NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM PHILLIPS,

Petitioner,

v.

DALE ARTUS, Superintendent, Clinton Correctional Facility and
ERIC SCHNEIDERMAN, Attorney General of New York State**,**

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Court should decide the dispositive threshold question as to what rule to use in determining the relevant time for deciding in a post-AEDPA habeas case what Supreme Court precedent applies, i.e. what is "clearly established federal law" under 28 U.S.C. §2254 - - either the date-of-finality rule or the date-of-the-last-reasoned-state-court-decision rule - - thereby resolving the current split among federal Circuit Courts recently deciding this issue.

II. Whether it is erroneous and unreasonable to interpret broadly the "fact of a prior conviction" exception to the *Apprendi* rule so that it encompasses findings regarding the seriousness and extensiveness of those convictions?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

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WILLIAM PHILLIPS, *Petitioner,*

v.

DALE ARTUS, Superintendent, Clinton Correctional Facility, and ERIC SCHNEIDERMAN, New York State Attorney General,[1] *Respondents.*

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William Phillips respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, sitting *en banc* (A1), is reported at 624 F.3d 69, *sub. nom. Portalatin* v. *Graham.* The opinion of the original three-judge panel granting the writ (A38), is reported at 601 F.3d 163, *sub. nom. Besser v. Walsh*. The opinion of the United States District Court for the Southern District of New York is not reported, but can be found at 2007 WL 1867386 (A103).

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Eric Schneiderman, New York State Attorney General, is automatically substituted for Andrew M. Cuomo, former New York State Attorney General.

JURISDICTION

The United States Court of Appeals for the Second Circuit, sitting en banc, entered its judgment denying the writ on October 18, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The Fourteenth Amendment to the United States Constitution provides, in relevant part, " ... nor shall any State deprive any person of ... liberty, ... without due process of law."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254 (A118)

New York Penal Law §70.10 (A119)

New York Criminal Procedure Law §400.20 (A119)

STATEMENT OF THE CASE

The issues presented in this important habeas case involve whether the New York Court of Appeals' decisions rejecting *Apprendi*[2]/*Ring*[3]/*Blakely*[4]/*Cunningham*[5]-based challenges to the constitutionality of New York State's persistent felony offender (PFO) statutes were contrary to, or based on an unreasonable application of, controlling Supreme Court precedent and what rule

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2 *Apprendi v. New Jersey*, 530 U.S. 466 (1990).

3 *Ring v. Arizona*, 536 U.S. 584 (2002).

4 *Blakely v. Washington*, 542 U.S. 296 (2004).

5 *Cunningham v. California*, 549 U.S. 270 (2007).

to use in determining the relevant time for deciding in a post-AEDPA habeas case what Supreme Court precedent applies, i.e., what is "clearly established law" under 28 U.S.C. §2254. The New York PFO statutes permit a sentencing court to exercise its discretion to impose a dramatically enhanced sentence regarding a defendant who stands convicted of at least a third felony offense, but require the court to determine, before doing so, that "the history and character of the defendant and the nature and circumstances of his criminal conduct are such that extended incarceration and lifetime supervision of the defendant are warranted to best serve the public interest." N.Y. Penal Law (P.L.) §§70.10(1), (2); N. Y. Crim. Pro. Law (C.P.L.) §400.20(1). That determination, in turn, requires that the court make supporting fact findings, based on a preponderance of the evidence test and under relaxed evidentiary rules. C.P.L. §400.20(5), (9).

We contend that petitioner's PFO sentence violates his rights to a jury trial and due process, because those constitutional guarantees prohibit a sentencing scheme that allows a judge, rather than a jury, to impose a sentence above the otherwise-applicable statutory maximum based on fact findings, linked to but going far beyond the mere fact of prior convictions, and determined under a standard of proof less than beyond a reasonable doubt. A three-judge panel of the Court of Appeals for the Second Circuit ruled in petitioner's favor, *Besser v. Walsh* (*Phillips* v. *Artus*), 601 F.3d 163 (2010), but the full court, upon a rehearing *en banc*, vacated that decision by a vote of 9 to 3, and denied the petition. *Portalatin v. Graham* (*Phillips v. Artus*), 624 F.3d 69 (2010).

The State Court Trial and Sentencing

Phillips was tried for robbery, following an incident in which two men entered a mid-town Manhattan news stand and stole money and magazines from the shopkeeper at knife point. When the men fled the store, the shopkeeper chased them, but they escaped. Despite confusing

and contradictory evidence as to which of the robbers had held the knife and significant gaps in the identification testimony, Phillips was convicted of robbery in the second degree (P.L. §160.10[1]).

Phillips was sentenced, without a jury, to sixteen years' to life imprisonment as a discretionary persistent felony offender. The maximum prison term Phillips could have received based on the jury's factual findings was a determinate sentence of fifteen years. P.L. §§160.10; 70.02 (1) (b).

The People filed a "Presentence Statement" listing his prior offenses, providing a detailed chronology, with commentary, of his criminal record and incarcerations, and arguing that his "history and character and the nature and circumstances of his criminal conduct" required a life sentence (December 6, 1999, Presentence Statement; A64).

Prior to the day of sentencing, the court entertained argument on the People's motion to sentence Phillips as a discretionary persistent offender (January 4, 2000, minutes; A74). The prosecutor argued that his "extensive" criminal history indicated that he had failed to take advantage of repeated opportunities and "breaks in the criminal justice system," i.e. plea bargains, "package deals," and offers of concurrent time (A75-76). The prosecutor further cited the "similarity" between some of his prior crimes and the crime in this case (A76).

Counsel responded that the defense was not challenging that Phillips was the one who had committed the crimes listed in the People's Presentence Statement, that the defense continued to dispute the facts of this case, and that Phillips continued to maintain his innocence (A76-77). He maintained that, if Phillips were not sentenced as a persistent felony offender, he could receive a sentence "anywhere from seven and a half to fifteen years," which counsel argued would be a "sufficient" sentence (A77-78).

