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THE PRISONER'S DILEMMA: LIFE IN THE LOWER FEDERAL COURTS AFTER *TEAGUE v. LANE*

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In 1989, in Teague v. Lane, *a badly fragmented Supreme Court rewrote the law of retroactivity to preclude the application of "new rules" in habeas corpus cases unless those rules fell within two narrow exceptions. At the same time, the Court stated that it would no longer announce "new rules" of criminal procedure in collateral proceedings. The result, according to dissenting members of the Court and to many commentators, would be nothing less than the evisceration of the Great Writ and a radical restriction of the traditional role of the lower federal courts in the articulation of constitutional doctrine, not to mention confusion in the application of* Teague *itself.*

In this Article, Professor Marc Arkin assesses the initial impact of Teague *by studying its application and development in the lower federal courts. The Article first reviews the* Teague *decision and briefly discusses previous Supreme Court retroactivity doctrine. It next examines four cases in which the Court first attempted to clarify* Teague*'s new doctrine of nonretroactivity. The Article then analyzes the lower federal courts' effort to develop a consistent body of nonretroactivity doctrine in the eighteen months following* Teague. *In light of this, Professor Arkin concludes that—although* Teague *issues arise less frequently than might have been expected—most courts have ignored all invitations to read* Teague *narrowly, thus curtailing consideration of the merits of habeas corpus claims. The focus of creative advocacy and judicial reasoning has, instead, shifted to narrowing the reach of* Teague.

Professor Arkin also illuminates a new series of problems created by the interplay between Teague*'s nonretroactivity analysis and existing habeas corpus procedural rules. Calling this "the prisoner's dilemma," the author discusses the ironic predicament in which the habeas corpus petitioner must prove that he is relying on a novel rule of law in order to have the court excuse his procedural default or permit his successive petition—only to have the court invoke that very showing of novelty to bar consideration of the claim pursuant to the rule of* Teague. *Throughout, Professor Arkin contends that the effect of* Teague *will not be the intended lightening of the federal courts' habeas corpus workload, but, rather, an increase in the complexity of that workload and a further shift away from the merits of habeas litigation toward procedural issues.*

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On February 22, 1989, the Supreme Court handed down a decision that radically altered the legal landscape surrounding petitions for habeas corpus. In *Teague v. Lane*,[1] a badly fractured Court rewrote the law of retroactivity in habeas corpus proceedings to preclude the application of the so-called "new rules"[2] to cases pending on habeas corpus unless those rules fit into two narrow exceptions. The predominant response to *Teague*, both from the legal community and the public, was that the decision sounded the death knell of habeas corpus as a vehicle for the protection of defendants' rights.[3] The sole area of disagreement was whether or not this event was a welcome one.[4]

One and one half years after *Teague*, it is possible to see the initial effects of that decision on habeas corpus litigation in the lower federal courts. These results make it feasible to determine, at least preliminarily, whether predictions of the demise of habeas corpus review were correct. Moreover, because *Teague* effects a drastic break with previous law, it provides an excellent means for studying the articulation of a novel body of doctrine by the lower federal courts. Although this article does not propose to supplement the already extensive body of literature analyzing *Teague* itself,[5] the lower courts' application of the deci-

1. 109 S. Ct. 1060 (1989).

2. According to *Teague*, a new rule of criminal procedure is one which was "not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* at 1070 (plurality opinion) (emphasis in original).

3. *See, e.g.*, *Recent Developments: The Court Declines in Fairness*—Teague v. Lane, *109 S. Ct. 1060*, 25 HARV. C.R.-C.L. L. REV. 164, 182 (1990) ("Frank Teague is not the only loser. The *Teague* bar may effectively slam the door on most federal review of state criminal cases and permanently stunt the evolution of constitutional jurisprudence."); Note, *Sixth Amendment: The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128, 1129 (1990) (suggesting that *Teague* has "eliminat[ed] the safeguards of fundamental fairness that come from examining the nature and purposes of proposed rules"); *Justices Limit Path to U.S. Courts for State Prisoners on Death Row*, N.Y. Times, Mar. 6, 1990, § 1, at 1, col. 3 (discussing subsequent Supreme Court retroactivity opinions in habeas corpus and noting that "[a]s the Supreme Court itself has grown more conservative over the years, it has issued a number of decisions limiting habeas corpus jurisdiction").

4. On the same day the Court decided *Teague*, it also handed down Harris v. Reed, 109 S. Ct. 1038 (1989), which revised the law concerning procedural bars arising from state court review. *Harris* held that when the last state tribunal to render judgment in a case has failed to articulate the basis—state or federal—of its decision, the federal courts should presume reliance on federal law. *Id.* at 1042 (citing Michigan v. Long, 463 U.S. 1032, 1042 (1983) ("plain statement rule")). Thus, a state prisoner's procedural default will bar access to a federal habeas forum only if the state court's opinion plainly indicates reliance on a state procedural rule. *Id.* at 1044. *Teague* has been perceived as a greater threat to defendants' rights than *Harris* because the latter appears, at first glance, to be more innocuous. The effect of *Harris*, however, may be more deleterious in the long run since it offers state courts an incentive to alter their writing habits and thereby insulate their decisions from federal habeas review. Indeed, if predictions are in order, it can be predicted that, of the two habeas decisions, *Harris* will work the more significant curtailment of habeas corpus litigation, despite early returns to the contrary. This is due to the frequency with which prosecutors and courts alike invoke procedural bars as a defense to habeas petitions. *See, e.g.*, Note, Harris v. Reed: *A New Look at Federal Habeas Jurisdiction over State Prisoners*, 58 FORDHAM L. REV. 493, 507-08 (1989); *cf.* Jeffries & Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 679-90 (discussion of present law of procedural default and citing recent literature).

5. *See, e.g.*, 1 J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 22A.1 (Supp. 1989) (extensive discussion of *Teague* retroactivity analysis and related case law); Hoffman, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 B.Y.U. L. REV. 183; Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990); *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 290-300 (1989) (discussing *Teague*). For further discussion, see articles cited *supra* note 3.

sion vividly illuminates both the weaknesses and strengths of the Supreme Court's effort to rewrite the law of retroactivity in collateral proceedings.

This Article first reviews the *Teague* decision and the Supreme Court's efforts to clarify the meaning and scope of *Teague* in a quartet of recent opinions: *Penry v. Lynaugh*,[6] *Butler v. McKellar*,[7] *Saffle v. Parks*,[8] and *Sawyer v. Smith*.[9] It then canvasses lower courts' efforts to thread their way through the complexities of *Teague* to develop a consistent body of retroactivity doctrine in habeas corpus cases. This discussion will show that *Teague* has had a more limited effect in the lower courts than many had predicted. Yet, the lower federal courts have declined virtually every opportunity to construe *Teague* narrowly. They have applied the decision to collateral attacks brought by federal prisoners; they have found that most rules fall within *Teague*'s definition of novelty; they have found that few rules fall within either of the two *Teague* exceptions by reading both quite restrictively. While there is some disarray among the lower courts, the restrictive tendency of their decisions is self-evident.[10]

Lower federal court decisions also contain intimations of a different series of problems for prisoners seeking habeas review of their convictions. These problems, which might be termed the prisoner's dilemma, arise from the interplay between *Teague*'s refusal to announce or apply "new rules" retroactively in habeas corpus and existing law which permits successive habeas petitions attacking a single conviction and excuses state procedural default on a showing that the rule being applied is "new." The prisoner may have his procedural default excused, or his second petition heard, only to find that his underlying claim is now barred by *Teague*—winning the battle to lose the war. The irony of these decisions is evident; with each attempt to curtail the lower federal courts' habeas workload, the Supreme Court has increased the complexity of that workload and, while decrying the use of technicalities in habeas corpus litigation, has actually shifted the focus away from the merits and onto procedural issues.[11]

I. RETROACTIVITY IN THE SUPREME COURT: *TEAGUE V. LANE* AND ITS PROGENY

Frank Dean Teague, a black defendant, was convicted by an all-white jury in an Illinois state court of the armed robbery of an A & P supermarket and the attempted murder of police officers. After an unsuccessful direct appeal, in which he argued that the prosecutor's use of peremptory challenges had denied him the right to be tried by a jury representative of the community,[12] Teague

6. 109 S. Ct. 2934 (1989).
7. 110 S. Ct. 1212 (1990).
8. 110 S. Ct. 1257 (1990).
9. 110 S. Ct. 2822 (1990).
10. Moreover, this direction was clear even before the Supreme Court's decisions in *Butler*, *Saffle*, and *Sawyer*.
11. *Cf.* ABA Task Force on Death Penalty Habeas Corpus, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 163 n.308 (Oct. 1989) (discussing effect of added procedural hurdles on litigation on the merits).
12. The Illinois Appellate Court denied Teague's claim on the ground that he had failed to

filed a petition for federal habeas corpus. In his petition, Teague repeated his fair cross-section claim and argued, in addition, that the opinions arising from the denial of certiorari in the case of *McCray v. New York*[13] had invited a reexamination of the existing precedent of *Swain v. Alabama*.[14] The district court held itself to be bound by *Swain*,[15] but a panel of the Seventh Circuit concluded that Teague had stated a prima facie case of discrimination and that the sixth amendment barred the prosecution from using peremptory challenges in such a way as to deprive the defendant of the opportunity to obtain a representative jury.[16] The Seventh Circuit later vacated the panel opinion and voted to rehear the case en banc,[17] subsequently postponing that hearing to await the Supreme Court's decision in *Batson v. Kentucky*.[18]

The Supreme Court decided *Batson* in a way which appeared to favor Teague's claims of discrimination in jury selection.[19] Before the Seventh Circuit could hold its en banc hearing in Teague's case, however, the Supreme Court decided *Allen v. Hardy*,[20] holding that *Batson* could not be applied retroactively to cases on collateral review. Consequently, the Seventh Circuit, sitting en banc, held that Teague could not benefit from the new *Batson* rule.[21] Adding insult to injury, the court of appeals also held that Teague's *Swain* claim was procedurally barred[22] and, in any event, was without merit because the fair cross-section requirement was limited to the jury venire and did not apply to the panel itself.[23]

Teague then brought his claim before the Supreme Court, arguing in part that the sixth amendment fair cross-section requirement should extend to the

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demonstrate the systematic exclusion of black jurors as required by Swain v. Alabama, 380 U.S. 202 (1965). People v. Teague, 108 Ill. App. 3d 891, 895-96, 439 N.E.2d 1066, 1070 (1982). The Illinois Supreme Court denied leave to appeal, People v. Teague, 93 Ill. 2d 547, 449 N.E.2d 820 (1983), and the United States Supreme Court denied Teague's petition for writ of certiorari, Teague v. Illinois, 464 U.S. 867 (1983), thereby rendering Teague's conviction "final." It should be noted that certain states do not date finality from the completion of a prisoner's direct appeal, but rather from the end of her first state post-conviction remedy.

13. 461 U.S. 961 (1983). Writing for the Court in the denial of certiorari in *McCray*, Justice Stevens stated, "I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the question more wisely at a later date." *Id.* at 962.

14. 380 U.S. 202 (1965) (requiring that a defendant prove a systematic exclusion of black jurors throughout the district in order to make out a claim of racial discrimination in the venire, and reiterating that there is no right to a representative cross-section in the petit jury).

15. The district court opinion was unreported. *See* Teague v. Lane, 109 S. Ct. at 1065-66.

16. The panel decision was not published. *See* United States *ex rel.* Teague v. Lane, 779 F.2d 1332, 1332-33 (7th Cir. 1985) (en banc).

17. *Id.* at 1332.

18. 476 U.S. 79 (1986); *see Teague*, 109 S. Ct. at 1066.

19. In *Batson*, the Supreme Court overruled the portion of *Swain* that dealt with the evidentiary showing necessary to establish a claim of racial discrimination in a prosecutor's use of peremptory challenges. *Batson* held that a defendant can establish a prima facie case of racial discrimination by showing that the defendant is a member of a cognizable racial group, that the prosecutor exercised his peremptory challenges to eliminate members of that racial group from the venire, and that these and other circumstances raise an inference of racial discrimination. *Batson*, 476 U.S. at 93.

20. 478 U.S. 255 (1986).

21. Teague v. Lane, 820 F.2d 832, 834 n.4 (7th Cir. 1987) (en banc).

22. *Id.* at 834 n.6.

23. *Id.* at 834-43. Judge Cudahy dissented, arguing that the fair cross section requirement should be extended to the petit jury. *Id.* at 847-51 (Cudahy, J., dissenting).

petit jury. In its decision, the Court refused to consider the merits of his sixth amendment claim on the ground that it called for a new rule of constitutional criminal procedure. In so doing, the Court—without the benefit of briefing or oral argument—announced a new rule of its own.

A. Retroactivity Before Teague v. Lane

As a general principle, legal decisions that announce a new rule of law apply retroactively.[24] Twenty-five years ago, in *Linkletter v. Walker*,[25] the Supreme Court qualified this rule, stating that the "Constitution neither prohibits nor requires [that] retrospective effect" be given to new constitutional rules of criminal procedure.[26] Since the *Linkletter* decision, the Court occasionally has found a new rule of constitutional criminal procedure to be so disruptive of preexisting law that it has refused to apply the new rule to cases that had already reached a specified stage in their proceedings when the new rule was announced.[27] In deciding whether to apply a rule retroactively or only prospectively, the Court consciously refused to differentiate between habeas corpus and other proceedings.[28] Rather, the Court used the same three part test to determine retroactivity without regard to whether the case was on direct or collateral review, weighing "(a) the purpose to be served by the new standards, (b) the extent of 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."[29]

Even as the Court committed itself to the *Linkletter* doctrine of retroactivity, Justice Harlan criticized both the *Linkletter* rationale and its expression in the three-factor test.[30] Instead, Justice Harlan argued that all new rules should be applied retroactively to cases not yet final and that no new rule should be applied retroactively to cases already final, thus distinguishing between cases on

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24. *See* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE, § 29.07, at 711 (1986). The literature on retroactivity is extensive. *See, e.g.*, Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975); Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C.L. REV. 745 (1983); Mishkin, *Foreword: The High Court, The Great Writ and The Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966). *Cf.* Hoffman, *supra* note 5, at 183-98.

25. 381 U.S. 618 (1965) (holding that Mapp v. Ohio, 367 U.S. 643 (1961), which applied the exclusionary rule to the states, should not be retroactive).

26. *Id.* at 629. In *Linkletter*, the Court created a balancing test requiring consideration of the "prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation." *Id.*

27. *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (holding nonretroactive United States v. Wade, 389 U.S. 347 (1967), which applied the sixth amendment right to counsel to lineups); Johnson v. New Jersey, 384 U.S. 719 (1966) (holding nonretroactive Miranda v. Arizona, 384 U.S. 436 (1966), which established the right to counsel at interrogations); Linkletter v. Walker, 381 U.S. 618 (1965) (holding nonretroactive Mapp v. Ohio, 367 U.S. 643 (1961), which applied the exclusionary rule to the states).

28. *See, e.g., Stovall*, 388 U.S. at 300 ("[N]o distinction is justified between convictions now final, as in the instant case, and convictions at various stages of trial and direct review.").

29. *Id.* at 297 (*cited with approval in* Teague v. Lane, 109 S. Ct. at 1078 (White, J., concurring in part and concurring in the judgment)).

30. *E.g.*, Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).

direct and collateral review for purposes of retroactivity.[31] Justice Harlan contended that this distinction was necessary to meet the needs of finality in criminal litigation.[32] However, Justice Harlan did recognize two exceptions to his position regarding nonretroactivity on collateral review.[33] The first was for new rules 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."[34] As Justice Harlan initially envisioned the second exception, it applied only to rules which "significantly improve" existing factfinding procedures.[35] Justice Harlan subsequently revised this view, suggesting that the second exception should apply to rules that involve procedures " 'implicit in the concept of ordered liberty.' "[36] It was Justice Harlan's criticism which was to shape the course of future law, emerging triumphant in *Teague v. Lane.*

Indeed, with the Court's 1982 decision in *United States v. Johnson*,[37] Justice Harlan's view began to prevail. In *Johnson*, the Court held that new fourth amendment rules should be applied retroactively to nonfinal convictions, but should not be applied to cases on collateral review.[38] Five years later, in *Griffith v. Kentucky*,[39] the Court fully embraced the first half of Justice Harlan's retroactivity model, holding that a new rule must be applied to all cases not final at the time the rule is handed down.[40] At the same time, the Court failed to decide whether cases on habeas corpus were final within the meaning of the *Griffith* rule. In 1988, in *Yates v. Aiken*,[41] the Court explicitly raised this issue, but did not clearly decide it. After *Aiken*, however, the stage was set for the next term's decision in *Teague v. Lane.* And, in *Teague*, the Court for the first time adopted the second prong of Justice Harlan's view, expressly precluding the application of new rules of criminal procedure in habeas corpus.

B. The Supreme Court's Opinion in Teague v. Lane

In the first three parts of the *Teague* plurality opinion, Justice O'Connor

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

32. *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in part and dissenting in part) (quoting Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.")).

33. *See Teague*, 109 S. Ct. at 1088, 1093 (Brennan, J., dissenting).

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

35. *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

36. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

37. 457 U.S. 537 (1982).

38. *Id.* at 562. The *Johnson* Court also held that there should be an exception for cases which represented a "clear break" from past rules. *Id.* at 549.

39. 479 U.S. 314 (1987).

40. *Id.* at 328 ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the rule constitutes a 'clear break' with the past.").

41. 484 U.S. 211 (1988).

explained that *Allen v. Hardy*[42] barred the application of *Batson v. Kentucky*[43] to Teague's case because his conviction was final at the time *Batson* was announced.[44] Justice O'Connor also found that Teague was procedurally barred from raising his challenge to the jury's composition under *Swain v. Alabama* because he had failed to raise the claim either at trial or on direct appeal.[45] Had Justice O'Connor done no more, the opinion probably would have passed unnoticed by any save Frank Teague and his counsel.

In Parts IV and V of her opinion, however, Justice O'Connor reached out to make a major statement about the applicability of new rules of law in habeas corpus, an issue neither briefed nor argued by the parties themselves.[46] Moreover, the rather complex configuration of the concurrences in Parts IV and V initially raised doubt about the viability of the decision.[47] In fact, Justice O'Connor's opinion contained two novel rules which were not clearly distinguished from each other. The first was that a "new rule" of law no longer would be applied retroactively in habeas corpus to benefit a petitioner whose conviction had become final before the rule was announced unless the "new rule" fell within two narrowly defined exceptions.[48] The second, derived from the first, was that the Court would no longer announce new rules of constitutional crimi-

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42. 478 U.S. 255 (1986).

43. 476 U.S. 79 (1986).

44. Teague v. Lane, 109 S. Ct. 1060, 1067 (1989). By "final" the Court meant that the defendant had completed his state direct appeal and had received a final disposition of his petition for certiorari to the United States Supreme Court. *Id.* (citing Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986), which, in turn, relied on the standard set forth in Linkletter v. Walker, 381 U.S. 618, 636 (1965)).

45. *Teague*, 109 S. Ct. at 1067. Teague was barred from raising the *Swain* claim unless he could show both cause for his failure to present the issue to the state courts and prejudice arising from that failure. *Id.* at 1068 (citing Engle v. Isaac, 456 U.S. 107, 113-14, 117, 124-35 (1982)).

46. *Id.* at 1084 (Brennan, J., dissenting). Justice Brennan stated:

> Today a plurality of this Court, without benefit of briefing and oral argument, adopts a novel threshold test for federal review of state criminal convictions on habeas corpus. . . . I cannot acquiesce in this unprecedented curtailment of the reach of the Great Writ, particularly in the absence of any discussion of these momentous changes by the parties or the lower courts.

