CHIPPING AWAY AT THE GREAT WRIT: WILL DEATH SENTENCED FEDERAL HABEAS CORPUS PETITIONERS BE ABLE TO SEEK AND UTILIZE CHANGES IN THE LAW?

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Introduction 357
I. The *Teague* and *Penry* Decisions 364
  A. *Teague v. Lane* 364
  B. *Penry v. Lynaugh* 372
II. Applying *Teague* and *Penry*: The Unanswered Questions 375
  A. When Does a Decision Announce a New Rule? 376
    1. *Sawyer v. Butler* 381
    2. *Butler v. McKellar* and Answering the New Rule Question 384
  B. The Implicit in the Concept of Ordered Liberty Exception .. 387
    1. *Sawyer v. Butler* 392
    2. *Hopkinson v. Shillinger* 393
III. *Teague* Rules in the Capital Sentencing Context: Final Reflections on Finality 396
Conclusion 399
Postscript 401
  A. *Butler v. McKellar* 402
  B. *Saffle v. Parks* 404
  C. *Sawyer v. Smith* 407
  D. Remaining Issues and Recent Developments after *Butler*, *Parks*, and *Sawyer* 410

INTRODUCTION

The writ of federal habeas corpus generally provides an opportunity for those convicted in state court to challenge their conviction or sentence based on any federal constitutional claim that has been properly preserved for federal court review.[1] Under present law "[t]he Supreme Court . . . or a district

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1. 28 U.S.C. §§ 2241-2255 (1988). *Cf.* Stone v. Powell, 428 U.S. 465 (1976) (fourth amendment claims are not cognizable in federal habeas corpus proceedings where the petitioner has had a full and fair opportunity to litigate the claim in state court). *But see* Kimmelman v. Morrison, 477 U.S. 365 (1986) (the principles of *Stone* are not applicable to federal habeas consideration of a claim of ineffective assistance of counsel where the principal argument regarding ineffectiveness concerns the failure to raise a fourth amendment claim); Rose v. Mitch-

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court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[2]

The function and scope of the federal habeas corpus remedy in the judicial review of state convictions and sentences has been the subject of considerable controversy. Some espouse an expansive view of the writ, a view articulated by the Supreme Court as far back as 1868 when it stated that the habeas corpus statute "brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."[3]

Others argue that this expansive reach of the remedy lacks both historical foundation and contemporary justification. They assert that the federal habeas remedy should be limited to what they understand to be its narrower, common law origins,[4] noting that "[u]ntil the early years of this century, the

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ell, 443 U.S. 545 (1979) (*Stone* does not preclude federal habeas consideration of claims of racial discrimination in the selection of members of a state grand jury); Jackson v. Virginia, 443 U.S. 307 (1979) (a claim of whether there is sufficient evidence of a necessary element of a crime to justify a rational trier of fact to find guilt beyond a reasonable doubt is cognizable in federal habeas corpus, notwithstanding *Stone*); Duckworth v. Egan, 109 S. Ct. 2875, 2881 (1989) (O'Connor, J., concurring) (the writ of federal habeas corpus should not be available for *Miranda* claims when the petitioner has had a full and fair opportunity to raise the claims in state court). As to the writ's applicability to claims that have not been properly preserved for federal court review because of the failure of the petitioner to comply with reasonable state procedural rules in presenting the claim to the state courts, *i.e.*, procedurally defaulted claims, see Murray v. Carrier, 477 U.S. 478, 496 (1986) (absent cause for the failure to raise a claim and prejudice resulting from that failure, federal constitutional claims which are not raised in compliance with reasonable state procedural rules are not cognizable in federal habeas proceedings unless the constitutional violation has probably resulted in the conviction of an innocent person). *See also* Smith v. Murray, 477 U.S. 527 (1986); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977). The procedural default doctrine is equally applicable in capital cases. *Smith*, 477 U.S. at 538 ("We reject the suggestion that the principles of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws.").

2. 28 U.S.C. § 2254(a) (1988).

3. *Ex Parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1868) (emphasis omitted). In *McCardle*, the Court construed the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385, which, with some slight modifications, remains the habeas corpus statute today. J. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2, 10 n.8 (1988); *see also* Mackey v. United States, 401 U.S. 667, 685-86 (1971) (Harlan, J., concurring in part and dissenting in part) ("habeas lies to inquire into every constitutional defect in any criminal trial, unless the error committed was knowingly and deliberately waived or constitutes mere harmless error"); Fay v. Noia, 372 U.S. 391, 426 (1963) ("Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum."). For a thorough discussion of the "expansion" of the statutory federal habeas remedy since 1867, see L. YACKLE, POSTCONVICTION REMEDIES § 19, 84-92 (1985).

4. For criticism of what has been perceived to be unjustified expansion of the federal habeas remedy, see Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judg-*

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substantive scope of the federal habeas corpus statutes was defined by reference to the scope of the writ at common law, where the courts' inquiry on habeas was limited exclusively 'to the jurisdiction of the sentencing tribunal.' "[5] The expansion of the writ, they contend, produces two unacceptable consequences. First, it undermines the finality of the state criminal process, thereby generating disrespect for the law among citizens.[6] Second, it undercuts federalism interests by frustrating state court efforts to faithfully apply federal constitutional law principles.[7]

More specifically, critics of an expansive view of the writ feel that the federal habeas remedy duplicates the efforts of the state courts, assuming the state courts have afforded the accused a full and fair hearing on the federal constitutional claims.[8] As Justice Harlan noted,

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ments, 38 U. CHI. L. REV. 142 (1970); Oaks, *Legal History in the High Court — Habeas Corpus*, 64 MICH. L. REV. 451, 458-68 (1966); *see also* Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 993-94 (1985) (discussing dissatisfaction with the expansion of the writ expressed by Chief Justice Rehnquist, Justices O'Connor and White, former Chief Justice Burger, and former Justice Powell).

5. Kuhlmann v. Wilson, 477 U.S. 436, 445-46 (1986) (quoting Stone v. Powell, 428 U.S. 465, 475 (1976)); *see also Stone*, 428 U.S. at 474-82; *Schneckloth*, 412 U.S. at 250-75 (Powell, J., concurring); Bator, *supra* note 4, at 475; Oaks, *supra* note 4, at 458-68.

6. *See, e.g.*, *Mackey*, 401 U.S. at 690-91 (Harlan, J., concurring in part and dissenting in part). Justice Harlan asserted that

> [i]t is . . . a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view. . . . If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

Id.

7. *See* Snead v. Stringer, 640 F.2d 383 (5th Cir.), *cert. denied*, 454 U.S. 988, 993-94 (1981) (Rehnquist, J., dissenting from a denial of certiorari) ("It is scarcely surprising that fewer and fewer capable lawyers can be found to serve on state benches when they may find their considered decisions overturned by the ruling of a single federal district judge on grounds as tenuous as these."); *see also* Bator, *supra* note 4, at 451 ("I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective sense of conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 624-25 (1981) ("If we want the state judges to internalize the sense that they, too, speak for the Constitution — that it is *their* Constitution — we must not too easily construct our jurisdictional and remedial rules on the premise that they can't and won't speak for the Constitution.").

8. *See generally* Bator, *supra* note 4, at 507-28. *See also* Lucas, *Minority Report*, in RECOMMENDATIONS AND REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON DEATH PENALTY HABEAS CORPUS 1 (October 1989) [hereinafter *Minority Report*]:

> I agree that federal habeas corpus is an important safeguard of justice in state death penalty cases. I would emphasize, however, that habeas corpus is an extraordinary remedy, heretofore used in very limited situations. Contrary to the thrust of the majority report, federal habeas challenges to state death penalty judgments should not be

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> [b]y hypothesis, a final conviction, state or federal, has been adjudicated by a court cognizant of the Federal Constitution and duty bound to apply it. To argue that a conclusion reached by one of these 'inferior' courts is somehow forever erroneous because years later this Court took a different view of the relevant constitutional command carries more emotional than analytic force.[9]

These critics reject the notion that increasing the number of opportunities for review necessarily enhances the likelihood that the ultimate outcome will be correct. They contend that the federal habeas remedy should not provide an avenue to essentially re-litigate state trials — even when the defendant's life is at stake.[10]

In response to these criticisms, proponents of the broader view of the federal habeas remedy assert that experience has shown the need for a federal forum to review federal rights, particularly in the cases of capital defendants. The rate of success of death sentenced individuals in federal habeas proceedings, it is argued, strongly supports this claim.[11] Proponents of an expansive

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> based on an 'appellate model.' Federal district court and court of appeals judges should not be expected to sit as 'super-supreme courts.' Their role in these cases should be understood as *collateral* both to the original conviction and to any state habeas proceedings.

Id. (emphasis in original).

9. *Mackey*, 401 U.S. at 689-90 (Harlan, J., concurring and dissenting). Justice Harlan further noted:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Id. at 690 (quoting Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)); *see also* Bator, *supra* note 4, at 509 ("There is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse.").

10. As the Court stated in Barefoot v. Estelle, 463 U.S. 880, 887-88 (1983),

> [D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception. When the process of direct review — which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari — comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited.

Id.

11. *See id.* at 915 (Marshall, J., dissenting) (between 1976 — the date of Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976), decisions which rejected broad-based constitutional challenges to the capital punishment statutes of those states — and 1983, over 70% of the cases that had reached and were resolved by the federal courts of appeals were decided in favor of the death sentenced petitioner); *see also* J. LIEBMAN, *supra* note 3, at § 2.2, 23-24 n.97 (as of August 1985, the success rate for petitioners in habeas corpus appeals in nonsuccessive-petition cases since *Gregg* was 49%). Although these figures may be somewhat misleading given the systemic challenges to state capital penalty statutes that needed to be resolved following the 1976 Supreme Court decisions, recent figures suggest that the success rate of death sentenced federal habeas petitioners remains high. Former Chief Judge of the United States Court of Appeals for the Eleventh Circuit, John Godbold, made "a horseback guess that probably now a third of the [death] cases

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federal remedy also point to the pressures on state court judges in high visibility proceedings, such as capital cases, and emphasize that because many state court judges are popularly elected, they lack the independence of their federal counterparts.[12] They also assert that increased opportunities for review enhance the likelihood that the outcome will be correct, a particularly important goal when the stakes are life or death.[13] Finally, they suggest that federal review is not designed to show disrespect for the state courts but simply to insure that the decision to deprive an individual of his liberty or even his life is constitutional.[14]

In recent years, the debate over the reach of the federal habeas remedy has divided the Supreme Court, with a majority exhibiting an increased willingness to limit the scope of the writ, especially in death cases.[15] Some attri-

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have constitutional error of such dimension that the petitioner is entitled to an order." Godbold, *Pro Bono Representation of Death Sentenced Inmates*, 42 REC. A.B. CITY N.Y. 859, 873 (1987).

12. *See* Stone v. Powell, 428 U.S. 465, 525 (1986) (Brennan, J., dissenting). Brennan stated that

> [e]nforcement of *federal* constitutional rights that redress constitutional violations directed against the "guilty" is a particular function of *federal* habeas review, lest judges trying the "morally unworthy" be tempted not to execute the supreme law of the land. State judges popularly elected may have difficulty resisting popular pressures not experienced by federal judges given lifetime tenure designed to immunize them from such influences, and the federal habeas statutes reflect the congressional judgment that such detached federal review is a salutary safeguard against *any* detention of an individual "in violation of the Constitution or laws . . . of the United States."

Id. (emphasis in original); *see also* Coleman v. McCormick, 874 F.2d 1280, 1295 n.8 (9th Cir. 1989) (Reinhardt, J., concurring) (Judge Reinhardt, referring to the defeat of three California Supreme Court justices in the November 1986 merit retention election who were portrayed as favoring capital defendants, noted that "the system of direct election of judges can impose public opinion upon 'politically neutral' constitutional interpretations."). For other examples of judicial races where death penalty decisions have become electoral issues, see Tabak, *The Death of Fairness*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 846-47 (1986).

13. *See McCormick*, 847 F.2d at 1295 n.8 ("[M]ere redundance of federal review of state imprisonment poses a formidable barrier to high error rates. Each successive decision diminishes the possibility of unconstitutional executions."); *see also* Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045 (1977) ("redundancy fosters greater certainty that constitutional rights will not be erroneously denied").

14. *See also* Mercer v. Armontrout, 864 F.2d 1429, 1431 (8th Cir. 1988) ("What separates the unlawful killing by man and the lawful killing by the state are the legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence. If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon."); Bass v. Estelle, 696 F.2d 1154, 1162 (5th Cir.) (Goldberg, J., specially concurring) ("Yes, there must be an end to criminal litigation. Our duty as judges, a duty we may not shirk, is to ensure that the ending is a *constitutional* one. Some things go beyond time."), *cert. denied*, 464 U.S. 865 (1983). *See generally* Cover & Aleinikoff, *supra* note 13.

15. *See, e.g.*, Dugger v. Adams, 109 S. Ct. 1211 (1989) (a claim that is relevant to the reliability and accuracy of the capital sentencing determination does not necessarily come within the fundamental miscarriage of justice exception permitting procedurally defaulted claims to be cognizable in federal habeas proceedings); Smith v. Murray, 477 U.S. 527 (1986) (inadvertence or ignorance will not constitute cause in determining whether procedurally defaulted claims should be entertained in federal habeas proceedings irrespective of whether the question arises in a death case); Autry v. McKaskle, 465 U.S. 1090 (1984) (a rule granting an

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bute the relatively low number of executions since 1976,[16] the year that the Court rejected a broad based eighth amendment challenge to certain state capital punishment statutes,[17] to the availability and scope of the federal habeas remedy. Congress, however, has repeatedly rebuffed recent efforts to limit the reach of the federal habeas corpus remedy.[18]

How this debate over the proper scope of federal habeas corpus is re-

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automatic stay, regardless of the merits when the applicant in a death case is seeking review in the Supreme Court of the denial of his first federal habeas petition is not warranted); Barefoot v. Estelle, 463 U.S. 880, 889 (1983) (permitting an expedited appeals process when federal circuit courts of appeal are asked to review decisions in federal habeas proceedings that involve death cases as long as counsel is given an "adequate opportunity to address the merits" and knows that she is expected to do so); *see also* Powell, Remarks on Capital Punishment at the Criminal Justice Section of the American Bar Association Meeting in Toronto, Can. (Aug. 7, 1988). The former Justice opined that:

> A fundamental reason for the delay [in the execution of death sentences] is our unique system of dual collateral review of criminal convictions.... [B]y virtue of the federalization of death penalty jurisprudence since *Furman*, federal claims can be raised in virtually all death cases. A great majority — perhaps all — of the states also now have their own systems of collateral review of criminal convictions.
>
> The scope of both federal and state collateral review for many years was narrow ... (but both now) provide expanded opportunity for relitigation of prisoners' claims.
>
> The result has been a burdensome increase in habeas corpus litigation that surely Congress did not anticipate.... I believe that most judges, federal and state, would agree that the dual post-conviction remedies are abused.

Id. at 5-6. Justice Powell struck the same theme four years earlier in Woodard v. Hutchins, 464 U.S. 377, 377-80 (1984) (per curiam) (Powell, J., concurring). For similar views, see also Statement of former Attorney General William French Smith, *Proposals for Habeas Corpus Reform*, in CRIMINAL JUSTICE REFORM: A BLUEPRINT 137, 145-46 (P. McGuigan & R. Rader eds. 1983); *Who is on Trial? Conflicts between the Federal and State Judicial Systems in Criminal Cases, 1988: Hearing Before the Subcomm. of the Comm. on Government Operations, House of Representatives*, 100th Cong., 2nd Sess., at 26 (Feb. 26, 1988) (statement of Paul Cassell, Associate Deputy Attorney General, U.S. Department of Justice) [hereinafter *Hearing*].

16. As of September 21, 1990, there have been 140 executions. N.Y. Times, Sept. 22, 1990, at A24, col. 5.

17. In Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); the Supreme Court rejected eighth amendment challenges to the death penalty statutes of Georgia, Florida, and Texas. In these decisions, the Court upheld so-called guided discretion statutes that limit and channel the discretion afforded those responsible for determining if death is an appropriate penalty, whether those responsible be a judge, the jury or both. At the same time, the Court held that mandatory death penalty statutes (*i.e.*, those that don't allow a full consideration of the offender and all the circumstances surrounding the offense) are unconstitutional. *See* Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Green v. Oklahoma, 428 U.S. 907 (1976); *see also* Summer v. Shuman, 483 U.S. 66 (1987) (holding unconstitutional a mandatory death sentence for a prisoner who committed murder while serving a life sentence without the possibility of parole).

18. "Congress has done nothing to shrink the set of claims cognizable on habeas since it passed the Habeas Corpus Act of 1867." Teague v. Lane, 109 S. Ct. 1060, 1087 (1989) (Brennan, J., dissenting); *see also* Stone v. Powell, 428 U.S. 465, 525-30 (1976) (Brennan, J., dissenting). Various legislative proposals have been suggested to limit the reach of the remedy. These include precluding federal habeas review absent a colorable showing of factual innocence, *see* Friendly, *supra* note 4; precluding federal habeas relief of any claim where the state courts have provided a full and fair opportunity to have the claim considered, *see* Bator, *supra* note 4; and limiting federal habeas to claims relevant to factual innocence assuming the state courts have provided a full and fair hearing as to other claims — a less restrictive combination of the first

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solved by Congress and/or the Supreme Court holds enormous importance, particularly for those sentenced to death in the state courts. In its 1988-89 term, the Supreme Court handed down two decisions, *Teague v. Lane*[19] and *Penry v. Lynaugh*,[20] which graphically indicate that a slim majority of the Court is displeased with the present state of the federal habeas writ. Both decisions offer clues as to future development of habeas doctrine. Read together, they reflect a limited role for the federal habeas corpus remedy in the judicial review process of those convicted in state courts, including those sentenced to death.[21]

In *Teague*, a four person plurality concluded that, subject to what appeared to be two narrow exceptions,[22] federal habeas corpus petitioners would not be permitted to seek a new rule decision. Nor were they to get the benefit of decisions announcing new rules unless those decisions were rendered prior to their convictions becoming final.[23] The *Teague* plurality specifically left open the question of whether its conclusions should be equally applicable to errors in the capital sentencing process.[24]

In *Penry*, a five person majority concluded that they should.[25] More fundamentally, the *Penry* decision implicitly manifests an impatience with the pace of the judicial review process in death cases and specifically a distaste for the role played by the federal habeas remedy in that process. To critics of *Teague* and *Penry*, however, this impatience and distaste has resulted in an approach which raises the spectre that because of timing fortuities relating to the pace of litigation, the state will be allowed to take a human life although

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two approaches, *see* Schneckloth v. Bustamonte, 412 U.S. 218, 266 (1973) (Powell, J., concurring).

Regarding the merits of these suggested legislative changes, the fundamental question is whether federal habeas should be viewed as an integral part of the judicial review process of state criminal convictions or whether it should be seen as an extraordinary remedy available only to correct clear miscarriages of justice. *Compare* Harris v. Nelson, 394 U.S. 286, 290-91, 292 (1969) ("The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.... [I]ts ability to cut through barriers of form and procedural mazes . . . have always been emphasized and jealously guarded by courts and lawmakers."), *with* Barefoot v. Estelle, 463 U.S. 880 (1983). *See also* Yackle, *supra* note 4, at 1049 ("The apparent relationship of claims to 'factual guilt' . . . should have no bearing on petitioner's ability to litigate federal claims in a federal district court.").

For a discussion of some of the legislative proposals designed to limit the reach of the federal habeas remedy, see Yackle, *The Reagan Administration's Habeas Corpus Proposals*, 68 IOWA L. REV. 609 (1983); *see also Hearing, supra* note 15, at 5-61.

19. 109 S. Ct. 1060 (1989).

20. 109 S. Ct. 2934 (1989).

21. *See supra* notes 4-10 and accompanying text.

22. *See infra* text accompanying notes 46-48.

23. *Teague*, 109 S. Ct. at 1075. A state criminal conviction is final for this purpose when "the availability of [direct] appeal [has been] exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987).

24. "Because petitioner is not under sentence of death, we need not, and do not express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context." *Id.* at 1077 n.3.

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

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the manner in which the sentence was determined may in fact violate the Constitution.[26]

This Article analyzes the changes brought by *Teague* and *Penry*. After briefly summarizing the two decisions, it first addresses the problems that are likely to arise in the application of the *Teague/Penry* doctrine given the two exceptions to that doctrine and the fact that the doctrine only applies to decisions announcing new rules. Second, it considers whether the Court's conclusion in *Penry* that the *Teague* rules should govern in the capital sentencing context is correct as a matter of policy. The Article suggests that the Court was not correct and that because Congress clearly has the power to define the reach of the federal habeas remedy,[27] it should act to reverse the Court's action.

