Justice for All: Analyzing *Blakely* Retroactivity and Ensuring Just Sentences in Pre-*Blakely* Convictions[±]

DAVID E. JOHNSON[*]

In the months following the Supreme Court's holding in Blakely v. Washington*, a countless number of state and federal prisoners were hopeful that their unconstitutionally imposed sentences would be revisited. For prisoners who were not given their Sixth Amendment right at sentencing, the question became—in the words of one prisoner—"Who is going to mount the vigorous and spirited campaign this cause so deserves?"*

There are strong arguments to suggest that Blakely*'s requirement of jury fact-finding using the beyond a reasonable doubt standard of proof should be applied retroactively to cases on collateral review. Similar to* Gideon*,* Blakely *is a watershed rule of criminal procedure that implicates the fundamental fairness and accuracy of a proceeding. This result, however, is unlikely to occur. The other two branches of government must be prepared to ensure constitutionally just sentences for pre-*Blakely *defendants. The legislative branch should contemplate ways in which to minimize the effect a retroactive holding would have on the judiciary and should also correct the recent statutory interpretation of the habeas statute. The executive branch should use its historic remedy of correcting injustices through the clemency process. Constitutional justice can be accomplished for pre-*Blakely *defendants and all three branches of government must begin this dialogue to ensure justice for all.*

[±] This Note is forthcoming from the *Ohio State Law Journal*, Fall 2005. Cite as David E. Johnson, *Justice for All: Analyzing* Blakely *Retroactivity and Ensuring Just Sentences in Pre-*Blakely *Convictions*, 66 OHIO ST. L.J. ____ (2005).

[*] Managing Editor, the *Ohio State Law Journal*. J.D., The Ohio State University Moritz College of Law, expected 2006. B.A., *summa cum laude*, Political Science with honors, Economics and Philosophy minors, The George Washington University, 2003. I am indebted to Professor Douglas A. Berman for suggesting the topic and discussing with me at length the ideas presented in this Note. Professor Berman's teachings and guidance throughout my law school career have been truly invaluable. In addition, Professor Berman's Web Log, http://sentencing.typepad.com, was of great help in researching for this Note. I would also like to thank Joshua Fritsch and Jason Job of the *Ohio State Law Journal* for reviewing earlier drafts of this Note. Finally, but most significantly, a special thanks to my parents, Edward and Karen Johnson, for their neverending support of my educational and professional endeavors; their encouragement and model work ethic are serving me well as I embark upon my legal career.

I. INTRODUCTION

Despite America's often-repeated ideal of achieving "justice for all,"[1] the courthouse doors of American justice will likely be closed to hundreds of thousands of state and federal prisoners currently serving unconstitutionally imposed sentences. The reason for this is that these prisoners' sentences became final prior to the United States Supreme Court's revolution of sentencing procedures. For such unlucky prisoners,[2] the recognition that convicted offenders are entitled to Sixth Amendment rights at sentencing arbitrarily came too late. For example, had their narcotics violation case lasted a mere twenty-one days longer, Anthony Toliver and Brian Patterson[3] would have received the possible benefit of the Court's holding in *Blakely v. Washington*.[4] Similarly, had Anthony DeJohn and Christopher Harb's narcotics and weapons case[5] continued at least fifty-seven days longer, they would have received the benefit of the Court's holding in *United States v. Booker*.[6] However, because of the untimely dates on which their convictions became final,[7] these prisoners will likely be denied the justice the Founding

---

[1] Most notably, the Pledge of Allegiance concludes with the ideal that we are "one nation . . . with . . . justice for all." Former Attorney General John Ashcroft articulated his commitment to this principle when he promised that "the men and women of the Department of Justice—and by extension the entire justice community—would work tirelessly to achieve justice for all." *See Ashcroft Worked for Freedom and Justice*, 39 PROSECUTOR 10, 10 (2005). Upon leaving his position, Attorney General Ashcroft explained his desire to "continu[e] to work . . . for freedom and justice for all." *Id.* at 44. *See also* Michael Higgins & Matt O'Connor, *Lefkow Case Puts Security in Spotlight,* CHI. TRIB., March 13, 2005, at 1 (explaining that our legal system "promises equal justice under the law"). *Cf.* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, [and] establish Justice . . . do ordain and establish this Constitution for the United States of America.").

[2] *See* United States v. Paladino, 401 F.3d 471, 481 (7th Cir. 2005) ("Had the judgments become final before the Supreme Court [cases], the defendants would be out of luck . . . .").

[3] *See* United States v. Toliver, 351 F.3d 423, 429 (9th Cir. 2003).

[4] Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004).

[5] *See* United States v. DeJohn, 368 F.3d 533, 539, 542 (6th Cir. 2004).

[6] United States v. Booker, 125 S. Ct. 738, 746 (2005).

[7] For the purpose of retroactivity analysis, a defendant's case is considered final when all appeals have been exhausted, when the Supreme Court has denied a petition for certiorari, or when the available time period to file an appeal or petition for certiorari has elapsed. *See* Ellen E. Boshkoff, *Resolving Retroactivity After* Teague v. Lane, 65 IND. L.J. 651, 654 n.29 (1990). The Supreme Court denied defendants Toliver and Patterson's petition for certiorari on June 1, 2004, *Toliver v. United States*, 124 S. Ct. 2429 (2004), but *Blakely* was decided on June 24, 2004. *Blakely*, 124 S. Ct. at 2531. The Supreme Court denied defendants DeJohn and Harb's petition for certiorari on November 15,

Fathers would have desired and to which the Supreme Court has declared individuals are entitled.[8] Consider also the situation of Nasario Gonzalez. Like countless other Washington State and other state prisoners, Mr. Gonzalez is currently serving an unconstitutionally imposed sentence.[9] Due to the date the Washington Supreme Court denied his appeal,[10] however, the federal courts will likely deny Mr. Gonzalez the ability to receive a constitutionally just sentence. Finally, besides the fact that the aforementioned prisoners are currently serving unconstitutionally imposed sentences, they also share an additional characteristic: On appeal, these prisoners correctly argued that their sentences were unconstitutionally imposed.[11] Yet, because their cases arbitrarily became final too soon, our federal courts will likely deny these unlucky prisoners the justice for which they have each previously argued.

The reason for this denial of constitutional justice stems from three separate Supreme Court developments within the last two decades. First, the Court has recently recognized that America's sentencing procedures are not constitutionally suitable given recent substantive changes in America's sentencing laws. Specifically, in *Blakely v. Washington*, the Court held that under a determinate sentencing system,[12] enhancement of a defendant's sentence may only be done based upon facts reflected in the jury verdict or

---

2004, *DeJohn v. United States*, 125 S. Ct. 510 (2004), but *Booker* was decided on January 11, 2005. *Booker*, 125 S. Ct. at 738.

[8] *See Blakely*, 124 S. Ct. at 2543. The Court noted:

> [E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. . . . The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors' . . . .

Id. (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *343).

[9] *See* State v. Gonzalez, 116 Wash. App. 1001 (Wash. Ct. App. 2003).

[10] *See* State v. Gonzalez, 150 Wash. 2d 1013 (2003) (denying review on November 4, 2003).

[11] *See* United States v. Toliver, 351 F.3d 423, 432 (9th Cir. 2003) ("The defendants argue that in fixing their sentences . . . the district court violated [a constitutional rule] by determining that 5 kilograms of cocaine was involved in the conspiracy."); United States v. DeJohn, 368 F.3d 533, 544 (6th Cir. 2004) ("DeJohn additionally claims that . . . the district court's determination of drug quantity at sentencing was [a Constitutional] error . . . ."); State v. Gonzalez, No. 20070-1-III, 2003 WL 723351, at *3 (Wash. Ct. App. Mar. 4, 2003) ("Mr. Gonzalez also argues that the exceptional sentence violated his right to a jury trial.").

[12] Blakely v. Washington, 124 S. Ct. 2531, 2540 (2004) ("This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment.").

admitted by the defendant.[13] It would therefore be a violation of a defendant's Sixth Amendment right for a judge (instead of a jury) to find sentence-enhancing facts using a preponderance of the evidence (instead of a beyond a reasonable doubt) standard.[14] Second, the Court's relatively recent retroactivity jurisprudence will rarely permit the retroactive application of such procedural changes. Specifically, in *Teague v. Lane*, the Court held that new rules of criminal procedure do not apply retroactively to cases under collateral review unless the rule falls within what has been interpreted to be two extremely narrow exceptions.[15] Third, the Court's recent statutory interpretation of the federal habeas statute will severely limit the amount of successful habeas petitions.[16] Specifically, in *Dodd v. United States*,[17] the Court restrictively interpreted the amount of time a defendant has to file an otherwise valid habeas petition.

Given these three developments, this Note will examine the constitutional failure of America's sentencing procedures and the potential remedies that prisoners sentenced under such defective methods may have. Most obviously, the judicial branch could retroactively apply *Blakely* to cases that were final prior to June 24, 2004, the date *Blakely* was decided. This result, however, is unlikely to be realized. And even if this result is realized, *Dodd* would continue to prevent the retroactive imposition of constitutional sentences. Recognizing this, the other two branches of government should be equally concerned about the imposition of unconstitutional sentences.

This Note will begin to examine this topic in Part II by summarizing the transformation in American sentencing law since the 1970s, and by explaining the implications of the recent landmark decisions, *Blakely v. Washington* and *United States v. Booker*. Part III will establish the Court's current retroactivity jurisprudence, concentrating on Justice Harlan's view, which was largely adopted by the Court in *Teague v. Lane*. This approach will be applied in Part IV to determine whether the Court's holding in *Blakely* should be applied retroactively. After concluding that a compelling argument exists for the federal judiciary to apply *Blakely* retroactively, Part V explains why this result is unlikely to occur: the consequences of such an action appear to be too overwhelming. Furthermore, due to another recent Supreme Court development, even if such a result did occur, the federal courts would still be unable to grant prisoners the constitutional justice they

---

[13] *Id.* at 2537.

[14] *Id.*

[15] Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the 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.").

[16] 28 U.S.C. § 2255 (2003).

[17] Dodd v. United States, 125 S. Ct. 2478 (2005).

deserve. In response to these realities, the Note culminates in Part VI with a suggestion and explanation of three separate proposals—two legislative branch proposals and one executive branch proposal—that would ensure justice for defendants who were sentenced prior to *Blakely*. While these proposals are not meant to be fully described or detailed herein, I hope to begin a discussion as to how all current prisoners can receive just sentences, and how all three branches of government have a responsibility toward this end. Justice in sentencing has been denied for pre-*Blakely* defendants. Yet the American ideal of justice for all can and should be accomplished for all.

II. A BRIEF HISTORY OF SENTENCING POLICY

A. *Sentencing Law and Procedure Prior to* Blakely v. Washington

Over the past half century, the legal community has witnessed remarkable changes in the area of sentencing policy. During this time, various eras of sentencing law have ended and begun, as the Supreme Court or legislatures have articulated new rules for sentencing law and procedure.[18] Most notably, the seminal case of *Williams v. New York*[19] is viewed as the high-water-mark for the sentencing era characterized by the rehabilitative model.[20]

---

[18] For example, when capital punishment is studied, *Furman v. Georgia* marks the end of the antiquated and unregulated death penalty era because the decision caused states across the country to re-evaluate and transform their capital sentencing procedures. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (holding through nine separate opinions that Georgia's death penalty system was a violation of the Eighth and Fourteenth Amendments because it was imposed in an arbitrary fashion). Similarly, *Gregg v. Georgia* marks the beginning of the modern death penalty era because it approved the state's amended capital sentencing procedures, thereby permitting the continued use of the death penalty. Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (holding that Georgia's amended capital sentencing statute—which included a bifurcated proceeding, where the jury is provided with information and guidance on aggravating and mitigating circumstances—does not violate the Eighth and Fourteenth Amendments).

[19] Williams v. New York, 337 U.S. 241, 252 (1949).

[20] *See* Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 414 (2002) (explaining that *Williams* shows that "penal theory and policy in that era were oriented toward rehabilitation . . . ."). Interestingly enough, the *Williams* Court strongly endorses the rehabilitative model of punishment and uses this model to explain its holding. *See Williams*, 337 U.S. at 248 ("Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."). Ironically, the Court uses this laudable theory of punishment to affirm the defendant's death sentence. Ipso facto, however, death rehabilitation is impossible, for an offender cannot rehabilitate himself if he is no longer alive.

The rehabilitative model of sentencing, prominent throughout much of the twentieth century, empowered judges with a great amount of discretion when making their sentencing decisions.[21] As such, this era of sentencing was characterized by indeterminate sentencing schemes, which placed minimal restrictions on a judge's sentencing decision.[22] In crafting a sentence, sentencing statutes allowed for—and the rehabilitative model required—the sentencing judge to consider the "fullest information possible" about the defendant and his offense.[23] Such information, therefore, was not limited only to facts found by the jury. The process of sentencing was viewed as trying to find the best possible "cure" that would rehabilitate a defendant.[24] Because determining a "cure" was perceived to be beneficial to a defendant, defendants were not afforded procedural protections under indeterminate sentencing schemes.

Beginning in the 1970s, judges and academics began questioning the rehabilitative model of sentencing.[25] Spurred by Judge Marvin E. Frankel,[26] an era of structured-sentencing reforms, based on non-rehabilitative theories of punishment, replaced the rehabilitative and indeterminate sentencing era.[27]

---

[21] Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 937–38 (1995) (explaining that, by the early twentieth century, "[t]he rehabilitative model was firmly entrenched in state and federal criminal justice systems[]" and that "[d]iscretion was central" under such a model).

[22] *See id.* (noting that under the rehabilitative model, "indeterminate sentencing structures became the norm"); *see also* Huigens, *supra* note 20, at 414 (explaining that there was an "indeterminate sentencing philosophy [in] the mid-twentieth century"). An indeterminate sentencing scheme is a system in which a sentencing judge has "nearly unfettered discretion to impose on defendants any sentence selected from within wide statutory ranges." NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 118 (2004). This "broad judicial discretion" was "complemented by" the existence of parole officials who "exercise[] similar discretion concerning prison release dates." *Id.*

[23] *See Williams*, 337 U.S. at 247.

[24] *See* Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENT'G REP. 89, 93–94 (2004) ("Under a sentencing system whose goal was rehabilitation, crime was seen as a 'moral disease'; the system delegated its cure to 'experts' like judges.").

[25] *See id.* at 94 ("[I]t has been nearly a quarter century since the rehabilitative model of sentencing has held sway.").

[26] *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 107–24 (1973).

[27] California and North Carolina were among the first states to pass determinate systems that reflected a rejection of the rehabilitative model. For example, parole was abolished and presumptive sentencing ranges were created for various classes of offenders. *See* DEMLEITNER, *supra* note 22, at 125. Other states were soon to follow. *See e.g.*, David H. Norris & Thomas Peters, *Fiscal Responsibility and Criminal Sentencing in*

Unlike the rehabilitative model era, the structured sentencing era viewed sentencing as finding an appropriate punishment,[28] not as finding a needed cure.[29] As such, the legislature (or sentencing commission) largely instructs judges on how to find the appropriate punishment.[30]

However, the change from the rehabilitative era to the structured sentencing era, and the simultaneous change from indeterminate sentencing schemes to determinate sentencing schemes, was *not* accompanied by a needed simultaneous change in sentencing procedures. In other words, the new era of sentencing law only ushered in substantive changes to state and federal sentencing schemes, but needed procedural changes at sentencing did not occur.[31] As an illustration of this inadequacy, in a determinate sentencing

---

Illinois: The Time for Change Is Now, 26 J. MARSHALL L. REV. 317, 326 (1993) ("In 1977, Illinois dramatically changed its criminal sentencing and corrections system. The legislature replaced the rehabilitative model with a model based on the punative [sic] theories of incapacitation and deterrence. Determinate sentencing supplanted indeterminate sentencing and thus, shelved the parole system."). "By the year 2000, nearly every state in the country had adopted some form of structured sentencing." DEMLEITNER, *supra* note 22, at 125. Also, Congress rejected the rehabilitative model of punishment in favor of a structured sentencing system with the passage of the Sentencing Reform Act of 1984. The Act created the United States Sentencing Commission, which was authorized to promulgate, what were at the time, mandatory guidelines for judges to follow at sentencing. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. As a result, in the federal system, "[i]ndeterminate sentence[ing] and parole [were] gone." Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1028 (1991).

[28] *See* Huigens, *supra* note 20, at 415–16 (explaining that the current aim of sentencing is "lengthy incapacitation and an 'economy of threats' deterrence").

[29] *See, e.g.*, Douglas A. Berman, *The Roots and Realities of* Blakely, CRIM. JUST., Winter 2005, at 4, 7 (noting that "the discretionary, rehabilitative, 'medical' model of sentencing" has been "replaced by an array of sentencing structures to govern and control sentencing decision making").

[30] *See e.g.*, Karin Bornstein, *5K2.0 Departures for 5H Individual Characteristics: Backdoor out of the Federal Sentencing Guidelines*, 24 COLUM. HUM. RTS. L. REV. 135, 136 (1993) ("Guidelines prescribe most sentences . . . .").

