No. 00-5961

In the Supreme Court of the United States

MELVIN TYLER, PETITIONER

v.

BURL CAIN, WARDEN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a second or successive petition for a writ of habeas corpus asserting a claim under *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. 2244(b)(2)(A) (Supp. IV 1998).

2. Whether *Cage* v. *Louisiana* announced a new rule of constitutional law that should be made retroactive to cases on collateral review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and rule:

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INTEREST OF THE UNITED STATES

This case presents the question whether a state prisoner's second or successive petition for a writ of habeas corpus asserting a claim under *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), satisfies the requirement of 28 U.S.C. 2244(b)(2)(A) that such petitions rely "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[1] An identical statutory provision restricts second or successive motions for post-conviction relief by federal prisoners. See 28 U.S.C. 2255 para. 8(2). Because the Court's ruling will apply to collateral attacks on federal criminal judgments, the

[1] All citations to 28 U.S.C. 2244, 2254, and 2255 in this brief refer to Supp. IV 1998.

United States has a substantial interest in the outcome of this case.

STATEMENT

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. I, 110 Stat. 1217, 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). The Act also provides an alternative test that permits a second or successive application for habeas corpus based on newly discovered evidence. 28 U.S.C. 2244(b)(2)(B).

The AEDPA also contains a "gatekeeping" provision. That provision requires that, 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, 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).

2. In 1976, 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. J.A. 4; see *State* v. *Tyler*, 363 So.2d 902 (1978). Petitioner then filed five applications for post-conviction relief in state court, all of which were denied. J.A. 4. Petitioner also filed a federal habeas corpus petition under 28 U.S.C. 2254. The district court denied petitioner federal habeas corpus relief, and the court of appeals affirmed. See Pet. 4.

In 1995, petitioner filed his sixth application in state court for post-conviction relief, claiming that the jury instruction on reasonable doubt that was given at his trial violated *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam).[2] The state court denied his application, and the Louisiana Supreme Court denied a similar application. J.A. 4-5; see *State ex rel. Tyler* v. *Cain*, 684 So.2d 950 (1996).

3. Petitioner then filed a motion in the court of appeals for authorization to file a second or successive habeas corpus petition in the district court. J.A. 3; see 28 U.S.C. 2244(b)(3)(A). The court of appeals granted the motion, finding that petitioner had "made a prima facie showing that he meets the requirements of § 2244(b)(2)." J.A. 3. The court limited petitioner's successive habeas petition, however, to whether *Cage*

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[2] The text of the reasonable doubt instruction given at petitioner's trial is reproduced in Appendix B to this brief. 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).

should be applied retroactively on collateral review and whether the reasonable doubt instruction at petitioner's trial was unconstitutional under *Cage* and *Victor* v. *Nebraska*, 511 U.S. 1 (1994). J.A. 3.

4. The district court analyzed the case on the assumption that the court of appeals had already determined that petitioner satisfied Section 2244(b)(2)(A). J.A. 4. The district court held that *Cage* should be applied retroactively to petitioner's application for collateral relief, noting that the court of appeals had held that *Cage* applies retroactively to cases on collateral review. J.A. 5-7 (citing *Humphrey* v. *Cain*, 138 F.3d 552 (5th Cir.) (en banc), cert. denied, 525 U.S. 935, 943 (1998)). The court denied petitioner's habeas corpus petition, however, concluding that petitioner could not satisfy the "stringent AEDPA standard," J.A. 12, of 28 U.S.C. 2254(d)(1), which precludes collateral relief on "any claim that was adjudicated on the merits in [s]tate court proceedings" unless the state court's denial of relief "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

5. The court of appeals affirmed the denial of petitioner's habeas corpus petition. J.A. 14-15. The court stated, however, that the district court "erred in not determining first whether [the] petition satisfied AEDPA's successive habeas standard, 28 U.S.C. § 2244(b)(2)(A)." J.A. 15. Citing its decisions in *Brown* v. *Lensing*, 171 F.3d 1031 (5th Cir. 1999), and *In re Smith*, 142 F.3d 832 (5th Cir. 1998), the court held that petitioner's successive petition was barred by Section 2244(b)(2)(A) because he could not show "that any Supreme Court decision renders the *Cage* decision retro-

actively applicable to cases on collateral review." J.A. 15.

SUMMARY OF ARGUMENT

I. The AEDPA imposes stringent new limitations on the ability of a prisoner to file a second or successive petition for a writ of habeas corpus. A prisoner must, before filing his petition, meet a "gatekeeping" requirement by having the court of appeals certify that his petition meets one of two narrow conditions. See *Felker* v. *Turpin*, 518 U.S. 651, 657 (1996). One of those conditions is that the petition must rely 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). The text of that provision requires that the determination that the new rule is retroactive be made by this Court —not by a lower court applying the principles of retroactivity announced in this Court's opinions.

The conclusion that Section 2244(b)(2)(A) requires a decision of this Court on the retroactivity of a particular new rule is reinforced by this Court's interpretation of an analogous provision of the AEDPA in *Williams* v. *Taylor*, 529 U.S. 362 (2000). In that case, the Court made clear that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. 2254(d)(1), "refers to the holdings, as opposed to the dicta, of this Court's decisions," and "restricts the source of clearly established law to this Court's jurisprudence." 529 U.S. at 412. There is no reason to give Section 2244(b)(2)(A) a different interpretation; in both provisions, Congress intended this Court's specific decisions, rather than decisions of the lower courts, to provide the governing rule on the particular point of law at issue.

