  
9 Court. The point is that under Griffith the defendant  
10 obviously doesn't have any more of a right than to go to  
11 the courts that are up the chain, and which at a certain  
12 point exercises discretionary review.

13                   JUSTICE KENNEDY: Is Griff constitutional  
14 case?

15                   MR. EISENBERG: Your Honor, I believe it was  
16 a constitutional interpretation, but that's a right that  
17 the defendant has.

18                   JUSTICE KENNEDY: Would the Congress of the  
19 United States have the authority looking at this case to  
20 direct Federal courts to issue habeas in this -- on  
21 these facts?

22                   MR. EISENBERG: I think that the Congress  
23 could have written the AEDPA in order to allow review  
24 here. But I don't think that they did.

25                   JUSTICE KENNEDY: Then is that then a

1 restriction on habeas corpus?

2 MR. EISENBERG: I think that AEDPA puts a  
3 restriction on habeas corporation, Your Honor. And in  
4 most cases, in most aspects of AEDPA put far more of a  
5 restriction than exists in this case.

6 JUSTICE KENNEDY: Is there a rule of  
7 constitutional avoidance that we should interpret the  
8 statute to avoid? Any inference that there is a  
9 restriction on habeas corpus?

10 MR. EISENBERG: No, Your Honor. I think  
11 it's clear from prior case law that the AEDPA does not  
12 constitute an unconstitutional restriction of habeas.  
13 The defendant here does not argue that the restriction  
14 --

15 JUSTICE KENNEDY: No. That's not argued. I  
16 agree.

17 MR. EISENBERG: And I think it is clearly  
18 not -- this is a relatively minor restriction on AEDPA  
19 review compared to the deference rule in and of itself,  
20 which the Court has characterized as a fundamental  
21 bedrock principle of AEDPA.

22 JUSTICE KENNEDY: While we are discussing--  
23 on a different point. What response do you make to Mr.  
24 Fisher's point about Graham and Roper v. Simmons?

25 MR. EISENBERG: Your Honor, if those kinds

1 of cases amount to a Teague exception, then for the  
2 reasons I have explained I think that those will be  
3 subject to review on Federal habeas corpus. If they are  
4 not, if they don't need to --

5 JUSTICE KENNEDY: Do they meet the Teague  
6 exception?

7 MR. EISENBERG: Your Honor, I don't know  
8 whether any particular new rule meets the Teague  
9 exception standards. Those are high standards and they  
10 should be. They are exceptional. But for the normal  
11 new rule --

12 JUSTICE KENNEDY: To me it's not a question  
13 of a new trial. It's a question of looking at a  
14 continuing sentence and seeing validity of a continuing  
15 sentence.

16 MR. EISENBERG: I think there are certainly  
17 good arguments that those kinds of rules would not  
18 qualify as Teague exceptions, Your Honor. It's going to  
19 be a rare circumstance. And as I said the only one that  
20 even arguably in recent years would seem to fit well  
21 into the first Teague exception, that is the Adkins  
22 case, the State courts have allowed review.

23 JUSTICE BREYER: How does that happen if --  
24 let's imagine Smith is convicted of some kind of  
25 disorderly conduct and he goes to the State courts and

1 it's upheld. And then sometime thereafter I am being  
2 vague on how much time. Maybe it's a couple of months  
3 or something. The Supreme Court says that particular  
4 kind of conduct is protected by the First Amendment. So  
5 now it falls within its exception for: you can't  
6 criminalize this.

7 Now habeas is filed. Smith files habeas.  
8 Well how can you get that heard? Because this  
9 particular provision says that unless it was clear at  
10 the time under, in your view, of the State statute, the  
11 final state decision on the matter, you can't get into  
12 habeas. How wasn't it clear?

13 MR. EISENBERG: The defendant should go  
14 first to the State court once the new Teague exception  
15 is established, Your Honor. And if he doesn't, if he  
16 goes to Federal court first --

17 JUSTICE BREYER: He goes to State court  
18 under a collateral review.

19 MR. EISENBERG: Yes, Your Honor.

20 JUSTICE BREYER: Suppose there is no such --

21 MR. EISENBERG: Then I think we have Justice  
22 Sotomayor's question, Your Honor. And the answer is  
23 that in that case the defendant can argue that the  
24 State's failure to provide review constituted a bar that  
25 he is allowed to circumvent by the existing doctrine in

1 habeas corpus.

2 JUSTICE BREYER: This is quite far out, but  
3 conceivable. You argue that in the State court the  
4 State -- you would have to go to collateral review in  
5 State court and argue that they now have to apply the  
6 new rule.

7 MR. EISENBERG: Yes, Your Honor, and that's  
8 appropriate because of course AEDPA wants the State  
9 court to have the first chance to review. If the State  
10 court refuses to do so, then he can circumvent the bar.  
11 If the State court does so, then the State court's  
12 review on the merits on the new rule becomes the law  
13 that will be applied, the clearly established law that  
14 will be applied.

