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*Standards for Retroactive Application Based Upon  
Groundbreaking Supreme Court Decisions in Criminal Law*

Paul Starett Wallace, Jr., American Law Division

September 28, 2004

**Abstract.** One of the hallmarks of new Supreme Court decisions is that until their announcement many of the lower courts are likely to have ruled erroneously on the issue. The question becomes when may defendants convicted or sentenced on the basis of these errors claim the benefit of the new decision and have their convictions or sentences overturned. Generally new decisions of the Supreme Court will apply retroactively to defendants currently on trial or on direct appeal. Also, a defendant may take advantage, retroactively, of a new Court rule in a few other limited situations, for example, decisions which construe a criminal statute to exclude certain acts or conduct. New decisions of the Court sometimes apply retroactively to those on collateral review, and rarely apply retroactively to those petitioners on second or successive collateral reviews.

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## **Standards For Retroactive Application Based Upon Groundbreaking Supreme Court Decisions in Criminal Law**

**September 28, 2004**

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# Standards For Retroactive Application Based Upon Groundbreaking Supreme Court Decisions in Criminal Law

## Summary

The Supreme Court is said to have announced a “new rule” when it hands down a decision that addresses an issue of law in a new way or for the first time. In criminal law new rules apply prospectively, but they also apply retroactively sometimes. Whether a new rule provides the basis for overturning a past case depends on the nature of the new rule and where in the review process a past case is located when the new rule is announced.

If the new rule is a substantive one, that is, if it declares that conduct previously outlawed may not be criminalized, it applies retroactively. If the new is procedural, the issue is more complicated. The new rule will not apply to any case in which the defendant has waived the right to the benefits of the new rule. The new rule will not apply where the failure to apply it in a past case was harmless (procedural defects that undermine the very structure of the trial process - secret trial, denial of the right to a lawyer, biased judges, and the like - are never harmless). A new rule will apply to a past case if the case is still on direct appeal and if the defendant raised the issue in a timely manner before the new rule was announced. If a case is still on direct appeal but the defendant failed to raise the issue in a timely manner, the new rule will only apply retroactively if the defendant can claim the benefits of the plain error doctrine.

Those defendants who have reached the state of finality with their sentence which is an indication that they have exhausted their criminal appeal procedures, are not in as favorable position as those defendants who are on direct appeal. Errors raised on collateral review (essentially means that the defendant is attacking the sentence or conviction in a manner other than through direct appeal) are reviewed under the more difficult harmless error standard for *habeas corpus* cases. As a general framework for analyzing the applicability of new rules to convictions that have already become final: New substantive rules apply retroactively, but new procedure rules do not. A procedural rule applies retroactively only if it is a “watershed rule of criminal procedure” that implicates the fundamental fairness and accuracy of the criminal proceeding. In *Teague v. Lane*, the Supreme Court answered questions of retroactivity for cases on collateral review. In *Teague*, the Court held that as a general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced. There are two exceptions: (1) *Teague* held that the new rule should apply retroactively if it places a class of conduct beyond the power of the State to proscribe; and (2) *Teague* held that a new rule should apply retroactively if the new constitutional rule is a “watershed rule” of criminal procedure “implicating the fundamental fairness of the criminal proceeding.” Thus, if a court determines that the constitutional rule at issue is a new procedural rule, it must determine when the defendant’s conviction became final. Even if a *habeas* petition survives *Teague* analysis its claim to a new rule may be impaired by restrictions on stale or repetitious petitions, failure to exhaust state remedies, or procedural default.