Asked by the court whether there was anything Phillips wished to address "about sentencing, your background or anything like that," Phillips stated:

> My past criminal history, the ultimate involvement and everything but personally, I'm scared of knives as weapons myself. I would not try to pull no weapon out on anybody, no knife or anything. I committed burglaries in my life but never no weapon. I don't try to hurt anybody that is one thing I go by is weapons. I don't mess with weapons and children at all and it's not another thing that I was not there and I'm still innocent. I never committed that crime. I had no reason to commit that crime. I was satisfied with my job even though it wasn't a big income but it was better. I used to be a crack head, a dope fiend, a drug user but I appreciated being working seven days a week (A80-81).

At sentencing the following week, the court found Phillips to be a persistent felony offender, declined the prosecutor's request to sentence him to twenty-five years to life, and sentenced him, instead, to sixteen years to life (A88-91). It issued a written opinion, beginning with the statement that it had "adopted" the People's Presentence Statement (January 10, 2000, decision and order; A82).

The opinion then proceeded to list Phillips's prior felony convictions and launched into a discussion of petitioner's "history and character" (A83). It referred to a 1986 second-degree robbery charge following an incident in which Phillips and a companion had "grabbed a man on a Bronx street and forcibly stole his property" (A83). It referred further to Phillips's failure to appear at a court date on this charge, the issuance of a warrant for his arrest, and three arrests while he was awaiting sentence on this charge (A84). Phillips, it stated, ended up pleading guilty to charges arising from each of these arrests, involving theft of merchandise from a broken store window, of a wallet from an undercover officer, and of merchandise from a "card store" (A84). He received concurrent sentences after guilty pleas to all four of these indictments (A84).

Six weeks after his release on these charges, the opinion recounted further, Phillips was found in possession of property stolen from a recently burglarized store (A84). He was convicted of criminal possession of stolen property, and his parole was revoked (A84). The following year, Phillips was arrested on charges involving the forcible theft of property from a newsstand (A84-85). At the time of arrest, he told the police his name was Thomas W. Lee (A85).

Phillips pleaded guilty to petit larceny, was sentenced to six months in prison, and, upon his release, was arrested, in January 1990, after having been observed using a metal bar to pry open a building gate (A85). Following another guilty plea and brief incarceration, he was again released, and then arrested for forcible theft of money from a candy/stationery store (A85). He told the police that his name was Travis Palmer (A85). The following year, Phillips absconded from a "temporary release program" (A85).

From 1992 through 1998, Phillips was paroled, re-incarcerated, paroled, convicted of burglary-related charges (involving the use of the Palmer alias), and then convicted three separate times on (two) drug possession charges and one set of charges alleging the sale of cocaine (A85-86). One of his drug arrests occurred while he was participating in a "short-term in-patient" drug program, from which he was released in December, 1998 (A86). He was arrested in this case on March 13, 1999 (A86).

Having recited this history, the court found that:

> Over the past thirteen and a half years, defendant has received the benefit of favorable plea bargains, minimal sentences, early parole, a temporary release program, community service in lieu of incarceration and a drug program. Rather than taking advantage of these opportunities, defendant chose to commit new crimes as soon as he was released from custody. Defendant has demonstrated time and again, throughout his entire adult life, that he cannot be trusted to function normally in society and that he is unwilling and unable to rehabilitate himself. The history and character of defendant and the nature and circumstances of his

> criminal conduct are such that extended incarceration and lifetime supervision are warranted to best serve the public interest. CPL 400.20(1); PL 70.10 (A86-87).

The State Court Appeal

Phillips appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department. He argued, inter alia, that his sentencing to an increased maximum sentence as a discretionary persistent felony offender based on facts in addition to recidivism that were determined by the court rather than a jury, on a mere preponderance of the evidence, violated his rights under the Sixth Amendment to the United States Constitution.[6]

In a decision and order dated December 18, 2003, the Appellate Division, First Department, affirmed Phillips's conviction. *People v. Phillips*, 2 A.D.3d 278, 768 N.Y.S.2d 812. It ruled, in pertinent part, that:

> The court properly denied defendant's motion to set aside his sentence as a discretionary persistent felony offender . . . We need not decide whether *People v. Rosen* . . ., to the extent that it upholds the constitutionality of the discretionary persistent felony offender procedure conflicts with *Ring v. Arizona* . . ., because the particular facts upon which the sentencing court based its determination were all permissible under *Apprendi*, in that they constituted facts found by the jury in the instant case, prior convictions and undisputed matters of record (A94).

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[6] Phillips initially raised this issue in a supplemental brief. Also during the pendency of his appeal, petitioner filed a motion in the trial court to vacate the judgment on this ground, pursuant to C.P.L. §440.20. The People opposed the motion.

The trial court summarily denied the motion. It found, in sum and substance, that, "[u]nlike *Apprendi* (where the judge without a jury determined that defendant's crime was motivated by racial hatred) and *Ring* (where the judge without a jury determined that it was defendant who fired the fatal shot), the only factors I considered in deciding which sentence to impose were the facts underlying defendant's 1999 robbery conviction (which had already been proved to the jury's satisfaction beyond a reasonable doubt) and defendant's twenty-year history of convictions, incarcerations and failed attempts at rehabilitation, all of which are a matter of public record and with respect to which there was no dispute" (June 25, 2003, decision and order, at pp. 1-2; [A92-93]). The Appellate Division, First Department granted leave to appeal the denial of this motion, consolidating it with the direct appeal. Upon further leave of the Appellate Division, petitioner filed a supplemental brief raising the issue *Apprendi* issue again, in the context of the trial court's denial of the C.P.L. §440.20 motion.