I.
THE *TEAGUE* AND *PENRY* DECISIONS

A. Teague v. Lane[28]

The questions presented in *Teague* revolved around the constitutional propriety, at Teague's trial, of the prosecution's use of peremptory challenges in an arguably racially discriminatory manner. Relying on both *Batson v. Kentucky*[29] and *Swain v. Alabama*,[30] Teague claimed that his rights under the

26. *See id.* at 2959 (Brennan, J., concurring in part and dissenting in part).

> This extension [of *Teague*] means that a person may be killed although she has a sound constitutional claim that would have barred her execution had this Court only announced the constitutional rule before her conviction and sentence became final. It is intolerable that the difference between life and death should turn on such a fortuity of timing, and beyond my comprehension that a majority of this Court will so blithely allow a State to take a human life though the method by which sentence was determined violates our Constitution.

27. Although Congress undoubtedly has the power to expand the reach of the remedy, its authority to significantly limit it is subject to some question. *See* Davis v. Adult Parole Authority, 610 F.2d 410 (6th Cir. 1979); U.S. v. Hayman, 187 F.2d 456 (9th Cir. 1950) (suggesting that the "suspension clause," U.S. CONST., art. I, § 9, cl. 2, places some limits on Congress' power to preclude or significantly limit the federal habeas remedy). *But cf.* Swain v. Pressly, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring). As Burger stated,

> The sweep of the suspension clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted . . . . The fact is that in defining the scope of federal collateral remedies the Court has invariably engaged in statutory interpretation, construing what Congress has actually provided, rather than what it constitutionally must provide . . . I do not believe that the suspension clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction.

Id.; *see also* L. Powell, Statement Before the Committee on the Judiciary of the United States Senate on Proposed Habeas Corpus Reforms (Nov. 8, 1989) (arguing that Congress may alter the habeas remedy); *Hearing, supra* note 15, at 15-16 ("[T]he right to habeas corpus set out in the Constitution was only intended as a check on abuses of authority by the federal government, and was not meant to provide a judicial remedy for unlawful detention by state authorities"). *See generally* L. YACKLE, *supra* note 3, at § 17, 77-80.

28. 109 S. Ct. 1060 (1989).

29. 476 U.S. 79 (1986).

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equal protection clause had been violated. He also asserted that the prosecutorial conduct had infringed his sixth amendment right to a jury drawn from a fair cross section of the community.[31]

In *Batson,* the Supreme Court had overruled its earlier holding in *Swain* that to make a prima facie case of racial discrimination regarding the use of peremptory challenges, a petitioner had to establish that the prosecutor had misused her peremptory challenges "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be."[32] *Batson* permitted a petitioner to make a prima facie showing of racial discrimination based solely on the use of peremptory challenges in her case.[33] If she did so, the burden then shifted to the state to offer a legitimate nonracial explanation for the use of its peremptories.[34]

In *Allen v. Hardy,*[35] however, the Supreme Court, applying the three pronged retroactivity test of *Linkletter v. Walker*[36] and *Stovall v. Denno,*[37] concluded that petitioners whose convictions were final before *Batson* would not get the benefit of that decision. Since Teague's conviction was final before *Batson* was decided,[38] *Allen* then precluded his *Batson* claim. Regarding Teague's contention that he was entitled to relief under *Swain,* the Court found the claim to be procedurally barred since it was not raised at trial or on direct appeal and there was no legitimate cause for the failure to do so.[39]

30. 380 U.S. 202 (1965), *rev'd,* 476 U.S. 79 (1986).

31. *See* Holland v. Illinois, 110 S. Ct. 803 (1990) (holding that the sixth amendment fair cross section requirement does not proscribe the use of peremptory challenges in an arguably racially discriminatory manner). *But see* Powers v. Ohio, 111 S. Ct. 1364 (1991) (holding that one need not be a member of the group discriminated against to bring an equal protection claim challenging such a practice, thus rendering the *Holland* holding of little practical significance).

32. *Swain,* 380 U.S. at 223.

33. *Batson,* 476 U.S. at 96.

34. *Id.* at 97.

35. 478 U.S. 255 (1986).

36. 381 U.S. 618 (1965).

37. 388 U.S. 293 (1967). This test requires a court to focus on three factors: (1) the purpose of the new rule (*i.e.*, is it designed, for example, to safeguard the integrity of the fact finding process); (2) the extent of the reliance by law enforcement on the old standard; and (3) the effect on the administration of justice of a retroactive application of the new standards. *Linkletter,* 381 U.S. at 636; *Stovall,* 388 U.S. at 297. Applying these standards, the Supreme Court, prior to *Teague,* had been most likely to find a change retroactive where the new rule "goes to the heart of the truthfinding function." *Hardy,* 478 U.S. at 259 (citing Solem v. Stumes, 465 U.S. 638, 645 (1984)).

38. Teague's conviction became final two and one-half years before *Batson* was decided. Teague v. Lane, 109 S. Ct. 1060, 1067 (1989).

39. *Teague,* 109 S. Ct. at 1067-69. In Harris v. Reed, 109 S. Ct. 1038 (1989), the Supreme Court held that "a procedural default does not bar consideration of a federal claim on . . . habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." *Id.* at 1043 (citation omitted). Even if the state court renders a ruling on the merits of the federal claim, federal habeas review is still precluded "as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision." *Id.* at 1044 n.10.

Teague never raised his *Swain* claim before the trial or appellate courts, *Teague,* 109 S. Ct. at 1067, and as a result the state courts never relied on a procedural bar in rejecting it. The Supreme Court concluded, however, notwithstanding *Harris,* that the claim was procedurally

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The Court found Teague's sixth amendment claim more difficult to resolve. In fact, the Court was unable to produce a majority opinion. Justice O'Connor, writing for a four person plurality,[40] first noted that to insure even-handed treatment, federal habeas corpus petitioners, like Teague, should only be able to seek and get the benefit of a favorable decision if the decision would be equally applicable to others similarly situated. Such an approach requires the retroactivity of a decision to be treated as a threshold question before the merits are addressed, an approach inconsistent with the Court's past practice not to address the question of retroactivity until a new rule decision was announced. Contrary to this practice, however, Justice O'Connor concluded that fairness dictates that the retroactivity of a claim be addressed prior to the merits being considered.[41]

As to whether Teague's sixth amendment claim would be retroactive assuming a ruling in his favor, she concluded that, subject to two seemingly narrow exceptions, new constitutional rules of criminal procedure should not be applicable to those cases which have become final before the new rules are announced.[42] Put differently, she believed that federal habeas corpus petitioners generally should be precluded from either seeking new rules or taking advantage of new rule decisions rendered after their convictions became final.[43] Believing that a decision in Teague's favor on his sixth amendment claim

barred since the *Harris* plain statement rule only comes into play when "a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding." *Teague*, 109 S. Ct. at 1068. If the state courts did not have an opportunity to consider the claim, then the federal habeas court must first consider whether the federal habeas exhaustion requirement has been satisfied before addressing the procedural default question. *See* 28 U.S.C. § 2254(b) (1988). To do so, it must apply state procedural default rules in determining whether adequate remedies remain in the state court, notwithstanding the seeming default. *See* Engle v. Issac, 456 U.S. 107, 125-26 n.28 (1982). If it concludes that the state courts would not entertain the claim, then state judicial remedies have been exhausted for the purpose of the federal habeas exhaustion requirement. If there is some ambiguity as to whether the state courts would entertain the claim, the better practice is to remand the matter to the state courts for this determination. *Teague*, 109 S. Ct. at 1083 (Stevens, J., concurring). If the federal habeas court determines the claim has been exhausted, it then turns to whether there is some basis for excusing the procedural default so that the claim will be cognizable in federal habeas. *Teague*, 109 S. Ct. at 1068-69. In *Teague*, the Court concluded there was no basis for excusing the procedural default.

40. Justice O'Connor's opinion was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.

41. "Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated." *Teague*, 109 S. Ct. at 1070.

42. In reaching this conclusion, the plurality largely adopted Justice Harlan's views of the role of the federal habeas remedy in the review of state criminal convictions as stated in Desist v. United States, 394 U.S. 244, 256 (1969) (Harlan, J., dissenting), and Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., separate opinion). *Teague*, 109 S. Ct. at 1071-78; *see also infra* text accompanying notes 169-78.

43. O'Connor stated that "implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated." *Teague*, 109 S. Ct. at 1078 (emphasis in original).

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would announce a new rule, that neither of the two exceptions were applicable, and therefore that such a decision could not be utilized by a federal habeas petitioner whose conviction was already final, she concluded that the merits of Teague's sixth amendment claim need not be addressed. Specifically, she emphasized that if Teague were to prevail on his sixth amendment claim, the Court would have to disregard its previous statements that the fair cross section requirement was not applicable to the petit jury.[44] She thus had no problem in finding that a decision in Teague's favor would announce a new rule.

In explaining the *Teague* plurality's approach to federal habeas consideration of claims seeking new rules, Justice O'Connor recognized that it would often be difficult to determine when a decision would announce a new rule. Regarding this definitional question, she stated that a case "announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [or] . . . to put it differently . . . if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[45]

The *Teague* plurality did identify two exceptions to its general preclusion on federal habeas petitioners seeking or benefitting from new rule decisions. Both exceptions were drawn from Justice Harlan's opinion in *Mackey v. United States*.[46] First, a new rule could be sought or applied retroactively in cases where the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority."[47] Second, "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty." ' "[48]

As to these exceptions, the *Teague* plurality held the first to be inapplicable to Teague's sixth amendment claim, since the exception was intended to cover substantive due process challenges to the state's power to criminalize private conduct — an issue absent in *Teague*.[49] It concluded that the second exception was equally inapplicable since the exception is limited to "watershed rules of criminal procedure,"[50] or "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[51] In this context, Justice O'Connor further noted "it unlikely that many such components of basic due process have yet to emerge."[52]

The plurality opinion declined to address whether its "retroactivity" approach would apply to capital sentencing claims since Teague was not under a

44. *Id.* at 1065, 1070, 1078.

45. *Id.* at 1070 (emphasis in original).

46. 401 U.S. 667 (1971).

47. *Id.* at 1075. This exception was taken verbatim from Justice Harlan's opinion in *Mackey*, 401 U.S. at 692. Harlan wrote, "there is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Id.* at 693.

48. *Teague*, 109 S. Ct. at 1073 (citations omitted).

49. *Id.*

50. *Id.* at 1075.

51. *Id.* at 1076-77.

52. *Id.* at 1077.

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sentence of death.[53] The opinion did emphasize, however, that the finality concerns which in part prompted its decision were not limited to making convictions final, and thus were not inapplicable in the capital sentencing context.[54]

Crucial to the conclusions of the *Teague* plurality was its perception of the proper role of the federal habeas remedy in the review of state criminal convictions. The plurality recognized that the question of retroactivity was intertwined with the availability of federal collateral review of state criminal convictions.[55] Quoting Justice Harlan, the plurality declared that "the interest in leaving concluded litigation in a state of repose... may quite legitmately be found by those . . . defining the scope of the writ to outweigh . . . the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."[56] The plurality's view of the remedy, then, was shaped by its concerns with finality and by considerations of comity. It viewed federal habeas relief primarily in terms of deterrence: the writ's purpose is to insure that state trial and appellate judges "conduct their proceedings in a manner consistent with established constitutional standards,"[57] and not to provide a federal forum for the review of federal constitutional claims or as a substitute for direct review. Given these conclusions, it should not be surprising that the plurality believed that, except in rare circumstances, federal habeas petitioners should not be able to seek or to benefit from decisions announcing new rules. In other words, the plurality looked not to Teague's sixth amendment claim, but to its perception of the appropriate role of the federal habeas remedy in the review of state criminal convictions to decide the "retroactivity" question presented.[58]

The remaining five members of the court split 1-2-2 on Teague's sixth amendment claim. Justice White concurred only in the judgment of the plurality. He wrote that the result reached in the plurality opinion "is an acceptable application in collateral proceedings of the theories embraced by the Court in cases dealing with direct review, and I concur in that result."[59] Justice White's reference to the Court's retroactivity decisions in direct review cases was in large part to the Court's holding two terms earlier in *Griffith v. Ken-*

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53. *Id.* at 1077 n.3.

54. *Id.* In asserting that collateral challenges in capital cases undermined society's interest in finality, the Court noted that "for the ten year period from 1977-1987, the average elapsed time from the imposition of a capital sentence to execution was 77 months." *Id.*

55. *See id.* at 1074 (" 'From this aspect, the problem becomes not so much one of prospectivity or retroactivity of the rule but rather of the availability of collateral attack to go behind the otherwise final judgment of conviction . . . for the potential availability of collateral attack is what created the retroactivity problem . . . in the first place.' " (quoting Mishkin, *Foreward: The High Court, The Great Writ and The Due Process of Time and Law*, 79 HARV. L. REV. 56, 77-78 (1965))).

56. *Id.* at 1072 (quoting Mackey v. United States, 401 U.S. 667, 682-83 (1971)).

57. *Id.* at 1073 (quoting Desist v. United States, 394 U.S. 244, 262-63 (1969)).

58. *Id.* at 1072.

59. *Id.* at 1079 (White, J., concurring).

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tucky.[60] *Griffith* contained an extensive discussion of whether, for retroactivity purposes, the Court should differentiate between cases decided before a conviction became final and those decided after that time, with criminal defendants getting the benefit of all decisions rendered before their convictions became final.[61] In *Griffith*, the Court held that criminal defendants would get the benefit of all decisions rendered before their convictions became final, even if the decision represented a "clear break" with the past.[62] Since Griffith, however, had relied on a decision handed down before his conviction became final, the Court did not have to address whether those pursuing federal collateral remedies at the time the decision was announced could also get the benefit of that decision.

Justice White dissented in *Griffith*.[63] For retroactivity purposes, he rejected any distinction between cases on direct versus cases on collateral review. Rather, he believed the Court should adhere to the retroactivity standards set out in *Linkletter v. Walker* and *Stovall v. Denno*.[64] White's concurrence in *Teague* was undoubtedly based on the *Griffith* holding. His brief concurrence also made no reference to the question of the applicability of the *Teague* plurality rules to capital sentencing claims.

Justice Stevens, in an opinion joined in part by Justice Blackmun, generally subscribed to the *Teague* plurality's retroactivity doctrine.[65] However, he

60. 479 U.S. 314 (1987).

61. In Johnson v. New Jersey, 384 U.S. 719, 732 (1966), and Stovall v. Denno, 388 U.S. 293, 300 (1967), the Supreme Court held that the three pronged retroactivity standard for cases pending in federal collateral review proceedings, first announced in Linkletter v. Walker, 381 U.S. 618 (1965), should also be applied to convictions pending on direct review. *See supra* note 37. In his opinions in *Desist* and *Mackey*, Justice Harlan took issue with this proposition. He believed that all new rule decisions "must at a minimum be applied to all those cases which are still subject to direct review by [the Supreme] Court at the time the 'new' decision is handed down." *Desist*, 394 U.S. at 258; *see also Mackey*, 401 U.S. at 677-81. To not allow cases on direct review the benefit of new rule decisions, according to Harlan, would be for the Court to act more as a legislative than a judicial body. *See id.* at 679.

Implicit in Harlan's view is the notion that Supreme Court review is a matter of right — a questionable proposition. *See* Ross v. Moffitt, 417 U.S. 600 (1974). Not permitting individuals whose cases are pending on direct review to take advantage of new rule decisions might be better justified by a concern for judicial integrity. Once the new rule decision is announced, judicial integrity concerns would warrant that the court apply that decision to cases pending before it raising the same issue. Griffith v. Kentucky, 479 U.S. 314, 322-23 (1987). Justice Harlan also emphasized that not allowing those on direct review the benefit of new rule decisions would result in similarly situated individuals being treated differently solely because of the fortuity of which case the Supreme Court chose to accept for review. *Desist*, 394 U.S. at 258-59. In United States v. Johnson, 457 U.S. 537 (1982), the Court took the first step towards adopting the Harlan position, holding that cases not yet final at the time any new rule decision was announced would get the benefit of that decision when the decision was not a clear break with the past. The question presented in *Griffith* was whether *Johnson* should be extended to clear break decisions.

62. *Griffith*, 479 U.S. at 328.

63. *Id.* at 329 (White, J., dissenting, joined by Rehnquist, C.J. and O'Connor, J.).

64. These cases are discussed *supra* note 37 and accompanying text.

65. *Teague*, 109 S. Ct. at 1080 (Stevens, J., concurring) (noting that "[i]n general, I share Justice Harlan's views about retroactivity").

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disagreed with the plurality on two significant points. First, he believed that the retroactivity claim should not be addressed until the right had been established.[66] While he agreed that the retroactivity of a new rule decision should generally be decided at the same time the new rule is announced, he believed the Court should first determine whether there was any constitutional violation. Implicitly then, he disagreed with the conclusion that federal habeas petitioners should not be able to seek new rules. He further noted that "until a rule is set forth, it would be extremely difficult to evaluate whether the rule is 'new' at all. If it is not, of course, no retroactivity question arises."[67] Second, Stevens disagreed with the plurality's perception of the reach of the implicit in the concept of ordered liberty exception. The *Teague* plurality had seemingly limited this exception to claims where the factual accuracy of the verdict is significantly threatened. Stevens argued that claims undermining the fundamental fairness of the proceeding should also fall within this exception.[68] He concluded that since a claim of racial discrimination in jury selection implicated fundamental fairness concerns, such a claim, if meritorious, should be applied retroactively.[69]

Applying this approach to the question presented in *Teague*, Justice Stevens concluded that Teague had set forth a meritorious claim. However, because the rule of *Batson v. Kentucky*[70] was unavailable to Teague in light of *Allen v. Hardy*,[71] and because Teague's sixth amendment contention was analogous to his *Batson* claim, Stevens reasoned that Teague should not be entitled to relief.[72] Finally, Stevens noted that the principle of finality, which in great part drove the plurality approach of limited retroactivity to cases in federal collateral review, is "wholly inapplicable to the capital sentencing context."[73]

Justice Brennan, in a dissent joined by Justice Marshall, took issue with most of the plurality's conclusions regarding Teague's sixth amendment claim. First, he rejected the notion that if other individuals whose convictions had already become final could not get the benefit of a decision in Teague's favor, then the Court should decline to entertain Teague's claim.[74] Although he recognized that as a matter of discretion it might be best for the Court to address claims on direct rather than collateral review, he believed that if the Court chose to do so in all cases, an "opportunity to check constitutional violations and to further the evolution of our thinking in some area of the law would in

66. *Id.* at 1079-80.

67. *Id.* at 1079-80 n.2.

68. *Id.* at 1080-81. He noted that the plurality's definition of this exception differed significantly from that set forth by Justice Harlan in *Mackey*.

69. *Id.* at 1081.

70. 476 U.S. 79 (1986).

71. 478 U.S. 255 (1986).

72. *Teague*, 109 S. Ct. at 1081-82.

73. *Id.* at 1081 n.7.

74. *Id.* at 1090 (Brennan, J., dissenting).

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the meanwhile [be] lost."[75] Further, he noted, the refusal of the court to consider the merits of federal habeas petitions seeking new rules would also preclude the Court from using those cases to resolve the questions presented in a manner favorable to the state, or to resolve any uncertainty in the law.[76] Consequently, Brennan saw no need to address whether the Court should abandon the three-factor approach set out in *Linkletter* and *Stovall* in favor of the plurality's new approach, since he believed that any question of the retroactivity of Teague's sixth amendment claim (if Teague were to prevail) should not control whether the Court should address the merits of the claim in Teague's case.[77]

Brennan also noted that even if he were to apply the plurality approach, Teague's claim should be considered since a decision in Teague's favor would not announce a "new rule," but rather would "flow[ ] quite naturally" from earlier precedents which prohibit race-based exclusion of individuals from jury service.[78] Also, echoing Justice Stevens, he concluded that Teague's claim is of such a nature to be "implicit in the concept of ordered liberty."[79] Finally, like Justice White, he did not specifically address the applicability of the plurality approach to death cases.