Id.; *see also id.* at 1086 (Brennan, J., dissenting) (again noting the sua sponte nature of the plurality opinion).

47. Parts IV and V of the *Teague* opinion were espoused only by a four-vote plurality consisting of Justices O'Connor, Scalia, Kennedy, and Chief Justice Rehnquist. Justice White, who had concurred with these four in Parts I, II, and III to form a majority, grudgingly called Parts IV and V "an acceptable application in collateral proceedings of the theories embraced by the Court in cases dealing with direct review" and concurred in the result. *Id.* at 1079 (White, J., concurring in part and concurring in the judgment). Justice White explained that he regretted that the Court had departed from the three-part balancing test of Stovall v. Denno, 388 U.S. 293, 297 (1967), in questions of retroactivity but recognized that *Stovall* had long been a dead letter. *Teague*, 109 S. Ct. at 1079 (White, J., concurring in part and concurring in the judgment). Justice Stevens, joined by Justice Blackmun, generally endorsed the plurality's approach to retroactivity, but disagreed with the plurality's application of that approach. *Id.* at 1079 (Stevens, J., concurring in part and concurring in the judgment). Justice Blackmun joined part I of Justice Stevens's two-part concurrence and concurred in the result insofar as Teague's claim was based on Swain v. Alabama, 380 U.S. 202 (1965). *Teague*, 109 S. Ct. at 1079 (Blackmun, J., concurring in part and concurring in the judgment). Justices Brennan and Marshall dissented from the decision altogether. *Id.* at 1084 (Brennan, J., dissenting).

48. *Teague*, 109 S. Ct. at 1070.

nal procedure in cases on habeas corpus review.[49]

Complicating matters further, Justice O'Connor also developed a novel definition of what constitutes a "new rule" of law. As Justice O'Connor explained, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[50] A new rule of law is one which "breaks new ground or imposes a new obligation on the States or the Federal Government."[51] In all but unusual cases, therefore, a federal habeas corpus petitioner attacking a state conviction may rely only on the law in effect at the time that his conviction became final. While all new rules apply retroactively to cases on direct review, almost none apply to cases on collateral review.

Justice O'Connor explained that this rule of nonretroactivity accorded with the purposes of habeas corpus, because collateral review was intended to enforce " 'the constitutional standards that prevailed at the time the original proceedings took place.' "[52] "Implicit" in this approach, according to the plurality, is the principle that habeas corpus proceedings cannot be used to create new constitutional rules of criminal procedure.[53] Despite the explicit disagreement of Justices Stevens and Blackmun, the plurality also held that retroactivity must be treated as a threshold question to be addressed before the habeas court considers either the nature of the rule advocated or its possible application to the petitioner's case.[54] Not only should the habeas court not apply the "new rule" to petitioners, the plurality continued, but in cases in which it might be called on to create a "new rule," the habeas court should not even discuss what the rule

49. *Id.* at 1077-78.

50. *Id.* at 1070.

51. *Id.*

52. *Id.* at 1073 (quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

53. *Id.* at 1069, 1078. The Court's reasoning on this point does not withstand exacting scrutiny. The most favorable reading of Justice O'Connor's opinion would focus on her discussion of the inequity of the Court's prior practice of announcing a new rule of procedure in one case and then considering the retroactivity of that rule in habeas corpus proceedings in another, *id.* at 1077-78, a practice exemplified by the pair of opinions Batson v. Kentucky, 476 U.S. 79 (1986), and Allen v. Hardy, 478 U.S. 255 (1986). *See supra* notes 19-21 and accompanying text. Accordingly, as the plurality argued, since the rule advocated by Teague could not be applied retroactively to subsequent cases on collateral review, it should not be applied to Frank Teague either. *Teague*, 109 S. Ct. at 1078.

54. *Teague*, 109 S. Ct. at 1069-70. Justice Stevens argued that novelty could not be a threshold test because "until a rule is set forth, it would be extremely difficult to evaluate whether the rule is 'new' at all." *Id.* at 1079 n.2 (Stevens, J., concurring in part and concurring in the judgment).

In his concurrence, Justice White did not state any opinion as to whether *Teague* should constitute a threshold test. *Id.* at 1078-79 (White, J., concurring in part and concurring in the judgment). However, he later supported this position when he joined Justice Scalia's separate opinion in Penry v. Lynaugh, 109 S. Ct. 2934, 2963-64 (1989) (Scalia, J., concurring in part and dissenting in part). Justice Stevens, writing separately in *Penry*, iterated his view that the constitutional rule should be articulated before *Teague* is applied. *Id.* at 2963 (Stevens, J., concurring in part and dissenting in part) ("[I]t is neither logical nor prudent to consider a rule's retroactive application before the rule itself is articulated.") (citing *Teague*, 109 S. Ct. at 1079 n.2 (Stevens, J., concurring in part and dissenting in part)). Indeed, in *Penry*, the entire Court subscribed to a passage in Justice O'Connor's opinion stating, "[b]ecause Penry is before us on collateral review, we must determine, as a threshold matter, whether granting him the relief he seeks would create a 'new rule.' " *Penry*, 109 S. Ct. at 2944. The confusion of the Court on this issue prompted the Fifth Circuit to observe: "We must take care, however, not to overstate the significance of these votes." Sawyer v. Butler, 881 F.2d 1273, 1281 (5th Cir. 1989) (en banc), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

might be.[55]

Just as she had taken up Justice Harlan's position distinguishing between retroactivity on direct and collateral review, Justice O'Connor also adopted Justice Harlan's views with regard to the two exceptions to the rule of nonretroactivity on collateral review.[56] First, the petitioner may rely on a new rule of law "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' "[57] Second, petitioner may rely on a new rule of law if it is one of those "watershed rules of criminal procedure" which "implicate[s] the fundamental fairness of the trial" and "without which the likelihood of an accurate conviction is seriously diminished."[58] The first exception is obviously a narrow one, but Justice O'Connor also emphasized the limited scope of the second exception by pointing out that "we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, . . . [that it is] unlikely that many such components of basic due process have yet to emerge."[59] In fact, it appears that Justice O'Connor adopted Justice Harlan's earlier view of the second exception, a view later rejected by Justice Harlan himself.[60]

The *Teague* decision left open a number of questions, including—as a result of the Court's extraordinary fragmentation—the plurality opinion's own authority and viability. *Teague*'s reach remained unclear as well. Justice O'Connor herself explicitly reserved the question of whether *Teague* would apply in the capital sentencing context.[61] Justice Brennan pointed out that the plurality opinion did not decide whether *Teague* applies to collateral attacks on federal convictions.[62] In addition, the actual meaning of *Teague* remained obscure on a number of points. How were courts to understand the requirement that retroactivity be addressed as a "threshold matter" without consideration of the merits of the rule? How were they to fix the meaning of the term "new rule"? What was the reach to be given the two exceptions to nonretroactivity, and in particular, were courts to follow the earlier or the later views of Justice Harlan in their decisions? As the lower courts began to face the task of applying *Teague* to the petitions before them, all of these questions remained unsettled.

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55. *Teague*, 109 S. Ct. at 1078. The plurality engaged in a rather obscure discussion of why such a practice would constitute the rendering of an advisory opinion. This may well demonstrate that one person's advisory opinion is another person's dicta.

56. *Id.* at 1075-77.

57. *Id.* at 1075 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)).

58. *Id.* at 1075-77.

59. *Id.* at 1077.

60. *See id.* at 1080 (Stevens, J., concurring in part and concurring in the judgment) (indicating a preference for Justice Harlan's later view); *cf. id.* at 1093 (Brennan, J., dissenting) (arguing that Justice O'Connor construed Justice Harlan's views regarding the second *Teague* exception too narrowly). *See supra* notes 30-36 and accompanying text.

61. *Teague*, 109 S. Ct. at 1077 n.3.

62. *Id.* at 1084 n.1 (Brennan, J., dissenting).

C. *Supreme Court Decisions Elaborating* Teague's *Retroactivity Analysis*

The Supreme Court itself resolved some of the questions left unanswered by *Teague* in a quartet of decisions applying *Teague*'s retroactivity analysis.[63] The Court decided the first of these, *Penry v. Lynaugh*,[64] later in the same term as *Teague*. The legal issues in *Penry* revolved around the conditions for imposing the death penalty, thus settling whether *Teague* applied in the capital sentencing context.[65] Instead, the *Penry* Court focused on and struggled with the meaning of a "new rule." *Penry* involved a challenge to the jury instructions given under Texas law in the capital sentencing phase of a trial. Over ten years earlier, in *Jurek v. Texas*,[66] the Supreme Court had held the Texas capital sentencing statute to be constitutional. The petitioner in *Penry*, however, argued that the Texas statutory instructions were constitutionally deficient in his case because they did not give the sentencing jury adequate discretion to make effective use of mitigating evidence concerning his mental retardation and abused background in deciding whether to impose the death penalty.

Applying *Teague*, Justice O'Connor first turned to the "threshold" question of whether granting Penry the relief he requested would create a "new rule."[67] On its face, Penry's claim seemed to require the Court to find that the Texas capital sentencing statute was unconstitutional as applied, a position inconsistent with the binding authority of *Jurek*. Nevertheless, Justice O'Connor argued that *Penry* would not create "new law," in the process espousing a rather narrow view of novelty.[68] Relying on *Yates v. Aiken*[69] for support, Justice O'Connor held that the rule Penry sought to establish was dictated by existing case law in the capital sentencing context[70] and would do no more than "fulfill the assur-

63. Sawyer v. Smith, 110 S. Ct. 2822 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

64. 109 S. Ct. 2934 (1989).

65. *Id.* at 2944. Justice O'Connor wrote this part of the Court's opinion and was joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy; that is, the *Teague* core majority. However, Justice Stevens retained his reticence regarding the application of *Teague* in capital cases. *Id.* at 2963 (Stevens, J., concurring in part and dissenting in part).

66. 428 U.S. 262 (1976).

67. *Penry*, 109 S. Ct. at 2944.

68. *Id.* at 2947.

69. *Id.* at 2944 (citing Yates v. Aiken, 484 U.S. 211 (1988)). In *Yates*, the Supreme Court unanimously held that the rule in Francis v. Franklin, 471 U.S. 307 (1985), which forbade the use of certain permissive presumptions on the issue of mens rea in jury instructions, raised no retroactivity problem because it was merely an extension of the principles of Sandstrom v. Montana, 442 U.S. 510 (1979), which invalidated mandatory presumptions in jury instructions regarding mens rea. *Yates*, 484 U.S. at 216-17. Oddly enough, although the *Yates* Court was willing to agree that *Franklin* did not present a new rule, four Justices had dissented from the "extension" of *Sandstrom*. *Franklin*, 471 U.S. at 329 (Powell, J., dissenting); *id.* at 332 (Rehnquist, J., dissenting) (joined by Burger, C.J., and O'Connor, J.). Thus *Franklin* could hardly be said to be "dictated by" existing law.

70. *Penry*, 109 S. Ct. at 2944-47. Justice O'Connor found that the rule advocated by Penry was dictated by Supreme Court decisions in Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion) (the sentencer should not be precluded from considering any evidence of the defendant's character offered by the defendant as a basis for imposing a sentence other than death) and Eddings v. Oklahoma, 455 U.S. 104 (1982) (a sentencing jury may not be precluded from considering any relevant mitigating evidence offered by the defense to lessen the death sentence).

ance upon which *Jurek* was based."[71] In so finding, Justice O'Connor caused a realignment of the personnel in an already fragmented Court; she was joined in this part of her opinion by the Justices who had been most skeptical of the *Teague* approach.

In dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Kennedy—the "hard core" of the *Teague* majority—strongly criticized Justice O'Connor's position regarding the novelty of Penry's claim.[72] According to Justice Scalia, *Penry* both created a "new rule" within the meaning of *Teague* and then applied that rule retroactively to a case on collateral review.[73] From the standpoint of the purpose of habeas corpus review enunciated in *Teague*—to create an incentive for trial courts to conduct their proceedings in accord with then-existing constitutional norms[74]—Justice Scalia argued that the *Penry* decision was inexplicable.[75] As he stated,

> It seems to me utterly impossible to say that a judge acting in good faith and with care should have known the rule announced today, and that future fault similar to that of which the Texas courts have been guilty must be deterred by making good on the 'threat' of habeas corpus.[76]

Justice Scalia concluded his remarks by accusing Justice O'Connor of gutting *Teague* in the very term in which it had been announced.[77] *Penry* clearly demonstrated the division in the Court over the meaning of novelty, resulting in a fair degree of uncertainty in the commentary.[78]

Slightly more than a year after the *Teague* decision, the Court decided—on the same day—two more cases explicating its position regarding retroactivity in collateral proceedings. The results were not encouraging for those who had expected that the narrow reading given *Teague* in *Penry* was to be the wave of the future. Moreover, both cases showed the "hard core" of the *Teague* majority in sufficient control to muster a majority in cases involving retroactivity.[79] In *Butler v. McKellar*,[80] Chief Justice Rehnquist turned his hand to the question of

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71. *Penry*, 109 S. Ct. at 2945. This part of Justice O'Connor's opinion was joined by Justices Brennan, Marshall, Blackmun, and Stevens.

72. *Id.* at 2963-69. (Scalia, J., dissenting) ("[I]t challenges the imagination to think that today's result is 'dictated' by our prior cases. Indeed, if there is any available contention that our prior cases *compelled* a particular result, it is the contention that petitioner's claim was considered and rejected by *Jurek v. Texas*." *Id.* at 2965 (Scalia, J., dissenting) (citation omitted)).

73. *Id.* at 2964-65 (Scalia, J., dissenting).

74. *Id.* at 2964 (Scalia, J., dissenting) (citing *Teague*, 109 S. Ct. at 1072).

75. *Id.* at 2965 (Scalia, J., dissenting).

76. *Id.* (Scalia, J., dissenting).

77. *Id.* (Scalia, J., dissenting) ("It is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term.").

78. *E.g.*, *Recent Developments: The Court Declines in Fairness*—Teague v. Lane, *109 S. Ct. 1060*, 25 HARV. C.R.-C.L. L. REV. 164, 176 (1990) ("The Court's single post-*Teague* application of the *Teague* bar reveals that even for the Court that created the new test, the meaning of a rule 'dictated from prior constitutional rules' is unclear.").

79. Both cases involved majorities consisting of Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy, with Justices Brennan, Marshall, Blackmun, and Stevens in dissent. *See* Butler v. McKellar, 110 S. Ct. 1212 (1990); Saffle v. Parks, 110 S. Ct. 1257 (1990).

80. 110 S. Ct. 1212 (1990).

what constituted a new rule; in *Saffle v. Parks*,[81] Justice Kennedy added a further gloss on the issue.

Butler involved a challenge to the use at trial of a murder confession obtained during the course of a police interrogation conducted after police knew that the defendant had retained counsel on an unrelated assault charge.[82] Although police had read Butler his *Miranda*[83] rights and had obtained a waiver with regard to questioning about the murder, Butler initially argued that *Edwards v. Arizona*[84] required the police to refrain from all questioning once an accused invoked his right to counsel on any charge.[85] Faced with Butler's petition for habeas corpus, both the district court[86] and the Fourth Circuit rejected this claim on its merits and dismissed the petition.[87]

On the same day that the Fourth Circuit denied Butler's requests for rehearing and rehearing en banc, however, the Supreme Court decided *Arizona v. Roberson*.[88] *Roberson* held that the fifth amendment bars police-initiated interrogation if a suspect has already requested counsel in a separate investigation.[89] Based on *Roberson*, Butler petitioned the Fourth Circuit for reconsideration, and the original Fourth Circuit panel held that he was not entitled to a retroactive application of the *Roberson* rule.[90] Butler then brought his case to the Supreme Court.

Chief Justice Rehnquist, joined by Justices White, O'Connor, Scalia, and Kennedy, began with the threshold inquiry of whether the decision in *Roberson* should be termed a "new rule" or should be considered an extension of the Court's earlier decision in *Edwards*.[91] Counsel for Butler argued that *Roberson* was not novel because it fell within the " 'logical compass' " of *Edwards*, advocating a broad view of when one holding is "dictated" by another.[92] Rejecting this argument, Chief Justice Rehnquist stated that if there were reasonable disagreement among courts—or even among attorneys—as to the outcome of a case, it was not dictated by existing precedent and the ensuing decision announced a

81. 110 S. Ct. 1257 (1990).

82. *Butler*, 110 S. Ct. at 1214-15.

83. Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogation not accompanied by certain warnings constitutes proscribed compulsion within the meaning of the fifth amendment).

84. 451 U.S. 477 (1981) (once accused has invoked the right to counsel, police must refrain from further interrogation until counsel has been made available).

85. *Butler*, 110 S. Ct. at 1215.

86. *See id.* The district court opinion is unpublished. Butler's petition was dismissed on the state's motion for summary judgment.

87. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), *aff'd sub nom.* Butler v. McKellar, 110 S. Ct. 1212 (1990).

88. 486 U.S. 675 (1988).

89. *Id.* at 677-78.

90. Butler v. Aiken, 864 F.2d 24, 25 (4th Cir. 1988), *aff'd sub nom.* Butler v. McKellar, 110 S. Ct. 1212 (1990).

91. Butler v. McKellar, 110 S. Ct. 1212, 1216-18 (1990).

92. *Id.* at 1217 (quoting transcript of oral argument). Butler's claim that *Roberson* did not state a new rule but was compelled by *Edwards* was buttressed by the fact that Justice Stevens, writing for the majority in *Roberson*, described the state's position as "ask[ing] us to craft an exception to that [*Edwards*] rule for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." *Roberson*, 486 U.S. at 677; *see Butler*, 110 S. Ct. at 1217.

"new rule."[93] Accordingly, given the previous existence of a split among the circuits on the issue of interrogation, *Roberson* stated a new rule for purposes of retroactivity analysis.[94]

Chief Justice Rehnquist then considered whether the *Roberson* rule fell within either of the two *Teague* exceptions.[95] Recognizing the obvious fact that *Roberson* did not place individual conduct beyond the reach of regulation, Chief Justice Rehnquist proceeded to explain that *Roberson* did not meet the criteria of the second exception either.[96] Cautioning against undue reliance on the *Palko* "ordered liberty" standard when applying the second exception, Chief Justice Rehnquist focused instead on whether *Roberson* increased the likelihood of an accurate determination.[97] He wryly concluded that "[b]ecause a violation of *Roberson*'s added restrictions on police investigatory procedures would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood— . . . *Roberson* did not establish any principle that would come within the second exception."[98]

In *Butler*, Chief Justice Rehnquist's majority opinion both expanded the definition of a "new rule" and significantly restricted the second *Teague* exception. It achieved the former result by narrowing the Court's understanding of when one rule dictates another[99] and accomplished the latter result by stressing that only rules that enhanced the accuracy of outcomes would fall within its purview. As the Chief Justice explained, the effect of this position was to validate "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[100] In

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93. *Butler*, 110 S. Ct. at 1217-18. Chief Justice Rehnquist was at some pains to explain that

> the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. . . . That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits . . . . It would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*.

Id. The extreme quality of Chief Justice Rehnquist's statement almost appears to respond to the challenge implicit in Justice Brennan's statement in his *Teague* dissent that "[v]irtually no case that prompts a dissent on a relevant legal point, for example, could be said to be *'dictated'* by prior decisions." *Teague*, 109 S. Ct. at 1088 (Brennan, J., dissenting).

