BURTON v. STEWART: RECONSIDERING WHAT MAKES A SUPREME COURT DECISION "NEW"

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I. INTRODUCTION

In *Burton v. Stewart*,[1] the Supreme Court narrowly avoided deciding whether *Blakely v. Washington*[2] is a "new" rule, as well as the related question of whether *Blakely* should be applied retroactively on collateral review. Instead, the Court ruled that Mr. Burton's petition for review did not meet the "gatekeeping requirements of 28 U.S.C. § 2244(b)."[3] By deciding *Burton* on procedural grounds rather than considering the merits of the underlying claims upon which certiorari was granted, the Court delayed consideration of important issues, which are likely to resurface.

In this commentary, I begin by describing Mr. Burton's claim that the Court's *Blakely* decision should be available to prisoners challenging their prison sentences through habeas corpus review.[4] Next, I review the historical underpinnings of the Court's *Teague v. Lane*[5] decision, which established the modern framework for determining when the Court's decisions will be retroactively applicable.[6] I then explore how the Court has applied one part of the *Teague* test, the critical determination of when a decision is "new."[7] Finally, I attempt to apply this part of the *Teague* test to the *Blakely v. Washington* decision.[8] As this attempt reveals the uncertainty

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1. 127 S. Ct. 793 *2007).
2. 542 U.S. 296 (2004).
3. 127 S. Ct. 793, 794 (2007).
4. *See infra* Part I.
5. 489 U.S. 288 (1989).
6. *See infra* Part II.
7. *See infra* Part III.
8. *See infra* Part IV.

surrounding the application of the *Teague* test, I conclude with a brief discussion of the implications of the continued use of this method for determining when a Supreme Court decision is "new," and propose that the Court should rethink, or at least carefully apply this test.[9]

II. THE PLEA FOR RETROACTIVITY IN *BURTON V. STEWART*

In the June 2000 decision of *Apprendi v. New Jersey*, the Supreme Court described the constitutionally guaranteed right that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[10] The *Apprendi* decision impacted Lonnie Burton,[11] a prisoner in the State of Washington, whose sentence had depended on his sentencing judge's independent findings.[12] After he had exhausted his direct appeals, and his conviction had become final,[13] Mr. Burton filed a Personal Restraint Petition in the Supreme Court of Washington as well as a writ of habeas corpus in federal court on the grounds that his conviction was unconstitutional.[14] In both "collateral attacks," he relied on *Apprendi*, arguing that the sentencing judge had impermissibly relied on facts neither proven to a jury, nor proven beyond a reasonable doubt.[15] However, both the state and federal courts denied Mr. Burton's request for relief, the Supreme Court of Washington explicitly stating that "*Apprendi* does not apply to exceptional sentences that are otherwise within the statutory maximum for the crime."[16]

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9. *See infra* Conclusion.

10. 530 U.S. 466, 490 (2000).

11. Mr. Burton was convicted of rape, robbery, and burglary in a Washington state court. Petition for Writ of Certiorari, Burton v. Waddington, No. 05-9222, 2006 WL 1525997, at *3 (Feb. 10, 2006). His sentence for these crimes was consecutively imposed after the court found exceptional circumstances under Washington's Revised Code § 9.94A.400 (2007). *Id.*

12. Petition for Writ of Certiorari, Burton v. Waddington, No. 05-9222, 2006 WL 1525997, at *3 (Feb. 10, 2006); *see also* Transcript of Oral Argument at 37, Burton v. Stewart, 127 S. Ct. 793 (2007), (Justice Stevens noting that "[i]t nowhere says they're unnecessary either" to the judge's sentence).

13. Petition for Writ of Certiorari, Burton v. Waddington, No. 05-9222, 2006 WL 1525997, at *3 (Feb. 10, 2006).

14. *Id.* at *4.

15. *Id.*

16. *Id.* at *5 (quoting Supreme Court of Washington, Ruling Denying Review, No. 72656-4 (July 16, 2002)).

Following the completion of Mr. Burton's case, the Supreme Court decided *Blakely v. Washington*. In *Blakely*, the Court agreed with Mr. Burton's argument, and disagreed with the lower courts' characterization of *Apprendi*, holding that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[17] This ruling meant that judges in future cases could no longer independently find facts as the judge did in Lonnie Burton's case.[18] However, the Ninth Circuit ruled that the Supreme Court's clarification of the law would not benefit Mr. Burton, as his conviction had become final prior to the Supreme Court's *Blakely* decision.[19] In *Burton v. Waddington*, the Supreme Court granted certiorari to address whether the *Blakely* decision applied to criminal defendants whose conviction had already become "final" before it was decided.[20] Though the Court remanded *Burton* based on the district court's lack of jurisdiction to consider the habeas petition, the issues contained in the case are likely to be raised again and remain important for practitioners.

