No. 98-5804

In the Supreme Court of the United States

IN RE GREGORY SMITH, PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), announced a new rule of constitutional law that should be made retroactive to cases on collateral review, as required to file a successive petition for a writ of habeas corpus under 28 U.S.C. 2244(b)(2)(A).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

No. 98-5804

IN RE GREGORY SMITH, PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Title I, 110 Stat. 1217 (AEDPA) (28 U.S.C. 2241 *et seq.*), which was signed into law on April 24, 1996, works substantial changes to Chapter 153 of Title 28 of the United States Code, pertaining to collateral review of criminal convictions. See *Felker* v. *Turpin*, 518 U.S. 651, 654 (1996). It places specific restrictions on second or successive habeas applications. In particular, the Act provides that

> a claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless * * * the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. 2244(b)(2)(A).[1] The Act also provides an alternative test that permits a second or successive appli-

[1] All citations to 28 U.S.C. 2244 in this brief refer to Supp. III 1997.

cation for habeas corpus based on newly discovered evidence. 28 U.S.C. 2244(b)(2)(B).[2]

Under the AEDPA's "gatekeeping" mechanism, before a prisoner may file a second or successive application for a writ of habeas corpus in a district court under 28 U.S.C. 2254 (1994 & Supp. III 1997), the prisoner must "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. 2244(b)(3)(A). To obtain such authorization, the prisoner must make a "prima facie showing" that his application "satisfies the requirements," 28 U.S.C. 2244(b)(3)(C), of Section 2244(b)(2). The grant or denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. 2244(b)(3)(E). This Court, however, retains the authority to entertain original applications for habeas corpus relief. *Felker*, 518 U.S. at 658. Although the "new rule made retroactive" standard of Section 2244(b)(2)(A) at least "informs" the authority of this Court to grant a successive application, *Felker*, 518 U.S. at 662-663; see *Calderon* v. *Thompson*, 118 S. Ct. 1489, 1502 (1998), the requirement that a petitioner obtain a non-appealable gatekeeping ruling regarding the satisfaction of that standard applies only to successive petitions under Section 2254 "filed in district court," 28 U.S.C.

---

[2] The newly discovered evidence provision states:

> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. 2244(b)(2)(B).

2244(b)(3)(A), not in this Court. See *Felker*, 518 U.S. at 660.

2. In 1979, petitioner was convicted in Louisiana state court of second degree murder and sentenced to life imprisonment. His conviction was affirmed by the Louisiana Supreme Court. Pet. App. A1; see *State* v. *Smith*, 392 So. 2d 454 (La. 1980). He filed federal habeas corpus petitions under 28 U.S.C. 2254 challenging his state conviction and sentence in 1980, 1983, and 1988. In each case, the district court denied petitioner federal habeas corpus relief. Pet. App. A2.

In (or shortly before) 1991, petitioner filed an application in state court for postconviction relief, claiming, *inter alia*, that the jury instruction on reasonable doubt that was given at his trial violated *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam).[3] The state court denied his application on January 9, 1992. See App., *infra*, 1a-2a. The Louisiana Supreme Court denied a similar application on February 21, 1997. See *id.* at 3a-4a.

---

[3] In its charge to the jury, the trial court defined "reasonable doubt" as a doubt

> founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your minds as to the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a moral certainty of the defendant's guilt. A reasonable doubt is not a mere possible doubt. It should be an actual or substantial doubt. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt for which you could give good reason.

Pet. App. A3. In *Cage* v. *Louisiana*, this Court held that a similar instruction was unconstitutional because it permitted "a finding of guilt based on a degree of proof below that required by the Due Process Clause." 498 U.S. at 41 (footnote omitted); see *Sullivan* v. *Louisiana*, 508 U.S. 275, 278-282 (1993) (constitutionally deficient reasonable doubt instruction cannot be harmless error).

