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Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners' Apprendi Claims on Collateral Review

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Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners' *Apprendi* Claims on Collateral Review

On June 26, 2000, the Supreme Court decided *Apprendi v. New Jersey*,[1] holding that the Constitution requires 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."[2] Although the issue in *Apprendi* concerned a state statutory penalty enhancement,

1. 530 U.S. 466 (2000).
2. *Id.* at 490.

the decision has had a significant impact on the number of § 2255 motions[3] filed by federal prisoners attacking their sentences.[4] Specifically, many federal prisoners convicted under the Comprehensive Drug Abuse Prevention and Control Act[5] have filed § 2255 petitions based on *Apprendi*. These prisoners claim that their sentences have been unconstitutionally enhanced because the quantity of drugs involved in their offenses was determined by a judge at sentencing on a preponderance of the evidence,[6] rather than by a jury beyond a reasonable doubt as *Apprendi* mandates.[7] Although the impact of the *Apprendi* decision on federal drug cases pending on direct appeal has been fairly well settled,[8] the issue of whether the *Apprendi* rule is retroactive to cases on collateral review—i.e., federal habeas corpus claims under § 2255—remains unsettled by the Supreme Court.

Retroactivity asks "what to do when the law changes?"[9] When a judicial decision changes the law, the question of retroactivity boils down to how a rule announced in a given case should govern other cases. Three approaches to this question ask whether a specific rule should govern:

> (1) only future cases and neither the parties before the court nor any previous or pending cases ("pure prospectivity"), (2) future cases as well as the litigants at bar but not previous or pending cases ("non-retroactivity"), or (3) future cases, the present litigants, and all fact situations

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3. The term "§ 2255 motion" refers to a motion made under 28 U.S.C. § 2255 (2000). Section 2255 provides for a post-conviction remedy for a federal prisoner claiming that his incarceration is unconstitutional. *See* § 2255. The remedy is intended to be the federal counterpart of state habeas corpus. *See* Reed v. Farley, 512 U.S. 339, 354–55 (1994); Davis v. United States, 417 U.S. 333, 344 (1974) ("[S]ection 2255 was intended to mirror [habeas corpus statutes for state prisoners] in operative effect.").

4. *See* Talbot v. Indiana, 226 F.3d 866, 868 (2000) (noting that there have been "throngs of state and federal prisoners" who have relied on *Apprendi* to collaterally attack their sentences).

5. Pub. L. No. 91-513, § 401, 84 Stat. 1236, 1260–61 (1970) (codified as amended at 21 U.S.C. §§ 801–971 (2000)) (criminalizing all aspects of unauthorized trade in controlled substances including manufacture, distribution, possession, and conspiracy to engage in any of these acts).

6. *See, e.g.*, United States v. Hamm, 269 F.3d 1247, 1248–49 (11th Cir. 2001) (denying defendant's *Apprendi* claim based on the doctrine of *Teague v. Lane*, 489 U.S. 288 (1989)); United States v. Moss, 252 F.3d 993, 995 (8th Cir. 2001) (denying defendant's *Apprendi* claim); United States v. Sanders, 247 F.3d 139, 141 (4th Cir. 2001) (same).

7. *See Apprendi*, 530 U.S. at 490.

8. *See infra* cases cited note 27 (holding that *Apprendi* applies to cases on direct review).

9. Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1075 (1999).

arising before the date of the law-changing decision that are still reviewable either by direct appeal or by collateral attack ("retroactivity").[10]

The Supreme Court, as discussed below, has adopted a variation of the third approach, i.e., a partial retroactivity approach. The Supreme Court's current retroactivity doctrine, as announced in *Teague v. Lane*[11] and developed through a subsequent line of cases,[12] is an unsatisfactory method for adjudicating whether new constitutional sentencing rules will apply retroactively to federal cases on collateral review. Over the course of the past thirty-six years, the Court has grappled with the issue of retroactivity and has crafted a theoretically incoherent doctrine that has proven difficult to apply.[13]

This Comment will illustrate the difficulty with the Court's current retroactivity doctrine by applying it to the hypothetical case of a federal prisoner incarcerated for a violation of the federal drug statute[14] who raises a post-conviction claim based on the *Apprendi* decision. The Introduction sets out a brief explanation of the retroactivity issue in the context of a federal drug prisoner's *Apprendi*

10. Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1557 n.2 (1975). The situation that Professor Beytagh calls "non-retroactivity" is also referred to as "selective prospectivity." *See* Roosevelt, *supra* note 9, at 1092.

11. 489 U.S. 288 (1989). Under *Teague*, a new rule of constitutional law will not be available to a § 2255 petitioner as a basis to attack his sentence unless either (1) the new rule places an "entire category of primary conduct beyond the reach of the criminal law" or prohibits imposition of a certain punishment on an entire class of defendants; or (2) the new rule is a "watershed rul[e] of criminal procedure" that both improves the accuracy of a conviction and " 'alter[s] our understanding of the bedrock procedural elements' essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 241–42 (1990) (emphasis omitted) (quoting *Teague*, 489 U.S. at 311).

12. *See, e.g.*, Horn v. Banks, 122 S. Ct. 2147, 2150 (2002) (holding that a federal court must apply the *Teague* analysis if the State raises the issue in a federal habeas proceeding despite the state court's failure to consider retroactivity); Williams v. Taylor, 529 U.S. 362, 382–84 (2000) (holding that the definition of a "new rule" for retroactivity purposes on collateral review is to be determined by reference to Supreme Court precedent); Bousley v. United States, 523 U.S. 614, 620 (1998) (holding *Teague* inapplicable to changes of substantive construction of federal statutes); Lockhart v. Fretwell, 506 U.S. 364, 372–73 (1993) (holding that when a new rule is favorable to the state, *Teague* allows retroactive application of that rule to cases on collateral review). For cases interpreting what constitutes a "new" rule for retroactivity purposes, see *Sawyer*, 497 U.S. at 234; Saffle v. Parks, 494 U.S. 484, 488 (1990); Butler v. McKellar, 494 U.S. 407, 414 (1990). The Court has also clarified how lower courts are to apply the *Teague* analysis and clarified the scope of the *Teague* exceptions. *See* O'Dell v. Netherland, 521 U.S. 151, 156–57 (1997); Caspari v. Bohlen, 510 U.S. 383, 390 (1994).

13. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 113 (1993) (O'Connor, J., dissenting) (acknowledging that the Supreme Court's retroactivity jurisprudence is "somewhat chaotic").

14. 21 U.S.C. § 841 (2000).

claim filed under § 2255. Part I gives an overview of the development of the Court's modern retroactivity doctrine beginning with *Linkletter v. Walker*[15] and continuing through *Teague v. Lane* and its progeny. Part II examines how the Court's current retroactivity doctrine has been applied by lower courts and how the current doctrine malfunctions in the context of federal prisoners' § 2255 motions. Part III presents and adopts the "decision-time" model of retroactivity proposed by Professor Roosevelt in a recent article[16] and extends that model to federal habeas petitioners raising claims directly attacking the length of their sentences. Part IV argues that the extended decision-time model addresses the infirmities of *Teague* in the federal context. This Comment concludes that by applying the extended decision-time model, thus making current law available to federal prisoners who claim that the lengths of their sentences are unconstitutional, a court could decide whether to apply *Apprendi* or a similar new rule to a § 2255 motion with significantly more doctrinal clarity than it could by applying the present partial retroactivity model.

INTRODUCTION

The codified version of the Comprehensive Drug Abuse Prevention and Control Act of 1970[17] includes 21 U.S.C. § 841. Section 841(a) prohibits manufacturing, distributing, dispensing, and possessing a controlled substance, with the intent to engage in any of these activities.[18] Section 841(b) establishes a complex penalty structure based on the type and quantity of drug involved in the crime.[19] The three main subsections of § 841(b) set out increasing maximum sentences corresponding to increased quantities of various types of drugs.[20] Prior to *Apprendi*, maximum penalties based on

15. 381 U.S. 618 (1965).

16. *See* Roosevelt, *supra* note 9, at 1117–19.

17. Pub. L. No. 91-513, § 401, 84 Stat. 1236, 1260–61 (1970) (codified as amended at 21 U.S.C. §§ 801–971 (2000)).

18. 21 U.S.C. § 841(a); *see* SARAH N. WELLING ET AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO § 9.2, at 256–57 (1998) (referring to the offenses listed in § 841(a) as the "core offenses").

19. 21 U.S.C. § 841(b).

20. *Compare id.* § 841(b)(1)(A) (setting out a life imprisonment maximum on a first offense for specified quantities), *and id.* § 841(b)(1)(B) (setting out a forty-year maximum imprisonment for a first offense based on specified quantities), *with id.* § 841(b)(1)(C) (setting out a twenty-year maximum imprisonment for a first offense "[i]n the case of a controlled substance in schedule I or II [and other named substances] except as provided in subparagraphs (A), (B), and (D)"). Courts have held that the twenty-year maximum of § 841(b)(1)(C) also applies where the quantity of Schedule I or II drugs is unspecified. *See*

drug quantity were determined at a sentencing hearing by a judge who made factual findings of drug quantity on a preponderance of the evidence.[21] Assume, for example, that Bob, a hypothetical federal defendant, was convicted on a one-count indictment for a violation of § 841(a). If the federal judge found at sentencing that Bob was distributing 4.99 grams of crack cocaine,[22] the maximum penalty he would face would be twenty years.[23] If that same judge found on a preponderance of the evidence that Bob's violation of § 841(a) involved 5.00 grams of crack cocaine, the statutory maximum penalty would be forty years.[24] Now assume Fred, another defendant, was convicted of a violation of § 841(a) involving 5.00 grams of crack cocaine. Fred, however, has a prior felony drug conviction. Under the federal drug law, Fred would face a maximum of life in prison.[25] In contrast, if the judge found that Fred's violation of § 841(a) involved only 4.99 grams of crack cocaine, Fred would be subject to a thirty-year maximum sentence.[26] Thus, as this example demonstrates, a judge's decision that it is merely more likely than not that a defendant was involved in a drug violation involving 5.00 grams, as opposed to 4.99 grams, can have serious consequences for a defendant.

United States v. Thomas, 274 F.3d 655, 661 & n.7 (2d Cir.), *cert. denied*, 531 U.S. 1069 (2001); United States v. Promise, 255 F.3d 150, 156 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 2296 (2002); United States v. Doggett, 230 F.3d 160, 165 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001).

21. *See* WELLING ET AL., *supra* note 18, § 9.3(A), at 259 (noting the pre-*Apprendi* rule that drug quantity was relevant only at the sentencing stage where it was established by a preponderance of the evidence); Alan Ellis et al., *Apprehending and Appreciating* Apprendi, 15 CRIM. JUST. 16, 17 (2001) (noting that drug quantity was decided by a judge on a preponderance of the evidence before *Apprendi*).

22. Crack cocaine is referred to in § 841(b) as "cocaine base." 21 U.S.C. § 841(b); *see also* United States v. Stevens, 19 F.3d 93, 94 (1995) (noting that "cocaine base" is also known as crack cocaine).

23. *See* 21 U.S.C. § 841(b)(1)(C) (setting out a twenty-year maximum imprisonment for the first offense "[i]n the case of a controlled substance in schedule I or II [and other named substances], except as provided in subparagraphs (A), (B), and (D)"). The enhanced penalties of § 841(b)(1)(B), the next most severe sentencing provision, take effect for offenses involving 5.00 grams or more of "cocaine base," i.e., crack cocaine. *See id.* § 841(b)(1)(B)(iii); *supra* note 22. Crack cocaine is a Schedule II substance. *See id.* § 812 (c). Section 841(b)(1)(C) also applies a twenty-year maximum for a violation of § 841(a) that involves an unspecified amount of a Schedule I or II controlled substance. *See Thomas*, 274 F.3d at 661; *Promise*, 255 F.3d at 156; *Doggett*, 230 F.3d at 165.

24. *See* 21 U.S.C. § 841(b)(1)(B)(iii) (providing that "[i]n the case of a violation of subsection (a) of this section involving . . . 5 grams or more of a mixture or substance . . . which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be . . . more than 40 years").

25. *Id.*

26. *See id.* § 841(b)(1)(C); *Doggett*, 230 F.3d at 166.

After *Apprendi*, if the government seeks an enhanced penalty under 21 U.S.C. § 841(b)(1)(A) or (B) based on the quantity of drugs, the quantity must be alleged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.[27] Due to the large number of federal prisoners serving sentences for drug convictions,[28] the *Apprendi* decision has prompted many prisoners to file § 2255 motions attacking the lengths of their sentences.[29] On direct review,[30] a cognizable *Apprendi* claim arises in a case where a defendant has actually received a sentence beyond what is supported by the factual findings of the jury.[31] On the other hand, if a judge's determination of the quantity of drugs only *exposes* a defendant to an increased sentence, but the defendant actually receives a sentence that is within the statutory maximum for an undetermined quantity of a particular drug, there is no constitutional violation under *Apprendi*.[32]

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27. Under *Apprendi*, if the type and quantity of drugs involved in a charged crime are used to impose a sentence above the statutory maximum for an otherwise undetermined quantity of drugs, then the type and quantity of drugs are an element of the offense that must be charged in the indictment and submitted to the jury. *See, e.g.*, *Thomas*, 274 F.3d at 660 n.3 (appealing a conviction of conspiracy to distribute and possess with intent to distribute cocaine and cocaine base); *Doggett*, 230 F.3d at 164–65 (appealing a conviction for possession of methamphetamine); United States v. Nordby, 225 F.3d 1053, 1053 (9th Cir. 2000) (appealing a conviction for possession of marijuana); United States v. Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir. 2000) (appealing a conviction for possession of methamphetamine).

28. According to the United States Sentencing Commission, in fiscal year 2000 alone, 24,179 defendants were sentenced for violations of the federal drug laws. *See* UNITED STATES SENTENCING COMMISSION, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 12, Guideline Offenders in Each Primary Offense Category (Table 3), http://www.ussc.gov/ANNRPT/2000/SBTOC00.htm (last visited Dec. 19, 2001) (on file with the North Carolina Law Review).

29. *See* Talbot v. Indiana, 226 F.3d 866, 868 (2000) (noting that there have been "throngs of state and federal prisoners" who have relied on *Apprendi* to collaterally attack their sentences).

30. "Direct review" describes the appeals process prior to a defendant's conviction becoming "final." According to the Supreme Court, a defendant's conviction is "final" if a judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time for petition for certiorari has elapsed. *See* Allen v. Hardy, 478 U.S. 255, 258 n.1 (1986).