[31] For example, the type and form of information used at sentencing embraced in *Williams* remained largely unchanged, even after the advent of structured sentencing guidelines and the decline of rehabilitation. *See, e.g.*, United States v. Dunnigan, 507 U.S. 87, 98 (1993) ("Upon a proper determination [by the judge using a preponderance of the evidence standard of proof] that the accused has committed perjury at trial, an enhancement of sentence is required by the Sentencing Guidelines. That requirement is [constitutional]."); United States v. Watts, 519 U.S. 148, 157 (1997) ("[A not guilty verdict] does not preclude a finding by a preponderance of the evidence that" a defendant's sentence should be enhanced for the acquitted conduct.); Edwards v. United States, 523 U.S. 511, 514 (1998) ("[R]egardless of the jury's actual, or assumed, beliefs about the conspiracy, the Guidelines nonetheless require *the judge* to determine whether

world, a judge was often *required* to increase a defendant's sentence for the exact conduct the jury acquitted him of if the conduct was proven by a mere preponderance of the evidence.[32] This procedural inadequacy also permitted the state to convict a defendant on the most easily proved charge and "wait until the sentencing hearing to prove [using a lower standard of proof] that the defendant should also be held responsible for [a more serious crime]."[33] Essentially, pre-*Blakely* defendants were often punished for offenses and for conduct that was never found by a jury beyond a reasonable doubt or, more strikingly, for offenses and for conduct that a jury found was *not* proven beyond a reasonable doubt.[34] This seemingly unjust practice continued regularly throughout most of the structured sentencing era. This is true despite the fact that most jurors and citizens were unaware of, and would be shocked to learn of, its common occurrence; in fact, learning of such a practice would likely cause jurors, citizens, and prisoners to lose faith in our system of justice.[35]

---

the 'controlled substances' at issue—and how much of those substances—consisted of cocaine, crack, or both.") (emphasis added).

[32] *Watts*, 519 U.S. at 157.

[33] KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 140 (1998) (explaining that, "with candor," the government engaged in such behavior in order to hold a defendant convicted of a less serious crime also responsible for "an associated murder"). *Cf.* Laurie P. Cohen & Gary Fields, *Reasonable Doubts: How Unproven Allegations Can Lengthen Time in Prison*, WALL ST. J., Sept. 20, 2004, at A1.

[34] *See, e.g.*, United States v. Averi, 730 F. Supp. 398, 399 (M.D. Ala. 1989), *aff'd* 922 F.2d 765, 766 (11th Cir. 1991) (Defendant was convicted of failing to keep records for distribution of controlled substances and acquitted of distributing controlled substance to a person under the age of twenty-one for a purpose other than legitimate medical use; yet the sentencing judge increased the defendant's sentence after "consider[ing] evidence that was introduced at trial on the counts . . . for which Averi was acquitted."); United States v. Vernier, 335 F. Supp. 2d 1374, 1376 (S.D. Fla. 2004) (noting that defendant was convicted of fraudulent withdrawal of money and interstate transportation of stolen goods and money, but the judge found "sufficient" evidence "that [defendant] was responsible for [a missing woman's] death[;]" his sentence was increased 147 months because of the unexplained disappearance of the woman); United States v. Gallagher, 223 F.3d 511, 516 (7th Cir. 2000) (noting that defendant was convicted of arson, but his sentence was increased because "the government proved by a preponderance of the evidence that the defendant committed past uncharged crimes, including [murder]").

[35] *See* United States v. Putra, 110 F.3d 705, 706 (9th Cir. 1997) (Hug, C.J., concurring). In his concurrence, Chief Judge Hug wrote:

> One wonders what the reaction of the jury would be if the jurors were told at the outset, "If you convict the defendant on one charge, but acquit her on the other, the judge, utilizing a different burden of proof, can sentence the defendant as though you had convicted her on both." Would this resonate with the jury as being fair to

In 2004, the Supreme Court ended such unconstitutional practices and ushered in what will undoubtedly be viewed as a new era in sentencing law and policy.[36] In *Blakely v. Washington*, the Supreme Court effectively declared that in a structured sentencing era—where judges are instructed on how to impose a sentence—additional protections must be given to a defendant that were not necessary under indeterminate sentencing schemes.[37] Under determinate sentencing schemes, the Court appreciated that there was a "need to give intelligible content to the right of jury trial," which was not present under current sentencing systems.[38] The Court accomplished this constitutional need by expanding upon its decision in *Apprendi v. New Jersey*, which held 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."[39] Four years later, the *Blakely* Court made clear that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."[40] In redefining the definition of statutory

---

> the defendant, worthwhile of their time and effort, and instill respect and admiration for our system of justice? I seriously doubt it.
>
> The man on the street would be quite surprised to learn that our present guideline approach to sentencing permits a person to be charged with two offenses, convicted of one, acquitted of the other, and yet be sentenced as though he had been convicted of both. Sentencing on the basis of acquitted conduct gives the impression of a judge being able to second-guess a jury that has acquitted a defendant, despite our explanations about burdens of proof.

Id. In addition to "jurors" and "[people] on the street," *id.*, prisoners are especially shocked to learn of such sentencing practices. One current federal prisoner described his sentencing enhancement by explaining: "No other word suffices for it, than ambushed." Letter from Oladipo Salimonu, federal prisoner, to Douglas A. Berman, Professor of Law, The Ohio State University Moritz College of Law (Apr. 3, 2005), http://sentencing.typepad.com/sentencing_law_and_policy/files/prisoner_retroactivity_plea.doc (on file with author) [hereinafter Prisoner Letter].

[36] *See* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 379–80 (2005); Rachel E. Barkow, *The Devil You Know: Federal Sentencing After* Blakely, 16 FED. SENT'G REP. 312, 312 (2004) ("*Blakely* will usher in a new era in . . . sentencing.").

[37] *See* Blakely v. Washington, 124 S. Ct. 2532, 2546 (2004) (O'Connor, J., dissenting) ("While not a constitutional prohibition on [determinate] guidelines schemes, the majority's decision today exacts a substantial constitutional tax [on structured sentencing schemes].").

[38] *Id.* at 2538 (majority opinion).

[39] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[40] *Blakely*, 124 S. Ct. at 2537.

maximum,[41] the Court clarified that the maximum sentence a judge may impose is not determined "after finding additional facts, but the maximum he may impose *without* any additional findings."[42] Therefore, if a legislature (or sentencing commission) requires that a defendant's sentence be determined only after certain factual findings are made, the Sixth Amendment requires that a jury make those findings using the beyond a reasonable doubt standard of proof.

B. *Implications of* Blakely v. Washington

Within days after the *Blakely v. Washington* decision, courts across the country were thrown into sentencing chaos.[43] In the weeks following *Blakely*, Justice Sandra Day O'Connor, who wrote an extremely critical dissent in the case, observed such chaos and lamented how, to her, it "looks like a No. 10 earthquake."[44] Legal commentators have also been quick to analogize *Blakely* to this type of momentous occurrence.[45] What Justice O'Connor and these observers were describing was the wave of courts—both state and federal—that did not know how to respond to *Blakely* and were divided in

---

[41] *See* Frank O. Bowman III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 253 (2004) ("The trick [in *Blakely*] is accomplished by redefining 'statutory maximum sentence.'"); *see also id.* (explaining that the "focus" of *Blakely* is "on the newly defined 'statutory maximum'"); Michael Goldsmith, *Reconsidering the Constitutionality of Federal Sentencing Guidelines After* Blakely*: A Former Commissioner's Perspective*, 2004 BYU L. REV. 935, 952 (2004) ("*Blakely* . . . transformed the meaning of the term 'statutory maximum.'").

[42] *Blakely*, 124 S. Ct. at 2537.

[43] *See* Laurie P. Cohen & Gary Fields, *Legal Quagmire: High Court Ruling Unleashes Chaos over Sentencing*, WALL ST. J., July 14, 2004, at A1; *see also* Albert W. Alschuler, *To Sever or Not to Sever? Why* Blakely *Requires Action by Congress*, 17 FED. SENT'G REP. 11, 17 (2004) ("Prosecutors, defense attorneys, and judges have described *Blakely* as 'a tidal wave,' a 'brave new world,' a 'legal haymaker,' a 'monkey wrench,' 'a number 10 earthquake,' and a source of 'chaos,' 'upheaval,' and 'mass uncertainty.'").

[44] Lyle Denniston, *Justices Agree to Consider Sentencing*, N.Y. TIMES, Aug. 3, 2004, at A14.

[45] *See* Douglas A. Berman, *Examining the* Blakely *Earthquake and Its Aftershocks*, 16 FED. SENT'G REP. 307, 307 (2004) [hereinafter Blakely *Earthquake*]; *see also* DOUGLAS A. BERMAN, MARC L. MILLER, NORA V. DEMLEITNER, & RONALD F. WRIGHT, GO SLOW: A RECOMMENDATION FOR RESPONDING TO *BLAKELY V. WASHINGTON* IN THE FEDERAL SYSTEM, WRITTEN TESTIMONY SUBMITTED TO THE SENATE COMMITTEE ON THE JUDICIARY 1 (July 13, 2004) (on file with author).

their attempts to do so.[46] In many instances, federal sentencing decisions were postponed awaiting further explanation from the Supreme Court.[47]

Exemplifying the importance of the issue, on the first day of its Fall 2004 term, the Supreme Court heard oral arguments in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*[48] to determine if *Blakely* applied to the Federal Sentencing Guidelines.[49] Most observers had predicted *Blakely* would apply to the Federal Sentencing Guidelines, but the remedial issue was uncertain.[50] Less then seven months after announcing *Blakely*, the Court confirmed what most district courts and several circuit courts had

---

[46] In the federal system, compare *United States v. Booker*, 375 F.3d 508, 514–15 (7th Cir. 2004) (holding that *Blakely* invalidates the Federal Sentencing Guidelines in all cases where sentencing enhancements are required), and United States v. Ameline, 376 F.3d 967, 974, 978 (9th Cir. 2004) ("join[ing] the Seventh Circuit" in finding that *Blakely* invalidates the Federal Sentencing Guidelines, but also concluding that sentencing enhancements are severable from the remainder of the Guidelines), with *United States v. Pineiro*, 377 F.3d 464, 465–66 (5th Cir. 2004) (holding the Federal Sentencing Guidelines to be valid unless the Supreme Court explicitly instructs otherwise). *See also* United States v. Penaranda, 375 F.3d 238, 247 (2d Cir. 2004) ("To afford the Supreme Court an opportunity to adjudicate promptly the threshold issue of whether *Blakely* applies to the federal Sentencing Guidelines, we . . . certify [specific] questions . . . ."). For a thorough discussion of how various states have responded to *Blakely*, see *The Future of American Sentencing: A National Roundtable on* Blakely, 17 FED. SENT'G REP. 115, 122–25 (2004) (discussing "*Blakely* and the States: Effects on State Law and the Changing Roles of Sentencing Commission").

[47] *See, e.g.*, *Federal Sentencings Slow After Change in Guideline System*, WALL ST. J., Dec. 1, 2004, at B2 (reporting that, following *Blakely*, criminal sentencings declined 17.8% in July 2004).

[48] *See Booker*, 375 F.3d at 515, *cert. granted*, 125 S. Ct. 12 (2004); *see also* United States v. Fanfan, No. 03-47, 2004 WL 1723114, at *1 (D. Me. June 28, 2004), *cert. granted*, 125 S. Ct. 12 (2004).

[49] *See* 28 U.S.C. § 994(a)(1) (2000) (authorizing the United States Sentencing Commission to create and promulgate the Federal Sentencing Guidelines); *see also* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

[50] *See* Alschuler, *supra* note 43, at 12 ("[*Blakely*] means the end of judicially determined enhancements under the Federal Sentencing Guidelines. What remedy follows from this conclusion, however, is a far closer question."); Steven L. Chanenson, *Hoist with Their Own Petard?*, 17 FED. SENT'G REP. 20, 24 (2004) ("[T]he smart money seems to be against [the constitutionality of the Guidelines]."). *But see* Goldsmith, *supra* note 41, at 938 ("[N]otwithstanding *Blakely*, the federal sentencing guidelines are constitutional."). *Cf. The Supreme Court, 2003 Term*, 118 HARV. L. REV. 333–34, 343 (2004) (arguing that because "the Washington Supreme Court took the unusual step of explicitly foreclosing departures based on the elements of the crime," there is "an opportunity" for courts to uphold the constitutionality of the Federal Sentencing Guidelines and other guideline regimes; if this argument is correct, then *Blakely* would have "relatively minor implications" on sentencing schemes).

already held: *Blakely* applies to the Federal Sentencing Guidelines.[51] In predicting this decision and recognizing the truly groundbreaking effect *Blakely* would have on sentencing law and criminal law in general, one commentator has perceptively remarked that "[i]t does not seem hyperbolic to say that *Blakely*, and its application of *Apprendi* to sentencing guidelines, may be one of the most significant criminal procedure decisions in decades."[52]

In a divided opinion, the Court formed two separate majorities—one for each of the questions presented.[53] Five Justices agreed that *Blakely* applies to the Guidelines, thus making them unconstitutional as applied.[54] Justice Ginsburg, however, switched coalitions causing a different group of five Justices to write the remedial opinion.[55] In resolving the constitutional infirmity, Justice Breyer excised two statutory provisions from the Sentencing Reform Act:[56] 1) the provision that makes the Guidelines mandatory, and 2) the provision articulating the standard for appellate review of sentences.[57] Consequently, the Guidelines are now merely advisory (instead of mandatory), and an appellate court must review sentences for

---

[51] United States v. Booker, 125 S. Ct. 738, 746 (2005) ("We hold that . . . the Sixth Amendment as construed in *Blakely* does apply to the Sentencing Guidelines.").

[52] RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 252 (Supp. 2004).

[53] As framed by the government, *Booker* presented the following two questions:

> 1. Whether the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.
>
> 2. If the answer to the first question is "yes," the following question is presented: whether, in a case in which the Guidelines would require the court to find a sentence-enhancing fact, the Guidelines as a whole would be inapplicable, as a matter of severability analysis, such that the sentencing court must exercise its discretion to sentence the defendant within the maximum and minimum set by statute for the offense of conviction.

Brief for the United States, United States v. Booker, 125 S. Ct. 738 (2005), Nos. 04-104, 04-105, 2004 WL 1967056, at *I. The two questions presented were framed differently by Booker in his brief to the Court. *See* Respondent Freddie J. Booker's Brief, United States v. Booker, 125 S. Ct. 738 (2005), No. 04-104, 2004 WL 1732757, at *I.

[54] The substantive majority was composed of Justices Stevens, Scalia, Souter, Thomas, and Ginsburg.

[55] The remedial majority was composed of Chief Justice Rehnquist and Justices Breyer, O'Connor, Kennedy, and Ginsburg.

[56] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

[57] United States v. Booker, 125 S. Ct. 738, 764 (2005).

reasonableness (instead of using *de novo* review).[58] When sentencing, a judge must still "consult those Guidelines and take them into account" while also considering the other statutory goals of sentencing.[59]

Given this recent shift in the protections afforded to a defendant at sentencing, an obvious question remains: How should the federal judiciary, Congress, and the executive branch address past instances of unconstitutionally imposed sentences? The next two Parts of this Note will analyze the Supreme Court's jurisprudence on the subject of retroactivity. Part III will explain the Court's current approach to retroactivity, which largely resembles Justice Harlan's views of the doctrine. Employing this retroactivity analysis to *Blakely*, Part IV concludes that if the federal courts principally applied the doctrine, *Blakely* should be retroactively applied to cases on collateral review.[60]

---

[58] Interestingly, after *Blakely* but prior to *Booker*, at least one commentator suggested this approach to make the Federal Sentencing Guidelines constitutional; however, he asserted and assumed (perhaps not imprudently) that such a change would *require Congressional action* and could not be done by the courts alone. *See, e.g.*, Alschuler, *supra* note 43, at 11 ("This commentary proposes a sentencing system that courts *could not implement without* Congressional action—one in which judges would be guided by but not bound by sentencing guidelines, . . . and in which their sentences would be subject to appellate review for reasonableness. . . . If *approved by Congress*, this system" would pass constitutional review.) (emphasis added). In fact, the remedial dissent in *Booker* criticizes the remedial majority for acting as a legislature. *Booker*, 125 S. Ct. at 771 (Stevens, J., dissenting in part) ("While it is perfectly clear that Congress has ample power to repeal these two statutory provisions if it so desires, this Court should not make that choice on Congress' behalf."). *See also id.* at 793 (Scalia, J., dissenting in part) ("The Court's need to supplement the text that remains after severance suggests that it is engaged in 'redraft[ing] the statute' rather than just implementing the valid portions of it.") (alteration in original).

[59] *Booker*, 125 S. Ct. at 767. The other statutory goals of sentencing are found in 18 U.S.C. § 3553(a) (2000). Courts have been divided over how much weight to give the new advisory guidelines as compared to the other statutory goals of sentencing. *See* United States v. Gray, 362 F. Supp. 2d 714, 720, 722 (S.D. W. Va. 2005) ("One of the fundamental problems with advice is determining how much confidence to place in it. . . . One of the most important questions I face in the new advisory regime is how much confidence to place in the advice of the Guidelines."). *Compare* United States v. Wilson, 350 F. Supp. 2d 910, 925 (D. Utah 2005) ("[T]he court concludes that in exercising its discretion in imposing sentences, the court will give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate.") *with* United States v. Leroy, 373 F. Supp. 2d 887, 896 (E.D. Wis. 2005) ("Now that the guidelines are advisory, courts are surely free to . . . critically evaluat[e] the guidelines in light of their experience.").

[60] The Court's holding in *Booker* can and should undergo a similar detailed retroactivity analysis. *See infra* note 222.