Apparently in October 1997, see Pet. 6, petitioner filed his fourth federal application for a writ of habeas corpus, which included his *Cage* claim. The district court recognized that under 28 U.S.C. 2244(b)(3)(A), it lacked jurisdiction to consider the habeas corpus petition until petitioner had obtained authorization to file the petition from the court of appeals. Pet. App. B2. Accordingly, the district court construed the petition in part as a motion for authorization for the court to consider the successive application, and it transferred the motion to the court of appeals for that court to determine whether to authorize the filing of the habeas petition. Pet. App. B3.

3. The court of appeals denied petitioner's request to file a successive habeas application. It held that he had failed to make a prima facie showing that his claim under *Cage* v. *Louisiana* relied on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Pet. App. A1-A5; see 28 U.S.C. 2244(b)(2)(A). The court stated that "*Cage* announced a new rule of constitutional law" that was "previously unavailable" to petitioner, Pet. App. A4, but it held that petitioner could not show that the *Cage* rule had been "made retroactive to cases on collateral review by the Supreme Court." *Ibid.* In reaching that conclusion, the court of appeals joined other courts that had held that

> an application to file a second or successive habeas petition must point to a Supreme Court decision that either expressly declares the collateral availability of the rule (such as by holding or stating that the particular rule upon which the petitioner seeks to rely is retroactively available on collateral review) or applies the rule in a collateral proceeding.

Ibid. (quoting *Rodriguez* v. *Superintendent, Bay State Correctional Ctr.*, 139 F.3d 270, 275 (1st Cir. 1998)). Because petitioner could not "identify a Supreme Court edict that renders *Cage* retroactively applicable to cases on collateral review," the court denied his request for leave to file a fourth federal habeas corpus petition. Pet. App. A2, A4.

4. Invoking this Court's original habeas jurisdiction, see *Felker*, 518 U.S. at 658; 28 U.S.C. 2241, 2254(a), petitioner filed this petition for a writ of habeas corpus.

DISCUSSION

As explained in *Felker*, this Court's Rule 20.4(a) "delineates the standards under which" the Court will grant an original writ of habeas corpus. 518 U.S. at 665. First, the habeas petitioner must state "the reasons for not making application to the district court of the district in which the applicant is held," Sup. Ct. R. 20.4(a) (quoting 28 U.S.C. 2242), and the petitioner must show "that adequate relief cannot be obtained in any other form or from any other court." *Ibid.* Second, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers." *Ibid.* In our view, the "reasonable doubt" instruction given at petitioner's trial is constitutionally inadequate under this Court's holding in *Cage*. Petitioner, however, cannot invoke *Cage* to seek relief in a successive habeas application in the lower courts because *Cage* has not been made retroactive by this Court to cases on collateral review. Therefore, if petitioner is correct that *Cage* announced a new constitutional rule that should be applied retroactively to cases on collateral review, this case comes within this Court's habeas jurisdiction and it would be one of the rare instances in which exercise of the Court's habeas

jurisdiction would satisfy the stringent standards of Rule 20.4. Accordingly, the Court should set this case for full briefing and argument to determine whether *Cage* announced a new rule that should be applied retroactively and, therefore, whether petitioner's habeas petition should be granted.

1. Petitioner has no remedy available in any other form or in any other federal court. Section 2244(b)(2)(A) requires a prisoner seeking to file a second or successive petition for a writ of habeas corpus to show that his application raises a claim that relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." The plain language of that provision requires a determination of whether there is a ruling of this Court making the new rule retroactive, not, as petitioner suggests (Pet. 11), whether "this Court's decisions * * * clearly necessitate retroactive application" of the rule. Cf. *Calderon* v. *Thompson*, 118 S. Ct. at 1502 (Section 2244(b)(2)(A) applies to "new rule of constitutional law made retroactive by this Court"). Thus, as the court of appeals explained (Pet. App. A4-A5), it is insufficient that the lower courts have held that under this Court's precedents, the *Cage* rule should be applied retroactively; the statute clearly states that "the Supreme Court" must have made the rule retroactive.[4]