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# Standards For Retroactive Application Based Upon Groundbreaking Supreme Court Decisions in Criminal Law

## Background

One of the hallmarks of new Supreme Court decisions is that until their announcement many of the lower courts are likely to have ruled erroneously on the issue. The question becomes when may defendants convicted or sentenced on the basis of these errors claim the benefit of the new decision and have their convictions or sentences overturned. Generally new decisions of the Supreme Court will apply “retroactively”<sup>1</sup> to defendants currently on trial or on direct appeal.<sup>2</sup> Also, a defendant may take advantage, retroactively, of a new Court rule in a few other limited situations, for example, decisions which construe a criminal statute to exclude certain acts or conduct.<sup>3</sup> New decisions of the Court sometimes apply “retroactively” to those on collateral review, and rarely apply “retroactively” to those petitioners on second or successive collateral reviews.<sup>4</sup>

## Waiver

There are a number of significant restrictions on the ability to raise error after the fact. The most common problem appears to be waiver. Waiver may be accomplished either affirmatively or by inaction. By pleading guilty for example, a defendant waives jury trial, confrontation, and self-incrimination rights, and thereby

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<sup>1</sup> Retroactivity deals with new decisions, or changes in the law. Occasionally, a court will issue a decision which overrules a number of other decisions. Sometimes, these decisions may provide relief for a defendant who has already been convicted. Generally, the courts have held that new rules of *procedure* will not be applied retroactively. Hence, unless the case is on direct appeal at the time the decision is rendered, the defendant cannot take advantage of it.

<sup>2</sup> In a direct appeal, the court is limited to reviewing the record from the trial court. It will not consider evidence which was not submitted. In *habeas corpus* the same limitations are not present, and the court may consider additional evidence. In a direct appeal, almost any violation of law may be addressed. This can include violations of statutes and rules. In contrast, *habeas corpus* is generally limited to constitutional claims. As a result, the violation of statutes or rules cannot generally be a basis for relief in a *habeas* proceeding.

<sup>3</sup> *Bousley v. United States*, 523 U.S. 614, 620-21 (1998).

<sup>4</sup> *Schriro v. Summerlin*, 124 S.Ct. 2519, 2522 (2004).

the ability to claim the benefits of any new decisions in those areas.<sup>5</sup> Waiver by inaction may be no less debilitating. Here the doctrine of waiver recognizes that a court should have an opportunity to rule on a claim at a time when it can be remedied. The effect of this means that issues must be raised at the first opportunity to do so.<sup>6</sup> Depending upon the circumstances of the case and the nature of the error, failure to interpose a timely and consistent objection may limit a defendant's ability to benefit when the Supreme Court later confirms the validity of the objection.

## Harmless Error

Prior to *Chapman v. California*<sup>7</sup> most courts understood that constitutional error in a criminal case could never be "harmless" and always warranted relief, either on direct review or in federal *habeas corpus*. That understanding changed after *Chapman*, when the Court held that some constitutional errors at trial could be ignored if it could be said with relative assurance that they had no effect on the ultimate verdict.<sup>8</sup>

In justifying this change in constitutional law, *Chapman* weighed the cost of automatic reversal against the risks of erroneous conviction and concluded that the system could tolerate some additional risk.<sup>9</sup> To ensure that the idea of harmless error remained within close bounds, however, the Court held that no error could be considered harmless unless the prosecution demonstrated, beyond a reasonable doubt, that the error had not influenced the verdict.<sup>10</sup>

The rule pronounced in *Chapman* remains the governing rule with two exceptions. First, its reach is limited to direct appeals. Thereafter upon collateral review, a different standard applies:

When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case. See *Chapman v. California*, 386 U.S. 24 (1967) ("[T]he court must be able to declare a belief that [constitutional error] was harmless beyond a reasonable doubt"). When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard.<sup>11</sup>

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<sup>5</sup> *Cf.*, *Parke v. Raley*, 506 U.S. 20, 29 (1992)

<sup>6</sup> *Wainwright v. Sykes*, 433 U.S. 72, 88-89 (1977).

<sup>7</sup> 386 U.S. 18 (1967).

<sup>8</sup> *Id.* at 23-24. Rule 52(a) of the Federal Rules of Criminal Procedure reflects this view ("Harmless error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded").

<sup>9</sup> *Id.* at 22.

<sup>10</sup> *Id.* at 24.

<sup>11</sup> *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993), *United States v. Dominquez Benitez*, (continued...)

Under *Brecht*, constitutional trial error when raised on collateral review can be held harmless if it had no “substantial” effect on the verdict within the meaning of the principal harmless error case, *Kotteakos v. United States*.<sup>12</sup> Second, it does not apply to “structural errors.”