III. THE COURT'S RETROACTIVITY JURISPRUDENCE

The most apparent implication of the Court's holding in *Blakely* is that since the beginning of the structured-sentencing era, a countless number of sentences have been unconstitutionally imposed under various state sentencing systems.[61] Moreover, by confirming that *Blakely* applies to the federal system, the Court also confirmed that since 1987,[62] hundreds of thousands of sentences[63] have been unconstitutionally imposed on defendants under the Federal Sentencing Guidelines.[64] One prisoner has described living under such a reality—where one knows that he is serving an

---

[61] *See* Blakely v. Washington, 124 S. Ct. 2531, 2548–49 (2004) (O'Connor, J., dissenting). In her dissent, Justice O'Connor states:

> Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. See, *e.g.*, ALASKA STAT. § 12.55.155 (2003); ARK. CODE ANN. § 16-90-804 (Supp. 2003); FLA. STAT. § 921.0016 (2003); KAN. STAT. ANN. § 21-4701 *et. seq.* (2003); MICH. COMP. LAWS ANN. § 769.34 (West Supp. 2004); MINN. STAT. § 244.10 (2002); N.C. GEN. STAT. § 15A-1340.16 (Lexis 2003); ORE. ADMIN. RULE § 213-008-0001 (2003); 204 PA. CODE § 303 *et seq.* (2004), reproduced following 42 PA. CONS. STAT. ANN. § 9721 (Purdon's Supp. 2004) . . . . Today's decision casts constitutional doubt over them all.

Id.; *see, e.g.*, State v. Evans, 114 P.3d 627, 630 (Wash. 2005) ("This means that there are offenders currently serving sentences that, if issued today, would be the result of an unconstitutional sentencing procedure."); State v. Sawatzky, 96 P.3d 1288, 1288–89 (Or. Ct. App. 2004) (vacating a defendant's sentence because Oregon's sentencing law is similar to Washington's and thus violated the rule announced in *Blakely*); State v. Robinson, 699 N.W.2d 790, 792–93 (Minn. Ct. App. 2005) (holding that Minnesota's sentencing scheme violates the rule announced in *Blakely*); *see also infra* note 169.

[62] While the Sentencing Reform Act was passed by Congress in 1984, the Federal Sentencing Guidelines went into effect in 1987. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 247 (1993).

[63] In her dissenting opinion in *Blakely*, Justice O'Connor posited that between just June 27, 2000 and March 31, 2004, "there have been 272,191 defendants sentenced in federal court." *Blakely*, 124 S. Ct. at 2549 n.2 (O'Connor, J., dissenting). In her dissenting opinion in *Apprendi*, Justice O'Connor posited that from 1989 to 2000, "almost a half-million cases have been sentenced under the Sentencing Guidelines . . . ." Apprendi v. New Jersey, 530 U.S. 466, 551 (2000) (O'Connor, J., dissenting). "Given that nearly all federal sentences are governed by the Federal Sentencing Guidelines, the vast majority of these cases are Guidelines cases." *Blakely*, 124 S. Ct. at 2549 n.2 (O'Connor, J., dissenting). Therefore, a copious amount of sentences may have been imposed via unconstitutional procedures.

[64] United States v. Booker, 125 S. Ct. 738, 746 (2005).

unconstitutional sentence—as "an intolerable existence."[65] Unfortunately for these unlucky individuals (who are entitled to the justice they deserve),[66] the Court's retroactivity jurisprudence rarely allows an aggrieved party the ability to enjoy the benefit of constitutional rules if the rule was announced after his case became final.

A. *The Interest in Finality: Justice Harlan's View of Retroactivity*

Justice Harlan was among the most vocal supporters of the principle of finality, arguing that there is a substantial difference between reviewing an issue on direct review versus reviewing an issue on collateral review.[67] This view stemmed from his belief that "[t]he interest in leaving concluded litigation in a state of repose" may often outweigh the interest of "readjudicating convictions according to all legal standards in effect when a habeas petition is filed."[68] As such, Harlan viewed it as sounder policy "to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation."[69] Justice Harlan called this an "interest in finality" which "might well lead to a decision to *exclude completely* certain legal issues . . . from the cognizance of courts administering this collateral remedy."[70] Harlan feared that not differentiating between cases on direct review and cases on collateral review could harm the application of criminal justice in America.[71] Similarly, it is an interest in finality that causes the Supreme Court to act as the decisive actor in our legal system; such a role, however, does not necessarily translate into opinions that are more accurate when compared to a lower court's decision.[72]

---

[65] *See* Prisoner Letter, *supra* note 35 ("Serving a sentence one thinks unduly harsh is, at the very most, a drudgery. Serving one that one knows is illegal and that has been announced as such by the highest court in the land, is at the very least, an intolerable existence.").

[66] *See supra* notes 2, 8, and accompanying text.

[67] *See* Mackey v. United States, 401 U.S. 667, 682–83 (1971) (Harlan, J., concurring in part and dissenting in part).

[68] *Id.* at 683.

[69] *Id.* at 689.

[70] *Id.* at 683 (emphasis added).

[71] *See id.* at 691 ("A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process.").

[72] Justice Harlan wrote:

> [R]eversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial portion of our

At the same time, Justice Harlan was well aware of the compelling countervailing reasons to retroactively apply new constitutional rules and thereby saw limits to the interest of finality.[73] As such, he allowed for two exceptions to his view that new constitutional rules are not to be applied to cases on collateral review. First, "[n]ew 'substantive due process' rules" should be applied retroactively, as opposed to "new 'procedural due process' rules," which generally should not.[74] Harlan's second exception involves "claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.'"[75] Such procedural rules should be applied retroactively and may be adjudicated on collateral review.[76] Justice Harlan justifies this second exception by properly noting:

> [I]n some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction.[77]

> reversals of [inferior] courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.

Mackey v. United States, 401 U.S 667, 690 (1971) (quoting Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring)).

[73] *See id.* at 689. Justice Harlan opined further by noting:

> Assuring every state and federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction tends to assure a uniformity of ultimate treatment among prisoners; provides a method of correcting abuses now, but not formerly, perceived as severely detrimental to societal interests; and tends to promote a rough form of justice, albeit belated, in the sense that current constitutional notions, it may be hoped, ring more "correct" or "just" than those they discarded.

Id.

[74] *Id.* at 692. For an example of a new substantive rule see *infra* notes 84, 174. For a complete discussion of what constitutes a substantive versus procedural rule, see *infra* Part IV.C.

[75] *Mackey*, 401 U.S. at 693. Justice Harlan borrows the phrase "implicit in the concept of ordered liberty" from Justice Cardozo. Justice Cardozo first invoked the phrase in an incorporation doctrine case, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). For this reason, the phrase has become known as the "the Palko test."

[76] *Mackey*, 401 U.S. at 693.

[77] *Id.* (emphasis added).

Justice Harlan cites "the right to counsel at trial"—which was established in *Gideon v. Wainwright*[78]—as an example of this second exception.[79] Harlan believed that other possible cases that fall within this second exception must be "worked out in the context of actual cases brought before [the Court] that raise the issue."[80]

B. *The Court's Current Approach to Retroactivity*

Given the Court's greatly criticized approach to retroactivity throughout the 1970s and 1980s,[81] the Court recognized that its retroactivity jurisprudence for cases on collateral review "require[d] modification."[82] In the relatively recent landmark retroactivity case, *Teague v. Lane*,[83] Justice O'Connor wrote the plurality opinion, declaring "[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the 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."[84]

However, the *Teague* Court did detract from Justice Harlan's view in one respect. While it fully endorsed the first exception that rules relating to "certain kinds of primary, private individual conduct" and relating to substantive procedural law may be litigated on collateral review,[85] the Court modified Harlan's second exception.[86] The Court feared that the phrase "implicit in the concept of ordered liberty" (the *Palko* test[87]) was too broad

---

[78] Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (holding that criminal defendants have a right to counsel at trial when charged with serious offenses).

[79] Mackey v. United States, 401 U.S. 667, 694 (1971).

[80] *Id.*

[81] *See* Teague v. Lane, 489 U.S. 288, 303 (1989) (plurality opinion) (commenting that retroactivity analysis "generated vehement criticism").

[82] *Id.* at 301.

[83] *Id.* at 316 (plurality opinion).

[84] *Id.* at 310.

[85] *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)). This first exception would apply to conduct that was once punished but the punishment for such conduct has since been declared unconstitutional. For example, a person imprisoned under a state's sodomy laws would enjoy the benefit of this exception following the Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding Texas's statute criminalizing sodomy unconstitutional under the Fourteenth Amendment).

[86] *See* Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 356–57 (1993) ("In *Teague v. Lane*, the Court adopted an amalgamated version of Justice Harlan's approach.").

[87] *See supra* note 75.

and "unnecessarily anachronistic."[88] Instead, the *Teague* plurality opted for a combination of Justice Harlan's earlier views of the second retroactivity exception[89] (which he later disavowed[90]) with his more recent "ordered liberty" view.[91] The result was that the scope of the second *Teague* exception was limited "to those new procedures without which the likelihood of an accurate conviction is seriously diminished."[92] The second exception adopted by the Court in *Teague* is consequently narrower than the exception Harlan advocated: "Under this position, a new rule must be *both* fundamental and related to accuracy in order to be applied retroactively on habeas."[93] The *Teague* Court did adopt Harlan's view that "watershed rules of criminal procedure" would fit into this second exception and therefore should be applied retroactively.[94] The Court has continued to use this phrase in describing the second exception, but has also interpreted it quite narrowly.[95]

In bringing this analysis together, it appears that a new rule will fall within the Court's second *Teague* exception and thus apply retroactively if it:

---

[88] *See* Teague v. Lane, 489 U.S. 288, 312 (1989) ("Were we to employ the *Palko* test [*see supra* note 75] without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation [under the Fourteenth Amendment]. Reviving the *Palko* test now, in this area of law, would be unnecessarily anachronistic.") (citations omitted).

[89] *See* Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting). In this earlier opinion, Justice Harlan tentatively suggested that the second exception should be new rules which "significantly improve the pre-existing fact-finding procedures" mandated by the Constitution. *Id.* This has been referred to as the "truth-determining test." *See infra* note 91.

[90] *See infra* note 91.

[91] In developing this combined approach in *Teague*, Justice O'Connor cites Harlan's earlier *Desist* opinion. *See Desist*, 394 U.S. at 244. However, Justice Harlan later disavowed these views. *See* Mackey v. United States, 401 U.S. 667, 694 (1971) ("Subsequent reflection . . . leads me to these additional observations. . . . I am now persuaded that those new rules cognizable on habeas ought to be defined, not by the [*Desist*] 'truth-determining' test, but by the *Palko* test.").

[92] *Teague*, 489 U.S. at 313 (plurality opinion).

[93] *See* Steiker, *supra* note 86, at 357.

[94] *Teague*, 489 U.S. at 313, 322 (using the word "watershed" to describe the second exception).

[95] *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 495 (1990) ("The second exception is for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."). In illustrating what constitutes a "watershed rule," the Court has continuously cited *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963), which held that defendants have a right to counsel in criminal trials for serious offenses. *See Saffle*, 494 U.S. at 495. This has become the typical example of a new rule that would meet the second exception. *See id.* Justice Harlan had also held such a belief. *See Mackey*, 401 U.S. at 694.

1) is fundamental and 2) increases the accuracy of a proceeding,[96] or 3) is a watershed rule of criminal procedure that "alter[s] our understanding of the bedrock procedural elements" of a proceeding.[97] The current Court has expressed its agreement with Justice Harlan that *Gideon* is the prototypical example of a rule that would meet these three characteristics.[98] Other than *Gideon*, however, Justice O'Connor explains that rules which fall into this second *Teague* exception are rare, and it is "unlikely that many such components of basic due process have yet to emerge."[99] As a result, this second exception will rarely be successfully invoked.[100]

Finally, the *Teague* Court had to address the central question of what constitutes a "new rule." Both Justice Harlan and Justice O'Connor recognized the difficulty of this task.[101] In her *Teague* plurality opinion, Justice O'Connor did articulate a general approach to this issue but did not attempt "to define the spectrum of what may or may not constitute a new rule

---

[96] *See supra* notes 92–93 and accompanying text.

[97] Teague v. Lane, 489 U.S. 288, 311 (1989) (quoting *Mackey*, 401 U.S. at 693) (emphasis removed).

[98] O'Dell v. Netherland, 521 U.S. 151, 171 n.4 (1997) ("The most commonly cited example of a rule so fundamental that it would fit this category is the right to counsel articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963)."). Compare this statement with Justice Harlan's statement in *Mackey v. United States*, 401 U.. 667, 694 (1971).

[99] *Teague*, 489 U.S. at 313. Justice O'Connor also lists examples of what type of faulty procedures may invoke this exception: "[T]hat the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Id.*

[100] *See, e.g.*, Butler v. McKellar, 494 U.S. 407, 416 (1990) (Rejecting a retroactivity argument and therefore affirming the conviction and death sentence, the Court explained: "Because [*Arizona v. Roberson*, 486 U.S. 675 (1988)] added restrictions on police investigatory procedures [that] would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood—we conclude that *Roberson* did not establish any principle that would come within the second exception [of non-retroactivity].").

[101] *See Mackey*, 401 U.S. at 695 (Harlan, J., concurring in part and dissenting in part).

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

Id. (quoting Desist v. United States, 394 U.S. 244, 263 (1969)); *see also Teague*, 489 U.S. at 301 (plurality opinion) ("It is admittedly often difficult to determine when a case announces a new rule . . . .").

for retroactivity purposes."[102] The general rule was that a rule is new when it "breaks new ground or imposes a new obligation on the States or Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[103]

Before the Court's retroactivity jurisprudence is applied to a specific case, it may be helpful to summarize the doctrine. While the Court's retroactivity analysis can often seem overwhelming, the Court has recently encapsulated its current approach into a less complex process:

> Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. First, the court must determine when the defendant's conviction became final. Second, it must ascertain the "legal landscape as it then existed," and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity.[104]

With this understanding of the Court's current approach to retroactivity, this Note will next analyze and apply the approach to *Blakely v. Washington*. The outcome of this analysis will be of paramount importance to defendants like Mr. Toliver, Mr. DeJohn, and Mr. Gonzalez—among countless others—who are currently serving unconstitutionally imposed sentences.[105]

IV. IS THE *BLAKELY* EARTHQUAKE RETROACTIVE?

Given the amount of potentially unconstitutional sentences that have been imposed under various state determinate sentencing schemes and the Federal Sentencing Guidelines, the issue of *Blakely* retroactivity will be argued by prisoners and addressed by courts across the country.[106] In a

---

[102] *Teague*, 489 U.S. at 301 (plurality opinion).

[103] *Id.*

[104] Beard v. Banks, 124 S. Ct. 2504, 2510 (2004) (citations omitted).

[105] *See supra* Part I; *see also* Prisoner Letter, *supra* note 35.

[106] *See, e.g.*, Barbara L. Jones, *Public Defenders, Legal Aid Face Funding Concerns Again*, ST. PAUL LEGAL LEDGER, Dec. 13, 2004, 2004 WLNR 14583764 ("[A]bout 400 to 600 *Blakely* hearings will be scheduled while the courts determine the parameters of the retroactive affect of *Blakely*."); Maureen O'Hagan, *Lawyers Try to Sort out Effects of Court Ruling on Sentencing*, SEATTLE TIMES, June 26, 2004, at B1 ("The first question is whether [*Blakely*] is retroactive."); Susan Paynter, *A New Fear for Those Who Testified Against Brutal Criminals*, SEATTLE POST-INTELLIGENCER, Nov. 12, 2004, at E1 ("This

memorandum dated December 1, 2004, the Federal Bureau of Prisons (BOP) explained that "[BOP] staff continue to get questions from inmates with respect to the" recent Supreme Court cases.[107] No less than three times, the memo instructs federal prison officials to inform inmates that they must "petition the Court" if they would like to have their sentence reviewed.[108] Undoubtedly, state prisoners have been just as attentive to these recent sentencing developments.[109] Therefore, in the following months and years, federal courts will be receiving many § 2254[110] writ of habeas corpus[111] petitions from state prisoners, and also receiving § 2255 motions[112] from federal prisoners, most of whom will be claiming a violation of their Sixth

---

week the State Supreme Court heard arguments that *Blakely* should be made retroactive."). *Cf.* Gail Gibson, *Judges Left in Confusion on Sentencing*, BALTIMORE SUN, Feb. 13, 2005, at 1A ("One unresolved question is whether the decision from *Booker* should apply retroactively . . . .'Everybody who is serving a federal sentence is trying to figure out whether they can get some relief under *Booker* . . . .'").

[107] Memorandum from Kathleen M. Kenney & Thomas R. Kane, Assistant Director/General Counsel & Assistant Director, Federal Bureau of Prisons, to all Chief Executive Officers, Federal Bureau of Prisons (Dec. 1, 2004) (on file with author), *available at* http://www.caribbeanfishery.com/PDFs/bopmemo.pdf.

[108] *Id.* Furthermore, the Bureau of Prisons extended library hours and "encourage[d]" inmates to become familiar "with the decision and [its] potential implications." *Id.*

[109] *See, e.g.*, *supra* note 106 (citing stories from Wisconsin and Minnesota of prisoners inquiring about *Blakely* retroactivity).

[110] For state prisoners wishing to have their sentence or conviction reviewed because of an alleged federal Constitution violation, the vehicle to get into federal court is through a § 2254 petition. *See* 28 U.S.C. § 2254 (2000) (addressing state custody and remedies in federal courts). State prisoners are required to have "exhausted" available state court remedies before a federal court will have jurisdiction over the § 2254 petition. *See* 28 U.S.C. § 2254 (b)(1) (2000). For an example of what a prisoner must do to satisfy this requirement, see Frederickson v. Wood, 87 F.3d 244, 245 (8th Cir. 1996).