Applying for leave to appeal to the New York Court of Appeals, Phillips repeated the argument to the Appellate Division set forth above (A95-96). By order of June 24, 2004, Judge Judith S. Kaye, Chief Judge of the New York Court of Appeals, denied his application for leave to appeal to that court, "without prejudice to renew within thirty days of" the decisions in two other cases then pending in the Court of Appeals (A99). *People v. Phillips*, 3 N.Y.3d 645. On September 2, 2004, Phillips sent a follow-up letter to the Court of Appeals discussing at length the salient aspects of *Blakely v. Washington*, 542 U.S. 296 (2004) and asking that his case be calendared with pending cases involving the constitutionality of the discretionary persistent felony offender statute, including *People v. Rivera* (A100-101). On September 30, 2004, the Court of Appeals further denied leave, upon reconsideration, without granting leave to renew. 3 N.Y.3d 710 (2004) (A102).

The District Court Order Denying the Petition for a Writ of **Habeas Corpus**

Phillips filed a timely petition for a writ of habeas corpus based on the *Apprendi* sentence issue raised and exhausted in state court. The District Court denied the petition on the merits (A103). It cited this Court's rulings in *Brown v. Greiner*, 409 F.3d 523 (2005) and *Brown v. Miller*, 451 F.3d 54 (2006), that the rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) did not entitle the petitioners in those cases to habeas relief. Further finding that Phillips' conviction "became final after *Blakely v. Washington*, 542 U.S. 296 (2004)]", it held, nonetheless that:

> *Blakely*, however, did not materially change the analysis regarding judicial fact-finding from that of *Apprendi* or *Ring*. *See Brown v. Miller* . . . Given that the Second Circuit has held that it was not unreasonable for the New York Court of Appeals to conclude that §70.10 [the discretionary persistent felony offender statute] does not run afoul of *Apprendi* - or *Ring* - there is nothing in *Blakely* that would change that conclusion.

The Issuance of the "COA" and the Framing of the Issues

Upon application by Phillips, the Second Circuit Court of Appeals issued a Certificate of Appealability from that judgment instructing the parties to address the following issues:

> (1) which date - - that of the entry of the Appellate Division's opinion, the date the New York Court of Appeals denied leave to appeal, the date the Court of Appeals entered its order denying leave upon reconsideration, or the date upon which the conviction became final - - is the relevant time for determining the applicable Supreme Court precedent; (2) if *Blakely v. Washington*, 542 U.S. 296 (2004), applies to this case, whether the state court's determination was an unreasonable application of the Supreme Court's holding in that case; and (3) what effect, if any, *People v. Rivera*, 5 N.Y.3d 61 (2005), has on the present case.

The Decision of the Three-Judge Panel

In *Besser v. Walsh* (*Phillips v. Artus*), 601 F.3d 163 (2d Cir. 2010), the panel, in an opinion by Judge Winter, ruled unanimously that the New York Court of Appeals decisions upholding these provisions had unreasonably applied Supreme Court precedent. The panel explicitly acknowledged the validity of the Second Circuit's rejection of *Apprendi*- and *Apprendi*/*Ring*-based challenges to PFO in *Brown I* and *Brown II*. 601 F.3d at 181-182. Critically, however, those decisions did not assess the impact of *Blakely*. *Id*. Before *Blakely*, as *Brown I* and *Brown II* recognized, it was reasonable for a state court to conclude that because the factual determinations required for a sentencing increase under the statutory framework here, unlike those at issue in *Apprendi* and *Ring*, are amorphous and not elemental in character, they could be determined by the court. 601 F.3d at 181-182. *Blakely*, however, "rejected the argument that the *Apprendi* rule did not apply because Washington's sentencing laws did not require the finding of any *specific* fact or facts, but rather required application of the amorphous test of 'substantial and compelling reasons,' as a prerequisite for the imposition of a sentence enhanced beyond the standard range." 601 F.3d at 181 (emphasis as written; citation omitted).

Under *Blakely*, it is irrelevant whether the necessary finding is "a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or any aggravating fact (as [in *Blakely*])." *Besser*, 601 F.3d at 181, *quoting from Blakely*, 542 U.S. at 305.

The panel also evaluated the impact of *Cunningham v. California*, 549 U.S. 270 (2007), which was decided after petitioner's state judgments had become final, because *Blakely* "compelled the result in *Cunningham*," which "presented no issue of law or fact materially distinguishable from *Blakely*." 601 F.3d at 184-185. It noted that the Ninth Circuit had reached the same conclusion in *Butler v. Curry*, 528 F.3d 624, 635-636 (9th Cir. 2008). 601 F.3d at 184-185.

The decision recognized that "[t]here is no material difference between the PFO statute and the schemes that the Supreme Court found objectionable in *Blakely/Cunningham*." 601 F.3d at 186. In each statutory scheme, the convicted defendant is *eligible for* enhanced sentencing based on the facts underlying the jury's verdict and/or defendant's prior convictions. The court is allowed to *impose* the increased maximum, however, only upon fact findings in addition to the prior convictions. *Id*. at 173-174, 186. Absent such a finding, the court lacks discretion to impose the increased sentence, and must sentence the defendant under a less onerous range. *Id*. at 187. Just as the amorphous and unspecified nature of the required fact findings was constitutionally irrelevant regarding the Washington and California schemes at issue in *Blakely* and *Cunningham*, they are irrelevant here as well. *Id*. at 188.

