2005

Reflections on Fifteen Years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine

Lyn Entzeroth

REFLECTIONS ON FIFTEEN YEARS OF THE *TEAGUE V. LANE* RETROACTIVITY PARADIGM: A STUDY OF THE PERSISTENCE, THE PERVASIVENESS, AND THE PERVERSITY OF THE COURT'S DOCTRINE

LYN S. ENTZEROTH*

Co-defendants John and Mary are tried separately for capital murder, convicted, and sentenced to death in July of 1988.[1] They separately appeal their convictions and death sentences in state court, each seeking a new trial based on a faulty jury instruction on the state's burden of proof. Due to delays in producing and filing the court record, delays in both the defense and state's appellate offices, and delays in the court system, John's case proceeds through the state direct appeal process much more slowly than Mary's case. In June of 1989, the state supreme court affirms Mary's conviction and sentence, specifically rejecting her bid for a new trial based on the faulty jury instruction. Mary petitions the U.S. Supreme Court for certiorari review. As it does with the vast majority of certiorari petitions, the Court, in November of 1989, denies the petition. In November of 1990, while John's case is still pending on state direct appeal, the U.S. Supreme Court grants certiorari and issues a short per curiam opinion in *Cage v. Louisiana*,[2] holding that a jury instruction identical to the one used in both John's and Mary's cases is unconstitutional. Because John's case is pending on state direct review at the time the Supreme Court decides *Cage*, John receives a new trial with a jury instructed in accordance with the Constitution. He is convicted of second-degree murder and sentenced to forty years in prison.

Mary's fate is less clear. To obtain the benefit of *Cage*, Mary seeks collateral relief pursuant to a writ of habeas corpus in federal court.[3] After meeting all of the procedural requirements to obtain federal habeas review,[4] Mary will benefit from *Cage* only if the Supreme Court, pursuant to *Teague v. Lane*,[5] applies *Cage* retroactively to cases such as Mary's. For Mary, timing is everything.

---

* Associate Professor of Law, University of Tulsa College of Law; J.D., Tulane University, 1987; B.A., University of Wisconsin, 1982. I would like to thank Russell Christopher, Randy Coyne, Janet Levit, Valerie Phillips, and Tamara Piety for their support, patience, and kind counsel during this project. I also would like to thank Nicholas Haugen for his outstanding research and assistance in this work. All errors, of course, lie solely with me.

1. This problem is purely hypothetical; however, it serves as a fairly realistic example of the issues that arise in defining the retroactive scope of new rules of criminal law.

2. 498 U.S. 39, 41 (1990) (per curiam) (holding jury instruction unconstitutional where it inaccurately defined reasonable doubt resulting in a jury verdict "based on a degree of proof below that required by the Due Process Clause" of the Fourteenth Amendment), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62 (1991) (indicating that proper inquiry is whether a jury is likely to be confused by reasonable doubt instruction). *See* John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Compensation*, 39 AM. CRIM. L. REV. 1187, 1240 (2002).

3. 28 U.S.C. § 2254 (2000).

4. Among the procedural requirements that must be met before a federal court will review the merits of a federal habeas petition are filing the habeas petition within the applicable statute of limitations, 28 U.S.C. § 2244(d)(1) (2000); exhausting all state remedies, 28 U.S.C. § 2254(b)(1) (2000); and presenting federal claims that are subject to habeas review, 28 U.S.C. § 2254(a) (2000).

5. 489 U.S. 288 (1989); *see also* Penry v. Lynaugh, 492 U.S. 302, 313–14 (1989) (applying *Teague* to capital sentencing proceedings), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

Who benefits from a new rule or a change in constitutional criminal procedure has proved to be an issue of immeasurable importance and concern in the administration of criminal justice.[6] Over fifteen years ago,[7] the Supreme Court rewrote the rules controlling which defendants receive the benefit of changes in the Court's decisional law, a determination that is now based primarily on where in the criminal process a case is pending.[8] In the 2003–2004 Term, the Supreme Court applied these rules in *Schriro v. Summerlin*[9] and *Beard v. Banks*,[10] confronting which death row inmates would benefit from the constitutional guarantees articulated by the Court in *Ring v. Arizona*[11] and *Mills v. Maryland*.[12] On June 24, 2004, a divided Court held that criminal defendants whose cases were pending in federal habeas review would not benefit from either *Ring* or *Mills*.[13] As a result, a number of death row inmates, who were sentenced to die in a manner that plainly violates the Constitution, will not be entitled to re-sentencing proceedings and may be put to death based solely on the fortuitous timing of their convictions and sentences.

This Article looks at the retroactive application of criminal procedure decisional law, particularly in light of the Court's most recent decisions on this question. Who benefits from which constitutional protections implicates significant jurisprudential, political, and practical considerations. Understanding why the issue of retroactivity has played such a controversial and important role in the criminal justice system requires a study of the evolution of the doctrine over the last forty years. This task demands, at the outset, an overview of the theoretical and practical underpinnings of the doctrine of retroactivity and the criminal post-trial process, including state direct appeals and federal habeas corpus review, in which retroactivity concerns arise. The article then turns to the modern history of the retroactivity doctrine, considering in depth the dominant model of retroactivity from the early 1960s to 1989, the shift away from this model, and the post-1989 retroactivity model that operates today. This backdrop sets the stage for an examination and critique of the Court's current doctrine as reflected by *Schriro v. Summerlin*[14] and *Beard v. Banks*[15] and the implications and impact of the Court's approach to retroactivity and criminal

---

6. The issue of who benefits from the pronouncement of a new rule of law also arises in civil cases. This article focuses on retroactive application of changes in criminal law. There are a number of excellent articles addressing retroactivity in civil law including Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 819–20 (2003); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1097–1100 (1999); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1521–24 (1998); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1059–63 (1997); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1754–55 (1991).

7. *See Teague*, 489 U.S. 288; *Penry*, 492 U.S. 302.

8. *Teague*, 489 U.S. at 310.

9. 124 S. Ct. 2519 (2004).

10. 124 S. Ct. 2504 (2004).

11. 536 U.S. 584, 589 (2002) (overruling, in part, Walton v. Arizona, 497 U.S. 639 (1990), and holding that the Sixth Amendment requires a jury to find aggravating factors necessary for imposition of the death penalty).

12. 486 U.S. 367, 384 (1988) (holding unconstitutional capital sentencing proceeding where there existed reasonable probability that jurors believed they had to unanimously agree on mitigating factors in order to consider such factors in deciding whether to sentence defendant to life or death).

13. *Summerlin*, 124 S. Ct. at 2526; *Banks*, 124 S. Ct. at 2515.

14. 124 S. Ct. 2519 (2004).

15. 124 S. Ct. 2504 (2004).

justice, including its effect on *Blakely v. Washington*[16] and the pending case of *Roper v. Simmons*.[17]

I. AN OVERVIEW OF THE RETROACTIVE APPLICATION OF CHANGES IN THE LAW: UNDERLYING ISSUES AND COMPETING DOCTRINES

As mentioned at the outset, the doctrine of retroactivity addresses the question of who benefits from a change—either significant or minor—in the law. Until the middle of the twentieth century, the prevailing wisdom was that legislation applied prospectively,[18] to future conduct, and judicial decisions applied retroactively, to past actions as well as future actions.[19] This view of judicial retroactivity was in accord with the writings of William Blackstone who posited that judges discover the law; they do not create it.[20] As such, when a court overturned a prior decision and declared an arguably "new rule" of law,[21] the overturned decision was viewed as having never been law, but rather a misinterpretation of the law.[22] Accordingly, the more recent decision expressed what the law always had been.[23] As Supreme Court Justice Miller[24] explained, "I understand the doctrine to be, in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law, and is overruled for that very reason."[25] Consistent with this view of the role of the judiciary in the development of the law, a court's most recent decision, including a decision that overturned precedent, applied to all cases regardless of their temporal relation to the change in the court's understanding of the law.[26]

---

16. 124 S. Ct. 2531 (2004). In *Blakely*, *id.* at 2538, which was decided the same day as *Summerlin*, 124 S. Ct. 2519, and *Banks*, 124 S. Ct. 2504, the Supreme Court held unconstitutional a state sentencing system that provided that the judge find certain facts that could be used to support an increase in a criminal sentence above the maximum prescribed sentence. The Court did not address the retroactivity question in *Blakely*.

17. 124 S. Ct. 1171 (2004) (granting certiorari to address question of whether imposition of death penalty on person under the age of eighteen at the time of the commission of the crime violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the U.S. Constitution).

18. *See* Roosevelt, *supra* note 6, at 1075 ("Legislation is presumptively treated as non-retroactive, but it may, subject to certain limitations imposed by the Ex Post Facto Clause, operate retroactively if the legislature so desires."). *See generally* John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C. L. REV. 745, 746 (1983) (discussing eighteenth and nineteenth century concepts of the creation of law).

19. *See* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years."); *see also* Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 374 (1977); Roosevelt, *supra* note 6, at 1075–76; Corr, *supra* note 18, at 746.

20. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring); Linkletter v. Walker, 381 U.S. 618, 622–24 (1965), *overruled by* Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

21. The precise definition of new rule is a slippery slope, and the current Court is divided on its meaning. *See, e.g.*, *Banks*, 124 S. Ct. 2504. As discussed *infra* text accompanying notes 229–252, the definition of a new rule of law is controversial as well as pivotal to retroactivity theory.

22. *Linkletter*, 381 U.S. at 623; *see* Fallon & Meltzer, *supra* note 6, at 1758–63.

23. *Linkletter*, 381 U.S. at 623; *see* Fallon & Meltzer, *supra* note 6, at 1758–63.

24. Justice Samuel Freeman Miller was appointed to the Supreme Court by President Abraham Lincoln. He served as an associate justice from 1862–1890. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 547–48 (Kermit L. Hall ed., 1992).

25. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 211 (1863) (Miller, J., dissenting); *see* Munzer, *supra* note 19, at 375.

26. Fallon & Meltzer, *supra* note 6, at 1734 (stating that the Blackstone view was "that the function of the courts is to apply the law, not make it, and that judges, once they have found the law, have no warrant to refuse to apply it regardless of when the relevant conduct occurred").

There are significant advantages to this Blackstone model. For example, the Blackstone model provided a straightforward and simple rule: judicial decisions apply retroactively. Also, the concept that judges do not create law seems in accord with the principles of stare decisis[27] and the evolution of common law, that is, that judges are bound by precedent in crafting their decisions. As Justice Thurgood Marshall noted, adherence to precedent and the slow building of judicial doctrine

> permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact. While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged "to bring its opinions into agreement with experience and with facts newly ascertained."[28]

Nonetheless, the Blackstone model of legal interpretation and change has shortcomings. In particular, the Blackstone model seems to show little regard for the parties' expectations, which can create serious practical problems when the court unexpectedly changes society's understanding of the law.[29] On a more fundamental level, Blackstone's idea that judges discover rather than create the law may not satisfactorily reflect the complete function of the courts. Indeed, a number of modern scholars and jurists reject the idea that judges simply discover the law and have no role in the creation of law.[30] As Justice Clark observed in *Linkletter v. Walker*:[31]

---

27. Stare decisis, of course, is the well-recognized common law principle assuring that courts give proper deference to precedent. *See generally* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 652–54 (1999). Of course, the doctrine of stare decisis raises some complex interests and ideas about the role of the Supreme Court in the development of the law. *See, e.g.*, Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 94–97 (2003); Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012–16 (2003); Lee, *supra*, at 648–52.

28. Vasquez v. Hillery, 474 U.S. 254, 265–66 (1986) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), *overruled by* Helvering v. Mountain Producers Corp., 303 U.S. 376, 378 (1938)); *see* Lee, *supra* note 27, at 653.

29. *See* Roosevelt, *supra* note 6, at 1089–90; Fisch, *supra* note 6, at 1058; Munzer, *supra* note 19, at 376.

30. Munzer, *supra* note 19, at 375. Not all modern scholars have abandoned Blackstone. For example, Ronald Dworkin advocates a neo-Blackstone analytical approach to law making and retroactivity. Roosevelt, *supra* note 6, at 1104–06; Fallon & Meltzer, *supra* note 6, at 1759 ("Dworkin depicts law as a seamless web, and he maintains that all legal questions have one right answer.") (citing RONALD DWORKIN, LAW'S EMPIRE 266–71 (1986)).

Having noted the more complicated role of judges in the development of the law, it, however, would be unwise to dismiss the Blackstone model out of hand. For example, in the vast majority of cases pending in state and federal courts, judges do not create law, but rather apply existing law to a particular case. Paul Mishkin, *Forward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 58–60 (1965). To that extent, Blackstone's description of the work of judges appears largely valid. *Id.* Likewise, even though the Supreme Court is unique in the nation's court system and even though the Court's justices tend to decide the most difficult, the most cutting-edge, the most divisive, and the most politically charged cases, the decisions issued by the Supreme Court "are still necessarily conditioned by traditions, processes, and institutions of law." *Id.* at 63 (citing KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960)). To some degree, the Blackstone model represents an idealized view of courts and judges as impersonally and impartially applying a fixed set of legal rules to an individual problem. *Id.* at 62–63. This view provides a sense that the judicial process is not dependent on the personal whim and political agenda of the individual judges or justices hearing a case. While perhaps naive, simplistic, or simply unrealistic, this worldview does reflect a fundamental symbolic and aspirational goal of the court system. *Id.* at 62–63.

31. 381 U.S. 618 (1965).

> [J]udges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law. Implicit in such an approach is the admission when a case is overruled that the earlier decision was wrongly decided. However, rather than being erased by the later overruling decision it is considered as an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed.[32]

This more nuanced and complex view of the role of judges contributed to the transition from the Blackstone retroactivity model to the retroactivity models that emerged in the latter half of the twentieth century.[33]

As stated earlier, under the Blackstone model, all judicial decisions apply retroactively, at least in part, because a new decision simply reflects the way the law always has been.[34] However, if courts occasionally create law, then the newly created law is not simply a reflection of the law as it always has been. Rather, the new law represents the law as the court now understands it.[35] Under this description of a new law, questions emerge as to whether that new law should control actions that occurred prior to its creation when the old law was still in effect. In other words, should the court limit its decision in some temporal manner so that the new rule is applied to some, but not all, prior cases? Relatedly, if a decision is restricted retroactively, so that only some cases have the new rule applied to them, where should the court draw the line?

One modern model of retroactivity analysis advanced by Professors Fallon and Meltzer uses the law of remedies as an analytical framework for determining who should benefit from a change in the law.[36] Under this model, after applying a high threshold test to decide whether a legal opinion actually produces a new rule of law,[37] the test for determining whether to apply such a new rule retroactively turns, at least in part, on the predictability of the new rule.[38]

> Within a remedial framework, the question whether to deny retroactive effect to a relatively unpredictable decision is properly governed "not by metaphysical

---

32. *Id.* at 623–24.

33. It has been asserted that positivist legal theory, as most notably expounded by H.L.A. Hart, "open[ed] the way to a distinction between 'old' and new law." Fallon & Meltzer, *supra* note 6, at 1760. However, it has been observed that even for Hart the

> distinction between judge-made new law and judge-found old law tends to blur in practice. Even in penumbral cases, Hart writes, the judicial task is an exercise not of independent political will but of legal judgment. Judges thus stick close to the lawbooks in rendering decisions, as they weigh and balance "principles, policies, and standards" in a manner that is tightly structured by the nature of the judicial office.

Id. at 1761 (quoting H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 107 (1983)) (footnotes omitted).

34. *See supra* notes 18–25 and accompanying text.

35. *See supra* notes 25–28 and accompanying text.

36. Fallon & Meltzer, *supra* note 6, at 1833.

37. As noted *infra* text accompanying notes 229–252, whether a decision is in fact new or simply an elaboration of current law is a fairly interesting and at times controversial question. *See, e.g.*, *Banks*, 124 S. Ct. 2504. Professors Fallon and Meltzer argue that in the context of habeas review a new rule should be defined "to exclude rules and decisions that are clearly foreshadowed, or reflect ordinary legal evolution, not just those that are 'dictated by precedent.'" Fallon & Meltzer, *supra* note 6, at 1817 (footnote omitted) (quoting *Teague*, 489 U.S. at 301).

38. Fallon & Meltzer, *supra* note 6, at 1793–94.

> conceptions of the nature of judge-made law, nor by the fetich of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice."[39]

Another model offers an equilibrium approach to retroactivity analysis.[40] Under this model of retroactivity, the question of whether to apply a new rule retroactively focuses on the legal context within which the new rule emerges: "Rather than evaluating new legal rules in isolation—in terms of their novelty or foreseeability—equilibrium theory focuses the inquiry on the regulatory structure and seeks to characterize that structure in terms of its stability."[41] This analysis turns on the extent to which a change in the law disturbs the equilibrium of the law and the parties' reliance on the law.[42] A third approach to the retroactivity of constitutional decisions is the decision-time model, which focuses on the just result at the time of the trial.[43]

All of these theories address the practical and theoretical dilemmas of who should benefit or be burdened by changes in the law and how to assure predictability and stability in allocating these burdens. Related to these concerns is the constitutional role of the Supreme Court in developing and changing the law. For the past forty years, the Court has struggled with these concerns, producing a lineage of cases that have generated varying reactions as to their efficiency and fairness in deciding who benefits from a change in decisional law.

II. THE RETROACTIVITY QUESTION IN THE CONTEXT OF THE CRIMINAL APPEALS AND COLLATERAL REVIEW PROCESS

In the context of criminal procedure, retroactivity has become a particularly troublesome issue. The problem, at least in part, emerges out of the significant changes in constitutional criminal procedural law that occurred primarily, although not exclusively, in the second half of the twentieth century, as well as the incorporation of these changes to the states.[44] As is well-chronicled,[45] one of the most notable legacies of the Warren Court is its expansion of the rights of criminal defendants, including guaranteeing the right to counsel to indigent state criminal

---

39. *Id.* at 1833 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 148–49 (1921)) (footnote omitted).

40. Fisch, *supra* note 6, at 1058.

41. *Id.*

42. *Id.*

43. Roosevelt, *supra* note 6, at 1117. A recent article suggests that, based on the decision-time model proposed by Professor Roosevelt, the Court should apply *Apprendi v. New Jersey*, 530 U.S. 466 (2000), retroactively to cases pending in federal habeas corpus review. *See* Comment, *Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners'* Apprendi *Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1254 (2003). In light of *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004), this argument no longer seems likely. *See infra* notes 400–489.

44. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 15.2–15.3 (4th ed. 2003).

45. A number of articles have discussed the legacy of the Warren Court from differing points of view, including Corrina Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004); Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429 (2002); Robert M. Cover & T. Alexander Aleinikoff, *Dialectic Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1976–1977).

defendants,[46] requiring police to administer *Miranda* warnings to criminal suspects,[47] and excluding from state trials certain evidence procured by the government in violation of the Constitution.[48] However, having expanded such rights, the Warren Court faced the questions of which and, importantly, how many criminal defendants should receive the benefit of those changes.[49] Intimately tied up with these questions was the effect that full retroactivity would have on the state and federal governments that had to implement these new procedural rules and the effect that full retroactivity would have on the Court's ability, both politically and jurisprudentially, to make sweeping changes in criminal procedure.[50]

In addressing the retroactivity question in the context of criminal procedure, a myriad of interests emerge. For example, a criminal defendant has an interest in a trial that comports with the Constitution. A trial that does not comport with the Constitution may be defective not only in its process, but also in the ultimate determination of guilt or innocence as well as the sentencing decision, particularly if the death penalty is imposed. Further, a criminal defendant has an interest in having a trial that is conducted in the same manner, or at least under the same constitutional protections, as the trials of other criminal defendants. Society also has an interest in assuring that the prosecution of a criminal defendant complies with the requirements of the Constitution so as to protect the innocent from wrongful convictions and punishment, particularly the death penalty, and to promote and protect the rule of law.