[111] *See* BLACK'S LAW DICTIONARY 709 (6th ed. 1990) (Although there are many types of writs of habeas corpus, "the primary function of the writ is to release from unlawful imprisonment."). The writ of habeas corpus provides a remedy for miscarriages of justice and "underscores the fundamental need for fairness in the administration of justice." Jude Obasi Nkama, Note*, The Great Writ Encumbered by Great Limitations*, 26 SETON HALL LEGIS. J. 181, 183 (2001). While the writ can serve many purposes, the function of petitioning the courts for review of confinement or sentence has been called the "great writ." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95–96 (1807).

[112] For federal prisoners wishing to have their sentence or conviction reviewed because of an alleged federal Constitution violation, the vehicle to re-enter the federal court is through a § 2255 petition. *See* 28 U.S.C. § 2255 (2000). For an analysis of § 2255, see *Davis v. United States*, 417 U.S. 333, 343 (1974) (explaining that the legislative history of § 2255 "makes clear that [the section] was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus").

Amendment jury trial right[113] and seeking a review of their sentence. Because these efforts will be a prisoner's last opportunity to argue for the imposition of a constitutionally just sentence, it is important to objectively evaluate how likely it is for a prisoner's § 2254 or § 2255 petition to succeed.[114]

A. *Cases That Were Not Final When* Blakely *Was Decided*

If a convicted defendant had not, by June 24, 2004[115] 1) been convicted and sentenced, 2) exhausted all his avenues for appeal, and 3) exceeded the time for which a petition of certiorari could be filed or a petition of certiorari has been denied, then the defendant's case is not considered final for the purposes of *Blakely* retroactivity analysis.[116] Because § 2254 and § 2255 petitions are only used to review final convictions, a habeas petition will not be necessary in such cases. The Supreme Court has likewise held that such defendants will be able to benefit from the rule articulated in *Blakely*.[117] Therefore, for all cases not yet final on June 24, 2004, all facts (other than

---

[113] *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."); *see also* U.S. CONST. art. III, § 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.").

[114] The main difference between § 2254 and § 2255 petitions is that the former is available only to state prisoners and the latter is available only to federal prisoners. *See* Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, 29 CHAMPION 16, 17 (2005) ("Section 2255 is the analog of § 2254 for federal prisoners who wish to attack their federal convictions and/or sentences."). As such, with the exception of § 2254's requirement that state prisoners exhaust state remedies, *see supra* note 110, this Note treats the two petitions as equivalent when discussing a court's review of the writ. However, it must be highlighted that federal courts are required to "afford a degree of deference," *see* Newton, *supra* at 20, to claims that were previously rejected by state courts "on the merits." 28 U.S.C. § 2254(d) (2000). Such deference is not required, however, if the state court's judgment were contrary to federal law or unreasonable. *See* 28 U.S.C. § 2254(d)(1)-(2) (2000).

[115] This is the date that *Blakely v. Washington* was decided.

[116] *See* Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965); United States v. Johnson, 457 U.S. 537, 542 n.8 (1982).

[117] *See* Griffith v. Kentucky, 479 U.S. 314, 316 (1987) (A new rule of criminal procedure "is applicable to litigation pending on direct state or federal review or not yet final when [the rule was announced]."). Therefore, even if *Blakely* is deemed to be a "new rule [that] constitutes a 'clear break' with the past," the holding will still apply to cases that are not yet final. *Id.* at 328; *see also* United States v. Booker, 125 S. Ct. 738, 769 (2005) ("[W]e must apply today's holdings . . . to all cases on direct review.").

the existence of a prior conviction[118]) that were used to increase the defendant's sentence must be reflected in the jury verdict or admitted by the defendant.[119]

However, if these defendants did not raise a Sixth Amendment claim at sentencing, then the chance of obtaining a resentencing hearing will depend on whether the defendant can show plain error.[120] In *Booker*, the remedial majority confirms this approach.[121] (However, there are several Supreme Court precedents that suggest that a *Blakely* and *Booker* Sixth Amendment violation should constitute structural error, in which case resentencing would

---

[118] This prior conviction exception is a result of the Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). However, Justice Thomas has expressed regret in voting with the 5-4 majority in this case. *See* Apprendi v. New Jersey, 530 U.S. 466, 520–21 (2000) (Thomas, J., concurring). More strikingly, Justice Thomas has urged the Court to reconsider the prior conviction exception. *See* Shepard v. United States, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring in part and concurring in the judgment) ("[I]n an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability."). The enduring validity of the prior conviction exception may therefore be in doubt.

[119] *See* Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004). If however, via a plea agreement, the defendant waived his right to challenge his sentence on appeal, then he may not be able to benefit from *Blakely*'s holding regardless of his case not being final. *See* Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 316, 321–22 (2004) (discussing "express [appeal] waivers"). Many commentators have called into question the validity of pre-*Blakely* appeal-waivers. Such agreements may not be enforceable if they are found to be "uninformed and unintelligent." *See, e.g.*, Posting of Douglas A. Berman to Sentencing Law & Policy, http://sentencing.typepad.com/ (March 4, 2005, 12:05 EST). *Compare* United States v. Killgo, 397 F.3d 628 (8th Cir. 2005) (reviewing a defendant's sentence despite his plea agreement containing a waiver of his right to appeal) *and* United States v. Jeronimo, 398 F.3d 1149 (9th Cir. 2005) (same) *with* United States v. Rubbo, 396 F.3d 1330 (11th Cir. 2005) (holding that an appeal waiver is binding on a defendant claiming *Blakely* error).

[120] Haag v. State, 117 P.3d 775, 783 (Alaska Ct. App. 2005) ("[B]ecause Haag did not object to these sentencing procedures at the time, he must now show plain error."). *See also* United States v. Buckland, 289 F.3d 558, 563 (9th Cir. 2002) (joining nine other federal circuits in finding *Apprendi* error subject to plain error review). "Plain error" review differs from "structural error" in that in situations where the latter is present, the case is automatically remanded for reconsideration. Under the former, in order for the defendant to obtain resentencing, he must show the error had some prejudicial or injurious effect on the outcome of his case or sentence. *See* United States v. Dominguez Benitez, 124 S. Ct. 2333, 2339 (2004).

[121] *See* United States v. Booker, 125 S. Ct. 738, 769 (2005) ("[W]e must apply today's holdings . . . to all cases on direct review. . . . [W]e expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error test.'").

automatically be ordered).[122] As a result of plain-error review, the defendant will have the burden of showing that not having a jury find all the facts essential to the imposition of his punishment and not using a beyond a reasonable doubt standard of proof at sentencing had either: 1) a prejudicial effect on the sentence or 2) was an "error that affects substantial rights"[123] and "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[124] State and federal courts are deeply divided over how difficult it is for a defendant to meet this plain-error burden.[125] And despite

---

[122] *See, e.g.*, Sullivan v. Louisiana, 508 U.S. 275 (1993). In *Sullivan*, the Court held that a violation of a defendant's Sixth Amendment right by not using a beyond a reasonable doubt standard would be structural error. *Id.* at 281. Without a finding of beyond a reasonable doubt, the Court reasoned that there is no reliable jury verdict that an appeals court can review. *Id.* Therefore, such a violation would always require reversal. The Court stated:

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. . . . The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

Id. at 280, 281–82; *see also* Neder v. United States, 527 U.S. 1, 32–39 (Scalia, J., concurring in part and dissenting in part, joined by Souter and Ginsburg, JJ.) (arguing that harmless error review only applies when the jury "*actually renders* a verdict"); Rose v. Clark 478 U.S. 570, 578 (1986) (explaining that a violation of an individual's Sixth Amendment jury trial right will be structural error because "the error in such a case is that the wrong entity judged the defendant guilty"). People v. Nitz, 353 Ill. App. 3d 978, 1002 (2004) (In reviewing a case involving a violation of the rule announced in *Blakely*, the court explained, "we firmly believe that a majority of the justices on today's United States Supreme Court would never allow the harmless error analysis that we are about to engage in . . . ."). *But see* State v. Henderson, 100 P.3d 911, 917 (Ariz. Ct. App. 2004) ("Utilizing the standard for structural error employed in Arizona, this is a clear delineation that *Apprendi* error is not structural error . . . ."); United States v. Antonakopoulos, 399 F.3d 68, 80 n.11 (1st Cir. 2005) ("[A] *Booker* type error is not a structural error; the defendant must convince us of prejudice. Indeed, had the majority in *Booker* thought there was structural error, it would have said so."). The Court has explained that structural errors will only be found "in a very limited class of cases." Johnson v. United States, 520 U.S. 461, 468–69 (1997) (citing examples of errors that are classified as structural).

[123] *Dominguez Benitez*, 124 S. Ct. at 2339.

[124] United States v. Cotton, 535 U.S. 625, 631 (2002).

[125] *Compare* State v. Indiana, 823 N.E.2d 679, 689 (Ind. 2005) (holding that if a defendant did not raise a Sixth Amendment challenge at sentencing, it "would be unjust" to penalize him for this lack of prognostication), *with* State v. Boales, No. W2003-02724-CCA-R3-CD, 2005 WL 517538, at *5 (Tenn. Crim. App. Mar. 3, 2005) (holding that the plain-error standard had not been met and resentencing was not necessary because "a jury presented with the opportunity to apply [the sentencing enhancement] would have done

this confusion and the fact that both a defendant and the United States Solicitor General have asked the Court to consider the issue,[126] the Supreme Court has continued to deny petitions for a writ of certiorari in a *Blakely*/*Booker* plain-error review case.[127]

B. *Defendants Who Have Previously Filed a Habeas Corpus Petition*

Individuals who have previously filed a § 2254 or § 2255 petition will not be able to benefit from the holding in *Blakely* or *Booker* until the United States Supreme Court declares the cases to be retroactive.[128] As such, a lower court would be correct to dismiss a prisoner's second or subsequent habeas motion so long as the Supreme Court has not explicitly held that *Blakely* should be applied retroactively.[129]

---

so"). For a summary of the "three-way [federal] circuit split on plain error," see Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/ (March 6, 2005, 22:30 EST) [hereinafter Three Ring Circus Circuit Split]; United States v. Serrano-Beauvaix, 400 F.3d 50, 57–58 (1st Cir. 2005) (Lipez, J., concurring) (discussing different circuit approaches to the prejudice prong of plain-error analysis); *see also* Alan Ellis et al., *Litigating in a Post*-Booker *World*, CRIM. JUST., Spring 2005, at 28–29 (displaying how the Fourth, Sixth, and Eighth Circuits have the lowest *Booker* plain-error burden, the Eleventh and First Circuits have the strictest plain-error burden, and the Second and Seventh Circuits permit limited sentencing remands).

[126] *See* Petition for a Writ of Certiorari, Rodriguez v. United States, 125 S. Ct. 2935 (2005), No. 04-1148, 2005 WL 474028, at i (petition for defendant); *see also* Brief for the United States on Petition for Writ of Certiorari, Rodriguez v. United States, 125 S. Ct. 2935 (2005), No. 04-1148, 2005 WL 1210522, at 19 (concluding that "[t]he conflict in the Circuits therefore warrants resolution by this Court").

[127] *See, e.g.*, Rodriguez v. United States, 125 S. Ct. 2935 (2005) (denying cert.).

[128] *See* 28 U.S.C. § 2244(b)(2)(A) (2000) (A second or successive § 2254 petition shall be dismissed unless "the applicant shows that the [new] claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable . . . ."); *see also id.* § 2255 ¶ 8(2) (Before a second or successive § 2255 petition can be heard in a federal district court, the motion must "be certified" by a three-judge panel of the court of appeals to contain "a new rule of constitutional law, made retroactive . . . by the Supreme Court."). For a detailed examination of the second or successive habeas rule, see Alan Ellis et al., *It's Not Too Late Part II: Filing Second and Successive 2255 Motions Under the New Habeas Corpus Reform Law*, 21 CHAMPION 16 (1997).

[129] *See* Simpson v. United States, 376 F.3d 679 (7th Cir. 2004) (denying a second habeas motion, which sought retroactivity of *Blakely*); *In re* Dean, 375 F.3d 1287 (11th Cir. 2004) (same). *Cf. In re* Anderson, 396 F.3d 1336 (11th Cir. 2005) (rejecting a second habeas motion, which sought retroactivity of *Booker*); Green v. United States, 397 F.3d 101 (2d Cir. 2005) (same).

C. *Is* Blakely *a Substantive Rule?*

For defendants whose cases were final when *Blakely* was decided and who have not filed a previous § 2254 or § 2255 petition, the issue of *Blakely* retroactivity becomes much more difficult and often times complicated.[130] To begin this analysis, one must determine whether the *Blakely* rule is substantive or procedural.[131] If the rule is substantive, then the Court's holding will apply retroactively "almost automatically."[132] Being able to classify the *Blakely* holding as substantive would therefore be in the best interest of prisoners seeking constitutionally just sentences through retroactive application of the decision.

To classify the *Blakely* holding as substantive, a court will look to the rules announced in the case and determine if those rules fall within one of three categories.[133] At first blush, the rules 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,"[134] and that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings,"[135] appear to be procedural.[136] In fact, the process of having a jury—as opposed to a

---

[130] *See* Ellis et al., *supra* note 125, at 29 ("The retroactivity question is a difficult one.").

[131] *See, e.g.*, Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 147 n.185 (2004) (illustrating that, when the Court holds that a case is not to be applied retroactively, the Court will "first" find that the decision "did not announce a new substantive rule").

[132] *The Supreme Court, 2003 Term*, *Leading Cases*, 118 HARV. L. REV. 324, 326 (2004).

[133] *See* Tamara L. Graham, Note, *Case of Interest*, Schriro v. Summerlin*, 124 S. Ct. 2519 (2004)*, 17 CAP. DEF. J. 253, 255 (2004) (The Supreme Court has explained "that substantive rules are rules that either: (1) 'narrow the scope of a criminal statute by interpreting its terms'; (2) remove a class of persons from the State's legal reach; or (3) 'place particular conduct . . . beyond the State's power to punish.'").

[134] Blakely v. Washington, 124 S. Ct. 2531, 2536 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[135] *Id.* at 2537.

[136] *See* Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004). Because the rules articulated in *Blakely* "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise," the rules appear to be procedural. *Id.*

judge—find sentencing facts seems, by definition, procedural.[137] However, there is dictum in *Blakely* that suggests that Justice Scalia (and other members of the majority) may be prepared to call this rule that protects the Sixth Amendment a substantive rule.[138] It is uncertain whether Justice Scalia—who has never been a Federal Sentencing Guideline aficionado[139]—intentionally included this dictum to foreshadow his opinion on retroactivity. In fact, such a hypothesis is unlikely.[140] Nevertheless, the argument can still be made that Justice Scalia's language in *Blakely* implies the retroactive effect of the decision. In fact, at least one commentator has argued exactly that,[141] and other commentators seem open to the proposition that *Blakely* is a substantive rule.[142]

---

[137] *See id.* ("Rules that allocate decisionmaking authority . . . are prototypical procedural rules . . . .").

[138] *See Blakely*, 124 S. Ct. at 2538–39. Justice Scalia interestingly states that a rule requiring jury-found facts "is *no mere procedural formality*, but a fundamental reservation of power in our constitutional structure." *Id.* (emphasis added). He likens an individual's jury-trial right to an individual's right to vote, and then invokes the Founders to suggest it may in fact be more important than suffrage. *Id.* at 2539.

[139] *See* Mistretta v. United States, 488 U.S. 361, 413, 427 (1989) (Scalia, J., dissenting) (calling the Sentencing Commission a "junior-varsity Congress" and explaining his belief that "in the long run the improvisation of a constitutional structure on the basis of currently perceived utility will be disastrous").

[140] On the same day *Blakely* was decided, Justice Scalia also issued a ruling, which declared that a jury trial right "could not have" been substantive because the Sixth Amendment "has nothing to do with the range of conduct a State may criminalize." *Schriro*, 124 S. Ct. at 2523.

[141] *See* Donald V. Morano, Justice Antonin Scalia: His Instauration of the Sixth Amendment in Sentencing 13 (Oct. 6, 2004) (unpublished manuscript), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/justice_scalias_insaturation.doc ("[T]he *Apprendi*-rule that Justice Scalia announced clearly in *Blakely* is not a *new* substantive procedural rule but is a *most venerable and fundamental substantive* procedural rule that must be given fullest retroactive effect."). *Contra* Lucien v. Briley, 213 Ill. 2d 340, 348 (2004) ("[Scalia's language] is a general philosophical statement about the importance of juries as a check on the power of the judicial branch of government. It has nothing to do with the specific legal question whether [the rule] is procedural, as opposed to substantive, for purposes of retroactivity.").

[142] *See* Stephanos Bibas, *The* Blakely *Earthquake Exposes the Procedure/Substance Fault Line* (U. Iowa Legal Studies, Paper No. 05-01, 2004), *available at* http://ssrn.com/abstract=650861 ("*Blakely* is about the substance of crimes and the punishment tied to each element. Because *Blakely* is substantive, the argument goes, it should be fully retroactive on direct and collateral review . . . ."); Goldsmith, *supra* note 41, at 974 n.186 ("*Blakely* announced a new substantive rule . . . .").

D. *Is* Blakely *a New Rule?*

If *Blakely* is considered to be a procedural rule, the next issue one must analyze is whether the rule can be classified as "new."[143] As discussed previously, answering this question can often be difficult.[144] If *Blakely* is a new rule, then it cannot be applied retroactively to cases on collateral review unless one of the two *Teague* exceptions is met.[145] If *Blakely* is not a new rule, then the holding will be treated as "old law" dating back to the precedent that dictated *Blakely*, which by most accounts would be *Apprendi v. New Jersey*.[146] The rule would be treated as "new" for all cases that became final prior to June 26, 2000[147] and "old" for all cases that became final between June 27, 2000 and June 24, 2004.[148] Prisoners will not be able to benefit from "old law" unless their attorney had previously raised the issue at sentencing or during direct appeal.[149] Because the determination of *Blakely* as a new rule has such significant consequences for retroactivity purposes,[150] the next two Parts of this Section will analyze both sides of the issue.