## Structural Error

In *Arizona v. Fulminante*<sup>13</sup> the Supreme Court distinguished “trial errors” from “structural errors” in the context of constitutional rights violations stating that the former are subject to harmless error analysis but the latter requires automatic reversal. A “trial error” occurs during a case’s presentation to the trier of fact and “...may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission is harmless beyond a reasonable doubt.”<sup>14</sup> A structural defect, on the other hand, “...affect[s] the framework within which the trial proceeds,” and therefore defies harmless error analysis.<sup>15</sup>

The Court in *Fulminante* noted that most constitutional errors are subject to harmless error analysis and supplied a list of past examples, 499 U.S. at 306-307 (characterizations of the Court):

- unconstitutionally overbroad jury instructions at the sentencing stage of a capital case, *Clemons v. Mississippi*, 494 U.S. 738, 752-754 (1990);
- admission of evidence at the sentencing stage of a capital case in violation of the Sixth Amendment Counsel Clause, *Statterwhite v. Texas*, 486 U.S. 249 (1988);
- jury instruction containing an erroneous conclusive presumption, *Carella v. California*, 491 U.S. 263, 266 (1989);

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<sup>11</sup> (...continued)  
124 S.Ct. 2333, 2339 n.7 (2004).

<sup>12</sup> 328 U.S. 750 (1946). The test under *Kotteakos* is whether the error “had substantial and injurious effect or influence in determining the jury’s verdict.” Under this standard, *habeas* petitioners may obtain plenary review of their constitutional claims, but they are not entitled to *habeas* relief based on trial error unless they can establish that it resulted in “actual prejudice.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In *O’Neal v. McAninch*, 513 U.S. 432 (1995), the Court further refined the *Brecht* harmless error standard holding that this standard does not place the burden of proof upon the petitioner to show that a trial error substantially affected the verdict. Rather, where the issue is evenly balanced and the judge has doubts about whether the error had “substantial and injurious effect” on the jury’s verdict, then the judge must treat the error as if it were not harmless and must rule for the petitioner. See also, *California v. Roy*, 519 U.S. 2, 4-5 (1997).

<sup>13</sup> 499 U.S. 279, 306-312 (1991).

<sup>14</sup> *Id.* at 307-308.

<sup>15</sup> *Id.* at 310.

- jury instruction misstating an element of the offense, *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987);
- jury instruction containing an erroneous rebuttable presumption, *Rose v. Clark*, 478 U.S. 570 (1986);
- erroneous exclusion of defendant's testimony regarding the circumstances of his confession, *Crane v. Kentucky*, 476 U.S. 683, 691 (1986);
- restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause, *Delaware v. Van Arsdall*, 475 U.S. 673 (1986);
- denial of a defendant's right to be present at trial, *Rushen v. Spain*, 464 U.S. 114, 117-118 and n.2 (1983);
- improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause, *United States v. Hastings*, 461 U.S. 499 (1983);
- statute improperly forbidding trial courts giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause, *Hooper v. Evans*, 456 U.S. 605 (1982);
- failure to instruct the jury on the presumption of innocence, *Kentucky v. Whorton*, 441 U.S. 786 (1979);
- admission of identification evidence in violation of the Sixth Amendment Counsel Clause, *Moore v. Illinois*, 434 U.S. 220, 232 (1977);
- admission of the out-of-court statement of a nontestifying codefendant in violation of the Sixth Amendment Counsel Clause, *Brown v. United States*, 411 U.S. 223, 231-232 (1973);
- confession obtained in violation of *Massiah v. United States*, 377 U.S. 201 (1964), *Milton v. Wainwright*, 407 U.S. 371 (1972);
- admission of evidence obtained in violation of the Fourth Amendment, *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970);
- denial of counsel at a preliminary hearing in violation of the Sixth Amendment Confrontation Clause, *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970);

The Court's list of cases exemplifying structural error was far shorter, 499 U.S. at 309-10 (characterizations of the Court):



- total deprivation of the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963);
- a [trial] judge who was not impartial, *Tumey v. Ohio*, 273 U.S. 510 (1927);
- unlawful exclusion of members of the defendant’s race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986);
- [denial of] the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-78, n.8 (1984);
- [denial of] the right to [a] public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n.9 (1984).