Conversely, a state that conducts a criminal trial that comported with the constitutional procedural rules existing at the time of the trial has a reliance interest in that process and an interest in leaving that process undisturbed.[51] State governments can face significant burdens when a new rule of law is applied to already-convicted defendants who are then entitled to new trials and/or sentencing proceedings. These burdens include the financial costs of new prosecutions and trials; the expenditure of time and resources by the police, the state prosecutor, and the state court; the difficulty involved in retrying cases years after the occurrence of the crime; and the potential emotional impact on the victims of crime who may now have to participate in or otherwise experience a second judicial proceeding.[52] The

---

46. Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that Sixth Amendment applies to states and indigent state criminal defendants have right to appointed counsel). The Court applied *Gideon* retroactively to all criminal defendants regardless of when their conviction and sentence were imposed. Kitchens v. Smith, 401 U.S. 847 (1971) (per curiam).

47. Miranda v. Arizona, 384 U.S. 436 (1966) (establishing now-classic *Miranda* warnings). The Court declined to apply *Miranda* retroactively and limited it to trials that began after the decision was announced. Johnson v. New Jersey, 384 U.S. 719, 732 (1966).

48. Mapp v. Ohio, 367 U.S. 643 (1961) (applying exclusionary rule to states). The Court declined to apply this rule retroactively to cases that were final at the time the Court decided *Mapp*. Linkletter v. Walker, 381 U.S. 618 (1965), *overruled by* Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

49. For examples of the Warren Court's retroactive application of significant changes in constitutional law, see *supra* notes 46–48. For a general discussion of these issues, see Fallon & Meltzer, *supra* note 6, at 1739–40.

50. *See infra* text accompanying notes 128–130.

51. *See* Mishkin, *supra* note 30; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

52. *See generally* CHEMERINSKY, *supra* note 44, § 15.5, at 904–05; Fallon & Meltzer, *supra* note 6, at 1764–67 (discussing cost of retroactivity within a law of remedies framework); Fisch, *supra* note 6, at 1084–94 (noting prudential considerations that argue both for and against retroactivity of laws).

consequences of granting or denying the retroactive application of a new rule of criminal procedure are widespread and substantial.

The retroactive application of new rules of criminal procedure will have a different effect, both practically and theoretically, at various stages of the trial and post-trial process. For example, applying new rules only to individuals who have yet to stand trial would result in a much smaller group benefiting from changes in criminal procedure and would impose a much smaller cost on the states than applying rules retroactively to criminal defendants in the process of seeking a writ of habeas corpus. In addition, habeas review, which involves federal courts reviewing final judgments of state courts, implicates concerns of federalism and finality that are not at issue, or at least not at issue to the same degree, in cases pending on direct appeal.[53] These differences have caused scholars and jurists to articulate differing concerns over the retroactive application of new rules of law depending on whether a case is pending in the direct appeal process or in habeas corpus review.[54] Since under the Court's current retroactivity doctrine the procedural posture of the case is considered critical in determining whether an individual receives the benefit of a new rule of law,[55] a brief explanation of the applicable post-trial criminal process is warranted.

A. Trial and Direct Appeal

Each state has its own unique criminal process, and there are important distinctions among the states. Nonetheless, most states provide a somewhat similar trial and direct appeal process, and a discussion of this general process will illuminate the issues that emerge in applying changes in the law retroactively when a case is pending on direct appeal.[56]

The first stage of a criminal proceeding begins with the criminal trial in a state trial court.[57] At trial, evidence is presented and rebutted, and a jury renders a verdict and sentence. Obviously, this trial must be conducted in accordance with certain constitutional substantive and procedural rules and guarantees. For example, a criminal defendant is entitled to constitutionally effective counsel.[58] Likewise, the number of jurors[59] and the manner by which those jurors are selected for

---

53. For an early discussion of these federalism concerns, see Mishkin, *supra* note 30; Bator, *supra* note 51. *But see* Herman Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1965–1966).

54. Retroactive application of new rules of law can also arise in state collateral or post-conviction proceedings. For an interesting article discussing the issue of retroactive application of *Ring v. Arizona*, 536 U.S. 584 (2002), in Missouri post-conviction proceedings, see Hon. Laura Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421 (2004).

55. *See infra* Part IV.

56. *See generally* CHEMERINSKY, *supra* note 44, § 15.5, at 896–98; RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (2d ed. 2001).

57. This trial stage includes all pre-trial proceedings and post-trial proceedings that may occur before a direct appeal is taken.

58. *See* Strickland v. Washington, 466 U.S. 668 (1984).

59. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978) (finding that conviction by five-member jury violates Sixth Amendment right to jury trial); Williams v. Florida, 399 U.S. 78 (1970) (finding that conviction by six-member jury does not violate Sixth Amendment); Duncan v. Louisiana, 391 U.S. 145 (1968) (applying Sixth Amendment jury trial guarantee to states).

service[60] must be in accordance with certain constitutional guarantees. During the trial, the trial judge, prosecutor, and defense counsel are entrusted with the responsibility of assuring that the trial comports with the Constitution. Thus, there exists an expectation on the part of the interested parties, including the defendant, the victim, and society in general, that the trial will comport with the Constitution.

However, trials are not flawless, and a defendant's ability to appeal a conviction and sentence is well entrenched in American law.[61] In general, after conviction and sentencing, a defendant may appeal the conviction and sentence through the applicable state court appellate system. For example, a defendant may ask a higher court to review the trial court's decision based on a belief that a jury instruction was unconstitutional or that certain evidence was admitted in violation of the Constitution. After reviewing the defendant's claims, the appellate court may affirm the defendant's conviction and sentence or may grant some form of relief including, but not limited to, a new trial, a new sentencing proceeding, or a modification of the conviction and sentence.

If the highest applicable state court[62] affirms the defendant's conviction and sentence, or otherwise denies relief, the defendant may file a petition for a writ of certiorari with the U.S. Supreme Court seeking direct review of federal claims.[63] The petition for a writ of certiorari must be filed within ninety days of the highest state court's decision,[64] and the Supreme Court has discretion to grant the writ and hear the case, or deny the writ, ending the direct appeal process.[65] This discretionary review is the only opportunity for a state defendant to have a federal court hear federal claims in the direct review process. After exhausting or concluding this direct appeal process, including the process for seeking a writ of certiorari with the

---

60. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986) (finding it unconstitutional for state prosecutor to use peremptory challenges in a racially discriminatory manner).

61. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963).

62. Under 28 U.S.C. § 1257 (2000), the Supreme Court is authorized to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had."

> The decisions of lower state courts are reviewable by the Supreme Court when there is no appellate review of such rulings within the state and when they thus constitute the judgment of the highest courts in which review can be had....Similarly, when a state's highest court declines to review a lower state court decision, that lower court decision can be reviewed by the United States Supreme Court.

CHEMERINSKY, *supra* note 44, § 10.4, at 667.

63. Prior to 1916, a state criminal defendant, in certain circumstances, could file an appeal on a writ of error with the U.S. Supreme Court. *See* REV. STAT. § 709 (1875); Curtis Reitz, *Federal Habeas Corpus: Impact of Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1328 (1961). However, prior to 1916, many of the constitutional criminal rights now taken for granted had not yet been developed and/or incorporated to the states. *See* CHEMERINSKY, *supra* note 44, § 15.2, at 870. Since 1916, Congress has conferred much greater discretion on the Supreme Court, which has discretion to hear direct appeals from state courts. *See, e.g.*, 28 U.S.C. § 1257 (2000); 45 STAT. § 54 (1928); 43 STAT. §§ 236, 237 (1925); 39 STAT. § 726 (1916); Reitz, *supra*, at 1328. Since the Court hears only a small fraction of the cases presented to it in certiorari petitions, few state direct appeals are heard by the Supreme Court each year. *See Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 514 tbl.1 (2004); CHEMERINSKY, *supra* note 44, § 10.1, at 639.

64. SUP. CT. R. 13.

65. 28 U.S.C. § 1257 (2000).

Supreme Court,[66] and after being denied relief by all applicable courts, a criminal defendant's conviction and sentence are deemed "final."[67]

B. Collateral Review

The conclusion of the direct appeal process does not end the defendant's opportunity to seek relief from conviction and sentence. Both state and federal law provide for some form of collateral review of a defendant's conviction and sentence. A number of policy reasons undergird collateral review processes, not least of which is the policy of assuring fairness and reliability in the criminal process.[68] There are generally two collateral review processes that are available to a criminal defendant: state post-conviction review and federal habeas corpus review. A separate discussion of each collateral review process follows.

1. State Post-Conviction

After a state direct appeal, a defendant may be able to seek further state review through a state's post-conviction process. The post-conviction apparatus varies from state to state, and each state determines the applicable process, the issues that may be raised in state post-conviction review, and the timing of the state post-conviction proceedings.[69] The state post-conviction process allows a criminal defendant to seek collateral review of a conviction and sentence usually, although not universally, after the conclusion of the direct appeal process.[70] Often the criminal defendant is limited in the issues that may be raised in state post-conviction.[71] For example, states often curtail a defendant's ability to raise issues that were not raised on direct appeal, but which were known to the defendant.[72] Likewise, many state post-conviction systems limit the defendant's ability to re-litigate issues already raised on direct appeal.[73] In many cases, defendants will not have claims amenable to state post-conviction review and, accordingly, will forgo that process. If the state court

66. A defendant is under no obligation to petition the Supreme Court for a writ of certiorari. If a defendant does not file a certiorari petition, the defendant's direct appeal is deemed over and the conviction and sentence are considered final after the expiration of the ninety days to file the certiorari petition. *See* Griffith v. Kentucky, 479 U.S. 314 (1987); Teague v. Lane, 489 U.S. 288 (1989).

67. The Supreme Court, in *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Teague v. Lane*, 489 U.S. 288 (1989), defined a conviction and sentence as final when the defendant had exhausted direct appeal, including the defendant's opportunity to seek certiorari review with the Court. *Griffith*, 479 U.S. at 322; *Teague*, 489 U.S. at 295. While one may wish to quibble with this definition, for purposes of this article and its retroactivity analysis, the term "final" is used in the sense defined by the Supreme Court in *Griffith* and *Teague*.

68. *See, e.g.*, LARRY W. YACKLE, FEDERAL COURTS: HABEAS CORPUS (2003); Reitz, *supra* note 63, at 1325. Even scholars envisioning a more limited role for collateral review recognize its importance. *See, e.g.*, Mishkin, *supra* note 30; Bator, *supra* note 51.

69. *See, e.g.*, MISS. CODE ANN. §§ 99-39-1 to 99-39-29; OKLA. STAT. ANN. tit. 22, §§ 1080, 1089; 42 PA. CONS. STAT. ANN. §§ 9541–9546 (West 1998); TENN. CODE ANN. §§ 40-30-101 to 40-30-313.

70. *See, e.g.*, MISS. CODE ANN. § 99-39-5; OKLA. STAT. ANN. tit. 22, §§ 1080, 1089; 42 PA. CONS. STAT. ANN. § 9543 (West 1998); TENN. CODE ANN. § 40-30-102.

71. *See, e.g.*, MISS. CODE ANN. § 99-39-5; OKLA. STAT. ANN. tit. 22, §§ 1080, 1089; 42 PA. CONS. STAT. ANN. § 9543 (West 1998); TENN. CODE ANN. § 40-30-102.

72. *See, e.g.*, MISS. CODE ANN. § 99-39-21; OKLA. STAT. ANN. tit. 22, §§ 1080, 1089; 42 PA. CONS. STAT. ANN. § 9544 (West 1998).

73. *See, e.g.*, MISS. CODE ANN. § 99-39-21; OKLA. STAT. ANN. tit. 22, §§ 1080, 1089; 42 PA. CONS. STAT. ANN. § 9544 (West 1998); TENN. CODE ANN. §§ 40-30-101 to 40-30-313.

denies state post-conviction relief, the defendant may file a petition for a writ of certiorari with the U.S. Supreme Court, which the Court then may grant or deny.

2. Federal Habeas Corpus

After exhausting all state avenues for relief, including state direct appeal and, if appropriate, state post-conviction or collateral review,[74] a criminal defendant has a third process of review that can be pursued: a defendant can petition a federal district court for a writ of habeas corpus asking for release from prison.[75] In reviewing a petition for a writ of habeas corpus, a federal court considers only claims showing that the petitioner is being held in state custody in violation of federal law, that is, federal statutes, federal treaties, and the Federal Constitution.[76] Therefore, if a defendant believes that a constitutionally defective jury instruction was used at trial, and relief was not granted on direct appeal, the defendant may petition a federal court to review the claim and grant a writ of habeas corpus to obtain release from prison.

The writ of habeas corpus has a long history, tracing its roots to at least fourteenth-century English law.[77] Habeas corpus means "that you have the body,"[78] and the writ originally was used, at least on some occasions, to bring a person before the court for judicial proceedings.[79] By the seventeenth century, and as specifically established by the Habeas Corpus Act of 1679, the writ of habeas corpus evolved under English law into a procedural tool that allowed individuals to challenge their confinement by the crown.[80] The writ thus served as a procedural device to control the abuse of the judicial process by the crown.[81] So critical was this procedural protection that Blackstone described the Habeas Corpus Act of 1679 as a "stable bulwark of our liberties."[82]

The British colonists brought these ideas and the protection of the writ of habeas corpus with them to the American colonies, and the writ operated, at least to some degree, in the colonies prior to the ratification of the U.S. Constitution.[83] Mindful of the importance of the writ of habeas corpus, the drafters of the Constitution specifically preserved the writ of habeas corpus in Article I, Section 9, Clause 2 of the U.S. Constitution: "The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may

---

74. 28 U.S.C. § 2254(b)–(c) (2000).

75. 28 U.S.C. § 2254 (2000); U.S. CONST. art. I, § 9, cl. 2.

76. 28 U.S.C. § 2254(a) (2000).

77. *See generally* CHEMERINSKY, *supra* note 44, §§ 15.1–15.3, at 862–80; YACKLE, *supra* note 68, at 9–11; COYNE & ENTZEROTH, *supra* note 56, at 661–69; WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12 (1980).

78. BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

79. YACKLE, *supra* note 68, at 9–11.

80. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2660–62 (2004) (Scalia, J., dissenting).

81. YACKLE, *supra* note 68, at 9–19 (discussing English history of the writ).

82. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 133, *quoted in Hamdi*, 124 S. Ct. at 2662–63 (Scalia, J., dissenting).

83. *See* CHEMERINSKY, *supra* note 44, §§ 15.2–15.3, at 868–80; COYNE & ENTZEROTH, *supra* note 56, at 661–69; DUKER, *supra* note 77; Lyn Entzeroth, *Federal Habeas Review of Death Sentences, Where Are We Now?: A Review of* Wiggins v. Smith *and* Miller-el v. Cockrell, 39 TULSA L. REV. 49 (2003); *see also* ERIC FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001).

require it."[84] In the *Federalist Papers*, Alexander Hamilton praised the inclusion of the writ in the Constitution as a great stalwart of liberty and protection against tyranny.[85]

The power of a federal court to issue a writ of habeas corpus was embraced early in U.S. history. In enacting the Judiciary Act of 1789, Congress specifically authorized federal courts to issue the writ to federal prisoners.[86] After the Civil War and in light of congressional distrust of southern states' willingness to enforce federal law and protect former slaves,[87] Congress specifically amended the habeas statute providing that federal courts could issue the writ to any person held in state or federal custody "in violation of the constitution, or of any treaty or law of the United States."[88] The Supreme Court initially opined that "[t]his legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of deprivation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction."[89]

Despite the Court's early expansive language regarding federal court post-Civil War power to issue the writ, the Court, in other important respects, curtailed the writ of habeas corpus during the late nineteenth century and early twentieth century.[90] Perhaps the most notable restriction was that a habeas writ could issue only where the state court lacked jurisdiction to convict or sentence a defendant.[91] Although the language of the habeas statute did not express such a restriction, the Court appeared to recognize one.

The first inroads into this limited construction of the writ of habeas corpus appeared in the 1920s,[92] but it was during the 1950s and 1960s that the writ came to be a more commonly used legal process by which criminal defendants obtained relief from unlawful detentions.[93] Several factors arguably contributed to this

---

84. *Hamdi*, 124 S. Ct. at 2662–63 (noting that the writ of habeas corpus is the only common law writ mentioned in the Constitution).

85. THE FEDERALIST NO. 84, at 479–80 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also* THE FEDERALIST NO. 83, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The role of the Great Writ in protecting individuals from arbitrary detention by the President was addressed recently in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660–62 (2004).

86. Judiciary Act of 1789, 1 STAT. 81–82; *see also* CHEMERINSKY, *supra* note 44, § 15.2, at 868; Entzeroth, *supra* note 83; Bator, *supra* note 51. *See generally* Reitz, *supra* note 63, at 1325. Recently, some scholars have offered thought-provoking alterative views of early habeas corpus doctrine and have argued that the power of early federal courts to issue the writ was more expansive. FREEDMAN, *supra* note 83; Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961 (1998).

87. CHEMERINSKY, *supra* note 44, § 15.2, at 869; YACKLE, *supra* note 68, at 30–34; Reitz, *supra* note 63, at 1325.

88. Act of Feb. 5, 1867, ch. 28, 14 STAT. 385 (codified at 28 U.S.C. §§ 2241–2255); *see* CHEMERINSKY, *supra* note 44, § 15.2, at 868–69; Reitz, *supra* note 63, at 1325.

89. *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325–26 (1867); *see* CHEMERINSKY, *supra* note 44, § 15.2, at 868–69; Reitz, *supra* note 63, at 1325.

90. For example, the Court required state prisoners to exhaust their state remedies before seeking relief in federal court. *Ex parte* Royall, 117 U.S. 241 (1886); Reitz, *supra* note 63, at 1325.

91. Frank v. Mangum, 237 U.S. 309 (1915); *see* CHEMERINSKY, *supra* note 44, § 15.2, at 868–70; YACKLE, *supra* note 68, at 34–38; Reitz, *supra* note 63, at 1325.

92. Moore v. Dempsey, 261 U.S. 86 (1923); *see* Reitz, *supra* note 63, at 1328; *see also* YACKLE, *supra* note 68, at 38–39.