If Congress had intended to invoke only the "principles" of this Court's retroactivity decisions, as petitioner contends (Br. 9, 21-22), it could have easily used the "application of * * * law" language contained in the provision of the AEDPA at issue in *Williams*, and simply required the lower courts to assess whether a new rule was retroactive to cases on collateral review "*by application of the principles determined* by the Supreme Court." The italicized phrase, however, was not included in the statute. Indeed, on petitioner's interpretation, the statute's reference to "the Supreme Court" is superfluous; even without such a reference, the lower courts would be bound to apply this Court's settled and well-established framework for the analysis of retroactivity questions.

Interpreting the gatekeeping provision to require that this Court has made a decision retroactive before second or successive habeas petitions may be filed is consistent with the purpose of the AEDPA to restrict habeas litigation. The requirement ensures that, unless and until this Court has determined that the new rule is available, lower courts need not adjudicate "new rule" claims in second petitions. It is also consistent with the procedural scheme of the gatekeeping system, which contemplates summary decisions on a short timetable. There is, moreover, nothing anomalous about Congress's requirement that this Court itself determine retroactivity; only a small set of new rules will qualify for retroactive application, and it is sensible to require this Court to make the decision before entitling repetitive habeas filers to seek relief.

In this case, petitioner relies, for his new rule, on the holding of *Cage* v. *Louisiana*, 498 U.S. 39 (1990) (per curiam), that a particular reasonable-doubt instruction was unconstitutional. *Cage* arose on direct review, and

this Court has not made *Cage* retroactive to cases on collateral review. Accordingly, petitioner was not entitled to relief in the courts below.

II. *Cage* should not be made retroactive to cases on collateral review. In a line of cases beginning with *Teague* v. *Lane*, 489 U.S. 288 (1989), this Court has established that new rules of constitutional criminal procedure are not retroactively applicable to cases on collateral review unless they satisfy one of two narrow exceptions. First, a new rule is retroactively applicable if it places primary conduct beyond the reach of the State to prosecute, or establishes a categorical guarantee prohibiting a particular punishment for a class of persons. *Cage* clearly does not satisfy that test; it simply held that a particular reasonable-doubt instruction did not meet constitutional requirements.

The second *Teague* exception is limited to "watershed rules of criminal procedure" that are "central to an accurate determination of innocence or guilt." *Teague* v. *Lane*, 489 U.S. at 311, 313 (plurality opinion). For a rule to fall within *Teague*'s second exception, it must satisfy two requirements: infringement of the new rule must "seriously diminish the likelihood of obtaining an accurate conviction," *id.* at 315, and the new rule must "alter our understanding of the *bedrock procedural elements*" essential to the fairness of a proceeding, *id.* at 311. *Cage* is not such a rule.

This Court's holding in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), that a *Cage* error is "structural"—*i.e.*, that it requires reversal without a harmless-error inquiry—does not establish that *Cage* is a "watershed" decision. The holding in *Sullivan* indicates that the *Cage* rule serves the goal of obtaining an accurate conviction. But it does not speak to whether the rule

has changed our conception of the fundamental elements of a fair proceeding. And *Cage* did not do so.

The reasonable doubt standard has been established at least since *In re Winship*, 397 U.S. 358 (1970). *Cage* was simply an application of that principle. It did not alter our understanding of a fair trial; it simply refined an existing requirement. If refinements of basic components of a fair trial, such as *Cage*, are considered "watershed" new rules, then many of this Court's constitutional decisions will have to be made retroactive. Such a conclusion would be inconsistent with the Court's recognition in *Teague* and later cases that it is "unlikely that many such components of basic due process have yet to emerge." *Butler* v. *McKellar*, 494 U.S. 407, 416 (1990) (quoting *Teague* v. *Lane*, 489 U.S. at 312 (plurality opinion)).

ARGUMENT

I. SECTION 2244(b)(2)(A) PERMITS A PRISONER TO FILE A SECOND OR SUCCESSIVE HABEAS CORPUS PETITION THAT RELIES ON A NEW RULE OF CONSTITUTIONAL LAW ONLY IF THIS COURT HAS EXPRESSLY MADE THE NEW RULE RETROACTIVE TO CASES ON COLLATERAL REVIEW.

A. The Text Of Section 2244(b)(2)(A) Permits A Second Or Successive Petition Only When This Court—Not A Court Of Appeals Or A District Court—Has Made A New Rule Retroactive To Cases On Collateral Review

1. Section 2244(b)(2)(A) permits a prisoner to file a second or successive petition for a writ of habeas corpus only if the petition relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously

unavailable." A "new rule" is "made retroactive * * * by the Supreme Court" only when this Court explicitly states that the new rule is retroactive or applies the new rule to a case on collateral review. The text of Section 2244(b)(2)(A) requires that result. The language is not satisfied, as petitioner contends (Br. 9), by a determination *by the lower courts* making the "new rule" retroactive in light of "the principles of this Court's decisions" (Br. 21-22) in the field of retroactivity.