31. The *Apprendi* rule applies to all cases pending on direct review at the time *Apprendi* was announced. *See Thomas*, 274 F.3d at 663–64; *infra* note 90 and accompanying text. In *Thomas*, the Second Circuit held that, under *Apprendi*, drug quantity is an element of a violation of 21 U.S.C. § 841, and further held that where the defendant received a 292-month sentence based on drug quantity findings made by a judge on a preponderance of the evidence, the correct remedy is to remand to the lower court for resentencing pursuant to the lower twenty-year statutory maximum applicable under § 841(b)(1)(C). *Thomas*, 274 F.3d at 673.

32. The federal courts of appeals have agreed that *Apprendi* is inapplicable any time a judge's drug quantity determination at sentencing actually results in a sentence that is less than or equal to the base statutory maximum applicable to an undetermined quantity of

The question raised in the lower federal courts has been whether the *Apprendi* decision applies retroactively to cases collaterally challenged in a § 2255 motion. As one court noted, if *Apprendi* is held to be retroactive, it "could well lead to overwhelming and disastrous results given that every court in every jurisdiction in the country has treated drug quantity as a sentencing factor for the judge to determine for well over ten years."[33] Because of this long-standing practice of sentencing federal drug prisoners, the *Apprendi* rule could have a substantial impact on many federal sentences if the rule applies to petitioners' constitutional claims brought under § 2255.

I. THE COURT'S RETROACTIVITY DOCTRINE

Prior to 1965, the Supreme Court generally applied all new constitutional rules retroactively to cases on collateral review—i.e., cases brought post-conviction seeking a writ of habeas corpus.[34] This practice grew out of the Blackstonian declaratory theory that judges find law rather than make law, and that the best understanding of the law at any given time should be applied to any case that comes to court.[35] This general rule changed in *Linkletter v. Walker*,[36] where the

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the drug at issue in the case, regardless of whether the quantity determination *exposed* the defendant to a sentence above that base statutory maximum. *See* Horton v. United States, 244 F.3d 546, 553 (7th Cir. 2001); United States v. Robinson, 241 F.3d 115, 119–22 (1st Cir. 2001); United States v. White, 240 F.3d 127, 130 (2d Cir. 2001); United States v. Thompson, 237 F.3d 1258, 1262 (10th Cir. 2001); United States v. Munoz, 233 F.3d 410, 413–14 (6th Cir. 2000); United States v. Richardson, 233 F.3d 223, 231–32 (4th Cir. 2000); United States v. Gerrow, 232 F.3d 831, 834 (11th Cir. 2000); *Doggett*, 230 F.3d at 165; United States v. Egge, 223 F.3d 1128, 1131 n.1 (9th Cir. 2000); *Aguayo-Delgado*, 220 F.3d at 933–34.

33. United States v. Pittman, 120 F. Supp. 2d 1263, 1270 (D. Or. 2000).

34. *See, e.g.*, Boles v. Stevenson, 379 U.S. 43, 44 (1964) (holding that a right to a preliminary determination by the judge, not the jury, of voluntariness of confession announced in *Jackson v. Denno*, 378 U.S. 368 (1964), applied retroactively to a habeas corpus petition); Eskridge v. Wash. State Bd. of Prison Terms and Paroles, 357 U.S. 214, 216 (1958) (per curiam) (holding the right to a free trial transcript for an indigent defendant announced in *Griffin v. Illinois*, 351 U.S. 12 (1956), applied retroactively to a habeas corpus petition).

35. Blackstone stated his theory of the law as follows:

> These judicial decisions are the principal and the most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law .... Yet this rule admits of exceptions where the former determination is most evidently contrary to reason .... But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not* law; that is, that it is not the established custom of the realm, as had been erroneously determined.

Court held that the exclusionary rule of *Mapp v. Ohio*[37] would not apply to cases where convictions had become final prior to the date *Mapp* was announced.[38] Acknowledging that the Court had always applied a new constitutional rule to cases that were final before the new rule was announced, the Court nevertheless stated that "the Constitution neither prohibits nor requires retrospective effect."[39] Thus, the exclusionary rule would apply only to cases pending on direct review at the time *Mapp* was announced and to future cases, but not to cases on collateral review.

The Court in *Linkletter* was faced with a large number of state convictions that could be affected by applying the exclusionary rule retroactively, which would, in turn, potentially have a substantial and negative impact on federal-state relations.[40] Prior decisions of the Court already had created significant burdens for state criminal justice systems, and with the announcement of the *Mapp* exclusionary rule, the states almost instantly resisted applying the rule to habeas petitions.[41] In light of the states' resistance, Justice Clark announced a new analytical framework for deciding if new rules would be held retroactive or prospective. The Court set out a three factor test, weighing: (1) the purpose of the new rule; (2) the reliance placed by parties on the old rule; and (3) the effect on the administration of justice if the rule were to be held retroactive.[42] Because (1) the purpose of the new exclusionary rule was to deter unlawful police conduct; (2) states had relied on the rule in effect prior to *Mapp* that exclusion of unlawfully obtained evidence was not compelled by the Fourth Amendment; and (3) retroactive application would seriously

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Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 908 (1962) (quoting 1 BLACKSTONE, COMMENTARIES 68–71 (1769)).

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

37. 367 U.S. 643 (1961). The "exclusionary rule" is a constitutional remedy that prevents federal and state law enforcement from using evidence against an accused that was gathered in an unreasonable search and seizure in violation of the Fourth Amendment, in the case of federal law enforcement, or in violation of the Fourth and Fourteenth Amendments, in the case of state law enforcement. *See id.* at 657–60.

38. *Linkletter*, 381 U.S. at 639–40.

39. *Id.* at 629–30.

40. *See* James B. Haddad, *"Retroactivity Should Be Rethought": A Call for the End of the* Linkletter *Doctrine*, 60 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 417, 420–24 (1969) (noting that *Mapp* would place a heavy burden upon state criminal justice systems either because the state did not have the resources to defend against claims of unlawful seizures or because essential evidence had been unlawfully seized and offered at trial).

41. *See id.* at 422 (noting the immediate reaction to *Mapp* urging that the states be "spared the impact of a retroactive application") (citing Roger J. Traynor, Mapp v. Ohio *At Large in the Fifty States*, 1962 DUKE L.J. 319, 341–42).

42. *Linkletter*, 381 U.S. at 636.

disrupt the administration of justice, the newly formed retroactivity test counseled against applying the rule to the habeas petitioner's case.[43]

The next two cases to address the question of retroactivity in the criminal context were *Johnson v. New Jersey*[44] and *Stovall v. Denno*.[45] In *Johnson*, the Court held that the rules governing police interrogations announced in *Escobedo v. Illinois*[46] and *Miranda v. Arizona*[47] would apply only to defendants whose trials started after the standards established by those cases were announced.[48] Similarly, the *Stovall* Court held that the rule announced in two companion cases, *United States v. Wade*[49] and *Gilbert v. California*,[50] requiring counsel at pretrial lineups, would apply only to the actual *Wade* and *Gilbert* defendants and not to Stovall, a habeas petitioner, or any other case pending on direct review,[51] even though all three decisions were announced on the same day. In neither of these cases did the Court focus on whether the case was on direct or collateral review to determine who would benefit from the rules announced. Instead, it determined the retroactivity or non-retroactivity of a new rule either by reference to a trial date, as in *Johnson*, or by whether a particular defendant was fortunate enough to have been the litigant in the rule-changing case, as in *Stovall*.[52] This "selective prospectivity" created an unfair situation in which two defendants whose constitutional rights had been infringed in exactly the same way and who stood in the exact same procedural posture—direct review—but who underwent either an interrogation or a pretrial lineup at different times, would be treated differently.[53] Recognizing that "[i]nequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated," the Court nevertheless reasoned that this

43. *Id.* at 636–39.
44. 384 U.S. 719 (1966).
45. 388 U.S. 293 (1967).
46. 378 U.S. 478 (1964).
47. 384 U.S. 436 (1966).
48. *Johnson*, 384 U.S. at 732.
49. 388 U.S. 218 (1967).
50. 388 U.S. 263 (1967).
51. Stovall v. Denno, 388 U.S. 293, 296 (1967).
52. *See Stovall*, 388 U.S. at 296; *Johnson*, 384 U.S. at 732.
53. *See* Roosevelt, *supra* note 9, at 1092 (arguing that even though the *Stovall* decision had the apparently beneficial effect of unifying the treatment of direct and collateral review, different treatment of similarly situated defendants was not only unfair but "openly incoherent when both cases came to the Court in the same procedural posture").

unfairness was "an insignificant cost for adherence to sound principles of decision-making."[54]

The Court continued applying new rules in this selective way in *Desist v. United States*.[55] At issue in *Desist* was the retroactivity of the eavesdropping rule the Court adopted in *Katz v. United States*.[56] The *Desist* decision refined a key aspect of the retroactivity doctrine.[57] The Court stated that the question of non-retroactivity arises only when the law is significantly altered—i.e., when a rule constitutes a "clear break with the past."[58] Further, the *Desist* Court held that the *Katz* rule would not be applicable even to cases pending on direct review if the challenged wiretap had occurred prior to the date *Katz* was announced.[59] This opinion echoed the *Stovall* theme that even though it may be inequitable to only apply a new rule to the parties in the case announcing the rule, this inequity was tolerable.

Justice Harlan voiced his objection to the Court's practice of holding new constitutional rules of criminal procedure non-retroactive in similarly situated cases—other cases pending on direct review at the time the new rule was announced. He noted the doctrinal confusion as follows:

> In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied, we have created an extraordinary collection of rules to govern the application of that principle. We have held that certain "new" rules are to be applied to all cases then subject to direct review, certain others are to be applied to all those cases in which trials have not yet commenced, certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, and still others are to be applied only to the party involved in the case in which the new rule is

54. *Stovall*, 388 U.S. at 301.

55. 394 U.S. 244 (1969).

56. 389 U.S. 347 (1967).

57. As one commentator has noted, *Desist* "produced the most definitive and exhaustive treatment of the non-retroactivity doctrine since its birth in *Linkletter*." Beytagh, *supra* note 10, at 1570.

58. *Desist*, 394 U.S. at 248. For sources discussing what, exactly, constitutes a new rule for purposes of retroactivity analysis, see *infra* note 139.

59. *Desist*, 394 U.S. at 254. In reaching this conclusion, the Court focused on the deterrence purpose of Fourth Amendment rules and reasoned that a retroactive application of the *Katz* rule would not serve that purpose. *Id.* at 253–54.

> announced and to all future cases in which the proscribed official conduct has not yet occurred.[60]

Justice Harlan's view was that new constitutional rules should be uniformly applied to cases pending on direct review because to "simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law" was a violation of jurisprudential principle.[61] Justice Harlan did not, however, advocate applying new constitutional rules uniformly to cases on collateral review, in part because recent decisions of the Supreme Court had expanded the availability of habeas corpus review for state and federal prisoners.[62] This expansion led Justice Harlan to argue that the *Linkletter* test of purpose, reliance, and effect was an inappropriate test to apply to habeas petitions because that test did not adequately take into consideration what he believed to be the purposes of collateral review.[63] Under Harlan's view, one purpose of federal habeas corpus review was to prevent incarceration of the innocent defendant.[64] Thus, only new constitutional rules that "significantly improve the pre-existing fact-finding procedures" should be applied to cases on collateral review.[65] The other function of habeas was to provide an incentive for trial and appellate courts to conduct their proceedings in accordance with constitutional standards.[66] This deterrence function

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60. *Id.* at 256–58 (Harlan, J., dissenting) (citations omitted). During this era, the Court was attempting to find the correct temporal limitation on the retroactive effect of new constitutional decisions. One commentator classified these limitations into three categories: "(1) the trial date rule; (2) the final judgment rule; and (3) the violation date rule." *See* Barry Robert Ostrager, *Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations*, 19 N.Y. L. F. 289, 297 n.47 (1973) (citing Phillip Johnson, *Forward: The Supreme Court of California, 1967–68*, 56 CAL. L. REV. 1612, 1613 (1968)). These three limitations applied, respectively, to three situations: (1) cases where the trial had not yet commenced when the new rule is announced; (2) cases pending on direct appeal; and (3) to proscribed conduct occurring after the new rule was handed down. *See id.*

61. *Desist*, 394 U.S. at 259 (Harlan, J., dissenting).

62. *See* Kaufman v. United States, 394 U.S. 217, 231 (1969) (expanding the scope of § 2255 petitions to include a claim of illegal search and seizure); Fay v. Noia, 372 U.S. 391, 398–99 (1963) (holding that the doctrine under which state procedural defaults are held to constitute an adequate and independent state law ground barring direct Supreme Court review is not to be extended to limit the power granted to federal courts under federal habeas corpus statutes).

63. *Desist*, 394 U.S. at 260 (Harlan, J., dissenting) ("[P]rincipled habeas retroactivity now seems to me to demand much more than the 'purpose,' 'reliance,' and judicial 'administration' standards . . . .").

64. *See id.* at 262 (Harlan, J., dissenting).

65. *Id.* (Harlan, J., dissenting).

66. *See id.* at 262–63. (Harlan, J., dissenting).

of habeas did not require a retroactive application of new constitutional rules; deterrence could be served by simply applying the constitutional rules in effect at the time of the proceeding.[67]

Justice Harlan's position did not command a majority of the Court, and the Court continued to apply new constitutional rules using the *Linkletter* standard without regard to the procedural posture of the case.[68] In 1971, the Court decided *Mackey v. United States*,[69] a case presented on collateral review involving a challenge to an income tax evasion conviction.[70] The petitioner in *Mackey* unsuccessfully sought the benefit of two Supreme Court opinions decided subsequent to his conviction that held that certain evidence admitted against the petitioner could not be admitted at trial constitutionally.[71] Concurring in the Court's denial of Mackey's habeas motion, Justice Harlan again argued for the uniform treatment of cases on direct review, and criticized the Court's retroactivity doctrine for creating an unprincipled practice of "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."[72] Admitting that he and other members of the Court had initially accepted the *Linkletter* non-retroactivity principle as a way to constrain the activist Warren Court's criminal procedure decisions, he argued that the Court's resultant selective prospectivity doctrine was more akin to legislative rulemaking than principled adjudication.[73]

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67. *See id.* at 263 (Harlan, J., dissenting).

68. For in-depth coverage and a critique of the Court's selective prospectivity decisions between 1965 and 1975, see generally Beytagh, *supra* note 10. Noting "the inequality plainly apparent in the Court's current approach," *id.* at 1616, Professor Beytagh argues that the inequality that results from applying a decision to the litigants in a given case, but not to others similarly situated procedurally, could be solved by adopting a "pure prospectivity" approach, i.e., announcing a new rule and only applying it to cases arising after the law-changing decision. *Id.* For detailed discussion and synthesis of cases applying the *Linkletter* standard from 1975 to 1982, see generally Fred Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine 'As Applied'*, 61 N.C. L. REV. 745 (1983).

69. 401 U.S. 667 (1971).

70. *Id.* at 672.