---

[4] See *Rodriguez* v. *Superintendent, Bay State Correctional Ctr.*, 139 F.3d at 274-275 (AEDPA "invests the [Supreme] Court with the sole authority" to declare new rules retroactive on collateral review for purposes of successive habeas petitions); *Bennett* v. *United States*, 119 F.3d 470, 471 (7th Cir. 1997) ("only when a decision has been specifically declared retroactive by the Supreme Court may it be used as the basis for a successive motion for habeas corpus"); *In re Vial*, 115 F.3d 1192, 1197 (4th Cir. 1997) (en banc) ("a new rule of constitutional law has been 'made retroactive

The court of appeals also correctly held that this Court has not yet made the *Cage* rule retroactive to cases on collateral review for purposes of Section 2244(b)(2)(A). Petitioner suggests (Pet. 10) that this Court's disposition in *Adams* v. *Evatt*, 511 U.S. 1001 (1994), in which the Court vacated a decision holding that retroactive application of *Cage* was barred by *Teague* v. *Lane*, 489 U.S. 288 (1989), and remanded for further consideration in light of *Sullivan* v. *Louisiana*, *supra*, indicates that the Court has concluded that *Cage* should be applied retroactively. As the First Circuit has explained, however, a summary reconsideration order like the one in *Adams* "does 'not amount to a final determination on the merits'"; rather, "[s]uch an order merely directs the lower court to reexamine the case against the backdrop of some recent, intervening precedent; [but] does not compel a different result." *Rodriguez* v. *Superintendent, Bay State Correctional Ctr.*, 139 F.3d at 276 (quoting *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964)); see also Robert L. Stern, et al., *Supreme Court Practice* 249-250 (7th ed. 1993). But see *Nevius* v. *Sumner*, 105 F.3d 453, 462 (9th Cir. 1996) (holding that petitioner who claimed that *Cage* rule was made retroactive by *Adams* had "made a prima facie showing" that his application satisfied Section 2244(b)(2)(A); court did not "intimat[e] any view" as to whether petitioner had "in fact met the requirements"

---

to cases on collateral review by the Supreme Court' * * * only when the Supreme Court declares the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding"); *In re Hill*, 113 F.3d 181, 184 (11th Cir. 1997) (court of appeals' ruling that *Cage* rule was retroactive did not satisfy requirement of Section 2244(b)(2)(A) that applicant "establish that the Supreme Court has made the new rule of constitutional law retroactively applicable to cases on collateral review").

of the statute). Accordingly, the Court's action in *Adams* does not satisfy the statutory requirement that this Court have considered the issue of retroactivity and have expressly decided in favor of retroactive application.

2. Because this Court has not yet held the *Cage* rule to be retroactive to cases on collateral review, petitioner cannot bring his *Cage* claim in a habeas petition in district court. The situation in this Court, however, is different. Section 2244(b)(2)(A) requires that a successive petition "shall be dismissed" unless it "relies on a new rule of constitutional law, *made* retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. 2244(b)(2)(A) (emphasis added). The terms of the statute do not compel a temporal restriction, *i.e.*, that unless this Court has already "made" the new rule retroactive before the time the successive habeas petition is filed, the petition should be dismissed. Rather, the purpose of requiring this Court to determine the retroactivity of a new rule before it may be invoked in a successive habeas petition is satisfied if the Court makes that determination in the consideration of an original habeas petition itself. Accordingly, if this Court were to review petitioner's habeas application on the merits and determine that *Cage* announced a new rule that should be retroactively applied to cases on collateral review, Section 2244(b)(2)(A) would permit application of that rule in this case.

3. The fact that this Court could grant habeas relief to petitioner under Section 2244(b)(2)(A) does not establish, standing alone, that the grant of such relief would be a sound exercise of this Court's discretion, as set forth in Rule 20.4. As petitioner points out (Pet. 8, 12-14), however, this case presents the kind of "exceptional circumstance" that would warrant an exercise of this Court's habeas corpus jurisdiction if petitioner is

right that *Cage* announced a new rule that should be applied retroactively to cases on collateral review. The unusual posture of this case arises because of the interaction between this Court's certiorari practice and Congress's decision in Section 2244(b)(2)(A) to limit second and successive habeas petitions to claims that this Court alone (rather than any court of appeals) has made retroactively applicable on collateral review.