In the years that followed, the Court added defective reasonable-doubt jury instructions to the list of structural errors requiring reversal,<sup>16</sup> but enlarged the list of constitutional errors subject to harmless error analysis to encompass jury instructions that omitted an element of the offense.<sup>17</sup>

## Plain Error

A defendant, who lacked the foresight to raise a timely objection to an error subsequently confirmed in a new rule of the Supreme Court, must overcome the plain error rule. “[B]efore an appellate court can correct an error not raised at a trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights....If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.”<sup>18</sup>

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<sup>16</sup> *Sullivan v. Louisiana*, 508 U.S. 275, 278-282 (1993).

<sup>17</sup> *Neder v. United States*, 527 U.S. 1, 10-12 (1999) (noncapital case); *Mitchell v. Esparza*, 540 U.S. 7, 10-11 (2003) (capital case).

<sup>18</sup> *Johnson v. United States*, 520 U.S. 461, 466-467 (1997); *United States v. Olano*, 507 U.S. 725, 733-34 (1993); *Jones v. United States*, 527 U.S. 373, 389 (1999) (If an error meets the first three requirements the appellate court engages in a fourth consideration: whether or not to exercise its discretion to correct the error – “An appellate court should exercise its discretion to correct plain error only if it ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings.’”). The plain error standard is reflected in Federal Rule of Criminal Procedure 52(b), “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.” Under the standard, courts have “a limited power to correct errors that were forfeited because [they were] not timely raised” below, *United States v. Olano*, 507 U.S. at 731. Even when an error has occurred that is plain and affects substantial rights, “an appellate court may . . . exercise its discretion to notice a forfeited error . . . only if . . . the error seriously affects[s] the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Cotton*, 535 U.S. at 631-632 (quoting *Johnson v. United States*, 520 U.S. at 467).

This last hurdle may be the most difficult to overcome. The defendants in *Olano* failed to convince the Court that the unlawful presence of alternate jurors during the jury deliberations that led to their convictions seriously affected “the fairness, integrity, or public reputation of judicial proceedings.”<sup>19</sup> The defendant in *Johnson* had no more success with the contention that the failure to present the issue of materiality of a false statement to the jury satisfied the standard – not because such an error might never satisfy the “substantial affect” standard, but because in *Johnson* the evidence of materiality was “overwhelming” and “uncontested.”<sup>20</sup> The *Cotton* defendants met the same fate. The erroneous failure to include within the drug trafficking indictment allegations of the sentencing-determining quantity of the drugs involved did not satisfy the “substantial affect” standard because the jury had been presented with “overwhelming” and “essentially uncontroverted” evidence of the quantity of drugs involved.<sup>21</sup>

## Application on Collateral Review

In *Schriro v. Summerlin*,<sup>22</sup> the Court held that *Ring v. Arizona*<sup>23</sup> did not apply retroactively to cases already final on direct review. In *Ring*, the Court concluded that in the capital sentencing context, the existence of an aggravating factor must be proved to a jury rather than a judge. Summerlin was tried and convicted before *Ring*, however, and thus under Arizona’s sentencing scheme, a judge found the aggravating factors that made him eligible for the death penalty. In his federal *habeas* petition, Summerlin argued that he was entitled to the benefit of the *Ring* rule, but the Court did not concur. The Court, in an opinion written by Justice Scalia, outlined the general framework under *Teague v. Lane*<sup>24</sup> for analyzing the applicability of new rules to convictions that have already become final: New substantive rules generally apply retroactively, but new procedural rules generally do not. A procedural rule applies retroactively only if it is a “watershed rule of criminal procedure” that implicates the fundamental fairness and accuracy of the criminal proceedings.<sup>25</sup> With this overview, the Court disregarded any suggestion that the *Ring* rule applied to Summerlin’s case because it was a substantive rule. The *Ring* rule does not “alter the range of conduct or the class of persons that the law punishes.”<sup>26</sup> It merely assigns decision making authority for essential facts bearing on punishment, it regulates only the manner of determining culpability, *id.*, and thus is primarily a procedure rule

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<sup>19</sup> *United States v. Olano*, 507 U.S. at 739-41.