The Supreme Court's grant of certiorari in *Burton* represented the latest in a long line of cases in which the Court has considered whether one of its decisions should be available to prisoners collaterally attacking their convictions through a writ of habeas corpus. Traditional jurisprudence in this area relies heavily on an analysis by Justice Harlan for the purpose of the "great writ," and his proposal that a "new rule" should generally not be available to such prisoners.[21]

III. THE RETROACTIVITY RULE: THE ROAD TO *TEAGUE V. LANE*

The modern framework for assessing whether Supreme Court decisions should be retroactively applied was developed in a series of cases following the Court's 1965 proclamation that the Constitution

17. 542 U.S. 296, 303–04 (2004).

18. *See, e.g.*, State v. Washington, 143 P.3d 606 (Wash. Ct. App. 2006) (holding a *Blakely* violation under facts substantially similar to those in Mr. Burton's case).

19. Burton v. Waddington, 142 F. App'x. 297 (9th Cir. 2005).

20. Burton v, Stewart, 127 S. Ct. 793 (2007).

21. *See infra* Part II.

does not require retroactive application of criminal decisions.[22] This framework was born in Justice Harlan's dissent in *Desist v. United States*,[23] subsequently germinated in his concurring opinion in *Mackey v. United States*,[24] and culminated in the Court's decision in *Teague v. Lane* after Justice Harlan was no longer on the Court.[25] To replace the balancing test in place at that time,[26] Justice Harlan created a framework in which he relied heavily on the difference between direct review of, and collateral attack on, a conviction.

For cases on direct review, Justice Harlan noted that "[m]atters of basic principle are at stake" when deciding to which defendants to apply the Court's decisions.[27] Lamenting a system in which the Court would "simply pick and choose from among similarly situated defendants those who alone will receive the benefit,"[28] he concluded that the Court has "no right on direct review to treat one case differently from another with respect to constitutional provisions applicable to both."[29] He rested this conclusion on his view of the role of the Court: "I continue to believe that a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was."[30] Thus, to achieve fairness, Justice Harlan believed that a Supreme Court decision that interprets the criminal law should be applied to every criminal defendant whose case is still pending, until all appeals have been exhausted.

Justice Harlan viewed the application of Supreme Court decisions to prisoners who already had exhausted their direct appeals very differently. The common-sense notion that everyone should benefit from a changed interpretation of the law, which Justice Harlan applied for direct review, was here counterbalanced by an understanding that "the law" is not an absolute truth that judges "find," but is more simply just a question of what was "on the books"

22. Linkletter v. Walker, 381 U.S. 618 (1965).
23. 394 U.S. 244, 256 (1969) (Harlan, J., dissenting).
24. 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part).
25. 489 U.S. 288 (1989).
26. *E.g.*, *Linkletter*, 381 U.S. at 636.
27. *Desist*, 394 U.S. at 258.
28. *Id.* at 259.
29. *Mackey*, 401 U.S. at 701 (Harlan, J., concurring).
30. *Id.* at 681.

when a crime was committed.[31] Because the courts' role is "to say what the law is,"[32] equal application of the law to everyone would only require an equal application of the law as it was then understood. Thus, Justice Harlan's description of the role of the Court suggests that there is nothing inherently aberrant in applying different rules to people who were convicted when different Supreme Court decisions were in effect. For him, the issue of whether a decision should be applied to cases on collateral review hinges on what makes the collateral review system different from the system of direct appeal.

Noting the "expansion of the writ" in the prior years, Justice Harlan asserted that "[t]he primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors is that it provides a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark."[33] In other words, the purpose of collateral review is to serve as a procedural safeguard designed to ensure that courts at all levels are applying the law, including relevant Supreme Court decisions, as it was then fairly understood. As Justice Harlan described, "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[34] Most important, he noted, "[i]n order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[35] This purpose is reflected in the statutory requirement that habeas review be granted only if the lower court uses an "unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[36]

Importantly, Justice Harlan did not envision habeas review as primarily a process for obtaining justice for an individual defendant.

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31. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) ("But law in the sense in which courts speak of it today does not exist without some definite authority behind it. . . . The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.") (quoting Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533–35 (1928))).

32. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

33. *Mackey*, 401 U.S. at 687.

34. *Desist*, 394 U.S. at 258–59.

35. Teague v. Lyons, 489 U.S. 288, 306 (1989) (quoting *Desist*, 394 U.S. at 263).

36. 28 U.S.C. § 2254(d)(1) (1996).