This Court has adopted general principles for determining the retroactivity of new rules of criminal procedure to cases on collateral review. See *Teague* v. *Lane*, 489 U.S. 299 (1989); see also *Graham* v. *Collins*, 506 U.S. 461 (1993); *Saffle* v. *Parks*, 494 U.S. 484 (1990); *Butler* v. *McKellar*, 494 U.S. 407 (1990); *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989). But the AEDPA does not refer to such "principles." Rather, Congress specifically designated this Court as decisionmaker on the issue of retroactivity. Thus, as the Eleventh Circuit has explained, "[i]t is not enough that the new rule is or will be applied retroactively" by the courts of appeals, or "that it satisfies the criteria for retroactive application set forth by the Supreme Court"; the statute clearly states that "the Supreme Court" must have made the rule retroactive. *In re Joshua*, 224 F.3d 1281, 1283 (2000); accord *Browning* v. *United States*, No. 00-7096 (10th Cir. Mar. 1, 2001), slip op. 4 ("[A] rule is 'made retroactive' by the Court only if the Court actually applies the rule retroactively, or makes some explicit statement regarding retroactivity."); *In re Tatum*, 233 F.3d 857, 859 (5th Cir. 2000) (petitioner "must point to a Supreme Court decision that either expressly declares the collateral availability of the rule . . . or applies the rule in a collateral

proceeding"); *Rodriguez* v. *Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 274-275 (1st Cir. 1998) (AEDPA "invests the [Supreme] Court with the sole authority" to declare new rules retroactive on collateral review for successive 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) (Section 2244(b)(2)(A) requires that "the Supreme Court declare[] the collateral availability of the rule in question, either by explicitly so stating or by applying the rule in a collateral proceeding"); see also H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996) (AEDPA provision limits successive applications for postconviction relief to those applications "that involve new constitutional rights that have been retroactively applied by the Supreme Court").[3]

2. This Court's decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), which construed an analogous provision of the AEDPA, strongly supports the conclusion that Section 2244(b)(2)(A) requires an explicit ruling by this Court making a new rule retroactive. In *Williams*, the Court considered 28 U.S.C. 2254(d)(1), which permits a federal habeas court to grant relief on a claim adjudicated by a state court only if the state court adjudication "resulted in a decision that was contrary to, or in-

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[3] Two courts of appeals have reached the contrary conclusion, and permit retroactivity decisions to be made under Section 2244(b)(2)(A) by the lower courts. For the reasons discussed below, those decisions are incorrect. See *West* v. *Vaughn*, 204 F.3d 53, 59-62 (3d Cir. 2000); *Flowers* v. *Walter*, 2000 WL 33157575, at *5 (9th Cir. Feb. 9, 2001).

volved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." This Court held that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in Section 2254(d)(1) "refers to the holdings, as opposed to the dicta, of this Court's decisions," and "restricts the source of clearly established law to this Court's jurisprudence." 529 U.S. at 412; accord *id.* at 382 (Stevens, J., concurring). There is no indication that Congress intended its requirement of action "by the Supreme Court" in Sections 2244 and 2254 to have different meanings. Rather, the phrase "made retroactive * * * by the Supreme Court," like the phrase "determined by the Supreme Court," requires a specific ruling by this Court itself; a lower court's prediction about what this Court might do, or its application of principles found in this Court's decisions generally, is not sufficient.

Petitioner argues (Br. 16-17) that the provision at issue in *Williams* deserves a different construction because it uses the phrase "clearly established Federal law, as determined by the Supreme Court," while Section 2244(b)(2)(A) uses the phrase "made retroactive * * * by the Supreme Court." But it is natural for Congress to speak of this Court "determin[ing]" federal law, just as it is natural to speak of this Court "ma[king] retroactive" a particular new rule. Nothing in the two phrases points to an intention, in one provision, to require specific action by this Court while, in another provision, to invoke only "general principles" in this Court's decisions. The point of both provisions is that Congress was careful to specify that this Court had to take the necessary action—either determining the

content of the legal rule in Section 2254(d)(1) or making the new rule retroactive in Section 2244(b)(2)(A).[4]

Petitioner also suggests that the definition of the word "made" in Section 2244(b)(2)(A) is broad enough to embrace the meaning of "to have 'caused to occur,'" and that the verb "make" can be defined as "to cause to exist." Br. 15-16 (citing dictionary definitions). On that basis, he posits that Congress's use of the word "made" could include the act of "'making' something happen indirectly" (Br. 16), such as by announcing general principles that compel particular results (Br. 21-22). The dictionary definitions that petitioner cites do not support his argument that the word "made" can refer to entirely indirect action, such that this Court could be said to have "made" an event occur by announcing a broad legal standard that is then applied to a specific context by a lower court.[5] In the context of the

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[4] Petitioner cites (Br. 16-17) a variety of other provisions in the AEDPA that, he says, clearly specify that "something be done directly by a specific court"; he argues that in those provisions "the statutory language makes unmistakably plain that a particular court must do something actively, directly, and expressly." Section 2244(b)(2)(A), however, provides an equally unmistakable requirement that a new decision is not available to second or successive habeas petitioners until it has been "made retroactive * * * by the Supreme Court."