---

[143] *See supra* note 104 and accompanying text. "[The Court must] ascertain the 'legal landscape as it then existed,' and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule. That is, the court must decide whether the rule is actually 'new.'" Beard v. Banks, 124 S. Ct. 2504, 2510 (2004).

[144] *See supra* note 101 and accompanying text.

[145] *See supra* Part III.B. The first exception to *Teague* is for rules that relate to private conduct and substantive due process. For examples, see *supra* notes 74, 85 and accompanying text. The second exception to *Teague* is for procedures that are fundamental and increase the fairness and accuracy of a proceeding, or is a watershed rule of criminal procedure. *See supra* notes 92-94, 96-98 and accompanying text.

[146] Apprendi v. New Jersey, 530 U.S. 466 (2000). An argument could also be made that if *Blakely* is not dictated by *Apprendi*, then it is "compelled" by *Ring v. Arizona*.

[147] This is the day *Apprendi* was decided.

[148] ALLEN ET AL., *supra* note 52, at 253 (explaining that if *Blakely* was "dictated by" *Apprendi*, "then *Blakely* would be treated as 'old law' for defendants whose convictions and sentences became final between June 27, 2000 . . . and June 24, 2004").

[149] *See* Lilly v. United States, 342 F. Supp. 2d 532, 540 (W.D. Va. 2004) ("[E]ven if *Blakely* invalidates the [Federal Sentencing Guidelines] and that holding is available for Lilly to use [because it was "old law" compelled by *Apprendi*], her failure to raise the issue at trial or on direct appeal bars Lilly from raising this claim for the first time under § 2255."). Naturally, however, if the *Blakely* rule is determined to be "old law" and a Sixth Amendment challenge was not previously raised, a prisoner may try to argue that his counsel was ineffective. The chances of success with such a claim are likely to be remote, but such a topic is outside the scope of this Note.

[150] *See* Rucker v. United States, No. 2:04-CU-00914PGC, 2005 WL 331336, at *5 (D. Utah Feb. 10, 2005) ("If this court were to conclude that neither *Blakely* nor *Booker* announced a new rule, but that both were dictated by *Apprendi*, then many of the sentences . . . between *Apprendi* and *Booker* might have to be revisited.").

1. *Arguments That* Blakely *Is Not a New Rule and the Consequences of Such a Conclusion*

For two reasons, it is undeniable that *Blakely* relies upon *Apprendi* in reaching its holding. First, in their Supreme Court brief in *Booker*, the United States contended that *Blakely* is a mere extension of *Apprendi* and *Ring*[151] and does not declare a new rule.[152] Second, there is language in the *Blakely* decision itself that supports this conclusion.[153] However, the Court has previously acknowledged that "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, [will] not [be] conclusive" when determining if a case declares a new rule.[154]

The question that must be asked, therefore, is not whether *Blakely* is an application of past precedent, but whether the *Blakely* rule was "dictated by" or "compel[led]" by the *Apprendi* rule.[155] Judging solely by her dissents in both *Apprendi* and *Blakely*, Justice O'Connor would seem to answer this question in the affirmative and would not view *Blakely* as a new rule.[156] If

---

[151] Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that *Apprendi* required a jury to find the existence of aggravating factors that warrant the imposition of a death sentence).

[152] Brief for the United States, United States v. Booker, 125 S. Ct. 738 (2005), Nos. 04-104, 04-105, 2004 WL 1967056, at 17–18 (describing the holding of *Blakely* by saying "the Court found the principle [of *Apprendi* and *Ring*] to be applicable in *Blakely* as well," and arguing that "*Blakely* thus applied the rule of *Apprendi*").

[153] For example, the decision expressly says that "[t]his case requires us to apply the rule we expressed in *Apprendi v. New Jersey*." Blakely v. United States, 124 S. Ct. 2531, 2536 (2004). Additionally, the Court continuously refers to the existence of established precedent to support the *Blakely* decision. *See id.* at 2537 (declaring that "[o]ur precedents make clear" the definition of statutory maximum); *see also id.* at 2538 (explaining that the commitment to jury fact-finding at sentencing reflects respect for "longstanding precedent").

[154] Butler v. McKellar, 494 U.S. 407, 415 (1990) (holding that *Arizona v. Roberson*, 486 U.S. 675 (1988) "announced a 'new rule'," despite the *Roberson* Court's opinion stating that the decision was controlled by previous precedent).

[155] *See supra* notes 103, 104 and accompanying text.

[156] *See* Apprendi v. New Jersey, 530 U.S. 466, 550–51 (2000) (O'Connor, J., dissenting) ("[P]erhaps the most significant impact of the Court's decision will be a practical one—its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. As I have explained, the Court does not say whether these schemes are constitutional, but its reasoning strongly suggests they that are not."); *see also Blakely*, 124 S. Ct at 2549 (O'Connor, J., dissenting). By arguing that "all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack," Justice O'Connor is

she is correct in these two dissents, then *Blakely* cannot be considered a new rule and would apply retroactively to the date of *Apprendi*.[157] At least two state courts, in fact, have held exactly that, with one court declaring: "*Blakely* applies retroactively to the date that *Apprendi* established its new rule."[158] At least one federal court reached a similar conclusion.[159] However, even if *Blakely* is dictated by *Apprendi*—and hence retroactive to *Apprendi*—only prisoners who have previously attempted to assert their Sixth Amendment right at sentencing or on direct appeal are likely to receive the benefit of the *Apprendi*/*Blakely* rule.[160]

2. *The More Compelling Argument:* Blakely *Is a New Rule*

In analyzing whether *Blakely* was dictated or compelled by *Apprendi*, the most helpful evidence is the impression of inferior state and federal courts that heard *Blakely*-like arguments following the *Apprendi* decision.[161] It is

---

implicitly arguing that *Blakely* is in fact compelled by *Apprendi*. *Id.* at 2550 ("[T]ens of thousands of criminal judgments are in jeopardy.").

[157] *See supra* note 148 and accompanying text.

[158] People v. Johnson, No. 03CA2339, 2005 WL 774416, at *1 (Colo. Ct. App. Apr. 7, 2005), *cert. granted*, No. 05SC408 (Colo. Oct. 11, 2005), *available at* http://www.courts.state.co.us/supct/caseannouncements/2005/10.11.05.htm. *Cf.* State v. Gomez, 163 S.W.3d 632, 650 (Tenn. 2005) ("[W]e conclude that *Blakely* did not announce a new rule.").

[159] Garcia v. United States, No. 04-CV-0465, 2004 WL 1752588, at *5 (N.D.N.Y. Aug. 4, 2004). Senior U.S. District Judge Thomas J. McAvoy first explains that "*Blakely* did not announce a new rule of law, but extended the rule in *Apprendi*." *Id.* After reaching this result, however, he erroneously reasons that "[b]ecause *Apprendi* does not apply retroactively to collateral attacks and *Blakely* is an extension of *Apprendi, Blakely* is similarly limited to prospective application." *Id.* This second conclusion is the result of an incorrect analysis; if *Blakely* is not a new rule, then the rule will apply retroactively to the date of *Apprendi*. *See supra* notes 147, 148 and accompanying text.

[160] *See supra* note 149. If a Sixth Amendment claim was not previously raised, but the *Blakely* rule is found to be "dictated by" *Apprendi*, then the defendant is said to have procedurally defaulted on such claims; as such, he cannot bring them for the first time under § 2254 or § 2255 petitions. *See* Bousley v. United States, 523 U.S. 614, 621–22 (1998). The Court has explained that habeas review "will not be allowed to do service for an appeal," and therefore, to get relief a defendant would have to show: (i) cause for not bringing the claim and (ii) actual prejudice from not doing so. *Id.* at 621–22. Based upon precedent, the Court will not accept as sufficient cause the proposition that bringing a *Blakely* claim following *Apprendi* was "novel" or "futile" at the time. *Id.* (internal quotations omitted). Naturally, such a rule creates an incentive for defendants to make "futile" motions at trial and sentencing, but it also prohibits those who did not do so from benefiting from the later-announced rule.

[161] *See* Lambrix v. Singletary, 520 U.S. 518, 538 (1997) (explaining that the Court will look to lower federal courts and state courts when determining whether a decision

therefore a significant indication that *Blakely* is a new rule when every federal circuit court rejected the argument that *Blakely*'s result was compelled by *Apprendi*.[162] Every state court that has considered the issue—with the lone exception of Kansas—has similarly concluded.[163] Given the overwhelming number of jurists who did not view *Apprendi* as requiring the *Blakely* holding, it seems unpersuasive to argue that *Blakely* was "dictated" by *Apprendi* and that "*no other* interpretation [of *Apprendi*] was reasonable."[164] It would be equally unpersuasive—and perhaps insulting to the many judges who thought otherwise—to argue that the *Blakely* holding was "apparent to all reasonable jurists."[165]

There is one additional argument that supports *Blakely* being a new rule: *Blakely* has "br[oken] new ground or impose[d] a new obligation on the States or the Federal Government."[166] For example, following *Blakely*, many states have required the "*Blakely*-ization"[167] of indictments.[168] Multiple state

---

announces a new rule); Caspari v. Bohlen, 510 U.S. 383, 395 (1994) ("in the *Teague* analysis the reasonable views of state courts are entitled to consideration along with those of federal courts").

[162] *See* United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001) (explaining that *Apprendi* does not require a jury to find the amount of drugs involved in the offense); United States v. Garcia, 240 F.3d 180, 184 (2d Cir. 2001) (explaining that *Apprendi* does not require a jury to determine the amount of loss involved in the offense); *see also* United States v. Williams, 235 F.3d 858, 862 (3d Cir. 2000) (explaining that judge-found facts which raise the sentencing range under the Federal Sentencing Guidelines do not violate *Apprendi* so long as the range is below the maximum term of imprisonment set by Congress); United States v. Sanders, 247 F.3d 139, 150 (4th Cir. 2001) (same); United States v. Doggett, 230 F.3d 160, 166 (5th Cir. 2000) (same); United States v. Corrado, 227 F.3d 528, 542 (6th Cir. 2000) (same); United States v. Nance, 236 F.3d 820, 824 (7th Cir. 2000) (same); United States v. Moss, 252 F.3d 993, 996 (8th Cir. 2001) (same); United States v. Ochoa, 311 F.3d 1133, 1136 (9th Cir. 2002) (same); United States v. Jones, 235 F.3d 1231, 1236–37 (10th Cir. 2001) (same); United States v. Nealy, 232 F.3d 825, 829 (11th Cir. 2000) (same); United States v. Fields, 251 F.3d 1041, 1044–45 (D.C. Cir. 2001) (same); United States v. Robinson, 241 F.3d 115, 119–20 (1st Cir. 2001) (explaining that the distinction between an *Apprendi*-like claim and a *Blakely*-like claim was "obvious").

[163] *See* State v. Gould, 23 P.3d 801 (Kan. 2001). Kansas' General Assembly was the only state legislature to respond to *Apprendi* by requiring that all facts relevant to sentencing "be presented to a jury and proved beyond a reasonable doubt." KAN. STAT. ANN. § 21-4718(b)(2) (Supp. 2004).

[164] *See Lambrix*, 520 U.S. at 538 (explaining that a holding is dictated by prior precedent, only if "*no other* interpretation [is] reasonable").

[165] *Id.* at 528 (explaining that a holding is dictated by prior precedent only if the articulated rule "was apparent to all reasonable jurists").

[166] Teague v. Lane, 489 U.S. 288, 301 (1989).

[167] The process of "*Blakely*-ization" of indictments means that the prosecutor would "include in indictments all readily provable Guidelines upward adjustment or upward

sentencing procedures have been deemed insufficient due to *Blakely*.[169] Moreover, *Blakely* required the federal sentencing scheme to become advisory and altered appellate review of sentences.[170] Using *Teague*'s general rule and noticing these aftershocks of the *Blakely* earthquake, it appears that *Blakely* is a new rule.[171] In fact, most courts that have

---

departure factors (except for prior convictions . . .).'' *See* Memorandum from United States Deputy Attorney General James Comey to all Federal Prosecutors (July 2, 2004), *reprinted in* 16 FED. SENT'G REP. 357, 358 (2004) [hereinafter Comey Memo].

[168] *See, e.g.*, North Carolina Sentencing & Policy Advisory Commission *Blakely* Subcommittee, Draft Final Report, (Dec. 3, 2004), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/nc_sent_commission_proposals.doc (requiring *Blakely*-ization of indictments in North Carolina). The Department of Justice also required this procedure, as well as the issuance of alternative sentences. *See* Comey Memo, *supra* note 167, at 358. However, the remedial opinion of *Booker* made this practice unnecessary.

[169] *See* State v. Natale, 878 A.2d 724, 728 (N.J. 2005) (*Blakely* "has called into question the constitutionality of sentencing schemes across the nation."); *see e.g.*, *id.* (noting that as a result of *Blakely*, the court was "compelled to eliminate presumptive terms from the sentencing process"); State v. Brown, 99 P.3d 15 (Ariz. 2004); Smylie v. State, 823 N.E.2d 679, 682 (Ind. 2005) ("Indiana's sentencing system is unconstitutional."); Lopez v. People, 113 P.3d 713 (Colo. 2005); State v. Schofield, 876 A.2d 43 (Me. 2005); State v. Shattuck, 689 N.W.2d 785 (Minn. 2004); State v. Allen, 615 S.E.2d 256 (N.C. 2005); State v. Dilts, 103 P.3d 95 (Or. 2004); State v. Hughes, 110 P.3d 192 (Wash. 2005); State v. Sawatzky, 96 P.3d 1288 (Or. Ct. App. 2004); *see also* Impact of *Blakely v. Washington* on Tennessee's Sentencing Scheme, Op. Att'y Gen. No. 04-131 (2004), *available at* http://www.attorneygeneral.state.tn.us/op/2004/OP/OP131.pdf ("Those portions [of Tennessee's sentencing procedures] . . . are constitutionally invalid."); Report of the Governor's Task Force on the Use of Enhancement Factors in Criminal Sentencing, at 3, http://sentencing.typepad.com/sentencing_law_and_policy/files/tennessee_task_force_report.pdf (last visited Oct. 5, 2005) ("This proposed Act eliminates presumptive sentencing from Tennessee sentencing law so as to comply with [*Blakely*]."); Minnesota Sentencing Guidelines Commission, *The Impact of* Blakely v. Washington *on Sentencing in Minnesota*, at 1, http://www.msgc.state.mn.us/Data%20Reports/blakely_shortterm.pdf (last visited Oct. 5, 2005) ("[T]he decision does affect certain sentencing procedures pertaining to aggravated departures and specific sentence enhancements that will need to be modified to meet the constitutionality issues identified under *Blakely*."); Conf. Comm. 56, 24th Leg., 1st Sess. (Alaska 2005), *available at* http://www.legis.state.ak.us/PDF/24/Bills/SB0056F.PDF ("With this Act, the legislature sets out a sentencing framework . . . that is constitutional under the decision of the United States Supreme Court in *Blakely v. Washington*."); Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/ (Apr. 24, 2005, 22:39 EST).

[170] *See supra* notes 57–59 and accompanying text.

[171] It is also important to note that even if *Blakely* cannot be considered as a pure "new rule," the non-retroactivity analysis would still apply because "*Teague* applies not only to 'new rules,' but also to 'the application of an old rule in a manner that was not

considered the issue have found *Blakely* to articulate a new rule,[172] but this conclusion is not unanimous.[173]

As a result of this likely outcome, prisoners petitioning for retroactive application of *Blakely* will have to argue that the decision falls within an exception to *Teague*'s rule of non-retroactivity. The next two Sections will analyze this issue, focusing almost entirely on *Teague*'s second exception. Given the Court's opinion in *Schriro v. Summerlin*, the issue ultimately becomes whether *Blakely*'s rule requiring proof beyond a reasonable doubt at sentencing falls within *Teague*'s second exception.

E. *Does* Blakely *Fit into Either of the Two* Teague *Exceptions?*

If *Blakely* is deemed to be a new procedural rule, it will be given retroactive effect to cases under § 2254 or § 2255 collateral review only if it meets one of the two *Teague* exceptions. The first exception permits new rules to be applied retroactively if the rule places a class of private conduct beyond the power of the State to regulate[174] or addresses a "substantive categorical guarantee[] accorded by the Constitution."[175] *Blakely* neither decriminalizes a class of conduct nor prohibits a category of punishment from being imposed on a class of offenders. Therefore, *Blakely* would clearly not fit into *Teague*'s first retroactivity exception.

---

dictated by precedent.'" Coleman v. United States, 329 F.3d 77, 89 n.10 (2d Cir. 2003) (quoting Stringer v. Black, 503 U.S. 222, 228 (1992)).

[172] *See, e.g.*, Morris v. United States, 333 F. Supp. 2d 759, 770 (C.D. Ill. 2004) ("This interpretation of the term 'statutory maximum' for *Apprendi* purposes announced a new rule of criminal procedure that was neither compelled by existing precedent nor apparent to all reasonable jurists."); Lilly v. United States, 342 F. Supp. 2d 532, 536 (W.D. Va. 2004) (concluding that *Blakely* is a new rule); United States v. Quintero-Araujo, 343 F. Supp. 2d 935, 942 (D. Idaho 2004) (concluding that not a single circuit applied *Apprendi* as *Blakely* did; therefore, *Blakely* is a new rule); State v. Febles, 115 P.3d 629, 634 (Ariz. App. Div. 2005) ("[W]e conclude that *Blakely* announced a new rule of criminal procedure."); State v. Houston, No. A04-324, 2005 WL 1981578, at *4 (Minn. Aug. 18, 2005) ("*Blakely* is a new rule . . . ."). *Cf.* State v. Houston, 689 N.W.2d 556, 560 (Minn. Ct. App. 2004) ("Although there is dispute as to whether *Blakely* was 'dictated' by the holding of *Apprendi* the more persuasive view is that it was not.").