The panel rejected respondent's contention that the primary New York Court of Appeals decision upholding these provisions, *Rivera*, interpreted them so as to eliminate the second-step judicial fact findings in addition to the defendant's prior convictions, mandated under C.P.L. §400.20 before the increased sentence may be imposed. Though the *Rivera* court frequently

declared that two prior convictions were alone sufficient to render defendants "eligible for," or "subject to," the possibility of a maximum sentence of life, the court nevertheless "follow[ed] the language of the PFO statute in giving a sentencing court discretion to impose such a sentence but only if the court finds that 'the history and character of the defendant and the nature and circumstances of [defendant's] criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest.'" *Besser*, 601 F.3d at 173. "As *Rivera* stated, these factors govern 'whether to impose the authorized persistent offender sentence' or whether 'to hand down a sentence as if no recidivism finding existed.'" *Besser*, 601 F.3d at 173-174, *quoting from Rivera*, 5 N.Y.3d at 198-199.

The *Besser* panel recognized that the result in *Rivera* was actually based on its mistaken view that under *Blakely*, only facts other than recidivism that establish *eligibility* for the sentence increase need be found by the jury. In *Blakely* and *Cunningham* themselves, the defendants were eligible to receive the enhancement as the result of a guilty plea (*Blakely*) or a jury verdict (*Cunningham*), but were nevertheless entitled to a jury determination of the additional facts necessary before the sentence could be imposed. *Besser*, 601 F.3d at 186-187. *Rivera* also mistakenly viewed the nature of the required fact findings as somehow consequential; it "emphasized that the history/character/criminal conduct findings are of the sort that have always guided the exercise of discretion in sentencing," *Besser*, 601 F.3d at 185, and "fall[] squarely within the traditional discretionary role of the judge." *Id*., *quoting from Rivera*, 5 N.Y.3d at 69. Under *Blakely* and *Cunningham*, however, "the statutory labels 'history and character' and 'nature and circumstances of [the] criminal conduct' can no longer reasonably be described as the kind of judicial fact-finding constitutionally permissible." *Besser*, 601 F.3d at 188.

Relying on *Brown I* and *Brown II*, the panel determined that Morris's claim was decided on the merits by the Appellate Division even though that court purported to invoke a procedural bar. 601 F.3d at 179. The Appellate Division cited *Rosen*, regarding which the Second Circuit held in *Brown I* that "the state court in ... *Rosen* could not have invoked state procedural law and barred Rosen's Sixth Amendment claim without first having found that the claim was without merit." *Besser*, 601 F.3d at 179, citing *Brown I*, 409 F.3d at 532. Accordingly, "a citation to *Rosen* in holding that a claim is procedurally barred establishes that the state court decision was interwoven with federal law," and the resulting decision is "on the merits" and therefore subject to habeas review. *Besser*, 601 F.3d at 179, citing *Brown I*, 409 F.3d at 532, and *Brown II*, 451 F.3d at 56-57.

Finally, the court determined that harmless-error analysis was applicable here pursuant to the Court's decision in *Washington v. Recuenco*, 548 U.S. 212 (2006), and remanded this case in order to enable the District Court to make that determination. *Id*. at 188-189.

The Decision of the Second Circuit *En Banc*

In an opinion by Circuit Judge Wesley, the full court agreed with the panel that petitioner's claim was not barred by procedural default. 624 F.3d at 79 n. 4. It also acknowledged that petitioner was entitled to rely on *Cunningham*, even though it was decided after his state court judgment became final, because the result in *Cunningham* was compelled by this Court's previous decision in *Blakely*, and hence *Cunningham* did not state a "new rule" for purposes of either 28 U.S.C. §2254(d)(1) or *Teague v. Lane*, 489 U.S. 288 (1989). 624 F.3d at 83-84. Nevertheless, by a vote of 9 to 3, the majority vacated the panel's decision in *Besser v. Walsh*, holding that the New York courts "did not engage in an unreasonable application of

clearly established Supreme Court precedent in affirming the petitioners' sentences." 624 F.3d at 88.[7]

First, the majority rejected petitioner's argument that the second-step determination required under the PFO statute (the directive requiring the court to consider the history and character of the defendant and the nature and circumstances of the crime and set forth findings of fact before determining whether the increased sentence should be imposed) requires judges to find facts going well beyond the fact of the prior convictions in order to impose the enhancement, thereby violating *Blakely* and *Cunningham*. 624 F.3d at 88-91. The majority relied heavily on its belief that the New York Court of Appeals, in its decision in *People v. Rivera* upholding these provisions, construed this directive to be a "procedural" rather than a "legal" requirement, "that is only triggered once a judge is already *authorized*[8] to impose the [increased] sentence" based on the prior convictions alone:

> In essence, *Rivera* construed the statutory directive that a sentencing judge articulate the reasons for imposing a heightened] sentence as one of procedure: the explanation itself satisfies the statutory requirement, regardless of whether it contains any facts beyond those respecting the defendant's predicate felonies. Accordingly, any other facts upon which the sentencing judge chooses to rely cannot properly be understood as "elements" of the underlying offense in terms of *Apprendi*, because they are not necessary factual predicates to the imposition of the sentence. Instead, they simply inform the judge's discretion to select an appropriate sentence within those *ranges* authorized by statute.

624 F.3d at 89 (emphasis supplied).

Thus, the majority concluded, the *Apprendi* permissible sentencing range under these provisions -- the range of sentences that the court could constitutionally impose based upon the facts found by the jury and prior convictions alone -- was the term authorized for persistent

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[7] Two additional petitioners' cases were consolidated for argument and decision by the *en banc* court: *Morris v. Artus* and *Portal atin v. Graham*.

[8] Emphasis as written.

felony offenders whom the court believed to merit that sentence, a minimum term of between 15 and 25 years and a maximum term of life in prison. 624 F.3d at 91. Strikingly, however, the majority acknowledged that if the court determined that a PFO enhancement was *not* warranted, it was *obligated* to impose a sentence within a second, far less severe "range:" a sentence no more than the maximum term for *second* felony offenders, which, in Mr. Phillips's case, was a prison term of fifteen years. *Id*. at 89 and n. 12.