As the Court has reminded, this system is not intended to be a substitute for direct review, and, is not "defined . . . by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error."[37] As Justice Harlan observed, "it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged."[38]

This understanding of the purpose of habeas explains why Justice Harlan felt that "new" Supreme Court decisions should generally not be applied retroactively to habeas petitioners. Asking lower courts to correctly predict the outcome of Supreme Court decisions does nothing to advance habeas' purpose of keeping lower courts accountable. An understanding of this purpose of habeas also explains why all decisions that are *not* deemed to be new should be available to someone collaterally attacking their confinement through habeas review. If the Supreme Court sees its decision as *dictated* by precedent, a lower court's failure to come to the same conclusion is, by definition, "unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States."[39] Deciding to apply "established" rules retroactivity is just as important to serving the purpose of habeas as the decision not to apply "new" rules retroactively, by requiring the lower courts to faithfully apply the Court's explicit decisions as well as to apply the logic implicit in the decision to any new situation. Retroactive application of any decision that clearly and logically follows from a previous one is the role of a "reasonable jurist," one who does not look for ways to distinguish a case from the Court's decisions, but rather faithfully follows both the decision and its intent. By 1982, the Court viewed this principle as obvious:

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.[40]

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37. Kuhlman v. Wilson, 477 U.S. 436, 447 (1986) (plurality opinion).
38. *Mackey*, 401 U.S. at 694.
39. 28 U.S.C. § 2254(d)(1) (1996).
40. United States v. Johnson, 457 U.S. 537, 549 (1982).

Justice Harlan's analysis also relied on the state's interest in the finality of its judgments, and what this means to the scope of habeas review. He regarded this interest as "substantial," asserting that it is "a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process,"[41] and found agreement in Congress's having changed the habeas statute "to introduce a greater measure of finality into the law."[42] He was particularly suspicious of whether habeas was a proper use of "the very limited resources society has allocated to the criminal process,"[43] when collateral review is utilized "to relitigate facts buried in the remote past."[44]

Despite these concerns about retroactivity, Justice Harlan made clear that fairness to an individual, and the demands of justice, nevertheless, required application of some "new" decisions even to collateral review. In particular, he defined those situations to include when the rule involves "substantive due process," placing "private individual conduct beyond the power of the criminal law-making authority to proscribe,"[45] or when the decision requires adherence to "procedures that . . . are implicit in the concept of ordered liberty."[46] These latter situations have often been described as the "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[47]

In 1987, in *Griffith v. Kentucky*,[48] the Court adopted the first part of Justice Harlan's opinion, deciding that a "new" rule would be applied to all cases pending on direct review. Two years later, in *Teague v. Lane*, the Court adopted Justice Harlan's framework in its entirety.[49] To conduct a *Teague* analysis, therefore, the Court needs to first determine whether or not a rule is "new." If it is not "new," but rather directly follows from a prior decision, it is retroactively applicable. If it is "new," it will not be retroactively applied, unless it falls into one of the exceptions described by Justice Harlan. Whether *Blakely* is a "new" rule and, if so, whether it should nonetheless be

41. *Mackey*, 401 U.S. at 690.
42. *Id.* at 688.
43. *Id.* at 691.
44. *Id.*
45. *Id.* at 692.
46. *Id.* at 693 (citation and internal quotation marks omitted).
47. Saffle v. Parks, 494 U.S. 484, 495 (1990).
48. 479 U.S. 314 (1987).
49. 489 U.S. 288 (1989).

retroactively applied was the issue before the Court in *Burton v. Stewart*.[50]

IV. THE COURT'S APPLICATION OF THE TEST FOR "NEW"

As Justice Harlan noted in *Mackey v. United States*, there are:

> [I]nevitable difficulties that will arise in attempting to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.[51]

When adopting Harlan's framework for determining the retroactivity of the Court's decisions, the *Teague v. Lane* Court agreed with this proposition, acknowledging "[i]t is admittedly often difficult to determine when a case announces a new rule."[52] Experience with the *Teague* rule has not simplified this inquiry.

In *Desist v. United States*, Justice Harlan first described a decision that his proposed framework would not characterize as "new."[53] This case involved a situation in which the Court had "never previously encountered the precise situation raised," but wherein the "decision in that case rested upon . . . established doctrine."[54] He characterized these non-"new" decisions as follows:

> [M]any, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against application of the "new" rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.[55]

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50. 127 S. Ct. 793 (2007).

51. Mackey v. United States, 401 U.S. 667, 695 (1971) (internal quotations and citation omitted) (Harlan, J., concurring in part and dissenting in part).

52. Teague v. Lane, 489 U.S. 288, 301 (1989).

53. Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (describing the decision in Spinelli v. United States, 393 U.S. 410 (1969), as resting upon Johnson v. United States, 333 U.S. 10 (1948), and Aguilar v. Texas, 378 U.S. 108 (1964)).