Following the decision in *Sullivan* v. *Louisiana*, in which this Court held that an unconstitutional reasonable doubt instruction is "structural error," 508 U.S. at 281-282, the courts of appeals that have addressed the issue (on first habeas petitions) have uniformly held that *Cage* announced a new rule that should be applied retroactively to cases on collateral review. See *Humphrey* v. *Cain*, 138 F.3d 552, 553 (5th Cir.) (en banc), cert. denied, 119 S. Ct. 348, 365 (1998); *Adams* v. *Aiken*, 41 F.3d 175, 178-179 (4th Cir. 1994), cert. denied, 515 U.S. 1124 (1995); *Nutter* v. *White*, 39 F.3d 1154, 1157-1158 (11th Cir. 1994). That unanimity, however, combined with this Court's ordinary practice of granting certiorari on questions like this only when there is a conflict in the circuits, see Sup. Ct. R. 10(a), means that this Court is unlikely to have the occasion to issue a ruling to the same effect. See *In re Vial*, 115 F.3d at 1196 n.8 ("[I]t seems unlikely that the Supreme Court would grant certiorari to declare the applicability of a rule announced on direct review to collateral proceedings when * * * lower federal courts uniformly rule in favor of collateral availability.").

Section 2244(b)(2)(A) creates an anomalous result in this situation. As noted above, absent a retroactivity ruling from this Court, a *Cage* claim is not available on a second or successive federal habeas petition; moreover, such a ruling is unlikely under ordinary certiorari practice because the courts of appeals are unanimous in

holding that *Cage* should be retroactively applied on collateral review. A legal claim whose retroactive application is more debatable, however, would be more likely to lead to a disagreement in the courts of appeals (hearing first habeas petitions) on the retroactivity issue. Such a circuit split would plausibly result in a grant of certiorari and, if this Court holds the claim retroactive, it would become available on a second or successive federal habeas petition. The net result is that a claim whose retroactive application is uniformly accepted by the courts of appeals would remain unavailable on a second or successive federal habeas petition, while other claims, with a more controversial basis for retroactive application, could possibly become available on second or successive federal habeas petitions. While the Court need not intervene on original habeas in every such situation, it would be an appropriate exercise of this Court's discretionary jurisdiction to act when faced with that outcome.

The justification for considering original habeas jurisdiction in this context is strengthened by the fact that the unusual circumstances of this case would be unlikely to arise frequently. New rules of constitutional law applicable to criminal proceedings are not retroactively applicable to proceedings on collateral review, unless they satisfy one of the two exceptions discussed in *Teague* v. *Lane*, 489 U.S. 288, 307 (1989) (plurality opinion). The first *Teague* exception covers primary conduct that the legislature may not regulate under the criminal law (or a constitutional rule categorically barring certain punishment for certain persons), while the second exception applies to "watershed rules of criminal procedure" that are central to the accuracy of the conviction. 489 U.S. at 311-312; see *Lambrix* v. *Singletary*, 520 U.S. 518, 539 (1997). The narrowness of the "watershed" exception is underscored by this Court's

reminder that a rule in this class "must not only improve accuracy [of criminal trials], but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990) (emphasis and internal quotation marks omitted). Very few new rules will even arguably satisfy the latter exception to the *Teague* rule, see 489 U.S. at 307, and even fewer are likely to lead to a situation (as here) in which the courts of appeals are unanimous that a *Teague* exception is satisfied. Even then, the warrant for this Court's habeas jurisdiction would arise only where a prisoner is unable to take advantage of the court of appeals' unanimous retroactivity rulings because the prisoner attempts to bring the "new rule" claim on a second or successive habeas petition.[5]

This Court should be cautious not to exercise its habeas authority to undercut the strict limitations Congress placed on second and successive habeas petitions when it enacted AEDPA. If there were some reason to believe that Congress intended to preclude claims like that presented by petitioner in second and successive habeas petitions, while permitting presumptively weaker claims that have led to splits in the circuits and decisions in favor of retroactivity by this Court, this Court should not exercise its habeas authority to undermine that result. In our view, however, there is no reason to believe that Congress intended to create such an unusual system of collateral review. The rare exercise of this Court's habeas jurisdiction in a case like this, therefore, far from interfering with the accomp-