[173] *See supra* notes 158–59.

[174] Teague v. Lane, 489 U.S. 288, 311 (1989); *see supra* note 85 and accompanying text.

[175] Penry v. Lynaugh, 492 U.S. 302, 329 (1989). A rule that "prohibits [a certain category of punishment (i.e. capital punishment) for a] class of defendants because of their status" falls under this exception. *Id.* For example, the Court's decision in *Atkins v. Virginia* would meet the requirements of the first exception. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding executions of the mentally retarded to be a violation of the Eighth Amendment); *see also supra* note 85.

However, the second *Teague* exception—watershed rules of criminal procedure that implicate the fundamental fairness and accuracy of the proceeding[176]—requires a more detailed analysis to determine *Blakely*'s applicability. To begin, it must be acknowledged that any prisoner presenting a § 2254 or § 2255 petition—in the hope that this exception will be found—is facing an uphill battle.[177] Scholars have long commented on how restrictive *Teague*'s second exception is.[178] One commentator, arguing for the retroactive application of *Apprendi*, has suggested that the Court abandon its subjective evaluation of what is "fundamental" and concentrate only on an accuracy-enhancing test when deciding retroactivity issues.[179] Regardless of what one's personal belief of the merits or demerits of *Teague*'s second exception, for the foreseeable future, prisoners will continue to carry a heavy burden in order to obtain retroactive application of new Court precedent. In fact, unless the prisoner can convince a court that the *Blakely* rule is similar to the "sweeping rule"[180] of *Gideon v. Wainwright*,[181] his argument will fail. Similar to *Gideon*, therefore, the rule must do more than increase the accuracy of a criminal proceeding; it must also be "fundamental"[182] and "alter our understanding of the bedrock procedural elements essential to the

---

[176] *See supra* notes 96–98 and accompanying text.

[177] In fact, in the most recent decision considering this second exception, the Court explained that because the exception applies in only the rarest of circumstances, "it should come as no surprise that [the Court has] yet to find a new rule that falls under the second *Teague* exception." Beard v. Banks, 124 S. Ct. 2504, 2512–14 (2004) (holding that the Court's previous decision that jury instructions in capital punishment cases—which could be understood to prevent consideration of mitigating circumstances if the jury was not unanimous in finding the existence of such circumstances—were unconstitutional, was not a watershed rule). *Cf.* United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000) ("[T]he Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule at issue retroactively.").

[178] Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1817 (1991) ("Equally troubling is the narrowness of the exceptions to *Teague*'s rule barring consideration of new law claims.").

[179] Note, *Rethinking Retroactivity*, 118 HARV. L. REV. 1642 (2005) (arguing that subjective criteria that does not relate to whether a rule increases a proceeding's accuracy makes the meaning of *Teague*'s second exception virtually indecipherable).

[180] O'Dell v. Netherland, 521 U.S. 151, 167 (1997).

[181] Gideon v. Wainwright, 372 U.S. 335 (1963); *see supra* notes 95, 98, and accompanying text; *see also O'Dell*, 521 U.S. at 167 (noting that the second *Teague* exception must be "on par" with *Gideon*); Saffle v. Parks, 494 U.S. 484, 495 (1990).

[182] *See* Steiker, *supra* note 86, at 357.

fairness of a proceeding."[183] To determine if *Blakely* meets this standard, the Court's recent decision in *Schriro* is a necessary starting point.

F. *The Biggest Impetus to Retroactivity:* Schriro v. Summerlin

Every court that has found *Blakely* to be a new procedural rule has concluded that the rule is not retroactive.[184] Similarly, every federal court that has considered whether *Booker* is retroactive has concluded that it is not.[185] These courts have repeatedly explained that the Court's opinion in *Schriro v. Summerlin*[186] "strongly implie[s]" that *Blakely* and *Booker* should not be applied retroactively.[187] In fact, this observation may be correct. But concluding—as some courts have—that *Blakely* or *Booker* is not retroactive *because* of *Schriro* would certainly be a mistake.[188] In fact, one federal court

---

[183] Sawyer v. Smith, 497 U.S. 227, 241 (1990) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989) (internal quotations and emphasis omitted)).

[184] *See, e.g.*, Morris v. United States, 333 F. Supp. 2d 759, 772 (C.D. Ill. 2004); United States v. Quintero-Araujo, 343 F. Supp. 2d 935, 938 (D. Idaho 2004); Lilly v. United States, 342 F. Supp. 2d 532, 538 (W.D. Va. 2004); United States v. Stoltz, 325 F. Supp. 2d 982, 987 (D. Minn. 2004); United States v. Lowe, No. 04-C-50019, 2004 WL 1803354, at *3 (N.D. Ill. Aug. 5, 2004); United States v. Phillips, No. CR 01-30016-HO, 2004 WL 2414819, at *3 (D. Or. Oct. 26, 2004); State v. Evans, 114 P.3d 627 (Wash. 2005); State v. Petschl, 688 N.W.2d 866 (Minn. Ct. App. 2004).

[185] *See, e.g.*, Never Misses A Shot v. United States, 413 F.3d 781, 783 (8th Cir. 2005) (per curiam) ("[A]s all circuit courts considering the issue to date have held, we conclude the 'new rule' announced in *Booker* does not apply to criminal convictions that became final before the rule was announced, and thus does not benefit movants in collateral proceedings."); United States v. Cruz, No. 03-35873, 2005 WL 2243113, at *1 (9th Cir. Sept. 16, 2005) ("We hold that *Booker* does not apply retroactively to convictions that became final prior to its publication."); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005) ("We conclude, then, that *Booker* does not apply retroactively to criminal cases that became final before its release on January 12, 2005."); Humphress v. United States, 398 F.3d 855, 857 (6th Cir. 2005); United States v. Price, 400 F.3d 844, 845 (10th Cir. 2005); Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005).

[186] Schriro v. Summerlin, 124 S. Ct. 2519 (2004).

[187] *In re* Dean, 375 F.3d 1287, 1290 (11th Cir. 2004).

[188] For an example of such an incorrect analysis, see *Morris*, 333 F. Supp. 2d at 772. To further see why this is an incorrect analysis, see Nancy J. King & Susan R. Klein, *Beyond* Blakely, FED. LAW., Nov.-Dec. 2004, at 53, 62 ("[T]he Court in *Summerlin* addressed only the retroactivity of the right to jury trial holding of *Ring* and did not address whether the proof-beyond-a-reasonable-doubt requirement was retroactive, there is still a chance that the proof-beyond-a-reasonable-doubt requirement of *Blakely*, and *Apprendi* itself, would be applied retroactively.").

correctly recognized this fact,[189] and in encouraging words for those seeking just sentences in pre-*Blakely* convictions, explained: "I cannot exclude the possibility that the Court might apply *Blakely*/*Booker* retroactively in some situations."[190] Given this possibility, an individual seeking a constitutionally just sentence on collateral review must recognize that while *Schriro* is a hurdle in their attempt to make *Blakely* retroactive, it certainly is not an impossible hurdle to jump.

Decided on the same day and written by the same Justice as *Blakely*, *Schriro* held that *Ring v. Arizona*[191] was not to be given retroactive effect.[192] In doing so, the *Schriro* Court first found that *Ring* announced a new rule.[193] Second, the Court rejected the defendant's argument and the Ninth Circuit's determination[194] that the rule announced in *Ring* was substantive rather than procedural.[195] Next, Justice Scalia, writing for the Court, clarified that to determine if *Ring* met the second *Teague* exception, the question to ask is "whether judicial factfinding so '*seriously* diminishes' accuracy that there is an 'impermissibly large risk'" of incorrectly punishing the defendant.[196] The Court answers this question in the negative, claiming that "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[197] Therefore, a rule requiring jury fact-findings in a capital sentencing hearing is not a watershed rule of criminal procedure and in turn does not retroactively apply to habeas petitions.[198]

---

[189] United States v. Siegelbaum, 359 F. Supp. 2d 1104, 1107 (D. Or. 2005) ("The government asserts that retroactive application of *Blakely*/*Booker* is foreclosed by *Schriro*. That is only partly true.").

[190] *Id.* at 1108.

[191] Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that the existence of an aggravating factor in a capital punishment case must be proven to a jury beyond a reasonable doubt and could not constitutionally be found by a judge).

[192] *See* Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review."). *Ring* held that the Court's holding in *Apprendi* applied to Arizona's capital punishment scheme. *See Ring*, 536 U.S. at 609.

[193] *Ring* had overturned the Court's holding in *Walton v. Arizona*, 497 U.S. 693 (1990). *See Ring*, 536 U.S. at 609. Therefore, for the purpose of retroactivity analysis, *Ring* clearly constituted a new rule.

[194] Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003), *cert. granted*, Schriro v. Summerlin, 540 U.S. 1045 (2003), *and overruled by Schriro*, 124 S. Ct. at 2526.

[195] *Schriro*, 124 S. Ct. at 2522–23.

[196] *Id.* at 2525 (quoting Teague v. Lane, 489 U.S. 228, 312–13 (1989)).

[197] *Id.*

[198] *See id.* at 2526 ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.") Even twenty-one years before

Many have argued that through its holding in *Schriro*, the Court indirectly held that *Apprendi* was not retroactive.[199] Justice O'Connor poignantly claimed exactly that in her *Blakely* dissent.[200] Furthermore, "every circuit court that has dealt with the problem has determined *Apprendi* to be a procedural rule that does not rise to the level of a watershed rule under *Teague*."[201] It is true that the claimed non-retroactivity of *Apprendi* is another hurdle that a prisoner seeking retroactive effect of *Blakely* must jump; however, once again, this hurdle is not an impossible one to jump. Even if a court has determined that *Apprendi* does not apply retroactively—a conclusion the Supreme Court has never reached—the same court can nevertheless still principally hold that *Blakely* should be given retroactive effect.[202]

In addition, even though the Supreme Court has determined that *Ring* is not retroactive, courts may still find that *Blakely* is retroactive. The Arizona

---

Teague, the Court reached a similar conclusion in denying retroactive effect to two cases implicating an individual's Sixth Amendment right. *See* DeStefano v. Glannen, 392 U.S. 631, 633 (1968) ("We hold . . . that *Duncan v. State of Louisiana* [391 U.S. 145, 150, 162 (1968) (holding that states cannot deny a request for a jury trial in serious criminal cases)] and *Bloom v. State of Illinois* [391 U.S. 194, 207–08 (1968) (holding that the jury trial right extends to serious criminal contempt cases)] should receive only prospective application.") (per curiam).

[199] *See, e.g.*, United States v. Stoltz, 325 F. Supp. 2d 982, 987 (D. Minn. 2004) ("[*Schriro*] held that *Ring* was not a watershed rule . . . .Therefore, *Ring* does not have retroactive application . . . .By that reasoning, *Apprendi* is not a watershed rule either. It follows, then, that *Blakely* is also procedural, rather than substantive, and . . . is not a watershed rule.").

[200] Blakely v. Washington, 124 S. Ct. 2531, 2549 (2004) (O'Connor, J., dissenting) ("[W]e hold in *Schriro v. Summerlin* . . . that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review . . . .") (citations omitted).

[201] Derek S. Bentsen, Note, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionality Significant Facts*, 90 VA. L. REV. 645, 687 & n.211 (2004) (citing cases therein).

[202] For the purpose of retroactivity analysis, it would not be difficult to distinguish between *Blakely* and *Apprendi*. First, the degree of impact the two decisions have had on criminal procedure is starkly different. *Apprendi*'s "impact on established criminal law doctrines was relatively limited because lower federal and state courts typically interpreted *Apprendi* narrowly, and legislatures [and prosecutors] did not feel compelled to alter existing sentencing systems or criminal codes in light of *Apprendi*." Berman, Blakely *Earthquake*, *supra* note 45, at 308. In stark contrast, *Blakely*'s impact on criminal law cannot be overstated, *see supra* note 50 and accompanying text, and has imposed additional duties and obligations on legislators and prosecutors. *See supra* notes 166–70 and accompanying text. Furthermore, *Blakely* redefined the standard definition of "statutory maximum." *See* Bowman, *supra* note 41, at 253. For this reason, *Blakely* can be viewed as "a watershed rule" of criminal procedure, and hence retroactive, even if *Apprendi* is not.

sentencing statute under review in *Ring* required that the *judge* find an aggravating factor *beyond a reasonable doubt* before imposing the death sentence.[203] The Court explicitly references this fact.[204] Because the reasonable doubt standard was not "at issue" in *Schriro*,[205] *Schriro* plainly did not determine whether this burden of proof standard should be applied retroactively.[206]

Unlike the Arizona statute involved in *Ring*, the Washington statute involved in *Blakely* did not require judge-found facts to be proven beyond a reasonable doubt.[207] Therefore, jurists would be *wrong* to automatically conclude: "*Schriro* teaches . . . that [*Blakely*] cannot be applied retroactively because it is not of the type [of right] fundamental to the concept of ordered liberty."[208] Because of this difference in Arizona's and Washington's sentencing statutes, the issue of *Blakely* retroactivity turns on whether the proof beyond a reasonable doubt standard announced in *Blakely* should be given retroactive effect. The next portion of the Note will examine this question in depth and reveal why this question should be answered in the affirmative.

---

[203] Ring v. Arizona, 536 U.S. 584, 597 (2002) ("[I]n Arizona, a 'death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist [by the sentencing judge] beyond a reasonable doubt.'") (quoting State v. Ring, 25 P.3d 1139, 1151 (Ariz. 2001)).

[204] Schriro v. Summerlin, 124 S. Ct. 2519, 2522 n.1 (2004) ("Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, that aspect of *Apprendi* was not at issue.") (citations omitted).

[205] *Id.*

[206] Rucker v. United States, No. 2:04-CV-00914PGC, 2005 WL 331336, at *8 (D. Utah Feb. 10, 2005) ("With respect to Mr. Rucker's second challenge—the need for proof beyond a reasonable doubt—*Schriro* is not controlling.").

[207] *See* State v. Gore, 21 P.3d 262, 276 (Wash. 2001). In this case prior to *Blakely*, defendant Gore argued that "the factual basis for aggravating factors supporting exceptional sentences upward under [Washington's] Sentencing Reform Act of 1981 (SRA), chapter 9.94A, must similarly be submitted to the jury and proved beyond a reasonable doubt." *Id.* The Washington Supreme Court rejected this argument, stating, "*Apprendi* does not support Gore's position." *Id.* Because of this, Washington's sentencing scheme called for judge-found facts, proved only by a preponderance of the evidence. *Id.*

[208] Morris v. United States, 333 F. Supp. 2d 759, 772 (C.D. Ill. 2004).

1. *An Initial Survey of the* Schriro *Court*

Although unlikely, prior to Justice O'Connor's retirement, there may have principally[209] been at least five votes to conclude that *Blakely* constitutes a watershed rule.[210] Four dissenting Justices in *Schriro* were willing to conclude that *Ring* was exactly that.[211] In addition, Justice O'Connor—a member of the *Schriro* majority—is on record in her belief that *Apprendi* "will surely be remembered as a watershed change in constitutional law."[212] Because *Apprendi* ultimately had little impact,[213] Justice O'Connor's prediction was premature, and she should reasonably view

---

[209] I say "principally" because this conclusion rests on analyzing previously written opinions by the Justices, without considering how they realistically would hold in a *Blakely* retroactivity case. As will be discussed, the "principle" outcome may be different than the "realistic" outcome.

[210] At the time of this writing, Justice O'Connor's replacement has yet to be confirmed, but President Bush has nominated Harriet Miers to be her successor. Should she be confirmed, it is important, for the purposes of this Note, to highlight her apparent lack of experience in sentencing jurisprudence. *See* Postings of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/ (Oct. 5, 2005, 2:31 EST; Oct. 4, 2005, 17:22 EST; Oct. 3, 2005, 8:22 EST). In addition, Judge John Roberts has recently been sworn in as Chief Justice of the United States. Chief Justice John Roberts's opinions on *Blakely* and *Booker* are unknown and were not disclosed during his confirmation process. *See* Responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Edward M. Kennedy, http://www.washingtonpost.com/wp-srv/nation/documents/roberts/kennedy_responses.pdf (last visited Oct. 7, 2005). In response to the question "What is your view on the appropriateness of sentencing based on facts not considered by a jury or admitted by a defendant?[,]" *id.* at 8, Judge Roberts answered: "I do not think it would be appropriate for me to state a view on the issue now, as it is one that will almost certainly come before the Court again." *Id.* at 9. Because Chief Justice Roberts's and Harriet Miers's opinions on *Blakely* and *Booker* are not known, their views of *Blakely* retroactivity will not be included in this analysis.

[211] Schriro v. Summerlin, 124 S. Ct. 2519, 2531 (2004) (Breyer, J., dissenting, joined by Stevens, Souter, & Ginsburg, JJ.) ("Judged in light of *Teague*'s basic purpose, *Ring*'s requirement that a jury, and not a judge, must apply the death sentence aggravators announces a watershed rule of criminal procedure that should be applied retroactively in habeas proceedings."). These same four Justices, however, may not be willing to lend their vote in a *Blakely* retroactivity case. Justice Breyer's dissenting opinion stressed the "death-related . . . value judgments" that a jury makes, and explained that, "[w]here death-sentence-related factfinding is at issue," considerations of accuracy have unusually strong force. *Id.* at 2528–29 (Breyer, J., dissenting). Such unique issues pertaining to capital punishment were not present in *Blakely*, and may therefore weaken these four Justices' willingness to find a watershed rule.