[5] For example, petitioner relies (Br. 15) on definitions of "make" that the Third Circuit drew from *Webster's Third New International Dictionary* (1986). The meanings given in that dictionary do not, however, apply to entirely indirect and general causation. For example, the dictionary does define "make" as "to cause to exist, occur, or appear: bring to pass: create, cause," but then gives as examples "God *made* heaven and earth," "make a disturbance," "his entrance made a sensation," "making a fuss over nothing," and "making mischief." *Id.* at 1363. The same dictionary also defines "make" as "to cause to be or become: put in a certain

AEDPA, the phrase "made retroactive * * * by the Supreme Court" clearly refers to a concrete and specific act of this Court that establishes that a particular "new rule" is applicable on collateral review. Indeed, this Court has itself used the phrase "made retroactive" to describe its own rulings concerning the retroactive application of particular constitutional rules.[6]

3. If Congress had wished to express the meaning that petitioner ascribes to Section 2244(b)(2)(A), it had a variety of simpler and more direct ways to do so. The provision at issue in *Williams*, Section 2254(d)(1), itself suggests one model for how Congress could have written the statute to embody petitioner's view that the retroactivity finding need merely result from an application of "the principles of" this Court's decisions. Pet. Br. 21-22. Congress could have framed Section 2244(b)(2)(A), as it did Section 2254(d)(1), by speaking of the "application of" this Court's decisions. Such a

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state or condition." *Ibid.* The examples given for that meaning are: "trying to make the matter clear to everyone," "was *made* leader of the expedition," "*made* him sorry he had spoken so quickly," "*made* the scene real for us," and "made himself useful around the house." The examples illustrate that the word "make" does not encompass indirect and general action, such as announcing general principles of retroactivity that are then applied by the lower courts. The other dictionary cited by petitioner contains similar examples. Nothing in either dictionary supports petitioner's theory.

[6] See *Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (1968) ("The right to counsel at the trial (*Gideon* v. *Wainwright*, 372 U.S. 335); on appeal (*Douglas* v. *California*, 372 U.S. 353); and at the other 'critical' stages of the criminal proceedings (*Hamilton* v. *Alabama*, *supra*) have all been *made retroactive*.") (emphasis added); *Stovall* v. *Denno*, 388 U.S. 293, 300 (1967) ("We conclude * * * that the *Wade* and *Gilbert* rules should not be *made retroactive*.") (emphasis added).

provision could have conditioned a second or successive habeas petition on a showing that the new rule cited in the petition has been "made retroactive to cases on collateral review *by application of the principles determined* by the Supreme Court." Instead, however, Congress chose the quite different formulation that omits the italicized portion and simply requires that the rule have been "made retroactive to cases on collateral review by the Supreme Court."

Indeed, on petitioner's view, the phrase "by the Supreme Court" in Section 2244(b)(2) is entirely superfluous. If the statute had said only that a second or successive habeas petitioner must invoke a "new rule of constitutional law, made retroactive to cases on collateral review," the lower courts would have had to apply the well-established "principles" found in this Court's retroactivity jurisprudence. Those retroactivity decisions—like decisions of this Court on any other federal question—bind all federal and state courts, regardless of whether Congress so provides. See *Cooper* v. *Aaron*, 358 U.S. 1, 18-19 (1958). And this Court's *Teague* rules were announced and defined long before the enactment of the AEDPA. Accordingly, petitioner's reading of the statute would render the phrase "by the Supreme Court" without function, contrary to this Court's repeated admonition to avoid an interpretation of a statute that renders words superfluous. See, *e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 150 (1996); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 121 S. Ct. 675, 682-683 (2001) (declining to adopt a construction that would "read[] [a] term * * * out of the statute" and "give it no effect whatever").

Under our reading of Section 2244(b)(2)(A), by contrast, all of the terms of the statute are given effect,

and the statute can be read harmoniously as a whole. Section 2244(b)(2)(A) provides that a second or successive petition must rely on a new rule "made retroactive to cases on collateral review by the Supreme Court." The provision requires a decision by this Court holding that a "new rule" satisfies the stringent standards of *Teague* for retroactive application; only then can a second or successive habeas petitioner satisfy the gatekeeping requirement.[7]

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[7] The AEDPA also provides a 1-year limitations period. 28 U.S.C. 2244(d)(1) provides that "[t]he limitation period shall run from the latest of" four dates, of which one is "the 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). In order to apply that provision, it must be determined whether "the right has been * * * made retroactively applicable to cases on collateral review." 28 U.S.C. 2244(d)(1)(C). If that phrase refers to action by this Court making the rule retroactive, as our construction of the similar language in the gatekeeping provision suggests, then the inquiry is manageable and a uniform nationwide standard will result. If, on the other hand, the question is just whether the principles of *Teague* make the new rule retroactive, as petitioner's argument in this case suggests, then no decision by any court would be necessary, and the retroactivity clause would be entirely redundant. Even if the action of a court of appeals or district court applying *Teague* were necessary, it is highly unlikely that Congress intended to hinge the application of the statute of limitations on whether some court of appeals or district court somewhere in the country had found that the new rule satisfied *Teague*. The limitations provision should not be given such an indefinite interpretation, nor should the gatekeeping provision. The similar language in both provisions should be read to require specific action by this Court to make the new rule retroactive.

B. A Requirement That This Court Pass On The Retroactivity Issue Accords With Congress's Intent And Provides A Workable Standard

A test that looks to an actual Supreme Court decision on retroactivity is easily applied and accords with Congress's intention to limit the cases in which a second or successive habeas petitioner may proceed to court. In contrast, petitioner's position—that second or successive habeas petitioners may proceed "when the principles of this Court's decisions compel the conclusion that [the new rule] must be retroactive" (Br. 15)—is inconsistent with Congress's intent in enacting the AEDPA and would be difficult to apply in a workable manner.