---

[5] The AEDPA established a strict one-year statute of limitations, see 28 U.S.C. 2244(d)(1) (Supp. III 1997), which is discussed below. That new limitation period will also tend to make it unlikely that the circumstances at issue in this case will arise frequently.

lishment of Congress's objectives in the AEDPA, would assist in effectuating in a sensible fashion the system of collateral review Congress created.[6]

4. There are three other procedural hurdles that are of potential relevance in considering the appropriate disposition of this case.

a. Petitioner presented two claims in his petition for postconviction relief filed in state court after this Court's decision in *Cage*. He states that "[n]either claim had previously been raised by [petitioner]." Pet. 6. That might present the question whether there had been an unexcused procedural default in this case that would bar relief for petitioner. For two reasons, however, we do not think that petitioner is procedurally barred. First, it appears that the state courts decided petitioner's application for post-conviction relief on his *Cage* claim on its merits and did not refer to any procedural bar.[7] Therefore, because the resolution of petitioner's claim for postconviction relief "did not

---

[6] Notably, *Cage* claims (in the light of *Sullivan*) appear to be the only new rule claims found to fit within *Teague*'s watershed exception by any court of appeals. This Court has never found a new rule to fit within *Teague*'s watershed exception.

[7] The state district court's judgment stated:

> With respect to the Court's charge to the jury, this issue was recently decided by the Louisiana Supreme Court on remand from the United States Supreme Court. The Louisiana Supreme Court found that any error in instructing the jury with respect to reasonable doubt was harmless. *State* v. *Cage*, 583 So. 2d 1185 (La. 1991). This issue lacks merit.

Order (Jan. 9, 1992), Order, see App., *infra*, 1a. The Louisiana Supreme Court simply denied petitioner's appeal on February 21, 1997, noting only that three justices "would grant evidentiary hearing." *Id.* at 3a. Under *Ylst* v. *Nunnemaker*, 501 U.S. 797, 803-804 (1991), the unexplained order of the Louisiana Supreme Court is interpreted to rest on the same ground as the last reasoned state court opinion rejecting the federal claim.

clearly and expressly rely on an independent and adequate state ground," *Coleman* v. *Thompson*, 501 U.S. 722, 735 (1991), petitioner is not procedurally barred. Second, the State has not claimed in this Court that petitioner's *Cage* claim was procedurally defaulted. That constitutes a waiver of any procedural default defense. See, *e.g.*, *Trest* v. *Cain*, 522 U.S. 87, 89 (1997). But cf. *ibid.* (holding that a federal court is not required to raise the issue of procedural default *sua sponte*, but reserving the question whether a federal court may raise it *sua sponte*).

b. Petitioner has filed three previous federal habeas applications. Two of them were dismissed or denied with prejudice, at least one of them on the merits; the third was dismissed or denied without prejudice for failure to exhaust state remedies. Pet. App. A2. Before the advent of the AEDPA, the filing of a fourth petition for habeas corpus would raise a question whether petitioner was barred from seeking relief under the doctrine of abuse of the writ. See *McCleskey* v. *Zant*, 499 U.S. 467 (1998). Under that doctrine, petitioner would be required to establish cause and prejudice or a colorable showing of factual innocence in order to present a new claim in federal habeas corpus that he omitted from prior applications. See *id.* at 493-496. The AEDPA does not eliminate all equitable bases for denying habeas corpus relief, and we are aware of no court of appeals decision addressing whether or to what extent the abuse of the writ doctrine survives under the AEDPA. Nevertheless, it appears that abuse of the writ principles would not bar relief for a prisoner, like petitioner here, if he can otherwise establish eligibility for relief in a second or successive petition based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. 2244(b)(2)(A).