94. *Butler*, 110 S. Ct. at 1218.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* It would seem that if the Chief Justice's logic were followed, most rules aimed at restricting police activity would fall outside the *Teague* exceptions.

99. *Id.* at 1216-18; *cf. id.* at 1221-22 (Brennan, J., dissenting) (The majority definition of novelty "betrays a vision of adjudication fundamentally at odds with any this Court has previously recognized.").

100. *Id.* at 1217. It is here that Chief Justice Rehnquist cryptically refers to the parallel between the *Teague* rule and the good faith exception to the exclusionary rule by means of a "*cf.*" citation to United States v. Leon, 468 U.S. 897, 918-19 (1984), which describes the *Leon* holding in the following terms: "assuming the exclusionary rule 'effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity.' " *Butler*, 110 S. Ct. at 1217 (quoting *Leon*, 468 U.S. at 918-19). *But see id.* at 1223 n.6 (Brennan, J., dissenting) (criticizing *Leon* analogy as "unsound").

essence, the *Butler* Court created a good-faith exception to the application of constitutional rules in habeas corpus.

In dissent, Justice Brennan argued that the majority opinion entailed an improperly constricted understanding of the meaning of "prevailing law" at any given time, a view so narrow as to be at odds with any previous understanding of adjudication.[101] Justice Brennan also took issue with the majority's attempt to insulate state court decisions, contending that the deterrent aim of habeas corpus review was not merely to encourage state courts to decide cases reasonably, but to encourage them to decide cases correctly.[102] Justice Brennan remarked that under the majority regime, "a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing standards that the decision could not be defended by any reasonable jurist."[103] Indeed, Justice Brennan warned that the very function of habeas corpus was undercut when federal courts were forced to pay deference to the federal constitutional rulings of the state courts.[104]

Butler's companion case, *Saffle v. Parks*,[105] involved a challenge to the Oklahoma capital sentencing scheme on behalf of an inmate whose conviction became final in 1983. Parks argued that the Oklahoma court's instruction in the penalty phase of his trial violated the eighth amendment, claiming that the trial court's instruction to " 'avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor' " caused jurors to disregard his mitigating evidence.[106] After an unsuccessful direct appeal,[107] and an equally unsuccessful attempt at state postconviction relief, Parks filed a petition for federal habeas corpus relief, arguing, *inter alia*, that the jury instructions were infirm.[108] The district court denied the petition[109] and a divided panel of the Tenth Circuit affirmed that decision.[110] On rehearing, the Tenth Circuit, sitting en banc, reversed and held that the antisympathy instruction was unconstitutional for the reasons advanced by Parks.[111]

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101. *Butler*, 110 S. Ct. at 1222 (Brennan, J., dissenting). Justice Brennan stated:

> In Justice Harlan's view, adjudication according to prevailing law demands that a court exhibit "conceptual faithfulness" to the principles underlying prior precedents, not just "decisional obedience" to precise holdings based upon their unique factual patterns. The inability of lower courts to predict significant reformulations by this Court of the principles underlying prior precedents does not excuse them from the obligation to draw reasoned conclusions from principles that are well established at the time of their decisions.

Id. (Brennan, J., dissenting) (citation omitted).

102. *Id.* at 1223 (Brennan, J., dissenting).

103. *Id.* at 1219 (Brennan, J., dissenting).

104. *Id.* at 1224-25 (Brennan, J., dissenting).

105. 110 S. Ct. 1257 (1990).

106. *Id.* at 1259 (quoting transcript of jury instruction).

107. Parks v. State, 651 P.2d 686 (Okla. Crim. App. 1982), *cert. denied*, 459 U.S. 1155 (1983).

108. *Saffle v. Parks*, 110 S. Ct. at 1259. The district court opinion is unpublished.

109. *Id.*

110. Parks v. Brown, 840 F.2d 1496 (10th Cir.), *rev'd*, 860 F.2d 1545 (10th Cir. 1988) (en banc), *rev'd sub nom.* Saffle v. Parks, 110 S. Ct. 1257 (1990).

111. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), *rev'd sub nom.* Saffle v. Parks, 110 S. Ct. 1257 (1990).

Writing for a majority of the Supreme Court, Justice Kennedy reversed the Tenth Circuit en banc decision, further exploring the meaning of a "new rule" for purposes of retroactivity in habeas corpus review.[112] Justice Kennedy characterized Parks's argument as contending that "the Eighth Amendment, as interpreted in 1983, required, and still requires, that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence."[113] The Court explained that this would be a new rule since, unlike earlier precedent that prescribed "*what* mitigating evidence the jury must be permitted to consider," the rule advocated by Parks would have prescribed "*how* it must consider the mitigating evidence."[114]

Parks constituted another vote in favor of a broad definition of a "new rule" for purposes of retroactivity. Rejecting Justice O'Connor's narrow reading of novelty in *Penry*, Justice Kennedy held that a rule was "new" as long as it could be described as logically distinct from the existing precedent from which it was derived and had been the subject of disagreement among the lower courts.[115] Having done so, Justice Kennedy quickly passed over the question of whether the *Parks* rule as construed by the majority would have fallen within either of the *Teague* exceptions, concluding that it neither regulated primary conduct nor had the "primacy and centrality of the rule adopted in *Gideon*."[116] Echoing Chief Justice Rehnquist's tone in *Butler*, Justice Kennedy pointed out that

> [t]he objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord within a juror.[117]

Less than four months after the decisions in *Butler* and *Parks*, in *Sawyer v. Smith*,[118] the Court once again attempted to clarify the elements of the *Teague* test for retroactivity. In *Sawyer*, petitioner challenged the propriety of the prosecutor's comments during the penalty phase of his capital trial, arguing that those remarks violated the Supreme Court's decision in *Caldwell v. Missis-*

112. *Saffle v. Parks*, 110 S. Ct. at 1259-63. The application of *Teague*'s nonretroactivity analysis to the *Parks* case was not briefed by either side, but was raised sua sponte by the Court. *Id.* at 1264 n.1 (Brennan, J., dissenting). *Cf.* Butler v. McKellar, 110 S. Ct. 1212, 1221 n.3 (1990) (Brennan, J., dissenting) ("[E]lsewhere the Court practically trips over itself in evident haste to employ the broadest possible definition of a 'new rule.' ").

113. *Saffle v. Parks*, 110 S. Ct. at 1260.

114. *Id.* at 1261.

115. *Id.* at 1259-63. The *Parks* result is particularly disquieting in light of California v. Brown, 479 U.S. 538 (1987), decided after Parks's conviction became final and discussed in *Parks*. *Parks*, 110 S. Ct. at 1263. In *Brown*, the Court held constitutionally infirm an instruction telling the jurors not to be swayed by " 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.' " *Brown*, 479 U.S. at 542. While the phrasing is slightly different, it is apparent that Mr. Parks is likely to meet his death for the lack of the adjective "mere."

116. *Parks*, 110 S. Ct. at 1264. The Court was referring to the right to counsel decision in Gideon v. Wainwright, 372 U.S. 335 (1963).

117. *Parks*, 110 S. Ct. at 1264.

118. 110 S. Ct. 2822 (1990). Justice Kennedy once again wrote for a five justice majority including Justices White, O'Connor, Scalia, and Chief Justice Rehnquist. Justice Marshall filed a dissenting opinion in which Justice Brennan joined and in which Justices Blackmun and Stevens joined in part. *Id.* at 2822 (Marshall, J., dissenting).

sippi,[119] a case decided over a year after Sawyer's conviction became final. *Caldwell* restricted the range of permissible prosecution comment during the penalty phase of a capital case, barring arguments that might mislead the jury about its role in the sentencing decision and create the possibility that the jury would make that decision without an appropriate sense of responsibility.[120]

Sawyer argued to the Fifth Circuit[121] that *Caldwell* was not novel because the rule was dictated by existing state precedent, which was itself based on both state and federal law, and because the Fifth Circuit had already held *Caldwell* not to be novel in a case in which it had refused to excuse a procedural default.[122] After weighing the implications of the Supreme Court's existing interpretations of novelty, the *Sawyer v. Butler* majority rejected both arguments. First, the majority refused to apply the procedural default standard—which requires an attorney to raise a claim which might reasonably have been known to him or risk losing the claim altogether on habeas—to the context of retroactivity. Instead, the majority placed Sawyer in a cruel dilemma: if *Caldwell* enunciated a more stringent rule than its due process based predecessor, *Donnelly v. DeChristoforo*,[123] then *Caldwell* was a "new rule" because it was not dictated by *Donnelly*; if it did not, then Sawyer could not make out a violation of *Caldwell*.[124] In effect, the Fifth Circuit found that *Caldwell* was "new" based on Sawyer's own argument that the *Caldwell* decision extended further than *Donnelly*.[125] Having held that the rule in *Caldwell* was new, a majority of the Fifth Circuit then found simply that it did not fit within either of the *Teague* exceptions.[126] In dissent, however, five judges argued that *Caldwell* was not novel, but merely fulfilled the promise of earlier constitutional decisions,[127] and in any event, fell within the second *Teague* exception for watershed procedural rules. Illustrating the division among the lower federal courts regarding the application of retroactivity analysis to cases claiming the benefits of *Caldwell*, only a few months after the Fifth Circuit decision, the Tenth Circuit, also sitting en

119. 472 U.S. 320 (1985).

120. *Id.* at 337-40. The type of argument condemned in *Caldwell* is familiarly called "the last word argument" because the prosecutor tells the jury that its word will not be the last word causing the defendant's execution, but will be reviewed by many other courts. *See* Hill v. Black, 887 F.2d 513, 517-18 (5th Cir. 1989), *cert. granted*, 111 S. Ct. 28 (1990). To establish a *Caldwell* violation, however, the defendant must demonstrate that the "remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 109 S. Ct. 1211, 1215 (1989).

121. Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

122. *Sawyer*, 881 F.2d at 1291 (citing Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985), *cert. denied*, 476 U.S. 1176 (1986)).

123. 416 U.S. 637 (1974) (prejudice to defendant necessary for prosecutor's improper remarks to violate due process).

124. *Sawyer*, 881 F.2d at 1279, 1284-85, 1293-94. Sawyer was unable to prove a claim under *Donnelly* because he could not demonstrate the prejudice necessary under *Donnelly*'s fundamental fairness standard. *Id.* at 1294.

125. *Id.* at 1290-91.

126. *Id.* at 1291-92.

127. *Id.* at 1296-1305 (King, J., dissenting). The dissent relied on the decision in *Penry* to argue that *Caldwell* merely fulfilled the promise of a variety of earlier decisions in the death penalty context and therefore did not state a new rule. *Id.* at 1297-98.

banc, held in *Hopkinson v. Shillinger*[128] that *Caldwell* was new, but that it fell within the second *Teague* exception because its rule implicated the accuracy of jury determinations.[129]

In *Hopkinson*, the Tenth Circuit was deeply troubled by the question of whether *Caldwell* had announced a new rule, remarking that its "initial impulse" suggested that "it is not a novel constitutional idea that a jury should understand its role and responsibility in a capital sentencing proceeding."[130] The court, however, felt itself bound by another line of its own precedent which held that a *Caldwell* claim could be raised for the first time in federal habeas review because the issue was so novel that trial counsel could not reasonably have been expected to anticipate it.[131] The court resisted the temptation to argue that the standard of novelty in the procedural default situation was different from the standard of novelty in the context of retroactivity, finding the two standards to be fundamentally alike.[132] Indeed, the court recalled that precedent had seemed to point away from the result in *Caldwell* and had to be "specifically addressed and distinguished in *Caldwell*."[133] As the Tenth Circuit recalled, *Woodson v. North Carolina*,[134] the authority said to underlie *Caldwell*, was so general as not to "compel" any specific result.[135]

Having found *Caldwell* novel, the *Hopkinson* court strained to place *Caldwell* within the second *Teague* exception. Although admitting that a rule that limits comment about the availability of appellate review during the penalty phase of a capital case is not a "bedrock" procedural rule within the meaning of the eighth amendment, the court went on to say that, "speaking in the abstract, and not as to the fact situation before us, it strikes us as a bedrock procedure that a jury must understand that it, not the appellate court, carries the responsibility for imposing the death penalty."[136] The court then found instead that the jury's understanding of its role was "fundamentally related" to the accuracy of the death sentence; a misunderstanding would "dislocate" the entire purpose of the proceeding, that of meeting the " 'heightened need for reliability' " present in capital sentencing.[137]

The *Sawyer v. Butler* majority had already rejected this reasoning on the ground that Sawyer's *Caldwell* claim had "neither the overwhelming influence upon accuracy nor the intimate connection with factual innocence demanded by

128. 888 F.2d 1286 (10th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 3526 (1990).

129. *Id.* at 1291-92.

130. *Id.* at 1288-89.

131. *Id.* at 1289 (citing Dutton v. Brown, 812 F.2d 593, 596 (10th Cir.) (en banc), *cert. denied*, 484 U.S. 836 (1987)).

132. *Id.* at 1290.

133. *Id.*

134. 428 U.S. 280 (1976).

135. *Hopkinson*, 888 F.2d at 1290.

136. *Id.* at 1292.

137. *Id.* at 1290 (quoting Caldwell v. Mississippi, 472 U.S. 320, 340 (1985) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976))); *cf.* Sawyer v. Butler, 881 F.2d at 1304 (King, J., dissenting) (arguing that *Caldwell* falls within the second *Teague* exception).

the second *Teague* proviso."[138] The majority's route to this conclusion, however, was convoluted and, as the dissenters observed, apparently confused the showing necessary to prove that Sawyer's own sentence was distorted by the prosecutor's argument—whether a *Caldwell* violation actually occurred—with the showing necessary to demonstrate that *Caldwell* presented a rule implicating the fundamental accuracy of the sentencing procedure.[139] In fact, the Fifth Circuit majority opinion provides a virtual roadmap to the pitfalls of discussing the merits prior to considering retroactivity.[140] The court appears to have fallen into this confusion because of its *sub rosa* use of the procedural default standard as a guide to the application of *Teague*;[141] the court argued that if a failure to reach a *Caldwell* error in an individual case worked no "miscarriage of justice," then the rule enunciated in *Caldwell* could not be so intrinsically tied up with fairness and accuracy to fall within the second exception.[142]

The Supreme Court overlooked these, as well as other,[143] difficulties raised by the Fifth Circuit decision, holding that *Caldwell* was novel within the meaning of *Teague*, did not fit within the *Teague* exceptions, and, therefore, was not to be applied retroactively to cases on habeas review.[144] Writing for the majority, Justice Kennedy viewed retroactivity through the prism of the *Butler* formula protecting the " 'reasonable, good-faith interpretations of existing precedents made by state courts.' "[145] Justice Kennedy first determined, as had all the courts of appeals to address the issue, that *Caldwell* was not dictated by already existing precedent, explaining simply that the *Caldwell* rule effected an extension of existing federal constitutional doctrine that was not predictable by the state courts.[146]

Having concluded that *Caldwell* was novel within the meaning of *Teague*, Justice Kennedy next considered whether it fell within either of the *Teague* exceptions. Although there was little dispute that *Caldwell* did not come under the first exception,[147] both the Tenth Circuit[148] and a significant minority of the

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138. Sawyer v. Butler, 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

139. *Id.* at 1304 (King, J., dissenting):

> To justify its conclusion that *Caldwell* does not satisfy *Teague*'s second exception, the majority relies primarily on *Dugger v. Adams*, in which the Court held that refusing to consider a petitioner's procedurally-barred *Caldwell* claim would not result in a "fundamental miscarriage of justice." Acknowledging that *Adams* scrutinized "the facts of a particular case, while the *Teague*-ordered liberty standard looks to the character of the general rule asserted," the majority nonetheless dismisses this distinction as more semantic than substantive.

Id. (citing Dugger v. Adams, 109 S. Ct. 1211 (1989)) (footnotes omitted).

140. *Id.* at 1281.

141. *Id.* at 1294 (noting that cause and prejudice requirement to excuse procedural bars may itself be excused when the ends of justice so require).

142. *Id.*

143. *See infra* notes 147-56 and accompanying text.

144. Sawyer v. Smith, 110 S. Ct. 2822, 2824-25 (1990).

145. *Id.* at 2827 (quoting Butler v. McKellar, 110 S. Ct. 1212, 1217 (1990)). Indeed, Justice Kennedy suggested that the Court formulated the *Teague* definition of novelty in order to meet this concern. *Id.*

146. *Id.* at 2828.

147. *Id.* at 2831 ("The first of these [exceptions] applies to new rules that place an entire cate-

Fifth Circuit believed that *Caldwell* fell within the second exception because it enhanced the reliability of capital sentencing.[149] Indeed, Justice Kennedy himself strongly—and inexplicably, given the Court's ultimate position—emphasized that the *Caldwell* rule grew out of the Court's concern for reliability in the capital sentencing process.[150] Justice Kennedy, however, announced that enhancement of accuracy was not enough for the second exception; rather, a "rule that qualifies under this [second] exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of the proceeding."[151] As Justice Kennedy explained, the bedrock procedural element of fairness in prosecutorial comment was already established by the due process based protections of *Donnelly v. DeChristoforo*.[152] Thus, *Caldwell* did not effect a fundamental change in the legal community's understanding of the bedrock procedural elements necessary to a fair and accurate determination, but merely added to existing procedural guarantees, thereby falling outside *Teague*'s second exception.[153] Justice Kennedy's opinion is a curious one. Having found *Caldwell* to be novel in the first place, Justice Kennedy was forced by his own reasoning to argue that, in the final analysis, it was not novel enough to be applied retroactively.

Indeed, *Sawyer* bore all the earmarks of an end-of-term opinion[154] and failed to confront many of the questions raised by the Fifth Circuit en banc opinion under review.[155] This is particularly unfortunate because *Sawyer* presented the Court with its first opportunity to consider a case in which the lower courts had specifically examined the difficulties presented by *Teague* and in which there was a split among the circuits regarding the retroactivity of a specific rule of law under *Teague*.[156] Although the Supreme Court affirmed the Fifth Circuit's result—and once again weighed in on behalf of an extremely expansive view of novelty and a restrictive reading of the *Teague* exceptions—the Court's opinion afforded little additional guidance for the lower courts.

Indeed, if any guidance at all is to be drawn from the majority opinion, it is that the Court's position is increasingly and explicitly determined by its desire to uphold the reasonable, good faith constitutional decisions of the state courts

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gory of primary conduct beyond the reach of the criminal law . . . or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense. . . . This exception has no application here." (citation omitted)).

148. Hopkinson v. Shillinger, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 3526 (1990).

149. Sawyer v. Butler, 881 F.2d 1273, 1303-05 (5th Cir. 1989) (King, J., dissenting), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

150. *Sawyer*, 110 S. Ct. at 2826-31.

151. *Id.* at 2831 (citing *Teague*, 489 U.S. at 311, which itself was quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., dissenting)).

152. *Id.* at 2832 (citing Donnelly v. DeChristoforo, 416 U.S. 637, 642-48 (1974)).

153. *Id.* at 2832-33.

154. The decision was handed down on June 21, 1990, shortly before the end of the term. The majority opinion was extremely brief, and roughly a quarter of its text was occupied by a discussion of the unusually inflammatory facts of Sawyer's crime and the procedural history of the case.

155. Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

156. *See supra* notes 128-37 and accompanying text.

even if those decisions fail to accord with subsequent federal constitutional norms. As a result, the Court continues to be committed to an extremely broad view of novelty and an extremely narrow view of the *Teague* exceptions. Almost any decision handed down after a petitioner's conviction is final—and therefore unavailable to the state courts at the time of conviction—fits within the Supreme Court's view of novelty. In addition, it appears that only decisions which radically alter the legal terrain regarding procedural fairness and accuracy fit within the second *Teague* exception as it is now formulated. It is ironic that the Court's opinion in *Sawyer* implies that only decisions sufficiently disruptive of existing constitutional norms to be nonretroactive under the pre-*Teague* regime would now be retroactive under *Teague*.