71. *See id.*

72. *Id.* at 679 (Harlan, J., concurring in part and dissenting in part). In Justice Harlan's view, the Court's "ambulatory retroactivity doctrine . . . entail[ed] an inexplicable and unjustifiable departure from the basic principle upon which rests the institution of judicial review." *Id.* at 681 (Harlan, J., concurring in part and dissenting in part).

73. *See id.* at 676–77 (Harlan, J., concurring in part and dissenting in part).

Taking a position similar to that in his *Desist* dissent, Justice Harlan again argued that new rules generally should not be applied to cases on collateral review. Noting that habeas "is not designed as a substitute for direct review,"[74] he concluded that the government's interest in finality would, in most cases, outweigh a prisoner's interest in relitigating a case already settled.[75] Justice Harlan's view of the importance of finality in the criminal process has two components. First, finality means that there is a "visible end" to the criminal process which would afford both society and defendants the opportunity to turn attention away from a past trial and focus on the future treatment of an incarcerated defendant and the efforts to restore the convict to a "useful place in the community."[76] Second, finality preserves resources of the criminal justice system by ensuring that those resources are not drained litigating past trial procedures that were constitutional when implemented.[77] Justice Harlan did, however, recognize two exceptions to the general principle that new constitutional rules should not be retroactively applicable to cases on collateral review. First, an exception would be appropriate for rules placing constitutional limits on the government's power to proscribe conduct.[78] Second, an exception would exist "for claims of nonobservance of those procedures that ... are 'implicit in the concept of ordered liberty.' "[79] In formulating these two exceptions, Justice Harlan modified the position he took in *Desist*, where he

74. *Id.* at 683 (Harlan, J., concurring in part and dissenting in part). Justice Harlan also argued that the interest in finality of a criminal conviction would support a narrow construction of the scope of the habeas statute such that the Court could simply remove issues cognizable on habeas to serve this interest. *See id.* (Harlan, J., concurring in part and dissenting in part). A direct limitation on the scope of habeas would be more theoretically consistent than the development of a new retroactivity doctrine.

75. *Id.* (Harlan, J., concurring in part and dissenting in part).

76. *Id.* at 690–91 (Harlan, J., concurring in part and dissenting in part).

77. *Id.* at 691 (Harlan, J., concurring in part and dissenting in part).

78. *Id.* at 692 (Harlan, J., concurring in part and dissenting in part) (defining these rules as those that "place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"). The Supreme Court has stated that this exception applies not only when an actor's primary conduct cannot be constitutionally proscribed, but also when the imposition of the death penalty on a class of defendants has been constitutionally proscribed. *See* Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989).

79. *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and further defining these rules as those that "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction"). An example of a decision requiring retroactive application under this exception is *Gideon v. Wainwright*, 372 U.S. 335 (1963), which established a right to counsel in all felony cases. *See* Gray v. Netherland, 518 U.S. 152, 170 (1996).

placed primary importance on rules that implicated the adequacy of the fact-finding process,[80] and concluded that the interest in the finality of criminal convictions would best be served by reference to the "implicit in the concept of ordered liberty" standard enunciated in *Palko v. Connecticut*.[81]

The Court adopted Justice Harlan's view that new rules should uniformly apply on direct review in a series of decisions beginning with *United States v. Johnson*[82] and *Shea v. Louisiana*.[83] Noting that the general rule of non-retroactivity was only applicable if a rule was "new," i.e., a "clear break with the past,"[84] the Court held in both cases that the constitutional decisions on which the petitioners were relying were not "new" rules and thus were retroactively applicable; neither the Fourth Amendment rule in *Payton v. New York*[85] nor the Fifth Amendment rule in *Edwards v. Arizona*[86] constituted a "clear break with the past."[87] Thus, the appellants on direct review could benefit from these prior decisions.

Then, in *Griffith v. Kentucky*,[88] the Court abandoned the "newness of the rule" rationale and adopted wholesale Justice

80. *See supra* text accompanying notes 64–65.

81. 302 U.S. 319 (1937).

82. 457 U.S. 537, 562 (1982) (holding that the Fourth Amendment decision in *Payton v. New York* should be applied to cases pending on direct review even where the alleged Fourth Amendment violation took place before the decision relied on was rendered, except in those situations that would be clearly controlled by existing retroactivity precedents).

83. 470 U.S. 51, 60–61 (1985) (holding that the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), barring the use of a confession obtained in interrogation after a request for an attorney, is applicable to a case pending on direct review, even where the interrogation took place before the *Edwards* decision).

84. Desist v. United States, 394 U.S. 244, 248 (1969).

85. 445 U.S. 573 (1980).

86. 451 U.S. 477 (1981).

87. *Shea*, 470 U.S. at 59 n.5 ("*Edwards* was 'not the sort of "clear break" that is automatically nonretroactive.' ") (quoting Solem v. Stumes, 465 U.S. 638, 647 (1984)); *Johnson*, 457 U.S. at 553–54 (stating that *Payton* did not "fall within the narrow class of cases that were non-retroactive because those cases constituted 'a clear break with the past.' ") (quoting Desist v. United States, 394 U.S. 244, 248 (1969)). Adopting a narrow definition of what constitutes a new rule such that the rule would be applied retroactively, the *Johnson* Court noted that *Payton* "rested on both long-recognized principles of Fourth Amendment law and the weight of historical authority as it had appeared to the Framers of the Fourth Amendment." *Johnson*, 457 U.S. at 552. Similarly, in *Solem v. Stumes*, 465 U.S. 638 (1984), the Court concluded that the *Edwards* rule was not sufficiently new to warrant nonretroactive treatment because prior to *Edwards* the Court had "strongly indicated that additional safeguards are necessary when the accused asks for counsel" and had referred to an accused's right to be free from further questioning once he invoked his right to counsel "several times." *Id.* at 646–47. Thus, the Court concluded that *Edwards* was not the sort of "clear break" case that is almost automatically nonretroactive. *Id.*

88. 479 U.S. 314 (1987).

Harlan's view that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[89] Following Harlan's view, the *Griffith* Court adopted a bright-line rule mandating a new rule's retroactive application to cases on direct review.[90] In an attempt to clarify the doctrinal underpinnings of its retroactivity doctrine, the Court abandoned the approach it had taken in cases such as *Stovall* and *Linkletter*, where it had attempted to define the temporal reach of a rule by reference to the time of the alleged violation, such as the date of trial or a pre-trial lineup.[91]

Having settled the question of whether new rules would be applied to appellants on direct review, the Court had yet to clarify a uniform treatment of petitioners on collateral review. Prior to announcing in *Shea* that the rule of *Edwards* would apply to cases on direct review, for example, the Court had addressed the question of whether that specific rule would be applicable to cases on collateral review, answering that the rule should not be applied to habeas petitions.[92] The Court, however, left open the question of whether, as a general principle, petitioners on collateral review should be treated similarly to appellants on direct review.[93]

In the controversial decision[94] of *Teague v. Lane* and its progeny,[95] the Court answered this question in the negative. The

89. *Id.* at 322.

90. *Id.* at 327–28 (holding that a new rule of constitutional criminal procedure applies retroactively to all cases, state or federal, pending on direct review or not yet final, without regard to whether a rule is a "clear break" with precedent).

91. *See supra* note 60 and accompanying text.

92. *See* Solem v. Stumes, 465 U.S. 638, 643 (1984) (applying the *Linkletter* purpose, reliance, and effect test and holding that the *Edwards* rule did not apply retroactively to a habeas petitioner).

93. *See* Yates v. Aiken, 484 U.S. 211, 215–17 (1988).

94. The *Teague* decision generated a good deal of commentary, much of it negative. *See, e.g.*, Roger D. Branigin III, *Sixth Amendment—The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128, 1147 (1989) ("The theoretical structure that the [*Teague*] plurality constructed . . . ultimately collapses in the absence of any substantive content."); Patrick E. Higginbotham, *Notes on* Teague, 66 S. CAL. L. REV. 2433, 2434–35 (1993) (noting the criticism that the *Teague* doctrine "produce[d] a largely toothless habeas"); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 374–75 (1991) ("The *Teague* exceptions do little . . . because they apply only to crimes so offbeat and punishments so cruel that they are beyond the constitutional pale, and to primitive pre-incorporation-era due process violations featuring lynch mobs, corrupt prosecutors, and cops with rubber hoses."); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2391 (1993) (arguing that the *Teague* "new rule" jurisprudence "would be utterly bizarre if it were not so obviously contrived . . . in service of political objectives").

principle question raised by the habeas petitioner in *Teague* was whether the Sixth Amendment fair cross-section requirement announced in *Taylor v. Louisiana*[96] should be extended to apply to the petit jury as well as the jury venire.[97] In a plurality opinion, Justice O'Connor held that because a rule requiring the *Taylor* fair cross-section rule to be applied to the petit jury would not be applied retroactively even if it were adopted, it was unnecessary to decide whether the rule *should* be adopted.[98] In so holding, the Court created and applied a brand new retroactivity analysis, even though the issue of retroactivity had not been raised or briefed by the parties.[99]

Teague modified the Court's retroactivity doctrine in three significant ways. First, and perhaps most significantly, the plurality opinion modified the retroactivity analysis by stating that "[r]etroactivity is properly treated as a threshold issue."[100] In prior cases, the Court had only reached the question of retroactivity once a new rule had been announced, either when a different defendant in a later case sought the benefit of that rule, or in the very case announcing the rule.[101] The plurality reasoned that "evenhanded justice" required that if a case on collateral review were to announce a new rule, the rule would have to be applied to all others "similarly situated."[102] Because not all new rules would apply to habeas petitioners, the issue of retroactivity of a potentially new rule should be decided before considering the constitutional merits of the rule itself.[103] Put another way, "the question of the retroactivity of any

95. *See* 2 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 25.1 n.4, § 25.2 n.31 (3d ed. 1998) (analyzing and interpreting post-*Teague* cases).

96. 419 U.S. 522, 526–33 (1975) (holding that the Sixth Amendment requires that a panel of potential jurors—the "jury venire," from which a trial, or "petit," jury is selected—must represent a fair cross-section of the community).

97. Teague v. Lane, 489 U.S. 288, 292 (1989) (plurality opinion).

98. *See id.* at 299. The plurality reasoned that because a fair cross-section requirement for a petit jury was not essential to fundamental fairness, and nor would it seriously implicate the accuracy of criminal convictions, any petit jury fair-cross-section rule would not be retroactive. *See id.* at 315. Thus, since the rule would not be retroactive even if adopted, the plurality "simply refuse[d]" to answer the question of whether it *was* the rule. *See id.* at 316. The plurality argued that there was "no other way to avoid rendering advisory opinions." *Id.*

99. *Id.* at 300 (noting that the retroactivity issue had only been raised in an amicus brief).

100. *Id.*

101. *See id.* at 299 (discussing cases deciding retroactivity of a prior decision and cases that answered the retroactivity question after announcing a new rule).

102. *Id.* at 300.

103. *Id.* at 300–01.

putatively 'new' rule for which a petitioner contends must be addressed . . . *before* the Court decides whether the rule the petitioner proposes *is* the law."[104]

Second, noting that *Griffith* had settled the question of retroactivity of new rules on direct review,[105] the plurality relied on the value of finality of criminal judgments and adopted a "bright-line"[106] standard of retroactivity that distinguished between direct review and collateral review.[107] Relying on Justice Harlan's dissents in *Desist* and *Mackey*, the plurality held that new constitutional rules of criminal procedure generally should not be applied to cases on collateral review unless they fall within one of two exceptions.[108] The first exception is for rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[109] The second exception, an amalgam of Justice Harlan's earlier views, excluded rules that both implicated fundamental fairness and "seriously diminished" the likelihood of an accurate conviction.[110]

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104. LIEBMAN & HERTZ, *supra* note 95, § 25.4, at 960. Liebman and Hertz point out that in developing this aspect of the retroactivity analysis, the Court relied on the case of *Bowen v. United States*, 422 U.S. 916 (1975), which did not address the order of the initial announcement of a rule of law and a determination of that rule's retroactivity, but addressed the "much less controversial question" of the order of the retroactivity analysis of a "potentially new" rule announced in an earlier decision and that rule's application in a subsequent case. *See id.* § 25.4 n.13. Arguably, the application of *Apprendi* to cases on collateral review would represent the "much less controversial" case. However, as discussed *infra* Part II.A, the operation of *Apprendi* on federal drug laws is distinguishable from a straightforward application of a rule to an analogous set of facts because it redefines the elements of federal crimes.

105. *See Teague*, 489 U.S. at 304.

106. Roosevelt, *supra* note 9, at 1097 ("The current retroactivity jurisprudence in criminal law has thus moved towards bright-line rules . . . .").

107. *See Teague*, 489 U.S. at 305–11.

108. *See id.* at 310.

109. *Id.* at 311. This exception applies to substantive constitutional rules. For example, *Roe v. Wade*, 410 U.S. 113 (1973), holding that the right to abortion was a substantive due process right, was held retroactive to a physician's conviction under New York's anti-abortion manslaughter law because the conviction implicated a substantive freedom. *See* United States *ex rel.* Williams v. Preiser, 360 F. Supp. 667, 668 (S.D.N.Y. 1973). Further, the Court has construed this exception to apply not only to an actor's primary conduct, but also to the substantive limits on the government's power to impose the death penalty. *See* Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989). Thus, the Court's recent decision in *Atkins v. Virginia*, 122 S. Ct. 2242, 2252 (2002), holding that the Eighth Amendment prohibits a State from executing mentally retarded individuals, *id.* at 2252, applies retroactively. *See* Hill v. Anderson, 300 F.3d. 679, 681 (6th Cir. 2002) (holding that *Atkins* applied retroactively because the execution of the mentally retarded was "beyond the State's power").

110. *Teague*, 489 U.S. at 313. An example of a decision requiring retroactive application under this exception is *Gideon v. Wainwright*, 372 U.S. 335 (1963), which

Third, the plurality adopted a somewhat confusing definition of what constituted a "new" rule for retroactivity purposes. Conceding that defining a new rule was a difficult task,[111] the plurality defined a new rule as one that either "breaks new ground or imposes a new obligation on the States or the Federal Government," or one that was "not *dictated* by precedent existing at the time the defendant's conviction became final."[112] Applying this new analysis, the plurality held that an extension of the *Taylor* cross-section requirement to the petit jury would be a new rule,[113] and that the rule, if adopted, would not fall within either exception to the general principle that new rules should not be applied retroactively to cases on collateral review.[114]

There are a number of issues arising after *Teague* that bear directly on how the retroactivity of *Apprendi* should be analyzed and how the lower courts have handled the retroactivity question. First, the *Teague* Court did not address the question of whether the *Teague* analysis applied to new statutory substantive criminal law decisions. The Court answered this question in the negative in *Bousley v. United States*.[115] The petitioner in *Bousley* pled guilty to possessing with intent to distribute methamphetamine in violation of the federal drug statute[116] and to using a firearm "during and in relation to a drug trafficking crime."[117] The petitioner filed a § 2255 motion, which was

established a right to counsel in all felony cases. *See* Gray v. Netherland, 518 U.S. 152, 170 (1996) (referring to the *Gideon* rule as a "paradigmatic example" of the second *Teague* exception). Commentators have agreed with the dissenting Justices in *Teague* that Justice O'Connor's combination of Harlan's prior opinions did not accurately reflect his most recent position on the scope of this exception. *See Teague*, 489 U.S. at 321 (Stevens, J., dissenting) (noting that Harlan rejected linking the fundamental fairness exception to factual innocence); LIEBMAN & HERTZ, *supra* note 95, § 25.7, at 1022 ("In defining the second exception, Justice Harlan disagreed with himself; the *Teague* plurality (favoring Harlan's earlier view) disagreed with the concurring Justices (endorsing Harlan's later view); and the post-*Teague* majority (fusing *both* Harlan views) disagreed with all prior views."); Roosevelt, *supra* note 9, at 1096 (questioning *Teague*'s fidelity to Harlan's view of the second exception).