First, as this Court has observed, the text of Section 2244(b)(2)(A), "constitute[s] a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" *Felker*, 518 U.S. at 664. Congress did not indicate that it wished to require successive habeas petitioners to meet pre-existing abuse of the writ requirements as well. Second, the alternative ground for obtaining relief in second or successive applications (based on newly discovered evidence) includes the equivalent of a cause and prejudice condition. See 28 U.S.C. 2244(b)(2)(B); note 2, *supra*. Applying abuse of the writ analysis to "new rule" AEDPA cases would improperly read comparable requirements into Section 2244(b)(2)(A). Cf. *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (Congress's inclusion of language in one section of an act, while omitting it from another, is generally presumed intentional). Finally, the narrow circumstances in which a new retroactive rule is likely to be recognized by this Court suggests that Congress regarded this alone as a sufficient basis for granting relief on a properly preserved constitutional claim. In short, we do not believe that petitioner's prior habeas applications bar his reliance on *Cage* at this time if *Cage* set forth a new rule of constitutional law that the Court would make retroactive to cases on collateral review.[8]

---

[8] Section 2244(b)(2)(A) also requires that the new rule be one that was "previously unavailable" to petitioner. We interpret that requirement to mean only that the case announcing the new rule was decided after the applicant's prior federal habeas application. If the requirement were interpreted to mean that the claim underlying the new rule must have been unavailable in some stronger sense (*i.e.*, that the claim was too novel even to be raised by competent counsel at the time of trial, see *Reed* v. *Ross*, 468 U.S. 1 (1984)), it would reduce the class of cases covered by Section 2244(b)(2)(A) to virtually a null set. Given Congress's intent to extend habeas relief to at least some successive habeas petitioners

c. The application of the one-year limitations period in 28 U.S.C. 2244(d)(1) is also of potential relevance to this case. Under 28 U.S.C. 2244(d)(1), "[a] l-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." A similar time period applies under 28 U.S.C. 2255 (1994 & Supp. III 1997) to federal prisoners. As relevant here, the period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[9] 28 U.S.C. 2244(d)(1)(A). However, "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim

---

covered by a new rule made retroactive to cases on collateral review, that does not seem to be a plausible result. See also 28 U.S.C. 2244(d)(1)(C) (permitting one-year statute of limitations to run from date on which a constitutional right was initially recognized by the Supreme Court, "if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

[9] The statute provides that a petition may be filed from the later of three other dates, but none of those dates would assist petitioner. First, there was no "date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed," 28 U.S.C. 2244(d)(1)(B), because there was no such impediment in this case. Second, there is not a "date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review," 28 U.S.C. 2244(d)(1)(C), because the *Cage* claim on which petitioner seeks relief has not yet been made retroactive by this Court. Third, there is no later "date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," 28 U.S.C. 2244(d)(1)(D), because petitioner could have discovered the factual basis for his claim—the contents of the jury instruction on reasonable doubt—at his trial.

is pending shall not be counted toward any period of limitation." 28 U.S.C. 2244(d)(2).

The courts of appeals have held that the Section 2244(d) one-year limitation period began to run no earlier than the effective date of the AEDPA, April 24, 1996. See, *e.g.*, *Flanagan* v. *Johnson*, 154 F.3d 196, 200-202 (5th Cir. 1998); *Brown* v. *Angelone*, 150 F.3d 370, 374-375 (4th Cir. 1998); *Ross* v. *Artuz*, 150 F.3d 97, 102 (2d Cir. 1998); *Burns* v. *Morton*, 134 F.3d 109 (3d Cir. 1998); *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997); *Calderon* v. *United States Dist. Ct.*, 128 F.3d 1283, 1287 (9th Cir. 1997), cert. denied, 118 S. Ct. 899 (1998); *United States* v. *Simmonds*, 111 F.3d 737, 744-745 (10th Cir. 1997) (Section 2255). The time for petitioner to file a petition under Section 2254 thus began to run on April 24, 1996.