Though the majority acknowledged that the *Rivera* decision also declared that, at this stage, "the People retain the burden to show that the defendant deserves a higher sentence," 624 F.3d at 90, *quoting from Rivera*, 5 N.Y.3d at 68, it concluded that "the meaning of *Rivera*'s reference to the State's 'burden' is not entirely clear -- it might, for example, mean that the State is obligated to prove by a preponderance of the evidence any of the facts it introduces in an attempt to persuade the sentencing judge, or might merely refer in an informal sense to the notion that it typically will be incumbent upon the State to oppose sentencing arguments advanced by defendants." 624 F.3d at 91. The majority believed it to be critical that "the [New York] Court of Appeals was emphatic that the statute does *not* impose an overarching evidentiary burden upon the State that must be satisfied before the sentencing court may lawfully impose [the increased] sentence." *Id*. (emphasis as written).

Similarly, the majority admitted that the *Rivera* court had written that the factors relied on by the trial judge to justify imposing the increased sentence were subject to "mandatory consideration and articulation," *Portalatin v. Graham*, 624 F.3d at 85, *quoting from Rivera*, 5 N.Y.3d at 69, but found it critical that the New York court had explained that the purpose of those requirements was to "provide the defendant with notice and an opportunity to respond," and to "facilitate[] an appellate review function that is distinct from the issue of whether the PFO

sentence was lawfully imposed;" "that oversight power is unrelated to the legality of the sentence." *Portalatin*, 624 F.3d at 86; *see also id*. at 90.

The majority also rejected petitioner's second argument: "that -- notwithstanding the Court of Appeals' authoritative construction in *Rivera* -- the PFO statute continues to require unconstitutional factfinding, because even assuming the predicate felony convictions are sufficient to authorize a PFO sentence, the mere fact of those convictions does not suffice. Instead, a sentencing judge must form an opinion about the nature of those convictions before imposing a PFO sentence, an endeavor that necessarily entails factfinding beyond the scope of the exception to *Apprendi* rule regarding the fact of a prior conviction.[9] That is, a court is required to consider subsidiary facts and surrounding circumstances of those convictions to arrive at a conclusion whether 'extended incarceration and life-time supervision will best serve the public interest'" (*quoting from* P.L. §70.10(2). *Portalatin* at 92.

The majority noted that (1) the *Rivera* court had said that a sentencing judge would be authorized to impose a life sentence "with no further factual findings, '[i]f, for example, a defendant had an especially long and disturbing history of criminal convictions,'" 624 F.3d at 92, *quoting from Rivera*, 5 N.Y.3d at 70-71, and that (2) the statutory provisions require the sentencing court to "arrive at a conclusion whether 'extended incarceration and life-time supervision will best serve the public interest.'" 624 F.3d at 92, *quoting* P.L. §70.10. We had argued that this language acknowledges that the scheme requires fact findings well beyond the prior convictions, based on value judgments about the seriousness of the crimes.

The majority accepted, *arguendo*, the premise that PFO requires the sentencing court to make additional findings beyond the "mere *fact* of [the prior] convictions": based on a consideration of "subsidiary facts and surrounding circumstances of those convictions," it must

[9] The exception is based on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

"form an opinion about the *nature* of those convictions before imposing a PFO sentence." 624 F.3d at 92. However, the majority rejected our contention that this requirement rendered the provisions constitutionally infirm, based on its determination that an opinion about the nature and seriousness of prior convictions could reasonably be construed to fall within the *Almendarez-Torres* exception ("[o]ther than the fact of a prior conviction ...") to the *Apprendi* rule:

> Assuming -- without deciding -- that petitioners are correct in reading New York law to require a sentencing judge to consider subsidiary facts respecting a defendant's criminal history before imposing a PFO sentence, we are not persuaded that such consideration equates to judicial "factfinding" in violation of *Blakely*. At bottom, petitioners urge that the *Almendarez-Torres* exception to the rule of *Apprendi* should be read narrowly (and the rule of *Blakely* broadly) to forbid a sentencing judge from forming an opinion about a defendant's criminal history, based on facts underlying those prior convictions, before imposing a recidivism sentence. Yet there is no clear holding of the Supreme Court to command such a result.

624 F.3d at 92.

The Second Circuit asserted that this Court had provided a "lack of guidance" as to the "precise scope of the recidivism exception," and noted that federal appeals courts had differed regarding whether certain facts were sufficiently related to a defendant's prior convictions so as to justify legislation providing for their judicial determination. *Id*. at 93. The opinion continues as follows:

> It might well be constitutionally significant whether a sentencing judge is required to find, for example, that a defendant's criminal history is "especially violent" before imposing a sentence, or whether, as in New York, a sentencing judge simply must find that the nature of his criminal history justifies "extended incarceration and life-time supervision." Or, perhaps after *Blakely* and *Cunningham*, it does not matter. The Supreme Court may answer that question at some future time. But, if our Court cannot divine a clear answer from the Court's existing holdings, AEDPA

> prevents us from faulting a state court for selecting one reasonable conclusion over another. For the time being, the recidivism exception remains, and the Supreme Court has yet to assess a statute in light of *Blakely* that tethers the authorization for an enhanced sentence solely to findings respecting recidivism. We therefore cannot say that the state courts unreasonably applied clearly established Supreme Court precedent in concluding that the PFO statute is simply different in kind from those invalidated in *Blakely* and *Cunningham*.

624 F.3d at 93.

Judge Winter dissented, in an opinion joined by Judges Pooler and Sack. The dissenters concluded that the PFO provisions were unconstitutionally applied to petitioner, and that the New York courts' contrary determination was unreasonable. They disagreed with the majority view that a sentence of a maximum of life in prison under these provisions is constitutionally tolerable under the *Apprendi* line. They concluded, instead, that the maximum permissible term under these provisions is the maximum term applicable without a PFO determination, since, without the additional fact findings required under PFO, the dramatically higher sentence of life imprisonment could not have been imposed. *Id*. at 99. "No party disputes the existence of a choice between sentencing within a range with a lower maximum and sentencing to a [PFO life] term. *Blakely* is therefore directly on point." *Id*.