Like the *Teague* plurality, Justice Brennan recognized that the retroactivity issue really involved the question of the reach of the federal habeas remedy. Unlike the plurality, however, he understood federal habeas, subject to some limited exceptions, to provide a remedy "whenever a person's liberty is unconstitutionally restrained."[80] Finding no indication that Congress had rejected

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75. *Id.* at 1090-91. Brennan added that,

> the uniform treatment of habeas petitioners is not worth the price the plurality is willing to pay. Permitting the federal courts to decide novel habeas claims not substantially related to guilt or innocence has profited our society immensely . . . . And although a favorable decision for a petitioner might not extend to another prisoner whose identical claim has become final, it is at least arguably better that the wrong done to one person be righted than that none of the injuries inflicted on those whose convictions have become final be redressed, despite the resulting inequality in treatment.

Id. at 1091.

76. *Id.* at 1088-89.

77. *Id.* at 1094.

78. *Id.* at 1092. Justice Brennan contrasted the plurality's new rule definition with that of former Justice Stewart in Milton v. Wainwright, 407 U.S. 371 (1972).

> An issue of the "retroactivity" of a decision . . . is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent, or disrupts a practice long accepted and widely relied upon.

Teague, 109 S. Ct. at 1087 n.4 (Brennan, J., dissenting) (quoting *Milton*, 407 U.S. at 381 n.2 (Stewart, J., dissenting)); *see also* United States v. Johnson, 457 U.S. 537, 547 (1982) (mere application of "settled precedents to new and different factual situations" is not a new rule decision); Lee v. Missouri, 439 U.S. 461 (1979) (a decision that "does not announce any 'new standards' of constitutional law not evident from" an earlier decision is not a new rule decision); Johnson v. New Jersey, 384 U.S. 719 (1966) (a decision that "had been fully anticipated" by an earlier decision or which was "already clearly foreshadowed" does not announce a new rule).

79. *Teague*, 109 S. Ct. at 1093.

80. *Id.* at 1084 (Brennan, J., dissenting). The limited exceptions to the general applicabil-

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that view,[81] he saw the plurality approach as an "unprecedented curtailment of the reach of the Great Writ."[82] This was an approach to which he was unwilling to acquiesce.

B. Penry v. Lynaugh[83]

Four months after *Teague*, the Court rendered its decision in *Penry v. Lynaugh*. Two merits issues were presented in *Penry*: whether, as applied, the Texas capital punishment scheme unconstitutionally precluded the sentencer from considering relevant mitigating evidence; and whether the eighth amendment prohibited Penry's execution because of mental retardation.[84] Because these claims arose in Penry's petition from a denial of federal habeas relief, a threshold issue for the Supreme Court was whether *Teague* would bar relief. The Court chose to address the *Teague* questions, notwithstanding the absence of briefing or oral argument on these issues.[85]

Justice O'Connor delivered the majority opinion in *Penry*. Three *Teague* issues were addressed, and her opinion was joined by different members of the Court on each issue. The first *Teague* issue was whether *Teague* should be applied to capital sentencing errors. The second *Teague* issue was whether a rule prohibiting the execution of mentally retarded individuals — arguably a "new rule" prohibiting certain types of punishment — should fall within the *Teague* exception to nonretroactivity for new rules which prohibit the state from criminalizing certain kinds of primary, individual conduct.[86] The third *Teague* issue was whether a decision that Penry's sentencer was precluded from considering mitigating evidence would announce a new rule within the meaning of *Teague*.

On the first issue, Justice White and the three other members of the *Teague* plurality joined Justice O'Connor's opinion concluding, with little discussion, that *Teague* applied to capital sentencing claims.[87] Justice O'Connor

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ity of the writ recognized by Brennan were those imposed by Stone v. Powell, 428 U.S. 465 (1976), and by principles of procedural default. 109 S. Ct. 1084, 1085 n.2, 1085-86.

81. Justice Brennan emphasized that Congress had taken no action to limit the claims cognizable in federal habeas despite the Court's "consistent interpretation of the federal habeas statute to permit adjudication of cases like Teague's." *Teague*, 109 S. Ct. at 1087. Consider, however, Chief Justice Rehnquist's remark 12 years before *Teague* that the Court had historically been willing "to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." Wainwright v. Sykes, 433 U.S. 72, 81 (1977). *But see* Murray v. Carrier, 106 S. Ct. 2661, 2679 (1986) (Brennan, J., dissenting) ("For while Congress did leave the federal courts considerable latitude to shape the availability of the writ, Congress did not issue this Court a mandate to sharpen its skills at ad hoc legislation."). Both *Sykes* and *Carrier* address the circumstances under which federal habeas courts should decide federal constitutional claims barred from consideration by state courts because of state procedural rules.

82. *Id.* at 1084.

83. 109 S. Ct. 2934 (1989).

84. *Id.* at 2941, 2943-44.

85. *Teague* was decided after oral argument in *Penry*. *Id.* at 2959.

86. *See supra* note 47 and accompanying text.

87. *Id.* at 2944.

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simply noted that the finality concerns which prompted *Teague* were also present in the review of errors in the capital sentencing process.[88] In a dissent joined by Justice Marshall, Justice Brennan objected to this extension of *Teague*. He remarked that relief would not be foreclosed if the claim had been reviewed before Penry's conviction became final, adding "[i]t is intolerable that the difference between life and death should turn on such a fortuity of timing."[89] The other two members of the Court, Justices Stevens and Blackmun, did not specifically address this question. Rather, Justice Stevens, as part of a concurrence joined by Justice Blackmun, stated that he "[did] not support the Court's assertion, without benefit of argument or briefing on the issue, that *Teague*'s retroactivity principles pertain to capital cases."[90]

On the second *Teague* issue, every member of the Court joined Justice O'Connor's opinion stating that *Teague* would not bar review of Penry's eighth amendment claim that the execution of the mentally retarded should be prohibited. Although the Court believed that a decision in Penry's favor on this claim would announce a new rule, they joined in Justice O'Connor's conclusion that the first *Teague* exception for rules which preclude the state from criminalizing certain conduct should apply to rules which would prohibit "a certain category of punishment for a class of defendants because of their status or offense."[91] The Court unanimously believed that "a new rule placing a certain class of individuals beyond the state's power to punish by death is analogous to a new rule placing certain conduct beyond the state's power to punish at all."[92]

The Court found the third *Teague* issue more problematic. Justices Brennan, Marshall, Stevens, and Blackmun joined Justice O'Connor's opinion that *Teague* did not bar review of Penry's claim that the Texas capital sentencing scheme unconstitutionally precluded the sentencer from considering mitigating evidence found in the record since any decision in Penry's favor would not announce a new rule. Rather, Justice O'Connor wrote that such a decision would not impose a new obligation on the state since it would simply require Texas "to fulfill the assurances" upon which the Court's decision in *Jurek v. Texas*[93] was based.[94] Indeed, consistent with *Teague*, O'Connor emphasized

88. *Id.*
89. *Id.* at 2959 (Brennan, J., dissenting).
90. *Id.* at 2963 (Stevens, J., concurring).
91. *Id.* at 2953.
92. *Id.* at 2952.
93. 428 U.S. 262 (1976).
94. *Penry*, 109 S. Ct. at 2945. The Texas death penalty statute requires the penalty phase jury to answer three questions affirmatively before a death sentence can be imposed: (1) "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;" (2) "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;" and, (3) "if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *Id.* at 2942 (citing TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981 and Supp. 1989)). Justice O'Connor understood the

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that such a decision would be dictated by prior precedent existing at the time Penry's conviction became final.[95]

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Kennedy, disagreed sharply with the conclusion that a new rule would not be announced were the Court to hold that Penry's sentencer was unconstitutionally precluded from considering relevant mitigating evidence.[96] Emphasizing the deterrence rationale for the federal habeas remedy espoused by the plurality in *Teague*,[97] Scalia asserted that it is "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."[98] Scalia urged that a rule should be deemed "new" not only when it overturns a prior decision, but also when it "replaces palpable uncertainty as to what the rule might be."[99]

After *Penry*, it is clear that the split on the Court over what constitutes a new rule derives from the competing perceptions evident in the *Teague* opinions about the proper role of the writ of habeas corpus. In capital cases, this interpretive disagreement plays itself out in a particularly problematic manner, for the broader the definition of new rule, the greater the likelihood that relief for death sentenced individuals will depend upon the pace of litigation — a consideration whose relevance to execution is difficult to discern. Predicting how the new rule question ultimately will be resolved is difficult because Justice O'Connor, author of the *Teague* plurality opinion which set forth an expansive definition of what constitutes a new rule, in *Penry*, in fact (if not in theory), adopted a more limited definition of when a decision announces a new rule. Her conclusion that Penry's mitigation claim did not seek a new rule

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Court's rejection, in *Jurek*, of a facial eighth amendment challenge to the Texas capital sentencing statute to be based on the Court's belief that Texas courts would allow consideration of all relevant mitigating evidence, notwithstanding the limited focus of the three penalty phase questions set out in the statutes. *Penry*, 109 S. Ct. at 2945, 2947.

95. "[T]he sentencer [must] 'not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " *Penry*, 109 S. Ct. at 2946 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original)); *see also*, Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982).

96. *Penry*, 109 S. Ct. at 2939, 2964-65 (Scalia, J., concurring in part and dissenting in part). Justice Scalia also noted that *Teague*'s new rule inquiry and Penry's claim that the Texas capital sentencing scheme precluded the sentencer from considering relevant mitigating evidence were "obviously interrelated," since a court must implicitly address the merits of Penry's claim to determine whether it announces a new rule. *Id.* at 2964. He further disagreed with the majority's disposition of the merits of Penry's mitigation claim, arguing that such a claim had been rejected by the Court in *Jurek*. *Id.* at 2966. For Justice Scalia, as long as the mitigating evidence could be considered by the sentencer under some circumstances, the fact that it would not be considered under all circumstances did not render the statutory scheme unconstitutional. *Id.* For a further discussion of Justice Scalia's views on this question, see Walton v. Arizona, 110 S. Ct. 3047, 3058 (1990) (Scalia, J., concurring in part and concurring in the judgment).

97. *See supra* text accompanying note 57.

98. *Penry*, 109 S. Ct. at 2965.

99. *Id.* at 2964.

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paradoxically minimizes the significance of *Teague* regarding the reach of the habeas remedy. It is this apparent paradox which prompted Justice Scalia to write in *Penry* that "it is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same term."[100]

II.
APPLYING *TEAGUE* AND *PENRY*: THE UNANSWERED QUESTIONS

Two fundamental questions remain to be resolved regarding the application of the principles set out in *Teague* and *Penry*. First, when does a decision announce a new rule? Second, what is the breadth of the *Teague/Penry* "implicit in the concept of ordered liberty" exception?[101] The resolution of these questions will determine to what extent *Teague* and *Penry* represent a significant departure from prior retroactivity law and to what extent the ability of those who attempt to use the federal habeas remedy either to seek or to rely on changes in the law will be curtailed.[102]

100. *Id.* at 2965.

101. It is unlikely that the *Teague/Penry* exception to nonretroactivity involving new rules which either place certain conduct beyond the power of the state to proscribe or prohibit a type of punishment for a certain class of defendants will be as problematic. Capital cases falling within this exception include Ford v. Wainwright, 477 U.S. 399 (1986) (eighth amendment precludes executing the insane); Emmund v. Florida, 458 U.S. 782 (1982) (eighth amendment bars death sentence for individual who does not kill and has no intention to take a life); Coker v. Georgia, 433 U.S. 584 (1977) (eighth amendment prohibits capital punishment for the crime of rape).

102. The resolution of two threshold procedural issues will also have an impact upon the effect of *Teague* and *Penry* on the reach of the federal habeas remedy. First, the retroactivity principles announced in *Teague* and *Penry* were themselves new rules. It is likely then that states will not have raised *Teague* and *Penry* retroactivity principles as a defense at the outset of many federal habeas proceedings, particularly those where a federal habeas petitioner is arguably seeking a new rule decision. To what extent will the state be precluded from raising a defense based on *Teague* and *Penry* later? This question was addressed by Justice Blackmun in his dissenting opinion in Zant v. Moore, 109 S. Ct. 1518 (1989). In *Moore*, the Supreme Court granted certiorari to address the issue of under what circumstances successive federal habeas petitions should be entertained. The Eleventh Circuit in an en banc opinion had concluded that Moore's petition should not be dismissed as an abuse of the writ. Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) (en banc). The Supreme Court, however, rather than addressing the question on which it had granted certiorari, vacated the judgment of the Eleventh Circuit and remanded the case for further consideration in light of *Teague*, which had been decided after the Eleventh Circuit ruling. Justice Blackmun, however, believed that certiorari was improvidently granted and that any *Teague* defense had been waived by its not being raised. *Moore*, 109 S. Ct. at 1519 (Blackmun, J., dissenting). Justice Brennan was the only other member of the Court to address the waiver question. He indicated that, while he shared Justice Blackmun's concerns, he believed the retroactivity question was "a matter for the Court of Appeals to address in the first instance." *Id.* (Brennan, J., concurring). On remand, only five members of the Eleventh Circuit en banc court explicitly addressed the question of waiver. This was the case because a seven person majority believed that irrespective of *Teague*, Moore's petition should be dismissed as an abuse of the writ. The Eleventh Circuit majority believed that since the Supreme Court had vacated the circuit's earlier en banc decision without commenting on its correctness, it was proper to reconsider the abuse issue. Moore v. Zant, 885 F.2d 1497, 1503 (11th Cir. 1989) (en banc). The five members of the court who believed that Moore was entitled to relief notwithstanding abuse of the writ principles explicitly addressed the waiver question. Judge Johnson, in an opinion joined by Judges Hatchett and Anderson, implicitly suggested that retroactivity is

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A. *When Does a Decision Announce a New Rule?*

In light of the *Teague* plurality's statement that applying the sixth amendment cross section requirement to the petit jury would be inconsistent with earlier Court dicta, it is understandable why a decision accepting Teague's sixth amendment claim would announce a new rule. Decisions which overturn past precedent or signal a retreat from principles the Court had previously articulated clearly announce new rules within the meaning of *Teague* and *Penry*.[103] The problem, as illustrated by *Penry*, however, is that only rarely does the Court explicitly overrule prior precedent or retreat from previously articulated principles: the rule of law and principles of stare decisis dictate this result. Indeed, when the Court wishes to expand the protections afforded criminal defendants, it is far more common for it to indicate that the new decision reflects a natural evolution of existing principles and precedents.

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an affirmative defense that can be waived. *Id.* at 1524. Judge Johnson assumed arguendo, however, that the state had not waived the retroactivity defense given the state's assertion that it need not raise that defense until its abuse of the writ defense was resolved. *Id.* at 1525. Judge Kravitch, in an opinion joined by Judge Clark, concluded that a retroactivity defense cannot be waived since "[p]ermitting a state to waive *Teague* in some cases and not in others would create the very unfairness and disparate treatement of similarly situated petitioners that *Teague* sought to prevent." *Id.* at 1519 n.5.

It is difficult to understand the rationale offered by Judge Kravitch as to why any retroactivity defense could not be waived. Any concern about disparity of treatment would be equally applicable to any procedural defense the state may have. For example, there is no question that the state could waive any abuse of the writ defense regardless of any disparity of treatment that may result. *See* Price v. Johnson, 334 U.S. 266, 292 (1948) (the government has the burden of pleading that the habeas petitioner has abused the writ). If an abuse of the writ can be waived, there is no reason why a retroactivity defense should also not be waived if not raised.

Judge Johnson's suggestion that perhaps there might not be any waiver given that the state need not raise any retroactivity defense until the abuse of the writ question is resolved is also problematic. Given the general admonition against piecemeal litigation in federal habeas proceedings, particularly in death cases, *see* Rose v. Lundy, 455 U.S. 509, 518-21 (1982); Thigpen v. Smith, 792 F.2d 1507, 1512 (11th Cir. 1986), it would be ironic if the state were allowed to do what the petitioner could not. To discourage habeas litigants from litigating in a piecemeal fashion, the better approach would be to find that nonretroactivity is an affirmative defense that can be waived if not raised when responsive defensive pleadings must be filed. *Cf.* Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989) (en banc) (refusing to find that the state had waived any *Teague/Penry* retroactivity defense since *Teague* and *Penry* changed retroactivity law and implicated the court's power to grant relief).

A second threshold question is whether the retroactivity principles of *Teague* and *Penry* — principles that were in part based on a concern about the even-handed treatment of habeas petitioners — should apply only to cases that became final after *Teague* and *Penry* were announced. If the new retroactivity doctrine announced in these cases is not so limited, *Teague* and *Penry* will preclude the new rule claims of some federal habeas petitioners while other petitioners will get the benefit of new rule decisions simply because of fortuities in the timing of litigation, an anomalous result. The contention that *Teague* and *Penry* should apply only to cases that become final after those decisions were announced is particularly compelling in death cases given the eighth amendment mandate to preclude arbitrariness in the administration of the death penalty. *See* Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976). In *Penry* it was not necessary for the Court to address this issue since it concluded that it could address both merits issues raised notwithstanding principles of retroactivity.

103. *See supra* text accompanying note 45. *But see* Milton v. Wainwright, 407 U.S. 371, 381 n.2 (1972) (Stewart, J., dissenting).

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Thus, the real issue that remains to be resolved after *Teague* and *Penry* is how to determine when (if ever) these evolutionary decisions announce "new rules."

After conceding that her plurality opinion in *Teague* did "not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes,"[104] Justice O'Connor expressed her understanding of a new rule decision as follows: "[I]n general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[105] Stated differently, she wrote that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[106] Justice O'Connor offered no further explanation of these principles, providing instead three references to earlier holdings of the Court. She cited *Rock v. Arkansas*[107] and *Ford v. Wainwright*[108] in support of the "breaks new ground or imposes a new obligation" language. After the "dictated by precedent" language, she referenced Justice Powell's dissenting opinion in *Truesdale v. Aiken.*[109]

Because Justice O'Connor's plurality opinion in *Teague* failed to discuss these referenced decisions, it is difficult to assess their significance to any emerging new rule doctrine. However, one can assume that they provide some guide to Justice O'Connor's thinking and are therefore worthy of examination.

In *Rock v. Arkansas*,[110] the Court, splitting 5-4, concluded that an Arkansas rule excluding all hypnotically refreshed testimony impermissibly infringed upon criminal defendants' right to testify. The majority in *Rock* viewed its decision as a logical application of earlier decisions striking down overbroad and arbitrary state rules limiting the right of an accused to offer witnesses, present a defense, and testify on his own behalf.[111] Although the majority recognized that "the right to present relevant testimony is not without limitation,"[112] it found that the Arkansas rule against the admission of hypnotically refreshed testimony went too far. Specifically, the majority reasoned that legitimate state concerns about the reliability of such testimony could be addressed in a less drastic way than through per se exclusion of such testimony.[113] The four dissenters, including Justice O'Connor, did not believe the Arkansas per se rule to be unreasonable. They argued that the state's crafting of evidentiary rules to further legitimate state interests was owed

104. *Teague*, 109 S. Ct. at 1070.
105. *Id.*
106. *Id.* (emphasis in original).
107. 483 U.S. 44 (1987).
108. 477 U.S. 399 (1986).
109. 480 U.S. 527, 528-529 (1987) (Powell, J., dissenting).
110. 483 U.S. 44 (1987).
111. *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967) (striking down a state statute precluding accomplices in the same crime from being witnesses for one another) (cited in *Rock*, 483 U.S. at 52-53).
112. *Rock*, 483 U.S. at 55.
113. *Id.* at 61.

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greater deference by the majority.[114]

Given Justice O'Connor's dissent in *Rock*, it is perhaps not surprising that she cited *Rock* in *Teague* as a case announcing a new rule. Yet the dissenting justices in *Rock* did not suggest that the Court was overturning past precedent or that the decision would involve a significant retreat from prior dicta. Rather, they agreed with the broad principles that prompted the majority ruling, disagreeing only with their application. If we then ascribe any significance to O'Connor's referencing of *Rock* in the context of the new rule definitional question, we get an expansive definition of when a decision announces a new rule. More specifically, O'Connor's citation of *Rock* suggests that unless a decision to deny relief would be clearly unreasonable, a decision extending the protections afforded a criminal defendant would create a new rule.[115]

The significance of *Ford v. Wainwright*,[116] the second decision referenced by Justice O'Connor is also somewhat difficult to discern. In *Ford*, a 5-4 majority concluded that the eighth amendment precluded the execution of the insane. A 7-2 majority also concluded that the procedures employed by Florida to determine the sanity of the death sentenced individual at the time of his scheduled execution violated the condemned's due process rights. Justice O'Connor referenced only *Ford's* eighth amendment holding in her *Teague* opinion. The majority in *Ford* premised this holding on an extensive examination of American and British common law which had consistently proscribed the execution of the insane.[117] The majority therefore suggested that its decision simply "recognized in our law a principle that has long resided there."[118]

The dissenters took issue with the majority's reading of the common law. Although recognizing that the insane could not be executed at common law, they emphasized that at common law the sanity determination was vested exclusively with the executive branch.[119] They concluded that the majority had "selectively incorporated the common law practice"[120] in finding an eighth amendment violation.[121]

114. *Id.* at 64-65. The *Rock* dissenters felt judicial deference was particularly appropriate where the "scientific understanding [of hypnosis] . . . is still in its infancy." *Id.* at 65 (Rehnquist, C.J., dissenting).