<sup>20</sup> *United States v. Johnson*, 520 U.S. at 469-70.

<sup>21</sup> *United States v. Cotton*, 535 U.S. at 632-33.

<sup>22</sup> 124 S.Ct. 2519 (2004).

<sup>23</sup> 536 U.S. 584 (2002) (The Supreme Court in *Ring* announced a new procedural rule that does not apply retroactively to cases which are final on direct review. This rule held that death penalty defendants had a constitutional right to have a jury decide their sentence).

<sup>24</sup> 489 U.S. 288 (1989).

<sup>25</sup> 124 S.Ct. at 2524.

<sup>26</sup> 124 S.Ct. at 2523.

rather than a substantive rule. The rule was also not characterized as a “watershed rule” of criminal procedure.

The Court has announced a rule of federal procedure that applies to federal *habeas corpus* claims which makes it clear that the finality of convictions cannot be brought into question by every change in the law. For example, under *Teague v. Lane*, a new rule in general cannot be applied retroactively to cases on collateral review unless the rule “...falls within one of two narrow exceptions to the general rule of nonretroactivity.”<sup>27</sup> The first exception permits retroactive application to new rules that place “...certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”<sup>28</sup> The second exception allows retroactive application of new rules that involve procedures that are “implicit in the concept of ordered liberty,”<sup>29</sup> the so-called “watershed” exception.<sup>30</sup>

A *Teague* analysis asks whether a particular Supreme Court decision announced a “new rule” and if so whether either of the two *Teague* exceptions apply so as to allow a *habeas* petitioner to claim the benefit of the new rule. The Supreme Court addressed the new rule issue of retroactivity in a capital sentencing context in *Beard v. Banks*.<sup>31</sup> In *Mills v. Maryland*<sup>32</sup> the Court held invalid a capital sentencing scheme that required juries to disregard mitigating factors that they had not found unanimously. In *Beard*, the Court held that the *Mills* rule does not apply retroactively. In its analysis, the Court considered whether the rule was dictated by existing precedent relative to whether the unlawfulness of *Mills*’ sentence would be apparent to “all reasonable jurist.” After tracing the jurisprudential roots of the *Mills* decision, the Court concluded that reasonable jurists could have differed as to whether the prior cases compelled the results in *Mills*. As confirmation, the Court noted that the *Mills* case (and a late released case) had dissents.

The *Beard* Court also provided guidance on the two *Teague* exceptions. The first exception is reserved for “primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”<sup>33</sup> This, *Beard* observes as would *Schriro* thereafter, is matter appropriately considered retroactive by its substantive nature rather than an exception to the procedural *Teague* rule.<sup>34</sup> Elsewhere, the Court has suggested that this exception covers things like “the execution of mentally

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<sup>27</sup> *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (discussing *Teague v. Lane*, 489 U.S. at 311-313 (1989)).

<sup>28</sup> *Teague v. Lane*, 489 U.S. at 307 (1989).

<sup>29</sup> *Id.*

<sup>30</sup> “The second exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” *Beard v. Banks*, 124 S.Ct. 2504, 2513 (2004), quoting *O’Dell v. Netherland*, 521 U.S. 151, 157 (1997) and *Graham v. Collins*, 506 U.S. 461, 478 (1993).

<sup>31</sup> 124 S.Ct. 2504 (2004).

<sup>32</sup> 486 U.S. 367 (1988).

<sup>33</sup> *Teague v. Lane*, 488 U.S. at 307.