1. A central purpose of the AEDPA is to "curb the abuse of the statutory writ of habeas corpus." H.R. Conf. Rep. No. 518, *supra*, at 111. Requiring a second or successive habeas petitioner, who relies on a new rule of constitutional law, to point to a specific ruling by this Court making the rule in question retroactive is consistent with that purpose. Any prisoner filing a second or successive petition has already had the opportunity for direct review of his conviction and state post-conviction review. In addition, he has filed and fully litigated an initial federal habeas petition. Congress did not want to cut off all opportunity for prisoners in that position to bring a second or successive habeas petition. But Congress did want to "further restrict[]," *Felker* v. *Turpin*, 518 U.S. at 664, the ability of prisoners who had previously filed habeas petitions to mount new challenges to their convictions and sentences, at a time when both their own attention and that of the courts and prosecutors should be turned to other matters. "No one, not criminal defendants, not the

judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation." *Mackey* v. *United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part).

Section 2244(b)(2)(A) accomplishes Congress's purpose by giving prisoners a "second bite at the apple" only in truly exceptional cases. Not only must the prisoner rely on "a new rule of constitutional law"—which can explain why the prisoner did not previously obtain relief on that basis—but the rule must have been "made retroactive to cases on collateral review by the Supreme Court." Congress thereby eliminated the opportunity for prisoners to bring second or successive petitions in order to *establish* that a new rule should be retroactively applied. The time for establishing that a new legal principle should be applied on collateral review expired with the prisoner's first habeas petition, which could have served as the vehicle for exploring new and controversial applications of retroactivity principles. And Congress sought to free the lower courts from adjudicating the potentially large volume of second or successive habeas petitions that relied on a new rule until this Court had determined that the rule is, in fact, retroactive. Only where both the validity and the retroactivity of the new rule have been established —finally and conclusively by a decision of this Court— did Congress intend to permit reopening criminal convictions and sentences in a second or successive petition.[8]

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[8] Petitioner is therefore correct (Br. 14 n.4) that a consequence of our position is that a prisoner may be "entitled to have [a new

2. Unlike petitioner's construction, an interpretation of Section 2244(b)(2)(A) that requires a Supreme Court decision on retroactivity fits comfortably within the "gatekeeping" scheme of the statute. Under 28 U.S.C. 2244(b)(3), before a second or successive application for habeas relief may be filed, the habeas petitioner must "move in the appropriate court of appeals for an order authorizing the district court to consider the application." The court of appeals may issue such an order "only if it determines that the application makes a prima facie showing that the application satisfies" the requirements of Section 2244(b)(2). 28 U.S.C. 2244(b)(3)(C). The court of appeals has only thirty days to make the gatekeeping decision. 28 U.S.C. 2244(b)(3)(D).

Under our reading, the courts of appeals should be able to dispose of gatekeeping motions under Section 2244(b)(3) relatively quickly and easily. They need only ascertain what claim the second or successive petition makes and then compare that claim with this Court's decisions on retroactivity. Indeed, because the standards for retroactivity are stringent and only a few new rules will likely be made retroactive, see *Graham* v. *Collins*, 506 U.S. at 478; *Sawyer* v. *Smith*, 497 U.S. 227, 243 (1990); *Teague* v. *Lane*, 489 U.S. at 313 (plurality

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rule] retroactively applied in an *initial* habeas petition, but not in a *successive* habeas petition." The inescapable point of Section 2244(b)(2)(A) is that second or successive petitioners must satisfy substantially stricter standards to obtain relief than those litigating a first petition. The reason for the differential treatment is not that a second or successive petition necessarily contains weaker constitutional claims than a first petition, but that a second or successive petition is a more severe affront to the interest in finality than is a first petition. See *McCleskey* v. *Zant*, 499 U.S. 467, 492 (1991).

opinion), ruling on the gatekeeping motion will likely require little expenditure of time and effort.

By contrast, under petitioner's theory (Br. 21-22), the courts of appeals must determine whether "the principles of this Court's decisions compel the conclusion that [the new rule] must be retroactive." That question can be quite complex. See *Saffle* v. *Parks*, 494 U.S. at 495 ("the precise contours of [*Teague*'s second exception for 'watershed rules of criminal procedure'] may be difficult to discern"). The fact that Congress intended the gatekeeping issue to be resolved speedily and without full litigation is inconsistent with petitioner's approach. Rather, the gatekeeping scheme suggests that Congress imposed on the courts of appeals only the efficient and manageable inquiry that the statutory language directs: whether the new rule on which the petition relies has already been "made retroactive to cases on collateral review by the Supreme Court."

3. Petitioner contends (Br. 18-20) that interpreting Section 2244(b)(2)(A) to require an express ruling by this Court would create an anomalous result, in that the Court is less likely to have the occasion to issue a decision making a particular rule retroactive where it is "obvious" that the rule should be applied retroactively. He notes that in *Bousley* v. *United States*, 523 U.S. 614, 619-621 (1998), the Court held that the rule of *Teague* v. *Lane* did not bar application to cases on collateral review of the decision in *Bailey* v. *United States*, 516 U.S. 137, 144 (1995), which narrowed the scope of criminal liability under former 18 U.S.C. 924(c). Petitioner argues (Br. 18 & n.8) that adopting the court of appeals' interpretation of Section 2244(b)(2)(A) would preclude prisoners from filing second or successive applications for post-conviction relief "in cases involving rules that,

under *Bousley*, are necessarily retroactive." Petitioner's contention is flawed.