Initially, the direction of the Court's post-*Teague* jurisprudence was uncertain. The majority and the dissenters seemed poised in an uneasy balance, sustained by Justice O'Connor's ability to reconcile her position in *Penry* with her position in *Butler* and *Parks*.[157] With the *Sawyer* decision, however, it is clear that *Penry*, and not *Butler*, will be the constitutional dead end. A solid majority of the Court has accepted Justice Harlan's view of retroactivity, with a five-Justice majority committed to a definition of a "new rule" cast in terms of protecting the good faith constitutional adjudication of the state courts as of the time the defendant's conviction has become final.[158] Moreover, the same five-Justice majority has narrowed the second *Teague* exception by stressing that a rule must both enhance the accuracy of the trial court's determination and work a major revision in the legal community's understanding of the bedrock procedural interests necessary to a fair and just adjudication. Nevertheless, the precise contours and effects of the new retroactivity jurisprudence remain murky. The task before the lower courts is to articulate and develop *Teague* doctrine in order that its structure and significance may become clear.[159]

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157. One commentator argues that Justice O'Connor's decisions are explicable in terms of her analysis of the reliance interests of the lower courts; that is to say, a lower court acting in good faith could not have applied the Texas statute in the manner challenged by Penry given the court's knowledge of existing precedent. 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 109-12 (Supp. 1989).

158. Although it is too early to predict changes in the Court's direction due to the retirement of Justice Brennan, it is fair to say that since Justice Brennan dissented in *Teague*, *Saffle*, *Butler*, and *Sawyer*, his departure will either work no change in the majority position or will permit that position to solidify further.

159. The Supreme Court has issued a handful of other decisions citing *Teague* or raising *Teague* questions, but none of them evinces serious analysis of retroactivity concerns. *See, e.g.*, Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) (one paragraph conclusorily stating *Teague* is not jurisdictional in the sense that it must be raised sua sponte and that a *Teague* issue may be waived by the state); Whitmore v. Arkansas, 110 S. Ct. 1717, 1737 (1990) (Marshall, J., dissenting) (citing *Teague* as an example of the "Court's unseemly effort to hasten executions at the cost of permitting constitutional violations to go unrectified."); Swindler v. Lockhart, 110 S. Ct. 1938, 1940 (1990) (Marshall, J., dissenting from denial of certiorari) (stating that the Court's failure to address the constitutionality of state change of venue rules that limit a trial court's ability to protect a defendant from the effects of prejudicial publicity does not bar consideration of the claim on habeas corpus; even assuming that the rule would be "new," it would fall within the second *Teague* exception because the likelihood of an accurate trial is "no doubt diminished when a defendant is tried by a jury that has prejudged his case"); McKoy v. North Carolina, 110 S. Ct. 1227, 1235 (1990) (Blackmun, J., concurring) (*Teague* cited as an example of the "unusual, but hardly unheard of" act of Supreme Court deciding issues not briefed by the parties); Mallett v. Missouri, 110 S. Ct. 1308, 1310 (1990) (Marshall, J., dissenting from denial of certiorari) (rejecting state's claim that defendant's *Batson* arguments were barred by *Teague*); Holland v. Illinois, 110 S. Ct. 803, 810 (1990) (discussing *Teague* in

II. THE APPLICATION OF *TEAGUE* RETROACTIVITY ANALYSIS BY THE LOWER FEDERAL COURTS

The application of *Teague* retroactivity analysis by the lower courts presents the opportunity both to study the articulation of a new body of doctrine and to take the measure of the Court's new retroactivity opinions. The first part of this section provides an overview of the application of *Teague* analysis by the lower courts. Here, it is significant to recognize that "new rule" issues arise in two different contexts, the more common involving the application of rules decided after the petitioner's conviction has become final—the classic retroactivity situation—and the less common involving genuinely novel rules advocated by the petitioner himself. The second part of this section discusses lower courts' interpretation of the scope of *Teague*, their understanding of *Teague*'s requirement that retroactivity be given threshold consideration, and the application of the term "new rule" and the two *Teague* exceptions. While courts generally have applied *Teague* broadly to find rules novel and to restrict consideration of the merits of habeas claims, some courts have attempted to limit the reach of *Teague*. The third part of this section analyzes the problems presented when *Teague*'s bar to the consideration of novel claims is combined with other procedural doctrines in habeas corpus and concludes with a discussion of some attempts to contain the reach of *Teague*.

A. *Overview: The Likely Significance of* Teague *in the Articulation of Rules of Criminal Procedure in the Federal Courts*

According to reliable statistics, there are roughly twelve thousand petitions for federal habeas corpus filed yearly on behalf of state and federal prisoners.[160] The Supreme Court decided *Teague* in February 1989. In the next year and a half, the lower federal courts cited *Teague* in approximately seventy-five cases.[161] A good proportion of those citations, as might be expected, appear in dicta.[162] Of the remaining cases, about one-third mention *Teague* in support of

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the context of its finding that application of the sixth amendment fair cross-section rule does not apply to the petit jury and would be a "new" rule); Zant v. Moore, 109 S. Ct. 1518 (1989) (vacating and remanding an Eleventh Circuit opinion for reconsideration in the light of *Teague*). For a discussion of *Zant* on remand, see *infra* note 300 and accompanying text.

160. Report of the Proceedings of the Judicial Conference of the United States, March 14, 1989, and September 20, 1989; 1989 DIR. ADMIN. OFFICE OF U.S. COURTS ANN. REP. 181 (showing 12,372 petitions for federal habeas corpus in 1989 as opposed to 25,957 civil rights actions on behalf of prisoners); *see also* Weisselberg, *Evidentiary Hearings in Federal Habeas Corpus Cases*, 1990 B.Y.U. L. REV. 131, 160-65. Weisselberg finds that habeas corpus filings per state prisoner remained fairly constant from 1945 to 1962, rose dramatically until 1970, and have steadily declined since 1970. In fiscal year 1945, Weisselberg found 0.47 federal habeas petitions filed for every 100 state prisoners; in 1961, there were 0.52; in 1970, 5.05; in 1988, 1.85. *Id.* at 162-63. If true, it would seem that the Supreme Court's efforts to protect state court adjudications bore fruit well before *Teague*. *See, e.g., id.* at 164.

161. While this study has no pretensions to statistical accuracy, particularly since the number of cases involved will be increasing even during the time between writing and publication, it is likely that the proportions discussed fairly predict how the cases will divide, at least for the foreseeable future, given no significant shifts in doctrine or personnel. In addition, the numbers and proportions are useful as background and to give a sense of context to the debate.

162. *See, e.g.*, United States v. France, 886 F.2d 223, 227 (9th Cir. 1989), *cert. granted*, 110 S. Ct. 1921 (1990).

propositions concerning procedural bars to claims being raised by petitioners rather than as authority regarding retroactivity.[163] Although it is early to draw absolute conclusions about the significance of *Teague*, it appears that retroactivity analysis plays a less central role in the disposition of existing habeas corpus petitions than might have been expected.[164]

In addition, one of the chief criticisms of *Teague* is that its retroactivity analysis will retard the development of constitutional rules of criminal procedure in the federal courts. Justice Brennan, dissenting in *Teague*, argued that the plurality decision would

> for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional challenges; where those challenges have merit, it would bar the vindication of personal constitutional rights and deny society a check against further violations until the same claim is presented on direct review.[165]

Although *Teague* has the potential to limit the development of new rules of constitutional criminal procedure, this possibility may well be overstated.[166]

Under *Teague*, the issue of novelty actually arises in two different contexts. In the first, the petitioner attempts to have the habeas court announce a genuinely novel rule of law in his case. In the second, the petitioner seeks the benefit of a rule which has already been decided but which was not available until after his conviction became final. Before *Teague*, courts generally announced a rule in one case and then considered its retroactivity in a second, when a petitioner

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163. In effect, these cases cite *Teague* for the position taken by the Court in Harris v. Reed, 109 S. Ct. 1038 (1989), rather than for the *Teague* plurality's position regarding retroactivity. While the issue of procedural bars is beyond the scope of this study, it is fair to say that of the two decisions, *Harris* is likely to be the more significant because it permits state courts to insulate their decisions even more completely than does the "good faith" rule of *Teague*. *See supra* note 4. The high proportion of cases citing *Teague* for the *Harris* position and the low number of cases in which *Teague* bars the discussion of genuinely novel issues of law tends to support this thesis.

164. *Cf.* Bradley, *Are State Courts Enforcing the Fourth Amendment: A Preliminary Study*, 77 GEO. L.J. 251, 253 (1988) (arguing that although Stone v. Powell, 428 U.S. 465 (1976), withdrew federal habeas jurisdiction over fourth amendment "claims," the decision has had little impact on state enforcement of the fourth amendment).

165. *Teague*, 109 S. Ct. at 1084 (Brennan, J., dissenting); *see also id.* at 1088-90 (Brennan, J., dissenting) (listing 18 important new constitutional rules that were announced in habeas corpus review); *Recent Developments: The Court Declines in Fairness*—Teague v. Lane, *109 S. Ct. 1060*, 25 HARV. C.R.-C.L. L. REV. 164, 164 n.4 (1990) (discussing the new rules of constitutional criminal procedure first announced in habeas corpus review).

166. As discussed *supra* note 160, earlier decisions of the Supreme Court restricting the availability of habeas relief have already cut down the absolute numbers of habeas filings by state prisoners and, consequently, the issues considered on habeas review. Indeed, it may be argued that the problems of procedural bars are far more significant in reducing the issues developed in habeas review.

If this observation is borne out, Harris v. Reed, 109 S. Ct. 1038 (1989) (applying the "plain statement rule" of Michigan v. Long, 463 U.S. 1032 (1983) to habeas corpus proceedings), will be the more significant decision from the standpoint of restricting the availability of habeas review for novel constitutional claims. It is also reasonable to assume that the focus of habeas corpus litigation will shift further from the merits and will become even more directed toward procedural issues. If nonretroactivity does not have the disastrous effect that has been predicted, it will be largely because the majority of claims were procedurally barred. While this does not speak well for the reach of habeas corpus, at least it shows where the focus of the debate ought to be placed. *See* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1056-57 (1985) (discussing effect of state procedural bars in habeas corpus proceedings).

sought the benefit of the already-decided rule. *Teague*'s strongest break with prior doctrine lies in its blanket preclusion of the announcement of "new rules" on collateral attack. Its position regarding the retroactivity of already decided rules is by and large an extension of existing doctrine regarding retroactivity, albeit with a radically altered definition of "novelty." While both developments limit the issues that the lower federal courts may consider in habeas review, it is presumably the blanket preclusion that will have the greatest effect on new doctrine. The redefinition of retroactivity may retard the incremental articulation of doctrine, but reason suggests it is unlikely to work as radical an effect as a complete bar.

Because many of the cases examined for this study were initiated before the *Teague* decision, there should be little, if any dissuasive effect on the types of claims raised by petitioners as a result of the preclusive rule. Yet, only a handful of cases presented a situation in which lower courts found themselves forced to refuse to consider genuinely novel questions of law.[167] Instead, as might be expected, the majority of *Teague* questions revolved around a "genuine" issue of retroactivity; that is, whether to give petitioner the benefit of a rule of law that the Supreme Court had decided in an unrelated case after petitioner's conviction became final.[168]

In fact, it is likely that the primary effect of *Teague* will be seen in the process of direct appeal. As Justice Brennan conceded, all federal constitutional claims that *Teague* might bar if first brought on habeas are cognizable in the federal system if brought on direct appeal.[169] Thus, the informed advocate is now obliged to raise and preserve every colorable federal constitutional issue both at trial and on direct appeal. In state criminal cases, the direct appeal certiorari petition to the Supreme Court may be a criminal defendant's only opportunity to secure relief from a federal court on a novel claim of federal

167. Of the cases reviewed, only four or five presented what might be termed genuinely innovative legal theories. *See* Callaghan v. United States, 895 F.2d 1412 (unpublished opinion) (6th Cir. 1990) (LEXIS, Genfed library, 6CIR file) (petitioner requesting retroactive application of the federal sentencing guidelines in order to reduce his sentence); Newlon v. Armontrout, 885 F.2d 1328, 1331-33 (8th Cir. 1989) (whether an instruction in a capital sentencing proceeding to the effect that it was an aggravating factor if the crime was the result of "depravity of mind" was too vague to pass constitutional muster; held by the court not to be a "new rule"), *cert. denied sub nom.* Delo v. Newlon, 110 S. Ct. 3301 (1990); Byrd v. Delo, 733 F. Supp. 1334, 1338 (E.D. Mo. 1990) (arguing that exclusion of character evidence at trial precluded consideration of mitigating factors at capital sentencing phase); United States *ex rel.* Silagy v. Peters, 713 F. Supp. 1246, 1251 (C.D. Ill. 1989) (exclusion of people over seventy years of age from jury venire does not create constitutional violation, but if it did, could not be applied retroactively under *Teague*), *aff'd in part and rev'd in part sub nom.* Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990).

168. The majority of these cases consider the retroactivity of Caldwell v. Mississippi, 472 U.S. 320 (1985), which restricted permissible comment by prosecution regarding jury role in capital sentencing proceeding, a matter settled by the Court's decision in Sawyer v. Smith, 110 S. Ct. 2822 (1990). *See, e.g.*, Gomez v. United States, 109 S. Ct. 2237, 2248 (1989) (reversible error for federal magistrates to conduct jury selection in felony trials); Harris v. Reed, 109 S. Ct. 1038, 1043 (1989) (applying the "plain statement" rule of Michigan v. Long, 463 U.S. 1032 (1983), to habeas corpus proceedings); Cruz v. New York, 481 U.S. 186, 188 (1987) (excluding defendant's own confession, corroborating that of his codefendant, when introduced against him); *see supra* notes 150-56 and accompanying text.

169. *Teague*, 109 S. Ct. at 1085 (Brennan, J., dissenting); *see supra* note 163 and accompanying text.

constitutional law. Because of this, counsel preparing a petition for certiorari in a direct appeal from a state conviction will be obliged to present—and the Supreme Court may well be obliged to consider—every potential novel constitutional claim. The effect of nonretroactivity in habeas on the Court's docket is likely to be quite the reverse of what the *Teague* plurality intended.

B. The Development of Teague *Analysis by the Lower Federal Courts*

Even if *Teague* does not deter the development of genuinely novel rules of constitutional procedure to the degree anticipated, lower courts still must regularly apply retroactivity analysis to petitions which present claims based on after-decided cases. As the lower courts work at elaborating *Teague*, a number of questions present themselves: (1) does *Teague* apply to petitions for habeas corpus on behalf of federal prisoners; (2) how can retroactivity be considered a threshold issue; (3) what is a "new rule"; (4) what is the scope of the *Teague* exceptions; and (5) what is the reach of *Teague* itself. There have been suggestions, in dissenting opinions and in academic commentary, that the *Teague* decision contained sufficient play to permit courts to limit its effect through creative answers to these questions.[170] Yet, almost uniformly, the lower courts—even if expressing bewilderment at the Supreme Court's own disagreements—have refused to take this course. Instead, they largely have followed the "hard core" *Teague* justices, holding most claims to be novel and to fall outside the *Teague* exceptions.

1. Application of *Teague* Retroactivity Analysis to Collateral Attacks on Both Federal and State Convictions

In his *Teague* dissent, Justice Brennan observed that the plurality did not decide whether its retroactivity analysis extended to claims brought by prisoners collaterally attacking federal convictions.[171] Indeed, insofar as *Teague* (and its progeny) focused on the protection of state court reliance interests, it might well be argued that *Teague* ought not to apply to federal convictions.[172] At the same time, *Teague* emphasized finality, equality of treatment for those similarly situ-

170. *See, e.g.*, *Teague*, 109 S. Ct. at 1084 n.1 (Brennan, J., dissenting); Sawyer v. Butler, 881 F.2d at 1279-81; 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 85-126 (Supp. 1989).

171. *Teague*, 109 S. Ct. at 1084 n.1 (Brennan, J., dissenting). Prisoners sentenced by a federal court may collaterally attack their convictions under 28 U.S.C. § 2255 (1988), the federal habeas corpus statute. Federal review of state convictions and sentences is provided under 28 U.S.C. § 2254 (1988).

172. *See Teague*, 109 S. Ct. at 1075 (plurality opinion). Justice O'Connor's opinion stated:

> The "costs 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 marshall resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle v. Isaac*, [456 U.S. 107 (1982)] "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Id. (plurality opinion) (citations omitted).

ated, and avoidance of unnecessary constitutional adjudication, concerns which are presented by collateral attacks on either state or federal convictions. The lower federal courts have been relatively untroubled by the distinctions between collateral review of state and federal convictions.[173] Only a few courts have explicitly considered the distinction with an eye to retroactivity;[174] all applied *Teague* to habeas review of federal convictions.[175] Those courts that discussed the issue stressed the overriding importance of finality in the criminal law.[176] The others simply adopted *Teague sub silentio*.[177]

In another era, Justice Brennan's observation might have provided an adventurous lower court with a vehicle for the limitation of *Teague*. However, given the direction of current Supreme Court decisions, *Teague*'s application to collateral review of federal convictions could be classified as a predictable nonissue.[178]

2. Retroactivity as a Threshold Issue

When *Teague* was first decided, courts and commentators expressed uncertainty both about the Court's intention to treat retroactivity as a threshold issue in habeas corpus review[179] and about the meaning of "threshold" considera-

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173. The similarity between §§ 2254 and 2255 is well established. Kaufman v. United States, 394 U.S. 217, 225-227 (1969). "[W]hen a request for relief under § 2255 asserts a claim . . . the § 2255 court need not stop to review the adequacy of the procedure established by [the Federal Rules of Criminal Procedure]. In this respect, and in this respect only, the position of the federal prisoner does differ from that of the state prisoner." *Id.* at 227; *cf.* United States v. Williams, 615 F.2d 585, 591 (3d Cir. 1980) ("[G]iven the similarity between section 2254 and section 2255 actions and the Court's attempt to provide similar relief under each, the logic of the Supreme Court's recent pronouncements in the section 2254 may well carry over into section 2255 cases.").

174. *E.g.*, Hrubec v. United States, 734 F. Supp. 60, 65 (E.D.N.Y. 1990).

175. *See, e.g.*, *Kaufman*, 394 U.S. at 225-27; *Williams*, 615 F.2d at 591-93.

176. *Kaufman*, 394 U.S. at 228; *Williams*, 615 F.2d at 591. The *Hrubec* court stated:

> Policy, too, dictates *Teague*'s application since concerns of finality are just as present here in this collateral attack on a federal conviction as they were in *Teague*. . . . The goal of finality would be thwarted if every new rule of criminal procedure could potentially lead to the collateral overturning of an otherwise valid conviction.

Hrubec, 734 F. Supp. at 65.

177. *See, e.g.*, United States v. Ayala, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990) (assuming that *Teague*'s "painstakingly formulated 'retroactivity' rules" are applicable to § 2255 proceedings); United States v. Lopez-Pena, 890 F.2d 490, 493 n.3 (1st Cir. 1989) (same); United States v. Muller, 733 F. Supp. 1392, 1394 (D. Haw. 1990) (applying *Teague* to a collateral attack on a federal conviction); United States v. Makaweo, 730 F. Supp. 1016, 1017 (D. Haw. 1990) (same); United States v. Baron, 721 F. Supp. 259, 261 (D. Haw. 1989) (same); United States v. Rubio, 722 F. Supp. 77, 84-85 (D. Del. 1989) (same), *aff'd without opinion*, 908 F.2d 965 (3d Cir. 1990).