111. *Teague*, 489 U.S. at 301.

112. *Id.* The rule of *Rock v. Arkansas*, 483 U.S. 44 (1987), holding that the exclusion of all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf, is just such a rule. *See Teague*, 489 U.S. at 301. Prior to *Rock*, there was a "strong majority rule" among lower courts to exclude hypnotically refreshed testimony; thus, *Rock* is a "classic example" of a "new" rule. *See* LIEBMAN & HERTZ, *supra* note 95, § 25.5 n.12.

113. *Teague*, 489 U.S. at 301.

114. *See id.* at 315–16.

115. 523 U.S. 614 (1998).

116. 21 U.S.C. § 841(a)(1) (2000).

117. 18 U.S.C. § 924(c)(1) (2000) (requiring a sentencing enhancement for the use of a firearm in relation to a drug crime).

dismissed.[118] While the appeal of the dismissal was pending, the Supreme Court decided *Bailey v. United States*,[119] in which the Court reinterpreted the firearms statute to require the government to show "active employment of the firearm."[120] The Court in *Bousley* held that the *Teague* analysis was inapplicable to the petitioner's *Bailey* claim because *Teague* addressed only procedural rules, not substantive constructions of federal statutes.[121] The Court reasoned that retroactivity was required because a substantive construction of a federal statute holding that certain conduct is not punishable carries a "significant risk" that defendants would be incarcerated for conduct which is not criminal.[122]

Second, the *Teague* Court failed to address whether the analysis in *Teague* applies to federal prisoners' petitions filed under § 2255.[123] Despite the Court's failure to specifically address this issue and the existence of a number of significant distinctions between § 2255 proceedings and federal habeas corpus for state prisoners,[124] the lower courts uniformly have held that the *Teague* analysis applies to federal prisoners' § 2255 claims.[125]

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118. *Bousley*, 523 U.S. at 617.

119. 516 U.S. 137 (1995).

120. *Id.* at 144.

121. *See Bousley*, 523 U.S. at 620; *see also* 28 MOORE'S FEDERAL PRACTICE § 672.06[2] (Matthew Bender 3d ed. 1997) (reviewing pre- and post-*Teague* cases where the lower courts had relied on *Davis* to govern the retroactivity of decisions reinterpreting federal statutes). While the courts of appeals had routinely applied Supreme Court decisions interpreting substantive federal criminal statutes retroactively, the lower courts had employed differing rationales for doing so. *See* LIEBMAN & HERTZ, *supra* note 95, § 25.1 n.20 (citing cases holding *McNally v. United States*, 483 U.S. 350 (1987), retroactive and noting that some lower courts had not applied the *Teague* analysis at all while others had applied *Teague* and found that a decision interpreting a statute is subject to the first *Teague* exception).

122. *See Bousley*, 523 U.S. at 620–21.

123. *See* Teague v. Lane, 489 U.S. 288, 327 n.1 (1989) (Brennan, J., dissenting) (stating that "[t]he plurality does not address the question whether the rule it announces today extends to [§ 2255] claims brought by federal, as well as state, prisoners").

124. *See infra* Part II.C.

125. *See, e.g.*, Gilberti v. United States, 917 F.2d 92, 94–95 (2d Cir. 1990) (holding that the *Teague* doctrine applies in § 2255 proceedings); United States v. Ayala, 894 F.2d 425, 429 n.8 (D.C. Cir. 1990) (same). In *Van Daalwyk v. United States*, 21 F.3d 179 (7th Cir. 1994), the court gave consideration to the claim that the *Teague* doctrine did not apply in a § 2255 proceeding. *Id.* at 180. But because of the interest in finality, the fact that the only other alternative analysis was the *Linkletter* test that had been repudiated, and the court's reluctance to treat state and federal prisoners differently, the court held that *Teague* should apply. *Id.* at 180–83. Thus, the *Teague* doctrine can be seen as sort of an analytical default, rather than a methodology designed for § 2255 proceedings.

Congress also has had an impact on the scope of *Teague* by passing the Antiterrorism and Effective Death Penalty Act of 1996[126] ("AEDPA"), which amended § 2255 to include a one-year statute of limitations for bringing claims on collateral review.[127] Additionally, AEDPA requires a petitioner filing a second or successive § 2255 motion to obtain permission from a court of appeals to file a petition and limits the availability of a § 2255 motion to claims involving new constitutional rules that have been "made retroactively applicable to cases on collateral review by the Supreme Court."[128] As will be discussed in Part II.B, *infra*,[129] these two provisions have had an impact on the lower courts' treatment of the retroactivity of *Apprendi*. The substantive/procedural dichotomy created by the *Bailey/Bousley* line of cases, the application of *Teague* to § 2255 petitioners, and the passage of AEDPA have resulted in an analysis of a federal prisoner's *Apprendi* claim that largely obscures the salient question of whether a particular federal prisoner is unconstitutionally incarcerated.

II. THE *APPRENDI* DILEMMA UNDER *TEAGUE*

Recall that our hypothetical defendant, Bob, is challenging his enhanced sentence for a violation of the federal drug laws, imposed in a federal court by a federal judge, under a statute specifically

126. Pub. L. No. 104-132, 110 Stat. 1220 (1996) (codified at 28 U.S.C. § 2255 (2000)).

127. AEDPA provides, in pertinent part, that a one-year statute of limitations run[s] from the latest of—

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255 (2000) (as amended in 1996 by AEDPA).

128. *Id.* A second or successive § 2255 motion must be certified by the appropriate court of appeals to contain:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Id.

129. *Infra* notes 167–81 and accompanying text.

designed to provide a remedy for unconstitutionally long sentences.[130] This scenario repeatedly has played out in the lower federal courts with confusing results and rationales.[131]

This Part will discuss three primary reasons why the *Teague* inquiry shortchanges a federal prisoner's *Apprendi* claim in a § 2255 motion. First, the necessity under *Teague* to classify a "new" rule as either procedural or substantive has led most lower courts relying on *Teague* to hold that *Apprendi* is a procedural rule not retroactive on collateral review without regard to *the operation* of the *Apprendi* rule on the substantive construction of the federal drug statute. By not considering the operation of a given rule prior to the retroactivity determination, current unconstitutional incarceration results. Further, this "threshold inquiry" approach prevents the inherent infirmities of current retroactivity analysis from being revealed and corrected.[132] Second, the delineation between direct and collateral

130. *See* § 2255 (stating that relief may be granted when "the sentence was in excess of the maximum authorized by law"); *supra* notes 20–32 (explaining the significance of drug quantity under the federal drug law and *Apprendi*-based challenges brought under § 2255).

131. The courts of appeals that have addressed the retroactivity of *Apprendi* under the second *Teague* exception for "fundamental" or "watershed" procedural rules, Teague v. Lane, 489 U.S. 288, 311–12 (1989), have held that *Apprendi* is not retroactive. *See, e.g.*, United States v. Moss, 252 F.3d 993, 998–1001 (8th Cir. 2001) (holding that *Apprendi* does not fall within *Teague*'s second exception); Jones v. Smith, 231 F.3d 1227, 1237–38 (9th Cir. 2000) (holding that *Apprendi* is not a "watershed" rule of criminal procedure). *But see infra* note 147 (noting the split in Ninth Circuit district courts on whether *Apprendi* constitutes a watershed rule). Several court of appeals judges, however, recognize that the *Apprendi* rule created a substantive change in the elements of a violation of § 841. *See* United States v. Clark, 260 F.3d 382, 388 (5th Cir. 2001) (Parker, J., dissenting) (dissenting from panel's remand to district court to reconsider in light of *Apprendi*); McCoy v. United States, 266 F.3d 1245, 1271–72 (11th Cir. 2001) (Barkett, J., concurring in the result only) (reasoning that the *Teague* analysis is inapplicable because the effect of *Apprendi* was to make drug quantity an element of a violation of § 841, and, thus, *Apprendi* has effected a substantive change in the law). Because decisions effecting substantive changes in federal law are not analyzed under *Teague*, *see infra* Part II.A, the confusion is not about the correct result under *Teague*, but whether *Teague* is applicable at all. Moreover, further potential confusion may arise because the Supreme Court has implied that decisions that change the substantive meaning of a federal statute might fall within *Teague*'s first exception for decisions "placing conduct 'beyond the power of the criminal law-making power to proscribe.' " Bousley v. United States, 523 U.S. 614, 620 (1998) (quoting *Teague*, 489 U.S. at 311).

132. *See* Branigin, *supra* note 94, at 1152–53. Professor Branigin identifies two related difficulties with trying to identify whether a rule is new and then focusing on the procedural posture to determine whether a litigant should get the benefit of the rule. *See id.* First, the determination of whether a rule is truly new, or a "necessary corollary" of an old rule, is often unclear. *Id.* Second, the *Teague* order of analysis allows dismissal of claims that could implicate fundamental fairness without an inquiry into the merits of a claim. *See id.*

review actually has the effect of treating similarly situated claimants dissimilarly; this inequality is in turn exacerbated by the AEDPA amendments to § 2255.[133] Third, the policy concerns behind the *Teague* plurality opinion are not necessarily applicable to a § 2255 motion, and thus it is even questionable whether the *Teague* analysis should govern § 2255 petitions. This Comment will demonstrate the shortcomings of current retroactivity doctrine as applied to a claim for relief from an unconstitutional sentence enhancement.

A. Is Apprendi *Procedural or Substantive?: The* Teague *Threshold Test*

The Supreme Court has held that the *Teague* analysis is only applicable to new procedural rules[134] when the benefit of those new rules is sought by a petitioner whose conviction has become final prior to the announcement of the new rule.[135] Furthermore, a plurality of four endorsed the proposition that the question of retroactivity should be addressed before a court addresses the merits of a petitioner's claim.[136] Accordingly, to undertake even this first step of retroactivity analysis, a court must determine two distinct issues—whether the rule sought to be applied is in fact new and whether the rule is procedural or substantive.[137] While these two inquiries may seem relatively straightforward, they have proven anything but simple under *Teague*. In the years since the *Teague* plurality defined a "new" rule as one that "breaks new ground or imposes a new obligation on the States or the Federal Government," or that was not "*dictated* by precedent,"[138] the Court, attempting to clarify the meaning of a "new" rule, has broadened the definition such that almost any application or extension of a legal principle to a

133. *See supra* notes 126–29 and accompanying text.

134. *See supra* note 121 and accompanying text.

135. Under current retroactivity analysis, a reviewing court must take the following steps: First, the court must determine the date the petitioner's conviction became final; second, the court must determine whether, under the law at that time, a court "would have felt compelled" to find that the rule was "required" by the Constitution. Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (citing Graham v. Collins, 506 U.S. 461, 468 (1993); Saffle v. Parks, 494 U.S. 484, 488 (1990)).

136. *See* Teague v. Lane, 489 U.S. 288, 300–01 (1989); *see also supra* notes 100–04 and accompanying text (discussing the *Teague* order-of-decision analysis).

137. *See* United States v. Clark, 260 F.3d 382, 384 (5th Cir. 2001) ("*Teague* is inapplicable unless we find both that the rule is new and that it involves a procedural rather than a substantive change.").

138. *Teague*, 489 U.S. at 301; *see supra* notes 111–14 and accompanying text (discussing *Teague*'s definition of a "new" rule).

new set of facts constitutes the announcement of a new rule.[139] Not surprisingly, under the definition of a new rule as one that "imposes a new obligation on . . . the Federal Government,"[140] most courts have held that *Apprendi* is a new rule.[141]

The next difficulty with the current retroactivity doctrine is the necessity of classifying a new rule as either procedural or substantive. Under current law, if a new rule works a substantive change in a federal criminal statute, the rule is retroactive to cases on collateral review.[142] If the rule is classified as procedural, it is subject to the *Teague* inquiry.[143] The difficulty here results from the classification of the *Apprendi* rule by reference to the superficial language of the rule itself rather than by way of an inquiry into the operation of the rule on the construction of the federal drug statute where a federal drug prisoner's sentence has been enhanced under § 841(b)(1)(A) or (B).[144]

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139. In three 1990 cases, *Sawyer v. Smith*, 497 U.S. 227, 234 (1990), *Saffle v. Parks*, 494 U.S. 484, 488 (1990), and *Butler v. McKellar*, 494 U.S. 407, 414 (1990), the Court settled on a broad formulation of the new rule principle that "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, 494 U.S. at 414. In *Butler*, Chief Justice Rehnquist stated that a decision announces a new rule if the outcome "was susceptible to debate among reasonable minds," despite the fact that the Court had previously characterized the rule at issue in *Butler* as "controlled" by precedent. *See Butler*, 494 U.S. at 415; *see also* Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371, 399–402 (1991) (arguing that the Court has "provide[d] substantial guidance . . . by broadening the definition of novelty so that virtually every rule becomes 'new' "). There has been extensive treatment and criticism of the Court's "new rule" jurisprudence. *See generally* Arkin, *supra*, at 399–402 (discussing the Court's new rule cases); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1747–49, 1791–97 (1991) (analyzing the Court's "new" rule jurisprudence and proposing a retroactivity analysis drawn from the law of remedies); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 994–1000 (1991) (discussing how new rule jurisprudence departs from Harlan's view of what constitutes a new rule). These commentaries demonstrate that "in the area of criminal law and procedure, the recurrent effort to identify 'new' law with that which is made, not found, leads to unhelpful debates and conceptual confusions." Fallon & Meltzer, *supra*, at 1736.

140. *Teague*, 489 U.S. at 301.

141. *See* United States v. Moss, 252 F.3d 993, 998 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 151 (4th Cir. 2001); Browning v. United States, 241 F.3d 1262, 1266 (10th Cir. 2001); Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000); United States v. Pittman, 120 F. Supp. 2d 1263, 1267 (D. Or. 2000).