15 Your Honor, I think it's -- Your Honors, I  
16 think it's important also to remember here that -- that  
17 Teague has not been abolished by 2254, its role has  
18 certainly been reduced, but that is true of many aspects  
19 of AEDPA.

20 JUSTICE GINSBURG: What's left of it?

21 MR. EISENBERG: What's left of it primarily,  
22 Your Honor, is the situation where there is no merits  
23 decision in the State court. And we've just described  
24 one example of that in the Teague exception case where  
25 the State refuses to provide merits review, but there

1 will be many others where the State asserts a default  
2 and the defendant is able to overcome them through cause  
3 and prejudice, et cetera.

4 In those cases the defendant, for purposes  
5 of 2254, wouldn't be barred because there is no merits  
6 determination. But Teague might still bar him if the  
7 new rule on which he seeks review is one that came down  
8 after the point of finality.

9 Teague is not a guarantee of rights to the  
10 defendant. Griffith was the guarantee of rights to the  
11 defendant, and the defendant received his Griffith  
12 rights. Teague is a bar to review. AEDPA is a bar to  
13 review. There are two separate bars that overlap to  
14 some degree but work in different ways.

15 Another example of a situation where --

16 JUSTICE KAGAN: And if it was the case that  
17 Congress supplanted Teague to the extent that you said  
18 it did, why is it, as Mr. Fisher says, that it took  
19 States upwards of 10 years to figure this out?

20 MR. EISENBERG: Your Honor, I'm not sure if  
21 I agree with that factually. In the Spisak case, for  
22 example, I don't know that it was necessary for the  
23 State to make that argument. The State thought it had a  
24 strong argument on the merits. That's exactly what  
25 happened in Horn v. Banks, as well, Your Honor, which is



1 a case that actually supports our position. In that  
2 case, the State court applied on collateral review the  
3 rule of Mills v. Maryland. Now this Court later held in  
4 that same case that Mills was a new rule that would be  
5 Teague-barred, but the State didn't know that at that  
6 time, and the State had a well established body of law  
7 applying Mills. And thought -- the State thought it  
8 could reasonably dispose of the claim on merits of the  
9 Mills issue, so it did so.

10 The case came to Federal habeas corpus  
11 review. It wouldn't have been barred, review on the  
12 merits would not have been barred by 2254 because the  
13 State collateral review court applied Mills and made a  
14 merits determination. So the defendant would have been  
15 entitled to merits review under the deferential  
16 standard.

17 The problem is Mills was a new rule and so  
18 the independent bar of Teague comes into play. The  
19 Third Circuit refused to apply that independent bar;  
20 that's why this Court reversed in Horn v. Banks; and so  
21 it neatly many illustrates another example of a  
22 situation where Teague actually does survive despite  
23 2254.

24 There are other doctrines that, based on  
25 this Court's case law, that have been overshadowed to an

1 even greater extent than Teague was. Abuse of the writ,  
2 the Keeney v. Tomayo-Reyes concerning evidentiary  
3 hearings. Certainly Congress had the right to do that,  
4 and in fact these issues were addressed to some degree  
5 even in the court's seminal deference case in  
6 Williams v. Taylor.

7 In Williams v. Taylor for example, it was  
8 Justice Stevens' position in dissent, arguing in  
9 dissent, that the statute really only embodied Teague.  
10 When the statute said clearly established all that  
11 Congress meant to do was to codify Teague. He said it  
12 was perfectly clear that that was the case. And he  
13 argued, particularly in footnote 12 of his dissenting  
14 portion of his opinion in Williams v. Taylor, just as  
15 Petitioner argues today that the fact that Congress in  
16 other portions of AEDPA, particularly in section 2244,  
17 used language talking about finality of judgment and  
18 talking about retroactivity, the fact that Congress did  
19 that in 2254 means that it was thinking about Teague and  
20 that it really meant to extend the Teague rule  
21 throughout the entire statute, that Teague really  
22 flavored the entire statute.

23 The Court necessarily rejected that  
24 argument, and in fact in reference to another prior case  
25 of this Court, Wright v. West that had been argued by

1 Justice Stevens in his dissent, Justice O'Connor  
2 speaking for the Court said: "Congress need not mention  
3 a prior decision of this Court by name in a statute's  
4 text in order to adopt a rule."

5 Now I think that's clearly what Congress  
6 did, and I think it's -- that the Court clearly  
7 recognized in *Williams v. Taylor* that the deference  
8 rule, 2254, constituted a new rule which sat side by  
9 side with *Teague* and operated in different ways even if  
10 in some cases, many cases that mean you never have to  
11 get to the *Teague* bar, because the 2254-bar came into  
12 play first or more easily.