[212] Apprendi v. New Jersey, 530 U.S. 466, 524 (2000) (O'Connor, J., dissenting).

[213] *See supra* note 202; *see also* Berman, Blakely *Earthquake*, *supra* note 45, at 308 ("Ultimately, the *Apprendi* decision itself proved to have a smaller impact than many observers . . . may have expected.").

Blakely as the "watershed change" she expressed in her *Apprendi* dissent.[214] If Justice O'Connor were to look at her own language in *Teague* and *Blakely*, it would be tough for her, or for members of the current Court who agreed with her, to conclude that *Blakely* is not a new watershed rule of criminal procedure.[215] Principally, therefore, Justice O'Connor (and other like-minded jurists) should retroactively apply the holding in *Blakely*. Nevertheless, given her intense dislike of the *Apprendi*/*Blakely*/*Booker* line of cases,[216] it is practically inconceivable that O'Connor would have ever held any of these decisions to be retroactive. (Former Chief Justice Rehnquist agreed with Justice O'Connor's dislike of *Blakely*/*Booker*; the Chief Justice's successor—Chief Justice John Roberts—has yet to make his opinion on the issue known.)

As for the current members of the Court, Justice Kennedy shares a similar dislike for the *Apprendi*/*Blakely*/*Booker* line of cases and is also unlikely to give *Blakely*'s holding retroactive effect. While Justice Breyer has consistently dissented in the *Apprendi*/*Blakely*/*Booker* line of cases, he concurred with the majority in *Ring* and agreed with the minority in *Schriro*; he viewed *Ring* as a watershed rule that increased the accuracy of a proceeding. Recognizing that Justice Breyer wrote a scathing dissent in *Booker*,[217] he would likely differentiate his views on *Ring*-retroactivity from *Blakely* non-retroactivity by highlighting the capital punishment setting of *Ring*.[218] As such, if it is at all possible to overcome the *Schriro* hurdle and persuade the Court to give *Blakely* retroactive effect, it will likely occur through Justices Stevens, Souter, and Ginsburg—who dissented in *Schriro*[219]—and Justices Scalia[220] and Thomas—who did not. All of the

---

[214] Certainly, Justice O'Connor should view any decision with "substantial and real" costs that causes "[o]ver 20 years of sentencing reform [to be] all but lost" as a watershed rule of criminal procedure. Blakely v. Washington, 124 S. Ct. 2531, 2546, 2550 (2004) (O'Connor, J., dissenting).

[215] Certainly, Justice O'Connor should view any decision that "exacts a substantial constitutional tax" on prior procedures as a new rule. *See Blakely*, 124 S. Ct. at 2546. Yet, O'Connor is still on record as indicating that *Blakely* is a mere extension of *Apprendi* and therefore not a new rule for retroactivity purposes. *See id.* at 2549.

[216] *See id.* at 2544 (Breyer, J., dissenting, joined by O'Connor, J.) ("[T]he practical consequences of [*Blakely*] may be disastrous.").

[217] United States v. Booker, 125 S. Ct. 738, 804 (2005) (Breyer, J., dissenting) (arguing that the consequences of *Booker* and *Fanfan* "seem perverse when viewed through the lens of a Constitution that seeks a fair criminal process").

[218] *See supra* note 211.

[219] Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004).

[220] By not joining footnote 17 of *Booker*'s remedial dissent, Justice Scalia may have signaled his desire or willingness to apply *Booker* widely. *See Booker*, 125 S. Ct. at 788 n.17 ("[T]he Court could have minimized the consequences to the system by limiting the

Justices on the Court, however, must recognize that *Schriro* did not consider retroactive application of the proof beyond a reasonable doubt standard at sentencing. In anticipation of this recognition, this Note will now consider whether the beyond a reasonable doubt standard at sentencing comes within the ambit of *Teague*'s second exception.

2. *Why* Blakely *Is Retroactive: Retroactivity of the Beyond a Reasonable Doubt Standard*

Given that *Ring* did not analyze the issue, the question in a *Blakely*-retroactivity case becomes whether the requirement for jury-found facts at sentencing *combined with* a standard of proof beyond a reasonable doubt at sentencing meets the second *Teague* exception to non-retroactivity.[221] For seven interdependent reasons, a strong argument can be made that this rule announced in *Blakely* does meet the second exception.[222]

---

application of its holding to those defendants on direct review who actually suffered a Sixth Amendment violation.").

[221] Once again, it must be acknowledged that the second *Teague* exception is extremely narrow and finding a case that falls within the exception has proven to be difficult. *See supra* notes 99–100, 177–78 and accompanying text.

[222] All of the following seven reasons would equally apply to the Court's holding in *Booker*. *See* United States v. Booker, 125 S. Ct. 738, 756 (2005). However, any analysis of *Booker* retroactivity should also include a discussion of: 1) how the *Booker* remedy would affect the case's retroactivity, and 2) is *Booker* a new rule? While a complete discussion of this issue is outside the scope of this Note, preliminary comments are warranted.

First, it may be argued that because *Booker* merely made the Guidelines advisory and did not alter the nature or procedure of the Guidelines (although it did alter appellate review), the rule announced in *Booker* is not as watershed nor does it affect fairness and accuracy as significantly as *Blakely* did. *Cf.* Rucker v. United States, No. 2:04-CV-00914PGC, 2005 WL 331336, at *10 (D. Utah Feb. 10, 2005) (explaining that given the *Booker* remedy, "it is impossible to conclude that sentences derived on that basis before *Booker* were somehow fundamentally flawed"). However, some have argued that even under the *Booker* remedy, a sentencing judge must now find facts using a beyond a reasonable doubt standard. *Compare* United States v. Malouf, No. CRIM. 03-CR-10298-NG, 2005 WL 1398624, at *3 (D. Mass. June 14, 2005) ("I would still apply the highest burden of proof to the facts at bar. . . . Even if the full formality of a jury were not required, at the very least, the 'beyond a reasonable doubt' standard was required." (citing Judge Nancy Gertner, *What Has* Harris *Wrought*, 15 FED. SENT.'G REP. 83, *1 (2002))), *with* United States v. Gray, 362 F. Supp. 2d 714, 723 (S.D. W. Va. 2005) ("At each sentencing, I will continue to calculate the advisory Guideline range based on a preponderance of the evidence. . . . [Next,] I will consider what the Guideline range would be if based solely on conduct that I have found beyond a reasonable doubt."). For additional discussion, see Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/ (Feb. 6, 2005, 09:30 EST) (linking additional materials

First, consider Justice Scalia's articulation of how to determine a watershed rule.[223] Putting the question in terms of *Blakely*, Justice Scalia should view the issue in the following way: Whether not finding sentencing facts with a proof beyond a reasonable doubt standard so seriously diminishes accuracy that there is an impermissibly large risk of imposing an inaccurate sentence.[224] In the interest of a comprehensive analysis, Justice O'Connor's language in *Teague* would phrase the issue in the following manner: Does the proof beyond a reasonable doubt standard implicate the fundamental fairness and accuracy of the proceeding?[225] In analyzing Court precedent, both of these questions must be answered in the affirmative.

In 1970, the Court mandated the proof beyond a reasonable doubt standard in the landmark case *In re Winship*.[226] Throughout the opinion, the Court powerfully supports the conclusion that the proof beyond a reasonable doubt standard significantly effects accuracy and fairness, and without the standard there is a substantial risk of mistaken judgments. In articulating the rule, the Court explained:

---

therein). If this is the case, then all of the foregoing analysis would be applicable to *Booker* retroactivity.

Second, an argument could be made that *Booker* only announced a new *remedy* but did not announce a new *rule*. *See infra* note 308. In fact, one federal circuit has implied that *Booker* is not a new rule, but is an old rule dating back to *Blakely*. *See* United States v. Crawford, No. 03-30263, 2005 WL 2030497, at *1 (9th Cir. Aug. 24, 2005) (explaining that *Booker* was "foreshadow[ed]" by *Blakely*). In *Crawford*, the Ninth Circuit, "in a case that apparently became final before *Booker*, seems to be adopting . . . a policy of equitable *Booker* retroactivity" at least to the date of *Blakely*. *See* Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/ (Aug. 24, 2005, 13:45 EST); *see also* Posting of DEJ to Sentencing Law and Policy, http://sentencing.typepad.com/ (Aug. 24, 2005, 21:01 EST) ("Does 'foreshadowing' a holding rise to the level of compelling or dictating a holding? . . . In the Ninth Circuit, only time will tell.") (internal citation omitted). Ultimately, less than a month later, the Ninth Circuit announced that *Booker* did involve a new rule and was not to be given retroactive effect. United States v. Cruz, No. 03-35873, 2005 WL 2243113, at *2 (9th Cir. Sept. 16, 2005). Nevertheless, if a court finds that *Booker* does not announce a new rule, or recognizes a 'new remedy' versus 'new rule' distinction, *Booker* may be retroactive to the date of *Blakely*. In such a situation, the issue of *Blakely* retroactivity becomes even more central.

[223] *Schriro*, 124 S. Ct. at 2525.

[224] *Id.* (paraphrasing Justice Scalia's articulation of the issue in *Schriro*).

[225] Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion) (paraphrasing Justice O'Connor's articulation of the rule).

[226] *In re* Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions *resting on factual error*. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."[227]

Without this standard of proof, individuals "'would be at a severe disadvantage, a disadvantage amounting to a *lack of fundamental fairness* . . . .'"[228] Given this language, the absence of the beyond a reasonable doubt standard at sentencing clearly presents an impermissibly large risk of inaccurate sentences and plainly implicates the fundamental fairness and accuracy of the sentencing proceeding. As such, language from *Teague* and the articulation of the issue in *Schriro* both require that *Blakely* be applied retroactively.

Second, two years after the Court articulated the requirement, the Court held that the beyond a reasonable doubt standard must be applied retroactively.[229] The Court declared the purpose of the standard is "'to overcome an aspect of a criminal trial that *substantially impairs its truth-finding* function'"[230] and not having the standard would "'raise[] serious questions about the *accuracy* of guilty verdicts in past trials.'"[231] As such, for the throngs of prisoners sentenced prior to *Blakely*, "serious questions" must be raised about the accuracy and justice involved in determining their sentence. Even though the Court's *Teague* retroactivity jurisprudence had yet to be developed, the Court's rationale is highly instructive in how to answer whether *Blakely*'s beyond a reasonable doubt standard is fundamental to fairness and accuracy.

---

[227] *Id.* at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1894)) (emphasis added).

[228] *Id.* (quoting Samuel W. v. Family Court, 247 N.E.2d 253, 259 (N.Y. 1969)) (emphasis added). The Court concludes by stating: "[T]he reasonable-doubt standard is indispensable. . . . [An individual does not have to fear condemnation without the government] convincing a proper factfinder of his guilt with utmost certainty." *Id.* at 364.

[229] Ivan V. v. City of New York, 407 U.S. 203, 205 (1972) ("*Winship* is thus to be given complete retroactive effect."). It must be remembered that the retroactivity analysis developed in *Teague* had yet to be adopted and therefore did not underlie *Ivan*. Despite this fact, the analysis and language used by the 1972 *Ivan* Court is remarkably applicable to a current-day *Teague* analysis.

[230] *Id.* at 204 (quoting Williams v. United States, 401 U.S. 646, 653 (1971)) (emphasis added).

[231] *Id.* at 204 (quoting *Williams*, 401 U.S. at 653) (emphasis added).

Third, at least one federal court has held that the beyond a reasonable doubt standard of proof meets the second *Teague* exception.[232] In *Cage v. Louisiana*,[233] the Supreme Court held that instructions given to a jury were unconstitutional because "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below [the beyond a reason doubt standard]."[234] The Eleventh Circuit subsequently held that *Cage* was to be given retroactive effect because the beyond a reasonable doubt standard ensures "the *systemic* accuracy of the criminal system."[235] Therefore *Cage* met the "accuracy prong" of *Teague*.[236] The court also held that *Cage*, "[l]ike *Gideon*," implicates a "bedrock procedural element" of court proceedings, and therefore the reasonable doubt standard meets the fundamental fairness prong of *Teague*.[237] Using the Eleventh Circuit's reasoning, *Blakely* should be given retroactive effect.

Fourth, the Supreme Court has indirectly agreed that *Cage* is retroactive, and therefore views the beyond a reasonable doubt standard as falling within *Teague*'s second exception. To see this belief, one must look to the Fourth Circuit, which—unlike the Eleventh Circuit—had held that *Cage* should not apply retroactively.[238] The Supreme Court granted certiorari on the Fourth Circuit case, and then vacated and remanded the case "for further consideration in light of *Sullivan v. Lousiana*."[239] By remanding the case with these explicit instructions—and only these explicit instructions—the Court was indirectly instructing that, as a result of the holding in *Sullivan*, the Fourth Circuit was wrong and the Court's holding in *Cage* should be applied retroactively.

Sullivan held that when reviewing a beyond a reasonable doubt error—an error similar to the one made in *Cage*—an appellate court cannot engage in harmless error review.[240] Justice Scalia reasoned that because "no jury verdict of guilty-beyond-a-reasonable-doubt" existed, "[t]here is no *object* . . . upon which harmless-error scrutiny can operate."[241] Chief Justice Rehnquist agreed, explaining that "[a] constitutionally deficient reasonable-doubt instruction will always result in the absence of 'beyond a reasonable

---

[232] Nutter v. White, 39 F.3d 1154 (11th Cir. 1994).

[233] Cage v. Louisiana, 498 U.S. 39, 39 (1990) (per curiam).

[234] *Id.* at 41.

[235] *Nutter*, 39 F.3d at 1157.

[236] *Id.*

[237] *Id.* at 1158 (quoting Mackey v. United States, 401 U.S. 667, 693 (1971)).

[238] Adams v. Aiken, 965 F.2d 1306, 1312 (4th Cir. 1992).

[239] Adams v. Evatt, 511 U.S. 1001, 1001 (1994).

[240] Sullivan v. Louisiana, 508 U.S. 275, 280–82 (1993).

[241] *Id.* at 280.

doubt' jury findings."[242] Using the Court's unanimous *Sullivan* rationale, the Eleventh Circuit reasoned that *Cage* must meet the second *Teague* exception.[243] Before the Supreme Court decided *Sullivan*, however, the Fourth Circuit found that *Cage* was not to be given retroactive effect. Because of the *Sullivan* decision, the Court vacated and remanded the Fourth Circuit decision. The Court implies that, in light of *Sullivan*, the Fourth Circuit was wrong to conclude that *Cage* is not retroactive and the Eleventh Circuit was correct to conclude that *Cage* is retroactive. If *Cage* should be applied retroactively, as the Supreme Court seems to think it should, then similar rules relating to proof beyond a reasonable doubt must also be retroactive. As demonstrated by the Court's decision in *Sullivan*, the interest in finality must ebb when a court is faced with a deficient standard of proof.

Fifth, while the Court's precedent and actions have indicated that the beyond a reasonable doubt standard should be given retroactive effect, the rationale of the majority's holding in *Schriro* demands it as well.[244] Recall that Justice Scalia's opinion for the Court argued that jury factfinding is not a watershed rule because there are good arguments to conclude that juries are less accurate than other factfinders.[245] He begins by comparing the lay juror's lack of legal knowledge to a judge's greater experience, and concludes by pointing out the "mixed reception that the right to jury trial has been given in other countries."[246] These two observations cannot be made about the beyond a reasonable doubt standard of proof. First, the standard cannot be said to be inferior to any other practically available standard of proof.[247] Second, Justice Scalia himself has described the beyond a reasonable doubt standard

---

[242] *Id.* at 285 (Rehnquist, C.J., concurring).

[243] *See* Nutter v. White, 39 F.3d 1154, 1157–58 (11th Cir. 1994) ("An erroneous reasonable doubt instruction invalidates the jury verdict, making it impossible to assess the accuracy of the conviction. . . . Thus, here we confront one of those rare instances where our interest in certainty is so clearly implicated that finality interests must be subordinated.").

[244] Ironically, many courts have concluded that the *Schriro* opinion forecloses *Blakely* retroactivity; this Note argues that, given the way in which the issue was phrased and the rationale given in *Schriro*, *Schriro* can support *Blakely* retroactivity. *See In re* Dean, 375 F.3d 1287, 1290 (11th Cir. 2004); Morris v. United States, 333 F. Supp. 2d 759, 772 (C.D. Ill. 2004).

[245] Schriro v. Summerlin, 124 S. Ct. 2519, 2525 (2004) ("[F]or every argument why juries are more accurate factfinders, there is another why they are less accurate.").

[246] *Id.*

[247] *See In re* Winship, 397 U.S. 358, 364 (1970) (noting that the standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude" and is used to ensure "utmost certainty" (quoting Dorsen & Rezneck, *In Re* Gault *and the Future of Juvenile Law*, 1 FAM. L.Q., No. 4, 26 (1967))).

as being "adhered to by virtually all common-law jurisdictions."[248] Therefore, the majority's rationale in *Schriro*, used to deny *Ring* retroactivity, compels the Court to grant *Blakely* retroactivity.