a. The AEDPA itself bars second or successive petitioners from raising claims under Section 2254 or 2255 based on intervening decisions defining the scope of criminal statutes. Section 2244(b)(2) limits claims that may be raised in second or successive habeas petitions to those based on newly discovered evidence and those that rely on "new rule[s] of constitutional law." Section 2255 imposes similar limits on Section 2255 motions. As the Second Circuit has explained, a habeas petitioner's claim based on an intervening statutory decision like the one in *Bailey* is "new, but not constitutional." *Triestman* v. *United States*, 124 F.3d 361, 372 (1997). Accordingly, there is no basis for petitioner's suggestion (Br. 19 n.8) that adopting the court of appeals' interpretation of "made retroactive" would "choke off access" to the courts for prisoners seeking to raise statutory claims in second or successive collateral attacks under Section 2255; such claims are not available under Section 2255 in any event because they are not based on a "new rule of constitutional law."[9]

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[9] The courts of appeals have uniformly held that a federal prisoner who relies on *Bailey* v. *United States* cannot file a second or successive motion under Section 2255 because the claim does not rely on a new constitutional rule; at the same time, those courts have held that such prisoners may resort to 28 U.S.C. 2241 under the habeas "savings clause" in Section 2255 for cases in which Section 2255 is "inadequate or ineffective." See, *e.g.*, *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997); *Triestman*, 124 F.3d at 376-380; *In re Davenport*, 147 F.3d 605 (7th Cir. 1998). Because of the availability of the "savings clause," there is no concern that federal prisoners who have a claim based on a new decision of this Court cutting back on the sweep of a criminal statute (see Pet. Br. 18) will lack a remedy. There is therefore no basis for distorting the

b. Petitioner also errs in claiming that reading Section 2244(b)(2)(A) to require a decision by this Court that made a new rule retroactive would create an anomaly. Petitioner asserts (Br. 18) that the anomaly is produced because a new rule that is most likely to be retroactive is least likely to generate a conflict in the circuits that would warrant a decision on retroactivity by this Court.

Rule 10(c) of the Rules of this Court states that a consideration in deciding whether to grant certiorari is whether a lower court "has decided an important question of federal law that has not been, but should be, settled by this Court." Cases presenting retroactivity issues, where the lower courts have all agreed that the new rule is retroactive, may well fall within that category, especially in light of Congress's express reliance on decisions of this Court in Section 2244(b)(2)(A). The number of new procedural rules that should be made retroactive is likely to be exceedingly small. As the Court has noted, new rules that should be applied retroactively must establish a "bedrock procedural element[]" that is vital to the fairness of the proceeding, *Sawyer* v. *Smith*, 497 U.S. at 242 (quoting *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion)), and it is "unlikely that many such components of basic due process have yet to emerge." *Butler* v. *McKellar*, 494 U.S. at 416 (1990) (quoting *Teague* v. *Lane*, 489 U.S. at 312 (plurality opinion)).[10]

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text of the gatekeeping provision (either in Section 2244(b)(2)(A) or in the identically worded Section 2255) in an effort to create such a remedy.

[10] The same conclusion follows with respect to new rules that are exceptions to the *Teague* non-retroactivity principle because they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to pro-

4. The court of appeals 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 contends (Br. 22) that the decision in *Sullivan* v. *Louisiana*, 508 U.S. 275, 278-282 (1993), which held that a constitutionally deficient reasonable doubt instruction cannot be harmless error, "compels the conclusion" that the *Cage* rule should be applied retroactively. As discussed more fully below, see pp. 25-29, *infra*, *Sullivan*'s holding that *Cage* errors are not amenable to harmless-error review does not resolve whether *Cage* announced a new rule that should be applied retroactively to proceedings on collateral review.

In arguing that the *Cage* rule has already been made retroactive by this Court, petitioner also relies (Br. 28) on the disposition in *Adams* v. *Evatt*, 511 U.S. 1001 (1994), in which the Court vacated a court of appeals' holding that retroactive application of *Cage* was barred

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scribe." *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion). Petitioner's view (Br. 18 n.8) that questions regarding the retroactivity of such rules are unlikely to reach this Court is speculative at best. The question whether any such rule is retroactive to cases on collateral review may well reach this Court on a petition for certiorari from a first federal habeas petition and could be raised on an original habeas petition filed in this Court. See *Felker* v. *Turpin*, 518 U.S. 654, 658-663 (1996). Indeed, a first federal habeas petition could present a retroactivity question to this Court not only if a lower court directly addresses the retroactivity issue, but also if the lower court addresses whether the rule on which the habeas petitioner relies is genuinely "new" under *Teague* or whether it is genuinely a rule that protects primary conduct from criminal punishment. In any event, the premise of Section 2244(b)(2)(A) is that principles of finality are of sufficient importance that some otherwise meritorious second and successive habeas petitions should be barred.

by *Teague*, and remanded for further consideration in light of *Sullivan* v. *Louisiana*, *supra*. As the First Circuit has explained, however, a summary reconsideration 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*, 139 F.3d at 276 (quoting *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam)); see also Robert L. Stern et al., *Supreme Court Practice* 249-250 (7th ed. 1993). 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.