115. O'Connor's reference to *Rock* might also suggest the broader proposition that any time there is a credible dissent to a decision expanding the protections afforded a criminal defendant, the decision will announce a new rule, irrespective of the rationale afforded by the majority. On the other hand, the referencing of *Rock* may simply be a reflection of Justice O'Connor's perception that the decision imposed a new obligation on the state. *See supra* text accompanying note 105.

116. 477 U.S. 399 (1986).

117. *Id.* at 405-08 (at a minimum, the eighth amendment provides at least the same protections as those existing at common law). The majority also emphasized that a survey of contemporary practices revealed that no state permitted the execution of the insane. *Id.* at 408-10.

118. *Id.* at 417.

119. *Id.* at 431 (Rehnquist, J., dissenting).

120. *Id.* at 435.

121. The dissenters also pointed to an earlier Court decision suggesting that the determina-

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Justice O'Connor dissented from the majority's eighth amendment holding in *Ford*. Perhaps then it should not be surprising that she referenced *Ford* in *Teague* as a case announcing a new rule. Unlike her referencing of *Rock*, however, O'Connor's referencing of *Ford* does not necessarily suggest an expansive definition of when a decision announces a new rule, for the *Ford* dissent, unlike that of *Rock*, suggests that the majority turned its back on past precedent.

Justice Powell's dissenting opinion in *Truesdale v. Aiken*[122] is the third opinion cited to by Justice O'Connor regarding the definition of a "new rule." *Truesdale* posed the question of whether a federal habeas petitioner should get the benefit of the Court's decision in *Skipper v. South Carolina*,[123] a case decided after Truesdale's conviction became final. In an opinion joined by Justice O'Connor, the Court in *Skipper* held that the preclusion in a capital sentencing proceeding of testimony relating to the defendant's good behavior while in jail awaiting trial was constitutional error.[124] Justice Powell, concurring in the judgment, argued that precluding testimony of good jail behavior was not error since the testimony did not "tend to reduce the defendant's culpability for his crime."[125]

In *Truesdale*, in summary fashion, a six member majority saw no need to apply then existing retroactivity principles in determining the applicability of *Skipper* because it viewed *Skipper* as an application of settled precedent. Since *Skipper* was a logical outgrowth of decisions handed down before Truesdale's conviction became final, the majority reasoned that Truesdale should get the benefit of *Skipper*.[126] Justice Powell, however, consistent with his dissenting

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tion of the sanity of a death sentenced individual at the time of execution is akin to the executive power to grant reprieves and, as such, is not subject to judicial review, *Id.* at 432 (citing Solesbee v. Balkcom, 339 U.S. 9, 11-12 (1950)).

122. 480 U.S. 527 (1987) (Powell, J., dissenting).

123. 476 U.S. 1 (1986).

124. The majority found its earlier holding in Lockett v. Ohio, 438 U.S. 586 (1978), to be controlling. *Lockett* held that the Constitution requires that "the sentencer . . . not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death." *Lockett*, 438 U.S. 586, 604 (1978) (plurality opinion of Chief Justice Burger); *see also* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (reiterating the language of *Lockett*). Although the *Skipper* majority recognized that the excluded testimony did "not relate specifically to petitioner's culpability for the crime he committed," it concluded it "would be 'mitigating' in the sense that (the testimony) might serve 'as a basis for a sentence less than death.' " *Skipper*, 476 U.S. 1, 4-5 (1986) (quoting *Lockett*, 438 U.S. at 604).

125. *Skipper*, 476 U.S. at 11 (Powell, J., concurring).

126. Truesdale v. Aiken, 480 U.S. 527, 528 (1987) (per curiam). The majority simply stated it was reversing the judgment of the South Carolina Supreme Court. It then cited *Lockett*, *Skipper*, and a single page from United States v. Johnson, 457 U.S. 537 (1982), which reads:

> when a decision . . . merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively . . . . [I]t has been a foregone conclusion that the rule in the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Id. at 549.

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opinion in *Skipper*, did not believe that the result in *Skipper* was "required" by earlier decisions.[127]

It is difficult to discern why O'Connor in *Teague* referenced Powell's dissent in *Truesdale* that *Skipper* announced a new rule, for O'Connor, in *Skipper*, had joined the majority opinion which implicitly rejected Powell's position that *Skipper* was not in fact an application of precedent. However, without explanation, she did join Justice Powell's dissent in *Truesdale*. When her positions in *Skipper* and *Truesdale* are read together with her referencing of the *Truesdale* dissent in *Teague*, they, like her reference to *Rock*, suggest a very expansive definition of when a decision announces a new rule, given that *Skipper* appears to follow inexorably from previously announced cases. More specifically, the citations suggest that a decision will announce a new rule unless it is virtually on all fours with an earlier decision.

If the Court should adhere to the expansive definition of the new rule doctrine suggested by O'Connor's reference of *Rock* and *Truesdale*, the effect will be to drastically limit the ability of federal habeas petitioners to seek new rule decisions or take advantage of developments in constitutional law occurring after their convictions become final.[128] But that the *Teague* plurality should define "new rule" in this way would not be surprising given its deterrence-driven interpretation of the role of the writ of federal habeas corpus. For if the primary purpose of federal habeas is to ensure that state trial and appellate judges conscientiously apply federal constitutional law, then a doctrine which insulates state court decisions from federal habeas re-examination absent a showing that the decisions were unreasonable would seem appropriate.[129]

While the *Teague* plurality suggested a broad definition of when a decision announces a new rule apparently in order to limit the reach of the federal habeas remedy, the *Penry* majority seemingly retreated from such an expansive definition. Justice O'Connor, given her *Penry* majority opinion, suggests that a decision need not be on all fours with an earlier decision in order for the later decision to escape the "new rule" label.[130] More significantly, *Penry* indi-

127. *Truesdale*, 480 U.S. at 527 (Powell, J., concurring) (citing *Skipper*, 476 U.S. at 9).

128. It would appear that such an expansive definition was intended, since unless "new rule" is defined in this fashion, the new *Teague* retroactivity law would differ little from pre-*Teague* standards which generally foreclosed a federal habeas petitioner from benefitting from a decision rendered after his conviction became final if law enforcement officials had justifiably relied on the earlier rule. *See* Solem v. Stumes, 465 U.S. 638, 646 (1984) ("We have been less inclined to limit the effect of a decision that has been 'distinctly foreshadowed.' "); United States v. Johnson, 457 U.S. 537, 554 (1982) (a rule of criminal procedure which is "a clear break with the past" is almost invariably nonretroactive).

129. An expansive new rule doctrine, is also consistent with the finality and comity concerns of the *Teague* plurality. *See supra* notes 6-7 and accompanying text.

130. Although in *Penry*, Justice O'Connor was careful to use *Teague*'s new rule definitional language (*e.g.*, a decision in *Penry*'s favor would "not 'impose a new obligation' on the State of Texas." *Penry*, 109 S. Ct. at 2945 (citing *Teague*, 109 S. Ct. at 1070)) it would not have been unreasonable to conclude otherwise and deny Penry relief. In fact, the four dissenting justices in *Penry*, as well as the Fifth Circuit, Penry v. Lynaugh, 832 F.2d. 915, 926 (5th Cir.

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cates that a decision will not announce a new rule solely because a contrary ruling would not be unreasonable. Given, however, that such a reading of *Penry* is inconsistent with the spirit and rationale of Justice O'Connor's *Teague* plurality opinion, the question of how the Court will ultimately define "new rule" remains unanswered.

Not surprisingly, the questions raised by the Court's new rule decisions have troubled and divided the lower courts. An excellent illustration of the confusion engendered by *Teague* and *Penry* is provided by the Fifth Circuit's en banc decision in *Sawyer v. Butler.*

1. Sawyer v. Butler[131]

The *Teague/Penry* new rule issue presented in *Sawyer* was whether the decision in *Caldwell v. Mississippi*[132] announced a new rule. In *Caldwell*, a five person majority held that the eighth amendment was violated when the prosecutor misled a capital sentencing jury, diminishing the jurors' sense of responsibility by telling them "your decision is not the final decision . . . [y]our job is reviewable."[133] The prosecutor's words were misleading and inaccurate because under Mississippi law a presumption of correctness attaches to the jury's sentencing decision on appeal.[134] The *Caldwell* majority suggested that its holding was a natural outgrowth of its earlier decisions stressing that the death penalty not be meted out of "whim, passion, prejudice or mistake."[135] The *Caldwell* dissenters, however, did not believe that the prosecutor's comments, when viewed in their entirety, significantly misled or diminished the jurors' sense of responsibility so as to justify sentencing relief.[136]

Caldwell did not announce a new rule in the way that a decision granting Teague's sixth amendment claim would have: it did not overrule past prece-

1987), had rejected Penry's mitigating evidence claim indicating that they did not believe that precedent compelled a different conclusion. *See also* Graham v. Lynaugh, 854 F.2d 715 (5th Cir. 1988); Selvage v. Lynaugh, 842 F.2d 89, 93-95 (5th Cir. 1988), *vacated sub nom.* Selvage v. Collins, 110 S. Ct. 974 (1990); Riles v. McCotter, 799 F.2d 947, 952-53 (5th Cir. 1986); Granviel v. Estelle, 655 F.2d 673, 675-77 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982). In light of the new rule holding in *Penry*, and recognizing that the resolution of the mitigation issue presented permits two reasonable outcomes, it would appear that a new decision need not be identical with a prior precedent in order for the new decision to fall outside of the definition of "new rule."

131. 881 F.2d. 1273 (5th Cir. 1989) (en banc), *affirmed sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990); for discussion of the United States Supreme Court decision in *Sawyer*, see *infra* text accompanying notes 272-93.

132. 472 U.S. 320 (1985).

133. *Id.* at 342-43 (O'Connor, J., concurring).

134. *Id.* at 331, 343. Four justices also suggested that informing the jury of the availability of appellate review would violate the eighth amendment regardless of the accuracy of the information, since such information was not "relevant to a legitimate state penological interest," and might diminish the sentencing jury's responsibility for its decision. *Id.* at 335-36.

135. *Id.* at 329 n.2 (citing Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring)); *see also Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring).

136. *Caldwell*, 472 U.S. at 348-49 (Rehnquist, J., dissenting) (prosecutor's comment did not render the proceedings fundamentally unfair and thus no constitutional violation occurred).

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dent, or repudiate past dicta of the Court.[137] None of the justices seemed to view *Caldwell* as a decision that dramatically redefined or expanded constitutional principles. The dispute between the majority and dissenting justices was not over which legal principles to apply, but rather over how to apply agreed upon principles to a set of facts capable of being understood in different ways.[138] In short, the *Teague* threshold question of whether *Caldwell* announced a new rule — the question which confronted the Fifth Circuit in *Sawyer* — was the question left unanswered by *Teague* and *Penry*.

In *Sawyer*, a majority of the Fifth Circuit held that *Caldwell* did announce a new rule thereby triggering the application of *Teague/Penry* retroactivity principles.[139] The majority, nonetheless, did recognize that "the Supreme Court's decision in *Penry* had left the definition of a 'new rule' in some doubt."[140] It also noted that Justice O'Connor's application in *Penry* of her *Teague* new rule definition raised the possibility that she was retreating from the *Teague* rationale. In light of this ambiguity, the court turned "to the purposes served by the *Teague* rule" to resolve the question before it.[141]

Emphasizing the finality and federalism interests upon which *Teague* was premised, the Fifth Circuit majority believed that *Caldwell* was not a decision which a state could "reasonably be asked to anticipate."[142] As such, it con-

137. *See supra* text accompanying note 44.

138. *Cf.* Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc) (suggesting that *Caldwell* implicitly announced a new rule because of the harmless error standard used in determining whether the *Caldwell* error would justify relief).

139. *See also Hopkinson*, 888 F.2d at 1291. In *Hopkinson*, the Tenth Circuit, in an en banc decision, unanimously held that *Caldwell* announced a new rule for *Teague/Penry* purposes. Six members of the court reached this conclusion after first acknowledging that their "initial impulse is that it is not a novel constitutional idea that a jury should understand its role and responsibility in a capital sentencing proceeding," that "the majority . . . in *Caldwell* did not state that it is announcing a new rule," and that "state supreme courts have routinely considered it error for a prosecutor to mislead a jury into thinking that the ultimate determination of death rests with others." *Id.* at 1288, 1289. The court nevertheless concluded that *Caldwell* announced a new rule because it believed reconciling its earlier holding in *Dutton v. Brown*, 812 F.2d 593, 596 (10th Cir.) (en banc), *cert. denied*, 484 U.S. 836 (1987) (*Caldwell* was sufficiently novel so as to constitute cause to forgive a procedural default), with a holding that *Caldwell* did not announce a new rule for *Teague/Penry* purposes was impossible. *Hopkinson*, 888 F.2d at 1289-90.

The standard for determining novelty/cause for purposes of procedural default bears a close relationship to the standard for determining whether a decision announces a new rule. Assuming a claim is so novel that it was not reasonably foreseeable and therefore there is cause for excusing any procedural default, it is difficult to understand how it can also be said that the same claim was dictated by prior precedent or imposed no new obligation on the state. However, it should not necessarily follow that, by establishing novelty/cause for a procedural default, relief is barred by *Teague*, since the time frames for making the novelty and new rule determinations differ. Whether a claim is novel for purposes of procedural default is likely to be determined at the time of trial, when the default is most likely to occur; whether a decision constitutes a new rule is determined at a later date, when the petitioner's conviction becomes final.

140. *Sawyer*, 881 F.2d at 1287; *see also id.* at 1288.

141. 881 F.2d at 1288.

142. *Id.* at 1290. The court believed that irrespective of existing state law, "*Caldwell* was certainly new in its conclusions that such arguments violated the Eighth Amendment." *Id.*

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cluded that the *Caldwell* decision did announce a new rule. It specifically rejected the argument that *Caldwell* was simply an application of earlier precedent that prosecutorial comments rendering the proceedings fundamentally unfair could give rise to a constitutional violation. Rather, the court believed that the rule of *Caldwell* was new because it presumed fundamental unfairness unless it could be shown that the prosecutor's comments had no effect in misleading the jury as to its role in the sentencing process.[143] Nor did the fact that prior to *Caldwell* many state courts had developed common law rules prohibiting the conduct at issue in *Caldwell* mean that *Caldwell* itself did not announce a new rule. Irrespective of existing state law, the court emphasized that "*Caldwell* was certainly new in its conclusions that such arguments violated the Eighth Amendment."[144] Finally the *Sawyer* majority, like the *Teague* plurality, recognized that the real issue was the reach of the federal habeas remedy. It noted that although "[j]udicial tradition demands that new rules find their trace in older ones," and consequently that "[a]t a sufficient level of abstraction, there are no new rules . . . [w]e should not play such sophistical games. The issue here is whether the federal judiciary will take hold of the open ended character of the habeas remedy it has created."[145]

Not surprisingly, the *Sawyer* dissenters relied heavily on Justice O'Connor's *Penry* opinion. To the dissenters, *Penry*

> made clear that [*Teague*'s] "*dictated* by precedent" language was not intended to categorize as "new" every rule that does not fit precisely within the pattern of a previously decided case. Rather, the [*Penry*] Court recognized that the process of constitutional interpretation routinely requires courts to articulate extant law and apply established principles of law to different facts and in different contexts.[146]

Further echoing the rationale employed by Justice O'Connor in *Penry*, the dissenters argued that *Caldwell* "simply fulfilled the assurances" enunciated in earlier cases that the capital sentencing decision be a reliable and individualized one, free from arbitrariness.[147]

In reaching a conclusion it perceived consistent with the spirit of the *Teague* plurality opinion, the *Sawyer* majority read *Caldwell* in a manner that overstated any legitimate reliance, federalism, and finality interests the state may have.[148] Specifically, the court failed to give due weight to the fact that

143. *Id.* at 1290.

144. *Id.* at 1290-91. Justice O'Connor's reference in *Teague* to Ford v. Wainwright, 477 U.S. 399 (1986), was cited for this proposition. 881 F.2d at 1290. For discussion of *Ford*, see *supra* text accompanying notes 116-21.

145. *Sawyer*, 881 F.2d at 1294-95.

146. *Id.* at 1297 (King, J., dissenting) (emphasis in original).

147. *Id.* at 1299. The dissenters also noted that "if anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than Penry's for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*." *Id.*

148. The court went so far as to state that holding that *Caldwell* did not create a new rule would mean "that little or nothing is left of *Teague*'s promise." *Id.* at 1295.

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prior to *Caldwell* many states, including Louisiana, had developed common law rules prohibiting the conduct at issue in *Caldwell*, thus indicating that *Caldwell* imposed no new obligation on the state and represented no significant departure from existing precedent.[149] Further, the court lost sight of the Supreme Court's frequently repeated admonition that the capital sentencing decision must be free from arbitrariness. In short, the court opted for a highly technical, ahistorical interpretation of *Caldwell* which, in turn, encourages state courts to adopt a parsimonious "wait and see" approach to constitutional adjudication.[150]

The Fifth Circuit opinions in *Sawyer* illustrate the difficult new rule questions spawned by *Teague* and *Penry*. Although the *Teague* plurality intended to cut back on the reach of the federal habeas remedy, *Penry* made it unclear how much of the writ the Court was willing to amputate. In concluding that *Caldwell* did announce a new rule, a majority of the Fifth Circuit opted for a reading consistent with the spirit of the *Teague* plurality opinion but not *Teague*'s application in *Penry*.[151] As the Fifth Circuit wrote, "ultimately only *Teague*'s authors can tell us if they meant what they said or if they have changed their minds."[152]

2. Butler v. McKellar[153] *and Answering the New Rule Question*

It is conceivable that the Supreme Court might tell us whether *Teague*'s authors "have changed their minds" when they decide *Butler v. McKellar*. *Butler* presents the question of whether a death sentenced federal habeas corpus petitioner should receive the benefit of the Supreme Court's decision in *Arizona v. Roberson*,[154] rendered after his conviction became final.[155] In *Roberson*, the Court held that the prophylactic rule of *Edwards v. Arizona*[156] regarding the admissibility of statements obtained after an accused has invoked his right to counsel applies to interrogations about matters different from that for which the accused originally requested counsel. In the United States Supreme Court, Butler argues that, just as the petitioner in *Truesdale v.*

149. *See id.* at 1290.

150. *See infra* text accompanying note 165.

151. Paradoxically, *Penry* would appear to impose more of a new obligation on the state regarding its capital trials then the obligation imposed by *Caldwell*.

152. *Sawyer*, 881 F.2d at 1295.

153. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988), *rev'd sub nom.* Butler v. McKellar, 110 S. Ct. 1212 (1990); for discussion of the United States Supreme Court decision in *Butler*, see *infra* text accompanying notes 243-56.

154. 486 U.S. 675 (1988).

155. Unlike in *Teague* and *Penry*, the question presented in *Butler* did not involve whether a federal habeas petitioner could seek an ostensibly new rule decision, but instead whether he should receive the benefit of a decision already announced.

156. 451 U.S. 477 (1981) (if an accused in custody invokes her right to counsel upon interrogation, then any subsequent statement made by the accused without counsel is inadmissable unless the accused voluntarily initiates further communication with the police and her subsequent statements are made knowingly and intelligently).

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Aiken[157] was able to benefit from *Skipper v. South Carolina*[158] since *Skipper* applied the settled precedent of *Lockett v. Ohio*[159] decided before his conviction became final, he is entitled to benefit from *Roberson* because *Roberson* also was an application of settled precedent (specifically *Edwards*) decided before his conviction became final.