54. *Id.*

55. *Id.* at 263–64.

The Court applied this principle in *Yates v. Aiken*,[56] holding that the prior decision in *Francis v. Franklin*[57] had been "merely an application of the principle that governed . . . in *Sandstrom v. Montana*,"[58] and thus "did not announce a new rule."[59] In *Teague*, the Court added specificity to the analysis of what constitutes a "new" rule by stating that "[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."[60] In addition, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[61] With respect to the rule being considered in *Teague* itself, the Court relied heavily on its having overruled a previous case in order to conclude that it was a new rule.[62]

In the decades following *Teague*, the Court has applied this test for what constitutes a new rule while continuing to reflect upon the test's origin in the purpose of the writ of habeas corpus. Yet, through these decisions, the "new rule" test has undergone a palpable change in emphasis, with the result that fewer decisions can be characterized as not being "new." In *Butler v. McKellar*, the Court reiterated that "[a] new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation,'"[63] but cautioned that the "inquiry will be more difficult"[64] in most cases. The *Butler* Court viewed the *Teague* test as one that "validates reasonable, good-faith interpretations of existing precedents,"[65] a description that indicates the Court would be reluctant to characterize a decision as not being "new."[66] Further highlighting this perspective, the Court asserts that "the fact that a court says its decision is . . . 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*."[67] Thus, the Court relied on "a significant difference of opinion on the part of several

56. 484 U.S. 211 (1988).
57. 471 U.S. 307 (1985).
58. 484 U.S. 211, 217 (1988).
59. *Id.* at 218.
60. 489 U.S. 288, 301 (1989).
61. *Id.*
62. *Id.* at 295 ("Batson constituted 'an explicit and substantial break with prior precedent because it overruled a portion of *Swain*.'") (citations omitted).
63. 494 U.S. 407, 412 (1990).
64. *Id.* at 413.
65. *Id.* at 414.
66. *Id.*
67. *Id.* at 415.

lower courts"[68] and its view that its decision was "susceptible to debate among reasonable minds"[69] to conclude that its decision in *Arizona v. Roberson*[70] was "new."[71]

On the same day the Court decided *Butler*, it also described, the "new rule" test as a determination of whether a lower court "would have felt compelled by existing precedent to conclude that the rule . . . was required by the Constitution."[72] Four dissenters in these two cases described the majority as having "limited drastically the scope of habeas corpus relief through the application of a virtually all-encompassing definition of 'new rule.'"[73] Nonetheless, the majority of the Court maintained that if "reasonable jurists may disagree," a rule is new.[74]

A year later, in a situation closely analogous to that presented in *Burton*, the Court considered whether two cases[75] were applications of a previously announced principle[76] or represented new rules.[77] Importantly, in finding that the cases did not break new ground and did not announce new rules, the Court attempted to limit the broader definition of "new rule," noting that "reasonableness . . . is an objective standard"[78] and that a circuit court's contrary view is "not dispositive."[79]

However, subsequent cases have confirmed the broad reading of "new." A few years later, in *Lambrix v. Singletary*, the Court considered "significant" to its conclusion that a decision had announced a "new rule" the fact that that decision "itself did not purport to rely upon any controlling precedent."[80] This case contains, perhaps, the broadest language yet regarding the definition of "new rule," stating that *Teague* "asks whether [a case] was *dictated* by

68. *Id.*
69. *Id.*
70. 486 U.S 675 (1988).
71. *Butler*, 494 U.S. at 415.
72. Saffle v. Parks, 494 U.S. 484, 488 (1990).
73. *Id.* at 497 (Brennan, J., dissenting).
74. Sawyer v. Smith, 497 U.S. 227, 234 (1990).
75. Maynard v. Cartwright, 486 U.S. 356 (1988); Clemons v. Mississippi, 494 U.S. 738 (1990).
76. Godfrey v. Georgia, 446 U.S. 420 (1980).
77. Stringer v. Black, 503 U.S. 222 (1992).
78. *Id.* at 237.
79. *Id.*
80. 520 U.S. 518, 528 (1997).

precedent—*i.e.*, whether *no other* interpretation was reasonable."[81] When applying the "reasonableness" test for whether a decision is "new," the Court has paid particular attention to both the existence and the substance of dissents from that decision.[82] In *O'Dell v. Netherland*, the Court relied on the existence of dissenters, noting "[t]he array of views expressed in [the case] itself suggests that the rule announced there was, in light of this Court's precedent, 'susceptible to debate among reasonable minds.'"[83]

More recently, in 2004, the Court again emphasized the significance of the dissenting opinion.[84] Noting that the dissenters argued that the Court's precedents "did not control" that decision, the Court concluded that "[i]t follows a fortiori that reasonable jurists could have concluded that the [earlier cases] did not compel [the latter]."[85] Thus, the modern rule for determining whether a holding is new is for the Court to "ask whether the decision in question was dictated by precedent," and, if "reasonable jurists" could disagree about the correct application of the Court's holding, a rule will be considered new for *Teague* purposes.[86]

The "reasonableness" rule for determining whether a decision is "new" accords with the language of the statute controlling availability of the writ of habeas review. If there are multiple ways that reasonable jurists can interpret a holding, none can be described as "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," the standard for habeas review.[87] Furthermore, correcting a state's reasonable but mistaken interpretation of Supreme Court precedent does nothing to advance the purpose of the writ to encourage states to faithfully apply the law as it was then understood.