II. THE NEW CONSTITUTIONAL RULE ANNOUNCED IN *CAGE* V. *LOUISIANA* SHOULD NOT BE APPLIED RETROACTIVELY TO CASES ON COLLATERAL REVIEW

1. New constitutional rules of criminal procedure are not retroactively applicable to proceedings on collateral review unless they satisfy one of the two exceptions discussed in this Court's *Teague* line of cases. *Teague*'s non-retroactivity principle is based on the purposes of the writ of habeas corpus and considerations of finality in the criminal law. The writ of habeas corpus exists as a safeguard against a fundamental miscarriage of justice; it has never been defined "by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion); *Teague* v. *Lane*, 489 U.S. at 308 (plurality opinion). Generally, the purpose of collateral review is

to ensure that courts conduct their proceedings in a manner consistent with the law in existence at the time, "and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer* v. *Smith*, 497 U.S. at 234. The distinction between law that prevailed at the time of trial and later-announced rules is important, because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. at 309 (plurality opinion). Accordingly, the "new rule" principle of *Teague* "validates reasonable, good-faith interpretations of existing precedents made by [lower] courts even though they are shown to be contrary to later decisions." *Butler* v. *McKellar*, 494 U.S. at 414; *Saffle* v. *Parks*, 494 U.S. at 488.

2. This Court has defined a "new rule" under *Teague* as one that was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Graham* v. *Collins*, 506 U.S. at 467; *Sawyer* v. *Smith*, 497 U.S. at 234; *Teague* v. *Lane*, 489 U.S. at 301 (plurality opinion); see also *O'Dell* v. *Netherland*, 521 U.S. 151, 164 (1997) (test for whether decision announces new rule is whether, at the time of the decision, a "reasonable jurist" would have felt "compelled" to adopt the rule it stated). As petitioner acknowledges (Br. 11-13), *Cage* clearly adopted a new rule under that standard. No prior decision had "dictated" that the reasonable doubt instruction in *Cage* violated the Due Process Clause.

3. The *Cage* rule does not fall within either of the narrow exceptions to *Teague*'s principle of non-retroactivity. The first *Teague* exception covers rules defining a class of conduct that the legislature may not

regulate under the criminal law. *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion); *Butler* v. *McKellar*, 494 U.S. at 415. Relatedly, it also applies to rules prohibiting a certain type of punishment for a particular class of defendants. See *Saffle* v. *Parks*, 494 U.S. at 494; *Penry* v. *Lynaugh*, 492 U.S. 302, 330 (1989). *Cage* neither protected primary conduct, nor restricted punishment, so that exception is plainly inapplicable.

4. The second *Teague* exception is limited to "watershed rules of criminal procedure" that are "central to an accurate determination of innocence or guilt." *Teague* v. *Lane*, 489 U.S. at 311, 313 (plurality opinion); see *Sawyer* v. *Smith*, 497 U.S. at 241- 242; *Saffle* v. *Parks*, 494 U.S. at 495; *Butler* v. *McKellar*, 494 U.S. at 416. This Court has made clear that for a rule to fall within *Teague*'s second exception, it must satisfy two distinct conditions that Justice Harlan originally proposed—an "accuracy element" and a "fundamental fairness" element. *Teague* v. *Lane*, 489 U.S. at 312 (plurality opinion). First, infringement of the new rule must "seriously diminish the likelihood of obtaining an accurate conviction," *id.* at 315, and second, the new rule must "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding," *Sawyer* v. *Smith*, 497 U.S. at 242 (quoting *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion)).

Petitioner contends (Br. 24-28) that the Court's ruling in *Sullivan* v. *Louisiana*, 508 U.S. at 281-282, that violations of the *Cage* rule are "structural" error makes clear that *Cage* announced a "watershed" rule within the meaning of the second *Teague* exception. Contrary to petitioner's argument (Br. 25), the Court has not adopted "essentially identical" tests for determining whether a constitutional rule falls within the *Teague* exception and for determining whether a

violation of that rule is not subject to harmless-error review. A decision that a given rule is not subject to harmless-error review does suggest that that rule may satisfy the "accuracy element" in the second *Teague* exception. It has little to do, however, with the question whether the new rule is a "bedrock procedural element[]." *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion; emphasis omitted).

a. As *Sullivan* makes clear, an error qualifies as "structural" when it is impossible to determine the effect of the error on the jury's verdict—and therefore impossible to conduct harmless error review. The Court concluded in *Sullivan* that a trial court's error in giving a defective reasonable-doubt instruction "was not subject to harmless-error analysis because it 'vitiates all the jury's findings,' * * * and produces 'consequences that are necessarily unquantifiable and indeterminate.'" *Neder* v. *United States*, 527 U.S. 1, 11 (1999) (quoting *Sullivan*, 508 U.S. at 281-282); see *Brecht* v. *Abrahamson*, 507 U.S. 619, 629 (1993) (unlike trial error, which "is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial],'" structural errors "defy analysis by harmless-error standards") (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 307-309 (1991)). In that respect, a "structural" error may well implicate the "accuracy element" of the second *Teague* exception.

b. The fact that it may be impossible to determine an error's effect on a jury verdict—and that harmless error analysis is therefore impossible—has little to do with whether the error satisfies the "fundamental fairness" element of the second *Teague* exception. To satisfy that element, a new rule must "'alter our under-

standing of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U.S. at 242 (quoting *Teague* v. *Lane*, 489 U.S. at 311 (plurality opinion)). This Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), for example, established for the first time that a criminal trial cannot satisfy standards of fundamental fairness if the defendant does not have the opportunity to be represented by counsel. In that sense, it "alter[ed] our understanding" of what is necessary for a fair trial. Before *Gideon*, it was believed that a defendant could have a fair trial without being provided with the opportunity to have an attorney; after *Gideon*, it was clear that a fair trial could not be conducted in that manner. Similarly, the plurality in *Teague* gave as examples of "watershed rules" those that constituted "the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." 489 U.S. at 313. Each of those holdings similarly "altered our understanding" of the "bedrock procedural elements" of a fair trial