An examination of the *Roberson* decision supports Butler's argument that *Roberson* did not announce a new rule but rather was simply an application of settled precedent. This conclusion is evidenced by the fact that Justice Stevens, writing for a six member majority, defined the issue in terms of whether the Court should "craft an exception to [the *Edwards*] rule for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their interrogation."[160] What is more, the Court considered this question by asking whether any of the reasons offered by the state to distinguish *Edwards* were compelling. In concluding that the state's efforts were "unavailing,"[161] the Court suggested that *Roberson* follows logically and inexorably from *Edwards*. Thus *Roberson*, much like *Skipper*, seems to exemplify a situation where the Court applied a settled rule to a factual setting slightly different from the setting present when the rule was first announced.

It is difficult to see how, consistent with *Penry*, the Court could declare that *Roberson* announced a new rule within the meaning of *Teague*.[162] Indeed, were the Court to hold that *Roberson* announced a new rule, it is hard to conceive of any decision which would not announce a new rule under *Teague* short of a decision that is virtually identical with prior precedent.

It should be emphasized, however, that it would be simplistic to focus solely on the rationale offered by the Court for an earlier decision in determining whether that decision announces a new rule. The reason why the analysis must go further is clear. Institutional pressures and the principle of stare decisis render it highly unlikely that the Supreme Court — indeed, any court — will trumpet a decision as a dramatic and significant departure from past pre-

157. 480 U.S. 527 (1987).

158. 476 U.S. 1 (1986).

159. 438 U.S. 586 (1978); *see supra* note 124.

160. Arizona v. Roberson, 486 U.S. 675, 677 (1988).

161. *Id.* at 685.

162. Not surprisingly, the dissenters in *Roberson* framed the issue differently than the majority. They asked whether the *Edwards* prophylactic rule should be extended and expanded to cover different factual situations. *Id.* at 688 (Kennedy, J., dissenting). *Edwards*, the dissent noted, was "designed to protect an accused in police custody from being badgered by police officers." *Id.* at 690. The dissenters argued that the standard *Miranda* rules are sufficient to preclude coerced statements in situations where the accused is questioned about a subject other than the one for which she invoked her right to counsel, and thus there is no need to extend the *Edwards* rule. When viewed from the dissenters perspective, it makes little sense to ask whether *Roberson* announced a new rule or was merely an application of *Edwards* since, by definition, the dissenters did not believe that *Roberson* was mandated by *Edwards*. Nevertheless, one does not get the sense that the *Roberson* dissenters believed that the majority effectively overturned an earlier decision or significantly departed from past precedent. Rather, they believed the majority simply misapplied an earlier precedent.

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cedent.[163] Rather, courts, not surprisingly, attempt to suggest that their decisions flow inexorably from earlier rulings to create a continuous narrative, a seamless web of "the law."

In other words, an examination of the rationale offered for a decision, while relevant to the new rule inquiry, cannot be dispositive of that inquiry. One must go beyond the level of precedent to the level of policy. Why should decisions applying settled precedent be available to federal habeas petitioners even if sought or rendered after petitioners' convictions become final? And why should decisions which truly present new rules be treated differently?

Federal habeas petitioners should be able to seek and get the benefit of decisions that apply settled precedent primarily to insure even-handed treatment among criminal defendants. For example, if *Roberson* necessarily follows from *Edwards,* it flouts our sense of fairness to preclude Butler from benefitting from the *Roberson* decision since Butler is really only asking that he be judged under the law (*Edwards*) which existed *at the time* of his conviction. Put differently, Butler is simply asking that he should not be disadvantaged because the Supreme Court had not had the opportunity to determine whether his fifth amendment rights had been violated before his conviction became final.[164]

On the other hand, the primary rationale for not allowing federal habeas petitioners to seek or benefit from new rule decisions is to further the state's legitimate interest in finality and to promote basic principles of federalism. If an accused's case has been resolved through direct appeal in accordance with established precedent, the state should be able to rely on that adjudication. It should be able to rest assured that the case is finished. The state should not have to worry that at some point down the road, after the accused's direct appeals are over, a change in the law might permit a federal court to reopen the case and to order the state to retry the accused.

In *Butler,* however, the state's finality and federalism concerns are weak. If it would not be unreasonable for the state to expect the rule of *Edwards* to control the facts of *Roberson,* it should follow that the state would be unjustified in asserting finality or federalism interests to defeat Butler's federal habeas petition seeking application of the *Roberson/Edwards* rule. Were the Court nevertheless to conclude that *Roberson* announced a new rule and thus was not available to federal habeas corpus petitioners whose convictions became final before *Roberson* was announced, even though the *Roberson* rule was reasonably foreseeable, the state would be rewarded for taking a parsimonious

163. The likelihood that the current Supreme Court would so advertise a decision which expands the protections afforded a criminal defendant borders on the infinitesimal.

164. In this regard, reliance on the Supreme Court's certiorari jurisdiction to the state appellate courts to address this problem would be misplaced since generally the Court's certiorari jurisdiction is reserved for cases in which either the federal courts of appeals or the highest state courts are in conflict, or for cases involving matters of nationwide importance. The Court's certiorari jurisdiction is not perceived as being available simply to correct errors, no matter how outrageous. *See* SUP. CT. R. 10.

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"wait and see" approach to the enforcement of constitutional rights.[165] Rather than determining whether a general principle should be equally applicable to somewhat different factual situations, the state would be encouraged to behave mechanically and only apply the general principle to a fact situation which is virtually identical with the facts of the case in which the general principle had been announced. Finality and federalism concerns should not require such an approach.

A decision in favor of a federal habeas petitioner, then, should announce a new rule for *Teague* purposes only if the rule was not reasonably foreseeable at the time petitioner's conviction became final. If the rule was reasonably foreseeable in light of earlier precedent, then the accused's interest in even-handed treatment, the state's interest in having litigation come to an end and not be upset by federal review, and the general public's interest in the vigorous enforcement of constitutional rights mandate that such decisions be available to federal habeas petitioners.[166]

B. The Implicit in the Concept of Ordered Liberty Exception

In *Teague*, Justice O'Connor stated that the exception for new rules implicit in the concept of ordered liberty was to have a limited reach. Specifically, it was to be restricted "to those new procedures without which the likelihood of an accurate conviction is seriously diminished."[167] To underscore the limited reach of this exception, O'Connor noted that "because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge."[168]

In defining the implicit in the concept of ordered liberty exception, Justice O'Connor acknowledged her debt to the views of Justice Harlan, but at

165. Butler, in turn, would be deprived of his liberty solely because his claim was not specifically addressed by the Supreme Court earlier, and not because it represented any significant extension of the law.

166. *Cf.* Solem v. Stumes, 465 U.S. 638 (1984) (*Edwards* is not retroactive to cases already final at the time the decision was announced). In *Solem*, the Court refused to apply *Edwards* retroactively absent any discussion of whether *Edwards* was simply an application of settled precedent. It did so notwithstanding language in Miranda v. Arizona, 384 U.S. 436 (1966), suggesting that a standard even more stringent than *Edwards* governs the admissibility of statements when an accused invokes her right to counsel. In *Miranda*, the Court stated: "Once warnings have been given, the subsequent procedure is clear.... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 473, 474.

167. Teague v. Lane, 109 S. Ct. 1060, 1076-77 (1989). Although Justice O'Connor defines the exception in terms of claims relevant to the guilt/innocence determination, there is no indication that she did not intend the same standard to govern claims alleging error in the capital sentencing process. Indeed, the exception parallels the fundamental miscarriage of justice exception for procedural defaults, an exception applicable to both guilt/innocence and capital sentencing claims. *See* Smith v. Murray, 477 U.S. 527, 538 (1986); *see also Teague*, 109 S. Ct. at 1089 n.5 (Brennan, J. dissenting) ("[T]he plurality presumably intends the exception to cover claims that involve the accuracy of the defendant's sentence as well as the accuracy of a court's determination of his guilt.").

168. *Teague*, 109 S. Ct. at 1077.

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the same time made explicit her unwillingness to embrace his position entirely.[169] In *Desist v. United States*,[170] Harlan had espoused a position very much like that laid out by Justice O'Connor in *Teague*. He wrote that federal habeas petitioners should be able to get the benefit of new rule decisions, rendered after their convictions became final, which "significantly improve . . . pre-existing fact finding procedures."[171] But in *Mackey v. United States*,[172] Harlan retreated from what he termed this tentative position, opting for a more expansive, open-ended standard. He concluded that "the writ ought always to lie for claims of non-observance of those procedures that . . . are 'implicit in the concept of ordered liberty.' "[173]

In *Mackey*, then, Harlan refused to endorse a standard strictly limited to claims relating to the integrity of the fact finding process. He gave three reasons for this refusal. First, since the federal habeas remedy is not limited to claims relevant to the accuracy of the verdict, he thought it incongruous to phrase any retroactivity standard in those terms.[174] Second, he believed that since certain new rule decisions purportedly designed to improve fact finding procedures do not always do so effectively, the justification for their retroactive application would be minimal.[175] Finally, he found "inherently intractable the purported distinction between those new rules that are designed to improve the fact finding process and those designed principally to further other values."[176]

In her *Teague* plurality opinion, Justice O'Connor found none of these reasons persuasive. In response to Harlan's first concern, she wrote that "since *Mackey* . . . our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review."[177] As to the other concerns, she concluded that "the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules" are adequately dealt with by a standard which focuses on whether the absence of the new procedures seriously diminished the likelihood of an accurate conviction.[178]

169. "The second exception suggested by Justice Harlan . . . we apply with a modification." *Id.* at 1075.

170. 394 U.S. 244 (1969).

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

172. 401 U.S. 667 (1971).

173. *Id.* at 693. The phrase is borrowed from Justice Cardozo's opinion in Palko v. Connecticut, 302 U.S. 319, 325 (1937) (defining the procedures mandated on the states by the fourteenth amendment due process guarantee). In *Mackey*, Justice Harlan also set forth a second exception, which was also adopted in *Teague*. *See supra* note 47 and accompanying text. Specifically, he noted that federal habeas petitioners should get the benefit of "new 'substantive due process' rules . . . that place . . . certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to proscribe." *Mackey*, 401 U.S. at 692.

174. *Mackey*, 401 U.S. at 694.

175. *Id.*

176. *Id.* at 695.

177. *Teague*, 109 S. Ct. at 1076 (citing, among other cases, Stone v. Powell, 428 U.S. 465 (1976)).

178. *Id.* at 1076-77.

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Beyond Justice O'Connor's efforts to respond to Justice Harlan, there is little question that her restrictive interpretation of the implicit in the concept of ordered liberty exception is premised on her view of the limited role for federal habeas in the review of state criminal convictions. Although not expressly stated, it is evident she feared that an open-ended exception to *Teague*'s retroactivity rules along the lines suggested by Harlan could result in the exception swallowing the rule. Yet, even her restrictive approach recognizes that in some situations notions of finality and comity must take a back seat to insuring that one is not unjustly imprisoned. Her acknowledgment of this exception is a concession that the purpose of the federal habeas remedy is not solely confined to insuring that state court judges faithfully apply established constitutional principles.

The difficult question then becomes one of determining when this exception should permit federal habeas petitioners to seek new rule decisions and when such decisions should be cognizable in federal habeas proceedings. The *Teague* opinions provide little specific guidance on this matter. As noted earlier, Justice O'Connor's opinion did not garner a majority of the court. Four members of the Court subscribed to Justice Harlan's more expansive approach,[179] while Justice White did not address the question. Thus the question of whether the O'Connor plurality view of the exception will prevail remains open. In *Penry*, it proved unnecessary for the Court to address this issue since a majority believed that the merits of both claims presented could be considered, notwithstanding *Teague*. If the Court remains split between the approaches of Justice Harlan and Justice O'Connor, Justice White's views may be dispositive in resolving this issue.

The division on the Court can be broken down into two basic queries. First, will the scope of the implicit in the concept of ordered liberty exception be limited to claims that have a significant impact on the accuracy of the fact finding process? And, second, assuming it is so limited, how will those claims be identified?

As discussed earlier, the determination of whether the exception should be limited to claims that have a significant impact on the accuracy of the verdict is dependent on one's view of the proper role of the federal habeas remedy. Particularly in capital cases, the fundamental fairness approach of Justice Harlan is preferable, for several reasons. First, to focus only on claims that relate to the accuracy of the verdict ignores the fact that the Framers of the Constitution in no way suggested that provisions of the Bill of Rights unrelated to factual guilt are of secondary or lesser importance.[180] Clearly, the

179. Justices Stevens, Blackmun, Brennan, and Marshall.

180. *See* Smith v. Murray, 477 U.S. 527, 544-45 (1986) (Stevens, J., dissenting) (citations and footnotes omitted):

> The majority's reformulation of the traditional understanding of habeas corpus appears to be premised on the notion that only constitutional violations which go to guilt or innocence are sufficiently serious to implicate . . . "fundamental fairness" . . . . If accuracy in the determination of guilt or innocence were the only value of our

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habeas remedy should be available for new rule claims that have an impact upon the factual integrity of any verdict. However, the same should also be true when, for example, a trial has been infested with racial, sexual, ethnic, or religious discrimination, even when the factual accuracy of the verdict is not implicated.[181]

Second, under *Teague*, the defendant's ability to seek or benefit from a new rule decision is often dependent on the pace of the litigation. Because the defendant has no control over these timing fortuities, it makes sense to opt for a relatively expansive interpretation of this *Teague* exception in order to minimize this unfairness.[182]

Finally, when a death sentence is at issue, the criminal justice system should be particularly sensitive to claims that the capital conviction or sentence has been obtained in an illegal fashion.[183] Given past and present con-

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> criminal justice system, then the Court's analysis might have a great deal of force. If accuracy is the only value, however, then many of our constitutional protections — such as the Fifth Amendment right against compelled self-incrimination and the Eighth Amendment right against cruel and unusual punishment . . . — are not only irrelevant, but possibly counter-productive. Our Constitution, however, and our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice, reflect a different choice. That choice is to afford the individual certain protections — the right against compelled self-incrimination and the right against cruel and unusual punishment among them — even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty, and individual dignity that our society affords to all, even those charged with heinous crimes.
>
> In my opinion, then, the Court's exaltation of accuracy as the only characteristic of "fundamental fairness" is deeply flawed. Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve "law and justice" should similarly reflect those values.

Although Justice Stevens' comments, joined by Justices Blackmun and Marshall, were made in the context of whether a federal habeas court should entertain a claim under the fundamental miscarriage of justice exception to procedural default doctrine, they are equally applicable here. *See also* Stone v. Powell, 428 U.S. 465, 523-24 (1976) (Brennan, J. dissenting).

181. *See* Rose v. Mitchell, 443 U.S. 545 (1979) (refusing to extend Stone v. Powell, 428 U.S. 465 (1976), to preclude a federal habeas claim of racial discrimination in the selection of a state grand jury foreperson even though there was no dispute as to factual guilt or innocence). "Discrimination on the account of race strikes at the core concerns of the Fourteenth Amendment and at fundamental values of our society and legal system." *Id.* at 564.

182. In this regard, federal habeas petitioners whose claims are barred under *Teague* differ from those whose claims are procedurally defaulted. In the latter situation, the petitioner and/or petitioner's counsel — at least in theory — are responsible for the preclusion.

183. *See* Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J. concurring):

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And, it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

See also Reid v. Covert, 354 U.S. 1, 77 (Harlan, J., concurring):

> So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness . . . . I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Con-

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cerns that the death penalty not be imposed in a racially discriminatory manner,[184] it would seem self-evident that, for example, a death sentenced individual whose conviction has become final should get the benefit of a new rule decision which would enable him to establish that the prosecution had used its peremptory challenges at his trial in a racially discriminatory fashion. Yet under the *Teague* plurality approach, such a new rule decision would be unavailable to a death sentenced individual.[185]

Assuming however that Harlan's fundamental fairness approach is rejected and the implicit in the concept of ordered liberty exception is limited to claims that have an impact upon the accuracy of the fact finding process, how significant must the impact be before the exception comes into play? While Justice O'Connor's *Teague* plurality opinion suggests an extremely narrow reading of this exception,[186] the precise contours of the exception's scope have yet to be worked out.

Like the question "When does a decision announce a new rule?" the question "What claims fall within the implicit in the concept of ordered liberty exception?" has begun to trouble and divide lower courts. Witness the Fifth and Tenth Circuits en banc decisions in *Sawyer v. Butler*[187] and *Hopkinson v. Shillinger.*[188] An issue presented in both cases was whether a claim premised on the Supreme Court decision in *Caldwell v. Mississippi*[189] came within the implicit in the concept of ordered liberty exception.[190] Given that there is

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stitution in a capital case. The distinction is by no means novel... nor is it negligible, being literally that between life and death.

184. *See* McClesky v. Kemp, 481 U.S. 279, 320-25 (Brennan, J. dissenting); *see also Furman*, 408 U.S. at 257 (Douglas, J., concurring); *id.* at 364 (Marshall, J. concurring) (suggesting that the evidence shows a historical pattern of racial discrimination in the imposition of the death penalty).

185. Of course, it is also true that in Allen v. Hardy, 487 U.S. 1244 (1988), which applied the pre-*Teague* three-pronged standard of Linkletter v. Walker, 381 U.S. 618 (1965), and Stovall v. Denno, 388 U.S. 293 (1967), the Court concluded that such a claim was not retroactive as to individuals whose convictions were already final.

186. Justice O'Connor's illustrations of the kinds of claims that would fall within the exception — knowing use of perjured testimony, confessions "extracted by brutal methods" and "proceedings dominated by mob violence" — indicate how limited the scope of the exception is likely to be. *Teague*, 109 S. Ct. at 1077. Indeed, unless Justice O'Connor narrowly cabined the *Teague* exception, the new *Teague* rules would be unlikely to work a significant change in retroactivity law, at least regarding the ability of federal habeas petitioners to utilize new rule decisions since under the *Stovall/Linkletter* retroactivity standards, new rules that have a significant impact on the integrity of the factfinding process were virtually assured of retroactive application. *See* Solem v. Stumes, 465 U.S. 638, 643 (1984) ("Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials."); United States v. Johnson, 457 U.S. 537, 544 (1982) ("[T]he Court has regularly given complete retroactive effect to new constitutional rules whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.' ").

187. 881 F.2d 1273 (5th Cir. 1989) (en banc), *rev'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990).

188. 888 F.2d 1286 (10th Cir. 1989) (en banc).

189. 472 U.S. 320 (1985).

190. *Caldwell* held that the giving of inaccurate and misleading information which mini-

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little question that a *Caldwell* error has a significant impact upon the integrity and reliability of the sentencing determination,[191] it would seem natural to suppose that *Caldwell* falls within the implicit in the concept of ordered liberty exception as defined by Justice O'Connor. Yet a majority of the Fifth Circuit, sitting en banc in *Sawyer*, concluded that *Caldwell* did not fall within this *Teague* exception. However, in *Hopkinson* a unanimous Tenth Circuit disagreed with this proposition.

1. Sawyer v. Butler[192]

The Fifth Circuit's conclusion that *Caldwell* did not fall within the implicit in the concept of ordered liberty exception was premised, in part, on the limiting language and restrictive examples used by O'Connor in *Teague* to describe the exception.[193] The Fifth Circuit also found support for its position in the Supreme Court's decision in *Dugger v. Adams*[194] because of its perceived similarity between the fundamental miscarriage of justice exception to procedurally defaulted claims and this *Teague* exception.[195] In *Adams* the

mized the importance of the jury's role in the capital sentencing determination "was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id.* at 340; *see supra* text accompanying notes 132-36.

191. *Caldwell*, 472 U.S. at 341. The Court in *Caldwell* stated as much when it declined to find such an error harmless unless it had "no effect on the sentencing decision." *Id.*

192. 881 F.2d 1273 (5th Cir. 1989) (en banc), *rev'd sub nom.* Sawyer v. Smith, 110 S. Ct. 2822 (1990); for a discussion of the United States Supreme Court decision in *Sawyer*, see *infra* text accompanying notes 272-93.

193. *See Sawyer*, 881 F.2d at 1294. Regarding the reach of the implicit in the concept of ordered liberty exception, the *Sawyer* majority also gave short shrift to Justice Harlan's fundamental fairness approach, rejecting the argument that the exception should encompass claims other than those that are relevant to the accuracy of the fact-finding process. The majority believed that Justice White's vote in *Penry* "strongly suggests [he] has adopted the position of the *Teague* plurality." *Id.* at 1292. It further noted that "pending further direction from the Supreme Court, and in particular the full view of Justice White, we should follow the course set by the plurality as best we can." *Id.*

194. 109 S. Ct. 1211 (1989). *Adams* is particularly significant as regards the scope of the implicit in the concept of ordered liberty exception since the author of *Adams* is Justice White.