13 If there are no further questions, I will  
14 rely on my brief. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Fisher, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF JEFFREY L. FISHER

18 ON BEHALF OF THE PETITIONER

19 MR. FISHER: Thank you.

20 Let me make three points. Starting with the  
21 most important, which is the *Teague* exceptions we have  
22 been talking about. Now, the State in its brief in  
23 footnote 12 and today says actual innocence, cause and  
24 prejudice, or something, would let you get around the  
25 problem that I've raised. But that doesn't work,

1 because all those doctrines do is allow you to bring the  
2 case forward. They just allow you to get out from under  
3 a situation where you haven't preserved a claim  
4 previously.

5 But this case is all about a situation where  
6 the defendant does everything he is supposed to do,  
7 everything he can do, but it just so happens that this  
8 Court's decision has come down after the last State  
9 court decision on the merits, and the State on  
10 collateral review has refused -- if it's been given a  
11 chance -- to remedy that.

12 The three cases I cited to you, at least one  
13 of them involves a situation where the defendant did go  
14 back to the State. And I believe it is the Graham case,  
15 and said apply this to me -- the State of Virginia said  
16 no, you are barred from State collateral review.

17 So all those doctrines do is allow the  
18 defendant to get in the door. Once he's in the door, he  
19 still has to satisfy 2254(d)(1), which says that no  
20 claim shall be granted -- no -- habeas relief shall not  
21 be granted on any claim unless the language we have been  
22 talking about today. So the only way out of the problem  
23 that we have phrased is to say that Teague decides what  
24 is clearly established law, not the language of the  
25 statute itself, under the State's reading of the

1 statute.

2                   The second thing is, as to this Court's GVR  
3 practice -- I don't think there is much doubt, in all  
4 fairness --

5                   JUSTICE ALITO: I think the claim under  
6 Graham is -- is a different claim from any previous  
7 claim. Doesn't that get you out from under it?

8                   MR. FISHER: Well, not if the State says  
9 that you are barred in its own -- that would get you out  
10 from the problem of being able to get in the door,  
11 because what would happen in that situation is the State  
12 would say this is waived because he didn't make it  
13 earlier. Then you go to the Teague -- you go to the  
14 exceptions in AEDPA for new claims, and whether actual  
15 innocence applies, et cetera. All those are merely  
16 gateways to the question of whether defendant gets  
17 relief which is controlled by 2254(d).

18                   JUSTICE ALITO: Do you think a case like  
19 Graham or Adkins applies only to those who -- whose  
20 cases are pending on direct review at the time when the  
21 case was decided, or do you think it applies to others?

22                   MR. FISHER: I think it -- I think it would  
23 satisfy one of the Teague exceptions. That's what the  
24 lower courts have all held. If it wouldn't -- certainly  
25 the hypothetical that Justice Breyer raised about the

1 First Amendment would satisfy the Teague exception, and  
2 you would have the exactly the same problem.

3 JUSTICE ALITO: Now, this is -- if a  
4 juvenile is sentenced to death prior to a decision --  
5 and -- I'm sorry -- yes, you think it applies only if it  
6 comes down during that period?

7 MR. FISHER: No, we think it applies anytime  
8 afterwards, too. But that just makes the problem bigger  
9 than just the twilight zone.

10 JUSTICE BREYER: It's not impossible to get  
11 out, because -- you say here's -- bring your collateral  
12 State. Now the collateral State, you're imaging, says  
13 no, we can't have it because it's time-barred.

14 MR. FISHER: Right.

15 JUSTICE BREYER: Then you go into habeas and  
16 you say the time bar is no good, and it's such an  
17 important opinion, you know, for all the reasons in  
18 Teague, that what they did was a time bar and they  
19 wouldn't hear it. Okay, so you hear it. And the claim  
20 is that they made a mistake. That State court that  
21 wouldn't hear it made a mistake in not hearing it and  
22 deciding it for me. Okay? So now we have a State court  
23 thing to review.

24 MR. FISHER: No, but that wouldn't be a  
25 decision on the merits, Justice Breyer. The decision on

1 the merits would have been earlier in the proceedings,  
2 when you argued I can't be executed because I was 17  
3 when I committed the crime, and a State would have  
4 rejected that before Roeper, and then you end up after  
5 Roeper, a State saying we won't hear this on collateral  
6 review because we've already heard it once. And then we  
7 have the situation we have today, and the only way out  
8 of that situation is to understand that Teague continues  
9 to control what is clearly established law.

10 It is not just a problem -- again, it goes  
11 back to the structure of the whole statute, because the  
12 question this Court is supposed to be asking itself is,  
13 is there clear and specific language in the new statute  
14 to think that Congress wanted to dispense with Teague?  
15 And this is very clear indication that no -- that's not  
16 what Congress had in mind, that's not what Congress had  
17 in mind. And so this is a case not just about habeas  
18 law, but also this Court's relationship with Congress,  
19 about whether Congress clearly had the kind of intent  
20 that is necessary.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Counsel, the case is submitted.

23 (Whereupon, at 1:43 p.m., the case in the  
24 above-entitled matter was submitted.)

25

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