178. *Cf.* Engle v. Isaac, 456 U.S. 107, 134 (1982). The *Engle* Court stated:

> Respondents, finally, urge that we should replace or supplement the cause-and-prejudice standard with a plain-error inquiry. We rejected this argument when pressed by a federal prisoner and find it no more compelling here. Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns.

Id. (citation omitted).

179. *See, e.g.*, Sawyer v. Butler, 881 F.2d 1273, 1280 (5th Cir. 1989) (en banc) ("It remains unclear . . . whether *Teague* necessarily operates as a threshold barrier preempting full analysis of the constitutional claims asserted. The *Teague* plurality clearly thought that a *Teague* bar would preempt discussion of the constitutional merits."), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

tion.[180] According to the *Teague* plurality, not only was retroactivity "properly treated as a threshold question," but the habeas court should address the question of "whether such a rule would be applied retroactively" before deciding whether the rule was constitutionally compelled.[181] In effect, the plurality asserted that in order to avoid rendering advisory opinions, courts should refrain from exploring the constitutional claims asserted by the petitioner if the rule advocated would be "new" within the meaning of *Teague*.[182] The plurality apparently expected courts to decide whether a rule would be novel without reaching the precise nature of the rule or the constitutional merits.

In his concurrence, Justice Stevens questioned whether such a decision was possible, arguing that the plurality "inverts the proper order of adjudication."[183] As Justice Stevens observed, "until a rule is set forth, it would be extremely difficult to evaluate whether a rule is 'new' at all."[184] Instead, Justice Stevens suggested that retroactivity analysis proceed by "[f]irst determining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief."[185]

Not only was the viability of the plurality approach at issue, but initially courts also had to contend with the uncertain precedential value of the plurality position.[186] Only Justices O'Connor, Rehnquist, Scalia, and Kennedy joined the part of the plurality opinion describing the threshold consideration of retroactivity. Although Justices Stevens and Blackmun had endorsed the adoption of a new retroactivity standard, they explicitly distanced themselves from this aspect of the plurality's reasoning.[187] Justice White also declined to join the relevant portion of the plurality opinion, leaving his own view on the issue unclear.

The Court's subsequent opinion in *Penry v. Lynaugh*[188] did little to clarify

180. *Teague*, 109 S. Ct. at 1079 n.2 (Stevens, J., concurring in part and concurring in the judgment). Professor Liebman takes up Justice Stevens's position, arguing that habeas courts first should consider whether a rule is constitutionally compelled before deciding whether it would be retroactive. 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 93-97 (Supp. 1989). Liebman contends that advisory opinions are inevitable under the plurality opinion and that Justice Stevens's approach avoids many of these problems, as well as permitting the habeas court to consider certain claims that do not arise until the process of direct review is completed. *Id.* Liebman also states that the plurality restriction will "have a dramatic impact on the legislative definition of both the habeas corpus enterprise and the jurisdiction of lower federal judges" who "would be relegated to the nearly ministerial task of putting into operation decisions that the Supreme Court renders on direct review." *Id.* at 96 (Supp. 1989).

181. *Teague*, 109 S. Ct. at 1069-70.

182. *Id.* at 1070, 1077-78.

183. *Id.* at 1079 n.2 (Stevens, J., concurring in part and concurring in the judgment). Justice Blackmun joined Justice Stevens on this issue.

184. *Id.* at 1079 n.2 (Stevens, J., concurring in part and concurring in the judgment).

185. *Id.* at 1079 (Stevens, J., concurring in part and concurring in the judgment).

186. *See* 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 92 (Supp. 1989). Professor Liebman states:

> Although the *Teague* plurality is at pains to characterize its approach to the proper order of decision as a "hold[ing]," the uncertain status of the plurality view is revealed both by the fact that four Justices expressly rejected the plurality approach and a fifth (Justice White) expressed no view and by the fact that the plurality concedes that its so-called "hold[ing]" is only "implicit."

Id.

187. *See supra* note 54 and accompanying text.

188. 109 S. Ct. 2934 (1989).

the matter. The entire Court subscribed to a passage in Justice O'Connor's opinion announcing that "[u]nder *Teague*, we address the retroactivity issue as a threshold matter,"[189] but the significance of this vote was unclear.[190] In his concurrence, Justice Stevens repeated his view that the habeas court should consider the constitutionality of the rule before addressing its retroactivity.[191] Justice O'Connor herself mixed the inquiry concerning novelty with a discussion of the merits,[192] and Justice Scalia admitted in dissent that the merits of the constitutional claim and its novelty are "obviously interrelated."[193]

Surprisingly, the apparent difficulties of giving threshold consideration to retroactivity have not particularly disturbed the lower courts. Few even have mentioned the problems raised by Justice Stevens. One of those few, the Fifth Circuit Court of Appeals, sitting en banc in *Sawyer v. Butler*,[194] displayed some of the fragmentation of the Supreme Court itself.[195] In *Sawyer*, Judge Higginbotham's majority opinion argued that *Teague*'s strict segregation of retroactivity analysis from the constitutional merits was unrealistic.[196] Fortified by *Teague*'s then uncertain authority, Judge Higginbotham explicitly chose to address the merits of Sawyer's constitutional claim before deciding the issue of retroactivity.[197]

Judge Higginbotham also alluded to the difficulties arising from *Teague*'s failure to distinguish between cases which present facially novel issues and cases which rely on "a rule that is new by comparison to . . . [the petitioner's] own conviction yet is well established by the time of his habeas petition."[198] The *Teague* plurality opinion was largely conceived in terms of genuinely novel issues. As Judge Higginbotham suggested, the plurality's concerns are far less apposite when the rule is already established; such cases do not risk the "awkward outcome"[199] of creating a new rule in a case in which it is then inapplicable. Hence, it ought to be less troubling, even from the plurality's perspective, to mingle the merits with the issue of novelty when the petitioner is attempting to seek the benefit of an after-decided case.

No court has accepted the Fifth Circuit majority view, but as a practical matter, many courts act in accord with its position. When a petitioner is claim-

189. *Id.* at 2952.

190. *See* Sawyer v. Butler, 881 F.2d 1273, 1281 (5th Cir. 1989) (en banc) ("We must take care not to overstate the significance of these votes."), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990); *supra* note 54.

191. *Penry*, 109 S. Ct. at 2963 (Stevens, J., concurring in part and dissenting in part).

192. *Id.* at 2944-46.

193. *Id.* at 2964 (Scalia, J., concurring in part and dissenting in part).

194. 881 F.2d 1273 (5th Cir. 1989) (en banc), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

195. The majority opinion by Judge Higginbotham occasioned a dissent by Judge King, joined by four other judges of the Fifth Circuit. *Id.* at 1295 (King, J., dissenting).

196. *Id.* at 1281.

197. *Id.* Judge Higginbotham also stated that "[i]t remains possible that an application of *Teague* to a conjectural rule may be appropriate in cases where the *Teague* issues do not turn, as they do here, upon a highly precise specification of the rule in question." *Id.*

198. *Id.*

199. *Id.*

ing relief under an after-decided rule, courts treat the requirement that retroactivity be given threshold consideration as one of priority; they simply decide the retroactivity of petitioner's claims—with whatever weighing of the merits is practically necessary—before proceeding to any other issue. Indeed, the fact that the issue of threshold consideration was passed over entirely by the Supreme Court in its affirmance of *Sawyer* may well signal a recognition that the extreme position of *Teague* was unworkable from the start.[200] Certainly, no court has expended much effort sorting out novelty from the constitutional merits.

Similarly, courts have elevated practicality over doctrine when dealing with the situation in which the petitioner is arguing for a genuinely novel rule. In one of the few cases to present a facially novel issue—whether the exclusion of people older than seventy from a jury venire is constitutionally impermissible—the district court painstakingly considered the merits of the claim.[201] Not only did the court's opinion discuss the relevant precedents at some length, but it also referred to an evidentiary hearing which it had held on the question.[202] Only after concluding that there was no constitutional violation did the court consider whether adoption of the petitioner's contention would create a new rule under *Teague*.[203]

In *Byrd v. Delo*,[204] however, a case presenting a more outlandish novel issue, the habeas court flatly refused to consider the merits of the petitioner's claim. In *Delo*, the petitioner attempted to characterize as constitutionally impermissible a trial court's ruling that the prosecution was entitled to offer evidence of petitioner's bad character should petitioner attempt to offer evidence of his good character.[205] Delo contended that the ruling constructively denied him

200. Sawyer v. Smith, 110 S. Ct. 2822 (1990).

201. United States *ex rel.* Silagy v. Peters, 713 F. Supp. 1246, 1250-51 (C.D. Ill. 1989), *aff'd in part and rev'd in part sub nom.* Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990).

202. *Id.* at 1249-50.

203. The court concluded that a rule which held that the exclusion of persons older than seventy from a jury venire was unconstitutional would be more than an extension of existing precedent and would amount to a new rule which fell into neither of the *Teague* exceptions. *Id.* at 1251; *cf.* Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990). In *Harris*, a panel of the Ninth Circuit virtually inverted the order of consideration envisioned by the Supreme Court in *Teague*. Harris argued that he was entitled to competent psychiatric assistance at trial under the rule of Ake v. Oklahoma, 470 U.S. 68 (1985), a case decided a number of years after his capital murder conviction became final. The *Harris* majority first found that the petitioner's claims were barred by both the rules against successive petitions and against prejudicial delay to the state caused by the petitioner. The court next held that it would consider Harris's claims in the interest of justice. It then proceeded to dispose of Harris's claims regarding ineffective and inadequate psychiatric assistance on the merits, largely on the grounds that Harris had chosen to rely on an alibi defense rather than a psychiatric defense at trial and because, in any event, the state had provided him with psychiatric assistance of his own choosing. Finally, having thoroughly explored the merits of Harris's claim, the court proceeded to find that the position Harris advocated would be a new rule within the meaning of *Teague* and that the rule fell within neither of the *Teague* exceptions. As if to underscore this inversion, Judge Noonan, concurring in part and dissenting in part, first argued that the rule advocated by Harris fell squarely within the ambit of *Ake*, and then contended that *Ake* itself was a new rule, concluding that *Ake* fell within the second *Teague* exception and was therefore retroactive. *See infra* notes 289-99 and accompanying text.

204. 733 F. Supp. 1334 (E.D. Mo.), *aff'd*, 1990 U.S. App. LEXIS 18140 (8th Cir.), *reh'g granted, stay granted*, 1990 U.S. App. LEXIS 19150 (8th Cir. 1990).

205. *Id.* at 1338.

the right to offer mitigating evidence during the penalty phase of his capital trial.[206] Without considering the merits of petitioner's claim, the district court simply noted that it "would mark such a departure from existing law that it would certainly create a 'new rule' within the meaning of *Teague v. Lane*."[207] In this case, the court obviously felt no need to weigh the merits of petitioner's claim. Instead, *Teague* effectively acted as a screening device, excusing the court from further consideration of frivolous claims.

3. When Is a Rule of Law "New?"

In *Teague*, Justice O'Connor defined a "new rule" as one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or is "not *dictated* by precedent existing at the time the defendant's conviction became final."[208] In *Butler v. McKellar*,[209] Justice Rehnquist explained that a case is not dictated by existing precedent if its outcome was "susceptible to debate among reasonable minds."[210] It may be argued that these definitions are unusually oblique and reflect a rather bewildering view of stare decisis.[211] In addition, it could be suggested that they do not appear to be mutually consistent.[212] At the very least, they give little direction to lower courts regarding exactly what constitutes a "new rule." As Judge King stated in her dissent in *Sawyer v. Butler*:

> The [*Teague*] plurality recognized that constitutional rules will fall along a "spectrum"—from those that fit neatly within the rubric of settled law to those that constitute a clear break from prior precedent—but provided little additional guidance for determining at *which* point a rule is not "dictated" by precedent and, therefore, "new" for

206. *Id.*

207. *Id.*

208. *Teague*, 109 S. Ct. at 1070.

209. 110 S. Ct. 1212 (1990).

210. *Id.* at 1214.

211. *See, e.g., id.* at 1222 (Brennan, J., dissenting) (arguing that the majority view "betrays a vision of adjudication fundamentally at odds with any this Court has previously recognized").

212. In *Teague*, Justice O'Connor cited Rock v. Arkansas, 483 U.S. 44 (1987), and Ford v. Wainwright, 477 U.S. 399 (1986), as examples of new rules. 109 S. Ct. at 1070. These would support a relatively narrow definition of "new rule" because *Ford* was one of those rare cases in which the Supreme Court actually overruled an earlier decision, Solesbee v. Balkcom, 339 U.S. 9 (1950). Furthermore, *Rock* was arguably a genuine procedural innovation because it both precluded the courts from adopting a blanket rule excluding all forms of hypnotically refreshed testimony and addressed for the first time the states' reaction to new techniques in hypnosis. Justice O'Connor's opinion in *Penry* appeared to support this narrow view of a "new rule." There she held that *Penry* did not announce a new rule as much as the jury instructions at issue failed to "fulfill the assurance" of earlier case law. Penry v. Lynaugh, 109 S. Ct. 2934, 2945 (1989). In so deciding, however, Justice O'Connor appeared to overrule the effect of Jurek v. Texas, 428 U.S. 262 (1976). *Jurek* had upheld the statute in question, as well as a great deal of lower federal and state court jurisprudence which—in reliance on *Jurek*—had approved the state court practices struck down in *Penry*.

On the other hand, the dissenters argued that the *Penry* result was not dictated by prior case law. 109 S. Ct. at 2969 (Scalia, J., dissenting). In so doing, they seemed to espouse a narrower view of what constituted a "new rule." The *Butler* view—if reasonable minds might disagree about the outcome of a case, it defines a "new rule"—is the fruition of this narrower definition. *Butler*, 110 S. Ct. at 1214.

retroactivity purposes.[213]

Before the decision in *Butler*, this disarray had found its way into the lower court opinions. Indeed, it might be said that one judge's new rule was another's extension of existing precedent. Take, for example, the experience of two courts faced with the issue of whether to apply *Cruz v. New York*[214] retroactively.[215] The background of *Cruz* can be stated briefly. In *Bruton v. United States*,[216] the Supreme Court held that when the confession of one codefendant contained references to a second codefendant, and the confessor refused to testify at trial, the use of the confession in a joint trial violated the second codefendant's sixth amendment right of confrontation. *Bruton* does not bar joinder of accomplices; it does, however, require deletion of the confessor's prejudicial references to the codefendant. Despite this rule, courts generally permitted the introduction of an unredacted confession against the confessor when both defendants gave interlocking confessions.[217] *Cruz* held that the *Bruton* restriction applied even if there were interlocking confessions.[218]

In considering whether *Teague* barred application of *Cruz* as a "new rule," one district court noted that the Supreme Court itself had held that *Cruz* did " 'no more than reaffirm [*Bruton*'s] central proposition' " and was " 'indistinguishable from *Bruton* with respect to those factors that the Court has deemed relevant in this area.' "[219] The district court, therefore, concluded that *Cruz* was not a new rule within the meaning of *Teague*.[220] In contrast, when faced with the same dilemma, Judge Easterbrook of the Seventh Circuit remarked that "*Bruton* was a novelty and *Cruz* a close case even given *Bruton*. The standard response to novel decisions that receive unanticipated extensions is not a change in the harmless error rule but prospective operation."[221] Although he eventually avoided resolving the *Teague* issue, Judge Easterbrook clearly would have found *Cruz* to be a new rule.[222]

Other decisions display similar disarray. In discussing the novelty of *Mich-*

213. Sawyer v. Butler, 881 F.2d 1273, 1297 (5th Cir. 1989) (en banc) (King, J., dissenting), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

214. 481 U.S. 186 (1987).

215. Hanrahan v. Greer, 896 F.2d 241 (7th Cir. 1990); Reddy v. Coombe, 730 F. Supp. 556 (S.D.N.Y.), *aff'd on different grounds*, 916 F.2d 47 (2d Cir. 1990).

216. 391 U.S. 123 (1968).

217. *See* Parker v. Randolph, 442 U.S. 62 (1969).

218. *Cruz*, 481 U.S. at 193-94.

219. Reddy v. Coombe, 730 F. Supp. at 566 (quoting *Cruz*, 481 U.S. at 193). Although Judge Stanton's opinion in *Reddy* found that *Cruz* was not a "new rule" and could be applied retroactively to the case before him, he also offered an alternative ground for decision, explaining that even if *Cruz* were a new rule, it applied the confrontation clause in such a way as to implicate the "basis of a fair hearing and trial," thus implicating the second *Teague* exception. *See id.*

220. *Id.*

221. Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990) (dictum).

222. *Id.* The *Hanrahan* panel ultimately decided that it need not reach the issue of retroactivity because the prosecution had waived the defense of nonretroactivity. *Id.* ("Prosecutors had been pumping for Justice Harlan's position for years. Not phrasing an objection to retroactivity in the precise terms the Court adopted in *Teague* is one thing; not phrasing *any* objection to retroactivity is another."); *cf.* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) (stating that *Teague* is not jurisdictional in the sense that it must be raised sua sponte and that a *Teague* issue may be waived by the state).

igan v. Jackson,[223] a panel of the Eleventh Circuit stated in *Collins v. Zant* that the "bright-line rule articulated in *Edwards v. Arizona* . . . which prohibits police-initiated interrogations after a defendant has asserted his fifth amendment right to counsel, also applies when the defendant has asserted his sixth amendment right to counsel 'at an arraignment or similar proceeding.' "[224] This statement seems to imply that *Jackson* merely applied the already settled *Edwards* rule to different facts. In an extended discussion of retroactivity, however, the court went on to hold that *Jackson* announced a new rule because it both imposed a new obligation on police not to initiate an interrogation after the defendant had invoked his sixth amendment right to counsel and established a new bright-line rule regarding the exclusion of police-initiated statements.[225]

In *Newlon v. Armontrout*,[226] however, the petitioner contended that a Missouri instruction in the penalty phase of capital cases was unconstitutional because it provided a statutory aggravating circumstance if the " 'offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, or depravity of mind.' "[227] Newlon claimed that this instruction did not channel the sentencer's discretion by " 'clear and objective standards' " as required by existing law.[228] The Eighth Circuit Court of Appeals simply set forth the *Teague* criteria, described the facts of the case and the existing case law, and then announced that the "rule in question is not a 'new rule' under *Teague* and *Penry* because it is dictated by case law existing at the time Newlon's conviction became final."[229] However, striking down an instruction regularly used in death penalty cases certainly could be said to impose a new obligation on the state government. At the very least, it is difficult to reconcile the Eight Circuit's reasoning in *Newlon v. Armontrout* with the Eleventh Circuit's reasoning in *Collins v. Zant*.

Butler may have narrowed the definition of "new rule" enough to prevent the *Newlon* court from reaching the same result if it were to decide the case today. Arguably, the virtue of the *Butler* decision is that it provides substantial guidance to the lower courts by broadening the definition of novelty so that virtually every rule becomes "new."[230] Even before *Butler*, however, most courts found few rules fell outside the *Teague* definition of novelty.[231] Rarely

223. 475 U.S. 625 (1986) (holding police may not initiate an interrogation after defendant invokes his sixth amendment right to counsel at an arraignment or similar proceeding).