142. *See supra* notes 115–22 (discussing retroactivity of substantive statutory construction decisions).

143. *See* Bousley v. United States, 523 U.S. 614, 620 (1998) ("*Teague* by its terms applies only to procedural rules . . . .").

144. *See* 21 U.S.C. § 841 (b)(1)(A) (2000) (setting out a life maximum for a first offense for specified quantities of certain drugs); *Id.* § 841(b)(1)(B) (setting out a forty-year maximum for a first offense based on specified quantities of certain drugs); *see also*

Relying on Justice Stevens's statement in *Apprendi* that "[t]he substantive basis is ... not at issue; the adequacy of New Jersey's procedure is,"[145] some courts summarily have concluded that the *Apprendi* rule is procedural.[146] Still other courts have completely neglected any inquiry into the nature of the rule and proceeded directly to whether the *Apprendi* rule falls within the exceptions to non-retroactivity announced in *Teague*.[147] Yet other courts have engaged in a more thoughtful inquiry into the nature of the *Apprendi* rule and have concluded that the rule has both procedural and substantive aspects. For example, in a dissenting opinion in *United States v. Clark*,[148] Judge Parker set out a thorough analysis of whether the *Apprendi* rule was procedural or substantive,[149] and this reasoning was later adopted by a district court in *Rosario v. United States*.[150]

McCoy v. United States, 266 F.3d 1245, 1272 & nn.21, 22 (11th Cir. 2001) (Barkett, J., concurring in result only). Judge Barkett explained:

> The real issue in determining whether *Teague* applies here is the *effect* of the Supreme Court's rejection of New Jersey's procedure on § 841 cases. If, after *Apprendi*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum is an element of the charged offense rather than a mere sentencing factor, then drug quantity is now an element of an offense leading to a punishment in excess of twenty years pursuant to § 841(b)(1)(A) or (B).

Id. at 1272 (Barkett, J., concurring in result only) (internal citation omitted).

145. Apprendi v. New Jersey, 530 U.S. 466, 475 (2000).

146. *See Sanders*, 247 F.3d at 147 (relying on Justice Stevens's statement to conclude that "*Apprendi* constitutes a procedural rule because it dictates what fact-finding procedure must be employed to ensure a fair trial.").

147. *See* Jones v. Smith, 231 F.3d 1227, 1238 (9th Cir. 2000) (concluding that *Apprendi* is not a watershed rule under the second *Teague* exception "insofar as it effects discrepancies between an information and jury instructions"). The *Jones* holding was limited to whether *Apprendi* applied retroactively to a state murder statute. District courts in the Ninth Circuit have divided on whether *Apprendi* applies retroactively in other contexts. *Compare* Reynolds v. Cambra, 136 F. Supp. 2d 1071, 1087 (C.D. Cal. 2001) (holding that *Apprendi* constitutes a " 'watershed rule' essential to the fundamental fairness of a criminal proceeding" and applying the rule retroactively to a state conviction where the sentence was enhanced because of a firearms violation), *with* Panoke v. United States, No. Civ. 00-00548, 2001 WL 46941, at *3 (D. Haw. Jan. 5, 2001) (finding that the *Apprendi* rule is not a "watershed rule" requiring retroactive application to a § 2255 motion attacking a drug and firearms conviction). Although the court in *Jones* had applied an analysis similar to the proposed extended decision-time model, i.e., considering the operation of a new rule in a given context, the *Panoke* court specifically rejected this approach, stating that "[r]etroactivity of a new constitutional rule should not vary with the merits or facts of each case, therefore the logical extension of *Jones* is to not apply *Apprendi* retroactively on collateral review regardless of the type of *Apprendi* violation alleged." *Id.*

148. 260 F.3d 382 (5th Cir. 2001).

149. *See id.* at 385–88 (Parker, J., dissenting).

150. No. 00 Civ. 9695, 2001 WL 1006641, at *3 (S.D.N.Y Aug. 30, 2001) ("The Court is persuaded by the rationale of the dissent in [*Clark*] which distinguishes between the new, substantive aspects of *Apprendi* and the ancient procedural ones.").

Judge Parker reasoned that if *Apprendi* were read as holding that every element of a crime must be submitted to a jury and proved beyond a reasonable doubt, the rule was procedural and subject to the *Teague* analysis.[151] On the other hand, Judge Parker wrote, if the *Apprendi* rule were read as redefining the elements of a federal offense, i.e., adding drug quantity as an element of an offense under § 841, then *Apprendi* was a substantive decision and could be asserted in a § 2255 motion.[152] Because prior Fifth Circuit cases had interpreted *Apprendi* as a rule that redefined the elements of a drug offense under federal law, the rule should be treated as a substantive rule.[153] Accordingly, Judge Parker concluded that *Apprendi* should be retroactive to cases on collateral review.[154]

The *Clark* case highlights the confusion that results from engaging in a threshold categorization of a rule as "new," "procedural," or "substantive" before considering how the rule operates on the merits of a case. If *Apprendi* simply requires all the elements of a crime to be proved to a jury beyond a reasonable doubt, it is procedural. Moreover, there is nothing particularly new about

151. *Clark*, 260 F.3d at 385 (Parker, J., dissenting).

152. *Id.* (Parker, J., dissenting). Judge Parker concluded that if *Apprendi* were a substantive decision, the case would be governed by *Davis v. United States*, 417 U.S. 333, 346–47 (1974) (holding that a defendant may assert in a § 2255 proceeding a claim based on an intervening substantive change in the interpretation of a federal criminal statute).

153. *Clark*, 260 F.3d at 385–86 (Parker, J., dissenting). Prior to *Clark*, the Fifth Circuit had held that *Apprendi*'s significance for the penalty provisions in 21 U.S.C. § 841(b) was that it made drug quantity an element of the offense rather than a sentencing factor. *See* Burton v. United States, 237 F.3d 490, 490–91 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); United States v. Doggett, 230 F.3d 160, 164–65 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001); *see also* United States v. Hernandez, 137 F. Supp. 2d 919, 928 (N.D. Ohio 2001) ("*Apprendi*'s holding encompasses a substantive construction, based on constitutional law, of any statute that treats facts that increase the penalty for a crime beyond the prescribed statutory maximum as a sentencing factor rather than as an element of the crime.").

154. *See Clark*, 260 F.3d at 388 (Parker, J., dissenting). Judge Parker reasoned that the nature of an *Apprendi* claim in the context of a § 841 drug offense is that while a defendant is guilty of possessing an unspecified quantity of drugs, he is actually innocent of possessing the quantity necessary to support an enhanced sentence under § 841(b). *See id.* (citing 21 U.S.C. § 841(b)(1)(A) (2000), which sets a maximum penalty of life imprisonment and a mandatory minimum of ten years imprisonment); *see also* United States v. Pittman, 120 F. Supp. 2d 1263, 1270 n.9 (D. Or. 2000) (holding that "a defendant may be 'actually innocent' of a sentencing enhancement while guilty of the underlying offense"). Agreeing with Judge Parker, Judge Barkett, in the Eleventh Circuit, further reasoned that despite the procedural component of *Apprendi*, i.e., shifting fact-finding from judge to jury and changing the burden of proof, a petitioner's *Apprendi* claim should not be analyzed under *Teague* as long as the petitioner's claim "relies on *Apprendi*'s effect on substantive law, as it does in the context of § 841." McCoy v. United States, 266 F.3d 1245, 1272 (11th Cir. 2001) (Barkett, J., concurring in result only).

such a rule even under the Court's broad definition of a "new" rule. But in the context of an enhanced sentence under § 841, if the operative effect of the *Apprendi* rule is to define drug quantity as a brand new element of the offense, the rule is a substantive construction of a federal criminal law. On this view, *Apprendi* is an old procedural rule that has, in operation, created a new element of a substantive criminal offense. Current retroactivity doctrine does not provide a clear analysis where such a hybrid rule of constitutional law has been announced. Rather, the *Teague* and *Bousley* cases rely on the neat categorization of rules as "new," "procedural," or "substantive,"[155] determinations not easily made without looking at the rule's operative effect in a given context.

B. How Current Retroactivity Doctrine and AEDPA Treat Similarly Situated Litigants Dissimilarly

Concerned with "evenhanded justice," the *Teague* plurality concluded that the principle of treating similarly situated litigants similarly required a bright line to be drawn between direct and collateral review.[156] On closer inspection, however, it is not at all clear that the *Teague* analysis promotes fairness in the way that the plurality suggested. Further, in the context of *Apprendi*, the current retroactivity analysis and the adoption of AEDPA[157] only exacerbate the disparate treatment of defendants who are similarly situated.

By adopting a bright-line distinction between direct and collateral review, the *Teague* plurality misconceived the definition of "similarly situated." The plurality defined those "similarly situated" as litigants in the same procedural posture, rather than litigants advancing the same fundamental claim.[158] As Professor Patchel notes, pre-*Teague* retroactivity doctrine focused on the nature of the right involved in the claim.[159] Citing the positions of Justices Black

155. *See* Bousley v. United States, 523 U.S. 614, 620 (1998) (holding that *Teague* only applies to procedural rules and noting that "[t]his distinction between substance and procedure is an important one in the habeas context"); Teague v. Lane, 489 U.S. 288, 301 (1989) (noting that "[i]t is admittedly often difficult to determine when a case announces a new rule").

156. *See Teague*, 489 U.S. at 300, 305 (discussing the inequity that resulted from applying the *Linkletter* test to "similarly situated defendants on collateral review").

157. *See supra* notes 126–28 and accompanying text.

158. As commentators have noted, "[A] formalistic argument [that focuses on the procedural posture of a case] ignores the reality that the entire class of convicted prisoners is 'similarly situated' when it comes to the prisoners' shared interest in avoiding incarceration that offends the Constitution." LIEBMAN & HERTZ, *supra* note 95, § 25.2 n.45.

159. Patchel, *supra* note 139, at 1003.

and Douglas in the early years of the Court's retroactivity doctrine,[160] Professor Patchel argues that Justices Douglas and Black defined "similarly situated" prisoners as those with the same type of claim, rather than those in the same procedural posture.[161] Rather than remedying any inequality inherent in the Court's early retroactivity approach,[162] the *Teague* plurality's approach "merely shifts the lines."[163]

Professor Patchel's argument has substantial force in the *Apprendi* context. Assume our two defendants, Bob and Fred, were separately tried co-conspirators who were both convicted in the Fourth Circuit under § 841(a)(1).[164] Both received enhanced sentences based on drug quantity pursuant to § 841(b)(1)(A).[165] Different results obtain depending upon how quickly each case was decided on direct appeal. If Bob's direct appeal was settled before the announcement of the *Apprendi* rule, he will not be able to benefit from the rule and will not be resentenced. On the other hand, Fred, whose direct appeal took longer, could receive the benefit of the *Apprendi* rule and be resentenced if his direct appeal was still pending when *Apprendi* was decided. This inequity results despite the fact that both Fred and Bob have the same claim, were subject to the same practice of having judges find drug quantity on a preponderance of the evidence, and, moreover, took part in the same conspiracy at the same time in the same circuit.[166]

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160. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 714 (1971) (Douglas, J., dissenting) (arguing that it is incomprehensible that the "fortuitous circumstances" of the time of the alleged wrong should compel unequal treatment of litigants with the same type of claim); Desist v. United States, 394 U.S. 244, 255–56 (1969) (Douglas, J., dissenting) ("It still remains a mystery how some convicted people are given new trials for unconstitutional convictions and others are kept in jail without any hope of relief though their complaints are equally meritorious."); Stovall v. Denno, 388 U.S. 293, 304 (1967) (Black, J., dissenting) ("[T]o deny this petitioner and others like him the benefit of the new rule deprives them of a constitutional trial and perpetrates a rank discrimination against them.").

161. Patchel, *supra* note 139, at 1003.

162. *See supra* Part I (discussing early retroactivity doctrine and selective prospectivity).

163. Patchel, *supra* note 139, at 1004.

164. 21 U.S.C. § 841(a) (2000).

165. *Id.* § 841(b)(1)(A); *see supra* notes 20–26 and accompanying text (explaining the penalty structure of § 841).

166. The Court of Appeals for the Fourth Circuit has held that *Apprendi* does not apply to a federal drug prisoner's § 2255 motion, but does apply to a similar claim on direct review. *Compare* United States v. Sanders, 247 F.3d 139, 141 (4th Cir. 2001) (holding that *Apprendi* does not apply to § 2255 motions), *with* United States v. Angle, 230 F.3d 113, 123 (4th Cir. 2000) (holding that *Apprendi* requires that defendant on direct review be resentenced to a maximum of twenty years).

A further inequity results due to the amendments AEDPA made to § 2255.[167] Under the current version of § 2255, the one-year statute of limitations for filing a motion runs from, among other dates, "the date on which the right asserted was initially recognized by the Supreme Court ... and made retroactively applicable to cases on collateral review."[168] In contrast, a second and successive petition based on an intervening change in law cannot be raised unless it is based on "a new rule of constitutional law, made retroactive to cases on collateral review *by the Supreme Court*, that was previously unavailable."[169] In *Tyler v. Cain*,[170] the Court held that for the purposes of a second or successive petition, the language in § 2255 requires that the Supreme Court specifically hold that a rule is retroactive.[171] No such limitation exists, however, for initial § 2255 petitions.[172] This discrepancy in statutory language has led a number of lower courts to conclude that, at least for initial petitions, those courts may make the retroactivity determination for new constitutional rules.[173] Thus, under the current retroactivity doctrine and the current construction of the language of § 2255, if Bob and Fred are both on collateral review in the same circuit, they may be treated dissimilarly. If Bob raises his *Apprendi* challenge in his first § 2255 motion, he may receive the benefit of the rule; but if Fred, having already filed one § 2255 motion before *Apprendi* was decided, attempts to raise the same claim, he will be barred under *Tyler*. The Supreme Court's *Tyler* decision simply forecloses the possibility that a second or successive § 2255 motion will be entertained without a Supreme Court holding of retroactivity. Thus, even the *Teague*

167. *See supra* notes 127–28 (setting forth the statute of limitations in the amended version of 28 U.S.C. § 2255 (2000)).

168. 28 U.S.C. § 2255 (2000) (as amended by AEDPA).

169. *Id.* (as amended by AEDPA) (emphasis added).

170. 533 U.S. 656 (2001).

171. *See id.* at 662–63 (interpreting the language of 28 U.S.C. § 2244(b)(2)(A), which is identical to the language in § 2255, and holding that a new rule is not made retroactive for purposes of a second or successive petition unless the Court specifically holds that it is retroactive).

172. *See* § 2255 (stating that the one year statute of limitations runs from the date that a new right is recognized by the Supreme Court but not explicitly limiting the retroactivity determination to the Supreme Court).