<sup>34</sup> *Beard v. Banks*, 124 S.Ct. at 2513 n.7; *Schriro v. Summerlin*, 124 S.Ct. at 2522 n.4.

retarded persons . . . regardless of the procedure followed.”<sup>35</sup> “In providing guidance as to what might fall within [the watershed] exception,” the Court has repeatedly referred to the rule of *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel), and only to this rule.<sup>36</sup> In contrast to *Gideon*’s solitary standing, the Court has identified more than a few decisions concerning procedural rights that may not claim “watershed” status for *Teague* purposes.<sup>37</sup>

## Other Bars to Collateral Relief

Even if a petitioner’s claim survives *Teague* analysis, in his efforts to claim the benefits of a new rule he may face other impediments.<sup>38</sup> Defendants being held under a state criminal conviction may file a federal petition for writ of *habeas corpus* under 28 U.S.C. § 2254 to challenge the validity of their conviction or sentence. Collateral review (*habeas corpus*) for federal prisoners is objecting to the sentence or conviction in a manner other than through a direct appeal. The object of the *habeas corpus* petition is to obtain release from custody. As a consequence, collateral review is only available while the petitioner is in custody or subject to some other form of collateral consequence as parole, supervised release, or registration requirement. Thus, the benefits of a new Supreme Court rule cannot ordinarily be claimed through collateral review unless collateral consequences of the conviction remain in effect.<sup>39</sup> When the Anti-Terrorism and Effective Death Penalty Act (AEDPA)<sup>40</sup> became effective on April 24, 1996, many changes occurred to the *habeas corpus* process, such as the addition of a statute of limitations and a strict standard for relief. Under the AEDPA, a one-year period of limitations applies to a

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<sup>35</sup> *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

<sup>36</sup> *Beard v. Banks*, 124 S.Ct. at 2514, citing, *Saffle v. Parks*, 494 U.S. 484, 495 (1990). See also, *Gray v. Netherland*, 518 U.S. 152, 171 (1996).

<sup>37</sup> *Beard v. Banks*, 124 S.Ct. at 2515 (“However laudable the *Mills* rule [relating to capital punishment schemes precluding jury consideration of mitigating factors not found unanimously] might be, it has none of the primacy and centrality of the rule adopted in *Gideon*. The *Mills* rule applies fairly narrowly and works no fundamental shift in our understanding of the bedrock procedural elements essential to fundamental fairness”); *Schriro v. Summerlin*, 124 S.Ct. at 2524 (the *Ring* rule relating to the right to jury determination of facts required for the imposing of capital punishment is not a watershed rule); *O’Dell v. Netherland*, 521 U.S. at 167 (decision recognizing capital defendant’s right to inform the jury of a life without parole sentencing alternative is not a watershed decision); *Lambrix v. Singletary*, 520 U.S. 518, 539-540 (1997) (decision precluding either capital judge or jury from considering invalid aggravating factors is not a watershed decision); *Saffle v. Parks*, 494 U.S. at 495 (proposed rule that would invalidate any anti-sympathy jury instruction would not be a watershed rule).

<sup>38</sup> In some instances, the courts may prefer to deal with these impediment first. For instance, in *Lambrix v. Singletary*, 520 U.S. 518, 522-525 (1997), the Court indicated that before conducting *Teague* analysis the federal courts should determine whether a claim is procedurally barred for failure to present to state courts in a timely manner.

<sup>39</sup> *Spencer v. Kemna*, 523 U.S. 1, 7-18 (1998); cf., *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300-301 (1984).

<sup>40</sup> 28 U.S.C. § 2243.

petition for a writ of *habeas corpus* filed by a person in custody, and the limitations period begins to run from “the date on which the judgement [of conviction] became final by the conclusion of direct review or the expiration of the time for seeking such.”<sup>41</sup> In the case of new rule announced by the Supreme Court, however, the period begins to run when the decision is handed down, if the Court has made it retroactively applicable for purposes of collateral review.<sup>42</sup>

Generally, the federal court cannot grant relief on *habeas corpus* claims unless the state supreme court has first had an opportunity to rule on the same federal claims. This is called exhaustion of state court remedies.<sup>43</sup> The Supreme Court explained the exhaustion requirement in *O’Sullivan v. Boerckle*:<sup>44</sup>

Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.