Under Section 2244(d)(2), the limitations period was tolled from April 24, 1996, until February 21, 1997, since petitioner's application for postconviction relief was apparently pending in the Louisiana state courts during that time. Petitioner states that he filed a motion under 28 U.S.C. 2254 (1994 & Supp. III 1997) in federal district court in October 1997. Pet. 6.[10] The district court transferred the motion to the court of appeals on November 13, 1997, for a gatekeeping determination under Section 2244(b)(3) as to whether petitioner could proceed. Pet. App. B1-B2. Although 28 U.S.C. 2244(b)(3)(D) provides that "[t]he court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the [Section 2254] motion," the court of appeals

[10] Neither petitioner nor respondent gives the exact date of filing. None of the time calculations discussed below would be affected by the exact date of filing.

did not decide to deny petitioner authorization until May 28, 1998. Pet. App. A1. Petitioner filed his habeas petition in this Court on August 25, 1998.

Because petitioner's habeas petition was filed in this Court more than one year after the Louisiana Supreme Court set the limitations clock running by denying his application for state postconviction relief on February 21, 1997, this case presents a potential question of timeliness. Before that question could be resolved, the Court would have to address a number of questions.

First, the Court would have to decide whether the Section 2244(d)(1) time limit applies to original habeas petitions filed in this Court. See *Felker*, 518 U.S. at 663 ("Whether or not we are bound by [other restrictions newly added to Section 2244], they certainly inform our consideration of original habeas petitions.").

Second, there would remain the question whether the statutory provision for tolling while "a claim for State post-conviction or other collateral review * * * is pending" under Section 2244(d)(2) applies to the time during which a Section 2254 motion is pending in the lower federal courts. Section 2244(d)(2) could be read to provide for tolling both for "State post-conviction * * * review" and for "other collateral review," in which case it would toll the limitations period while petitioner pursued collateral review in the lower federal courts, and the petition in this case would be timely.[11] Alternatively, Section 2244(d)(2) could be read

[11] Approximately eight months elapsed between the February 21, 1997, denial of petitioner's application for postconviction relief by the Louisiana Supreme Court and his October 1997 filing of a Section 2254 petition in federal district court. About three months elapsed between the Fifth Circuit's May 28, 1998, denial of authorization to file and the August 25, 1998, filing of the instant petition in this Court. The total elapsed time, under this calculation, thus adds up to less than less than one year.

to provide for tolling only for "State post-conviction * * * review" and for "State * * * collateral review," in which case it would not toll the limitations period while petitioner pursued collateral review in the lower federal courts. We have been unable to find any cases in which the lower federal courts have addressed whether Section 2244(d)(2) tolls the limitations period while habeas petitions are pending in the lower federal courts.

Third, even if Section 2244(d)(2) did not itself toll the limitations period while petitioner's habeas petition was pending in the lower federal courts, there would remain the question whether equitable principles would toll the time for filing a habeas petition in this Court while petitioner was pursuing his remedies in the lower federal courts. Some courts have held that equitable tolling principles would apply in some circumstances under Section 2244(d)(2). See *Davis* v. *Johnson*, 158 F.3d 806, 811 (5th Cir.), cert. denied, No. 98-8209 (Apr. 19, 1999); *Miller* v. *Marr*, 141 F.3d 976, 977 (10th Cir.), cert. denied, 119 S. Ct. 210 (1998); *Calderon* v. *United States District Ct.*, 128 F. 3d at 1289. Moreover, this Court's Rule 20.4(a) ("[P]etitioner must show that * * * adequate relief cannot be obtained in any other form or from any other court."), which requires exhaustion of all remedies in the lower courts, could be read to support application of a tolling rule to habeas cases in this Court.

Although the application of the limitation period to this petition would raise a number of issues, we do not think that the potential presence of those issues should prevent the Court from granting full consideration to this petition. The courts of appeals have generally held that the Section 2244(d)(1) limitations period is not jurisdictional, see *Davis* v. *Johnson*, 158 F.3d at 810; *Miller* v. *New Jersey State Dep't of Corrections*, 145

F.3d 616, 618 (3d Cir. 1998); *Miller* v. *Marr*, 141 F.3d at 978; *Calderon* v. *United States Dist. Ct.*, 128 F.3d at 1289, and respondent's failure to raise this issue presumably means that it has been waived. Accordingly, there is no procedural bar to plenary review of the petition.