224. Collins v. Zant, 892 F.2d 1502, 1510 (11th Cir. 1990) (quoting *Jackson*, 475 U.S. at 636).

225. *Id.* at 1511-12. To add to the confusion, the court recognized that this finding of novelty—and consequent nonretroactivity—conflicted with a pre-*Teague* decision by an Eleventh Circuit panel. *Id.* at 1511 n. 11 (citing Fleming v. Kemp, 837 F.2d 940, 947 (11th Cir. 1988), *cert. denied sub nom.* Fleming v. Zant, 109 S. Ct. 1764 (1989)).

226. 885 F.2d 1328 (8th Cir. 1989), *cert denied sub nom.* Delo v. Newlon, 110 S. Ct. 3301 (1990).

227. *Id.* at 1331 (quoting MO. REV. STAT. § 565.012.2(7) (1978)).

228. *Id.* at 1333 (citing Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion) (quoting Gregg v. Georgia, 428 U.S. 153, 198 (1976))).

229. *Id.*

230. While *Butler* is an extremely recent decision, it is possible that courts have been even less adventuresome in the post-*Butler* regime than they were earlier. *See, e.g.*, United States v. Muller, 733 F. Supp. 1392 (D. Haw. 1990) (discussing novelty of the rule in Gomez v. United States, 109 S. Ct. 2237 (1989)).

231. *See, e.g.*, discussion of cases applying Gomez v. United States, 109 S. Ct. 2237 (1989), *infra*

did courts stretch as the *Newlon* court did in order to give a petitioner the benefit of an "after decided" rule. At the very least, *Butler* and *Sawyer* reinforce this predisposition; courts will be inclined to think twice before finding a rule not to be novel. This broad view of novelty clearly shifts the focus of retroactivity analysis to the *Teague* exceptions. Following *Butler* and *Sawyer*, a court wishing to inject some flexibility into its consideration of retroactivity will be forced to rely on the *Teague* exceptions, an increasingly difficult proposition, or engineer some completely novel solution of its own.

4. The First *Teague* Exception: Does the New Rule Exempt a Category of Primary Conduct from Punishment?

The *Teague* plurality identified two exceptional situations, initially proposed by Justice Harlan, in which a new rule of constitutional law ought to apply retroactively to cases that were final at the time that the rule was announced. The first exception was for a rule which "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' "[232] In *Penry*, a majority of the Court concluded that this exception should 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."[233]

As might be expected, so far very few cases presented to the lower courts have fit within the primary conduct exception, even as broadened in *Penry*. In the most likely candidate, *Callanan v. United States*,[234] a case collaterally attacking a mail fraud conviction, the court explicitly based its decision on other grounds,[235] although the court's reasoning easily could place petitioners' claim under the first *Teague* exception. The petitioners, a father-judge and son-attorney pair, were convicted of mail fraud as a result of a scheme to fix cases heard by the father.[236] After their convictions were final, the Supreme Court decided *McNally v. United States*,[237] which repudiated the intangible rights theory on which their convictions were based.

Both father and son then filed petitions for habeas corpus relief. Relying on the Supreme Court decision in *Allen v. Hardy*,[238] the district court held that *McNally* was not retroactive.[239] On appeal, the Sixth Circuit modified the dis-

notes 253-75 and accompanying text; cases applying Caldwell v. Mississippi, 472 U.S. 320 (1985), *supra* notes 119-53 and accompanying text.

232. Teague v. Lane, 109 S. Ct. at 1073 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

233. Penry v. Lynaugh, 109 S. Ct. 2934, 2953 (1989).

234. 881 F.2d 229 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990).

235. *Id.* at 232 n.1 (*Teague* "addresses only the retroactivity of 'new constitutional rules of criminal procedure' and thus does not control our decision here.").

236. *Id.* at 230.

237. 483 U.S. 350 (1987).

238. 478 U.S. 255 (1986) (per curiam) (finding that Batson v. Kentucky, 476 U.S. 79 (1986), prohibiting prosecution's use of peremptory challenges in a racially discriminatory manner, could not be applied retroactively).

239. United States v. Callanan, 671 F. Supp. 487 (E.D. Mich. 1987), *modified*, 881 F.2d 229 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1816 (1990).

trict court opinion which had held that *Allen* was limited to new rules of criminal procedure rather than new interpretations of substantive criminal law.[240] The Sixth Circuit panel, instead, required retroactive application of any change in the substantive criminal law—such as *McNally*—which results in the defendant being punished " 'for an act that the law does not [now] make criminal.' "[241] The court also explicitly distinguished the case before it from the situation in *Teague*, stating that *Teague*, like *Allen*, addressed only " 'new constitutional rules of criminal procedure' " and did not control in a case involving the interpretation of substantive criminal law.[242]

Nevertheless, in the course of its opinion, the appeals court had established most of the predicates for *Teague* analysis. The court pointed out that *McNally* established a new rule which was a clear break with existing precedent and that the decision exempted certain categories of conduct from punishment.[243] The court apparently balked at the use of *Teague* because it viewed the case before it as one of statutory interpretation rather than one of constitutional import, as seemingly required by the second *Teague* exception. While this reasoning could augur a more limited role for *Teague* in cases challenging convictions under federal laws than in petitions for habeas review of state convictions, no other court appears to have read *Teague* in this limited way.[244] What is clear is that courts rarely have been called on to interpret the first *Teague* exception.

5. The Second *Teague* Exception: Fundamental Fairness or Accuracy of Determination

The second *Teague* exception provides for the retroactive application of watershed rules which involve "the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty." ' "[245] The *Teague* plurality emphasized fact-finding reliability—"procedures without which the likelihood of an accurate conviction is seriously diminished"[246]—while the concurring justices emphasized fundamental procedural fairness—" 'those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." ' "[247] The interests of fairness and accuracy obviously are not mutually exclusive, and the examples of watershed rules given by the *Teague* plurality

240. *Callanan*, 881 F.2d at 231.

241. *Id.* (quoting Davis v. United States, 417 U.S. 333 (1974)).

242. *Id.* at 232 n.1 (quoting *Teague*, 109 S. Ct. at 1075).

243. *Id.* at 231.

244. *See* discussion of cases applying Gomez v. United States, 109 S. Ct. 2237 (1989), *infra* notes 253-75 and accompanying text.

245. *Teague*, 109 S. Ct. at 1073 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.))).

246. *Id.* at 1076-77. Moreover, the *Teague* plurality cautioned that procedures falling within the second exception would be "so central to an accurate determination of innocence or guilt,[that] we believe it unlikely that many such components of basic due process have yet to emerge." *Id.* at 1077. Thus, at least according to the plurality, the second exception is supposed to be a narrow one as well.

247. *Id.* at 1080 (Stevens, J., concurring in part and concurring in the judgment) (quoting Palko v. Connecticut, 302 U.S. 319, 328 (1937) (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926))).

would qualify under both analyses.[248] In *Butler v. McKellar*,[249] however, the majority, led by Justice Rehnquist, put its weight behind the more restrictive view of the second exception, linking it to rules that enhance the accuracy of fact-finding rather than those that are merely conducive to procedural fairness.[250] Moreover, in *Sawyer v. Smith*,[251] Justice Kennedy effectively suggested that the exception was narrower still, being reserved for rules which both enhanced the reliability of fact-finding and revised the legal community's understanding of "bedrock procedural elements."[252]

Initially, it appeared that the second exception would permit courts leeway to mitigate the more draconian tendencies of *Teague*. Although this may be a fair assessment of the potential inherent in the second exception, the lower federal courts have not shown any inclination toward making full use of those possibilities. Indeed, even before *Sawyer*, the drift of the lower courts was toward the *Butler* reading of the "watershed rule" exception and, thus, toward a uniform finding of nonretroactivity, no matter what the procedural rule in question.

This development is well illustrated by the post-*Teague* line of cases in which the courts considered the retroactivity of *Gomez v. United States*.[253] In *Gomez*, the Supreme Court held that the Federal Magistrates Act[254] did not empower federal magistrates to conduct jury selection in felony trials.[255] Initially, it appeared that the lower courts would split regarding the retroactive application of *Gomez* to habeas corpus petitioners.[256] The tide then turned,

248. *Id.* at 1077 (citing Rose v. Lundy, 455 U.S. 509, 544 (1982) (Stevens, J. dissenting), which discussed overturning convictions which were dominated or obtained by mob violence, the government's use of perjured testimony, or a brutally coerced confession); *cf.* Saffle v. Parks, 110 S. Ct. 1257, 1264 (1990) ("Whatever one may think of the importance of respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception.").

249. 110 S. Ct. 1212 (1990).

250. *Id.* at 1218. *But see* 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 118 (Supp. 1989). Professor Liebman states:

> Emphases aside, however, there is much about the two competing formulations that is similar. In the first place, both formulations are rule-, not petitioner-, specific. Both versions, that is, apply to *rules* that *in the run of cases* affect reliability or fairness, irrespective of whether the rule would have that effect in the particular case before the Court. In this respect, the second exception is distinguishable from recent habeas corpus proposals to limit the "miscarriage of justice" exception to other procedural bars to particular *cases* in which individual *petitioners* can demonstrate a "colorable claim of factual innocence."

Id.; *cf.* Hoffman, *supra* note 5, at 213-15 (advocating restoration of the exception for claims based on new procedures that are implicit in the concept of ordered liberty and the addition of a new exception for claims capable of repetition yet evading review).

251. 110 S. Ct. 2822 (1990).

252. *Id.* at 2831 (quoting *Teague*, 109 S. Ct. at 1076 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part))).

253. 109 S. Ct. 2237 (1989). Prior to the Court's decision in *Sawyer*, the cases assessing the retroactivity of Caldwell v. Mississippi, 472 U.S. 320 (1985), also served as an excellent example of the problems raised by the application of the second exception.

254. 28 U.S.C. § 636(b)(3) (1988). The provision at issue granted federal magistrates the power to perform "such additional duties as are not inconsistent with the Constitution and laws of the United States." *Id.* The question before the Court was whether this grant of authority included jury selection. The Court held that it did not and, further, that *Gomez* error was not subject to harmless error analysis. *Gomez*, 109 S. Ct. at 2247-48.

255. *Gomez*, 109 S. Ct. at 2246-47.

256. *Compare* United States v. France, 886 F.2d 223, 227 (9th Cir. 1989) (stating in dictum that

however, and the holdings became unanimous in favor of nonretroactivity.[257] The lower courts uniformly held that *Gomez* announced a new rule of criminal procedure.[258] The contested issue was whether the *Gomez* rule was a watershed rule within the meaning of the second *Teague* exception.[259]

At first, it appeared that *Gomez* might be given retroactive application under the second *Teague* exception. Shortly after *Gomez* was decided, the Ninth Circuit held the *Gomez* rule to be retroactive on direct appeal under a straightforward application of *Griffith v. Kentucky*.[260] Although the Ninth Circuit did not decide whether *Gomez* ought to be given retroactive effect in collateral review, the court dropped copious hints as to how it would decide that question when it arose. Apparently with its eye on the second *Teague* exception, the court characterized *Gomez* as a decision "grounded in notions of trial 'accuracy' " and remarked that "the rule announced in *Gomez* is one that touches on one of the most 'basic rights' of the accused, the right to a fair and accurate trial."[261]

In *United States v. Baron*,[262] a district court in the Ninth Circuit picked up the hint and held that the *Gomez* rule was new but fell within the second *Teague* exception for the reasons stated in *France*.[263] That was on October 2, 1989. By

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Gomez rule would be applicable), *cert. granted*, 110 S. Ct. 1921 (1990) *with* United States v. Rubio, 722 F. Supp. 77, 85 (D. Del. 1989) (holding *Gomez* should not be applied retroactively on collateral review), *aff'd*, 908 F.2d 965 (3d Cir. 1990).

257. Indeed, two courts within the same district reached opposite conclusions on the issue within four months of one another, apparently with the same federal public defender appearing in both cases. United States v. Makaweo, 730 F. Supp. 1016, 1017-18 (D. Haw. 1990); United States v. Baron, 721 F. Supp. 259, 262 (D. Haw. 1989).

258. In fact, all but one of the decisions finding *Gomez* to be novel took place prior to the *Butler* decision narrowing the definition of a new rule. This unanimity is hardly surprising in light of the fact that, before *Gomez*, fifty-one federal districts permitted jury selection by magistrates in felony trials. *Rubio*, 722 F. Supp. at 86 (citing Brief for the United States, Gomez v. United States, 109 S. Ct. 2237 (1989)). There was a split among the circuits on the propriety of the practice, and prior to *Gomez*, the Supreme Court had not addressed the issue. In fact, as one district court remarked, "the trend prior to *Gomez* was toward expanding—not limiting—the authority of the magistrates." *Rubio*, 722 F. Supp. at 85.

259. The first exception was clearly inapposite because *Gomez* did not deal with primary conduct.

260. United States v. France, 886 F.2d 223, 227 (9th Cir. 1989) (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding that all rules of constitutional criminal procedure apply retroactively to cases not yet final), *cert. granted*, 109 S. Ct. 285 (1990)); *see supra* notes 161-64 and accompanying text. The primary issue was whether France had waived her right to a reversal under *Gomez* by failing to make a contemporaneous objection to the magistrate presiding at the voir dire. The Ninth Circuit held that there was no waiver because under the " 'solid wall of circuit authority' " such an objection would have been futile. *France*, 886 F.2d at 228. The Supreme Court has granted certiorari to review this issue. *See* United States v. France, 110 S. Ct. 1921 (1990).

261. *France*, 886 F.2d at 226 n.2, 228 (leaving open the *Teague* question and discussing the significance of *Gomez*). Faced with a similar question in United States v. Lopez-Pena, 890 F.2d 490 (1st Cir. 1989) (withdrawn from publication pending disposition of a petition for rehearing en banc), the First Circuit also found that *Griffith* required the application of *Gomez* to cases then pending on direct appeal. The court also pointed out that such a conclusion did not in any way intimate that *Gomez* would apply retroactively to cases in which the conviction was final, dropping the strong hint that it would find *Gomez* nonretroactive were the situation presented. *Id.* at 226 n.3 (citing United States v. Rubio, 722 F. Supp. 77, 84 (D. Del. 1989), *aff'd*, 908 F.2d 965 (3d Cir. 1990), for the proposition that *Gomez* is not retroactive on collateral review.).

262. 721 F. Supp. 259 (D. Haw. 1989).

263. *Id.* at 261. The *Baron* court therefore applied *Gomez* retroactively to vacate the petitioner's conviction. *Id.* at 263.

November, the winds blew from a different direction in the same courthouse.[264] Thereafter, no court in the Ninth Circuit[265]— indeed, it appears no court anywhere—has found *Gomez* to be retroactive. The difference appears to have been the decision in *United States v. Rubio*,[266] written by Judge Schwartz of the federal district court in Delaware, and the ensuing Supreme Court decisions in *Butler* and *Saffle*.

The court in *Rubio* found that *Gomez* was a new rule because it entailed a break with the trend of the law and with settled federal court practice.[267] Brushing aside the first *Teague* exception, Judge Schwartz held that *Gomez* could not fall within the second exception because it could not be meaningfully distinguished from the situation presented in *Teague* itself.[268] As Judge Schwartz noted, both cases involve challenges to the propriety of the jury empanelment:

> Whereas the petitioner in *Teague* raised a sixth amendment challenge to the propriety of the jury empanelment, . . . [this petitioner's] claim is based upon the Court's interpretation of a statute. Empanelment before a federal magistrate is no more likely to impact upon the accuracy of conviction than the use of peremptory challenges to strike jurors of the same race as the defendant. Surely if the constitutional claim raised by the petitioner in *Teague* did not implicate "fundamental fairness" as defined by the plurality, the statutory claim before me also fails to come within the second exception.[269]

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264. United States v. Bezold, No. 82-1027, slip op. (D. Haw. 1989) (finding *Gomez* nonretroactive on collateral review).

265. In February 1990, the district court in United States v. Makaweo, 730 F. Supp. 1016 (D. Haw. 1990), held that *Gomez* did not present the kind of bedrock procedural rule that would be entitled to full collateral application. *Id.* at 1017. Rather, the court pointed out that if *Teague* held the application of the fair cross-section requirement to the petit jury not to be within the second exception then, a fortiori, *Gomez*, a mere rule of statutory construction regarding jury selection could not be the type of watershed rule contemplated by the second exception. *Id.* There is a suggestion that the *Makaweo* court took umbrage at the *France* court's suggestion that a magistrate-selected jury might reach less accurate conclusions than a jury selected by an Article III judge. *Id.* at 1017-18 ("[N]owhere in *France* is it stated or even intimated that magistrate selection of a felony jury 'undermined' the fundamental fairness of a criminal trial or 'seriously diminished the likelihood' of obtaining an accurate conviction.").

Shortly afterward, another district court in Hawaii held *Gomez* to be nonretroactive on a different rationale. In United States v. Muller, 733 F. Supp. 1392 (D. Haw. 1990), the court cited both *Butler* and *Saffle*—which had been decided in the interim—and focused on the rules available to the district court at the time that the petitioner's case was tried. *Id.* at 1395. While agreeing that the selection of a jury occupies a "critical stage of a criminal proceeding," the court held that "at the time of the petitioner's trial, the empaneling of a jury by a magistrate constituted 'criminal proceedings in accordance with the Constitution as interpreted at the time of the proceeding.' " *Id.* (quoting Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990)). Furthermore, the court concluded that "there is no indication that such a procedure 'seriously diminished the likelihood of obtaining an accurate determination.' " *Id.* (quoting Butler v. McKellar, 110 S. Ct. 1212, 1218 (1990)).

266. 722 F. Supp. 77 (D. Del. 1989), *aff'd*, 908 F.2d 965 (3d Cir. 1990). The *Gomez* claim was procedurally barred because petitioner Rubio had failed to raise it either at trial or on direct appeal and was unable to make a proper showing of cause and prejudice for the omission. *Id.* at 82-83. Thus, the discussion of retroactivity in the opinion arose purely in dicta. *Id.* at 83-84.

267. *Id.* at 84-85.

268. *Id.* at 85.

269. *Id.*

Judge Schwartz's reasoning was extremely influential,[270] with at least one district court explicitly describing the analogy to the *Teague* jury selection issue as "persuasive."[271] A few months later, a second court in the same district also refused to apply *Gomez* retroactively, relying heavily on the *Rubio* decision.[272] That court, however, writing after *Butler* and *Saffle*, stressed that when a neutral and detached magistrate presides over a jury voir dire "it certainly is not more likely that an innocent man will be found guilty."[273] In fact, the court went on to point out that the presence of adversaries in the voir dire was sufficient to protect "fundamental fairness," " 'ordered liberty,' " and " 'accuracy of conviction.' "[274] The implication, if any, to be drawn from this line of cases is that, even before *Sawyer*, the courts anticipated the restrictive direction of the Supreme Court's decisions and attempted to demonstrate that a new procedural rule was nonretroactive under as many standards as were then available to them.[275]

III. THE PRISONER'S DILEMMA: PITFALLS FOR PETITIONERS UNDER *TEAGUE*

As can be inferred from the preceding discussion, existing habeas procedural rules join with *Teague* retroactivity analysis to create serious problems for petitioners seeking to present claims based on decisions handed down after their convictions became final, difficulties best described by the term "whipsaw." The first problem is created by the rule of *Wainwright v. Sykes*,[276] which held that a petitioner's procedural default before the state courts may be excused—and a defaulted claim heard on federal habeas review—only on a showing of "cause and prejudice."[277] As the courts have fleshed out the meaning of this phrase, "cause" has come to turn on "whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the

270. *See, e.g.*, United States v. Makaweo, 730 F. Supp. 1016, 1018 n.3 (D. Haw. 1990) (although the *Makaweo* opinion merely cites *Rubio* in a footnote, it adopts much of Judge Schwartz's argument without clear attribution); Hrubec v. United States, 734 F. Supp. 60, 65-66 (E.D.N.Y. 1990).