195. The fundamental miscarriage of justice exception has been defined for guilt-innocence claims in terms of whether the "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496 (1986). Though the Supreme Court has yet to define the exception's "actual innocence" standard in the capital sentencing context, it has concluded that the exception will not come into play for penalty phase errors when "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." Smith v. Murray, 477 U.S. 527, 538 (1986).

There is a clear parallel between the *Carrier* "innocence" language defining the fundamental miscarriage of justice exception and the *Teague* plurality's insistence that "the likelihood of an accurate conviction [be] seriously diminished" before permitting the implicit in the concept of ordered liberty exception to apply. Teague v. Lane, 109 S. Ct. 1060, 1077 (1989). Given this parallel, and the fact that finality and federalism concerns are at the root of both the procedural default and retroactivity doctrines, the *Sawyer* majority could find no reason why a *Caldwell* claim which is not exempt from the principles of procedural default should not also be subject to the consequences of *Teague*. In the majority's words, "it is difficult to see why a *Caldwell* violation should be sufficiently fundamental to require an exception to the 'new rule' doctrine,

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Court held that the fundamental miscarriage of justice exception for procedurally defaulted claims would not permit a federal habeas court to consider a *Caldwell* claim if the state courts had found the claim to be procedurally barred.

More importantly, however, the Fifth Circuit's unwillingness to declare that *Caldwell* came within the implicit in the concept of ordered liberty exception was rooted in its understanding of how *Caldwell* changed the law. To the *Sawyer* majority, *Caldwell* changed the law because of its willingness to find error, irrespective of any showing of any actual prejudice, when a capital sentencing jury had been misled as to its role. As the majority stated, "*Caldwell*'s deference to the fundamental character of the jury's role manifests itself precisely in its refusal to require actual prejudice to the defendant."[196] Given this conclusion and the majority's rejection of the notion that "every procedural rule affecting the accuracy of the trial . . . fit[s] within the 'ordered liberty' proviso,"[197] it is perhaps not surprising that the majority decided that *Caldwell* did not fall within this exception. Rather, the Fifth Circuit distinguished between "rules that only enhance" and "rules essential to fundamental fairness,"[198] concluding that *Caldwell* fell into the former category.

Unlike the majority, the dissenters in *Sawyer* viewed the impact of *Caldwell* error on the sentencing phase sufficient to warrant the application of the implicit in the concept of ordered liberty exception.[199] The dissenters argued that, contrary to the majority's assertion, *Caldwell*'s presumption of prejudice enhanced rather than undercut the applicability of the exception.[200] They invoked Justice O'Connor, author of the *Teague* plurality opinion, emphasizing that she had written that *Caldwell* error creates "an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily and capriciously . . . or through whim or mistake.' "[201] Moreover, they did not find *Adams* dispositive, reasoning that the fundamental miscarriage of justice exception in the procedural default context must focus on the specific facts of a case, whereas the focus in determining the applicability of the *Teague* exception is limited to the nature of the error at issue.[202]

2. Hopkinson v. Shillinger[203]

In *Hopkinson,* a unanimous Tenth Circuit, sitting en banc, found the po-

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but not so fundamental as to require an exception to the procedural default doctrine." *Sawyer,* 881 F.2d at 1293-94.

196. 881 F.2d at 1294.

197. *Id.*

198. *Id.* at 1293; *see also* Allen v. Hardy, 478 U.S. 255, 259 (1986) ("The fact that a rule may have some impact on the accuracy of a trial does not compel a finding of retroactivity.").

199. *Sawyer,* 881 F.2d at 1303 (King, J., dissenting).

200. *Id.* at 1304.

201. *Id.* (quoting Caldwell v. Mississippi, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring)).

202. *Id.*

203. 888 F.2d 1286 (10th Cir. 1989) (en banc).

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sition of the *Sawyer* dissenters to be the more persuasive one. Although its discussion of this issue was brief, the Tenth Circuit regarded "the jury's understanding of its core function in a capital sentencing hearing to be fundamentally related to the accuracy of a death sentence."[204] It followed, therefore, that the *Caldwell* rule was "the kind of absolute prerequisite to fundamental fairness that is implicit in the concept of ordered liberty."[205] The court did not address the relevance of *Adams* to this conclusion.

The Tenth Circuit's resolution of the *Caldwell* issue in *Hopkinson* is clearly correct given the Supreme Court's linking of *Caldwell* error to the unreliability of the jury's imposition of the death sentence.[206] The Court in *Caldwell* presumed that a *Caldwell* error seriously diminished the likelihood of an accurate sentencing determination, and thus refused to find such error harmless unless it could say that the error "had no effect on the sentencing decision."[207] This presumption suggests that a *Caldwell* claim should fall within the second *Teague* exception. *Adams* does not affect this conclusion because, while finality and federalism concerns are at the core of both the procedural default and *Teague* doctrines,[208] the procedural default doctrine's fundamental miscarriage of justice exception asks whether the accuracy of a verdict has been undermined in a specific case. The *Teague* implicit in the concept of ordered liberty exception, on the other hand, focuses on the nature of the error and its likely impact on the integrity of the fact finding process in all cases. It is conceivable, therefore, that on a particular set of facts, a *Caldwell* error might not undermine the accuracy of a specific capital sentencing determination so as to excuse a procedural default (for example, if the aggravating circumstances of a capital crime substantially outweigh any mitigating circumstances). On the other hand, when abstracted from the case-specific context and assessed in terms of its character and rationale, *Caldwell* clearly mandates a procedure necessary to ensure that the likelihood of an accurate sentencing determination is not seriously diminished.

More fundamentally, it would be wrong simply to apply procedural default principles in the *Teague* retroactivity context. Unlike where a procedural default may bar a claim, the federal habeas petitioner who may find his claim *Teague*-barred did not put himself in that posture. Rather, his claim is precluded not because of anything he or his counsel did, but rather because of fortuities in the timing and pace of litigation. Given that the Supreme Court has recognized the role that equitable considerations should play in defining

204. *Id.* at 1292.

205. *Id.* at 1291.

206. "In this case, the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell,* 472 U.S. at 340 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

207. *Id.* at 341.

208. *Id.*

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the reach of the federal habeas remedy,[209] these equitable considerations counsel against transplanting procedural default doctrine into *Teague*'s retroactivity rules.[210]

The reach of *Teague*'s implicit in the concept of ordered liberty exception remains to be resolved. The *Teague* plurality opinion suggests a restrictive reading of this exception, a reading consistent with the plurality's intent to limit the reach of the federal habeas remedy and thereby reduce the number of new rule decisions available to federal habeas petitioners. How the exception will be defined, though, seems to rest in large part on Justice White. White, in *Adams*, suggests that if a claim is to be cognizable (notwithstanding procedural default), it is not enough to establish that there is significant likelihood that the outcome would have been different but for the error; rather, the claim must establish that the defendant is "actually innocent" of the offense for which he was convicted.[211]

Justice White's approach is misguided and should not be incorporated into the *Teague* retroactivity principles. First, such an approach flies in the face of the *Teague* language defining the exception in terms of the likelihood of an accurate conviction being seriously diminished. Second, the *Teague* implicit in the concept of ordered liberty exception recognizes that federal habeas petitioners should be able to seek and benefit from certain new rule decisions under certain circumstances to ensure that one is not deprived of their liberty or life in an unconstitutional fashion. An actual innocence standard for relief does not comport with this purpose of the exception, particularly in death cases.

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209. *See* Reed v. Ross, 468 U.S. 1, 9 (1984).

210. The execution of John Eldon Smith strongly suggests as much. Smith and his wife, Rebecca Machetti, were charged with the murder of Machetti's former husband, Joseph Akins and his then wife Juanita Akins. Both Smith and Machetti were convicted and sentenced to death in separate trials held a few weeks apart in the same Georgia county. Machetti ultimately had her conviction and sentence set aside because women were unconstitutionally underrepresented in the jury pool. Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1983). Following her retrial, she received a life sentence. While Machetti did not raise the jury composition issue at the original trial, she did raise it in her first state habeas petition. Although she was denied relief in the state courts, she prevailed in the federal courts.

Smith, although tried by a jury drawn from the same unconstitutionally composed jury pool, raised this issue, not during his first round of collateral review, but only after *Machetti* was decided. Both the state and federal courts, however, refused to address the merits of the claim finding it to be procedurally barred despite affidavits from Smith's trial lawyers saying that they were unaware of a decision, Taylor v. Louisiana, 419 U.S. 552 (1975), which was crucial to the success of Machetti's jury composition claim. *Taylor* was decided six days before Smith's trial began. Smith v. Kemp, 715 F.2d 1459 (11th Cir.), *appeal denied*, 463 U.S. 1344, *cert. denied.*, 464 U.S. 1003 (1983). Smith was executed on December 15, 1983. Smith, in short, was executed for his counsel's failure to take the same action as his wife's counsel, although there was seemingly no justification for his decision not to do so.

211. 109 S. Ct. 1211, 1217-18 n.6 (1989).

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III.
TEAGUE RULES IN THE CAPITAL SENTENCING CONTEXT: FINAL REFLECTIONS ON FINALITY

In *Penry v. Lynaugh*,[212] the Supreme Court concluded that the *Teague* rules should be equally applicable in the capital sentencing context. The five member majority did so without extensive discussion and without the benefit of briefing or oral argument.[213] The Court simply noted that the finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context since "a criminal judgment necessarily includes the sentence imposed and . . . collateral challenges to sentences 'delay the enforcement of the judgment at issue and decrease the possibility that "there will at some point be the certainty that comes with an end to litigation." ' "[214] The Court's conclusion was consistent with its earlier holding in *Smith v. Murray*[215] that procedural default principles should not be applied "differently depending on the nature of the penalty a State imposes for the violation of its criminal laws."[216]

Justice Brennan, in criticizing this extension of *Teague*, noted that "[t]here is not the least hint that the Court has even considered whether different rules might be called for in capital cases, let alone any sign of reasoning justifying the extension."[217] A closer examination of the competing interests relevant to the question of the applicability of the *Teague* rules in the capital sentencing context indicates that Justice Brennan was correct in suggesting that *Penry*'s extension of *Teague* was erroneous. Because the reach of the federal habeas remedy is essentially a legislative rather than judicial question, Congress, at a minimum, should enact legislation reversing *Penry*'s extension of *Teague* to capital sentencing claims. It is these points — the Court's mistake in *Penry* and Congress' obligation after *Penry* — which this section addresses.

The *Penry* majority concluded that the *Teague* rules should be equally applicable to capital sentencing claims because of a perception that allowing death sentenced federal habeas petitioners to take advantage of new rule capital sentencing decisions would unduly delay the implementation of death sentences and consequently undercut the state's legitimate finality interests in carrying out its punishments. To assess the strength of this finality argument, it is first necessary to determine the likelihood and length of any delay in carrying out death sentences if new rule capital sentencing decisions may be sought and utilized by federal habeas petitioners. Next, it is necessary to weigh the likelihood and length of any delay against two explicit and counter-

212. 109 S. Ct. 2934 (1989).
213. *Id.* at 2963 (Stevens, J., concurring in part and dissenting in part).
214. *Id.* at 2944 (citation omitted).
215. 477 U.S. 527 (1986).
216. *Id.* at 538.
217. *Penry*, 109 S. Ct. at 2959 (Brennan, J., dissenting).

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vailing concerns of our justice system: that similarly situated individuals be treated uniformly, and that capital sentencing proceedings be conducted in accordance with the Constitution.

While it may be difficult to determine the impact on the state's ability to expeditiously execute capital killers if new rule capital sentencing decisions could be sought by and be available to federal habeas petitioners, it is crucial that this issue of finality be put in proper perspective. First, whatever delays may result from permitting capital federal habeas petitioners to seek or to rely on new rule decisions would be minor compared with delays created by the absence of competent counsel to represent death sentenced individuals and other sources of delay in the capital case review process, including delays in the processing of records, delays resulting from the length of these records, delays resulting from uncertainty regarding the substantive law, delays regarding interpretation of habeas review, and delays caused by the discovery of new facts.[218] Second, any state finality interest in the capital sentencing context is less compelling because, even if successful, a habeas petitioner, though perhaps able to avoid the executioner, will nevertheless face a sentence of life in prison. In short, any concern that permitting capital habeas petitioners to use new rule capital sentencing decisions will result in the freeing of dangerous criminals if the *Teague* rules are not applied to such claims is unfounded.[219]

Even if it is assumed that excepting capital sentencing claims from the *Teague* rules may negatively impact on state finality interests, the question remains whether the societal interest in the even-handed treatment of criminal defendants who are facing execution and the protection of their constitutional rights more than counterbalances this concern.

It should flout our sense of fairness that an individual could be executed when, but for fortuities in the timing and pace of litigation, the individual would otherwise benefit from decisions which might have the effect of sparing his life. Yet such fortuities could well seal a capital defendant's fate if *Teague*'s rules are applied in the capital sentencing context. This is not idle speculation. Kent Scheidegger, Legal Director of the California Justice Legal Foundation, which filed the amicus brief raising the retroactivity question in *Teague*, stated that "after an informal study of 28 death penalty habeas corpus cases he reviewed that were finally resolved in favor of the petitioner, 12 would

218. TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES: RECOMMENDATIONS AND REPORT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON DEATH PENALTY HABEAS CORPUS 270-72 (October, 1989) [hereinafter REPORT OF THE ABA]. It should not come as any surprise that because an individual's life is at stake in a capital case, federal and state courts will expend considerable time resolving the questions presented.

219. In fact, even if Congress chose to overturn *Teague* as to all federal constitutional claims, and not just capital sentencing claims, it is unlikely that successful federal habeas petitioners will be able to obtain release. The more likely scenario, assuming the factual guilt of those charged with criminal offenses, is that, following retrial, the petitioners will be returned to prison, but this time they will have been tried in a manner consistent with the Constitution.

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not have been possible had the *Teague* rule been in effect."[220]

More fundamentally, allowing new rule capital sentencing decisions to be sought by and available to federal habeas petitioners provides an important safeguard in ensuring that individuals are not put to death as a result of unconstitutional proceedings, an objective that is particularly important given the irrevocability of death as a sanction.[221] The need for such a safeguard is particularly compelling in light of the number of cases raising capital sentencing claims in which the death-sentenced petitioner has prevailed.[222]

In summary, society's interest in both the even-handed treatment of defendants facing execution and the constitutionality of capital sentencing proceedings favor making new rule capital sentencing decisions available to federal habeas petitioners, even if the result to some extent undercuts perceived legitimate state finality interests.[223]

It is imperative, then, that Congress reassert its traditional authority in defining the reach of the federal habeas remedy.[224] As *Teague* indicates, in recent years Congress has increasingly abdicated its responsibility to shape the writ.[225] This trend should be reversed given the significant public policy questions implicit in allowing federal court habeas review of state criminal convictions and sentences. At a minimum, the equitable considerations outlined previously[226] suggest that Congress should insure that federal habeas petitioners be able to seek and take advantage of new rule capital sentencing decisions.

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220. REPORT OF THE ABA, *supra* note 218, at 320 n.677.

221. For Supreme Court recognition that capital cases should be afforded heightened scrutiny, see *supra* note 183.

222. John Paul Penry is a recent example of a death sentenced petitioner who has had his sentence overturned. Other examples include petitioners in: McKoy v. North Carolina, 110 S. Ct. 1227 (1990); South Carolina v. Gathers, 109 S. Ct. 2207 (1989); Mills v. Maryland, 486 U.S. 367 (1988); Johnson v. Mississippi, 486 U.S. 578 (1988); Maynard v. Cartwright, 486 U.S. 356 (1988); Booth v. Maryland, 482 U.S. 496 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986); Caldwell v. Mississippi, 472 U.S. 320 (1985); Eddings v. Oklahoma, 455 U.S. 104 (1982); Enmund v. Ohio, 458 U.S. 782 (1982); Estelle v. Smith, 451 U.S. 454 (1981); Godfrey v. Georgia, 446 U.S. 420 (1980); Green v. Georgia, 442 U.S. 95 (1979); Lockett v. Ohio, 438 U.S. 586 (1978); Gardner v. Florida, 430 U.S. 349 (1977). Referencing these decisions in which death-sentenced petitioners prevailed on capital sentencing claims is not to suggest that these decisions necessarily announced new rules even under the expansive new rule definition set forth in *Teague*.

223. *See* Amsterdam, *The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 52 (Winter, 1987) (arguing that it should make no difference to anybody but the condemned inmate whether the death sentence, if finally held valid, is executed three or four years rather than two years after imposition since during the interim, the death sentenced inmate is neither at large and dangerous nor unpunished, and when the last review in his case is over, he is still incarcerated for the state to execute at its convenience).

224. For a complete history of the federal habeas remedy and Congress' role in defining that remedy, see L. YACKLE, *supra* note 3, §§ 15-21 (1985). *See also Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

225. Congress' abdication to the Court of its writ-defining responsibilities is also evidenced in the evolution of procedural default doctrine. *Compare* Fay v. Noia, 372 U.S. 391 (1963), *with* Murray v. Carrier, 477 U.S. 478 (1986); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

226. *See supra* text accompanying notes 209-10.

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In fact, Congress should act to overturn *Teague* completely to the extent the decision generally precludes federal habeas petitioners from seeking new rules since this *Teague* holding is contrary to consistent earlier Supreme Court precedent that the retroactivity of a decision need not be addressed until after any new rule is announced.[227] Absent congressional action, this *Teague* preclusion essentially forecloses the lower federal courts from playing a direct role in the evolution of the federal constitutional rights afforded those convicted in state court and encourages state courts to take a wait and see approach to the enforcement of federal constitutional rights. Further, Congress should allow federal habeas petitioners to take advantage of announced new rule decisions if, as a result of the decision, confidence in the accuracy of the guilt or sentencing determination has been undermined. Such a result is particularly warranted in capital cases because of heightened reliability concerns.[228]

CONCLUSION

The retroactivity rules announced in *Teague v. Lane*[229] and extended to the capital sentencing context in *Penry v. Lynaugh*[230] evidence the Supreme Court's displeasure with the scope of federal habeas review of state criminal convictions in general and death sentences in particular. However, given the manner in which the Court applied *Teague*'s new rule definition in *Penry* and the failure of a majority of the Court to agree upon the meaning of the implicit in the concept of ordered liberty exception, it is unclear to what extent federal habeas consideration of claims seeking or relying on new rules will no longer

227. Teague v. Lane, 109 S. Ct. 1060, 1069 (1990).

228. In the wake of *Teague* and *Penry*, Congress has begun to look at the questions posed by these rulings. To date, however, no new habeas legislation has been enacted. During the 101st Congress, the Senate did pass capital habeas legislation which would have allowed federal habeas petitioners to utilize new rule decisions rendered by the Supreme Court after their conviction became final if the decisions "establish[ed] fundamental constitutional rights." S. 2267, 101st Cong., 2d Sess., 136 CONG. REC. S6807 (1990). Although identifying when a decision establishes a "fundamental constitutional right" would be difficult, the provision does reflect an uneasiness with *Teague*'s virtual preclusion of federal habeas consideration of new rule decisions. *See* 136 CONG. REC. S6815 (daily ed. May 23, 1990) (comments of Sen. Graham, Fla.). Unlike the Senate Bill, however, the companion capital federal habeas reform legislation passed by the House of Representatives contained no *Teague* provision. *See* S. 1301, 101st Cong., 2d Sess., 136 CONG. REC. H8876-78 (1990). Ultimately, no habeas legislation was enacted by the 101st Congress. However, it is inevitable that the issue will continue to surface in Congress. For example, one recent proposal defines a *Teague* new rule as a "sharp break from precedent announced by the Supreme Court of the United States that explicitly and substantially changes the law from that governing at the time the claimant's sentence became final." H.R. 18, 102d Cong., 1st Sess. (1991). The American Bar Association recommends that "in the case of a petitioner under sentence of death, any claim that undermines the accuracy of either the guilt or the sentencing determination shall be governed by the law at the time a court considers the petition." REPORT OF THE ABA, *supra* note 218, at App. B-18 (proposed amendment to 28 U.S.C. § 2254(a)). The ABA did not view this recommendation as necessarily overruling *Teague* since it believed "the full impact of that case is not yet known." *Id.* at 38. Rather, the recommendation was offered "as a legislative interpretation of *Teague*." *Id.*

229. 109 S. Ct. 1060 (1989).

230. 109 S. Ct. 2934 (1989).