93. *See, e.g.*, Brown v. Allen, 344 U.S. 443 (1953); Fay v. Noia, 372 U.S. 391 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Townsend v. Sain, 372 U.S. 293 (1963), *overruled by Keeney*, 504 U.S. 1; Sanders v. United States, 373 U.S. 1 (1963).

development in habeas litigation. First, during the twentieth century, the Court, through the incorporation doctrine, extended a number of federal constitutional rights to the states.[94] This extension of federal rights to state criminal defendants dramatically increased the number of cognizable claims that a state prisoner could raise in a habeas petition.[95] Second, after World War II, national attention turned to civil rights and criminal justice, and there was increasing concern, particularly among the justices on the Supreme Court, about the circumscribed legal and political condition of African-Americans in the South.[96] Finally, during most of the twentieth century, the Supreme Court possessed complete, or nearly complete, discretion to hear a claim arising out of a state direct appeal.[97] Since the Supreme Court hears only a very small percentage of certiorari petitions from state criminal appeals in any given year,[98] the chance of direct federal review of a state conviction and sentence is extraordinarily limited. Federal habeas review, then, provided another means for federal court review of federal claims arising out of state criminal proceedings.[99] Among the cases seen as important in expanding the scope of the writ to state criminal defendants were *Fay v. Noia*,[100] which allowed a state defendant to raise claims in federal habeas that were not raised in state court provided the defendant had not deliberately bypassed the state process,[101] and *Brown v. Allen*,[102] which allowed a defendant to raise all constitutional claims in a habeas petition.[103] The writ of habeas corpus soon became not only a means by which federal courts could collaterally review federal claims arising in state criminal proceedings, but also an avenue for the Court to craft new procedural criminal law rules.[104]

The more active role of federal courts, including the Supreme Court, in issuing writs of habeas corpus met with strong criticism.[105] Grumbling from the bench and the legislature about the broad scope of habeas during the Warren Court years resulted in a number of judicial decisions by the Burger and Rehnquist Courts curtailing the scope of the writ.[106] In 1996, Congress crafted its most significant changes to the habeas statute since the Civil War by enacting the Antiterrorism and

---

94. CHEMERINSKY, *supra* note 44, § 15.2, at 870–71.

95. *Id.*

96. *Id.*; *cf.* YACKLE, *supra* note 68, at 47.

97. *See* 28 U.S.C. § 1257 (2000).

98. While thousands of petitions for a writ of certiorari are filed with the Supreme Court every year, less than 100 or so cases receive full review by the Court. CHEMERINSKY, *supra* note 44, § 10.1, at 639.

99. *See id.* § 15.2, at 870–71.

100. 372 U.S. 391 (1963), *overruled by Keeney*, 504 U.S. 1.

101. *Id.* at 399.

102. 344 U.S. 443 (1953).

103. *Id.* at 444.

104. In his dissent in *Teague v. Lane*, 489 U.S. 288 (1989), Justice Brennan listed a number of Supreme Court decisions in which the Court crafted a new rule or changes in the law during its review of a habeas corpus petition. *See id.* at 334–35 (Brennan, J., dissenting); *see also* CHEMERINSKY, *supra* note 44, § 15.5.1, at 897–99, 898 n.10.

105. *See, e.g.*, Frank W. Wilson, *Habeas Corpus and the State Criminal Defendant*, 19 VAND. L. REV. 741 (1966); Bator, *supra* note 51.

106. *See, e.g.*, *Keeney*, 504 U.S. 1 (denying federal evidentiary hearing of factual claim not developed in state court unless petitioner can show cause and actual prejudice for failure to develop claim in state court) (codified at 28 U.S.C. § 2254(e)(2)); Coleman v. Thompson, 501 U.S. 722 (1991) (holding federal court cannot hear claim that was procedurally defaulted in state court unless defendant shows cause and prejudice for default); Stone v. Powell, 428 U.S. 465 (1976) (finding Fourth Amendment exclusionary rule claims not cognizable in federal habeas).

Effective Death Penalty Act of 1996 (AEDPA).[107] While still providing that a federal court may "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States,"[108] the AEDPA limits the time period for filing a habeas petition,[109] curtails a petitioner's ability to file a second and successive habeas petition,[110] and redefines the discretion federal courts must give to state court findings of fact and law.[111]

Under current habeas law, any federal judge or Supreme Court justice can issue a writ of habeas corpus.[112] As a practical matter, a criminal defendant usually will file a writ of habeas corpus with a U.S. district court seeking issuance of a writ from that court. If a court grants the writ, the court will typically order the prison warden to release the prisoner unless retrial or resentencing occurs within a certain period of time, or unless the state advises the federal court within a certain time period that it intends to appeal the court's decision.[113] If denied relief at the district court level, the habeas petitioner must obtain a certificate of appealability to appeal the denial of the petition to the applicable circuit court of appeals.[114] If denied relief at the circuit court level, the habeas petitioner may petition the U.S. Supreme Court for a writ of certiorari, which the Court may grant or deny.

III. RETROACTIVE APPLICATION OF NEW RULES OF CRIMINAL PROCEDURE FROM 1965 TO 1989

A. Linkletter v. Walker *and* Stovall v. Denno—*The Emergence of a Model Restricting the Retroactive Application of New Rules of Law*

As the Warren Court expanded the scope of constitutional criminal rights and as the writ of habeas corpus increasingly became a means for state prisoners to challenge their convictions and sentences, the question of how wide the net of constitutional protection extended came to the fore. In *Linkletter v. Walker*,[115] the Court articulated the first of its modern restrictions on the retroactive application of judicial decisions.[116]

---

107. One scholar has described the AEDPA as the most significant change in habeas corpus law since 1867. Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 CONN. L. REV. 919, 923 (2001).

108. 28 U.S.C. § 2254(a).

109. 28 U.S.C. § 2244(d).

110. 28 U.S.C. § 2244(b).

111. 28 U.S.C. § 2254(d)–(e).

112. 28 U.S.C. § 2241(a).

113. *See, e.g.*, Wiggins v. Corcoran, 164 F. Supp. 2d 538, 577 (D. Md. 2001) (ordering, in issuing writ of habeas corpus to Wiggins, that he "shall be RELEASED within THIRTY (30) DAYS unless within that time respondents advise this court that they intend to appeal this decision, in which event counsel shall contact the court to discuss the issue of the appropriate forum to consider the question of petitioner's release pending appeal"), *rev'd by* Wiggins v. Corcoran, 228 F.3d 629 (4th Cir. 2002), *rev'd by* Wiggins v. Smith, 539 U.S. 510 (2003).

114. 28 U.S.C. § 2253(c); Miller-El v. Cockrell, 537 U.S. 322 (2003).

115. 381 U.S. 618 (1965), *overruled by* Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

116. *Id.* at 622 (referring to Blackstone's view of retroactivity and noting, "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future").

As noted earlier, during the 1950s and 1960s, the Supreme Court announced a number of landmark decisions regarding the constitutional rights guaranteed to state criminal defendants.[117] By 1965, a majority of the Court appeared willing to announce a rule limiting the retroactive scope of some of the Court's more groundbreaking decisions,[118] and the Court took the opportunity presented in *Linkletter* to announce this new doctrine. However, before announcing the retroactivity doctrine, which was itself groundbreaking, the Court had several important hurdles to overcome. Specifically, the Court had to determine (1) whether there existed a doctrine that, as a matter of law or judicial policy, required all Court decisions to apply retroactively,[119] and (2) whether the Constitution compelled all Court decisions to apply retroactively.[120] The existence of either a judicial or constitutional doctrine requiring retroactive application of all new rules would have cut off all efforts to limit the scope of changes in the law.

The first issue—whether case law or judicial doctrine required full retroactivity—posed a direct confrontation with the Blackstone view of the courts and the creation of law. In addressing this issue, the Court rejected, at least in part, Blackstone's view that judges simply discover the law.[121] In so doing, the Court observed:

> The Blackstonian view ruled English jurisprudence and cast its shadow over our own as evidenced by *Norton v. Shelby County*. However, some legal philosophers continued to insist that such a rule was out of tune with actuality largely because judicial repeal ofttime did "work hardship to those who [had] trusted to its existence."[122]

The Court further pointed to several cases in which the Court itself had allowed limited retroactive application of a few court decisions,[123] although the Court acknowledged that it also had endorsed competing retroactivity views, including the Blackstone view.[124] After considering these competing judicial philosophies and differing judicial actions, the Court ultimately concluded that neither legal philosophy nor the Court's own practices actually prohibited limits on the retroactive application of certain Court decisions.[125]

As to the second question, the Court did not find any prohibition in Article III or any other provision of the Constitution requiring the Court to give full retroactive effect to its decisions.[126] However, in considering the scope of new rules, an interesting question is raised about whether, consistent with Article III of the Constitution, the Court may issue a purely prospective decision binding only on future cases, excluding even the parties in the case before the Court from the benefit of the new

---

117. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963).
118. *See* Fallon & Meltzer, *supra* note 6, at 1739–40.
119. *Linkletter*, 381 U.S. at 622–28.
120. *Id.* at 628–29.
121. *Id.* at 623–24.
122. *Id.* at 624 (citation omitted).
123. *Id.* at 625–29.
124. *Id.* at 628 n.13 (noting criminal cases in which new rules of law are applied retroactively to cases pending in federal habeas).
125. *Id.* at 629.
126. *Id.* at 628.

law. Arguably, allowing such purely prospective decision making runs afoul of the case and controversy requirement of Article III,[127] as well as raising concerns about the Court acting as a legislature. These questions present important and substantial issues about the power of the Court. However, in *Linkletter*, the Court dodged such questions because *Linkletter* dealt only with denying a criminal defendant the benefit of a new rule on federal habeas review;[128] the Court was not trying to issue a purely prospective decision.[129]

Having found no express constitutional, common law, or other judicial prohibition, the *Linkletter* Court resolved that it retained the discretion to determine whether to give full or partial retroactive effect to a decision creating a new rule of law.[130] The Court then set out to establish a method by which to make such determinations. This analysis became the dominant model of retroactivity from 1965 to 1989.[131] Although it generally may be referred to as a three-part test,[132] there were really four parts in the *Linkletter* analysis, as discussed below.

In determining the retroactive scope of a decision of the Court, the first question was whether the Court had in fact issued a new rule of constitutional law.[133] If the case did not establish a new rule, then there was no reason to restrict the retroactive scope of the holding in the decision.[134] As the Court noted in *United States v. Johnson*:[135]

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.[136]

If, however, a decision overturns or unexpectedly changes the law of criminal procedure, the Court, in its discretion, could limit the retroactive scope of that decision based on the weighing of three interests or values: (1) the purpose of the new rule, (2) the reliance placed on the old rule, and (3) the effect that retrospective application of the new rule will have on the administration of justice.[137] In *Linkletter*,

---

127. *See infra* notes 132–151 and accompanying text.

128. *Linkletter*, 381 U.S. at 621.

129. *Id.* at 627–28.

130. *Id.* at 629. It should be noted that under this court-created retroactivity doctrine, limits on the retroactive scope of new rules could take several forms. For example, as the Court did in *Linkletter*, the Court could deny the effect of a new rule to cases pending in habeas but allow the new rule to apply to cases that were on direct appeal, and therefore not final, at the time the Court hands down the new decision. Alternatively, the Court could apply the new rule only to the parties before it and to all future cases but decline to give effect to the new rule in cases on direct appeal and habeas. At the most extreme, the Court could issue a decision and deny giving effect to any prior case, including the parties before the Court, and only give effect to cases in the future.

131. *See generally* Fallon & Meltzer, *supra* note 6, at 1743–46.

132. *See id.* at 1141.

133. *Linkletter*, 381 U.S. at 629.

134. *Id.*

135. 457 U.S. 537 (1982).

136. *Id.* at 549.

137. *Linkletter*, 381 U.S. at 629, 636. In *Linkletter*, the Court used this analysis to decide whether to apply *Mapp v. Ohio*, 367 U.S. 643 (1961), to cases pending in federal habeas review. *Linkletter*, 381 U.S. at 636–38. In *Mapp*, the Court overturned longstanding precedent by extending the exclusionary rule to the states. 367 U.S. at 660. Apparently, because it overturned long-standing precedent, the Court considered *Mapp* to be a new rule. *See*

the Court weighed these factors and declined to give habeas petitioners the benefit of *Mapp v. Ohio*,[138] a new rule of law that overturned prior case law on the application of the exclusionary rule to the states.

Linkletter dealt only with the retroactive application of new rules to habeas proceedings; it did not address the retroactive application of new rules to direct appeals. Two years later, the Court took its retroactivity tools to direct appeals in *Stovall v. Denno*.[139] At issue in *Stovall* was whether *United States v. Wade*[140] and *Gilbert v. California*,[141] in which the Court required exclusion of tainted identification evidence, should be applied retroactively to cases pending in habeas review.[142] In refusing to give retroactive effect to *Wade* and *Gilbert*, the Court concluded that the two decisions announced new rules because the "rulings were not foreshadowed in our cases; no court announced such a requirement until *Wade* was decided by the...Fifth Circuit."[143] After finding that *Wade* and *Gilbert* created a new rule, the Court reiterated that "[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[144] Applying these criteria, the Court declined to extend the benefit of *Wade* and *Gilbert* to persons seeking habeas relief.[145]

Stovall, however, went further than simply applying the *Linkletter* analysis to the habeas petitioner before the Court. The *Stovall* Court instead took the opportunity to consider the retroactive effect of *Wade* and *Gilbert* to persons on direct appeal:

> We also conclude that, for these purposes, no distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review. We regard the factors of reliance and burden on the administration of justice as entitled to such overriding significance as to make that distinction unsupportable. We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must

---

Linkletter, 381 U.S. at 629–35. After making this finding, the Court weighed the three interests the Court deemed relevant to retroactivity. As to the first factor, the Court reasoned that the exclusionary rule was designed to sanction police for Fourth Amendment violations and to deter future police misconduct, *id.* at 636; the Court found applying *Mapp* retroactively would not advance this purpose. *Linkletter*, 381 U.S. at 636–37. As to the second interest, the Court determined that states had relied on the pre-*Mapp* law and followed its rules. *Linkletter*, 381 U.S. at 637. Finally, the Court found that applying *Mapp* retroactively would impose significant costs on the administration of justice and would not enhance the fact-finding process. *Linkletter*, 381 U.S. at 637–38. Not surprisingly, using this analysis, the Court declined to apply *Mapp* to cases pending in federal habeas, although it did apply *Mapp* to cases pending on direct appeal at the time of its decision. *See id.* at 627; *see also* Johnson v. New Jersey, 384 U.S. 719, 732 (1966) ("Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced.").

138. 367 U.S. 643 (1961).

139. 388 U.S. 293 (1967).

140. 388 U.S. 218 (1967).

141. 388 U.S. 263 (1967).

142. *Stovall*, 388 U.S. at 294.

143. *Id.* at 299. The term "foreshadow" appeared to allow a broader application of the concept of a new rule than a requirement that the new rule must overturn a previous decision in order to be new, although arguably a new rule still would be one that substantially altered existing law.

144. *Id.* at 297.

145. *Id.* at 300.

> be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.[146]

Thus, not only could the Court preclude a habeas petitioner from the benefit of a new rule, but the Court also could deny defendants on direct appeal the benefit of the change in law.[147] This basic model for retroactive application of new rules operated throughout the Warren and Burger Court eras.[148]

B. Reaction to the Linkletter/Stovall *Retroactivity Doctrine*

In many ways, *Linkletter* and *Stovall* were the product of divergent political and judicial policies at issue in the 1950s and 1960s. On the one hand, those justices who disagreed with the expansion of criminal rights and the incorporation of certain constitutional rights to the states viewed the *Linkletter/Stovall* doctrine as a way of restricting the effect of those judicial changes.[149] Conversely, by finding that at least partially prospective decisions did not violate the Constitution or the fundamental principles of the role of the courts, the Court gave itself greater freedom to change long-standing doctrine.[150] Under the *Linkletter/Stovall* doctrine, the Court could craft new rules of criminal procedure without feeling constrained by the cost of applying the rules retroactively. For those justices who believed such new rules were long overdue, the *Linkletter/Stovall* doctrine aided in that process both politically and pragmatically.[151]

Perhaps the most significant early critique of *Linkletter* appeared in an article by Professor Paul Mishkin.[152] While agreeing with the ultimate retroactive limits that *Linkletter* placed on habeas review, Mishkin disagreed with the analytical approach employed by the Court.[153] He believed that the focus of retroactivity should be on

---

146. *Id.* at 300–01 (footnotes omitted).

147. For an interesting discussion of the *Linkletter/Stovall* doctrine and the cases to which it was applied, see Corr, *supra* note 18, at 746; Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975).

148. *See* Fallon & Meltzer, *supra* note 6, at 1743 & n.47. In a number of cases, the Court refused to give retroactive effect to new rules to cases pending on direct appeal. *See, e.g.*, DeStefano v. Woods, 392 U.S. 631, 635 n.2 (1968); Desist v. United States, 394 U.S. 244 (1969); Daniel v. Louisiana, 420 U.S. 31 (1975).

149. Fallon & Meltzer, *supra* note 6, at 1739.

150. *Id.*

151. Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring and dissenting).

152. Mishkin, *supra* note 30. *But see* Schwartz, *supra* note 53. Later critiques of the *Linkletter* doctrine include James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062 (1984–1985); Corr, *supra* note 18; Beytagh, *supra* note 147.

153. Mishkin, *supra* note 30, at 101–02. This article was published before the Court decided *Stovall v. Denno*, 388 U.S. 293 (1967).

the purposes and role of habeas corpus rather than on the purpose of the new rule and its effect on the expectations of the state.[154] Troubled in general by prospective judicial law-making, Mishkin endorsed giving full effect to new rules in all cases not yet final, that is all cases pending on direct review.[155] According to Mishkin, giving retroactive effect to cases pending on direct appeal was in accord with well-established operational rules of the judicial process.[156] Mishkin, however, advocated a different model when a defendant was seeking application of new rules on habeas review. According to Mishkin, the decision to apply new rules retroactively to persons seeking habeas relief should turn on the goals of the writ of habeas corpus rather than on an analysis of the three *Linkletter* factors.[157]

As described by Mishkin, "the prime function of habeas corpus is to secure individual freedom from unjustified confinement."[158] However, Mishkin propounded that "a proper sentence of a competent court imposed after an unquestionably fair trial is an acceptable justification for continued imprisonment; the mere possibility, however real, that a new trial might produce a different result is not a sufficient basis for habeas corpus."[159] Therefore, new rules of criminal procedure generally should not apply retroactively to cases pending in habeas review.[160] However, Mishkin clarified the limits of his proposal:

> Valuing the liberty of the innocent as highly as we do, earlier proceedings whose reliability does not measure up to current constitutional standards for determining guilt may well be considered inadequate justification for continued detention. For to continue to imprison a person without having first established to the presently required degree of confidence that he is not in fact innocent is indeed to hold him, in the words of the habeas corpus statute, "in custody in violation of the Constitution." On this basis, habeas corpus would assess the validity of a conviction, no matter how long past, by any current constitutional standards which have an intended effect of enhancing the reliability of the guilt-determining process.[161]

Accordingly, the question of whether to deny the effect of a new rule of criminal procedure to defendants seeking habeas relief should turn on whether the change in the law is one that affects the reliability of the truth-finding process of the trial.[162] According to Mishkin, where the Court recognizes a constitutional guarantee that has the "intended effect of enhancing the reliability of the guilt determining process,"[163] it is proper to apply such a decision retroactively to habeas cases.[164] Mishkin cited with approval the retroactive application of the Court's decisions

---

154. Mishkin, *supra* note 30, at 101–02.
155. *Id.* at 77.
156. *Id.* at 77–78.
157. *Id.* at 79–80.
158. *Id.* at 79 (footnote omitted).
159. *Id.* at 80.
160. *Id.* at 81.
161. *Id.* at 81–82 (footnote omitted).
162. *Id.* at 79–85.
163. *Id.* at 82.
164. *Id.*

extending the right to court-appointed counsel to the states[165] and the right to a trial transcript for indigent defendants appealing their state convictions.[166] Both of these due process rules—the right to counsel and the right to a transcript on appeal—went to the ability to ascertain the truth or accuracy of the criminal process, and, thus, according to Mishkin, habeas petitioners should have the benefit of these changes in the law.[167]

C. Justice Harlan's Dissenting and Concurring Opinions in Desist v. United States *and* Mackey v. United States

A few years after *Linkletter* and the publication of Mishkin's article, Justice Harlan, although in the majority in *Linkletter*, grew dissatisfied with its formula and sought to craft a different method for analyzing the retroactive scope of new decisions of criminal procedure.[168] Like Mishkin, Justice Harlan rejected the Court's focus on the purpose of the new rule and its effect on the reliance interests of the state;[169] instead, Justice Harlan focused on the distinctions between direct appeal and habeas review in determining the appropriate scope of retroactive application of new rules.[170]

In developing his reformation of the Court's retroactivity analysis, Justice Harlan criticized purely prospective applications of changes in the law and specifically rejected *Stovall v. Denno*.[171] Instead, echoing both Mishkin's article and language in *Linkletter*, Justice Harlan concluded that "all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the 'new' decision is handed down."[172]

Justice Harlan's conclusion was buttressed by several reasons regarding direct appeals and retroactivity. At a fundamental level, Justice Harlan believed the Court confounded its constitutional adjudicatory role when it treated persons on direct appeal differently: "We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."[173] For example, under the *Stovall* doctrine, the Court could accept certiorari in a case arising out of a state supreme court, grant relief in the case, and then limit application of that relief to that particular case and all future cases.[174] Under this policy, another defendant convicted on the same day, in the same court, in the same constitutionally defective manner

---

165. *Id.*

166. *Id.* at 82–86.