271. Gilberti v. United States, 731 F. Supp. 576, 579 (E.D.N.Y.), *aff'd* 917 F.2d 92 (2d Cir. 1990).

272. *Hrubec*, 734 F. Supp. at 66. In *Hrubec*, Judge Bartels also wrestled with the question of whether *Teague* could be applied to questions of statutory interpretation arising in collateral review of federal convictions. He concluded that the finality concerns of *Teague* were overriding and that it should be applied. *Id.* at 64-65.

273. *Id.* at 66.

274. *Id.*

275. *Cf.* United States v. Muller, 733 F. Supp. 1392, 1395 (D. Haw. 1990) (holding that the *Gomez* rule should not be applied retroactively because magistrate selection of jury was proper at time of trial and did not seriously impede an accurate verdict). *Muller* cited *Butler* and *Saffle* to suggest that:

> at the time of the petitioner's trial, the empaneling of a jury by a magistrate constituted "criminal proceedings in accordance with the Constitution as interpreted at the time of the proceeding." Furthermore there is no indication that such a procedure "seriously diminish[ed] the likelihood of obtaining an accurate determination."

Id. (quoting Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) and Butler v. McKellar, 110 S. Ct. 1212, 1218 (1990)).

276. 433 U.S. 72 (1977).

277. *Id.* at 86-87.

State's procedural rule."[278] One way a petitioner can establish an objective external cause for his default is to show that his "constitutional claim is so novel that its legal basis is not reasonably available to counsel"[279] at the time the claim should have been made.

Thus, if a petitioner is able to show that his claim is based on a "new" rule of law, the habeas court will excuse his state procedural default, assuming petitioner can show actual prejudice. But, having shown that the rule under which he seeks relief was not available to him at the time he should have raised it in the state courts, the petitioner may well have won the battle under *Wainwright* only to lose the war to *Teague*. Under most circumstances, the petitioner will have just shown that the very rule under which he seeks relief is not retroactive unless he can fit it into one of the two *Teague* exceptions.[280]

Such considerations already appear in the literature and in the decided cases, although in more convoluted form than might have been anticipated.[281]

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278. Murray v. Carrier, 477 U.S. 478, 488 (1986).

279. Reed v. Ross, 468 U.S. 1, 16 (1984). The same point was made in Murray v. Carrier, 477 U.S. 478 (1986), in which the Court also suggested two other external impediments: (1) when state officials interfere with counsel's ability to avoid default or (2) when default is the result of attorney error rising to the level of ineffective assistance of counsel. *Murray*, 477 U.S. at 488. *Carrier* also held that the cause standard might be dispensed with altogether in the extraordinary situation in which the constitutional violation has probably resulted in the conviction of an innocent person. *Id.* at 496.

280. For example, in Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989), *cert. denied*, 110 S. Ct. 3256 (1990), the Tenth Circuit wrestled with that very problem in a case involving *Caldwell* error. For a discussion of *Hopkinson* in connection with Sawyer v. Smith, 110 S. Ct. 2822 (1990), see *supra* notes 128-33, 154-55 and accompanying text. Petitioner Hopkinson claimed that the prosecutor's comment during his capital sentencing violated the Supreme Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985), a case decided two years after Hopkinson's death sentence became final. *Hopkinson*, 888 F.2d at 1287-88. The Tenth Circuit Court of Appeals first decided, without explanation, that the state's failure to raise the issue of retroactivity did not waive the defense. *Id.* at 1288. *But see* Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990) (brief statement that *Teague* is not jurisdictional in the sense that it must be raised sua sponte and that a *Teague* issue may be waived by the state). It then considered whether *Caldwell* presented a "new rule" under *Teague* and concluded that it did. This ruling was based largely on existing case law holding that failure to raise a *Caldwell* error fell within the category of "cause" excusing a procedural default because it was failure to raise a constitutional issue reasonably unknown to counsel. *Hopkinson*, 888 F.2d at 1289-90 (citing Dutton v. Brown, 812 F.2d 593, 596 (10th Cir.) (en banc), *cert. denied sub nom.* Dutton v. Maynard, 484 U.S. 836 (1987)). In *Hopkinson*, the Court expressly declined to hold that analysis of a new rule for "cause" and for nonretroactivity were different. *Id.* at 1290. Instead, the court found that, "[c]omparing the two definitions, there is far more ground for congruence than for distinction," and noted that "a holding that a claim is so novel that there is no reasonably available basis for it, thus establishing cause, *must* also mean that the claim was too novel to be *dictated* by past precedent." *Id.*

281. Commentators such as Leibman have commented on the interaction between the procedural default standard and *Teague*. *See* 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 111-13 (Supp. 1989).

Other than *Hopkinson*, 888 F.2d 1286, and Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990), however, the procedural default/*Teague* retroactivity issue thus far has arisen in only a handful of decisions. For example, in United States v. Rubio, 722 F. Supp. 77 (D. Del. 1989), *aff'd*, 908 F.2d 965 (3d Cir. 1990), Rubio's default involved the failure to make a *Gomez* objection at the voir dire. In his habeas petition, Rubio did not even attempt to show cause and the court found that he had not made a colorable showing of actual prejudice. *Id.* at 82-83. *Cf.* United States v. Frady, 456 U.S. 152, 167-68 (1982) (importing the cause and actual prejudice standard into the § 2255 context when there is a failure to make a contemporaneous objection).

Davis v. Armontrout, No. 88-1194-CV-W-1-P (W.D. Mo. Aug. 16, 1989) (LEXIS, Genfed

A particularly perverse version of the "whipsaw" appears in a recent Fifth Circuit case in which the petitioner claimed that the jury instructions in the capital sentencing phase of his trial had failed to give the jury proper guidance regarding the use of mitigating evidence.[282] The Fifth Circuit candidly admitted that the petitioner's argument had been accepted by the Supreme Court in *Penry*.[283] However, the court found the claim to be procedurally barred because the petitioner had failed to make a proper objection or request for a mitigating instruction at trial.[284] Petitioner countered that there was good cause for his default because, at the time of trial, the constitutionality of the Texas capital sentencing scheme was settled.[285] The court of appeals disposed of this argument by reminding the petitioner that the Supreme Court had held that *Penry* did not announce a new rule regarding mitigating evidence; accordingly, there was no good cause for failure to raise the objection at trial.[286]

Petitioners, possibly even more frequently, find themselves squeezed between the demands of retroactivity and habeas procedure when attempting to file a second habeas petition after a first has been denied. The rules governing federal habeas corpus petitions by state prisoners provide that the court may dismiss a second or successive petition if the petition "fails to allege new or different grounds for relief and the prior determination was on the merits."[287] Once again, the interaction between two definitions of novelty, one for retroactivity and the other for successive petitions, poses a dilemma for the petitioner. If the issue presented by the petitioner in a second writ is sufficiently novel to excuse a successive petition, then it will almost certainly be a new rule for purposes of retroactivity analysis.[288]

For example, in the course of entertaining an emergency application for a certificate of probable cause to appeal, Judge Noonan of the Ninth Circuit was called upon to consider the issues raised by a third habeas petition on behalf of

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library, Dist file), presented an even more bizarre dilemma. In that case, the court initially held that the petitioner's claim regarding jury selection could not be heard under the *Batson* rule since *Batson* was not retroactive under both Allen v. Hardy, 478 U.S. 255 (1986) and *Teague*. *Davis*, LEXIS at 20-21. Therefore, the only rule applicable to petitioner was that of Swain v. Alabama, 380 U.S. 202 (1965). *Davis*, LEXIS at 21. Accordingly, petitioner Davis could not claim novelty as a cause of his failure to object at trial since *Townsend* had already been decided at the time he was tried. *Id.* at 22. Instead, he was thrown back on a claim of ineffective assistance of counsel. *Id.* As the court pointed out, however, the *Batson* argument in Davis's habeas petition had been unavailable when he was tried; thus it was not ineffective assistance to have failed to raise the claim, and, moreover, even if counsel had advanced the *Townsend* claim, it would have failed. *Id.*

282. Fierro v. Lynaugh, 879 F.2d 1276, 1280 (5th Cir. 1989), *cert. denied sub nom.* Fierro v. Collins, 110 S. Ct. 1537 (1990).

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 1281-82.

287. 28 U.S.C. § 2254, Federal Rules Governing § 2254 Cases, Rule 9(b) (1988). Even if new and different grounds for relief are alleged in a second or successive petition, the judge may dismiss the petition if the failure of the petitioner to assert those grounds in a prior petition was an "abuse of the writ." *Id.*

288. For obvious reasons, given the number of successive petitions filed in death penalty cases, this rule will have a disproportionate impact on death penalty cases. *See* authorities cited *infra* note 354.

Robert Alton Harris.[289] Harris claimed that the psychiatric assistance given him at the penalty phase of his trial was incompetent and thereby violated the rule of *Ake v. Oklahoma*,[290] a case decided three years after Harris's second petition was filed.[291] Judge Noonan found that Harris had not abused the writ because *Ake* was both a fundamental rule and was unavailable at the time of Harris's previous petitions.[292] As Judge Noonan promptly recognized, however, the novelty of *Ake* rendered the case nonretroactive unless it fell within a *Teague* exception.[293] Suggesting that *Ake* is based on considerations of fundamental fairness and that it enhances the accuracy of the jury's conclusions, Judge Noonan then held that a reasonable jurist could conclude that the *Ake* rule fell within the second *Teague* exception and that a colorable argument could be made that the rule would be applied retroactively, despite its novelty.[294]

Faced with the task of resolving Harris's petition on the merits, however, a panel of the Ninth Circuit held, inter alia, that his claims would be barred by the rule against abuse of the writ because he had raised similiar issues in his prior petitions.[295] The majority then went on to consider the merits of Harris's claims in the interests of justice,[296] finding that his contention that he was entitled to competent psychiatric assistance amounted to a novel extension of *Ake*[297] that would not be retroactive because it did not amount to a watershed rule within the meaning of the second *Teague* exception.[298] Untroubled by the inconsistency involved, the majority of the panel at once held that the issues were available to Harris at the time he filed his second petition and that they were a novel extension of a rule that was itself novel when it was decided—some two years after the filing of Harris's previous petition.[299]

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289. Harris v. Vasquez, 901 F.2d 724 (9th Cir.), *petition to vacate denied*, 110 S. Ct. 1799 (1990). The case appeared before the court of appeals as an emergency application for a certificate of probable cause to appeal from the district court's denial of Harris's petition for habeas corpus combined with a motion for a stay of execution. *Id.* at 725. Thus, the matter was before a single judge, in this case Judge Noonan. *Id.* at 727. The court had to decide whether Harris had made "a substantial showing of the denial of a federal right," but was not faced with the actual resolution of the underlying appellate issues. *Id.* at 725 (citing Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983)). The actual issues were resolved in a subsequent opinion, Harris v. Vasquez, 913 F.2d 606 (9th Cir. 1990). *See infra* notes 295-99 and accompanying text; *see also supra* note 203.

290. 470 U.S. 68, 80 (1985) ("[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense.").

291. *Harris*, 901 F.2d at 726.

292. *Id.* at 726-27.

293. *Id.*

294. *Id.*

295. Harris v. Vasquez, 913 F.2d 606, 618 (9th Cir. 1990).

296. *Id.*

297. *Id.* at 622.

298. *Id.* at 625.

299. Dissenting from the panel's resolution of the *Ake* issue, Judge Noonan did not speak directly to the abuse of the writ question. Instead, he repeated his view that Harris's claim fell squarely within the rule enunciated by *Ake* and that *Ake*, while novel under *Teague*, nevertheless was a watershed rule of constitutional criminal procedure pursuant to the second *Teague* exception. Accordingly, Judge Noonan argued that Harris was entitled to an evidentiary hearing in which he might substantiate his claims of ineffective psychiatric assistance. *Id.* at 630 (Noonan, J., concurring in part and dissenting in part).

The Eleventh Circuit has been a particularly fertile ground for such issues, with outcomes equally unfavorable to the petitioners. In *Collins v. Zant*,[300] the petitioner presented a second habeas corpus petition to the court, claiming, inter alia, that the trial court erred by admitting into evidence a statement he made after his request at arraignment for court-appointed counsel.[301] Collins had challenged the statement in his first petition, arguing that its admission violated *Edwards v. Arizona*,[302] which prohibited police-initiated interrogations once the defendant asserted his fifth amendment rights.[303] In the second petition, Collins argued that admission of the statement violated the recently decided *Michigan v. Jackson*,[304] which prohibited police-initiated interrogations after the defendant asserts his right to counsel at an arraignment or similar proceeding.

The *Collins* court held, seriatim, that the *Jackson* claim was not new for purposes of the rules governing successive habeas corpus petitions on behalf of state prisoners because it merely presented a different legal predicate for a claim already raised;[305] that even if it were a new ground for relief, it would fail because *Jackson* presents a "new rule" within the meaning of *Teague* and therefore would not apply retroactively;[306] and that since the *Jackson* claim was neither new nor retroactive, the "interests of justice" did not require the court to hear it.[307] The message of *Collins* is patent: any way a petitioner argued his case, he would lose.

The Eleventh Circuit's most extended discussion of the problem posed by the interaction of rules governing successive petitions and retroactivity arises in *Moore v. Zant*.[308] Moore's second petition for federal habeas corpus relief

300. 892 F.2d 1502 (per curiam), *reh'g denied*, 900 F.2d 267 (11th Cir.) (en banc), *cert. denied*, 59 U.S.L.W. 3250 (U.S. Oct 2, 1990).

301. *Id.* at 1504.

302. 451 U.S. 477 (1981).

303. Collins v. Francis, 728 F.2d 1322, 1331-34 (11th Cir.), *cert. denied*, 469 U.S. 963 (1984).

304. 475 U.S. 625 (1986).

305. *Collins*, 892 F.2d at 1510.

306. *Id.* at 1510-12. The *Collins* court admitted that under pre-*Teague* case law, a different panel of the Eleventh Circuit had held that *Jackson* was retroactive in cases on collateral review involving sentencing errors. *Id.* at 1511 n.11 (citing Fleming v. Kemp, 837 F.2d 940, 947 (11th Cir. 1988), *cert. denied sub nom.* Fleming v. Zant, 109 S. Ct. 1764 (1989)). However, *Collins* held that *Jackson* presented a new rule within the meaning of *Teague* because "it imposed a new obligation on police (not to initiate an interrogation after a defendant has asserted his right to counsel under the sixth amendment) and established a bright-line rule excluding police initiated statements (a result not dictated by then existing precedent)." *Id.* at 1511-12. Moreover, it failed to fall within either exception to *Teague*, because it did not deal with primary, private conduct, nor did it implicate the concept of ordered liberty or accuracy of result. *Id.* at 1512 (citing, *inter alia*, *Jackson*, 475 U.S. at 638-640 (Rehnquist, J., dissenting) ("*Jackson* involves a 'prophylactic rule' providing 'second layer of protection' ")).

307. *Collins*, 892 F.2d at 1510.

308. 885 F.2d 1497 (11th Cir. 1989) (en banc), *on remand from the United States Supreme Court*, 109 S. Ct. 1518 (1989), *cert. denied*, 110 S. Ct. 3255 (1990). *Moore* originated as an appeal from a district court dismissal of the petitioner's second application for federal habeas corpus as an abuse of the writ within the meaning of Rule 9(b). Moore v. Kemp, 824 F.2d 847, 849 n.1 (11th Cir. 1987) (en banc). The Eleventh Circuit, sitting en banc, ultimately reversed and remanded in part. *Id.* at 857. Subsequently, the state filed a petition for a writ of certiorari with the Supreme Court and, after oral argument, the en banc opinion was vacated and remanded for further consideration in light of *Teague*. Zant v. Moore, 109 S. Ct. 1518 (1989) (per curiam).

The opinion of the Eleventh Circuit on remand reflects a divided court. Judge Cox wrote a

presented a number of issues which he had failed to raise in his first petition, the relevant claims being based on *Estelle v. Smith*[309] and *Profitt v. Wainwright*.[310] The majority of the Eleventh Circuit, sitting en banc, believed that Moore did not abuse the writ when he failed to raise the *Estelle* and *Profitt* claims because neither he nor his counsel could have reasonably anticipated the underlying decisions.[311] On remand from the Supreme Court, the Eleventh Circuit was charged with the task of reconsidering its findings in light of *Teague*.[312] The litigants themselves disagreed widely on the scope of the remand. Both, however, viewed abuse of the writ and retroactivity as separate inquiries to be conducted at the threshold of a successive petition.[313]

The Eleventh Circuit agreed, although in a way devastating to petitioner's claims. The court simply avoided consideration of the retroactivity of *Estelle* and *Proffitt*—evading the purpose of the Supreme Court's remand—by treating the abuse of the writ issue first. The court of appeals held that the arguments involved in the *Estelle* and *Profitt* claims could reasonably have been anticipated by counsel; hence, the claims were not "new" within the meaning of the federal habeas rules, the second petition was an abuse of the writ, and the court need not consider the merits of the petition.[314]

The ramifications of the Eleventh Circuit's position are troubling. If a court holds that a rule of law is sufficiently novel to serve as the basis for the filing of a second habeas corpus petition, the rule is virtually certain to fall within the *Teague* definition of novelty as well; accordingly, the court will be precluded from considering the underlying claim. If a court holds that a rule is not "new" for the purpose of excusing a second petition, the court will dismiss the petition and refuse to consider the claim. Under these circumstances, the petitioner's chances of presenting the merits of his petition to a federal court are slim indeed.

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plurality opinion on behalf of himself and three other judges. Moore v. Zant, 885 F.2d at 1499 (plurality opinion). Judges Roney, Hill, and Edmonson all wrote separate concurrences. *Id.* at 1514 (Roney, C.J., specially concurring); *id.* at 1518 (Hill, J., concurring); *id.* (Edmondson, J., concurring). Judge Kravitch dissented on behalf of herself and Judges Clark and Anderson. *Id.* at 1518 (Kravitch, J., dissenting). Judge Johnson dissented on behalf of himself and Judge Hatchett with Judges Kravitch, Anderson, and Clark joining in part. *Id.* at 1522 (Johnson, J., dissenting). Judge Anderson dissented separately. *Id.* at 1528 (Anderson, J., dissenting).

309. 451 U.S. 454 (1981) (the state may be obliged to warn defendant of his right to counsel prior to interviews by persons not primarily responsible for law enforcement).

310. 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir.), *cert. denied*, 464 U.S. 1002 (1983) (right to confront and cross-examine witnesses whose hearsay was presented in presentence report). Moore presented five claims in all. The other three concerned Gardner v. Florida, 430 U.S. 349 (1977) (establishing limited right of defendant to review the presentence report), the racially discriminatory application of the death penalty, and ineffective assistance of counsel. *See* Moore v. Zant, 885 F.2d at 1501. The circuit court originally suggested the hearing of the *Gardner* claim might be within the interests of justice. Moore v. Kemp, 824 F.2d at 857. On remand, however, the court of appeals found that the *Gardner* claim was procedurally barred because of a deliberate bypass and that the interests of justice did not require that it be heard because Moore could make no colorable claim of factual innocence or of an error affecting a material question in his sentencing. *Id.* at 1512-13. The court of appeals then dismissed the remaining claims.