Further, in *Cunningham*, the Supreme Court held that it was impermissible for a judge to impose sentences within a higher, non-continuous range based on fact findings that elevated the otherwise-applicable lower sentencing range. 624 F.3d at 99. "The *Apprendi* maximum for each petitioner is the maximum second felony offender sentence for their crime of conviction. That maximum in each case is less than life imprisonment." *Id*.

Accordingly, although the second-step findings required by PFO may be "procedural" in nature or relevant to the exercise of discretion, "the second step in the case of all petitioners

involved which of two sentencing ranges was to be selected and the choice was between ranges with different maximum sentences." *Id*. at 101.

Rivera's recognition that "the People retain the burden to show that the defendant deserves the [PFO] sentence," 624 F.3d at 102, *quoting from Rivera*, 5 N.Y.3d at 68, is critical. Though the majority stated that its meaning was not "entirely clear," "[i]t means what it says": "[i]f the prosecution failed to prove by a preponderance of the evidence that one or more of the petitioners 'deserve' a [PFO] sentence, the petitioner would have been sentenced to a range with a lower maximum." 624 F.3d at 102.

REASONS FOR GRANTING THE WRIT

I. The Court should decide the dispositive threshold question as to what rule to use in determining the relevant time for deciding in a post-AEDPA habeas case what Supreme Court precedent applies, i.e. what is "clearly established federal law" under 28 U.S.C. §2254 - - either the date-of-finality rule or the date-of-the-last-reasoned-state-court-decision rule - - thereby resolving the current split among federal Circuit Courts recently deciding this issue.

This case involves a potentially dispositive threshold question as to what rule to use in determining the relevant time for deciding in a post-AEDPA habeas case what Supreme Court precedent applies, i.e. what is "clearly established federal law" under 28 U.S.C. §2254. Applying the rule ultimately suggested by the State in this case - - using the date of the last reasoned state court decision - - petitioner would not be able to rely on *Blakely*; applying the rule proposed by petitioner - - using the date the case became final after appeal in the state court - - he could. This Court has never actually analyzed and decided this issue.[10] This case offers it the opportunity to do so.

[10] It has been remarked that this Court has provided "inconsistent guidance" as to this issue. *Brown v. Greiner*, 409 F.3d 523, 524 n. 3 (2d Cir. 2005); see *Greene v. Palakovitch*, 606 F.3d 85 (3d Cir. 2010) *Brown v. Miller*, 451 F.3d 54 (2d Cir. 2006); *Miller v. Stovall*, 608 F.3d 913, 919 (6th Cir. 2010). This characterization aside, it is clear that this Court, while referring to the issue in passing over the years, see e.g., *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003), has never analyzed and decided it.

The need for this Court to address this issue directly has been significantly increased by a number of recent decisions in the federal circuit courts analyzing and deciding this question and reaching directly contradictory results. Specifically, the First Circuit was the first federal circuit court to analyze and discuss this issue, rendering its decision in *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009). In that case the First Circuit held that the applicable date was the date on which the case became final in state court. Not long after, the Sixth Circuit addressed the issue and reached the same conclusion in *Miller v. Stovall*, 608 F.3d 913 (2010). Addressing the issue a month later, the Third Circuit reached the opposite conclusion, applying the date of the "relevant" state court decision and taking direct issue with the decision and analysis of *Foxworth v. St. Amand. Greene v. Palakovitch*, 606 F.3d 85 (2010). These decisions have thus created a clear split on this issue in the federal circuit courts.[11]

This Court should expressly confirm that the relevant time for applying established Supreme Court law to a case such as this is the date the case became "final." As defined, inter alia, in such cases as *Teague v. Lane*, 489 U.S. 288 (1989), this is the date when "the judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S.

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[11] In its March 31, 2010, opinion, the three-judge panel answered this question in Phillips' favor. Correctly recognizing and giving force and application to established principles of state-court appellate review it ruled:

> [A]ny state court decision involving the merits of an *Apprendi* claim is an application of federal law, whether or not the decision contains a discussion. Even if such a decision is a denial of leave to appeal or denial of a motion for reconsideration, application of federal law is still a factor that we must deem a state court to have considered. Therefore, we understand the relevant time to be the date on which a decision regarded as final under state law - - which may or may not include the certiorari period (not an issue here) - - has been entered in a proceeding deemed to involve the merits for federal habeas purposes. We believe that rule is not only fully consistent with Section 2254(d), which triggers AEDPA review once a claim has been "adjudicated on the merits in State court proceedings . . . , but also provides a bright-line rule. *Besser*, 601 F.3d at 183-184.

The en banc decision in this case did not revisit or decide the issue.

314, 321 n6 (1987); *Teague v. Lane*, 489 U.S. at 295; *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009) ("clearly established law" for AEDPA purposes included Supreme Court cases decided during state-court period for discretionary appellate review); *Miller v. Stovall*, 608 F.3d 913 (2010) (same).

Teague embodies the Supreme Court's prescription of rules to determine retroactivity on habeas review of new procedural constitutional rules decided after a case has become final, following the completion of direct review; *Griffith* established the requirement that new constitutional rules be applied retroactively to all cases where the decision establishing the rule is announced before the case has become final. Both cases employed the same temporal hallmark for determining what retroactivity standard to apply: the date the case became final, as defined above.