167. *Id.* at 82.

168. *Desist*, 394 U.S. at 256–69 (Harlan, J., dissenting); *Mackey*, 401 U.S. at 675–702 (Harlan, J., concurring in part and dissenting in part).

169. *Desist*, 394 U.S. at 256–69 (Harlan, J., dissenting); *Mackey*, 401 U.S. at 675–702 (Harlan, J., concurring in part and dissenting in part).

170. *Desist*, 394 U.S. at 256–69 (Harlan, J., dissenting); *Mackey*, 401 U.S. at 675–702 (Harlan, J., concurring in part and dissenting in part).

171. 388 U.S. 293 (1967), *cited in Desist*, 394 U.S. at 258 (Harlan, J.,dissenting).

172. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

173. *Id.* at 258–59.

174. *Id.* at 258 (Harlan, J., dissenting) (noting that *Stovall* "permits this Court to apply a 'new' constitutional rule entirely prospectively, while making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that rule").

would not receive the benefit of the change in law only because the Supreme Court had not accepted certiorari in his or her case.[175] According to Justice Harlan, neither the Constitution nor traditional ideas of the function of courts tolerated this type of judicial decision making.[176]

Justice Harlan posited that, by issuing decisions that do not apply to pending cases on direct appeal and that, therefore, are almost completely prospective, the Court was forced to move out of its traditional judicial role and into a legislative role.[177] As Justice Harlan expounded in his opinion in *Mackey*:

> [I]t tends to cut this Court loose from the force of precedent, allowing us to restructure artificially those expectations legitimately created by extant law and thereby mitigate the practical force of *stare decisis*, a force which ought properly to bear on the judicial resolution of any legal problem.[178]

Rejecting this role for the Court, Justice Harlan espoused a bright line rule with respect to direct appeals: all new rules of law would be applied retroactively to cases pending on direct appeal.[179]

In contrast, Justice Harlan did not believe that cases pending review in a federal habeas proceeding were entitled to the same treatment.[180] In part, this view stemmed from Justice Harlan's disagreement with the modern habeas process, particularly the idea that all constitutional claims could be raised in a habeas petition.[181] As Justice Harlan advised in his dissent in *Fay v. Noia*,[182] the use of the writ to challenge state detentions, at least as the writ was used in the latter part of the twentieth century, was an "unsound extension" of the writ and was not sufficiently deferential to the interests of federalism.[183] Justice Harlan feared that allowing new rules to apply in habeas proceedings would result in constant relitigation of every state conviction and sentence every time a new rule was issued, which would undermine the finality and stability of criminal convictions.[184] The role of habeas review, according to Justice Harlan, was limited to (1) protecting against imprisonment by a system that created an undue risk of imprisoning someone who is actually innocent[185] and (2) acting as an incentive to state courts to conduct their proceedings in accordance with

---

175. *See id.*

176. *Id.* at 258–60 (Harlan, J., dissenting); *Mackey*, 401 U.S. at 681 (Harlan, J., concurring in part and dissenting in part).

177. *Mackey*, 401 U.S. at 679 (Harlan, J., concurring in part and dissenting in part). In addition, Justice Harlan cautioned that refusing to apply new constitutional rules on direct appeal might deter those who did not have the necessary financial resources from litigating and presenting important federal questions to the Supreme Court. *Id.* at 680 (Harlan, J., concurring in part and dissenting in part).

178. *Id.* at 680–81 (Harlan, J., concurring in part and dissenting in part) (citation omitted).

179. *Id.* at 681 (Harlan, J., concurring in part and dissenting in part).

180. *Id.* at 682–89 (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 260–65 (Harlan, J., dissenting).

181. *Mackey*, 401 U.S. at 682–89 (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 260–65 (Harlan, J., dissenting).

182. 372 U.S. 391, 448–76 (1963) (Harlan, J., dissenting), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

183. *Mackey*, 401 U.S. at 684–85 (Harlan, J., concurring in part and dissenting in part).

184. *Desist*, 394 U.S. at 261–62 (Harlan, J., dissenting).

185. *Id.* at 262 (Harlan, J., dissenting).

the Constitution.[186] Justice Harlan believed habeas review could adequately meet these goals, particularly the second goal, by simply assuring that the defendant's trial adhered to the constitutional rules in effect at the time of trial and not at the time the habeas petition was filed.[187]

Based on his view of the purpose of habeas corpus, Justice Harlan advocated another bright line test: new rules of law would not be applied to habeas proceedings.[188] However, Justice Harlan did not view this limit as insurmountable; rather, he recognized two circumstances or exceptions under which new rules should be applied to habeas proceedings.

With respect to his first exception, Justice Harlan stated that his proposed retroactivity limits should apply only to new procedural due process rules.[189] He defined these procedural due process rules as rules that "forbid the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior."[190] In contrast, new substantive due process rules, that is, rules that place certain conduct beyond the power of the government to regulate or punish, should apply retroactively.[191] Examples of such substantive due process rules would be decisions prohibiting state regulation of certain conduct, such as marrying someone of a different racial or ethnic heritage.[192] With respect to substantive due process rules, the purported interest in finality must yield because "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[193] Thus, under Justice Harlan's first exception, new rules of law that place conduct outside the power of government to proscribe would be fully retroactive and would apply to final convictions being reviewed in federal habeas proceedings.

As to his second exception, Justice Harlan offered two different constructs. Initially, in his separate opinion in *Desist*, Justice Harlan appeared to follow Mishkin's model and focused on giving full retroactive benefit to new rules that affect or improve the truth-finding function of the judicial process.[194] However, in *Mackey*, Justice Harlan moved away from this approach and proposed that new rules that are "implicit in the concept of ordered liberty," as that view is understood in *Palko v. Connecticut*,[195] should be applied retroactively.[196] With respect to *Palko*, it would appear that Justice Harlan was referring to a rule that goes to the "very

186. *Id.* at 262–63 (Harlan, J., dissenting).

187. *Mackey*, 401 U.S. at 687–88 (Harlan, J., concurring in part and dissenting in part).

188. *Id.*; *Desist*, 394 U.S. at 262–63 (Harlan, J., dissenting).

189. *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in part and dissenting in part).

190. *Id.*

191. *Id.* at 692–93 (Harlan, J., concurring in part and dissenting in part).

192. *Id.* at 692 n.7 (Harlan, J., concurring in part and dissenting in part). It would seem that under this theory persons who were prosecuted under now-unconstitutional sodomy laws should be able to seek habeas relief. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

193. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part).

194. *Desist*, 394 U.S. at 258–69 (Harlan, J., dissenting).

195. 302 U.S. 319, 325 (1937), *overruled by Benton v. Maryland*, 395 U.S. 784 (1969), *and cited in Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part). For a discussion on *Palko* and the doctrine of selective incorporation, see WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE (4th ed. 2004).

196. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part).

essence of a scheme of ordered liberty,"[197] or that is a principle "rooted in the traditions and conscience of our people."[198] In other words, Justice Harlan's second exception would give full retroactive effect to new rules that set out bedrock procedural rules.[199]

Of course, as in *Linkletter*, the threshold question for Justice Harlan was whether the holding in a particular case was actually a new rule of law.[200] If the decision did not announce a new rule, then limiting the retroactive effect of that decision was not at issue. Justice Harlan conceded that determining whether a decision creates a new rule could prove quite difficult.[201] However, as Justice Harlan noted, "One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation."[202]

D. Beginning of the End of the Linkletter/Stovall *Paradigm:* Griffith v. Kentucky

In the 1980s, the beginning of the end of the *Linkletter/Stovall* retroactivity paradigm emerged. In *United States v. Johnson*,[203] the Court considered the retroactive effect of the Fourth Amendment rule of *Payton v. New York*,[204] in which the Court prohibited the police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest.[205] In considering whether to apply *Payton* retroactively to cases pending on direct appeal, Justice Blackmun, writing for the majority, criticized the *Stovall* rule and embraced the points made by Justice Harlan in his separate opinions in *Desist* and *Mackey*.[206] Indeed, like Justice Harlan, the *Johnson* Court advocated applying all changes in the law retroactively to cases pending on direct appeal unless the new rule constituted a "clear break" from prior precedent.[207] However, in the particular case before the Court in *Johnson*, the Court concluded that *Payton* did not overrule past precedent and none of the *Linkletter* factors supported a restriction on retroactivity.[208] Accordingly, the Court applied *Payton* to defendants whose cases were pending on direct appeal.[209]

Five years later, following up where *Johnson* left off, the Court, in *Griffith v. Kentucky*,[210] attacked *Stovall* head on and overturned the retroactivity rule that had allowed the Court to deny the benefit of new rules to cases on direct appeal.[211] As in *Johnson*, Justice Blackmun authored the majority opinion. He stated:

---

197. *Palko*, 302 U.S. at 325.
198. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
199. *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring in part and dissenting in part).
200. *Desist*, 394 U.S. at 263 (Harlan, J., dissenting).
201. *See id.* at 263–68 (Harlan, J., dissenting).
202. *Id.* at 263 (Harlan, J., dissenting).
203. 457 U.S. 537 (1982).
204. 445 U.S. 573 (1980).
205. *Id.* at 603.
206. *Johnson*, 457 U.S. at 542–48, 562.
207. *Id.* at 549.
208. *Id.* at 552–54.
209. *Id.* at 561–63.
210. 479 U.S. 314 (1987).
211. *Id.* at 314.

> In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication....[A]fter we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review.[212]

Recognizing that it was impossible for the Supreme Court to review all state cases on direct review,[213] the Court concluded, "we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final."[214] In addition, failure to give new rules full retroactive effect in cases pending on direct appeal would create an inequality among criminal defendants that the Court was no longer willing to tolerate.[215] The Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal,...with no exception for cases in which the new rule constitutes a 'clear break' with the past."[216]

Of course, the *Griffith* Court left open the question of retroactivity in habeas corpus and whether the Court should continue its *Linkletter* analysis or adopt some new test, such as Justice Harlan's model. That issue was addressed in 1989 in *Teague v. Lane*[217] and *Penry v. Lynaugh*.[218] As will be seen, these two cases marked not only a significant change in retroactivity doctrine, but also in the protections and scope of federal habeas corpus.

IV. THE ABANDONMENT OF *LINKLETTER* AND THE RISE OF *TEAGUE* AND *PENRY*

Teague v. Lane, the pivotal case establishing the modern retroactivity doctrine, concerned the federal habeas petition of Frank Teague, a black man who was convicted by an all-white jury of various felonies and sentenced to thirty years on each count, with the sentences to run concurrently.[219] During jury selection, the prosecutor used all of his peremptory challenges to strike black jurors from the jury, thus assuring that the jury consisted only of white jurors.[220] Teague appealed to the applicable state appellate court but was denied relief.[221] His conviction and sentence became final in 1983.[222] He then sought federal habeas relief from the U.S. District Court for the Northern District of Illinois but was again denied relief.[223] He appealed, but ultimately the Sixth Circuit Court of Appeals also denied relief.[224] Teague then filed a petition for writ of certiorari with the U.S. Supreme Court,

---

212. *Id.* at 322–23.
213. *See supra* notes 54–55.
214. *Johnson*, 479 U.S. at 323.
215. *Id.* at 323.
216. *Id.* at 328.
217. 489 U.S. 288 (1989).
218. 492 U.S. 302 (1989), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).
219. People v. Teague, 439 N.E.2d 1066, 1068 (Ill. App. Ct. 1982).
220. *Teague*, 489 U.S. at 288.
221. *Id.* at 293.
222. Teague v. Illinois, 464 U.S. 867 (1983) (denying certiorari of state direct appeal).
223. *Teague*, 489 U.S. at 293.
224. *Id.* at 294.

asking the Court, among other things, to hear his claim that the jury selection process in his case violated *Batson v. Kentucky*[225] and that the jury in his criminal trial had not been selected in accordance with the fair cross section requirement of the Sixth Amendment.[226] The Supreme Court agreed to hear Teague's case. However, rather than reach the merits of Teague's constitutional claims, the Court, without the benefit of briefing or oral argument by the parties,[227] crafted a new retroactivity doctrine that the Court then used to deny relief and review to Teague's claims.[228]

Writing for a plurality of the Court, Justice O'Connor faced two retroactivity questions in *Teague*: (1) whether *Batson v. Kentucky* should be extended retroactively to Teague's habeas petition,[229] and (2) whether the Court should even consider Teague's Sixth Amendment fair cross section claim.[230] The *Batson* question could be answered by a fairly straightforward application of prior case law on this issue. The second question allowed the Court to craft a broad, new rule of retroactivity with far-reaching effects on the scope of habeas corpus review.

The Court's examination of Teague's *Batson* claim was fairly straightforward. In *Batson v. Kentucky*,[231] the Court adopted a new standard for determining whether a prosecutor had engaged in purposeful discrimination in the jury selection process, which replaced the previous method that the Court had established in *Swain v. Alabama*.[232] In 1986, in *Allen v. Hardy*,[233] the Court found that *Batson* constituted a clear break with precedent and, applying the *Linkletter* analysis, declined to apply *Batson* to cases that were final when *Batson* was decided.[234] Teague's case became final in 1983, three years before *Batson*, and it appeared that under *Allen v. Hardy* he was not entitled to have *Batson* apply to his case.[235] However, Teague argued that *McCray v. New York*[236] should instead mark the emergence of the new rule on the jury selection process.[237] If *McCray* marked the new rule, then Teague would benefit from the change in the law because his case was pending on direct appeal at the time of *McCray*. *McCray*, however, was not a full Court opinion, but rather an order denying certiorari, in which several justices wrote as to the certiorari denial.[238] Teague argued that the justices' writings in *McCray* marked the beginning of the

---

225. 476 U.S. 79 (1986).

226. *Teague*, 489 U.S. at 288.

227. *Id.* at 326 (Brennan, J., dissenting). As Justice O'Connor noted in her plurality opinion, *id.* at 300, an amicus brief filed by the Criminal Justice Legal Foundation urged some of the retroactivity arguments embraced by the plurality in *Teague*.

228. *Id.* at 301–02.

229. *Id.* at 295–96.

230. *Id.* at 299.

231. 476 U.S. 79 (1986).

232. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986).

233. 478 U.S. 255 (1986) (per curiam).

234. *Id.* at 258–60.

235. Teague v. Illinois, 464 U.S. 867 (1983) (denying writ of certiorari to the Appellate Court of Illinois).

236. 461 U.S. 961 (1983) (denying certiorari in a memorandum order).

237. *Teague*, 489 U.S. at 296.

238. Justices Brennan and Marshall dissented from the certiorari denial and indicated that the old rule for jury selection as articulated in *Swain v. Alabama*, 380 U.S. 202 (1965), should be reexamined. *McCray*, 461 U.S. at 966. Justices Stevens, Blackmun, and Powell, while concurring in the denial of certiorari, stated the issue of *Swain*'s viability was an important one. *Id.* at 962.

rule eventually established in *Batson*.[239] The Court, however, rejected Teague's effort to trace the rule articulated in *Batson* to the certiorari denial in *McCray* and found that, under *Allen v. Hardy*, Teague was not entitled to the benefit of *Batson*.[240] This analysis, while raising some questions about when a new rule comes into existence, did not require a re-crafting of the *Linkletter* analysis.

Teague's fair cross section claim presented the Court with a different question and, as it turned out, an opportunity to not only revisit the retroactivity doctrine of *Linkletter*, but also to radically change the face of modern habeas corpus. According to Justice O'Connor, Teague, in his fair cross section claim, was asking the Court to create a new rule of law extending the fair cross section requirement of *Taylor v. Louisiana*[241] to petit juries.[242] While several justices disagreed with Justice O'Connor's claim that Teague was asking the Court to craft a new rule,[243] Justice O'Connor used this characterization of Teague's claim to overturn *Linkletter*, craft a new retroactivity rule, and dramatically limit the scope of the writ of habeas corpus.

In her plurality opinion, Justice O'Connor established two important components of the Court's current retroactivity analysis: (1) when a new rule may be applied to cases that are final and on habeas review,[244] and (2) what issues a petitioner may raise in his habeas petition.[245] These are corollary concerns that limit the claims a habeas petitioner may pursue in federal court.

A. Barring Retroactive Application of New Rules of Law to Cases That Are Final and Pending in Habeas Review

For a number of years prior to *Teague*, various members of the Court, as well as commentators and scholars,[246] had been expressing concerns about the *Linkletter/Stovall* analysis. As suggested in Justice Blackmun's majority opinion in *Griffith*, several of the justices were inclined to follow Justice Harlan's views on retroactivity. Interestingly, in *Griffith*, where the Court applied Justice Harlan's retroactivity analysis with respect to direct appeals, Justice O'Connor dissented and joined Justice White in observing that the *Linkletter/Stovall* model was workable.[247] Nonetheless, in *Teague*, a majority of the Court, including Justice O'Connor, embraced Justice Harlan's ideas, although only a plurality of the Court agreed with Justice O'Connor's reworking of the Harlan approach.

In abandoning *Linkletter*, Justice O'Connor turned the focus of retroactivity away from the purpose of the new rule, its degree of predictability, and the state's reliance

---

239. *Teague*, 489 U.S. at 295–96.