173. *See, e.g.*, United States v. Lopez, 248 F.3d 427, 432 (5th Cir. 2001) ("[Section] 2255(3) does not require that the retroactivity determination must be made by the Supreme Court itself."). The Eighth Circuit has also recognized the possibility that a lower court may hold *Apprendi* retroactive if the issue is raised in an initial § 2255 motion. United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001) (resolving the issue in favor of non-retroactivity).

bright-line definition of "similarly situated," meaning all litigants in the same procedural posture, does not operate evenly.

When two petitioners with the same claim in the same procedural posture are treated inequitably, the argument that the procedural posture of a case alone constitutes a principled definition of "similarly situated" for purposes of applying a new constitutional rule does not ring true. This inequity demonstrates, at the very least, that the rationale behind *Teague* of treating similarly situated litigants similarly is arguably not advanced by focusing on the procedural posture of the case; in conjunction with the provisions of AEDPA, that rationale is further undercut because even litigants in the same procedural posture may be treated dissimilarly.

A comment is warranted here about the effect of ambiguous language found in the one-year statute of limitations that was added to § 2255 by AEDPA.[174] As noted above, some courts have read the language in the statute of limitations to allow those courts to make the retroactivity determination in the case of an initial § 2255 petition.[175] At the same time, those courts also have read the one-year statute of limitations in § 2255 as running from the date *Apprendi* was announced.[176] Thus, in *United States v. Clark*,[177] Judge Parker, after concluding that *Apprendi* was retroactive, reasoned that even if the Fifth Circuit held that the *Apprendi* rule was retroactive to Clark's § 2255 claim, other petitioners would be barred from raising their *Apprendi* claims because the statute of limitations had run.[178] This inequity apparently would result even if the retroactivity determination was made in a case announced after the one-year limitations period had run. Judge Parker failed to fully explain why this result would be a correct and principled one, and this conclusion, while clever, is somewhat heartless. Imagine that both Bob and Fred have filed the same claim in an initial § 2255 petition within one year of a new constitutional rule affecting sentencing. If a court avoids making a retroactivity determination until after the time limitation has run, and disposes of Fred's case on other grounds, Fred cannot file a second § 2255 motion raising that claim unless the Supreme

174. *See supra* notes 127–28.

175. *See* cases cited *supra* note 173.

176. *See* United States v. Clark, 260 F.3d 382, 388–89 (5th Cir. 2001) (Parker, J., dissenting); *Lopez*, 248 F.3d at 432–33. The language in § 2255 is ambiguous on the question of who determines retroactivity, and on when the statute begins to run. *See* § 2255; *infra* note 181.

177. 260 F.3d 382, 384 (5th Cir. 2001).

178. *Id.* at 388–89 (Parker, J., dissenting).

Court has held the rule to be retroactive.[179] If, after the limitations period has run, the court does decide, in Bob's case, that the new rule is retroactive to his initial § 2255 petition, Bob will get the benefit of the rule, but no other litigants will. Thus, that court has, in effect, engaged in "selective retroactivity." Because Bob is the petitioner in the case announcing retroactivity, he would get the benefit of a new rule while Fred, with the same claim filed at the same time, and in the same procedural posture, would not. This is the mirror image of the "selective prospectivity" problem that prompted the Court to adopt Justice Harlan's view and discredit the practice of "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."[180]

Whether Judge Parker correctly interpreted the statute of limitations is arguable.[181] The possibility that the statute of limitations might operate this way, however, only raises more questions about the wisdom of applying complicated retroactivity analysis that has the potential to produce uneven results.

C. The Nature of a § 2255 Motion: Policy and Retroactivity

In contrast with the federal habeas corpus remedy for state prisoners,[182] § 2255 has unique characteristics that suggest that a § 2255 motion is "an integral part of a continuous criminal proceeding,"[183] rather than a separate civil action.[184] This

179. *See* Tyler v. Cain, 533 U.S. 656, 663 (2001).

180. Mackey v. United States, 401 U.S. 667, 679 (1971) (Harlan, J., concurring in part and dissenting in part).

181. The *Lopez* court noted that the circuits were split on when the statute of limitations begins to run. *Lopez*, 248 F.3d at 432–33. The court rejected the possibility that the statute of limitations is triggered when a lower court makes the retroactivity determination on an initial § 2255 motion. *Id.* at 433. The Ninth Circuit considered this possibility in *United States v. Valdez*, 195 F.3d 544 (9th Cir. 1999), holding that a petitioner's *Bailey* claim was not time-barred because the statute of limitations in § 2255(3) ran from the date the Supreme Court held *Bailey* retroactive in *Bousley*, not from the date of the *Bailey* decision. *See id.* at 547–48. That court noted that "§ 2255(3) does not specify whether the Supreme Court itself must have declared the right retroactive, or whether it is enough that this court have done so." *See id.* at 548 n.7.

182. *See* 28 U.S.C. § 2254 (2000).

183. LIEBMAN & HERTZ, *supra* note 95, § 25.6, at 1014.

184. *See* Reed v. Farley, 512 U.S. 339, 362 n.4 (1994) (Blackmun, J., dissenting) (stating that § 2255 is a "further step in [a] criminal case, not . . . separate civil action"); Grady v. United States, 929 F.2d 468, 470 (9th Cir. 1991) (holding certain claims not cognizable in a § 2255 motion because it is a "further step" in the criminal case and not a separate civil

interpretation, in turn, raises the possibility that the *Teague* doctrine does not apply to § 2255 proceedings because they are not collateral proceedings. Though most courts and commentators reject this possibility,[185] there are several significant characteristics of an *Apprendi* claim raised in a § 2255 motion that call into doubt whether the policy concerns underlying the *Teague* doctrine exist in the federal prisoner context. Policy concerns often expressed for limiting the retroactivity of new constitutional rules are federal-state relations, finality, and deterrence.[186] An analysis of these justifications with respect to a federal drug prisoner's *Apprendi* claim reveals that the *Teague* doctrine may not be the most appropriate vehicle for determining retroactivity of new constitutional sentencing rules in the federal context.

1. The Interest in Comity

First, the *Teague* plurality suggested that the retroactivity doctrine serves the interests of the states, not the federal government.[187] Relying on Professor Mishkin's observation that the potential availability of the *Mapp* exclusionary rule is "what created the retroactivity problem of *Linkletter* in the first place," the plurality went on to stress that because collateral review continually forces the states to expend resources to answer prisoners' claims of constitutional error when the convictions at issue complied with then prevailing constitutional law, the costs of retroactivity outweighed the benefits of retroactive application of new rules.[188] The Court explained that state courts are "understandably frustrated" when, having applied existing constitutional law, a federal court injects error into past state court proceedings by applying a new constitutional rule in a collateral federal proceeding.[189]

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action); S. REP. No. 80-1526, at 2 (1948) (characterizing a § 2255 motion as being "in" the criminal proceeding).

185. *See, e.g.*, Gilberti v. United States, 917 F.2d 92, 94–95 (2d Cir. 1990) (holding the *Teague* doctrine applicable to § 2255 motions); United States v. Ayala, 894 F.2d 425, 429 n.8 (D.C. Cir 1990) (holding *Teague* applicable to § 2255 motions); *see also* Arkin, *supra* note 139, at 395 (noting that lower federal courts have been untroubled by the distinctions between collateral review of state and federal convictions and arguing that *Teague*'s application to § 2255 claims could be classified as a "predictable non-issue"). *But see* Teague v. Lane, 489 U.S. 288, 327 n.1 (1989) (Brennan, J., dissenting) (noting that whether *Teague* applies to a § 2255 motion is an open question).

186. *See, e.g.*, Stringer v. Black, 503 U.S. 222, 228 (1992) ("[O]ur new rule jurisprudence" serves "interests in finality, predictability, and comity.").

187. *See Teague*, 489 U.S. at 310.

188. *See id.*

189. *See id.*

Our hypothetical drug prisoner, Bob, has raised an *Apprendi* claim asserting that his sentence for a federal drug crime is unconstitutional because a federal judge found drug quantity as a fact at his sentencing hearing on a preponderance of the evidence. In a § 2255 motion, a federal court does not review a state court judgment or state-imposed sentence. Thus, there is simply no federalism issue in this context, and whatever policy justification may support non-retroactivity when a federal court is reviewing a state court judgment is inapplicable to Bob's case. Assuming the interest to be served is respect for *any* lower court judgment, however, and further conceding that the interest is valid, the adjudicatory value of weighing that interest in the § 2255 context is questionable. A lower federal court's consideration of this interest suggests that there is some meaningful way to accurately balance Bob's interest in vindicating a constitutional right on one hand, and a lower federal court's interest in having its constitutional interpretations validated, on the other.[190] As discussed in the next section, placing importance on this interest is also inappropriate in the § 2255 sentencing claim context because the judge reviewing the constitutionality of a sentence is the very same judge that originally sentenced the defendant.

2. The Interest in Deterrence

Another factor the *Teague* plurality considered was the deterrence function of collateral review.[191] When federal courts review a state court determination of federal rights, the federal courts ensure compliance with the Federal Constitution. In the federal criminal context, the value of deterrence is served by having a higher federal court review the constitutional adjudication of a lower federal court for correctness.[192] Relying on Justice Harlan's *Desist* dissent, the *Teague* plurality agreed that because one of the functions of habeas is to serve as an incentive for trial and appellate courts to

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190. *See* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 269–70 & n.93 (1988) (arguing that balancing the liberty interest of a prisoner against a state's interest in its procedures necessarily creates the "intractable difficulties" associated with balancing "apples and oranges").

191. *See Teague*, 489 U.S. at 306.

192. It was precisely this "appellate" view of habeas corpus to which Justice Harlan was referring in his *Mackey* opinion:

> The primary justification given by the Court for extending the scope of habeas to all alleged constitutional errors [and applying the law at the time of the petition] 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.

Mackey v. United States, 401 U.S. 667, 687 (1971) (Harlan, J., concurring in part and dissenting in part).

conduct their proceedings according to "established constitutional standards," this function can be served adequately if a habeas court applies the constitutional rules in effect at the time of the original proceedings.[193]

The deterrence interest, however, is arguably not served when Bob and Fred bring their § 2255 *Apprendi* claims. In contrast to the habeas petitioner who is challenging a state conviction in a federal court, Bob and Fred will file their motions in "the court which imposed the sentence."[194] Moreover, under the rules governing the district courts, the motion "shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him."[195] Thus, the sentencing judge is often the same person ruling on the § 2255 petition challenging that sentence with an *Apprendi* claim. As some scholars have noted, "[t]he possibility of bias inherent in allowing judges whose rulings are under attack to review § 2255 motions has led to criticism of the same-judge assignment rule."[196] Thus, where a judge is reviewing his own prior sentencing determination, it makes little sense to rely on the notion that collateral review serves as a necessary additional incentive to adhere to constitutional standards. Obviously, the federal judge believed that his decision was correct when he rendered the decision.

Similarly, the current retroactivity doctrine presents a problem for federal judges considering *Apprendi* claims in § 2255 motions. First, under *Teague*'s proclamation that only "old" rules, those "*dictated* by precedent,"[197] generally will be retroactive, a federal judge applying *Apprendi* retroactively would be required to find that his prior sentencing decision was based on a misreading of precedent so severe that the error could not even be reasonably susceptible to debate.[198] Second, because current retroactivity is based on a

193. *Id.* (Harlan, J., concurring in part and dissenting in part).

194. 28 U.S.C. § 2255 (2000).

195. RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS, R. 4(a) (2001); *see* LIEBMAN & HERTZ, *supra* note 95, § 41.4c, at 1592 n.39 (quoting the RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS, R. 4(a) advisory committee note as recognizing the " 'longstanding majority practice [of] assigning motions made pursuant to § 2255 [to] the trial judge' ").

196. LIEBMAN & HERTZ, *supra* note 95, § 41.4c, at 1592.

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

198. *See* Johnson v. Texas, 509 U.S. 350, 378 (1993) (O'Connor, J., dissenting) ("When determining whether a rule is new .... [w]e ask only whether the result was *dictated* by past cases, or whether it is 'susceptible to debate among reasonable minds.' ") (citations omitted) (quoting Butler v. McKellar, 494 U.S. 407, 415 (1990)).

theoretical construct that injects error into prior proceedings,[199] the federal judge must then not only correct the prior judgment, but candidly admit that her prior decision was in error. The model proposed in Part III provides a simpler way to approach these problems.

3. The Interest in Finality

The most significant policy behind the restrictions on applying new constitutional rules to collateral review, and arguably the most legitimate, is the value of finality. Finality serves society's interest in the certainty that once a conviction of guilt has been rendered under constitutionally fair procedures, that verdict will be left untouched. Finality also preserves judicial resources.[200] After reviewing the Court's reliance on the value of finality in civil cases, the plurality in *Teague* noted, "The fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*.' "[201] The importance of finality also serves the development of constitutional law by reducing the costs of announcing new rules: If a new rule of constitutional law will not apply to a conviction once it has been determined to be final, the cost to society of freeing prisoners who have been found guilty of an offense is reduced.[202]

The *Teague* Court implied that the development of the analysis announced in that case was driven not so much by concern over theoretical clarity, but by a desire to restrict the scope of collateral review ostensibly to serve the interest in finality.[203] That the

199. *See infra* notes 212–21 and accompanying text (discussing the transaction-time model of current retroactivity doctrine).

200. *See supra* notes 74–77 and accompanying text (setting forth Justice Harlan's two-prong finality justification).

201. *Teague*, 489 U.S. at 309 (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

202. *See* Haddad, *supra* note 40, at 424 (noting that a retroactive application of *Mapp* would call into question the continued incarceration of prisoners whose convictions of guilt were not in doubt); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98 (1999) (discussing the "cost of change" and noting that "the Supreme Court would never have required *Miranda* warnings if doing so meant that every confessed criminal then in custody had to be set free").

203. *Teague*, 489 U.S. at 309–10. The *Teague* Court relied, in part, on Professor Mishkin's description of the *Linkletter* retroactivity problem as not one of whether a rule would be retroactively available on collateral review, but whether collateral review should be available at all to " 'go behind the otherwise final judgment of conviction.' " *Id.* at 310 (quoting Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77–78 (1965)).

development of the current retroactivity doctrine is driven primarily by social and political concerns is well supported by scholarly literature.[204] Some commentators have noted that the *Teague* doctrine, fueled by the desire to restrict collateral review, only further complicated retroactivity theory without solving the retroactivity problem.[205] The Court has been criticized for muddying the retroactivity waters rather than directly restricting the scope of collateral review when its recent decisions suggested that restrictions on the availability of collateral review were, and are, the real goal.[206] Other commentators argue that basing the retroactivity doctrine on policy concerns of finality has resulted in a loss of principled adjudication.[207] Still others note that the current debate over the availability of collateral review depends on subjective factors,[208] which raises the question of whether the Court should even be engaged in what is, at bottom, a political debate best solved by the legislature. However valid these criticisms may be, it is true that on some level, finality of judgments is a necessary component to a functioning criminal justice system. This Comment will argue, however, that this interest can be served under a model of retroactivity that provides more theoretical clarity than the *Teague* analysis.[209]

III. THE EXTENDED DECISION-TIME MODEL

In a recent article,[210] Professor Kermit Roosevelt exhaustively canvassed the Supreme Court's retroactivity doctrine and proposed a

204. *See generally* sources cited *supra* note 94 (noting commentary on *Teague*).