In the same vein, the Court entertains a procedural default doctrine under which it is reluctant to pass upon a constitutional claim pressed by a state prisoner who by his own default is barred from presenting the claim to state courts. It will do so, however, when the prisoner can satisfy the Court’s “cause and prejudice” requirements.<sup>45</sup> If the petitioner does not bring all of his/her federal claims which are related to a particular judgment in a single federal *habeas corpus* action, he/she will not be able to bring a second action without first obtaining permission to do so from the federal circuit court of appeals.<sup>46</sup> There is one relevant exception to the general maxim that a prisoner may not raise new issues in a second or successive *habeas* petition. A prisoner may do so if the Supreme Court has expressly made a new rule of constitutional interpretation retroactively applicable upon collateral review.<sup>47</sup>

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<sup>41</sup> 28 U.S.C. § 2244(d)(1)(A); *see also*, 28 U.S.C. § 2255.

<sup>42</sup> 28 U.S.C. § 2244(d)(1)(C).

<sup>43</sup> 28 U.S.C. § 2254(b)(1)(A).

<sup>44</sup> 526 U.S. 838, 845 (1999).

<sup>45</sup> *Dretke v. Haley*, 124 S.Ct. 1847, 1851-1852 (2004). “Cause” ordinarily requires a showing “that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The requirements can also be satisfied by showing of “actual innocence,” *id.* at 496. The Court has recently stated that federal courts should address a petitioner’s alternative claims before passing on a claim of actual innocence. *Dretke v. Haley*, 124 S.Ct. at 1852.

<sup>46</sup> 28 U.S.C. § 2244(b).

<sup>47</sup> 28 U.S.C. § 2244(b)(2)(A); 28 U.S.C. § 2255. *See also Atkins v. Virginia*, 536 U.S. 304 (2002) (Rule announced by the Court that execution of mentally retarded person was “cruel and unusual punishment” in violation of the Eighth Amendment, was a new rule of constitutional law made retroactive to cases on collateral review by the Court that was previously unavailable, as would support petitioner’s application for leave to file a second successive federal *habeas corpus* petition).

## Conclusion

New decisions of the Supreme Court always apply “retroactively” to defendants on trial or direct appeal, sometimes apply “retroactively” to those on collateral review, and rarely apply “retroactively” to those petitioners on second and successive collateral reviews.

There were two Supreme Court decisions during the 2003-2004 Term which dealt with the retroactive application of previous Court rulings on the death penalty, and the ability of death row petitioners to have a court review their claims.

In *Schriro v. Summerlin*, the Court ruled that death row inmates cannot benefit from a 2002 Supreme Court ruling that crucial findings of fact should be made by a jury, not a judge, in capital cases. The Court held that the earlier decision in *Ring v. Arizona* was not retroactive and therefore could not be applied to Summerlin and the death row inmates in five other states affected by the *Ring* ruling.

Justice Scalia, writing for the majority, held that the *Ring* decision represented a new procedural rule for the manner of determining the defendant’s culpability—whether a defendant is worthy of being sentenced to death—and these new procedural rules are generally not applicable retroactively unless they meet a very narrow “watershed” exception. Justice Scalia concluded that the evidence that juries were more accurate fact-finders than judges was too unconfirmable to support the conclusion that the *Ring* decision was a watershed rule.

The dissent argued that *Ring* did announce a watershed rule and focused on the jury’s role in serving as the community standard for determining whether the conduct of the defendant merits a death sentence.

In *Beard v. Banks*, another case involving retroactivity, the Court held that a 1988 opinion that invalidated death-sentencing schemes in which jurors were required to be unanimous in finding the existence of mitigating factors was not retroactive. Justice Thomas, writing for the majority, concluded that although the Court’s decision in *Maryland v. Mills* announced a new rule, that rule did not fall within the “watershed” exception for new rules that are retroactively applicable.

The Court emphasized in both *Summerlin* and *Beard* that these new procedural rules will only be retroactive under extremely limited circumstances.