240. This part of *Teague v. Lane*, 289 U.S. at 296, suggests some of the potential problems, or at least ambiguities, involved in discerning what is a new rule and where and how to mark it.

241. 419 U.S. 522 (1975).

242. *Teague*, 489 U.S. at 299.

243. *Id.* at 341–42.

244. *Id.* at 300–16.

245. CHEMERINSKY, *supra* note 44, § 15.5.1, at 897–905.

246. *See, e.g.*, Haddad, *supra* note 152; Corr, *supra* note 18, at 746; Beytagh, *supra* note 147; James B. Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 417, 424–41 (1969).

247. *Griffith*, 479 U.S. at 330–32.

interest; she instead focused on the role of the writ of habeas corpus in the criminal justice system, tailoring the doctrine of retroactivity to meet her views of the writ's function and purpose.[248] In important respects, Justice O'Connor agreed with Justice Harlan that the purpose of the writ was not to assure a trial free of constitutional error;[249] rather, she indicated that the purpose of the writ of habeas corpus was to deter misconduct by courts and police.[250] Referring to Justice Harlan's writings, Justice O'Connor noted that federal courts meet this deterrence purpose by assuring that the trial adheres to the constitutional rules in effect at the time of the trial; the deterrence purpose was not served by applying new rules retroactively.[251] However, in contrast to Justice Harlan, Justice O'Connor appeared to countenance only the deterrence function of the writ. While advocating a fairly circumscribed role for the writ, Justice Harlan, like Professor Mishkin, nonetheless recognized that deterrence was not the only value advanced by the writ of habeas corpus; the writ also advances liberty interests, including assuring fundamental fairness in the criminal process.[252]

In *Teague*, Justice O'Connor focused on counterbalancing the deterrence value of the writ with other societal concerns.[253] In particular, she stressed the importance of finality in criminal justice, which the writ undermined, and she emphasized the interests of comity and federalism, which she believed restricted the scope of the writ.[254] In this regard, she stated:

> Application 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. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*."[255]

Justice O'Connor further opined:

> "[C]osts imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus...generally far outweigh the benefits of this application." In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.[256]

---

248. *See Teague*, 489 U.S. at 308.
249. *Id.*
250. *See id.* at 306.
251. *See id.* at 305–07.
252. *See* Desist v. United States, 394 U.S. 244, 262 (1969).
253. 489 U.S. at 308.
254. *Id.*
255. *Id.* at 309 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).
256. *Id.* at 310 (citations omitted) (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984)) (alterations in original).

Having endorsed, at least in part, Justice Harlan's view of habeas corpus, his concern about the finality of state judgments, and his corresponding conclusion to limit new rules in habeas, Justice O'Connor abandoned the *Linkletter* model and structured the modern retroactivity rule: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[257] There would be no balancing of the purpose of the rule and the reliance interest in the old rule. It would be a clear black and white test; if it is a new rule, it will not be applied to convictions and sentences that are final. The rationale for this change from the *Linkletter* formula was the conclusion that retroactivity should be based on whether a case is on direct appeal or is pending in a collateral review proceeding, rather than on the nature and purpose of the rule.[258] This way of looking at the retroactivity problem means that, at least initially, the purpose of the new rule is not relevant to the question of its retroactive application.

While *Teague* created a clear bright line test barring application of new rules to decisions that are final, the *Teague* Court, like Justice Harlan, appeared to grant a concession to the idea that the purpose and function of some new rules might nonetheless compel their retroactive application to cases pending in habeas review. Reworking Justice Harlan's exceptions, the Court in *Teague* crafted two exceptions to its retroactivity bar that are similar to, but more limited than, those advocated by Justice Harlan.

The first exception established by *Teague* allowed a new rule to be applied to all cases, regardless of the date of finality, if the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[259] Since *Teague*, the Court has indicated also that decisions that place a certain class of persons outside of a state's power to punish would fit within this exception.[260] For example, *Atkins v. Virginia*,[261] in which the Court held that mentally retarded criminal defendants cannot be subjected to the death penalty, arguably would fit under the first exception.[262] Likewise, if the Court were to decide that juveniles who are under the age of eighteen at the time they commit a capital offense cannot be sentenced to death, that decision would also arguably fall within this exception.[263] Clearly, this set of cases is extremely limited.

The second *Teague* exception conflates the two different constructs that Justice Harlan offered with respect to his second exception. In *Desist*, Justice Harlan suggested an exception to the bar on retroactive application of new rules if the new

257. *Id.*

258. Fisch, *supra* note 6.

259. *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).

260. *See* Penry v. Lynaugh, 492 U.S. 302, 339 (1989), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

261. 536 U.S. 304 (2002). *Atkins* overturned *Penry* to the extent that *Penry* allowed states to execute mentally retarded criminal defendants.

262. *See Penry*, 492 U.S. at 330; *see also, e.g.*, Hearn v. Dretke, 376 F.3d 447, 455 n.11 (5th Cir. 2004); *In re* Hicks, 375 F.3d 1237, 1239 (11th Cir. 2004); *In re* Holladay, 331 F.3d 1169, 1172 (11th Cir. 2003); Hill v. Anderson, 300 F.3d 679, 681 (6th Cir. 2002). *But see* Noel v. Norris, 335 F.3d 832 (8th Cir. 2003) (per curiam).

263. *See* Roper v. Simmons, 124 S. Ct. 1171 (2004) (granting certiorari in a memorandum order).

rule advances the truth-finding function of the judicial process.[264] However, in *Mackey*, Justice Harlan shifted away from that test and focused on allowing an exception for new rules that create procedures that "are 'implicit in the concept of ordered liberty.'"[265] Justice O'Connor combined the two exceptions to create the impenetrable second exception to the *Teague* retroactivity bar: a new rule will be applied retroactively if (1) it is "implicit in the concept of ordered liberty," meaning it announces a bedrock principle of law, and (2) it affects the truth-finding function of the criminal process.[266]

Like its predecessors, the *Teague* retroactivity paradigm is triggered by a new rule.[267] In *Teague*, Justice O'Connor gave varying descriptions of what constitutes a new rule. She described a new rule as one that constitutes "[a] clear break with the past"[268] or, "[t]o put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[269] On the other hand, Justice O'Connor stated that a case did not create a new rule where it merely applied an earlier principle.[270] The scope and meaning of the term "new rule" was left vague and malleable.

Although Justice O'Connor's opinion in *Teague* was a plurality opinion, it has gained majority acceptance and is the retroactivity rule that controls today.[271] One issue that Justice O'Connor specifically avoided addressing in *Teague* was the question of whether the Court's newly created retroactivity analysis applied to capital sentencing proceedings.[272] However, only four months after *Teague*, in *Penry v. Lynaugh*,[273] a majority of the Court, again without having the benefit of briefing by the parties, ruled that the *Teague* retroactivity analysis applied to capital sentencing proceedings.[274] In reaching this conclusion, the Court simply stated, "In our view, the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity."[275] The *Penry* Court did not weigh or discuss the different finality, due process, or fairness issues that may exist in death penalty cases. Responding in his separate opinion in *Penry*, Justice Brennan opined:

> This extension [of *Teague* to capital sentencing] means that a person may be killed although he or she has a sound constitutional claim that would have barred his or her execution had this Court only announced the constitutional rule before his or her conviction and sentence became final. It is intolerable that the difference between life and death should turn on such a fortuity of timing, and beyond my comprehension that a majority of this Court will so blithely allow a

---

264. *See supra* notes 164, 194, and accompanying text.
265. Mackey v. United States, 401 U.S. 667, 693 (1971) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969)).
266. Teague v. Lane, 489 U.S. 288, 311–13 (1988).
267. *Id.* at 293 (considering Swain v. Alabama, 380 U.S. 202 (1965)).
268. *Id.* at 304.
269. *Id.* at 301.
270. *Id.* at 307.
271. *See supra* note 220.
272. *Teague*, 389 U.S. at 314 n.2.
273. 492 U.S. 302 (1989), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).
274. *Id.* at 314.
275. *Id.*

> State to take a human life though the method by which sentence was determined violates our Constitution.[276]

These concerns have continued to surface over the past fifteen years of the *Teague* doctrine.

B. Ability to Raise Potentially New or Novel Claims on Habeas Review: The Second Retroactivity Limit of Teague

As far-reaching as the above-discussed *Teague* retroactivity doctrine is, the Court reached a second issue in *Teague* that also had a tremendous impact on habeas litigation. The second major issue addressed by the *Teague* Court concerned the ability of habeas petitioners to even raise new or novel questions of law in a habeas petition.[277]

In initiating her break with the *Linkletter* doctrine, Justice O'Connor announced that the question of retroactivity is a threshold question to be determined before a court may decide the merits of a petitioner's claim.[278] Under the *Linkletter* model, the Court could, and did, create new rules of constitutional criminal procedure based on claims raised in habeas petitions.[279] *Teague* stopped this practice and held that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated."[280] Using the *Griffith v. Kentucky*[281] rationale, which assured all defendants on direct appeal the benefit of new rules, the Court now cut off new constitutional claims for habeas petitioners, reasoning that to allow one habeas petitioner to receive the benefit of a new rule, but not others, would be unfair.[282]

This aspect of *Teague*, in which the Court forbade habeas petitioners from raising novel or new rules, raises some interesting questions. First, *Teague* requires the Court to determine at the outset of its review of a case if a habeas petitioner is seeking a new rule, and only if the Court concludes that the petitioner is not seeking a new rule may the Court review the merits of the claim. It is curious how the Court can make this prediction before engaging in a thorough analysis of the rule. For example, how does the Court decide at the outset whether its decision will simply be an application of precedent to new or novel circumstances, or whether its decision will overturn a precedent and create a new rule? Does the Court base its conclusion on the petitioner's and respondent's briefs, or on the arguments in the

---

276. *Id.* at 341. Other commentators have expressed deep concerns about applying *Teague* to capital sentencing proceedings, where the punishment is irrevocable. *See, e.g.*, David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1992); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160 (1991). *Contra* Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273 (1991).

277. *Teague*, 489 U.S. at 319.

278. *Id.* at 300–01.

279. *See id.* at 334–35 (Brennan, J., dissenting) (listing a number of habeas cases in which the Court crafted new rules of law); CHEMERINSKY, *supra* note 44, § 15.5.1, at 897–99, 898 n.10.

280. *Teague*, 489 U.S. at 316.

281. 479 U.S. 314, 322 (1987).

282. *Teague*, 489 U.S. at 305.

amicus briefs? Should the Court fully analyze the problem, reach a conclusion of law, and then determine whether that conclusion is new law? If so, should the Court then decline to discuss or rule on the issue in a habeas proceeding?[283]

These legal gymnastics plainly restrict a petitioner's ability to seek habeas relief. However, the impact of this rule is greater than just its impact on individual criminal defendants. In fact, not only does this aspect of *Teague* cut off relief on novel claims for habeas petitioners, but it also greatly reduces the number of cases in which the Court will have an opportunity to craft new rules, and it eliminates a previously available federal forum in which state prisoners may argue for new federal procedural rules.[284] As mentioned earlier, the Supreme Court has sole discretion to hear a case from a state court on direct appeal,[285] and, given the Court's limited docket, not many cases reach the Court on direct appeal. If habeas is no longer an avenue for the establishment of new rules, only those few direct appeal cases in which the Court grants certiorari will be available for the development of criminal procedure rules.

V. FROM *TEAGUE* TO *SCHRIRO V. SUMMERLIN* AND *BEARD V. BANKS*: FIFTEEN YEARS OF THE *TEAGUE* PARADIGM

The impact of the *Teague* doctrine on the development of criminal law and on habeas corpus litigation cannot be overstated. *Teague* dealt not simply with retroactivity, that is, how law is made and how changes in the law affect litigants; it also addressed the role of the writ of habeas corpus in criminal justice and the issue of what constitutional protections are available to habeas petitioners. Over the past fifteen years, the Court has vigorously used the *Teague* retroactivity doctrine to circumscribe the writ. In accord with the Court's campaign to limit habeas review by application of the *Teague* doctrine,[286] Congress incorporated concepts from *Teague* in the AEDPA,[287] the modern habeas statute. To understand what the Court has done with *Teague* and how it has strayed from traditional concerns of retroactivity, as well as the habeas concerns expressed by Justice Harlan, requires a study of several aspects of *Teague*. The first issue is the Court's interpretation of the term "new rule," which is the threshold question that determines which cases are subject to *Teague* limitations. The second issue concerns the scope or understanding of which cases fall within a *Teague* exception or otherwise are not subject to *Teague*. Examining a slightly different aspect of the impact of *Teague*, this Article then will look at the relationship between the *Teague* doctrine and the AEDPA.

---

283. The Court continues to grapple with these questions as seen in the dissenting opinions in *Beard v. Banks*, 124 S. Ct. 2504 (2004). *See id.* at 2515–17 (Stevens, J., dissenting); *id.* at 2517–18 (Souter, J., dissenting). For a discussion of the difficulties in defining a new rule, see A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1, 9–15 (2002); Dow, *supra* note 276, at 36–38; Fallon & Meltzer, *supra* note 6, at 1816–17.

284. *See* CHEMERINSKY, *supra* note 44, § 15.5, at 896–905.

285. *See supra* text accompanying notes 63–67.

286. The *Teague* retroactivity doctrine is not the only procedural device effectively used by the Court to limit the relief that may be granted by the writ of habeas corpus. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991) (using procedural bar doctrine to prevent federal habeas review of claims raised by capital defendant).

287. 28 U.S.C. § 2254 (2000).

Finally, the culmination of *Teague* as expressed by the Court in its 2003–2004 Term will be considered.

A. Decisions Subject to the Teague *Analysis: The Meaning of "New Rule"*

As discussed earlier, doctrines limiting the retroactive effect of court decisions only come into play when the Court issues a new rule.[288] This structure makes sense when considering the factors that trigger a perceived need for a doctrine limiting retroactivity. For example, one reason for a doctrine limiting retroactivity is the recognition that significant changes in the law or the judicial creation of new law upsets established expectations and undermines stability.[289] Moreover, the move away from the Blackstone model of complete retroactivity stems from a recognition that the Court does more than discover the law. On occasion, it also creates the law.[290] This creative activity, which arguably may be described as quasi-legislative in character, is one of the reasons that many scholars and jurists believe it is appropriate to limit the retroactive application of new rules that upset the parties' expectations.[291] However, when the Court engages in applying precedent to new circumstances, or in expounding on established law, the concerns regarding the parties' expectations, stability, and the role of the Court do not dictate limits on retroactive application. Indeed, this activity falls well within the traditional role of judicial decision making and is not outside parties' expectations.[292] To the contrary, to deny a party the application of precedent or established law would undermine expectations of what the law is and what it protects. Because of this critical distinction, the first question in any retroactivity analysis is: does the decision at issue create a new rule?[293]

Justice Harlan, in his separate opinions in *Desist* and *Mackey*, recognized the difficulty in determining when a case creates a new rule but indicated that this difficulty should not be too troubling because most cases would not involve the creation of new rules.[294] Intuitively, this conclusion seems correct, as the term "new" is synonymous with the term "novel," and "new" has been defined as "never

---

288. *See supra* notes 130, 199–200 and accompanying text.

289. *See, e.g.*, Fisch, *supra* note 6, at 1058; Fallon & Meltzer, *supra* note 6, at 1757.

290. *See supra* notes 17–35 and accompanying text.

291. *See* Fisch, *supra* note 6, at 1058; Fallon & Meltzer, *supra* note 6, at 1759.

292. *See* Desist v. United States, 394 U.S. 244, 263–64 (1969) (Harlan, J., dissenting); *see also* Bryant, *supra* note 283, at 9–15; Fallon & Meltzer, *supra* note 6, at 1816–19.

293. Justice Scalia previously described the three-step process that the Court traditionally uses to determine whether a claim raised on habeas review is based on a new rule that should be applied retroactively:

> To apply *Teague*, a federal court engages in a three-step process. First, it determines the date upon which the defendant's conviction became final. Second, it must "'[s]urve[y] the legal landscape as it then existed,' and 'determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" Finally, if the court determines that the habeas petitioner seeks the benefit of a new rule, the court must consider whether the relief sought falls within one of the two narrow exceptions to nonretroactivity.

Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (citations omitted) (quoting Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (quoting Graham v. Collins, 506 U.S. 461, 468 (1993) (alterations in original); Saffle v. Parks, 494 U.S. 484, 488 (1990) (alterations in original))).

294. *See supra* notes 169–204 and accompanying text.

existing before."[295] *Teague* ventured that a new rule could be found when a decision "breaks new ground,"[296] "imposes a new obligation on the States,"[297] or where the result of a particular case "was not *dictated* by precedent existing at the time the defendant's conviction became final."[298] As will be seen, this language in *Teague* offered the Court an avenue to expand the new rule definition to encompass all types of uncontroversial court decisions.

In the fifteen years since *Teague*, the Court has taken the concept of the new rule doctrine to extreme forms.[299] The first move in this direction occurred the year after *Teague* in *Butler v. McKellar*.[300] In *Butler*, the Court faced the question of whether its decision two years earlier in *Arizona v. Roberson*[301] was a new rule subject to the retroactivity restrictions of *Teague*. *Roberson* dealt with the application of *Edwards v. Arizona*[302] to a different factual setting. In *Edwards*, the Court held that a suspect who had invoked the right to counsel could not be subjected to a second interrogation until counsel had been made available. The issue in *Roberson* was whether *Edwards* applied when the second interrogation concerned a separate offense.[303] The Court in *Roberson*, by a six-to-two vote,[304] found that the precedents of *Miranda v. Arizona*[305] and *Edwards*, as well as a number of other decisions, plainly supported the conclusion that the *Edwards* rule did apply when the second interrogation concerned a separate offense.[306] The language and tone of *Roberson* easily suggested that *Roberson* did not break with precedent, but rather was an application of well-established rules to a different factual situation.[307] It would seem, then, that *Roberson* would be the type of decision that did not constitute a new rule.