In the decade following the decision of these two cases, Congress passed the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §2254 ("AEDPA"). It is no secret that §2254(d)(1) was animated by a desire to restrict the availability of grounds for habeas relief. As noted by this Court in *Williams v. Taylor*, 529 U.S. 362, 1505-1506 (2000), one of its means for accomplishing this end was its incorporation of a requirement for habeas grants based on an unreasonable application of state court law that such law be "clearly established Federal Law, as determined by the Supreme Court of the United States." §2254(d)(1); (see also Leibman and Hertz, Federal Habeas Corpus Practice and Procedure, Ch. 32.3 n. 6-7 (Michie, 5th ed., 2005) (and cases cited therein).

Simple reference to §2254(d)(1) shows that, while it changed the choice-of law-rule by restricting it to "clearly established federal law" created by the Supreme Court, it did not purport to change the meaning of finality under *Teague*. Indeed, in her part of the court's opinion in

Williams v. Taylor, in the course of describing, in the context of AEDPA's clearly-established-law requirement, the extent to which AEDPA incorporates the rules and principles of *Teague*, Justice O'Connor recognized that *Teague*'s finality rules still apply, except that habeas petitioners must now rely solely on Supreme Court decisions:

> With one caveat, whatever would qualify as an old rule under *Teague* jurisprudence will constitute "clearly established Federal law, as determined by the Supreme Court of the United States" under §2254 (d) (1). [citation omitted] . . . The one caveat, as the statutory language makes clear, is that §2254 (d) (1) restricts the source of clearly established law to this Court's jurisprudence (529 U.S. at 412). *Accord* Justice Stevens, at 379-380.

See Foxworth v. St. Amand, 570 F.3d 414, 430-432 (1st Cir. 2009) (quoting above language, declaring that it signals "a frank recognition that the AEDPA has neither altered nor eroded the [finality] marker laid down by *Teague*," and stating that it clearly shows that Justice O'Connor had no intention "to modify or undercut the bright-line rule of *Teague* . . .". [at 431]).

AEDPA, moreover, specifically incorporated the operative retroactivity language of *Teague* in §§2244 (b) (2), 2244(d) (1), 2254 (e) (2) (A), and 2264 (a). Nowhere did it impose any retroactivity hallmark more restrictive than that embodied in *Teague*, at the same time that it incorporated *Teague* retroactivity concepts. Had it desired or intended to do so, Congress could have done so quite simply, but did not. Thus, it is clear that AEDPA's enactment left intact the *Teague* finality rule as applied to habeas actions.

Recent discussion in the federal courts of the date on which clearly established Supreme Court law applies has harked back to brief phrases employed by Justices Stevens and O'Connor in *Williams v. Taylor*, 529 U.S. 362 (2000). Justice Stevens stated that the "threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state court conviction became final" (at 390); while Justice O'Connor remarked

that the AEDPA phrase, "clearly established Federal law, as determined by the Supreme Court of the United States refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision" (at 412) (emphasis added). Notably, this latter formulation of the timing rule does not actually address the question at hand or constitute a contradiction of the Stevens finality formulation. Rather than answering it, reference to the "relevant state court decision" simply begs the question at issue.

Moreover, application of the time-of-finality rule in the case at bar would serve both the purposes of finality and comity undergirding both *Teague* and AEDPA. In addition, application of this rule to this case would favor the weighty retroactivity policies espoused in cases such as *Griffith v. Kentucky* - - protection of the integrity of the judicial process, based on the idea that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"; and the avoidance of "selective application" of new rules to similarly situated defendants (at 304). Indeed, failure to apply these principles to this situation would lead to the anomalous result that the substantive rules involved in this case would be binding on state courts but not federal habeas courts in an identical finality context. *See Foxworth v. St. Amand*, 570 F.3d at 431 (stating that "*Griffith* removes any vestige of doubt" that "*finality*, not the date of the last reasoned decision, is the principal determinant of whether a 'new' rule can be applied to an 'old' case); *Miller v. Stovall*, 608 F.3d 913., 921 (2010) (noting applicable "principles of comity, finality, and federalism" and citing, inter alia *Griffith v. Kentucky*). For these reasons, the *Teague/Griffith* finality date should be applied in the case at bar.

If, however, the *Teague/Griffith* finality date were not employed, the date of the final state court leave denial in this case, September 30, 2004, should be used, rather than the date of

the last reasoned state-court decision. Use of this date would further the policies advanced in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), in which the court emphasized the importance of the discretionary post-appeal review process in state-court criminal cases. In *O'Sullivan*, the Supreme Court held that habeas petitioners fail to exhaust their claims for federal review when they do not submit them for post-appeal review to the highest court of the state, even when that last stage of review is within the discretion of the highest court to grant or deny. The Supreme Court made it clear that, even when such review is discretionary, it provides the highest state court the necessary opportunity to correct an erroneous state court decision.

As the court noted in *O'Sullivan*, such discretionary review provides the state court with "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." (id. at 845). Thus, if a defendant must make a federal claim in a discretionary leave application proceeding in order to afford the state's highest court an opportunity to evaluate it under existing Supreme Court precedent, it obviously follows that the state court's refusal to avail itself of that opportunity is reviewable under §2254. In the case at bar, the highest court in the State had the opportunity to make such a correction, but declined to do so. Although the Appellate Division decision in this case was rendered before the decision in *Blakely*, the latter case was decided on June 24, 2004, the day the New York Court of Appeals conditionally denied leave to appeal to it; it was not until more than three months later, on September 30, 2004, that the Court of Appeals made its final disposition of the case, denying leave unconditionally, after reconsideration.

During that time, the Court of Appeals had every opportunity to consider *Blakely* and was expressly asked by petitioner to do so, but refused. It therefore cannot be said in this case that the use of the time-of-finality rule deprived the state courts of any chance to deal with the

newly-framed issue on the merits. Since, as discussed above, the Court of Appeals had a full opportunity to apply *Blakely* while the case was still pending on direct review, the date of the unconditional leave denial should govern. This conclusion is reinforced by the facts that the first leave denial was expressly conditional, and the second one was issued "upon reconsideration." In sum, using either of the leave denial dates, the New York State Courts had the opportunity to consider and apply *Blakely* to the case at bar while it was pending in state court.