205. Professor Roosevelt characterizes the *Teague* doctrine as "symptomatic of a larger mistake." Roosevelt, *supra* note 9, at 1113. Instead of realizing the problem with retroactivity theory, Roosevelt argues, "[B]oth the Court and commentators have persistently seen habeas, rather than retroactivity, as the source of the problem. They have thus responded by tinkering with habeas . . . ." *Id.* at 1113.

206. James B. Haddad, *The Finality Distinction in Supreme Court Retroactivity Analysis: An Inadequate Surrogate for Modification of the Scope of Federal Habeas Corpus*, 79 NW. U. L. REV. 1062, 1076–79 (1984) (arguing that "[i]f the Supreme Court's real desire is [the restriction of collateral review,] it could take the direct approach of narrowing the grounds for [collateral review]").

207. Patchel, *supra* note 139, at 1028–46 (concluding that the Court's "lack of concern for the interests of petitioners" is evidence that the Court's concern is not principled decision-making, but the jurisdictional reach of the habeas statutes).

208. Rosenberg, *supra* note 94, at 375 (arguing that an individual's view on whether habeas corpus is an unwarranted interference with the ability of the criminal justice system to keep guilty persons in jail or is a mechanism for safeguarding individual constitutional rights is "profoundly shaped by personal concerns about crime and about civil liberties").

209. *See infra* Part IV.C.2 (discussing the interest in finality under the extended decision-time model).

210. *See* Roosevelt, *supra* note 9.

new model of retroactivity, called the "decision-time" model.[211] Relying heavily on Professor Roosevelt's insightful analysis, this Comment argues that the decision-time model should be extended to apply to cases on federal collateral review when a new rule of constitutional law affecting sentencing is at issue.

A. Professor Roosevelt's Decision-Time Model

The question of retroactivity is largely a choice of law question; in a given case, what law applies? Professor Kermit Roosevelt contends that the Supreme Court's retroactivity doctrine is problematic because the Court developed it within a transaction-time model.[212] The premise of the *Linkletter* era decisions was that parties should be governed by the law in effect at the time of the conduct—i.e., the transaction—at issue in a case.[213] Thus, if the Court desired to make a law retroactive, the law-changing decision had to "reach back in time to change what the law *was*."[214]

In contrast to a model that changes the law in the past, Professor Roosevelt proposed a model of retroactivity termed the "decision-time" model:

> Where the transaction-time model supposes that the legally relevant rights and duties are those existing at the time of the parties' actions, the decision-time model starts from the opposite premise. Courts should apply their current best understanding of the law to all cases before them, regardless of whether the best understanding at the time of the transaction would produce a different result.
>
> A Court confronted with a "retroactivity question" thus has no choice in what law to apply if it is using the decision-time model. Current law governs, and the authority of a law-changing decision cannot be denied.[215]

Therefore, Professor Roosevelt explains, the decision-time model produces retroactive effect not by reaching back into the past to change what the law was at the time of the parties' conduct, but by simply applying current law.[216]

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211. *See id.* at 1117–31.
212. *Id.* at 1110–15.
213. *Id.* at 1078–79.
214. *Id.*
215. *Id.* at 1117–18.
216. *Id.* at 1124–25 ("Decision-time law is applied without retroactively changing transaction-time law, for the simple reason that only decision-time law is relevant.").

Under the current transaction-time framework, when the Court announces a new rule in a case on direct review and applies that decision to the appellant in that case, the Court, in effect, reaches back in time to change the law at the time of the claimed constitutional violation. The effect of handling retroactivity in this manner is that "[t]he retroactive application of new law injects error into proceedings that were error-free when conducted."[217] Put another way, the law does not change at the time of the decision, but by virtue of the application of the new rule in the case, the law changes retroactively at the time of the complained of constitutional violation.

Therefore, under a theoretically pure transaction-time framework, a petitioner whose claim arose any time after the date of the original violation that the Court addressed in the law-changing decision should benefit from the rule announced in that case.[218] Moreover, this would be true regardless of whether the petitioner seeks direct or collateral review; as long as the petitioner's claim arose after the law changed—i.e., after the date of the original transaction—the procedural posture of the case is irrelevant.[219] As noted above in the discussion of the development of the retroactivity doctrine, this is not the course the Court has taken.[220] Thus, the theoretical confusion arises from the Court's adherence to an impure transaction-time model that imposes an arbitrary temporal line based on the procedural posture of a case that has nothing to do with the point at which the transaction-time model dictates the law actually changed.[221]

Professor Roosevelt argues that the decision-time model clarifies this conceptual problem because it contains a self-executing delineation between cases on direct review and cases on collateral review.[222] Professor Roosevelt's premise is that the purpose of collateral review is not to apply the current best understanding of the

217. *Id.* at 1081.

218. *See id.* at 1112 & n.198.

219. *See id.* at 1112 ("The single retroactive application has also changed the law applicable to cases already finally decided .... Without a distinction between old law and new law ... there is no way to avoid judging collateral attacks according to the new law, for the holding of retroactivity has made it the old law.").

220. *See supra* Part I.

221. *See* Roosevelt, *supra* note 9, at 1112 (arguing that since the transaction-time model makes new law applicable to conduct arising after the date of the conduct at issue in a case, that model cannot distinguish between cases on direct or collateral review).

222. *See id.* at 1120, 1121 n.229 (arguing that by preserving the correctness of earlier decisions, the decision-time model distinguishes between direct and collateral review because a habeas court need only decide whether a case was "correct when rendered").

law to a collateral challenge, but to review lower court decisions and ask whether the judgment was correct at the time it was decided; thus, decision-time law is not controlling.[223] Despite this view of collateral review, Professor Roosevelt does acknowledge that even where a lower judgment may have been correct, certain cases result in unconstitutional incarcerations, and those cases should be open to collateral review in the decision-time model.[224] It follows, then, that mere correctness of a judgment cannot alone justify incarceration if that incarceration is unconstitutional.

B. The Extended Decision-Time Model

Under the decision-time model, reviewing courts considering direct appeals apply the "current best understanding of the law to all cases before them."[225] This Comment proposes an extended decision-time model that applies Professor Roosevelt's model to § 2255 claims based on new constitutional rules affecting the determination of a petitioner's sentence. On one hand, the extended decision-time model could be construed as merely reviving the pre-*Linkletter* standard of complete retroactive application of all new constitutional rules. There are, however, two analytical differences under the proposed extended decision-time model that distinguish it.

First, the extended decision-time model, like the decision-time model, addresses only the question of what law is available in a § 2255 petition. This is a different question from whether, in any particular case, a current incarceration is actually working a constitutional wrong, or what remedy, if any, is required. As Professor Roosevelt points out, "[t]he demand that courts 'apply the law as it is at the time, not as it once was,' speaks to the analytical model but does not require any particular result."[226]

Second, because the premise of the extended decision-time model is that current law is applied without injecting error into prior proceedings, only a claim of *current* unconstitutional incarceration would require a remedy. As Daniel Meador explains, when a

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223. *See id.* at 1121 ("Habeas is . . . a collateral remedy, focusing on the correctness of the judgment when rendered.").

224. *See id.* at 1122. Professor Roosevelt presents an argument that "[i]ncarceration after a change in law might violate the Constitution in two primary ways . . . which . . . precisely track the Harlan/*Teague* exceptions to non-retroactivity on collateral review." *See id.* at 1121–24.

225. *Id.* at 1117.

226. *Id.* at 1127 (quoting Williams v. United States, 401 U.S. 667, 681 (1971) (Harlan, J., dissenting)).

petitioner brings a claim on collateral review, the basis of the petitioner's claimed injury is the "*presently continuing* confinement imposed in a manner which violates the Constitution as presently construed."[227] On this view, a § 2255 petitioner would not be entitled to relief solely by showing that there had been a constitutional violation in the past. Rather, he would be required to show a constitutional violation working a current or future constitutional wrong. In this way, the extended decision-time model is limited to claims arising from new constitutional rules directly bearing on a petitioner's *sentencing*, rather than his adjudication of guilt. The petitioner's claim is "current" because it stems from the severity of his current sentence, which is presently continuing, rather than a claim of past error in the determination of guilt at trial, a past constitutional error. In essence, a claim under the extended decision-time model is a claim for prospective relief from the continuation of an unconstitutionally severe sentence; it is a direct attack on the sentence, not the past procedures used to impose the sentence. As conceived here, the extended decision-time model thus avoids the situation where the announcement of a new rule of constitutional law affecting trial or pre-trial procedures compels a court to apply that rule and vacate a prior judgment of guilt,[228] the precise situation that concerned the *Linkletter* Court.[229]

The extended decision-time model shares some of the same properties of constitutional harmless error review,[230] and, indeed, allows for such review. This model settles the question of which law

227. Daniel J. Meador, *Habeas Corpus and the "Retroactivity" Illusion*, 50 VA. L. REV. 1115, 1117 (1964). Meador explains that under this view, there is a "direct causal link between [the Constitutional violation] and the present confinement" that transcends any temporal limitation. *See id.*

228. *See* Fallon & Meltzer, *supra* note 139, at 1799 (noting Justice Stevens's reference to harmless error review in his *Teague* concurrence and arguing that "[w]hen an alleged constitutional error would be harmless in any event, a court could refrain from adjudicating the constitutional merits on the ground that any finding of violation would not lead to relief"). In a collateral attack concerning a rule established in a prior case, harmless error analysis allows a reviewing court to first determine whether a constitutional violation has occurred and then decide whether any remedy is required. Patchel, *supra* note 139, at 1004–05.

229. *See* Roosevelt, *supra* note 9, at 1091–92 (arguing that, given the "avalanche of habeas petitions" that would result if the *Mapp* rule were held to be retroactive, the *Linkletter* Court's development of a non-retroactivity analysis "was almost inevitable"); *supra* notes 40–43 and accompanying text.

230. "Harmless constitutional error review" can be traced to *Chapman v. California*, 386 U.S. 18 (1967), in which the Court held that constitutional errors would not require reversal of a criminal conviction if a reviewing court was convinced beyond a reasonable doubt that the error complained of did not contribute to the result of the case. *See id.* at 24.

applies, but the availability and application of a particular new constitutional rule will not necessarily compel any given result, such as reversal of a conviction, or even resentencing, in every case. If, after reviewing the facts of a case, a court determines that the application of current law would not change the currently continuing sentence of a federal prisoner, then no remedy is required, despite a constitutional error in the past. The key conceptual difference, however, between the extended decision-time model and harmless constitutional error review lies in the fact that the federal prisoner bringing a claim in a § 2255 motion does not claim error in prior proceedings. Rather, the nature of his claim is that under current constitutional law, his incarceration is effecting a current constitutional violation. Specifically, in the context of a federal drug prisoner's *Apprendi* claim, the claim is that the length of the sentence is effecting a current and unconstitutional deprivation of liberty. Under this view, the claim is for prospective relief, rather than an attack on the adjudication of guilt or initial imposition of a sentence.

As noted above, the extended decision-time model does not preclude a harmless error analysis. If, for example, a federal prisoner stipulated to drug quantity at sentencing, a court could conclude beyond a reasonable doubt that a federal prisoner's sentence is correct even applying current law because the fact that the drug quantity was found by a judge on a preponderance of the evidence in violation of *Apprendi* is not working a current constitutional deprivation. Moreover, the fact that a court must inquire into past events—i.e., what transpired at a past sentencing hearing—does not preclude finding both that (1) at the time of sentencing the decision was legally correct; and (2) the petitioner is nevertheless entitled to relief on collateral review because his sentence is unconstitutionally severe, and is thus working a current constitutional wrong.[231] The inquiry into past events does not render those past events erroneous, but merely serves as a factual basis on which a court may grant prospective relief for a constitutional wrong that is currently in effect or will take effect in the future—i.e., the day an unconstitutional sentence enhancement takes effect. As the next section

231. Meador, *supra* note 227, at 1119. Meador argues that the inquiry into the circumstances of a past prosecution does not foreclose a remedy on collateral review. *See id.* ("Despite the necessary involvement of what happened at a long-ago prosecution, the theory of habeas corpus makes the question for the court the present constitutionality of presently continuing detention.") *But see* Roosevelt, *supra* note 9, at 1121 n.233 (arguing against Meador's conception of granting relief on collateral review due to an intervening change in law, but recognizing the viability of harmless error review).

demonstrates, the application of the extended decision-time model addresses the three shortcomings of *Teague* discussed in Part II and results in a clearer and more uniform application of the *Apprendi* rule as applied in the § 2255 context.

IV. HOW THE EXTENDED DECISION-TIME MODEL ADDRESSES THE *TEAGUE* SHORTCOMINGS

A. *Is* Apprendi *Procedural or Substantive?: The Extended Decision-Time Model*

Recall that under the *Teague* analysis, a court must answer two preliminary questions to adjudicate Bob's § 2255 claim: Whether a rule is new, and whether the rule is procedural or substantive.[232] Under the extended decision-time model, the inquiry into whether a rule is new or old drops out of the analysis. The *Apprendi* rule, 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,"[233] is the current law. Under the extended decision-time model, there is no need to engage in an inquiry about whether a law is new or old. Current law is available as a basis of Bob's claim, and a court proceeds directly to a determination of the operation of the rule on his claim.

Similarly, under the extended decision-time model, the decision whether a rule is procedural or substantive will not determine the availability of the rule to a § 2255 petitioner. The application of the new rule to a case, however, may reveal the true nature of the rule. As Judge Parker did in his dissent in *United States v. Clark*,[234] a court will proceed to examine the operation of the *Apprendi* rule on Bob's substantive claim,[235] and, as other courts have determined when faced with *Apprendi* claims on direct review, will likely conclude that the *Apprendi* rule made drug quantity an element of a violation of the federal drug laws that must be proved beyond a reasonable doubt in order to support an enhanced sentence.[236] Thus, unless a judge could conclude that the drug quantity determination was harmless beyond a reasonable doubt, Bob would be resentenced to the maximum

232. *See supra* notes 137–55 and accompanying text.

233. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

234. 260 F.3d 382 (5th Cir. 2001).

235. *See supra* notes 149–54.

236. *See supra* notes 31–32 and accompanying text (describing courts' treatment of federal drug prisoners' *Apprendi* claims on direct review).

penalty for a violation of the federal drug laws where drug quantity was not specified.