In a counter-intuitive move, Chief Justice Rehnquist, who was one of the two dissenters in *Roberson*, classified *Roberson* as a new rule subject to *Teague* limitations.[308] In *Butler v. McKellar*,[309] Chief Justice Rehnquist, writing for the majority, found that the concept of a new rule was not about how the Court creates law or applies precedent as much as it was about protecting a state court's "reasonable, good-faith interpretations of existing precedents," even if the state court's interpretation of the law is "shown to be contrary to later decisions."[310] The new rule prong of *Teague* thus transformed the definition and purpose of the "new

295. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 957 (2d College ed. 1984).
296. 489 U.S. at 301.
297. *Id.*
298. *Id.*
299. Early on, several scholars noted the potential impact of *Teague* on the scope of habeas. *See* Dow, *supra* note 276; Heald, *supra* note 276.
300. 494 U.S. 407 (1990).
301. 486 U.S. 675 (1988).
302. 451 U.S. 477 (1981).
303. *Roberson*, 480 U.S. at 677.
304. Justice Stevens authored the majority opinion; Chief Justice Rehnquist and Justice Kennedy dissented; Justice O'Connor did not participate.
305. 384 U.S. 436 (1966).
306. *Roberson*, 486 U.S. at 680–85.
307. *See* Heald, *supra* note 276, at 1283–85; Metzner, *supra* note 276, at 170–75.
308. Butler v. McKellar, 494 U.S. 407, 415 (1990).
309. 494 U.S. 407 (1990).
310. *Id.* at 414.

rule" doctrine.[311] The doctrine is not about the scope of the Blackstone model of judicial decision making; it is not about the process of judicial interpretation of the law; it is not about a decision that overturns or upsets established rules of law. Rather, the new rule concept now protects a state court's reasonable expectations when interpreting the Federal Constitution, even if the state's interpretation of the Constitution is wrong.[312] This protection of the state's interest in interpreting the Constitution, even in a manner that ultimately proves to be incorrect, is curious considering that for well over 150 years it has been an expectation and, indeed, a fundamental constitutional principle that the Federal Constitution, and the Supreme Court's interpretation of the Constitution, prevail over conflicting or inconsistent state law, including state court interpretations of the Federal Constitution.[313]

In its endeavor to protect a state's interpretations of federal law, the Court instructed in *Butler* that, if the outcome of a case such as *Roberson* is "susceptible to debate among reasonable minds," it may be categorized as a new rule and thus is subject to *Teague*.[314] Along the same lines, a majority of the Court stated in *Saffle v. Parks*[315] that a decision is new unless a state court would have felt "compelled by existing precedent"[316] to reach the same conclusion ultimately reached by the Supreme Court. Even a Supreme Court decision issued in a summary, per curiam opinion applying established law can be characterized as new.[317] Under *Teague*, a state has a reasonable expectation that its erroneous interpretation of the law will be protected unless precedent compels the interpretation of the law ultimately found to be correct.[318] This formulation of a new rule deviates markedly from Justice Harlan's view that most decisions do not create new rules,[319] and completely breaks with Blackstone's conception of the law and the function of the courts.[320] Under the *Teague* doctrine, the presumption is that a decision is a new rule unless precedent compels the decision.

Moreover, the habeas petitioner now has the burden of showing that the decision is not a new rule.[321] As the Court said in *O'Dell v. Netherland*,[322] "we will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court."[323] Thus, the test for

---

311. Even the leading proponents of the positivist theories, which recognized the judicial creation of new law, recommend that judges hold closely to precedent, law, and policy in deciding cases. Fallon & Meltzer, *supra* note 6; *see also* Bryant, *supra* note 283, at 10–11; Heald, *supra* note 276, at 1283–84; Metzner, *supra* note 276, at 170–75.

312. *See* Sawyer v. Smith, 497 U.S. 227, 234 (1990); Saffle v. Parks, 494 U.S. 484, 488 (1990); Butler v. McKellar, 494 U.S. 407, 414–15 (1990).

313. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cooper v. Aaron, 358 U.S. 1 (1958).

314. *Butler*, 494 U.S. at 415.

315. 494 U.S. 484, 488 (1990).

316. *Id.*

317. Lambrix v. Singletary, 520 U.S. 518 (1997).

318. *Saffle*, 494 U.S. at 488.

319. *See supra* notes 168–201 and accompanying text.

320. *See supra* notes 20–43 and accompanying text.

321. O'Dell v. Netherland, 521 U.S. 151 (1997). The state may waive *Teague* by not raising it as an issue, although federal courts may still apply *Teague* even if it has been waived. Caspari v. Bolen, 510 U.S. 383 (1994).

322. 521 U.S. 151 (1997).

323. *Id.* at 156.

whether a decision articulates a new rule is "whether a state court considering [the defendant's] claim. . .would have felt compelled by existing precedent to conclude that the rule [sought] was required by the Constitution."[324] Meeting this test is a formidable task. For example, the Court indicated in *O'Dell* that if a court's decision is based on reasoning by a plurality of the Court, then that decision could not have been compelled by precedent and could be classified as new.[325] Likewise, if, prior to the Court's issuance of a decision, state or federal courts issued differing opinions about a particular rule or doctrine, then the Supreme Court's decision resolving that conflict could be classified as new.[326] Given the role of the Supreme Court in our nation's judicial structure as the court that resolves conflicts and confusions in federal law, it is hard to imagine any case that the Supreme Court selects for review that would not result in a new decision.

Moreover, under *Teague*, not only will a habeas petitioner not receive the benefit of new rules rendered since the petitioner's conviction and sentence became final, but also the Court cannot even consider a claim that might result in a new rule.[327] So, for example, it would appear that a petitioner who is requesting an application of established law to novel or even slightly different factual circumstances would be unable to receive federal habeas review of such a claim.[328]

Not surprisingly, commentators and scholars have criticized the Court's construction of the new rule doctrine.[329] The doctrine makes nearly every Court decision a new rule, which is counter to well-established ideas about the function of the Court in both a jurisprudential and a constitutional sense.[330] It also creates a degree of deference to state courts that, in a very real way, deprives habeas petitioners of a federal forum to independently review their constitutional claims and deprives federal courts of the ability to apply changes, improvements, and innovations in constitutional law to state prisoners.

B. The Teague *Exceptions and Limitations*

As noted earlier, if a decision does not create a new rule, then that decision applies to all cases regardless of their temporal relationship to the issuance of the decision.[331] If the Court does issue a new rule (and under the *Teague* construction of new rule almost every decision is potentially a new rule), then that new rule will not apply retroactively to cases that are final at the time the rule is handed down unless the new rule fits under one of the two *Teague* exceptions.[332] While the origins of the *Teague* exceptions suggest a small umbrella of protection for criminal

---

324. Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (quoting Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)) (first alteration in original)).

325. 521 U.S. at 159.

326. Stringer v. Black, 503 U.S. 222 (1992).

327. *See supra* notes 229–245 and accompanying text.

328. Interestingly, the Supreme Court, in habeas reviews in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), applied a standard of effectiveness for trial counsel in capital sentencing proceedings that Justice Scalia characterized as new.

329. For discussions on the shortcomings and problems with the Court's "new rule" formulation, see Fallon & Meltzer, *supra* note 6; Heald, *supra* note 276; Bryant, *supra* note 283; Metzner, *supra* note 276.

330. *See supra* notes 19–43 and accompanying text.

331. *See supra* notes 24–26 and accompanying text.

332. *See infra* notes 464–489 and accompanying text.

defendants, the Court has interpreted the exceptions so narrowly as to render them virtually non-existent.

The first *Teague* exception applies a new rule retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[333] This exception was derived from Justice Harlan's separate opinions in *Desist* and *Mackey*, in which Justice Harlan explained the first exception as follows:

> New "substantive due process" rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, must, in my view, be placed on a different footing [than new rules of procedural law]....[T]he writ has historically been available for attacking convictions on such grounds.[334]

In *Penry v. Lynaugh*,[335] the Court explained its understanding of this exception in the context of the Court's decisions protecting certain individuals from the death penalty:

> In our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity have little force. As Justice Harlan wrote: "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.[336]

Thus, new rules prohibiting the imposition of the death penalty on a class of individuals, such as those with mental retardation, should apply retroactively to all cases regardless of when the defendant's conviction and sentence became final. Outside of this type of case, the Court has not found any case within this exception.

The second exception in *Teague* is, if possible, more limited than the first exception. By combining the requirement that a new rule must be a bedrock rule of law and must enhance the truth-finding process,[337] the Court has crafted an exception so narrow that no case—not one—from 1989 to 2004 has been found to fall within it. Indeed, in *Teague* the Court remarked:

> Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge. We are also of the view that such rules are "best illustrated by recalling the classic grounds for

333. *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 692).
334. *Mackey*, 401 U.S. at 692–93 (footnote omitted).
335. 492 U.S. 302 (1989), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).
336. *Id.* at 330 (citation omitted).
337. *See supra* text accompanying notes 264–272.

> 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."[338]

Since 1989,[339] the Court has handed down important rules of criminal procedure such as those found in *Simmons v. South Carolina*,[340] which provides that, where the state raises the issue of future dangerousness in a capital sentencing proceeding, the defendant has the right to rebut with evidence that he or she will be ineligible for parole if sentenced to life imprisonment,[341] and *Caldwell v. Mississippi*,[342] which found it unconstitutional to allow jurors to return a death sentence where the jury had been led to believe that responsibility for determining the appropriateness of the defendant's death sentence rested elsewhere.[343] Despite the crucial role such rules play in determining the fairness and appropriateness of the death penalty, the Court has refused to apply either of these rules retroactively.[344]

The Court has carved out one other class of cases that fall outside of the retroactivity constraints of *Teague*. *Bousley v. United States*,[345] an opinion authored by Chief Justice Rehnquist, found that "decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct 'beyond the power of the criminal law-making authority to proscribe,' necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'"[346] Thus, when the Court interprets a substantive provision of a federal criminal statute and finds that congress exceeded its authority in proscribing certain conduct, "it would be inconsistent with the doctrinal underpinnings of habeas review to preclude [a] petitioner" from relying on that Court decision in seeking habeas relief.[347] *Bousely* appeared to provide that changes in substantive law would not be subject to the *Teague* analysis and, as such, substantive decisions would apply to cases pending in habeas review.

C. Incorporation of the Language and Ideas of Teague *in the AEDPA*

One of the intended and most striking results of *Teague* was its impact on the scope of the writ of habeas corpus: it drastically reduced the issues and claims that could be heard in habeas litigation. This impact on the writ did not pass unnoticed.

---

338. *Teague*, 489 U.S. at 313 (quoting Rose v. Lundy, 455 U.S. 509, 544 (1982) (footnotes omitted)).

339. Of course, the opportunities for the Court to establish new rules of criminal procedure have been greatly circumscribed since *Teague*. *See supra* notes 279–283 and accompanying text.

340. 512 U.S. 154 (1994).

341. *Id.* at 171.

342. 472 U.S. 320 (1985).

343. *See id.* at 341.

344. *See* O'Dell v. Netherland, 521 U.S. 151 (1997) (refusing to characterize *Simmons*, 512 U.S. 154, as a bedrock rule falling within second exception); Sawyer v. Smith, 497 U.S. 227 (1990) (refusing to characterize *Caldwell*, 472 U.S. 320, as a bedrock rule falling within second exception).

345. 523 U.S. 614 (1998).

346. *Id.* at 620 (quoting *Teague*, 489 U.S. at 312 (quoting *Mackey*, 401 U.S. at 692); Davis v. United States, 417 U.S. 333, 346 (1974)).

347. *Id.* at 621.

Not only did scholars and commentators observe its effects,[348] but also Congress noticed how *Teague* became an instrument for limiting the writ and for curtailing the power of federal courts in habeas review.

During the mid-1990s, a number of factors, including concerns about delays in the imposition of the death penalty, the rising interest in states' rights, and the bombing of the Murrah Building in Oklahoma City in 1995, sparked interest in and garnered enough support for a revamping of the federal habeas statute.[349] The AEDPA, which was enacted in April of 1996, dramatically refashioned the federal habeas corpus statute. Making many amendments to the previous habeas statute, Congress used concepts and incorporated language from *Teague* in several specific attempts to restrict the scope of habeas review. For example, 28 U.S.C. § 2244(b)(2)(A), which restricts the filing of second or successive habeas petitions, specifically provides that a second or successive petition cannot be heard on a new rule of law unless the Supreme Court has made that new law retroactive.

Another notable incorporation of *Teague* is seen in the provisions of 28 U.S.C. § 2254(d), which provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) 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, or
>
> (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[350]

In this provision, which greatly restricts federal court review of state court decisions,[351] Congress borrowed the concept of the new rule doctrine to protect a state's reasonable expectation that it will be allowed to interpret constitutional law as it sees fit, even if the state's interpretation of federal law is incorrect, provided that a contrary interpretation is not compelled by precedent. Likewise, section 2254(d)(1)

---

348. *See* CHEMERINSKY, *supra* note 44, § 15.2, at 869–73; Dow, *supra* note 276, at 49–50; Fallon & Meltzer, *supra* note 6, at 1746–49; Heald, *supra* note 276, at 1303.

349. *See* Entzeroth, *supra* note 83.

350. 28 U.S.C. § 2254(d) (2000).

351. As the Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000) (alteration in original) (quoting § 2254(d)(1)):

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) "was contrary to...clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of...clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

requires federal court deference to a state court decision provided the state court decision is "not contrary to," or "an unreasonable application of...clearly established federal law, as determined by the Supreme Court."[352] Like *Teague*, section 2254(d)(1) protects a state court's interpretation of Supreme Court precedent even when the state court is wrong in its judgment of those precedents. In this respect, section 2254 codifies the definition of new rule. In keeping with the new rule doctrine, the Supreme Court has made clear in *Teague*, and in its interpretation of section 2254, that a federal court is not empowered to grant habeas relief simply because the federal court finds the state court misapplied or incorrectly interpreted federal law; rather, habeas relief is proper only when the state got the law wrong and that wrong interpretation of law was unreasonable or contrary to established law.[353]

Although section 2254 incorporated much of the *Teague* doctrine, it did not render *Teague* ineffective. To the contrary, the Court has made clear that the *Teague* analysis is still an independent doctrine that must be applied before habeas review may begin. Specifically, in 2002, in *Horn v. Banks*,[354] the Court stated:

> While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d) ("[a]n application...shall not be granted...*unless*" the AEDPA standard of review is satisfied), none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments. To the contrary, if our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that the AEDPA and *Teague* inquiries are distinct. Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.[355]

Thus, all habeas petitioners face the hurdle of *Teague* as well as the procedural hurdles of the AEDPA.

VI. *TEAGUE* IN THE SUPREME COURT'S 2003–2004 TERM: *BEARD V. BANKS* AND *SUMMERLIN V. SCHRIRO*

In its 2003–2004 Term, the Supreme Court applied *Teague* in two key death penalty cases and considered the scope of the new rule doctrine and the *Teague* exceptions and limitations. Both of these cases evidence the extraordinary restraints that *Teague* has placed on habeas petitioners and provide some insight into future cases.

---

352. For an excellent and thought-provoking article on the relationship between *Teague* and section 2254, see Bryant, *supra* note 283.

353. Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for "Reasonably Erroneous" Applications of Federal Law*, 63 OHIO ST. L.J. 731, 750 (2002) ("Under § 2254(d)(1)'s 'unreasonable application' clause,...a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law *erroneously* or *incorrectly*. Rather, that application must also be *unreasonable*.").

354. 536 U.S. 266 (2002) (per curiam).

355. *Id.* at 272 (alteration in original) (citations omitted).

A. Beard v. Banks*: The Extraordinarily Expansive Reach of the New Rule Doctrine*

One of the Court's most recent applications of *Teague* occurred in *Beard v. Banks*[356] in which the Court faced the question of whether *Mills v. Maryland*[357] was a new rule. In 1988, before the Supreme Court had issued its landmark decisions in *Teague* and *Penry*, the Supreme Court declared in *Mills* that a capital sentencing proceeding is constitutionally defective if there exists a substantial probability that jurors believed they were required to unanimously agree on the existence of particular mitigating evidence before they could consider such evidence in deciding whether a defendant should be punished by death.[358] In 1990, in *McKoy v. North Carolina*,[359] a majority of the Court applied the principles of *Mills* to hold that North Carolina's requirement that jurors must unanimously agree on mitigating factors was unconstitutional.[360] In *Mills*, Justice Blackmun, writing for a five-member majority, stated:

> It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" The corollary that "the sentencer may not refuse to consider *or be precluded from considering* 'any relevant mitigating evidence'" is equally "well established."[361]

The ideas articulated in *Mills* stem from the Court's 1978 decision in *Lockett v. Ohio*[362] and its 1982 decision in *Eddings v. Oklahoma*.[363] Both *Lockett* and *Eddings* rely on well-entrenched principles of modern death penalty jurisprudence.[364]

When the Supreme Court established the modern death penalty jurisprudence, it mandated that (1) the jury's decision to impose the death penalty must be sufficiently directed and guided in the selection of individuals who may be subject to the death penalty[365] and (2) the jury must be allowed to hear relevant evidence, including mitigating evidence such as the "character and record of the individual offender and the circumstances of the particular offense,"[366] to determine ultimately

---

356. 124 S. Ct. 2504 (2004).

357. 486 U.S. 367 (1988).

358. *Mills* was decided by a five-member majority. Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Scalia dissented.

359. 494 U.S. 433 (1990).

360. *Id.* at 444.

361. *Mills*, 486 U.S. at 374–75 (quoting Eddings v. Oklahoma, 455 U.S. 104, 110, 114 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion), and citing Skipper v. South Carolina, 476 U.S. 1, 4 (1986)).

362. 438 U.S. 586 (1978).

363. 455 U.S. 104 (1982).

364. In 1972, in *Furman v. Georgia*, 408 U.S. 238 (1972), a divided Supreme Court struck down then-existing death penalty systems across the United States. In 1976, the Supreme Court, in a series of decisions, sanctioned certain death penalty statutes. *See* Gregg v. Georgia, 428 U.S. 153 (1976); *see also* Proffitt v. Florida, 428 U.S. 242 (1976), *vacated*, Gregg v. Georgia, 429 U.S. 875 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976) (disapproving death penalty procedure but sanctioning alternative); Roberts v. Louisiana, 428 U.S. 325 (1976) (disapproving death penalty procedure but sanctioning alternative). *See generally* COYNE & ENTZEROTH, *supra* note 56.

365. *Gregg*, 428 U.S. at 188, 192–93.

366. *Woodson*, 428 U.S. at 304.

if a particular defendant should be put to death.[367] In 1978, in *Lockett*, the Supreme Court reinforced the importance of mitigating evidence in the death sentencing process, stating:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[368]

In reaching this decision, the Court relied not only on the 1976 decision of *Gregg v. Georgia*[369] and its companion cases,[370] which established the modern death penalty criteria, but also on case law from the late 1940s and 1950s.[371] In *Mills*, relying at least in part on these legal principles, the Court held that jury instructions, which may have led jurors to believe that they had to unanimously agree on mitigating evidence before giving it effect, were constitutionally defective.[372] Writing for the dissent in *Mills*, Chief Justice Rehnquist did not characterize the majority view as unprecedented or novel; rather, he disagreed with the standard for determining juror confusion and disagreed with the majority's view that the jury, in fact, was confused by the judge's instructions.[373]

Sixteen years after *Mills*, in *Beard v. Banks*,[374] the Court addressed the question of who should receive the benefit of the principles expressed in *Mills* and *McKoy* and, in particular, whether a habeas petitioner whose conviction and sentence became final in 1987 was entitled to the holding and principles articulated in *Mills* and *McKoy*.[375] Banks, like the capital defendants in *Mills* and *McKoy*, was sentenced to death by jurors who may have believed that they had to unanimously agree on the mitigating evidence presented in the capital sentencing proceeding.[376] Needless to say, Banks objected to a sentencing proceeding that was constitutionally defective in this manner.

A five-member majority of the Court, which included Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Thomas, characterized *Mills* as new.[377] Writing for the majority in *Banks*, Justice Thomas stated that, in determining

---

367. *Gregg*, 428 U.S. at 192–93.

368. *Lockett*, 438 U.S. at 604 (footnote omitted). Justice Scalia has strongly criticized the modern death penalty paradigm and, in particular, has attacked the mitigation component of modern death penalty law as expressed in *Lockett*. *See* Walton v. Arizona, 497 U.S. 639 (1990) (Scalia, J., concurring), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

369. 428 U.S. 153 (1976).