Finally, if the date of the first leave denial were used, *Blakely* would still apply to this case. Supreme Court precedent should apply the day it is decided; nor should it be necessary to engage in the patently absurd process of deciding how many days, weeks, or months may go by before the law of the land from the highest court in the land should apply. If a Supreme Court decision is not applicable until the next or following days from its issuance, a judge aware of the decision on the date it is decided would be free to flout it. Such a possibility could only diminish the authority of the law.

The gist of Phillips's position on this issue, that the policies and precedents of *Griffith* and *Teague* dictate the use of the date of finality rule, was adopted and confirmed by the three-judge panel in *Besser v. Walsh* and by two other federal circuits in *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009) and *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010). The analysis of the single federal circuit court reaching a different conclusion after consideration of the issue, in *Greene v. Palakovitch*, 606 F.3d 85 (3d Cir. 2010), is simply unconvincing. To begin with the argument by that court (at 97-98) that the text of §2254(d)(1) suggests the use of the last-reasoned-decision date, this argument incorrectly assumes that a rule designed to identify what constitutes the relevant decision on the merits is the same thing as a rule setting a date for clearly-established law. On its face it does not do the latter, nor does it do so implicitly. Instead,

it does precisely what it purports to do, apply AEDPA rules to claims adjudicated on the merits. *Accord Foxworth*, at 430.

Certainly, no one would argue that the Appellate Division decision in a case such as this is not significant procedurally. But this fact does not establish that this decision is the only one of consequence under AEDPA. The United States Supreme Court does not by any means consider the period of time or the process involved in an application for leave to appeal to the highest state court to be a legal nullity; nor has it decided that this process is dwarfed into insignificance by the importance of the appellate court "decision on the merits." Rather, quite to the contrary, it has recognized the fundamental procedural importance of the discretionary appeal process, in the period following the intermediate appeal and before the case becomes final in state court. Indeed, it has premised an important AEDPA exhaustion requirement on its recognition of this fact.

Furthermore, the argument that the text of AEDPA supports application of a date-of-decision rule contradicts the analytical basis of *O'Sullivan* by unduly diminishing the importance of the <u>entire</u> state court appellate process, from beginning all the way to the end - - to "finality." Similarly, it diminishes the serious concerns expressed in *Griffith v. Kentucky*, 479 U.S, 314 (1987) that the denial to criminal defendants of favorable developments in the law occurring while their cases are still pending - - after the initial appellate court decision, but before the case becomes final following application to a higher court on direct appeal - - runs the risk of discriminating arbitrarily among similarly situated defendants and imperils the integrity of judicial review.

Likewise unavailing is the argument that Justice O'Connor's pronouncements in *Williams v. Taylor* support the use of the date-of-decision rule instead of the date-of-finality rule. Petitioner has explained above why that decision actually supports the rule he has advanced;

suffice it to say that nothing in *Greene v. Palakovitch* explains why the opposite result should be reached. It is difficult, moreover, to see how the court in *Greene* could have seriously cited the "numerosity" of Supreme Court "pronouncements" using the date-of-decision formulation as a basis for its decision (at 99), when throughout its opinion it refers to and acknowledges the failure of this Court, to date, actually to decide and clarify this issue.

In sum, nothing in AEDPA or federal law compels the result advocated by respondents in this case. As stated above, AEDPA left intact the *Teague* finality rule as applied to habeas actions, and, therefore, adoption of the rule proposed by Phillips would be in complete harmony with both the letter and spirit of the statute. Further, rather than jeopardizing comity concerns - - as the Supreme Court noted in *O'Sullivan* - - petitioner's rule enforces them by paying due deference to the ability of state courts to address changes in the law after the decision of an initial appeal, through the exercise of the discretionary review process before the highest state appellate court. Indeed, it is the rule proposed by respondents that would be at odds with this comity concern, not to mention its risk of jeopardizing the integrity of the appeals process and discriminating unjustifiably among similarly situated criminal defendants.

Thus, as can be seen, it is the rule proposed by Phillips that actually accommodates all of these concerns. The State's more draconian rule, on the other hand, fails to acknowledge the state courts' authority to apply recent United States Supreme Court decisions rendered between the initial disposition of the appeal and the completion of discretionary review in the state court. The courts need not and should not apply further restrictions that were not included in AEDPA's enactment. For these reasons, Phillips's rule should be adopted and applied by this Court.

II. The Court should decide whether it is erroneous and unreasonable to interpret broadly the "fact of a prior conviction" exception to the *Apprendi* rule so that it encompasses findings regarding the seriousness and extensiveness of those convictions.

A. The Second Circuit, sitting *en banc*, recognized that even under New York precedent, PFO likely requires that fact findings in addition to the bare existence of prior convictions, regarding the gravity of those convictions and the extensiveness of the defendant's criminal record, must be judicially made in order to dramatically increase a defendant's sentence, but nevertheless determined that the "prior conviction" exception to the *Apprendi* rule could reasonably be interpreted to allow such findings. That determination is worthy of the Court's review.

B. Though it purportedly held that the New York Court of Appeals had construed PFO to require no fact finding other than prior convictions to increase sentence, the *en banc* court actually determined only that no such findings were required in order to increase the sentencing range within which such offenders are eligible to be punished. Its analysis in this regard contravenes *Ring*, *Blakely*, and *Cunningham*, and, if allowed to stand, will undermine the authoritativeness of those decisions. (Phillips respectfully refers this Court to the discussion of the issues addressed in II, A. and B., above in the Petition for a Writ of Certiorari filed contemporaneously herewith by co-petitioner Vance Morris, see Morris petition, at pp. 19-35).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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