This analytical approach provides a clear way of determining what remedy, if any, should be given to an *Apprendi* claimant on § 2255 review. If a court inquires into the operation of a rule in a given context to determine whether a rule is, in application, procedural or substantive, rather than analyzing the rule in the abstract for this determination, the result of that analysis will be more legally precise and will thus aid a court in determining what remedy is required.[237] Whether the rule is in fact procedural or substantive is not determinative of the availability of the rule under the extended decision-time model, but such a finding would enhance the clarity of the rule in application.

B. The Extended Decision-Time Model and Similarly Situated Litigants

Recall that the *Teague* retroactivity analysis defines "similarly situated" defendants as those who are in the same procedural posture.[238] This Comment has argued that that definition of "similarly situated" leads to inequitable results: Those defendants with the same type of claim being treated dissimilarly.[239] Under the extended decision-time model, the initial analysis does not focus on the procedural posture of a case. Rather, the choice of law question—what rule should apply to the case before the court—is governed by the principle that "[c]ourts should apply their current best understanding of the law to all cases before them, regardless of whether the best understanding at the time of the transaction [i.e., sentencing hearing,] would produce a different result."[240] Applying this principle to an *Apprendi* claim brought in a § 2255 motion by a

237. Some courts, under current retroactivity analysis, have engaged in an analysis of *Apprendi* similar to that proposed here and have concluded that *Apprendi* worked a substantive change in the law, and thus would be available to petitioners on collateral review. *See* Rosario v. United States, No. 00 Civ. 9695, 2001 WL 1006641, at *3 (S.D.N.Y. Aug. 30, 2001) (discussing the effect of *Apprendi* and concluding that the rule "added substantive elements to every criminal statute . . . including the narcotics statutes at issue here, [and therefore] is a substantive rule of law retroactively applicable to cases on collateral review").

238. *See supra* notes 158–61 and accompanying text.

239. *See supra* notes 164–74.

240. Roosevelt, *supra* note 9, at 1117. This principle guides the development of Professor Roosevelt's decision-time model. As noted *supra* Part III, however, Professor Roosevelt does not extend this principle to collateral review because, in his view, the purpose of collateral review is limited to asking whether the judgment was correct when rendered. *Id.* at 1120.

federal drug prisoner means simply that the *Apprendi* rule is available to all petitioners, whether on direct or collateral review, as a basis to directly challenge their sentences. However, the determination that the *Apprendi* rule is available does not negate other procedural or statutory requirements that any federal prisoner generally must meet in order to file a § 2255 motion.[241] It merely clarifies the question of what law is available as a basis for a claim once those procedural and statutory requirements are met.

As a result of applying the extended decision-time model, similarly situated litigants—those with the same type of claim—are treated similarly. Thus, in the example above where co-conspirators Bob and Fred were convicted of drug offenses and received enhanced sentences based on drug quantity determined on a preponderance of the evidence at sentencing, the *Apprendi* rule would be available to both Bob and Fred. This result would obtain despite Bob's conviction becoming final prior to the *Apprendi* decision. While the *Teague* plurality invoked the idea of "evenhanded justice" as justification for a general rule of nonretroactivity for collateral review,[242] the application of the same rule to claimants bringing the same type of claim arguably goes further toward advancing even treatment of litigants.

C. *Policy Considerations Under the Extended Decision-Time Model*

1. Comity and Deterrence

This Comment has argued that the interests in comity and deterrence should not drive the retroactivity doctrine in the federal sentencing context primarily because (1) in the federal prisoner context, there is no federalism concern because a federal court is not reviewing a state court judgment;[243] and (2) the deterrence function of collateral review arguably is not served where a court entertaining a

241. For example, a petitioner who has not preserved his claim on direct review has procedurally defaulted his claim and must show " 'cause' for the waiver" and " 'actual prejudice . . . from the . . . violation" before being allowed to raise the claim on collateral review. *See* Reed v. Farley, 512 U.S. 339, 354 (1994) (quoting Wainwright v. Sykes, 433 U.S. 72, 84 (1977). Another example of a procedural rule given full effect under the extended decision-time model is the one-year statute of limitations in § 2255 for bringing claims based on new rules of constitutional law. *See supra* notes 127–28.

242. *See* Teague v. Lane, 489 U.S. 288, 300 (1989).

243. *See supra* Part II.C.1. Recall that under both Professor Roosevelt's decision-time model, and the extension of that model here to collateral review of sentencing determinations, the correctness of a prior decision is preserved. *See supra* note 216 and accompanying text.

§ 2255 motion is the same court that initially imposed the sentence.[244] Assuming, however, that these interests are significant, the proposed extended decision-time model accounts for them.

The extended decision-time model does not create error in prior proceedings, but applies current law to a petitioner whose claim is that his present incarceration is unconstitutional.[245] Thus, Bob would concede that the court that imposed his original sentence was correct under prevailing law at the time of his sentencing. Due to intervening changes in the law, however, a current enhanced sentence, which the prisoner is currently serving, effects a constitutional violation at the point that the sentence enhancement imposed in violation of current constitutional law begins. For example, if our hypothetical defendant, Bob, is sentenced to forty years under § 841(b)(1)(B) where there had been no finding of drug quantity by a jury beyond a reasonable doubt, the constitutional injury would occur on the day after twenty years had been served, when the increased penalty otherwise impermissible under *Apprendi* begins.[246] Thus, the crux of Bob's claim is not that his conviction is unconstitutional, or even that his original sentencing hearing was erroneous, but that a present or future constitutional injury should be addressed under current law. Because the nature of incarceration operates "in futuro,"[247] the constitutional violation is presently working a wrong. When Bob files a motion under § 2255 to "test the legality of his detention"[248] and is claiming that his sentence is unconstitutionally long, Bob is attacking an "operative event," current incarceration, that is taking place now.[249] Under the extended decision-time model, a collateral attack claiming a sentence "in excess of the maximum authorized by law"[250] does not require that the conviction of guilt be overturned, nor does it require that the original sentencing determination by the judge be found erroneous; collateral

244. *See supra* notes 194–99 and accompanying text.

245. *See supra* notes 227–29 and accompanying text (adopting Professor Meador's argument that the challenge on collateral review is a challenge to a present, continuing unconstitutional incarceration).

246. *See supra* notes 20, 23 (discussing the penalty structure of 21 U.S.C. § 841).

247. *See* Roosevelt, *supra* note 9, at 1123. Professor Roosevelt, contrary to the model advanced here, would require that the underlying conduct—the actual drug activity—be held constitutionally protected in order for a prisoner to receive relief on collateral review in this scenario. *See id.* As one court has noted, however, "a defendant may be 'actually innocent' of a sentencing enhancement while guilty of the underlying offense." United States v. Pittman, 120 F. Supp. 2d 1263, 1270 n.9 (D. Or. 2000).

248. 28 U.S.C. § 2255 (2000).

249. *See* Meador, *supra* note 227, at 1118.

250. *See* § 2255.

attack only requires that a prisoner being constitutionally harmed *now* be resentenced within current constitutional bounds.[251]

Moreover, the fact that a judge is reviewing his own prior sentencing determination supports the application of the extended decision-time model in the § 2255 context. The question is not whether error occurred in a prior proceeding, but what is the best understanding of the law at the time the petition is filed. By applying this model to the federal prisoner's *Apprendi* claim, the federal judge need only treat the *Apprendi* rule as the current, best understanding of what the Constitution demands. The judge is thus relieved from the difficulty of assigning error to his own prior judgment. By preserving the correctness of earlier judgments for the simple reason that only current operative events and law are relevant, the legitimate interest a federal judge may have in preserving his previous judgments is adequately served. Furthermore, not only is any possibility of actual bias significantly reduced, but any potential appearance of bias is removed. Consequently, a federal judge's decision may be viewed as more legitimate.

2. Finality

The interest in finality in the criminal process can be served by restricting the availability of collateral review in general, or by restricting the scope of that review in terms of what kinds of claims can be heard. Arguably, the *Teague* Court sought just such a restriction when it developed the current retroactivity analysis.[252] This Comment argues that the scope and availability of collateral review should be treated as issues separate and distinct from the question of what law applies. Reliance on the fortuity of the procedural posture of a case, even when combined with the value of finality, is not an acceptable normative justification for non-retroactivity. The interest in finality is always present, even on direct

251. If a prisoner is harmed by an *Apprendi* error, the current practice in federal court when the *Apprendi* error comes to the court on direct review is to vacate the sentence and remand for sentencing. *See, e.g.*, United States v. Thomas, 274 F.3d 655, 673 (2d Cir. 2001) (vacating a prisoner's 292 month drug sentence under 21 U.S.C. § 841(b)(1)(A) and remanding for re-sentencing pursuant to the twenty-year maximum under § 841(b)(1)(C)). Under the "extended decision time model," the same result would obtain but the model does not require a finding of error.

252. *See supra* notes 204–08 (discussing commentary critical of the *Teague* retroactivity analysis as a method of restricting the scope of habeas corpus review).

appeal, and that interest alone ordinarily should not be enough to overcome a constitutional violation.[253]

As noted above, however, finality in the criminal process is a legitimate interest that is not completely denied or undercut by the application of the extended decision-time model in the context of a new constitutional rule affecting sentencing. Recall that our defendant, Bob, charged with a violation of § 841 of the federal drug statute,[254] is exposed to a forty-year statutory maximum because a judge found, on the preponderance of the evidence, that 5.00 grams of crack were involved in his offense. On the other hand, Bob is subject to a statutory maximum of twenty years if no specific drug quantity was proved at sentencing.[255] Bob's § 2255 claim based on *Apprendi*, even if successful, leaves his conviction of guilt intact. The remedy for such an error is merely a resentencing, not an automatic reversal.[256] Notably, both the plurality in *Teague* and Justice Harlan, upon whom the *Teague* plurality relied, discussed the impact of retroactivity on finality in terms of new procedural rules that affect criminal "convictions" rather than "sentences."[257] Whatever legitimate interests the criminal process has in respecting the finality of an adjudication of guilt, that interest is not as strong when a new constitutional rule, such as *Apprendi*, only affects a sentencing determination. The strain on government resources will likely be less in the case where only a resentencing determination need be made, rather than a new trial held. Under current law, a prosecutor will answer Bob's § 2255 *Apprendi* claim and a judge will engage in an in-depth *Teague* retroactivity analysis in order to determine whether a decision such as *Apprendi* applies to a case on collateral review. In contrast, the extended decision-time model arguably places less strain on the criminal process by (1) settling the question of what law applies; (2) requiring only a straightforward application of the rule to

253. Roosevelt, *supra* note 9, at 1128. That finality cannot be a normative justification for non-retroactivity is illustrated by the Supreme Court's *Griffith* holding that all new rules should be applied to litigants on direct review. *See supra* notes 88–91 and accompanying text (discussing Griffith v. Kentucky, 479 U.S. 314 (1987)).

254. 21 U.S.C. § 841.

255. *See supra* notes 20–26 and accompanying text (explaining the operation of the penalty structure under § 841).

256. *See, e.g.*, United States v. Thomas, 274 F.3d 655, 673 (2d Cir.) (holding that the remedy for an *Apprendi* error is resentencing), *cert. denied*, 531 U.S. 1069 (2001).

257. *See* Teague v. Lane, 489 U.S. 288, 309–14 (1986) ("Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality . . . ."); Mackey v. United States, 401 U.S. 667, 689 (1971) (arguing for non-retroactivity on collateral review where procedures "utilized to convict" are not fundamentally unfair).

the facts of a case; and (3) allowing an application of harmless error analysis.

Even if Bob has a valid *Apprendi* claim, his sentence will be upheld if any constitutional error was harmless. The extended decision-time model, as conceived here, does not preclude a harmless error analysis. If, for example, a federal prisoner stipulated to drug quantity at sentencing or overwhelming evidence of drug quantity was presented at trial, a court could conclude that a federal prisoner's sentence is correct even under current law. Accordingly, despite the availability and application of *Apprendi*, the sentence is not effecting a current constitutional wrong.

In order to accept the finality of a decision as an ultimate and unyielding controlling value, one has to accept the position that even unconstitutional incarcerations are acceptable. When a prisoner claims a *current* unconstitutional incarceration and brings that claim in the very federal court that initially imposed the sentence, the view that finality overcomes a sentence too severe under current constitutional standards is difficult to accept. This view becomes even harder to accept because the current practice in the federal courts is to remedy a sentencing determination based on a valid *Apprendi* claim on direct review.[258]

CONCLUSION

Viewing the *Apprendi* decision as one that adds the substantive element of drug quantity to a violation of the federal drug laws for purposes of sentencing, the test should not be whether the prisoner is innocent of a violation of § 841, but whether his current sentence is constitutional under current constitutional standards.[259]

> A habeas petitioner who was the victim of a genuine *Apprendi* error meets this test. His imprisonment rests, at least in part, on a purely judicial finding made using the lowest standard of proof known to our judicial system. He has thus been deprived of his liberty without the benefit of

258. *See, e.g.*, *Thomas*, 274 F.3d at 673 (remanding for resentencing in light of a valid *Apprendi* claim); United States v. Doggett, 230 F.3d 160, 166–67 (5th Cir. 2000) (vacating two life sentences imposed on a prisoner and remanding for resentencing for a term not to exceed thirty years on each of the two counts), *cert. denied*, 531 U.S. 1177 (2001).

259. *See* Rosario v. United States, 2001 WL 1006641, at *4 (S.D.N.Y. Aug. 30, 2001) (arguing that the appropriate retroactivity inquiry is whether there is "a fundamental defect which inherently results in a complete miscarriage of justice" and whether there are "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent") (quoting Davis v. United States, 417 U.S. 333, 346 (1974)).

> the heightened protections that are the hallmarks of a criminal proceeding.[260]

The use of the extended decision-time model allows a court to discover whether there is, in fact, an unconstitutional incarceration by settling the initial decision of what law should apply to the petitioner's § 2255 motion. A court can then proceed directly to consider the merits of a claim and come to a more principled judgment on whether resentencing is necessary.

Moreover, the extended decision-time model is not an attack on the conviction of guilt itself and does not require resentencing in every case. As a result, the proposed model takes into account the principle of finality in criminal judgments. The other policy concerns behind non-retroactivity of new constitutional sentencing rules—respect for state court judgments and insuring that lower courts comply with the Constitution—are not necessarily present in the § 2255 context. These latter concerns, therefore, do not provide a persuasive justification for limiting the retroactivity of *Apprendi* in the context of a federal drug prisoner's § 2255 motion.

If the scope of collateral review is the problem, then that problem should be addressed directly. As the uneven treatment of petitioners in § 2255 proceedings demonstrates, any attempt to solve the policy questions driving the debate over post-conviction review by further complicating the retroactivity doctrine only exacerbates the very problems that the Court has attempted to rectify.

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260. *Id.*