370. Proffitt v. Florida, 428 U.S. 242 (1976), *vacated*, Gregg v. Georgia, 429 U.S. 875 (1976); Jurek v. Texas, 428 U.S. 262 (1976); *Woodson*, 428 U.S. 280; Roberts v. Louisiana, 428 U.S. 325 (1976). *See generally* COYNE & ENTZEROTH, *supra* note 56.

371. Specifically, the Court cited *Williams v. New York*, 337 U.S. 241, 247–48 (1949), and *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959), to support its conclusions on the importance of individualized sentencing in capital sentencing proceedings. *Lockett*, 438 U.S. at 603.

372. *Mills*, 486 U.S. at 384.

373. *Id.* at 390 (Rehnquist, C.J., dissenting)

374. 124 S. Ct. 2504 (2004).

375. *Id.* at 2508.

376. Banks v. Horn, 271 F.3d 527 (3d Cir. 2001), *rev'd on other grounds*, 536 U.S. 266 (2002).

377. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Scalia dissented in *Mills*. Justice Thomas was not on the bench at the time of the *Mills* decision. 486 U.S. 367.

whether to give a Court decision retroactive effect, the Court engages in a three-step process[378] requiring the Court (1) to determine the date on which a conviction and sentence become final, which, as discussed earlier, is generally when the defendant has exhausted the state direct appeals process, including the opportunity to seek certiorari review with the U.S. Supreme Court;[379] (2) to decide whether the rule or case law the habeas petitioner wishes to apply to his case is new by looking at the "legal landscape" at the time the petitioner's conviction became final and deciding "whether the Constitution, as interpreted by the precedent then existing, compels the rule";[380] and (3) if the rule is new, to determine whether either of the *Teague* exceptions applies.[381]

Applying this model, the Court decided that Banks' conviction and sentence became final in 1987[382] and then decided that *Mills* was new because its result was not dictated by precedent in 1987. It is the determination that *Mills* constitutes a new rule that is most remarkable about *Banks*. As noted above, *Mills* relied on *Lockett* and *Eddings* for its holding that a unanimity requirement for mitigating evidence was unconstitutional.[383] *Eddings* and *Lockett* predate 1987.[384] Both of these cases, as well as the 1976 case of *Gregg v. Georgia* and its companion cases, were part of the legal landscape in 1987. The Court, however, characterized *Lockett* as a "generalized" rule that may have supported *Mills* but did not mandate it.[385]

As the Court stated, "*Mills'* innovation rests with its shift in focus to individual jurors," and the need to assure that individual jurors may make a determination on mitigation.[386] According to the Court, this "shift in focus" was debatable among reasonable jurists.[387] As evidence of this debate, the Court pointed out that four justices dissented in *Mills*;[388] coincidentally, these four dissenting justices now joined Justice Thomas in confining the effect of *Mills*. Although in a footnote the Court insisted that "we do not suggest that the mere existence of a dissent suffices to show that the rule is new,"[389] the existence of dissenting justices appeared to weigh heavily in the Court's conclusion that a rule is new.

The idea that a rule is new because some justices on the Court dissent is quite removed not only from the Blackstone model of judicial decision making and traditional concerns of foreseeability in judicial decision making, but also from the

---

378. 124 S. Ct. at 2510. Justice Scalia offered a different analytical model in *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004).

379. *Banks*, 124 S. Ct. at 2510; *see supra* notes 56–67 and accompanying text. Although this determination is often straightforward, in Banks' case there was a question of when the conviction became final based on the Pennsylvania Supreme Court's consideration of the *Mills* question in a collateral proceeding. The U.S. Supreme Court held, however, that Banks' conviction and death sentence became final on October 5, 1987, when the Court denied certiorari review of his direct appeal. *Id.* at 2508, 2510–11.

380. *Id.* at 2510.

381. *Id.*

382. *See supra* note 379.

383. *Banks*, 124 S. Ct. at 2511.

384. *Lockett* was decided in 1978, and *Eddings* was decided in 1982. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

385. *Banks*, 124 S. Ct. at 2512.

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 2513 n.5.

new rule concerns discussed by Justice Harlan and Professor Mishkin in the context of habeas proceedings.[390] *Mills* did not overturn case law; it did not chart out new legal procedures; it did not add to the responsibilities of states in administering capital sentencing proceedings. Rather, *Mills* applied well-recognized principles of death penalty jurisprudence to a certain sentencing problem in a particular case.

In considering the majority's treatment of *Mills* as new, it bears noting that *Mills*, *Lockett*, and *Eddings* stand for a principle of death penalty jurisprudence that some members of the Court, particularly Justice Scalia, dislike and would prefer to eliminate. In particular, Justice Scalia stated in *Walton v. Arizona*[391] that he believed the mitigation prong of modern death penalty jurisprudence was wrong and should be abolished.[392] Notable among Justice Scalia's criticisms of *Lockett*, *Mills*, and *McKoy* and the line of cases outlining the scope of mitigation evidence in capital sentencing is his concern that state legislatures' efforts to create capital sentencing procedures were being undermined when the mitigation line of cases was applied retroactively.[393]

Justices Stevens, Souter, Ginsburg, and Breyer dissented in *Banks*. In his dissent, Justice Stevens, who was in the majority in *Mills*, stated:

> When *Mills* was decided, there was nothing novel about acknowledging that permitting one death-prone juror to control the entire jury's sentencing decision would be arbitrary. That acknowledgment was a natural outgrowth of our cases condemning mandatory imposition of the death penalty, recognizing that arbitrary imposition of that penalty violates the Eighth Amendment, and mandating procedures that guarantee full consideration of mitigating evidence. Indeed, in my judgment, the kind of arbitrariness that would enable 1 vote in favor of death to outweigh 11 in favor of forbearance would violate the bedrock fairness principles that have governed our trial proceedings for centuries. Rejecting such a manifestly unfair procedural innovation does not announce a "new rule" covered by *Teague v. Lane*, but simply affirms that our fairness principles do not permit blatant exceptions.[394]

According to four members of the Court, not only is *Mills* not a new rule, but also, characterizing *Mills* as new deprives Banks of his expectation that he will receive the benefit of established principles of capital sentencing law.[395] In the dissenters' view, Banks is not being denied the benefit of a new rule of law; he is being denied the benefit of the rule of law.[396]

---

390. *See supra* notes 152–202 and accompanying text.

391. 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

392. *Walton*, 497 U.S. at 656–74 (Scalia, J., concurring).

393. *Id.* at 668 (Scalia, J., concurring) ("For state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow.").

394. *Banks*, 124 S. Ct. at 2516 (Stevens, J., dissenting) (citations and footnote omitted) (citing Zant v. Stephens, 462 U.S. 862, 874 (1983); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion); Roberts v. Louisiana, 431 U.S. 633 (1977) (per curiam); Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 189 (1976); Furman v. Georgia, 408 U.S. 238 (1972) (per curiam)).

395. *Id.* at 2516 (Stevens, J., dissenting).

396. *Id.* (Stevens, J., dissenting).

Justice Souter joined Justice Stevens' dissent but wrote separately, noting that the reasonable jurist standard used to define a new rule was an objective standard designed "to distinguish those developments in this Court's jurisprudence that state judges should have anticipated from those they could not have been expected to foresee."[397] This distinction harkens back to one of the key reasons for a doctrine limiting retroactivity: protecting the foreseeable expectations of the parties. Further, Justice Souter noted that the majority's interpretation of the new rule doctrine "gives too much importance to the finality of capital sentences and not enough to their accuracy."[398] Focusing the question of a new rule on foreseeability would bring the new rule prong of *Teague* closer in line with the basic purpose of retroactive limits on changes in the law: protecting the reasonable expectations of the parties—both the state and the defendant—even in the context of habeas proceedings.

Banks demonstrates the outer reaches of the new rule prong of *Teague*. If *Mills*, which is well grounded in basic death penalty jurisprudence,[399] is a new rule, it is hard to imagine any capital sentencing decision that is not subject to such characterization. Not only is this construction of the types of cases subject to retroactive limitations inconsistent with the writings of Justice Harlan and many scholars, but also it has the effect of insulating state decisions that are wrong. Indeed, the purpose of retroactivity, in light of the *Teague* definition of the new rule doctrine, is not to protect parties from unforeseen changes in the law; it is not about reconciling Blackstone's theory of judicial decision making with the realities of judicial decision making; it is not about how law is made. The new rule component of *Teague*, as interpreted by five members of the Court, is a method by which to limit the scope of constitutional rules of criminal procedure, including capital sentencing procedures, and to prevent habeas petitioners from obtaining relief and review in federal court for their federal constitutional claims. Among the recognized functions of habeas review are protection of wrongfully convicted defendants and the protection of the rule of law in criminal proceedings;[400] the new rule construct defeats these purposes.

B. Schriro v. Summerlin*: The Extraordinarily Narrow Reach of the* Teague *Exceptions*

The other major retroactivity case that the Supreme Court considered in its 2003–2004 Term was *Schriro v. Summerlin*.[401] At issue in *Summerlin* was whether *Ring v. Arizona*[402] should be applied retroactively to Summerlin, whose conviction and sentence were final and whose case was pending in federal habeas review at the time of the *Ring* decision.[403] Prior to the Court's decision in June of 2004, several

397. *Id.* at 2517 (Souter, J., dissenting).
398. *Id.* at 2518 (Souter, J., dissenting).
399. *See supra* notes 361–364 and accompanying text.
400. *See supra* notes 74–114 and accompanying text.
401. 124 S. Ct. 2519 (2004).
402. 536 U.S. 584 (2002).
403. *Summerlin*, 124 S. Ct. at 2521–22.

law review articles urged that *Ring* was an appropriate case to apply retroactively.[404] A majority of the Court was not persuaded.

Before discussing the Court's retroactivity analysis in *Summerlin*, it would be useful to recount the Court's decision and actions in *Ring*. In *Ring*, the Supreme Court reversed its 1990 decision in *Walton v. Arizona*.[405] Under Arizona law, a jury decided if the defendant was guilty of first-degree murder.[406] After a jury rendered a guilty verdict, the case was presented to the judge who decided (1) whether the evidence supported the aggravating factors necessary to render a defendant eligible for the death penalty[407] and (2) whether the defendant should be sentenced to life imprisonment or death.[408] The *Walton* Court concluded that the aggravating factors that made an individual eligible for the death penalty were not elements of the offense of capital murder, and, therefore, a judge could make those findings.[409]

Within ten years of *Walton*, its holding became suspect when the Court decided *Apprendi v. New Jersey*,[410] a non-death-penalty case that dealt with whether a judge could make certain sentencing determinations. In *Apprendi*, the Supreme Court struck down part of a New Jersey hate crime statute that allowed a judge to make factual determinations, based on a preponderance of the evidence, to increase the maximum sentence that could be imposed on a defendant.[411] In *Apprendi*, the judge, after accepting a guilty plea from the defendant, determined, by a preponderance of the evidence, that Apprendi's crime was motivated by racial animus.[412] Under New Jersey's hate crime statute, the judge's finding of that fact allowed the judge to increase Apprendi's sentence from the maximum twenty years to thirty years.[413] The Supreme Court found this sentencing unconstitutional, holding that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[414]

The holding in *Apprendi* raised significant questions about the viability of *Walton*. If it was unconstitutional for a judge to make the factual determination increasing a sentence from a maximum twenty years to thirty years, how could it be constitutional for a judge to make the factual determination that increases the

---

404. Sarah C.S. McLaren, Comment, *Was Death Different Then Than It Is Now? The Opportunity Presented to the Supreme Court by* Summerlin v. Stewart, 88 MINN. L. REV. 1731 (2004); *Recent Case*, 117 HARV. L. REV. 1291 (2004); Ethan Isaac Jacobs, Note, *Is* Ring *Retroactive?*, 103 COLUM. L. REV. 1805 (2003).

405. 497 U.S. 639 (1990).

406. *Id.* at 645 (citing ARIZ. REV. STAT. ANN. §§ 13-1105, 13-703 (West Supp. 2004)).

407. *See id.* at 645 (citing ARIZ. REV. STAT. ANN. §§ 13-1105, 13-703 (West Supp. 2004)). When the Supreme Court sanctioned modern death penalty statutes, it required states to provide some rational system for narrowing the class of individuals who may be subject to the death penalty. *See supra* notes 364–367 and accompanying text. Many states, including Arizona, perform this narrowing function by requiring the State to prove certain aggravating factors about the crime or the defendant that make the defendant subject to the death penalty. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 2004).

408. *See* ARIZ. REV. STAT. ANN. §§ 13-703, 13-1105 (West Supp. 2004).

409. *Walton*, 497 U.S. at 647–49.

410. 530 U.S. 466 (2000).

411. *Id.*

412. *Id.* at 471.

413. *Id.* at 470.

414. *Id.* at 490.

maximum sentence from life imprisonment to death?[415] In 2002, in *Ring v. Arizona*,[416] the Court faced the question of how to make peace between *Walton* and *Apprendi*, but found the two cases "irreconcilable."[417] The *Ring* Court[418] stated that

> we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," the Sixth Amendment requires that they be found by a jury.[419]

The impact of *Ring* was significant. Like the classic new rule cases, *Ring* overruled previous Supreme Court case law and created a new rule of law. In accord with *Griffith v. Kentucky*,[420] capital defendants facing trial, or who were on direct appeal in states like Arizona, were entitled to jury sentencing. Left unanswered by *Ring*, however, was the fate of those death row inmates who had been sentenced to death by a judge and whose conviction and sentences became final prior to June 24, 2002, when the Supreme Court handed down *Ring*.

The question of the retroactive effect of *Ring* as well as *Apprendi* percolated among various district and circuit courts in the federal court system, and most courts declined to apply either *Ring* or *Apprendi* retroactively.[421] However, in *Summerlin v. Stewart*,[422] the Ninth Circuit directly considered *Ring* with respect to an Arizona death row inmate, whose conviction and sentence became final before *Ring* and who was sentenced under the Arizona judge-sentencing system.[423] The Ninth Circuit applied *Ring* retroactively,[424] and the Supreme Court accepted certiorari to review that finding.[425]

The history of Summerlin's case is interesting, if at times bizarre. In 1981, Summerlin, who the Ninth Circuit described as "extremely troubled,"[426] was charged

---

415. *See, e.g.*, Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1518–23 (2001).

416. 536 U.S. 584 (2002).

417. *Id.* at 609.

418. Justice Ginsburg wrote the majority opinion in which Justices Stevens, Scalia, Kennedy, Souter, and Thomas joined. *Id.* at 588–609. Justice Scalia issued a concurring opinion in which Justice Thomas joined, *id.* at 610–13; Justice Kennedy also filed a concurring opinion, *id.* at 613; and Justice Breyer filed an opinion concurring in the judgment, *id.* at 613–19. Justice O'Connor and Chief Justice Rehnquist dissented. *Id.* at 619–21.

419. *Ring*, 536 U.S. at 609 (citing Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

420. 479 U.S. 314 (1987); *see supra* notes 210–216 and accompanying text.

421. *See, e.g.*, Moore v. Kinney, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (stating it would not apply *Ring* retroactively without an express pronouncement by the Supreme Court); Szabo v. Walls, 313 F.3d 392, 398–99 (7th Cir. 2002) (declining to apply *Ring* retroactively); Cannon v. Mullin, 297 F.3d 989, 992–94 (10th Cir. 2002) (holding that the Supreme Court did not make *Ring* retroactive).

422. 341 F.3d 1082 (9th Cir. 2003) (en banc), *overruled by* Schriro v. Summerlin, 124 S. Ct. 2519 (2004).

423. *Id.* at 1091, 1096–97.

424. *Id.* at 1121. The Ninth Circuit set forth several reasons for applying *Ring* retroactively. First, the Court classified *Ring* as a new rule of substantive law to which *Teague* did not apply. *Id.* at 1108. Second, it stated that even if *Ring* was procedural, it fell within the second *Teague* exception, satisfying the *Teague* criteria, and should be applied retroactively. *Id.* at 1116, 1119, 1121.

425. Schriro v. Summerlin, 540 U.S. 1045 (2003).

426. Summerlin v. Stewart, 341 F.3d at 1084. The Ninth Circuit also noted that Summerlin has organic brain dysfunction, has been described as "functionally retarded," has an explosive personality disorder, and has impaired impulse control. *Id.* He grew up in an abusive, alcoholic home and dropped out of school in seventh grade. *Id.* At one point, he was diagnosed with paranoid schizophrenia and treated with Thorazine, an antipsychotic medication. *Id.*

with the murder of Brenna Bailey.[427] He was tried before a jury on first-degree murder charges.[428] The trial lasted four days; after deliberating a little over three hours, the jury convicted Summerlin of first-degree murder and sexual assault.[429] The only sentence that could be imposed under Arizona law, based on the jury's first-degree murder charge, was life imprisonment.[430] To impose the death penalty required additional factual findings by the trial judge.[431] The case then proceeded to sentencing before Judge Phillip Marquardt.[432]

Judge Marquardt had problems: he was a heavy marijuana user, who used marijuana during his tenure on the bench and arguably during the time he was presiding over Summerlin's sentencing hearing.[433] During his eventual disbarment proceedings, Judge Marquardt admitted that he was addicted to marijuana and that he engaged in various illegal schemes to obtain the drug.[434] Judge Marquardt at one point was convicted of misdemeanor marijuana possession in Texas; he was suspended from the bench for a year, but nonetheless continued to use marijuana.[435] Eventually Judge Marquardt stepped down from the bench and was disbarred.[436] It is apparently unknown whether the judge, in fact, was using marijuana during Summerlin's trial, but there is evidence showing Judge Marquardt was having difficulty concentrating or was experiencing short-term memory loss.[437]

The capital sentencing hearing before Judge Marquardt was brief.[438] In its case-in-chief, the State presented certified copies of a prior aggravated assault conviction;[439] in mitigation, defense counsel declined to call witnesses[440] and relied on a doctor's report that was attached to the presentence report.[441] The state then called two rebuttal witnesses.[442] After a weekend recess, the judge announced that he found two aggravating factors: (1) evidence of a prior felony involving use or threat of force, and (2) that the murder was committed in a heinous, cruel, or depraved manner.[443] Based on these findings, Summerlin could now be subject to the death penalty.

Some of the more melodramatic aspects of Summerlin's case are not discussed in the Supreme Court's decision; however, the Ninth Circuit opinion revealed that Summerlin's initial attorney, a state public defender, began a romantic relationship with the state prosecutor, who was prosecuting Summerlin, while she was still representing him. *Id.* at 1086–88. After the romance began, Summerlin's lawyer decided she had a conflict of interest, but she did not take any steps to withdraw or to inform her client of this new development. *Id.* at 1087. Eventually, new counsel was appointed, although Summerlin still did not know of his original lawyer's conflict of interest. *Id.* at 1088.

427. *Summerlin*, 124 S. Ct. at 2521.
428. *Id.*
429. Summerlin v. Stewart, 341 F.3d at 1088.
430. *Id.* at 1085.
431. *Id.* at 1103.
432. *Id.* at 1088.
433. *Id.* at 1089–90, 1089 n.1.
434. *Id.* at 1089 n.1.
435. *Id.* at 1090 n.1.
436. *Id.*
437. *Id.* at 1090.
438. *Id.* at 1089.
439. *Id.*
440. *Id.* It appears that at one point defense counsel was prepared to call a mitigation witness, but after consulting with Summerlin, defense counsel advised the court that he would not. *Id.*
441. *Id.*
442. *Id.*
443. *Id.* at 1090.