5. For the reasons given above, this case would present an appropriate occasion for the exercise of this Court's habeas jurisdiction if *Cage* announced a new rule that should be retroactively applied under this Court's definition of the *Teague* exceptions. In our view, this Court should not resolve the question whether *Cage* announced such a rule without plenary consideration of that question.

Contrary to petitioner's argument (Pet. 10), we do not believe that this Court's decision in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), resolved whether *Cage* announced a new rule that comes within the *Teague* exception. *Sullivan* held only that a constitutionally deficient reasonable doubt instruction may not be found harmless. The Court in *Sullivan* stated both that it could not identify a suitable means to analyze a jury's verdict to determine whether the *Cage* error was harmless, and that the right to a jury verdict beyond a reasonable doubt is a "'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan*, 508 U.S. at 281. *Sullivan*'s acknowledgment that a reasonable doubt instruction is necessary for an accurate verdict, however, does not establish that correction of the particular flaws in Louisiana's reasonable doubt instruction in *Cage* changed our understanding of the bedrock requirements of a fair trial. *Sawyer* v. *Smith*, 497 U.S. at 242. The constitutional requirement of proof beyond a reasonable doubt was no novelty before *Cage*, having been confirmed at least by the time of *In*

re Winship, 397 U.S. 358, 364 (1970). It is therefore open to question whether the refinements of the reasonable doubt instruction announced in *Cage* rise to the level of a "watershed" *Teague* exception. Cf. *Victor* v. *Nebraska*, 511 U.S. 1 (1994) (closely examining two reasonable doubt instructions in light of *Cage* and concluding that the instructions as a whole were not reasonably likely to have been applied unconstitutionally).

Because of the novelty and importance of this case, the Court would be in a better position to resolve the question whether the *Cage* rule falls within the *Teague* exception if it had the benefit of full briefing and argument by the parties on that point. Accordingly, the Court should set the case for full briefing and argument on that question.

CONCLUSION

The application for a petition for a writ of habeas corpus should be set for full briefing and argument on its merits.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
NINA GOODMAN
Attorney

MAY 1999

APPENDIX

CRIMINAL DISTRICT COURT PARISH OF ORLEANS

No. 265-774 "B"

STATE OF LOUSIANA, EX. REL. GREGORY SMITH,
PETITIONER

versus

JOHN P. WHITLEY, WARDEN
LOUSIANA STATE PENITENTIARY, RESPONDENT

JUDGMENT

Petitioner files an Application for Post-Conviction Relief alleging that the trial Court erred in charging the jury with respect to reasonable doubt and *Brady* violations.

With respect to the Court's charge to the jury, this issue was recently decided by the Louisiana Supreme Court on remand from the United State Supreme Court. The Louisiana Supreme Court found that any error in instructing the jury with respect to reasonable doubt was harmless. *State* v. *Cage*, 538 So.2d 1185 (La. 1991). This issue lacks merit.

As to the allegations that the State withheld evidence favorable to petitioner in violation of the *Brady* rule, petitioner presents to evidence in support of this contention. This allegation lacks merit. Accordingly, petitioner's application is hereby DENIED.

New Orleans, Louisiana this 9th of January 1992.

/s/ PATRICK G. QUINLAN
PATRICK G. QUINLAN, JUDGE

The Supreme Court of the State of Louisiana

No. 95-KH-0496

STATE EX. REL. GREGORY SMITH

vs.

JOHN P. WHITLEY, WARDEN

IN RE: Smith, Gregory; - Plaintiff(s); Applying for Supervisory and/or Remedial; Parish of Orleans Criminal District Court Div. "B" Number 265-774.

February 21, 1997

Denied.

JTK

WFM

JPV

CDT

CALOGERO, C.J. not on panel.
LEMMON, J. would grant evidentiary hearing.
KIMBALL, J. would grant evidentiary hearing.
JOHNSON, J. would grant evidentiary hearing.

Supreme Court of Louisiana
February 21, 1997

/s/ ILLEGIBLE
Clerk of Court
For the Court