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be available to those petitioners. The answer to this question will depend on how the Court applies both its new rule definition and its implicit in the concept of ordered liberty exception. These applications, in turn, are likely to be shaped by the Court's understanding of the purpose of the federal habeas remedy.

Teague and *Penry* suggest that a majority of the Court does not feel that the federal writ of habeas corpus is intended to provide a federal forum to review federal claims or to prevent unconstitutional deprivations of liberty. Rather, the majority perceives the habeas remedy primarily as a deterrent, the role of the writ being to insure that state judges apply in good faith the federal Constitution in criminal proceedings. Even accepting this view of the habeas remedy, however, a decision should not announce a new rule for *Teague* purposes unless it was not reasonably foreseeable in light of existing precedent. A contrary approach produces three consequences, any one of which is harmful, but the impact of all three is unacceptable. First, such an approach would reward state courts for adopting a "wait and see" policy regarding the enforcement of federal Constitutional rights. For example, if the Supreme Court in *Arizona v. Roberson*[231] announced a *Teague* new rule, then the state in *Butler v. McKellar*[232] would be rewarded for its refusal to apply fifth amendment principles in a manner consistent with the logic and spirit of the Court's earlier decision in *Edwards v. Arizona*.[233] Second, such an approach would undermine the goal of uniform treatment of similarly situated individuals, since inconsistent outcomes could result solely from the pace of litigation. And third, such an approach is not needed to further legitimate state interests in finality or comity, since if a decision granting relief would be reasonably foreseeable, any state interest in finality or comity would not justify denying federal habeas petitioners the opportunity to seek or utilize that decision.[234]

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231. 486 U.S. 675 (1988).

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

233. 451 U.S. 477 (1981).

234. A definition of new rule not limited by a "not reasonably foreseeable under existing precedent" analysis would have the additional consequence of increasing the pressure on the Supreme Court to grant certiorari following state appellate review to correct erroneous state court constitutional rulings. This is the case since federal habeas review would no longer be available to do so, assuming the inapplicability of either of the *Teague/Penry* exceptions.

Stone v. Powell, 428 U.S. 465 (1976), provides a powerful example of such hydraulic pressure at work in an analogous setting. As Justice Marshall noted in Mincey v. Arizona, 437 U.S. 385, 404 (1978) (Marshall, J., concurring), the Court, because of the constraints of *Stone*, "will often be faced with a Hobson's choice in cases of less than national significance that could formerly have been left to the lower federal courts: either to deny certiorari and thereby let stand divergent state and federal decisions with regard to Fourth Amendment rights; or to grant certiorari and thereby add to our calendar, which many believe is already overcrowded, cases that might better have been resolved elsewhere." *See also* Trapper v. North Carolina, 451 U.S. 997, 1001 (1981) (Brennan, J., dissenting from denial of certiorari) ("[S]ince Stone v. Powell saddles this Court with the duty of providing the only federal forum for decision of Fourth Amendment claims, we are obligated to decide cases on direct review which we might otherwise deny."). An expansive new rule definition then precludes the federal district courts from play-

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As to the reach of *Teague*'s implicit in the concept of ordered liberty exception, its very existence suggests that the Court believes that even when a decision announces a new rule, any state finality and federalism concerns are sometimes outweighed by the need to protect against deprivations of life or liberty. This exception should encompass all claims which undermine the fundamental fairness of the criminal proceeding, particularly when one's life is at issue. At a minimum, the exception should include all errors which significantly undermine the accuracy or reliability of the guilt or sentencing determination.

Finally, in light of the unfairness of applying the *Teague* rules to capital sentencing claims, it is incumbent upon Congress to legislatively remove *Teague*'s retroactivity rules from the capital sentencing context. Congressional action to this end would be consistent with the Court's repeated admonition that "[it] is of vital importance to the defendant and *to the community* that any decision to impose the death sentence be, ***and appear to be***, based on reason rather than caprice."[235]

POSTSCRIPT

During its 1989-90 Term, the U.S. Supreme Court decided three cases, *Butler v. McKellar*,[236] *Saffle v. Parks*,[237] and *Sawyer v. Smith*,[238] each of which addresses the *Teague* questions confronting capital federal habeas petitioners. As described more fully in this Postscript, the Court, by slender 5-4 majorities in each case,[239] made clear that only in truly extraordinary cases will a person sentenced to death[240] be able to utilize the federal habeas remedy either to seek a decision or to rely on one that would represent a new rule from the time when the federal constitutional claim at issue was addressed by the state court. Unless reversed by Congress, these rulings will simply exacerbate the problems which were forewarned in the body of this Article. More specifically, by expansively defining when a decision announces a new rule and by narrowly circumscribing the reach of the implicit in the concept of ordered liberty exception, these decisions will increase the likelihood that life and

ing a role in the review and evolution of the federal constitutional rights of state criminal defendants.

235. Beck v. Alabama, 447 U.S. 625, 637-38 (1980) (quoting Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (emphasis added)).

236. 110 S. Ct. 1212 (1990).

237. 110 S. Ct. 1257 (1990).

238. 110 S. Ct. 2822 (1990).

239. The division on the Court was the same in each case. Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy comprised the majority. Justices Brennan, Marshall, Blackmun, and Stevens dissented. The Chief Justice authored the majority opinion in *Butler*. Justice Kennedy wrote for the Court in *Parks* and *Sawyer*. Justice O'Connor, the author of the plurality opinion in *Teague* and the majority opinion in *Penry*, was surprisingly silent in all three decisions.

240. The Court's holdings are not limited to petitioners sentenced to death, but are equally applicable to any defendant seeking a federal habeas court's review of a state criminal conviction or sentence.

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death will be determined in some cases not by the merits of an individual's claims but by the fortuities in the timing and pace of litigation which are beyond the individual's control.[241] Further, they will preclude the habeas remedy and the lower federal courts from playing a significant role in the evolution of federal constitutional rights afforded state criminal defendants. Rather, the only role for the federal courts will be through direct review by the Supreme Court.[242] Finally, by misconstruing the central purpose of federal habeas to consist of deterring state courts from misreading federal constitutional rights, the Court encourages state courts to adopt an unduly cautious "wait and see" approach regarding the federal constitutional protections to be afforded an accused during the state criminal process.

A. Butler v. McKellar[243]

Butler presented the issue of whether the rule of *Arizona v. Roberson*[244] should be applied retroactively to benefit a federal habeas petitioner whose conviction had become final before *Roberson* was decided.[245] The principal *Teague* question presented was whether *Roberson* announced a new rule. If it did, *Teague* and *Penry* foreclosed relief, as neither of the two *Teague/Penry* exceptions applied given the nature of the claim.

In holding that *Roberson* did announce a new rule, the *Butler* majority did not focus on whether the rule in *Edwards v. Arizona*,[246] announced before Butler's conviction became final, would have dictated the same conclusion reached by the Court in *Roberson* had an identical case arisen before Butler's conviction became final.[247] Rather, focussing on the deterrent purpose of the

241. Since death-sentenced individuals will be able to utilize decisions rendered before their convictions become final, Griffith v. Kentucky, 479 U.S. 314 (1987), congestion and delay in the trial and appellate docket may well be the determinant factor in whether one lives or dies. As Justice White stated in arguing against the rule that was ultimately adopted in *Griffith*:

> Under the majority's rule, otherwise identically situated defendants may be subject to different constitutional rules, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases proceed through the criminal justice system. The disparity is no different in kind from that which occurs when the benefit of a new constitutional rule is retroactively afforded to the defendant in whose case it is announced but to no others; the Court's new approach equalizes nothing except the numbers of defendants within the disparately treated classes.

Shea v. Louisiana, 470 U.S. 51, 63-64 (1985) (White, J., dissenting).

242. "[T]oday's decision, essentially foreclosing habeas review as an alternative 'avenue of vindication,' overrides Congress' will and leaves federal judicial protection of fundamental constitutional rights during the state criminal process solely to this Court upon direct review." Butler v. McKellar, 110 S. Ct. 1212, 1225 (1990) (Brennan, J., dissenting). Concededly, the lower federal courts will continue to play a role in the evolution of federal constitutional rights of those charged and convicted in the federal system. These developments may, in turn, help shape the rights afforded state criminal defendants.

243. 110 S. Ct. 1212 (1990).

244. 486 U.S. 675 (1988).

245. *See supra* text accompanying notes 153-66.

246. 451 U.S. 477 (1981); for a discussion of the rule in *Edwards*, see *supra* text accompanying notes 156-62.

247. "It is clear from our opinion in *Roberson* that we would have reached the identical

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federal habeas remedy and the federalism costs of such collateral review, the Court concluded that federal habeas petitioners seek a new rule whenever a contrary ruling by the state courts would not be unreasonable or illogical.[248] In the Court's words, "[t]he 'new rule' principle . . . validates reasonable, good faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[249] In short, the Court implicitly extended to certain state court findings of law the presumption of correctness which Congress, in federal habeas proceedings, had afforded only to state court findings of fact.[250]

How the Supreme Court in *Butler* applied its new rule definition deserves elaboration. To answer the question of whether *Roberson* announced a new rule, that is whether the lower court ruling was unreasonable, Chief Justice Rehnquist crafted a test which is devastating to habeas petitioners. He suggested that if lower courts had disagreed as to whether earlier precedent controlled situations like the one before them (in this case, whether *Edwards* was controlling), this disagreement was evidence that a state court ruling denying the precedent's controlling effect would not have been unreasonable.[251] Applying this test in *Butler*, Rehnquist wrote that the fact "[t]hat the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced . . . 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*."[252] Given a "new rule" reasonableness standard and the lower court disagreement about the meaning of *Edwards*, it should not be surprising that Rehnquist concluded that *Roberson* announced a new rule, even though when deciding *Roberson* the Court saw that decision as virtually indistinguishable from *Edwards*.[253] The result was that Butler, in effect, was told that he

conclusion had that case reached us in 1983 when Butler's conviction became final." 110 S. Ct. at 1220 (Brennan, J., dissenting).

248. *Id.* at 1216-17.

249. *Id.* at 1217. Contrast the *Butler* new rule definition with what the Court has said about new rules in the civil retroactivity context. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) ("First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." (citations omitted)).

It should be emphasized, however, that there is no indication the Court intended its limitation on the reach of the federal habeas remedy to be applicable to considerations of mixed questions of law and fact, such as, for example, the voluntariness of a confession, *see* Miller v. Fenton, 474 U.S. 104 (1985), or whether the criminally accused has received the ineffective assistance of counsel, *see* Strickland v. Washington, 466 U.S. 668 (1984). Notwithstanding the *Butler*, *Parks*, and *Sawyer* decisions, a federal habeas court may still examine mixed questions of law and fact to determine whether the state court ruling was incorrect, not simply unreasonable. *See infra* text accompanying notes 257-93 (discussing *Parks* and *Sawyer*).

250. *See* 28 U.S.C. § 2254(d) (1988).

251. 110 S. Ct. at 1217.

252. *Id.* at 1217-18.

253. *See* Edwards v. Arizona, 486 U.S. 675, 682-88 (1988).

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could be executed, although statements admitted at his trial were certainly obtained from him in a manner now recognized to be unconstitutional.

The *Butler* new rule definition and application strains one's conceptual capacities to devise a scenario in which a Supreme Court decision expanding the rights afforded criminal defendants would *not* create a new rule. After all, the Court is unlikely to grant certiorari on an issue unless there is disagreement in the lower courts. Further, after *Butler*, for an earlier decision like *Roberson* not to be a new rule would mean that any opinions dissenting from the decision would have to be unreasonable.[254]

It is clearly difficult to reconcile the result in *Butler* with the Court's application of its new rule definition in *Penry*. Amazingly, there is no mention of *Penry* in the majority opinion except to reference general language from *Teague*.[255] Equally puzzling is that Justice O'Connor, the author of the *Teague* plurality opinion, the crucial vote in *Penry*, and a member of the slender *Butler* majority, made no effort to reconcile her *Butler* vote with her position in *Penry*. It appears, then, that the result in *Butler* can only be explained by the majority's distaste for the role played by the federal writ of habeas corpus in the judicial review afforded state criminal defendants, particularly those sentenced to death.[256]

B. Saffle v. Parks[257]

Parks was decided on the same day as *Butler*. Parks presented the question in his federal habeas petition of whether a penalty phase jury instruction to "avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence"[258] undermined the jury's consideration of mitigating evidence in violation of the eighth amendment. The Tenth Circuit, sitting en banc, concluded that it did. The court believed that the instruction might discourage a sentencer from considering relevant mitigating evidence, and that this shortcoming was not cured by the remainder of the jury charge.[259] The Tenth Circuit's decision was rendered before *Teague* and

254. *Contra* Truesdale v. Aiken, 480 U.S. 527 (1987) (per curiam) (implicitly holding that Skipper v. South Carolina, 476 U.S. 1 (1986), applied settled precedent and thus did not announce a new rule despite the fact that three Justices, though concurring in the judgment, dissented on the merits of the *Skipper* Court's resolution of the *Lockett* issue).

255. *See* 110 S. Ct. at 1216.

256. "Today, under the guise of fine-tuning the definition of 'new rule,' the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration. . . . With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime." 110 S. Ct. at 1219 (Brennan, J., dissenting).

257. 110 S. Ct. 1257 (1990).

258. Parks v. Brown, 860 F.2d 1545, 1552 (10th Cir. 1988) (en banc), *rev'd*, Saffle v. Parks, 110 S. Ct. 1257 (1990).

259. *Id.* at 1554. In granting relief, the Tenth Circuit distinguished California v. Brown, 479 U.S. 538 (1987), where the Supreme Court, in a 5-4 decision, rejected a claim that it was constitutional error to give a penalty phase instruction that the jury should not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." 860 F.2d at 1553-54. The Tenth Circuit distinguished *Brown* in part for the following reasons:

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there was no discussion of whether Parks' claim was cognizable in a federal habeas proceeding. Nor was this issue briefed by the parties for the Supreme Court.

During argument before the Supreme Court, the question of the *Teague* prohibition on federal habeas petitioners seeking new rules was raised. Parks argued that his claim, if accepted would not create a new rule because it was a straightforward application of the principles expressed by the Court in *Lockett v. Ohio*[260] and *Eddings v. Oklahoma*,[261] cases decided before Parks' conviction became final.[262] The majority was not persuaded. The Court, speaking through Justice Kennedy, stated that the issue was not, as in *Lockett* and *Eddings*, "what mitigating evidence the jury must be permitted to consider in making its sentencing decision,"[263] but rather "how [the jury] must consider the mitigating evidence."[264] The Court then purported to draw a distinction between ostensibly legitimate process limitations and impermissible substantive limitations on the capital sentencer's ability to consider relevant mitigating evidence. In doing so, the majority mischaracterized Parks' claim since the thrust of his claim was that a reasonable juror would construe the anti-sympathy instruction to preclude entirely the sentencer's consideration of relevant mitigating evidence because such evidence, though properly mitigating, had the additional effect of engendering sympathy for the accused.[265] Having

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the instruction in *Parks* lacked the word "mere," which modified "sympathy" in *Brown*; the *Parks* instruction used the phrase "any influence of sympathy;" the phrase "any influence of sympathy" appeared in a list of improper factors for the jury to consider; and finally, unlike in *Brown*, the reference to "sympathy" in *Parks* was not "buried" in the middle of seven factors but was first in a list of four impermissible factors. *Id.*

260. 438 U.S. 586 (1978).

261. 455 U.S. 104 (1982). For a discussion of the holdings of *Lockett* and *Eddings*, see *supra* note 124.

262. Parks also relied on California v. Brown, 479 U.S. 538 (1987), discussed *supra* note 259. Noting that the *Brown* Court found it permissible to preclude jury consideration of sympathy not based on mitigating evidence, he argued that the decision implicitly held that consideration of sympathy based on such evidence could not be foreclosed. The Court rejected this argument noting that "we doubt that this inference follows from *Brown* or is consistent with our precedents," and "that even if we accept Parks' arguments, *Brown* itself was decided nearly four years after Parks' conviction became final." *Parks*, 110 S. Ct. at 1263.

263. 110 S. Ct. at 1261 (emphasis omitted).

264. *Id.* (emphasis omitted).

265. "Respondent does not, however, raise a claim challenging *how* the jury considered mitigating evidence. . . . [H]e argues that his jury could have believed it could not consider his mitigating evidence's bearing on moral culpability *at all*." *Id.* at 1267 (Brennan, J., dissenting) (emphasis in original). The rationale advanced by the *Parks* majority bore a striking resemblance to the position taken by Justice Scalia in his partial dissent in Penry v. Lynaugh, 109 S. Ct. 2934, 2963 (1989), which the Court had expressly rejected. *See id.* at 1248. As Justice Brennan's dissent in *Parks* stated:

> [T]he majority's limited reading of *Lockett* and *Eddings* was rejected last term in *Penry* . . . . In sustaining Penry's challenge, we expressly rejected the argument that although the State may not bar "consideration" of all relevant mitigating evidence, it may channel the "effect" the sentencer gives the evidence. . . .
>
> [T]he majority's language is strangely reminiscent of the argument trumpeted by the dissent in *Penry*. Justice Scalia . . . argued that "it could not be clearer that *Jurek* adopted the constitutional rule that the instructions had to render all mitigating cir-

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thus reframed the claim, the Court stated (in tones reminiscent of *Butler*) that it "cannot say that the large majority of federal and state courts that have rejected challenges to antisympathy instructions similar to that given at Parks' trial have been unreasonable in concluding that the instructions do not violate the rule of *Lockett* and *Eddings*."[266]

The Court's mischaracterization of Parks' claim also led it to reject his argument that *Penry*'s new rule holding was controlling. The Court distinguished *Penry*, reasoning that Penry was granted relief because "the Texas system prevented the jury from giving any mitigating effect to the evidence of his mental retardation and abuse in childhood."[267] In *Parks*, however, the majority found that "there is no contention that the State altogether prevented Parks' jury from considering, weighing, and giving effect to all of the mitigating evidence . . . put before them."[268] Rather, the Court (wrongly) asserted, "Parks' contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered."[269]

In *Parks*, unlike in *Butler*, the *Teague* questions presented involved not only the new rule issue, but also the issue of how broad is the implicit in concept of ordered liberty exception. In concluding that Parks' claim did not fall within this exception, the Court was again influenced by its mischaracterization of Parks' claim. To the Court, Parks was seeking a rule which would make his penalty dependent not on whether he was "morally deserving of the death sentence, but on whether [he] can strike an emotional chord in a juror."[270] Not surprisingly, given this characterization, the Court concluded that such a claim did not fall within the exception for " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[271] Because the Court so gravely misconstrued the na-

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cumstances relevant to the jury's verdict, but that the precise manner of their relevance — the precise *effect* of their consideration — could be channeled by law." . . . The Court correctly rejected that position in *Penry*, and its failure to do so today creates considerable ambiguity about which *Lockett* claims a federal court may hereafter consider on habeas corpus review."

110 S. Ct. at 1267-69 (Brennan, J., dissenting) (emphasis in original).

The constitutional propriety of legislative attempts to define what effect a capital sentencer should give to mitigation remains a very real and perplexing question. *See* Walton v. Arizona, 110 S. Ct. 3047, 3058, 3068 (1990) (Scalia, J., concurring) (finding irreconcilable the *Furman* admonition against arbitrariness in capital sentencing and the *Lockett* emphasis on individualized sentencing and noting that he will no longer "vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted").

266. *Parks*, 110 S. Ct. at 1261.

267. *Id.* at 1261-62.

268. *Id.* at 1262.

269. *Id.* The majority also directly rejected "Parks' contention that the antisympathy instruction runs afoul of *Lockett* and *Eddings* because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether." *Id.* Again, the majority showed that it failed to properly understand Parks' claim when it noted that the "argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration." *Id.*

270. *Id.* at 1264.

271. *Id.* at 1263. Because the dissenters took Parks' claim to be premised on the impor-

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ture of Parks' claim, the Court's holding is of little assistance in resolving the two fundamental questions remaining after *Penry* about the implicit in the concept of ordered liberty exception: first, whether the exception would be limited to claims that have an impact on the factual accuracy of the guilt or sentencing determination; and second, were the exception to be limited to such claims, how significant that impact on the factual accuracy of the guilt or sentencing determination must be.