Thus, the modern inquiry into if a rule is "new" hinges on whether the Court believes that a decision is the only "reasonable application"

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81. *Id.* at 538.

82. Beard v. Banks, 542 U.S. 406 (2004).

83. O'Dell v. Netherland, 521 U.S. 151, 159–60 (1997) (quoting Butler v. McKellar, 494 U.S. 407, 415 (1990)).

84. *Beard*, 542 U.S. at 415.

85. *Id.* at 416. The Court also disclaimed in a footnote that "we do not suggest that the mere existence of a dissent suffices to show that the rule is new." *Id.* at 416 n.5.

86. Wright v. West, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in the judgment).

87. 28 U.S.C. § 2254(d)(1) (2006).

of its precedent. The Court's precedent indicates that it will variously consider 1) whether the decision itself overrules an earlier holding or purports to rely on precedent, 2) the extent of disagreement among lower courts about whether Blakely is "new", and 3) the existence and substance of dissents to the opinion.

V. IS BLAKELY V. WASHINGTON A "NEW" RULE?

The challenge accepted by the Supreme Court in granting certiorari in *Burton v. Stewart* was to apply the *Teague v. Lane* test to its decision in *Blakely v. Washington*. After determining the preliminary procedural issue of when Mr. Burton's conviction became final, the first substantive component of this application is determining whether *Blakely* is a "new" rule or "dictated by precedent." Because I conclude that *Blakely* is likely not a "new" rule, I need not explore whether *Blakely* might meet either of the two exceptions that would grant the decision retroactive status even if it were a "new" rule. To assess whether the Court is likely to conclude that *Blakely* is a "new" rule in the future, I will look to each of the factors the Court has previously relied on: (1) whether the decision itself overrules an earlier holding or purports to rely on precedent, (2) the extent of disagreement among lower courts about whether Blakely is "new," and (3) the existence and substance of dissents to the opinion.

A. Does Blakely *overrule an earlier holding or purport to rely on precedent?*

Clearly, the Court's decision in *Blakely v. Washington* did not overrule an earlier holding and thus is not easily categorized as a "new" rule.[88] In contrast, as Mr. Burton argued during oral argument, the "jury verdict beyond a reasonable doubt" standard in *Blakely* was expressed in Supreme Court precedent from as long ago as 1970 in *In re Winship*.[89] In that case, the Supreme Court stated that "[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a

88. *See* Butler v. McKellar, 494 U.S. 407, 415 (1990) (explaining when courts will consider whether a rule is "new").

89. 397 U.S. 358 (1970).

reasonable doubt of every fact necessary to constitute the crime with which he is charged."[90] In *Apprendi v. New Jersey*, the Court explained that its decision relied on *Winship* and its progeny.[91] During oral argument, Burton's counsel reminded the Court of "several passages in *Apprendi* that said that the statutory maximum was the maximum allowed based on the facts in the jury verdict," and that these statements were sufficient to dictate the aspect of *Blakely*'s holding that would result in a favorable outcome for defendants like Mr. Burton.[92] Although *Blakely* also defined "statutory maximum" in a manner later applied to the federal guidelines in *United States v. Booker*,[93] that application of *Apprendi* would not have been necessary for Mr. Burton, and is not necessary for similarly situated defendants. For Mr. Burton, all that would have been necessary is that the judge's discretion be "based on the facts in the jury verdict."[94]

A point in favor of the position that *Blakely* is not a "new rule" but rather is an application of established law is the fact that the *Blakely* majority announced that its decision merely required application of "the rule . . . expressed in *Apprendi*" and believed that "precedents make clear" its ultimate holding.[95] In *Booker*, the Court continued to suggest that the *Blakely* decision was pre-ordained by *Apprendi*, reiterating "[o]ur precedents, we explained, make clear that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflects in the jury verdict or admitted by the defendant."[96] Whereas these statements are "not conclusive,"[97] they demonstrate that, unlike *Lambrix v. Singletary*,[98] *Blakely* does purport to rely on precedent. Therefore, this first factor suggests that *Blakely* is not a "new" rule and should thus apply retroactively under the *Teague* test.