311. Moore v. Kemp, 824 F.2d at 850-54.

312. Zant v. Moore, 109 S. Ct. 1518 (1989) (per curiam).

313. Moore v. Zant, 885 F.2d at 1503-04 & n.8.

314. *Id.* at 1506-12.

Recognizing this irony, Judge Johnson dissented in *Moore* and argued that the court was bound by its prior finding that *Estelle* and *Proffitt* claims could be heard in a second petition.[315] In addition, Judge Johnson contended that *Proffitt* ought to be applied retroactively, because, despite its novelty, *Proffitt* fit within the second *Teague* exception.[316] Judge Johnson, however, pointed out that, in its 1987 opinion, the court had found *Estelle* to be old for purposes of retroactivity and new for purposes of denying an ineffective assistance claim based on counsel's failure to raise the matter.[317] Judge Johnson suggested that the Supreme Court remand may have been intended to force the court to impose some order on these decisions and to take a "hard look" at the relationship between different notions of "new law."[318]

In a special concurrence, Chief Judge Roney suggested that the majority of the panel had mistaken the proper order and scope of the inquiry before it.[319] As an alternative, he proposed that, in a successive petition, if the claims not previously asserted were without merit, the petition could be dismissed without resort to the abuse of the writ defense.[320] Because retroactivity is dispositive of the merits, Judge Roney argued that *Teague* should be applied first in considering a successive petition.[321] He then concluded that none of the claims advanced by Moore should be extended retroactively and agreed that the petition should be dismissed in its entirety.[322] The impact of order of consideration on outcome is difficult to assess; however, it would seem that once a court had committed itself to the view that the case was in some degree meritorious, it would be less likely to find a successive petition to be an abuse of the writ.

In any event, the relationship between the various definitions of novelty is a troubling question. Courts apparently believe that novelty for purposes of excusing procedural default or a successive petition is the same as novelty for purposes of barring retroactive application of a rule unless it falls within a *Teague* exception. Under current practice, this raises a cruel dilemma for petitioners. Under whatever practice develops as a result of the *Teague* regime, this dynamic is likely to lead to a further increase in the number, variety, and ingenuity of claims raised on direct appeal; indeed, it is likely to lead to the placing of even greater importance on the prisoner's direct appeal.[323]

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315. *Id.* at 1522-24 (Johnson, J., dissenting).

316. *Id.* at 1526 (Johnson, J., dissenting).

317. *Id.* (Johnson, J., dissenting).

318. *Id.* at 1527 (Johnson, J., dissenting) (suggesting the possibility that "only decisions which are new law for retroactivity purposes may excuse a successive petition").

319. *Id.* at 1514 (Roney, C.J., specially concurring).

320. *Id.* (Roney, C.J., specially concurring) (citations omitted).

321. *Id.* (Roney, C.J., specially concurring).

322. *Id.* at 1516 (Roney, C.J., specially concurring). Judge Roney's substantive application of *Teague* was somewhat unorthodox in that it eschewed the general three step inquiry and proceeded directly to the question of whether either *Estelle* or *Proffitt* was the type of bedrock rule that ought to be applied retroactively to all cases. *Id.* at 1516-17 (Roney, C.J., specially concurring).

323. *But see* Arkin, *Speedy Criminal Appeal: A Right Without a Remedy*, 74 MINN. L. REV. 437 (1990) (noting that recent massive increase in number of state criminal appeals often results in prisoners' appeals being substantially delayed, with delays up to six years not unheard of).

IV. LIMITING THE REACH OF *TEAGUE*

The lower federal courts have not shown any great inclination to experiment with the reasoning of *Teague* in order to permit the more liberal retroactive application of constitutional rules of criminal procedure. This disposition is simply a reasonable reading of the Supreme Court's direction, particularly after *Butler v. McKellar*[324] simultaneously expanded the definition of a "new rule" and tightened the "watershed rule" exception.[325] Because courts are understandably reluctant to move within the confines of *Teague*, creative advocacy and jurisprudence have focused on narrowing the class of cases to which *Teague* may be applied.

Following Judge King's suggestion in her dissent in *Sawyer v. Butler*,[326] some academic commentary has suggested that *Teague* itself ought not to be applied retroactively, thus exempting from its reach all cases final at the time it was decided.[327] While there is much to be said for the view that *Teague* itself announces a new rule that does not come within the *Teague* exceptions[328]—and particularly for its irony—no court has seriously taken up the proposal. This may be due to the fact that courts construe *Teague* as resolving a question of statutory authority in habeas corpus rather than one of constitutional law and therefore not falling within the *Teague* definition of "new rule."[329] It may also be due to the fact that the Supreme Court itself has not hesitated to apply *Teague* to cases already final at the time *Teague* was decided.[330]

Equally unrewarding was the effort of one advocate to revive a common law writ, *audita querela*, in order to evade the reach of *Teague*.[331] While the court

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324. 110 S. Ct. 1212 (1990).

325. *See supra* notes 99-100 and accompanying text.

326. 881 F.2d 1273, 1305 (5th Cir. 1989) (en banc) (King, J., dissenting), *aff'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990). Judge King stated:

> It is indeed ironic that the majority invokes *Teague*, undoubtedly a new rule, to prevent us from applying [a recent Supreme Court decision] . . . . If any case should be considered as having established a new rule not retroactively applicable to habeas petitioners whose convictions have become final, it is *Teague* itself. Had the majority decided Sawyer's case on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted to this court, the majority opinion would have granted him a new sentencing hearing. The majority instead reaches out to an opinion rendered by the Supreme Court 16 months after submission of Sawyer's case and 8 1/2 years after Sawyer's trial to find a reason to deny him constitutional protection. That to us is a finality of sorts, a final and irretrievable absurdity.

Id.

327. 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 122 (Supp. 1989). Liebman notes the irony that courts not disposed to view the novelty of the *Teague* opinion itself as a basis for denying its retroactive application to petitioners have found its novelty sufficient ground to excuse respondents from raising the retroactivity defense in a timely fashion. *Id.*

328. *See supra* note 321 (quoting Sawyer v. Butler, 881 F.2d at 1305 (King, J., dissenting)).

329. Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc) ("the very scope of the writ of habeas corpus, and therefore our power to grant relief, is implicated"), *cert. denied*, 110 S. Ct. 3256 (1990).

330. *E.g.*, Saffle v. Parks, 110 S. Ct. 1257 (1990); Butler v. McKellar, 110 S. Ct. 1212 (1990); Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

331. United States v. Ayala, 894 F.2d 425 (D.C. Cir. 1990). *Audita querela* is a common-law writ primarily directed at permitting the defendant "to obtain 'relief against a judgment or execution because of a defense or discharge arising' " after the judgment was rendered. Historically, *audita*

unhappily wrestled with the definition of *audita querela*, it ultimately concluded that the writ could be entertained as a basis for vacating a criminal conviction only if the defendant used it to raise issues not cognizable under the existing scheme of post-conviction remedies and that a defendant collaterally challenging his conviction could not style his motion as a petition for a writ of *audita querela* in order to avoid procedural requirements in habeas corpus, including those set forth by *Teague*.[332]

Several justices also have suggested that waiver might serve as a procedural device for narrowing the scope of *Teague*; if nonretroactivity were not raised by the government, the courts should deem it waived.[333] The value of waiver to petitioners, however, is likely to be limited. On several occasions already, the Court itself has reached out to decide issues of retroactivity that the parties had not raised.[334] Moreover, as government attorneys adjust to the post-*Teague* regime, they presumably will raise nonretroactivity as a matter of course in cases in which it applies, just as they now raise exhaustion of remedies and other defenses.

Nevertheless, the matter remains somewhat obscure. The question of when the government may waive a *Teague* nonretroactivity defense is not clearly settled.[335] Initially a number of courts raised the retroactivity question sua sponte, apparently on the theory that it goes to the issue of subject matter jurisdiction in habeas.[336] On the other hand, at least one court held that the government waived the retroactivity defense by failing to raise it, arguing that disputes about the retroactive application of constitutional decisions were common prior to *Teague*, and therefore the state could not be excused from making the

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querela was a remedy mainly for judgment debtors. *Id.* at 427 (citing 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2867, at 235 (1973)). The federal courts' power to issue common law writs is established by the All Writs Act, 28 U.S.C. § 1651(a) (1988).

332. *Ayala*, 894 F.2d at 429 n.8, 430.

333. *Penry*, 109 S. Ct. at 2963 (Stevens, J., concurring in part and dissenting in part) ("Nor am I at all sure that courts should decide the retroactivity issue if it was not raised below."); Zant v. Moore, 109 S. Ct. 1518, 1519 (1989) (Blackmun, J., dissenting) (the state "did not raise nonretroactivity as a defense to respondent's claim for federal habeas relief, and that defense should therefore be deemed waived"); *id.* (Brennan, J., concurring) (expressing "concern as to whether petitioner should be permitted to raise the retroactivity issue at this point in the proceedings"). *See* 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 90-91 (Supp. 1989).

334. *E.g.*, Saffle v. Parks, 110 S. Ct. 1257 (1990); Zant v. Moore, 109 S. Ct. 1518 (1989); Teague v. Lane, 109 S. Ct. 1060 (1989).

335. Liebman in particular raises questions about the retroactivity of rules which restrict the rights of criminal defendants and habeas petitioners. 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 123 (Supp. 1989). Citing Perry v. Lockhart, 871 F.2d 1384, 1393-94 (8th Cir.) (dicta), *cert. denied*, 110 S. Ct. 378 (1989), Liebman suggests that "*Teague*'s policy of treating like litigants alike impels the conclusion that new rules cutting back on rights not be applied retroactively to post-final convictions," since it would increase the incentive for state courts to ignore existing constitutional law in the hope that some rule cutting back defendants' rights will be announced "by the increasingly cohesive conservative majority of the Supreme Court." 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 123 (Supp. 1989). Liebman also argues that post-*Teague* case law will follow the general rule for defenses in habeas corpus and will place the burden of raising nonretroactivity and a concomitant requirement to prove the necessary facts by a preponderance of the evidence on the state. *Id.* at 121.

336. *E.g.*, Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc), *cert. denied*, 110 S. Ct. 3256 (1990); *cf.* Moore v. Zant, 885 F.2d 1497, 1524-25 (11th Cir. 1989) (en banc) (Johnson, J., dissenting) (assuming that the state did not waive nonretroactivity because "the time to raise it has not yet arrived"), *cert. denied*, 110 S. Ct. 3255 (1990).

argument.[337]

While the Supreme Court has now decided that the government *may* explicitly waive a *Teague* nonretroactivity claim, it has not given the lower courts guidance regarding any other circumstances under which such a waiver should be found.[338] Indeed, the Supreme Court's only explicit discussion of the issue has come in a one-paragraph pronouncement in a case otherwise concerned with the ex post facto clause of the Constitution.[339] In considering whether *Teague* precluded the court from reaching the merits, Chief Justice Rehnquist concluded: "Although the *Teague* rule is grounded in important considerations of federal-state relations, we think it is not 'jurisdictional' in the sense that this Court, despite a limited grant of certiorari, *must* raise and decide the issue sua sponte."[340] The Court then accepted the state's explicit waiver of the *Teague* retroactivity issue, and proceeded directly to its discussion of the ex post facto claim.[341] If anything, the Court's off-handed approach to the issue coupled with its own history of sua sponte consideration of Teague[342] has left the lower courts in greater confusion than before and has left litigants with little ability to predict the outcome of their own cases.

Perhaps the most novel and interesting effort to limit the reach of *Teague* appears in a recent Second Circuit opinion, *Sanders v. Sullivan*,[343] which dealt with post-trial recantation of testimony. In effect, the court held *Teague* inapplicable if the violation raised in the habeas petition was of a type that could not have been addressed by the state trial court.[344] Sanders had petitioned the court for habeas corpus based on credible evidence that the chief witness at his trial had recanted his testimony two years after testifying.[345] The witness's changed story strongly supported Sanders's contention that he was innocent of one of the

337. Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990). As Judge Easterbrook stated:

> Although it filed this response before the Court decided *Teague*, that is neither explanation nor excuse [for failing to raise retroactivity]. Disputes about the retroactive application of constitutional decisions have pervaded criminal procedure over the last 25 years .... Not phrasing an objection to retroactivity in the precise terms the Court adopted in *Teague* is one thing; not phrasing *any* objection to retroactivity is another.

Id.

338. Collins v. Youngblood, 110 S. Ct. 2715 (1990).

339. *Id.* at 2718.

340. *Id.*

341. *Id.*

342. *See supra* note 332 and accompanying text.

343. 900 F.2d 601 (2d Cir. 1990).

344. *Id.* at 606; *cf.* 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 96 (Supp. 1989). Liebman contends that:

> [T]here are certain kinds of claims—for example the absence of or ineffective assistance of counsel on appeal and the denial of constitutionally mandated appellate procedures—that do not even in theory arise until after the direct appeal is decided, and there are other kinds of claims—for example, most ineffective assistance of counsel allegations—that as a practical matter cannot be raised until after direct appeal. . . . Under the plurality view, these issues apparently could never become the basis for constitutional decision because "threshold" determinations of nonretroactivity at the only stage of the proceedings in which such claims theoretically or at least practically can arise would forbid the claim's resolution on the merits.

Id.

345. *Sanders*, 900 F.2d at 602-03.

crimes of which he had been convicted. The district court denied Sanders's petition, holding that the use of perjured testimony violates due process only if the prosecution knew or should have known that the testimony was perjured.[346] The court of appeals rejected that view, finding instead that due process is violated "when a credible recantation of the testimony in question would most likely change the outcome of the trial."[347]

On remand, the district court decided that the recantation was credible and that knowledge of the perjury would have altered the jury verdict.[348] Consequently, the district court granted Sanders's petition. On appeal from this decision, the state argued that the court of appeals had altered the constitutional standards that prevailed at the time that the original proceedings took place and, therefore, that Sanders should not be able to claim the benefit of the "new rule" under *Teague*.[349]

Without deciding whether its first *Sanders* opinion[350] had announced a new rule, a panel of the Second Circuit held the *Teague* analysis inapplicable to the matter presently before it.[351] As Judge Lumbard explained, "[t]he 'new rule' inquiry effectively asks habeas courts to place themselves in the position of a state appellate court on direct review and, by so doing, discern whether the constitutional standards *then* prevailing would have provided the defendant any relief."[352] Because the error complained of could not have been known to—or rectified by—the trial court, *Teague*'s rationale of protecting the reasonable good faith decisions of the trial court did not apply.[353]

Indeed, in one sense, the error itself did not arise until after the defendant's conviction was final. As Judge Lumbard wrote:

> Because recantations typically do not occur until after the trial and direct review are completed, the state's failure to reverse the conviction does not speak to the conduct of the state's criminal proceedings. A habeas petitioner alleging that a crucial trial witness perjured himself does not contend that the state conducted the trial illegally or otherwise acted in an unconstitutional fashion. Instead he contends, as Sanders does here, that it is unlawful for the state to *continue* his custody in light of the recantation—a violation for which a writ of habeas corpus is the petitioner's central remedy.[354]

The court recognized that because the recanting witness did not come forward

346. Sanders v. Sullivan, 863 F.2d 218, 222 (2d Cir. 1988).

347. *Id.*

348. *Sanders*, 900 F.2d at 603.

349. *Id.* at 605.

350. *Sanders*, 863 F.2d at 222.

351. *Sanders*, 900 F.2d at 606.

352. *Id.* In dicta, the court also announced that even if *Teague* applied to the case and the rule regarding recanted testimony were found to be new, it would fall within *Teague*'s second exception because it was a watershed rule that affected the fundamental fairness and accuracy of the conviction. *Id.*

353. *Id.*

354. *Id.*

until two years after Sanders's conviction became final, Sanders had no other avenue for relief except collateral review.[355] If that relief were precluded by *Teague*, the "right to federal habeas relief against unlawful state custody would be emasculated."[356]

As the tone of the *Sanders* opinion amply demonstrates, the Second Circuit was distressed by the prospect of an innocent person remaining incarcerated as a result of a rule which, simply because the prosecution was not involved in the perjury, did not require the state to consider recanted testimony. Moreover, the court appeared to find equally distasteful the idea that the so-called novelty of a rule requiring consideration of recanted testimony might permit the state to maintain custody of an innocent person. The facts of the *Sanders* case are thus both unusual and unusually sympathetic. Nevertheless, the court's limitation of *Teague* to rules and errors that might have been cognizable by the trial court is an interesting approach, particularly in light of the Supreme Court's decision in *Sawyer v. Smith*, which was largely cast in terms of the good faith adjudication of the state courts.[357] At the very least, the *Sanders* rationale would permit habeas courts to consider novel claims that could not have been raised on direct review, including claims focusing on appellate delay and ineffective assistance of appellate counsel.[358] Indeed one of *Teague*'s serious failings is that it effectively forecloses any federal forum—and possibly any forum at all—for these types of claims. Thus, the *Sanders* decision may prove to be an instructive avenue of reasoning. It is simply too early to tell.

V. CONCLUSION

In many respects, the jury is still out on the effects of *Teague v. Lane* and its new doctrine of nonretroactivity. The initial response has been notably hostile.[359] There is much concern that *Teague* will eviscerate federal habeas corpus and rob the lower federal courts of their proper function of providing as-of-right review for all federal constitutional issues in criminal cases, substituting discretionary Supreme Court review, and, in the process, retarding the articulation of federal rights.[360]

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355. *Id.*

356. *Id.*

357. *See supra* notes 143-46 and accompanying text.

358. See *supra* note 338 and accompanying text.

359. Liebman notes various examples, including the following: S. 1757, 101st Cong. 1st Sess., § 2262, 135 CONG. REC. S 13475 (Oct. 16, 1989) (proposal of Senator Biden to repeal *Teague* legislatively in capital cases and to reinstate the pre-existing three factor test); ABA Task Force on Death Penalty Habeas Corpus, *Toward a More Just and Effective System of Review in State Death Penalty Cases* (Oct. 1989) (proposing that any claim that casts doubt on the accuracy of the sentencing determination or the guilt of the capital defendant be governed by the law existing at the time the habeas court considers the petition); *Resolution of the Litigation Section of the ABA Regarding Reform of Habeas Corpus on Capital Cases* (Adopted September 9, 1989), at 4 (endorsing the Biden approach for guilt phase claims in capital cases but making all new constitutional rules affecting the sentencing phase fully retroactive); *Statement of the Civil Rights Committee of the Association of the Bar of the City of New York Concerning Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. A.B. CITY OF N.Y. 848 (1989) (proposal to make all legal changes fully retroactive in capital cases). 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 124-25 (Supp. 1989).

360. 1 J. LIEBMAN, *supra* note 5, § 22A.1, at 124-25 (Supp. 1989).

At one and the same time, things appear to be both better and worse than this litany of evils would indicate. They are better because it appears that fewer cases involve *Teague* claims than might have been anticipated; that fewer of these involve genuinely novel issues; and that most involve the application of after-decided rules to habeas petitioners. They are worse because courts have tended to apply *Teague* broadly, to find most rules novel and to fit few within the *Teague* exceptions. They are worse still because *Teague* interacts with other rules of habeas practice and procedure to create a cruel dilemma for what is the most vulnerable class of prisoners—primarily capital defendants raising claims for the first time either on habeas or in a second petition—in which their procedural lapse is forgiven only by a showing that bars the court from hearing their claim under *Teague*. Thus, although the systemic effect of *Teague* may be less drastic than predicted, that effect will be felt very strongly by certain individuals. While the interests of finality are all well and good, it is a troubling rule indeed which permits one person to be executed and another to stay alive simply because of the date on which a petition for certiorari to the United States Supreme Court is denied.