C. Sawyer v. Smith[272]

A few months after *Butler* and *Parks* were decided, the Court again addressed the questions posed by *Teague* and *Penry* in *Sawyer v. Smith.* Like *Parks, Sawyer* raised questions both as to when a decision announces a new rule and as to the scope of the implicit in the concept of ordered liberty exception. If there was any question about the Court's intent to severely limit the reach of the federal habeas remedy, *Sawyer* extinguished such speculation.

After *Butler*'s expansive definition of what constitutes a new rule, it was not surprising that the *Sawyer* Court held that *Caldwell v. Mississippi*[273] announced a new rule. It rejected the argument that *Lockett v. Ohio*,[274] *Eddings v. Oklahoma*,[275] and other cases emphasizing the importance of reliable sentencing determinations, rulings which had been announced before Sawyer's conviction became final, compelled the result in *Caldwell.* According to the *Sawyer* majority, if "Caldwell was dictated by the principle of reliability in capital sentencing . . . [then] the [new rule] test would be meaningless if applied at this level of generality."[276]

The *Sawyer* Court also rejected petitioner's argument that *Caldwell* did not announce a new rule because numerous state court decisions had found prosecutorial statements of the kind proscribed by the eighth amendment in *Caldwell* to be violative of state law. Sawyer had urged that since state courts had anticipated the rule of *Caldwell*, "no state reliance interest could be upset by retroactive application of the federal rule to overturn a state conviction that became final before *Caldwell* was decided."[277] Stated differently, he argued that if *Caldwell*'s eighth amendment holding essentially duplicated state law, then, tracking *Teague*'s new rule definition, the decision did not impose a new obligation on the state. The Court rejected this argument, believing instead that a claim's cognizability under state law did not necessarily render that

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tance of an individualized sentencing determination, they concluded that the claim fell within the second *Teague/Penry* exception. *Id.* at 1270 (Brennan, J., dissenting).

272. 110 S. Ct. 2822 (1990); *see supra* text accompanying notes 192-202.

273. 472 U.S. 320 (1985); *see supra* notes 189-91 and accompanying text.

274. 438 U.S. 586 (1978).

275. 455 U.S. 104 (1982).

276. 110 S. Ct. at 2828. In this regard, the majority emphasized the obvious point that the three justices who dissented in *Caldwell* did not view *Caldwell* to be compelled by past precedent. *Id.*

277. *Id.* at 2830.

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claim cognizable under the federal Constitution.[278] Since the majority believed that the purpose of the federal habeas remedy was to insure that state courts act reasonably in construing federal constitutional law as it existed at the time the petitioner's conviction became final, the claim's cognizability under state law was perceived to be irrelevant.[279]

Sawyer underscores the flaws and dangers of the Court's definition of a "new rule" and its application of that definition in the capital sentencing context. In refusing to recognize that *Caldwell* flowed directly from the Court's earlier precedents emphasizing the heightened need for reliability at the sentencing stage in capital cases, the Court lost sight of the fact that where there is a *Caldwell* violation, the state has given the sentencer inaccurate information which is likely to skew the sentencing determination in favor of death, a result clearly in conflict with earlier rulings.[280] Further, consistent with its application of its new rule definition in *Butler*, the Court's reliance on pre-*Caldwell* decisions to justify its refusal to declare unreasonable a state court's rejection of a *Caldwell* claim means, in effect, that "almost every Supreme Court decision would announce a new rule as [the Court] seldom take[s] cases to resolve issues as to which the lower courts are in universal agreement."[281] Not insignificantly, the majority's rationale suggests that by erroneously construing the Constitution, lower courts could thereby limit the reach of any later decision correctly interpreting the Constitution.[282] Finally, the Court's unwillingness to recognize the significance of state court decisions which track *Caldwell* but rely on state law ignores states' reliance interest — the very interest that the Court professes to protect through its new rule doctrine.

Having concluded that *Caldwell* created a new rule, the Court also held

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278. The flaw in this argument is that "the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution."

> . . . Under [Sawyer's] view, state court decisions would both inform this Court's decisions on the substantive content of the Eighth Amendment, and, by simultaneous effect, impose those standards back upon the states themselves with retroactive effect.

Id. (quoting Dugger v. Adams, 489 U.S. 401, 409 (1989)).

In this context, the Court also pointed to judicial decisions which suggest "that the *Caldwell* rule was *not* a requirement of the Eighth Amendment," 110 S. Ct. at 2828 (emphasis in original). *See* California v. Ramos, 463 U.S. 992 (1983) (no eighth amendment violation when the capital sentencer is accurately instructed about the governor's power to commute a life sentence); Maggio v. Williams, 464 U.S. 46 (1983) (vacating a stay of execution in a matter raising a claim very similar to that presented in *Caldwell*).

279. 110 S. Ct. at 2830. The *Sawyer* majority also rejected the argument that the several state courts which had upheld state law claims analogous to the successful eighth amendment claim in *Caldwell* simply regarded themselves as following the dictates of federal precedent. Such an assertion, the majority believed, is "premised on a skepticism of state courts that we decline to endorse." *Id.* at 2831.

280. *See id.* at 2834 (Marshall, J., dissenting) (arguing that majority's argument "ignores the centrality of the *Caldwell* rule to reliability in capital sentencing").

281. *Id.*

282. *Id.* This consequence of the Court's rationale, in turn, suggests the obvious: that the determination of whether a prior state court decision denying a constitutional claim is reasonable cannot turn simply on the the number of courts which may have reached the same decision. *See* Butler v. McKellar, 110 S. Ct. 1212, 1220-21 (1990) (Brennan, J., dissenting).

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that Sawyer's *Caldwell* claim fell outside of the implicit in the concept of ordered liberty exception of *Teague* and *Penry*. More significantly, the language and rationale used by the Court suggests that the majority will be extremely reluctant to find that any new constitutional protection for criminal defendants will fall under this exception.

In addressing the applicability of this exception, the *Sawyer* majority first noted that it is not defined solely in terms of whether the new rule is designed to preserve the accuracy and reliability of the fact finding process. Rather, to fall within the exception, a new rule "must not only improve accuracy, but also 'alter our understanding of the bedrock procedural elements' essential to the fairness of a proceeding."[283] Implicit in the Court's application of this exception was that if the new rule failed to so "alter our understanding," the exception, if granted, might well swallow the rule — particularly in the context of capital sentencing errors. Indeed,

> [i]t is difficult to see any limit to the definition of the second exception if cast as proposed by petitioner. All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.... In practical effect, petitioner asks us to overrule our decision in *Penry* that *Teague* applies to new rules of capital sentencing. This we decline to do.[284]

Moreover, the majority noted, to recognize such an exception under these circumstances would be inconsistent with the principle that the writ of federal habeas corpus not " 'seriously undermine[ ] the principle of finality which is essential to the operation of our criminal justice system.' "[285]

The *Sawyer* majority, then, did not believe that *Caldwell* exemplified a "bedrock" rule that should fall within the *Teague* implicit in the concept of ordered liberty exception. In part, the Justices premissed their conclusion on a belief that the only defendants who need to rely on *Caldwell* are those who are unable to show that the prosecutorial misstatements rendered their proceedings fundamentally unfair.[286] Finally, in rejecting the applicability of the exception, the *Sawyer* majority emphasized that its conclusion was consistent with its holding in *Dugger v. Adams*[287] that a *Caldwell* claim would not come within the fundamental miscarriage of justice exception to the doctrine of pro-

283. 110 S. Ct. at 2831 (quoting *Teague*, 109 S. Ct. at 1076 (quoting Mackey v. United States, 401 U.S. 677, 693 (1971))) (emphasis omitted).

284. *Id.* at 2832.

285. *Id.* at 2831 (quoting *Teague*, 109 S. Ct. at 1074).

286. *Id.* at 2832 (referencing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). The majority's assertion that *Caldwell* really does little to insure the accuracy of the sentencing determination is inconsistent with its conclusion that *Caldwell* announced a new rule because of the additional protections it provided. *See id.* at 2838-39 n.3 (Marshall, J., dissenting) ("The majority's extensive effort in its 'new rule' analysis to demonstrate that *Caldwell*'s 'additional' protections marked a departure in our Eighth Amendment jurisprudence, however, seems disingenuous in light of its conclusion that the departure did not amount to much.").

287. 489 U.S. 401 (1989).

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cedural default.[288]

Sawyer's implicit in the concept of ordered liberty holding is problematic for several reasons. First, the majority's emphasis on " 'bedrock procedural elements' essential to the fairness of a proceeding"[289] and its belief that "it is 'unlikely that many such components of basic due process have yet to emerge' "[290] suggests a static view of federal constitutional law. Such a view is at odds with settled doctrine that the scope of the eighth amendment is dependent on evolving standards of decency.[291] From a practical standpoint, such a view suggests that the implicit in the concept of ordered liberty exception, although available in theory, will not be available in fact. Second, the Court's reliance on procedural default doctrine is misplaced because the availability of any *Teague* defense, unlike a procedural default defense, is based on fortuities in the timing and pace of litigation — factors largely, if not wholly, beyond the control of the accused. Moreover, any reliance on procedural default doctrine is not justified since the second *Teague/Penry* exception, unlike the procedural default fundamental miscarriage of justice exception, focuses on the reliability enhancing importance of the new rule in the abstract and not in the context of a particular case.[292] Finally, the majority's application of the second *Teague/Penry* exception loses sight of the importance of the *Caldwell* rule in insuring accurate sentencing determinations.[293]

D. *Remaining Issues and Recent Developments after* Butler, Parks, *and* Sawyer

Notwithstanding *Butler, Parks,* and *Sawyer,* several *Teague/Penry* questions remain unresolved. The following are among the most troubling questions. Will a *Teague/Penry* defense be waived if not raised? Should a federal habeas petitioner be able to rely on *Teague* and *Penry* to *foreclose* consideration of *un*favorable federal constitutional law decisions creating new rules which are rendered after his conviction becomes final? What is the appropriate cut-off date for determining what law applies in a federal habeas proceed-

288. 110 S. Ct. at 2832-33. Although it conceded that *Adams* arose in a different context, the majority understood the rationale of *Adams* to "reflect[ ] a rejection of the argument that *Caldwell* represents a rule fundamental to the criminal proceeding." *Id.* at 2833.

289. *Id.* at 2831 (quoting *Teague,* 109 S. Ct. at 1076 (quoting Mackey v. United States, 401 U.S. 677, 693 (1971))) (emphasis omitted).

290. *Id.* at 2832 (quoting *Teague,* 109 S. Ct. at 1077).

291. *See id.* at 2840 (Marshall, J., dissenting) ("[T]he notion that we have already discovered all those procedures central to fundamental fairness is squarely inconsistent with our Eighth Amendment methodology, under which 'bedrock' Eighth Amendment principles emerge in light of new societal understandings and experience.").

292. The nontransferability of procedural default principles to the retroactivity context is discussed *supra* notes 208-10 and accompanying text. *See also Sawyer,* 110 S. Ct. at 2839 (Marshall, J., dissenting).

293. *See* Clark v. Dugger, 901 F.2d 908, 912, 913 (11th Cir. 1990) ("The text of *Caldwell* itself mandates that the rule it announces fall within the second exception." "Because a *Caldwell* error seriously corrupts and diminishes the accuracy of the imposition of the death sentence, we hold that the 'new rule' of *Caldwell* should apply retroactively to Clark.").

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ing for claims considered on the merits in state collateral post-conviction proceedings? Finally, perhaps the most difficult of all unresolved issues is what is the relationship of the procedural default and the abuse of the writ doctrines to the *Teague/Penry* principles?[294]

In *Collins v. Youngblood*[295] the Supreme Court addressed the question of whether any *Teague/Penry* defense could be waived. It held that the defense, though "grounded in important considerations of federal-state relations, [is] not 'jurisdictional' in the sense that [the] Court . . . *must* raise and decide the issue *sua sponte*."[296] In his majority opinion, Chief Justice Rehnquist was careful to point out, however, that the state had not raised *Teague* "in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that the State had chosen not to rely on *Teague*."[297]

Four months prior to the *Youngblood* decision, the United States Court of Appeals for the Seventh Circuit had anticipated the *Youngblood* jurisdictional/waiver holding. In *Hanrahan v. Greer*[298] the court held that a state could waive a *Teague/Penry* defense by failing to raise the issue in the federal district court. It reached this conclusion even though *Teague* had not been decided when the case was pending in the district court, noting that "[d]isputes about the retroactive application of constitutional decisions have pervaded criminal procedure over the last 25 years."[299] The Seventh Circuit approach should be followed. Nothing about a *Teague/Penry* defense sets it apart from abuse of the writ or procedural default defenses which the state, by failing to raise in a timely manner, can waive.[300]

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294. The Court in *Sawyer* addressed one aspect of the relationship between procedural default doctrine and *Teague/Penry* retroactivity principles, *i.e.*, the relationship between the second *Teague/Penry* exception and the procedural bar fundamental miscarriage of justice exception. 110 S. Ct. 2822, 2831-33 (1990). In Selvage v. Collins, 110 S. Ct. 974 (1990), the Court's certiorari grant suggested it might resolve another aspect of this relationship, the relationship between the *Teague/Penry* new rule definition and the novelty/cause procedural default exception. *See* Reed v. Ross, 468 U.S. 1 (1984). Specifically, the following question was presented in *Selvage*. "At the time petitioner was tried, was there 'cause' for not raising a claim based upon arguments later accepted in [*Penry*]." Selvage v. Lynaugh, 110 S. Ct. 231 (1989). In deciding the case, however, the Court remanded to the Texas state courts to determine whether under Texas law Selvage's claim for relief based on *Penry* would be procedurally barred. *Selvage*, 110 S. Ct. at 974-75.

295. 110 S. Ct. 2715 (1990).

296. *Id.* at 2718 (emphasis in original).

297. *Id.*

298. 896 F.2d 241 (7th Cir. 1990).

299. *Id.* at 245. The court remarked: "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.* The Seventh Circuit did imply that it might take a different approach regarding pre-*Teague* waivers for federal habeas petitioners seeking the establishment of new rules as contrasted to those seeking to utilize decisions which announced new rules since the pre-*Teague* practice was to decide the retroactivity question after the new rule had been established. *Id.*

300. Jenkins v. Anderson, 447 U.S. 231, 234 n.1 (1980) (state's failure to argue state procedural bar in lower courts resulted in waiver of the bar); Sanders v. United States, 373 U.S. 1, 10-

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Whether federal habeas petitioners should be able to rely on *Teague/Penry* principles to foreclose consideration of unfavorable new rule decisions rendered after their convictions became final[301] is a question that follows from the Court's emphasis on the deterrent rationale for the federal habeas remedy. It tests whether the Court will adhere to its stated understanding of the purpose of the federal habeas remedy. If the purpose of the remedy, as the Court claims, is to insure that state courts act reasonably, rather than correctly, at the time they resolve federal constitutional claims, then neither the state nor the federal habeas petitioner should be able to benefit from a new rule decision. Whether this argument from symmetry will withstand the scrutiny of a result-oriented Supreme Court remains to be seen.

As to the date which is determinative of the law to be used in evaluating a federal habeas petitioner's claims, the Court's recent retroactivity decisions have defined that date to be when the petitioner's conviction became final.[302] In light of the Court's understanding of the role of the federal habeas remedy, however, this date makes little sense for claims that are entertained on the merits in state collateral post-conviction proceedings. For such claims, the operative date should be when the Supreme Court disposes of a certiorari petition from the state collateral post-conviction court decision denying the federal constitutional claim on the merits. If the purpose of the habeas remedy is to insure that state courts resolve federal constitutional claims consistent with existing law, then a federal habeas court reviewing a merits decision of a state collateral post conviction court should be able to use the law as it existed when that ruling became "final."[303]

Finally, the relationship between *Teague/Penry* principles and the related defenses of procedural default and abuse of the writ remains to be resolved. As discussed earlier, the *Sawyer* majority addressed the question of the rela-

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11, 17 (1963) (burden of pleading the abuse of the writ defense rests with the state); Price v. Johnston, 334 U.S. 266, 292 (1948) (same).

301. *See* Butler v. McKellar, 110 S. Ct. 1212, 1221 n.4 (1990) (Brennan, J., dissenting):

> Habeas petitioners may no longer benefit from legal rulings that expand required procedural protections. But under the Court's regime, habeas petitioners who have valid claims under "prevailing" law even as defined today may nevertheless *lose* their claims should a federal court on habeas review decide to issue a "new" rule of law in favor of the *State* . . . . Today's decisions in *Butler* and *Saffle*, foreclosing relief for two petitioners based on "new" understandings of the limits of federal habeas, starkly illustrate the Court's lack of concern for symmetry — and fairness.

302. *See supra* note 23.

303. Accepting the Court's understanding of the habeas remedy, it would be logical for the federal habeas petitioner to have his claims evaluated under the law as it existed when the highest state court denied relief, not the law as it existed when his petition for certiorari petition was addressed. The same "logic," however, could be applied to the Court's present definition of when a state conviction becomes final for *Teague/Penry* purposes. The types of claims likely to be cognizable on the merits in state collateral post conviction proceedings include claims based on facts that were not reasonably available earlier (*e.g.*, claims premised on Brady v. Maryland, 373 U.S. 83 (1963), and its progeny), claims for which the record is inadequate to address the claim on direct appeal (*e.g.*, ineffective assistance of counsel), and claims based on changes in applicable law.

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tionship between the second *Teague/Penry* exception and the fundamental miscarriage of justice exception to procedural default principles.[304] As to the relationship between the novelty/cause procedural default exception and *Teague*'s general preclusion on habeas petitioners seeking or utilizing new rule decisions, there exists a clear tension between habeas petitioners asserting the novelty of a claim as cause to excuse a state procedural default while at the same time urging that the claim is not new for *Teague* purposes. However, since the time frames for making the novelty and new rule determinations may differ, it is at least conceivable that a claim may be new for procedural default purposes and not new for *Teague* purposes. In light of the Court's remand in *Selvage v. Collins*[305] the relationship between these doctrines remains to be addressed. Concededly, however, the federal habeas petitioner who is seeking to raise a claim procedurally defaulted in the state courts and who wishes to rely on the novelty of the claim as cause for the default will have a difficult time obtaining merits consideration of that claim in his federal habeas proceeding.

Regarding the relationship between the *Teague/Penry* principles and abuse of the writ doctrine, the questions posed are analogous to those presented in the procedural default context: first, whether the ends of justice exception to abuse of the writ principles[306] will be construed to be coextensive with the procedural default fundamental miscarriage of justice exception, and second, whether there will be any tension between the justifications required to excuse the failure to raise a claim in an earlier federal habeas petition and *Teague*'s general preclusion on habeas petitioners seeking or utilizing new rules. The Supreme Court is likely to shed some light on this latter question when it decides *McCleskey v. Zant*,[307] in which one of the issues presented is whether an objective or subjective standard will be used to determine whether the failure to raise a claim in a prior federal habeas proceeding constitutes an abuse of the writ.

Notwithstanding these unresolved issues, congressional action is warranted in the wake of *Butler*, *Parks*, and *Sawyer*.[308] By asserting that the purpose of the federal habeas corpus remedy is to encourage state courts to act reasonably, as opposed to correctly, in resolving federal constitutional claims, these decisions have so diminished the power of the writ that "the threat of habeas review will deter state courts only from completely indefensible rejections of federal claims."[309] In short, the Court has largely dismantled the Great Writ, something which Congress has steadfastly refused to do. It is

304. *See supra* notes 287-88 and accompanying text.

305. 110 S. Ct. 974 (1990); *see supra* note 294 for a discussion of *Selvage*.

306. *See* Sanders v. United States, 373 U.S. 1 (1963) (federal habeas courts may consider claims raised and rejected in an earlier habeas petition if warranted by the ends of justice).

307. 890 F.2d 342 (11th Cir. 1989), *cert. granted*, 110 S. Ct. 2585 (1990).

308. "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us . . . ." Teague v. Lane, 109 S. Ct. 1060, 1079 (1989) (White, J., concurring).

309. Butler v. McKellar, 110 S. Ct. 1212, 1222 (Brennan, J., dissenting).

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ironic that members of the Court who pride themselves on being judicial conservatives have chosen to act in this essentially legislative manner.[310] It is equally significant and troubling that the Court has chosen to do so in great part because of a distaste for the role the remedy plays in the review process of those sentenced to death.

310. *See id.* at 1226-27 ("It is Congress and not this Court who is 'responsible for defining the scope of the writ' . . . . Yet the majority, whose Members often pride themselves on their reluctance to play an 'activist' judicial role by infringing upon legislative prerogatives, does not hesitate today to dismantle Congress' extension of federal habeas to state prisoners.") (citation omitted).

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