90. *Id.* at 364.
91. Apprendi v. New Jersey, 530 U.S. 466, 484–92 (2000).
92. Transcript of Oral Argument at 21, Burton v. Stewart, 127 S. Ct. 793 (2007).
93. United States v. Booker, 543 U.S. 220 (2005).
94. Transcript of Oral Argument at 21, Burton v. Stewart, 127 S. Ct. 793 (2007).
95. Blakely v. Washington, 542 U.S. 296, 301–03(2004).
96. *Booker*, 543 U.S. at 232.
97. Butler v. McKellar, 494 U.S. 407, 415 (1990).
98. Lambrix v. Singletary, 520 U.S. 518, 529 (1997).

B. Do lower courts disagree about whether Blakely is "new"?

On the other hand, the opinions of various lower courts suggest that *Blakely* might involve the creation of a "new" rule. A number of federal circuit courts of appeal and state supreme courts had been faced with *Blakely*-like situations after *Apprendi v. New Jersey* but before *Blakely v. Washington* was decided, and concluded that *Apprendi* did not extend to those situations.[99] Similarly, after the *Blakely* decision, a number of circuit courts of appeals considered whether the decision was "new" under the *Teague v. Lane* test and concluded that it was.[100] Still, although the fact that lower courts did not agree with the Court's ultimate holding in *Blakely* is illustrative, it is also "not dispositive."[101] Moreover, more interesting than the fact that five courts of appeals decided that *Blakely* was a "new" rule for *Teague* purposes is the reasoning behind these courts' conclusions.

The first circuit court to consider *Blakely's* retroactivity was the Tenth Circuit Court of Appeals in *United States v. Price*.[102] The *Price* court relied on the fact that *Blakely* defined "statutory maximum" and thus crafted a new rule to conclude that *Blakely*, as a whole, should not apply retroactively.[103] However, as explained above, the definition of "statutory maximum" is irrelevant to how *Blakely* applies to Mr. Burton, or similarly situated defendants, who challenge their confinement based upon the existence of judge-found facts.

Subsequently, the First, Eleventh, and Eighth Circuits each also held that *Blakely* does not apply retroactively, but did so only after concluding that the Supreme Court's later decision in *United States v. Booker* also does not apply on collateral review.[104] As one of these courts described, "*Blakely* claims are now viewed through the lens of *United States v. Booker* . . . ."[105] Unfortunately, this merging of the *Blakely* and *Booker* decisions precludes any consideration of the

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99. *See Blakely*, 542 U.S. at 320 n.1 (O'Connor, J., dissenting) (contrasting one case which extended *Apprendi* to a *Blakely*-like situation with sixteen cases which failed to do so).

100. United States v. Hernandez, 436 F.3d 851 (8th Cir. 2006); Cirilo-Munoz v. United States, 404 F.3d 527 (1st Cir. 2005); Michael v. Crosby, 430 F.3d 1310 (11th Cir. 2005); Schardt v. Payne, 414 F.3d 1025 (9th Cir. 2005); United States v. Price, 400 F.3d 844 (10th Cir. 2005).

101. Stringer v. Black, 503 U.S. 222, 237 (1992).

102. 400 F.3d 844 (10th Cir. 2005).

103. *Id.* at 847.

104. *Crosby*, 430 F.3d at 1312 n.2; *Cirilo-Munoz*, 404 F.3d at 532; Never Misses a Shot v. United States, 413 F.3d 781, 783 (8th Cir. 2005).

105. *Cirilo-Munoz*, 404 F.3d at 532.

application of *Blakely* to cases such as Mr. Burton's, which do not necessarily rely upon the Court's application of *Apprendi* in *Booker*. Whether the Court's decision in *Booker* is "new" is a separate question that must be addressed independently. As these circuit courts did not address the issue of the retroactivity of *Blakely* directly, their conclusions can have only limited force in the Court's determination of whether *Blakely* is "new."

Finally, in *Schardt v. Payne*, the Ninth Circuit relied entirely on those aforementioned cases in which lower courts had failed to extend *Apprendi* to *Blakely*-like situations before the Supreme Court decided *Blakely* itself.[106] The Ninth Circuit reasoned that because the lower courts had not reached the same conclusion regarding the application of *Apprendi* that the Supreme Court eventually did, "the rule announced in *Blakely* was clearly not apparent to all reasonable jurists."[107] However, the logic of this position is weakened in particular circumstances, such as those raised by Justice Souter during oral argument in *Burton*.[108] As he noted, the force of implication that can be drawn from the existence of disagreements amongst the lower courts is diminished when those courts are simply engaging in an "exercise of hope" by "expressing the hope that the Court would draw a distinction which it had not drawn," rather than concluding that "*Apprendi* requires a certain result."[109] After all, the purpose of habeas is precisely to prevent this kind of independent wishful thinking on the part of lower courts, and to "forc[e] trial and appellate courts in both the federal and state system to toe the constitutional mark."[110] To this end, allowing habeas review of lower courts' decisions, which were decided between *Apprendi* and *Blakely*, serves the very purpose Justice Harlan attributed to the Great Writ.