The rule announced in *Cage* does not satisfy that standard. *Cage* did not announce the constitutional requirement of proof beyond a reasonable doubt. It had been well established that the government must prove all elements of the offense beyond a reasonable doubt since at least the time of *In re Winship*, 397 U.S. 358, 364 (1970). Rather than altering—or even reinterpreting—that requirement, the Court in *Cage* merely applied it to the particular jury instruction in that case. Such applications of settled legal principles in somewhat different contexts cannot be described as

"watershed" or "bedrock"; they are instead part of the ordinary process of constitutional adjudication. Although such adjudication may result in a "new rule," as it did in *Cage*, and it may even result in a rule that proves impervious to ordinary harmless error review, as *Sullivan* held was true of *Cage*, each application of an established constitutional protection does not produce a "watershed" or "bedrock" principle.[11]

This Court's decision in *Cage* itself reinforces that conclusion. This Court decided *Cage* in a three-page, per curiam opinion, without the benefit of full briefing and argument. The Court's legal analysis consisted of a single paragraph, see 498 U.S. at 41, which simply found that some of the language in the jury instruction "suggest[s] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Ibid.* That treatment of the case is entirely consistent with an application of a settled legal standard in a new context; it is not consistent with the discovery of a new "bedrock procedural element" or "watershed" rule.

Moreover, the conclusion that *Cage* merely applied the *Winship* rule in a new context is underscored by the Court's decision in *Victor* v. *Nebraska*, 511 U.S. 1 (1994). In that case, the Court considered the constitutionality of two reasonable doubt instructions in light of

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[11] Nothing in the Court's opinion in *Sullivan* suggests that *Cage* was a "bedrock" or "watershed" rule in the required sense. The Court's reasoning in *Sullivan* focused on the "pure speculation" that a reviewing court would have to engage in if it attempted to apply harmless error review where a "misdescription of the burden of proof * * * vitiate[d] *all* the jury's findings." 508 U.S. at 281. The Court also focused on the serious nature of a denial of the right to trial by jury, "without which a criminal trial cannot reliably serve its function." *Ibid.* Both of those concerns had to do with the "accuracy element" of the second *Teague* exception.

Cage. Although the instructions challenged in *Victor* were similar in many respects to the instruction at issue in *Cage*, the Court held that the particular language of those instructions, when read as a whole, was not reasonably likely to have been applied unconstitutionally. See *Victor*, 511 U.S. at 17 (noting that challenged instruction and *Cage* instruction "included an almost identical reference to 'not a mere possible doubt'"); *id.* at 21-22 (comparing use of phrase "moral certainty" in instruction at issue with use of that phrase in *Cage* instruction). The difference between the instructions in *Victor* and those in *Cage* is the difference between an adequate and an inadequate explication of the reasonable doubt standard. Neither decision, however, fundamentally altered the Court's understanding of the bedrock procedural elements necessary for a fair trial.

5. As in *Sawyer* v. *Smith*, 497 U.S. at 243, "[i]t is difficult to see any limit to the definition of the second [*Teague*] exception if cast as proposed by petitioner." This Court regularly considers the application of the bedrock constitutional principles of criminal procedure to particular contexts, such as the right to counsel, see *Smith* v. *Robbins*, 528 U.S. 259 (2000); the privilege against compelled self-incrimination, see *Mitchell* v. *United States*, 526 U.S. 314 (1999); or the right to confront witnesses, see, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116 (1999); *Gray* v. *Maryland*, 523 U.S. 185 (1998). Under petitioner's reasoning, each such case (if decided in favor of the defendant) would result in a "watershed" or "bedrock" rule that satisfies the second *Teague* exception, because each such case would be based on the lack of a protection—the right to counsel, to a jury trial, to confront witnesses, etc.—that is, in the abstract, "fundamental to the fairness of the proceeding."

Pet. Br. 27. If that were so, this Court would surely have been wrong in insisting that the second *Teague* exception would apply only to "a small core of rules," *Graham* v. *Collins*, 506 U.S. at 478, and that "it [is] unlikely that many such components of basic due process have yet to emerge." *Teague* v. *Lane*, 489 U.S. at 313 (plurality opinion); accord *Sawyer* v. *Smith*, 497 U.S. at 243; *Butler* v. *McKellar*, 494 U.S. at 416. The premise of this Court's *Teague* cases has been that retroactive application to cases on collateral review should be reserved for the truly exceptional rule in which the Court has altered a fundamental understanding of what constitutes a fair trial. Because no such alteration took place in *Cage*, the decision in that case does not apply retroactively.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTORY PROVISION INVOLVED

Section 2244 of Title 28 of the United States Code (Supp. IV 1998) provides as follows:

Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) 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—

(A) 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; or

(B)(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.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The 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 motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appeal-

able and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-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. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the 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, if the applicant was prevented from filing by such State action;

(C) the 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; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

APPENDIX B

The following reasonable doubt instruction was given at petitioner's trial:

> If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one 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 by reason of 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. If after giving a fair and impartial consideration of all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.
>
> The prosecution must establish guilt by legal and sufficient evidence beyond a reasonable doubt, but the rule does not go further and require a preponderance of testimony. It is incumbent upon the state to prove the offense charged, or legally included in the indictment, to your satisfaction and beyond a reasonable doubt. 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 man would seriously entertain. It is a serious doubt, for which you could give good reason.

See J.A. 9-10.