Judge Marquardt was not persuaded by Summerlin's mitigating evidence and sentenced him to die.[444]

Summerlin appealed but was denied relief on direct appeal, and it appears that his conviction and sentence became final in early 1984.[445] Summerlin sought state post-conviction relief[446] and federal habeas relief,[447] but his efforts were repeatedly unsuccessful until October of 2001, when the Ninth Circuit remanded the case for an evidentiary hearing on Judge Marquardt's competence.[448] In the meantime, the U.S. Supreme Court granted certiorari in *Ring v. Arizona*.[449] At that point, the Ninth Circuit withdrew its decision in Summerlin's case and deferred submission of his case until the Supreme Court resolved *Ring*.[450] After the Court issued a decision in *Ring*, the Ninth Circuit agreed to rehear the *Summerlin* case en banc[451] and ultimately decided to apply *Ring* retroactively.[452]

In accepting certiorari review in *Summerlin*, the Supreme Court faced a question it appeared to have dodged in *Ring*: whether *Ring* should be applied retroactively to cases that were final at the time *Ring* was decided.[453] In a five-to-four decision, the Court decided it should not be applied retroactively.[454]

Justice Scalia wrote the majority opinion for the Court. In one of the more interesting aspects of *Summerlin*, the Court seemed to reframe the *Teague* analysis by placing all changes in substantive law outside of *Teague* altogether and then recognizing only the second *Teague* exception.[455] The Court noted that:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands

444. *Id.* The same day that Judge Marquardt sentenced Summerlin, he also sentenced James Fisher to death. Fisher was convicted of murdering Marguerite Bailey, who was unrelated to Brenna Bailey, Summerlin's victim. In Fisher's case, Judge Marquardt also found two aggravating circumstances, including that the murder was committed in a heinous, cruel, or depraved manner. *Id.* at 1090–91. Again, Judge Marquardt found no mitigating factors sufficient to call for leniency, *id.* at 1091, and he sentenced Fisher to die, *id.* at 1090. "Fisher eventually received [state] post-conviction relief on the basis of an unethical plea agreement that Judge Marquardt expressly entered into as a party and subsequently allowed into evidence at [Fisher's] trial." *Id.* at 1091; *see* State v. Fisher, 859 P.2d 179, 184–85 (Ariz. 1993).

445. *See* State v. Summerlin, 675 P.2d 676 (Ariz. 1983) (denying reconsideration on Jan. 17, 1984). It does not appear that Summerlin petitioned the Supreme Court for certiorari with respect to his direct appeal.

446. *Summerlin*, 124 S. Ct. at 2521.

447. 28 U.S.C. § 2254 (2000).

448. Summerlin v. Stewart, 267 F.3d 926, 957 (9th Cir. 2001), *withdrawn by* 281 F.3d 836 (9th Cir. 2002), *aff'd on reh'g*, 341 F.3d 1082 (9th Cir. 2002), *rev'd sub nom.* Schriro v. Summerlin, 124 S. Ct. 2519 (2004).

449. 25 P.3d 1139, *cert. granted*, 534 U.S. 1103 (2002).

450. Summerlin v. Stewart, 281 F.3d 836, 836–37 (9th Cir. 2002).

451. Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002).

452. Summerlin v. Stewart, 341 F.3d at 1121.

453. *Summerlin*, 124 S. Ct. at 2521.

454. *Id.* at 2521, 2526.

455. *Id.* at 2525.

> convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him.[456]

Distinguishing rules of substantive law from rules of procedural law, the Court stated:

> New rules of procedure...do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[457]

The Court then appeared to eliminate the first *Teague* exception and recognize simply that changes in substantive law are not subject to *Teague* at all.[458]

It is unclear what if any effect this change will have on the *Teague* analysis. First, so few cases fit under the first *Teague* exception[459] that it is unlikely that this analysis will have a significant impact on *Teague* jurisprudence. Second, in *Banks*, the Court did not endorse this change in analysis, even though *Banks* and *Summerlin* were decided on the same day. Arguably, although it is not completely clear from the opinion, those cases that previously fell within the first exception—such as those exempting a group from the death penalty[460]—fall outside of *Teague* altogether as a change in substantive law and for that reason must be applied retroactively.

With respect to whether *Ring* was a new rule of substantive law, the Ninth Circuit found that it was because it changed the elements of capital murder.[461] In support of this conclusion, the Ninth Circuit cited the language in *Ring* in which the Court stated that "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense'" of capital murder.[462] The Supreme Court rejected the idea that *Ring* represented a change in substantive law and concluded that *Ring* was a new rule of procedural law subject to *Teague*.[463]

Finding *Ring* procedural, and thus within *Teague*, the Court then addressed whether *Ring* fit into the remaining *Teague* exception, which has traditionally been referred to as the second *Teague* exception.[464] This exception provides for retroactive application of watershed rules of law that enhance the truth-finding function of the judicial process.[465] As noted earlier, the Court has yet to find a case that fits within this exception, and it now appears unlikely that it ever will. Consider the

---

456. *Id.* at 2522–23 (citations and footnote omitted). The issue of the application of *Teague* to new rules of substantive law was at issue, at least in part, because the Ninth Circuit found that *Ring* was a change in substantive law that should be applied retroactively. Summerlin v. Stewart, 341 F.3d at 1121.

457. *Summerlin*, 124 S. Ct. at 2523 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting *Teague*, 489 U.S. at 311)).

458. *Id.*

459. *See supra* notes 333–336 and accompanying text.

460. *See supra* notes 335–336 and accompanying text.

461. Summerlin v. Stewart, 341 F.3d at 1108.

462. *Id.* at 1105 (quoting *Ring*, 536 U.S. at 609).

463. *Summerlin*, 124 S. Ct. at 2526.

464. *Id.* at 2525.

465. *See supra* notes 337–338 and accompanying text.

holding in *Ring*: the Sixth Amendment requires juries, not judges, to decide the existence of those factors that make a defendant eligible for the death penalty.[466] The five-member majority in *Summerlin* did not appear to dispute that *Ring* is a watershed rule of law.[467] In fact, the Court stated that "[t]he right to jury trial is fundamental to our system of criminal procedure."[468] Likewise, in *Blakely v. Washington*,[469] which also was handed down at the end of the Court's 2003–2004 Term, Justice Scalia, writing for the majority, stated that the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[470] Thus, not surprisingly, the majority's *Teague* analysis did not focus on whether *Ring* is a watershed rule, as that point appears to be conceded; rather, the majority opinion turned its attention to the truth-finding function of juries in capital sentencing.

The Court acknowledged that having a jury decide factual questions does have some effect on truth-finding;[471] however, the majority stated:

> The question here is not...whether the Framers believed that juries are more accurate factfinders than judges (perhaps so—they certainly thought juries were more independent)....Rather, the question is whether judicial factfinding so "*seriously* diminishe[s]" accuracy that there is an "'impermissibly large risk'" of punishing conduct the law does not reach.[472]

The majority then suggested that the question of whether juries are more accurate factfinders is a wash because there is evidence suggesting both that juries are more accurate factfinders and that they are not.[473] This mixed record, according to the Court, is insufficient to show that the role of juries in capital sentencing serves such a truth finding function as to require retroactive application of *Ring*.[474]

The four dissenting justices[475] disagreed with the majority's assessment of the role of juries in capital sentencing. Critical to Justice Breyer's dissenting opinion is the

---

466. *Ring*, 536 U.S. at 609.

467. *See Summerlin*, 124 S. Ct. at 2524–26.

468. *Id.* at 2526.

469. 124 S. Ct. 2531 (2004).

470. *Id.* at 2538–39.

471. *See Summerlin*, 124 S. Ct. at 2524–25.

472. *Id.* at 2525 (alteration in original) (citation omitted) (quoting *Teague*, 489 U.S. at 312–13 (quoting Desist v. United States, 394 U.S. 244, 262 (1968))).

473. *See id.* at 2525–26. Interestingly, Justice Scalia cites the mixed record on juries from other countries in this case, *id.* at 2525, even though the Justice generally rejects reliance on modern day foreign law in constitutional interpretation. *See* Atkins v. Virginia, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting) ("Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people. 'We must never forget that it is a Constitution for the United States of America that we are expounding....[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.'") (quoting Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting)) (alteration in original); Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC. INT'L L. PROC. 305, 307–08, 310 (2004); *see also The Supreme Court, 2003 Term: Leading Cases*, 118 HARV. L. REV. 248, 452 (2003).

474. *Summerlin*, 124 S. Ct. at 2526.

475. *See id.* at 2526–31 (Breyer, J., dissenting, with Stevens, Souter, and Ginsberg, JJ., joining).

unique role of juries in capital sentencing proceedings.[476] Justice Breyer observed that jury capital sentencing is critical to an accurate assessment of the community's values and views on the appropriateness of the death penalty in a particular case.[477] Juries, not judges, accurately reflect this concern;[478] moreover, trial judges, who are often elected to their positions, face potential political pressure that may skew or distort capital sentencing.[479] As noted earlier, the Supreme Court in *Penry* applied *Teague* to capital sentencing without briefing or oral argument on the issue.[480] *Summerlin* places in sharp relief the effect of *Penry*: more than 100 individuals may be put to death even though their sentences were imposed in violation of the Sixth Amendment.[481]

In contrast to the rigidity of the majority's *Teague* exception, Justice Breyer pointed to three factors that he suggested should be considered in deciding retroactivity in capital sentencing proceedings. First, in considering the retroactive application of a new capital-sentencing rule, the Court should look at the capital-sentencing interest advanced by the new rule.[482] The interest advanced by the new rule in *Ring* was the role of the jury in making community-based value judgments on the imposition of the death penalty.[483] According to the dissent, the jury is the decision-making body that is in the best position to make that judgment.[484] The second consideration in deciding the retroactive scope of a new capital sentencing rule requires a balancing of the extent to which the new rule advances the values of the writ of habeas corpus in protecting the innocent and assuring fundamentally fair procedures with the state's interest in finality by means of an execution.[485] Here, according to the dissent, the risk that a person may be wrongfully executed outweighs the limited resources needed to apply *Ring* to the approximately 110 individuals who have been improperly sentenced to death by a judge.[486] In particular, Justice Breyer stated, "I believe we should discount ordinary finality interests in a death case, for those interests are comparative in nature and death-related collateral proceedings, in any event, may stretch on for many years regardless."[487] Finally, Justice Breyer distinguished *Ring* from a non-death penalty case establishing certain constitutional jury requirements but not requiring retroactive application.[488] Specifically, Justice Breyer observed that the effect of applying *Ring* retroactively would not be to throw open the courthouse doors; rather, the decision

476. *See id.* at 2527 (Breyer, J., dissenting); *see also* Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1143–45 (2003) (noting that political pressure on state-elected judges to impose the death penalty distorts the truth-finding function of judge sentencing).

477. *See Summerlin*, 124 S. Ct. at 2527 (Breyer, J., dissenting).

478. *Id.*

479. *See* Stevenson, *supra* note 476.

480. Penry v. Lynaugh, 492 U.S. 302 (1989), *overruled in part on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

481. 124 U.S. at 2528.

482. *See supra* notes 212–215 and accompanying text.

483. *Ring*, 124 S. Ct. at 2528 (Breyer, J., dissenting).

484. *Id.*

485. *Id.* at 2528–30 (Breyer, J., dissenting).

486. *See id.* at 2530 (Breyer, J., dissenting).

487. *Id.*

488. *See id.* (discussing DeStefano v. Woods, 392 U.S. 631 (1968)).

would affect only a limited number of death row inmates in a limited number of states whose death sentences had been imposed in an unconstitutional manner.[489]

VII. THE FUTURE OF *TEAGUE*

As unwise as it often is to make predictions about future Court actions, some conclusions can be drawn from fifteen years of the *Teague* doctrine that give insight into how a majority of the Court may apply the current retroactivity doctrine to future cases. These observations and predictions also point out the inherent problems and shortcomings of the doctrine as well as the frustrations that students of *Teague* often have in trying to unravel and make sense of the Court's policies, both past and present, in this area of the law.

As fifteen years of *Teague* have taught, the new rule doctrine is interpreted in such an extraordinarily broad manner that it is removed from the traditional concerns and concepts that gave rise to retroactivity limits in general and in the context of habeas corpus proceedings in particular. At this point in time, it is not a stretch to say that a majority of the Court believes that almost all Supreme Court decisions interpreting or applying a principle of constitutional criminal procedure may be deemed a new rule.[490] It is hard to reconcile this definition of new rule with some of the fundamental theories of how law is made and who benefits from that law, even in the context of habeas proceedings. Even Justice Harlan[491] and Professor Mishkin,[492] who crafted a retroactivity model based specifically on the role of the writ of habeas corpus in the criminal justice system, did not appear to have intended the retroactivity doctrine to deprive habeas petitioners of established law; indeed, such a result would undermine the role of the writ in assuring fundamental fairness and preventing state courts from ignoring federal law. Nonetheless, the current new rule doctrine arguably classifies new rules as applying to any case in which there were dissenting justices,[493] or where lower courts disagreed or debated an interpretation of established law,[494] or where the decision did not use the word "compel" in reaching its holding.[495]

As to the first *Teague* exception, Justice Scalia suggests a possible shift in doctrine in his reformulation of the *Teague* model of retroactivity analysis in *Summerlin*. Justice Scalia appears to advocate elimination of the first *Teague* exception and seeks to classify cases that prohibit the imposition of criminal punishment for certain behavior or as to a class of individuals as changes in substantive law not subject to *Teague*.[496] The effect of this change is unclear but may become important in the 2005–2006 Term. One of the key cases before the Court this term is *Roper v.*

---

489. *See id.* at 2530–31 (Breyer, J., dissenting).

490. The possible exception to this construction of the new rule doctrine appears to be the Court's consideration of effective assistance of counsel in capital sentencing proceedings, as indicated in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 123 S. Ct. 2527 (2003).

491. *See supra* notes 168–202 and accompanying text.

492. *See supra* notes 152–167 and accompanying text.

493. *See supra* notes 388–389 and accompanying text.

494. *See supra* Part V.C.

495. *See supra* notes 315–326 and accompanying text.

496. *See supra* notes 456–463 and accompanying text.

Simmons,[497] in which the Court is to address the constitutionality of executing individuals who were under the age of eighteen at the time they committed their crime. If the Court determines that defendants in this category cannot be executed, the Court will have to decide whether to apply that rule retroactively. Based on *Penry*, as it applied and explained the first *Teague* exception, such a change in the law would fall within the first exception.[498] If Justice Scalia's formula prevails, the question will be whether such a rule is substantive and outside the scope of *Teague*. While there is language in *Summerlin* to suggest that it would be substantive and outside of *Teague*, at this point in time that question remains open.

As to the second *Teague* exception, it is hard to imagine any case that will fall within this exception. If *Ring* is not a watershed case that substantially increases accuracy of capital proceedings, what is? Certainly, one could interpret the Court's refusal to apply *Ring* retroactively as a signal that *Apprendi v. New Jersey*[499] and *Blakely v. Washington*[500] will not be applied retroactively. However, Justice Breyer's dissent, in which three other justices joined, suggests that in capital sentencing proceedings a balancing of interests reminiscent of *Linkletter*, but nonetheless within the *Teague* model, is the preferred approach. Such an approach would certainly reconcile the harshness and utter inflexibility of the *Teague* exception so that it actually has meaning as an exception. At present, however, the second exception remains insurmountable.

Returning to the dilemma of John and Mary: while John receives a new trial, Mary's case proceeds through habeas review. To receive the benefit of the constitutional protection expressed in *Cage v. Louisiana*,[501] Mary faces formidable hurdles. First, she must persuade the Court that its short per curiam opinion in *Cage* was not a new decision. Like Mary and John's cases, the jury instruction in *Cage* equated reasonable doubt with "grave uncertainty" and advised the jury that the reasonable doubt standard did not demand "moral certainty" in the defendant's guilt.[502] *Cage* held that such an instruction violated due process.[503] Even if Mary could present a persuasive argument that *Cage* was in accord with long-standing doctrine, the Court in *Cage* did not use the word "compelled," and the State of Louisiana obviously thought it constitutional to allow such an instruction. Under *Teague*, *Cage* can be classified as new; it is unlikely to be classified as substantive.

Mary may hope that she nonetheless should receive the benefit of *Cage* because it is a fundamental, bedrock rule of law: *Cage* goes directly to the fact-finding process because it sets out the burden of proof necessary to sustain a constitutional guilty verdict.[504] In fact, in *Cage*, the Court stated that the reasonable doubt requirement "is a prime instrument for reducing the risk of convictions resting on factual error."[505] Moreover, *Cage* is such a fundamental decision and so important to the

497. *See* State *ex rel.* Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, 124 S. Ct. 1171 (2004).
498. *See supra* notes 335–336 and accompanying text.
499. 530 U.S. 466 (2000).
500. 124 S. Ct. 2531 (2004).
501. 498 U.S. 39 (1990), *overruled on other grounds by* Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991).
502. *Id.* at 40.
503. *Id.* at 41.
504. *See id.* at 39.
505. *Id.* (quoting *In re* Winship, 397 U.S. 358, 363 (1970)).

fact-finding process that the Supreme Court has characterized *Cage* as a structural error not subject to harmless error review.[506] Accordingly, a number of federal circuit courts of appeal have found that *Cage* is perhaps that rare case that falls within the second exception to *Teague*.[507] Such a conclusion makes sense. The purpose of the reasonable doubt standard is to assure that a criminal trial meets the constitutional accuracy requirements of due process.

Unfortunately, the Supreme Court has signaled otherwise. In *Tyler v. Cain*,[508] the Supreme Court, by a five-to-four vote, ruled that a petitioner could not raise a *Cage v. Louisiana* claim in a second habeas petition because the Supreme Court had not explicitly made the rule retroactive, as required by section 2244 of the AEDPA.[509] Although the Court declined to state definitively whether *Cage* is retroactive or not, the majority certainly hinted that it was not.[510] Accordingly, Mary will likely be executed without a hearing on her claim that the jury convicted her under a system that plainly violated the Due Process Clause and that increased the likelihood that she was wrongly convicted. For Mary, timing is everything.

506. Sullivan v. Louisiana, 508 U.S. 275, 278–82 (1993).

507. *See, e.g.*, West v. Vaughn, 204 F.3d 53, 55, 62 (3d Cir. 2000), *abrogated by* Tyler v. Cain, 533 U.S. 656 (2001); Gaines v. Kelly, 202 F.3d 598, 604–05 (2d Cir. 2000); Adams v. Aiken, 41 F.3d 175, 178–79 (4th Cir. 1994); Nutter v. White, 39 F.3d 1154, 1158 (11th Cir. 1994). *But see* Leavitt v. Arave, 383 F.3d 809, 825–26 (9th Cir. 2004) (forecasting Supreme Court rejection of retroactive application of *Cage*).

508. 533 U.S. 656 (2001).

509. 28 U.S.C. § 2244 (2000).

510. *See Tyler*, 533 U.S. at 664–68.