C. The existence and substance of dissents from the Blakely opinion

As noted above, the Court has recently focused on an opinion's dissenters when deciding whether a rule is "new" for Teague purposes.[111] In *Blakely v. Washington*, there were three separate

106. Schardt v. Payne, 414 F.3d 1025, 1035 (9th Cir. 2005).
107. *Id.*
108. Transcript of Oral Argument at 41, Burton v. Stewart, 127 S. Ct. 793 (2007).
109. *Id.*
110. Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring in part and dissenting in part).
111. *E.g.*, Beard v. Banks, 542 U.S. 406, 415 (2004).

dissents from the Court's decision, which were authored by Justice O'Connor, Justice Kennedy, and Justice Breyer.[112] As the Court made clear in *Beard v. Banks*, the impact of these dissents on the Court's decision depends on the substance of their disagreement.[113] In this case, the impact of the dissents is potentially very limited by their lack of disagreement with the majority regarding the substance of the holding itself. In one remarkable moment during oral argument, Justice Breyer, one of only two dissenters in *Blakely* who are still on the Court (along with Justice Kennedy), acknowledged that when writing his dissent he "couldn't think of how they might have limited Apprendi" so as to preclude *Blakely's* outcome.[114] This strongly suggests that *Blakely* is not a "new rule." Furthermore, during oral argument in *Burton v. Stewart*, Justice Souter concluded his questioning by asking the state whether reading *Apprendi* like Justice O'Connor proposed in her *Blakely* dissent would have been a clear application of *Apprendi* or something new. The state responded that it "definitely would have been something new."[115] If the state is correct that Justice O'Connor's dissent was predicated on "a distinction which simply was not addressed in Apprendi,"[116] this suggests that, like Justice Breyer's dissent, her dissenting opinion also does not stand for the proposition that *Blakely* is a "new" rule. Thus, the only one of the three opinions that nudges in that direction is the dissenting opinion of Justice Kennedy, which does not attack the *Blakely* decision on the grounds that it does not obviously follow from *Apprendi* but rather challenges *Blakely* based on a policy concern that the decision does not comport with separation of powers ideals.

Taken together, the factors the Court looks to when deciding if one of its decisions is "new" lean toward the conclusion that *Blakely* does not establish a "new" rule but rather applies the Court's *Apprendi* decision, as the Court purports to do.[117] However, this conclusion is subject to disagreement on each of the factors considered, and the Court's recent proclivity for deeming their decisions "new" might suggest the opposite outcome.

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112. Blakely v. Washington, 542 U.S. 296, 314–47 (2004).
113. 542 U.S. at 415.
114. Transcript of Oral Argument at 40, Burton v. Stewart, 127 S. Ct. 793 (2007).
115. *Id.* at 42.
116. *Id.*
117. *Blakely*, 542 U.S. at 301.

V. CONCLUSION

It is important that the Supreme Court decide that *Blakely v. Washington* is not a "new" decision when and if the Court grants certiorari in a case similar to *Burton*. To fully understand the application of *Teague v. Lane*,[118] it is necessary to recall the context within which this doctrine first arose. In developing his framework, Justice Harlan explicitly noted that the move was necessary only "given the current broad scope of constitutional issues cognizable on habeas."[119] In the face of opposition like that of the dissenters to *Teague*, who viewed the general rule against retroactivity as an "unprecedented curtailment of the reach of the Great Writ,"[120] Justice Harlan specifically explained that the Court needed to limit the availability of the writ in order to ensure the finality of state court judgments.[121] Perhaps most important is his explanation in *Mackey v. United States* that "[a]s regards cases coming here on collateral review, the problem of retroactivity is in truth none other than one of resettling the limits of the reach of the Great Writ, which under the recent doctrines of this Court has been given almost boundless sweep."[122]

In contrast to the expansive availability of habeas review to which Justice Harlan and his contemporaries were responding,[123] the Court today decides questions of retroactivity against a backdrop of recent legislative and judicially created restrictions on the availability of habeas review. Among these changes are the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[124] which involves a "new statute of limitations, increased deference to state court findings, strict limitations on successive habeas petitions, and special procedures for capital habeas petitioners."[125] Moreover, these legislative changes reflect only part of the panoply of recent changes to habeas' availability. Describing the judicially created

118. 489 U.S. 288 (1989).
119. 401 U.S. 667, 688 (1971) (Harlan, J., concurring in part and dissenting in part).
120. 489 U.S. 288, 327 (1989) (Brennan, J., dissenting).
121. *Mackey*, 401 U.S. at 683.
122. *Id.* at 701–02.
123. *Id.*
124. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 21 and 28 U.S.C.).
125. Aaron G. McCollough, *For Whom the Court Tolls: Equitable Tolling of the AEDPA Statute of Limitations in Capital Habeas Cases*, 62 WASH. & LEE L. REV. 365, 376 (2005).

limitations which were created prior to AEDPA, one commentator recognized,

> The Court adopted and rigorously enforced strict rules of procedural default, excluded Fourth Amendment claims from habeas corpus review, made it more difficult for a habeas petitioner to obtain an evidentiary hearing to prove a constitutional violation, adopted an extremely restrictive doctrine regarding the retroactivity of constitutional decisions, reduced the burden on the states to establish harmless error once a constitutional violation was found, and erected barriers to the filing of a second habeas petition.[126]

In light of these changes to the availability of habeas, especially the statute of limitations, the Great Writ appears to be less of an independent attack on confinement and more closely approximates one particular method for reaching "final judgment." With these legislative changes to the scope of habeas corpus review, the practical effect is that state decisions have greater finality sooner after they are made, fewer prisoners are likely able to collaterally attack their confinement, and fewer of the prisoners who do so will benefit from Supreme Court decisions. In light of these effects and in the context of the comparatively limited availability of the writ today, Justice Harlan's rationale for limiting the retroactivity of "new" decisions may not be well founded.[127]

One important consideration in this regard is that AEDPA adequately maintains a state's "interest in finality"[128] by including a one-year statute of limitations within which prisoners may challenge their confinement.[129] The states' interest in finality is thus already preserved without the *Teague* rule. The additional limitations similarly have the effect of reducing challenges to lower courts' judgments. This effect is demonstrated by Mr. Burton's own case, as the Supreme Court ultimately determined that he was not able to have his case

126. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 9 (1997) (internal citations omitted).

127. *See generally* Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115 (1998).

128. Mackey v. United States, 401 U.S. 667, 683 (1971) (Harlan, J., concurring in part and dissenting in part).

129. McCollough, *supra* note 125, at 376.

decided because he failed to meet limitations on the availability of habeas review.[130] Furthermore, as state courts know that federal courts have only a limited ability and time period within which to review their judgments, it is likely that the purpose of habeas to ensure that the states "toe the line" has already been severely hampered. Thus, each of Justice Harlan's rationales behind the creation of the *Teague* framework is no longer controlling. Just as the Court has previously limited *Teague* to the "circumstances which gave rise to it,"[131] it may make sense in today's context to allow retroactivity even of "new" rules, and to reconsider the *Teague* rule.

Still another perspective the Court may consider regarding *Teague* is the effect that regularly deciding their decisions are "new" has on general perspectives of the Court. When Justice Harlan originally described his proposal for determining retroactivity, including the test of when a decision should be described as "new," he noted that "many, though not all, of th[e] Court's constitutional decisions are grounded upon fundamental principles whose content does not change."[132] Although the Supreme Court may conclude, in some later case, that *Blakely* is not "new" under *Teague*, application of the *Teague* test above illustrates that this outcome is by no means certain. This uncertainty reveals just how far the test for what constitutes a "new" rule has drifted from Justice Harlan's original proposal, and just how difficult it has become for a court to conclude that a decision is not "new."

In a very real sense, *Blakely* is the prototypical non-"new" case, which is "grounded upon fundamental principles whose content does not change." If this case, resting on "a fundamental reservation of power in our constitutional structure"[133] can be described as "new," the Court can surely describe any decision as "new." This fact calls into question the Court's very method of decision-making. The Court's reluctance to hold that its decisions were "dictated by precedent" is that the Court appears to be less bound by precedent and "to depend on nothing more than the proclivities of the individuals who *now* comprise a majority of th[e] Court."[134] In

130. Burton v. Stewart, 127 S. Ct. 793 (2007).
131. Lockhart v Fretwell, 506 U.S. 364, 373 (1993).
132. Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting).
133. Blakely v. Washington, 542 U.S. 296, 306 (2004).
134. Payne v. Tennessee, 501 U.S. 808, 851 (1991).

contrast, by deciding that *Blakely* and similar constitutionally-based decisions are not "new," the Court upholds the ideal of that body as independent of its members. As Justice Scalia recently noted, "[w]hat distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle."[135]

135. McCreary County v. Am. Civil Liberties Union, 545 U.S. 844, 890–91 (2005) (Scalia, J., dissenting).