Sixth, the *Blakely* decision—along with its beyond a reasonable doubt standard at sentencing—must be viewed as having "alter[ed] our understanding of the bedrock procedural elements that must be found to vitiate the fairness" of sentencing.[249] As discussed earlier, *Blakely* ushered in a new era of sentencing procedures.[250] Less than seven months later, *Booker* confirmed this new era. This new era is a recognition that our sentencing procedures must change along with our philosophy of punishment. *Blakely* has recognized that procedural protections have not occurred along with changes in the theory and substance of punishment.[251] In essence, in a determinate sentencing system, the Court has recognized there is—to use a phrase from *Teague*—a "basic due process" that is constitutionally required

---

[248] Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). These "common-law jurisdictions" could be termed as having an "accusatorial legal system" and include the United States, England, Canada, and Australia, whom all employ the beyond a reasonable doubt standard. *See* Thomas V. Mulrine, Note, *Reasonable Doubt: How in the World Is It Defined?*, 12 AM. U. J. INT'L L. & POL'Y 195, 214–18 (1997) (detailing each country's standard of proof). Moreover, German convictions must occur when the evidence "leave[s] no room for reasonable doubt." Richard S. Franse & Thomas Weigand, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 344 (1995) (citing 29 BGHST 18, 19–20 (1979)). Finally, the "universality" of the beyond a reasonable doubt standard can be shown by its acceptance in international criminal tribunals, including the Rome Conference. *See* Sara N. Scheidenman, *Standards of Proof in Forcible Responses to Terrorism*, 50 SYRACUSE L. REV. 249, 281 (2000). For these reasons, Scalia's comment that "so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*" cannot be said about the beyond a reasonable doubt standard. *Schriro*, 124 S. Ct. at 2525.

[249] *See* Mackey v. United States, 401 U.S. 667, 693 (1971).

[250] *See supra* note 36; *see also* Larry Kupers, *Proposal for a Viable Federal Sentencing Scheme in the Wake of* Blakely v. Washington, 17 FED. SENT'G REP. 28, 28 (2004) (As a result of *Blakely* and *Booker*, "an entirely new federal sentencing paradigm must be designed, enacted, and implemented.").

[251] *See supra* note 31; *see also* Berman, *supra* note 29, at 7. Professor Berman notes:

> Yet, significantly absent in all this sentencing lawmaking was a concern for sentencing procedures. Legislators and sentencing commissions, while committing much time and energy to enacting laws and developing guidelines to govern substantive sentencing decisions gave scant attention to regulating the processes through which judges obtain and assess the information that serves as the basis for reaching these decisions.

Id.

at sentencing.[252] *Blakely* made clear that under our current sentencing schemes, an individual's constitutional rights are denied. As such, it is almost axiomatic to conclude that *Blakely* has "alter[ed]" what we consider "bedrock procedural elements" necessary to protect fairness and accuracy at sentencing.[253] Recalling Justice O'Connor's analogy, it would be appropriate to say that the *Blakely* "earthquake"[254] shook America's criminal procedural bedrock. As such, using the amorphous standard of altering America's bedrock criminal procedure elements, the interest in finality once again must give way to the rule articulated in *Blakely*.

Finally, given this alteration of our criminal procedure bedrock, *Blakely* can easily be analogized to the Court's holding in *Gideon*. Both Justice Harlan[255] and the current-day Court have continuously referenced *Gideon* as the archetypal example of a rule that meets *Teague*'s second exception.[256] Comparing *Blakely* with *Gideon*, sentencing experts agree that *Blakely* is of "comparable universality" to *Gideon*,[257] and may even be more significant than *Gideon*.[258] Just as *Gideon* did, *Blakely* increases the fairness of a criminal proceeding and alters our understanding of what a fair criminal

---

[252] Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion).

[253] *See* Bowman, *supra* note 41, at 252 (noting that *Blakely* is comparable to cases that have "announced a bedrock principle of American constitutional criminal procedure").

[254] *See supra* notes 44–45 and accompanying text.

[255] Mackey v. United States, 401 U.S. 667, 693 (1971).

[256] *See supra* notes 96–98, 181.

[257] *See* Bowman, *supra* note 41, at 251–52. During a Senate hearing on *Blakely*, a panel of sentencing experts was asked if any of them "could think of another Supreme Court case 'in the history of American criminal law' with as big an impact 'on the practical working-out of justice' as *Blakely*." *Id.* (quoting Blakely v. Washington *and the Future of the Federal Sentencing Guidelines: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2004) (statement of Sen. Jeff Sessions)). The panel thought the "closest" case was *Gideon v. Wainwright*. *Id.* at 252.

[258] *See* Berman, *supra* note 29, at 1. Professor Berman explains:

> A handful of other modern-era Supreme Court cases [including *Gideon*] have shaped or reshaped the criminal justice system by redefining how police conduct investigations and how courts conduct trials. But doctrinally and practically these rulings have their limits; not every criminal case is affected by *Gideon*. . . . *Blakely* has the potential to impact every case in which a defendant is convicted of a crime and subject to punishment. In fact, every case in which a defendant may be charged with a crime is potentially impacted by *Blakely* because prosecutors always have an eye on sentencing when they decide which crimes to charge and how to conduct plea negotiations.

Id. at 5. *Cf. supra* note 52 and accompanying text. *But see* King & Klein, *supra* note 119, at 324 (arguing that *Blakel*y is "not as sweeping and fundamental" as *Gideon*).

process entails. Just as *Gideon*, therefore, *Blakely* should be given retroactive effect for cases on collateral review.

Because of these seven interdependent reasons, it becomes clear that *Blakely*: 1) is fundamental, 2) increases the accuracy of a proceeding, 3) is a watershed rule of criminal procedure that "alter[s] our understanding of the bedrock procedural elements"[259] of a proceeding, and 4) is of comparable impact as *Gideon*.[260] The second *Teague* exception has been met, and the federal judiciary should apply *Blakely* retroactively. This result, however, is unlikely to materialize. Because *Blakely* is such an earthquake of a decision, the judiciary will likely never extend the decision's scope beyond its current reach. To understand this situation, it is helpful to see the federal judiciary's fear of too much justice.

V. THE FEAR OF TOO MUCH JUSTICE

Although Part IV suggests that *Blakely v. Washington* should be given full retroactive effect, we have seen lower courts reluctant to issue such a holding. In fact, because the Supreme Court has made it repeatedly clear that the second *Teague* exception will rarely (if ever) be found, lower courts have repeatedly refused to find a new rule falling within the bounds of the narrow exception.

A. *A Telling Case:* United States v. Mandanici

Remarkably on point to the analysis of *Blakely*'s retroactivity is a revealing Second Circuit case: *United States v. Mandanici*.[261] The defendant in *Mandanici* had filed a writ of error *coram nobis*,[262] and attempted to get retroactive effect of the Supreme Court's decision in *United States v. Gaudin*.[263] In overruling Second Circuit precedent,[264] *Gaudin* held that when prosecuting for "falsifying, concealing, or covering up . . . a material fact" in federal documents,[265] the question of materiality must be submitted to a jury

---

[259] Teague v. Lane, 489 U.S. 288, 311 (1989).

[260] *See supra* notes 257–58 and accompanying text.

[261] United States v. Mandanici, 205 F.3d 519 (2d Cir. 2000).

[262] *See* BLACK'S LAW DICTIONARY 362 (8th ed. 2004) (explaining that *coram nobis* is "[a] writ of error directed to a court for review of its own judgment and predicated on alleged errors of fact"). For the purpose of retroactivity analysis, the writ of *coram nobis* is similar to a writ of habeas corpus. *See Mandanici*, 205 F.3d at 527.

[263] United States v. Gaudin, 515 U.S. 506, 522–23 (1995) (holding that the question of materiality must be found by a jury beyond a reasonable doubt).

[264] *See* United States v. Gribben, 984 F.2d 47, 50–51 (2d Cir. 1993).

[265] *Mandacini*, 205 F.3d at 522 (citing 18 U.S.C. § 1001 (1976)).

and found beyond a reasonable doubt. Mr. Mandanici, however, had been convicted under this statute prior to the Court's *Gaudin* decision; under then-good Second Circuit law, materiality was found by a judge based upon a preponderance-of-the-evidence.[266] After the Court's *Gaudin* decision, Mr. Mandanici filed his *coram nobis* petition, which the court held was similar to a § 2255 habeas petition. Therefore, "*Teague* applie[d]" in this case.[267]

In beginning its analysis, the court finds that *Gaudin* announced a new rule of constitutional criminal procedure. Therefore, "it does not apply retroactively on collateral review unless it fits within one of the two *Teague* exceptions."[268] In somewhat encouraging, but ultimately disappointing words for any prisoner attempting to obtain *Blakely* retroactivity, the Second Circuit concludes: "Although this question is a close one, we hold that the second *Teague* exception is also inapplicable."[269] As a result, the court refused to retroactively apply—similar to *Blakely*'s rule—a new rule requiring a fact to be proven to a jury beyond a reasonable doubt.[270]

The Second Circuit did acknowledge "that such a rule promotes both accuracy and fairness."[271] However, the court also adds that "[a] rule [that] qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding."[272] The court, comparing the new rule to the benchmark rule of *Gideon*,[273] cannot find that this later requirement is satisfied.[274]

---

[266] *Id.* at 525–26.

[267] *Id.* at 527. In essence, the Second Circuit was deciding whether to give retroactive application to a Supreme Court decision that requires a particular factual finding by a jury (rather than a judge) using a proof beyond a reasonable doubt (rather than preponderance of the evidence) standard. Clearly, the issue in *Mandanici* is remarkably similar to a potential *Blakely*-retroactivity case. One main difference from *Blakely* is that *Mandanici* does not concern the sentencing phase and is only concerned with the individual's conviction. For additional differences that may distinguish *Blakely* from *Mandanici*, see *infra* note 275.

[268] United States v. Mandanici, 205 F.3d 519, 528 (2d Cir. 2000).

[269] *Id.*

[270] *Id.* at 529. The Second Circuit comprehensively examines the Court's unwillingness to find a new rule that falls within *Teague*'s second exception, and "[w]ith these principles and examples in mind" the circuit court will not declare this a retroactive new rule. *Id.*

[271] *Id.* at 530.

[272] *Id.* (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)). To see why *Blakely* satisfies this threshold, see *supra* notes 249–54 and accompanying text.

[273] *Mandanici*, 205 F.3d at 531. "Thus, 'whatever one may think of the importance of [this] rule'—and we may think it is of great importance—'it has none of the primacy and centrality of the rule adopted in *Gideon* . . . .'" *Id.* (quoting Saffle v. Parks, 494 U.S.

Even though *Mandanici* non-retroactivity can be distinguished from *Blakely* retroactivity,[275] the fact remains that, like the Second Circuit, courts will be impressed by the reluctance of the Supreme Court to find a new rule within *Teague*'s second exception. As a result, a decision that holds *Blakely* to be retroactive is unlikely to occur in lower federal courts. If such a result is to occur, the Supreme Court will likely be the actor to deliver the opinion. However, for two reasons, prisoners seeking to retroactively apply *Blakely* should not be optimistic about the outcome. First, despite the valid legal arguments for applying *Blakely* retroactively, the Supreme Court will likely never reach such a conclusion because of the institution's interest in finality and in the potential impact such a holding would have on lower state and federal courts. Second, even if the Supreme Court did decide to apply *Blakely* to cases on collateral review, the Court's recent statutory interpretation of § 2255 would continue to prevent federal prisoners from receiving a constitutionally just sentence. The next two sub-Parts will examine these disappointing realities and will demonstrate why, absent other branch involvement, justice for all is not likely to be achieved in the federal judicial branch.

484, 495 (1990)). However, to see why *Blakely* is comparable to *Gideon*, see *supra* notes 253–56.

[274] For criticism of this "amorphous" second requirement—the requirement of being "fundamental" and altering bedrock procedural elements—see *supra* note 179 and accompanying text.

[275] Prisoners who hope to receive retroactive application of *Blakely* may find some hope in the Second Circuit's opinion. The circuit court views the question as "a close one." *Mandanici*, 205 F.3d at 528. Therefore, the result may have been different if some important facts were changed. For example, the court does not find this particular new rule to be like the "sweeping rule of *Gideon*" because "the requirement that materiality be proved beyond a reasonable doubt for conviction under § 1001 is a 'narrow right' that affects only 'a limited class' of cases." *Id.* at 531 (noting that the case "affects only a subset of § 1001 cases" (quoting O'Dell v. Netherland, 521 U.S. 151, 167 (1997))). *Blakely*, however, just like *Gideon*, affects "all felony cases." *Id.* (quoting *O'Dell*, 521 U.S. at 167); *see supra* notes 257–58. Because the new rule in *Blakely* has a much more expansive scope than the rule in *Mandanici*, it could be argued that *Blakely* retroactivity succeeds where *Mandanici* failed. That is, *Blakely* "altered our understanding of the *bedrock procedural elements*" essential to the fairness of a proceeding in a way that *Mandanici* did not. Teague v. Lane, 489 U.S. 288, 311 (1989) (emphasis added). In fact, *Blakely*, unlike *Mandanici*, dealt with the Sixth Amendment rights afforded to all defendants at all sentencing proceedings. A persuasive argument can be made, therefore, that even if a court agrees with the *Mandanici* holding, *Blakely* should still be given retroactive effect.

B. *The Court's Fear*

> The Court . . . states that its unwillingness to [find in favor of the defendant] is based . . . on the fear that . . . [the defendant's] claim would open the door to widespread challenges . . . . Taken on its face, such a statement seems to suggest a fear of too much justice.[276]
>
> United States Supreme Court Justice William J. Brennan, Jr.

In 1987, the Court had the occasion to review what could have been a landmark capital punishment and civil rights case—*McCleskey v. Kemp*.[277] Failing to bring such an opportunity to fruition, Justice Brennan—joined by Justices Marshall, Blackmun, and Stevens—lamented the Court's disappointing majority opinion. In his dissenting opinion, Brennan expressed his belief that the majority opinion was the result of "a fear of too much justice."[278] The majority claimed that if the opinion of the dissenting Justices had won the day, "principles that underlie our entire criminal justice system" would be thrown into chaos.[279] However, even if his dissenting opinion would "open the door to widespread challenges to all aspects of criminal sentencing," Justice Brennan virtuously argued: "[I]t does not justify complete abdication of our judicial role."[280] Seemingly in agreement with Justice Brennan's statement, a majority of the Court endorsed the view six years earlier that "[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations."[281]

In analyzing whether *Blakely* should be applied retroactively, however, "dollar considerations" may realistically outweigh "constitutional requirements." In fact, even before a *Blakely* or *Booker* retroactivity ruling, financial worries have already plagued the federal courts. For example, after the *Blakely* and *Booker* rulings, the federal judiciary was required to ask for an additional $91.3 million in funding "for costs associated" with the recent Supreme Court decisions.[282] Naturally, if *Blakely* were held to be retroactive,

---

[276] McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[277] *Id.*

[278] *Id.* at 339.

[279] *See id.* at 314–18 (majority opinion). The accuracy or exaggeration of the majority's analysis is beyond the scope of this Note.

[280] *Id.* at 339 (Brennan, J., dissenting).

[281] Rhodes v. Chapman, 452 U.S. 337, 359 (1981) (quoting Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968)).

[282] *See* Letter from Leonidas Ralph Mecham, Secretary, Judical Conference of the United States, to President George W. Bush (Feb. 17, 2005) [hereinafter Mecham Letter] (on file with author).

the federal courts would experience a flood of § 2254 and § 2255 petitions,[283] exacerbating this financial problem.[284] In fact, in a news release explaining the funding request, the Administrative Office of the U.S. Courts described how "[i]n addition to an increased workload . . . a significant number of inmates likely will seek relief by asking district and appellate courts to reconsider sentences [already] imposed . . . ."[285] Sixty million dollars of this additional funding request is needed for additional "defense counsel services," which includes the cost of litigating habeas corpus proceedings.[286] Moreover, every pre-*Blakely* sentence does not necessarily involve a *Blakely* violation.[287] As such, not all of these petitions would present a valid *Blakely* claim.[288] If history is any guide, prisoner abuses of habeas petitions may in fact become common in a post-*Blakely*/*Booker* world.[289] Yet time and

---

[283] *See* Melissa Nann Burke, *Lawyers Ponder New Discretion for Federal Sentencing Judges*, LEGAL INTELLIGENCER, Jan. 25, 2005, at 1 (quoting a senior appellate counsel for the United States Attorney's Office as saying if *Blakely* and *Booker* are retroactive, then "we'll be looking at the floodgates" for habeas petitions).

[284] *See* Mecham Letter, *supra* note 282 (stating that the recent Supreme Court decisions "will have an immediate impact on the judiciary's workload"). "It has been estimated [that] 12,000 to 18,000 new filings could be lodged under 28 U.S.C. § 2255, attacking an original sentence and asking the district court which imposed the sentence to vacate, set aside, or correct the sentence." Press Release, Administrative Office of the U.S. Courts, Courts Gird for Likely Impact of Sentencing Appeals, Class Action Lawsuits (March 4, 2005), http://www.uscourts.gov/Press_Releases/supplemental05.pdf [hereinafter U.S. Courts Press Release]. In fact, "[t]he appellate courts . . . have [already] reported increases" in habeas petitions. *Id.*

[285] *See* U.S. Courts Press Release, *supra* note 284.

[286] *Id.*

[287] A sentence would have been unconstitutionally imposed only if the judge increased the defendant's sentence based upon facts (other than a prior conviction) not admitted to or reflected in the jury verdict. *See* Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004). Sentences that were not based upon such facts would presumably be constitutionally imposed.

[288] When the Judicial Conference estimated that there were "12,000 to 18,000" potential § 2255 petitions, this number did not include "inmates who already received reduced sentences . . . , inmates with less than six months to serve, and inmates who received no enhancements." U.S. Courts Press Release, *supra* note 284. However, out of desperation or hope, even prisoners who fall within one of these categories may bring an unwarranted habeas petition.

[289] *See Fourteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1983-1984*, 73 GEO. L.J. 780, 783 nn.3144–46 (1984) (identifying various abuses of the habeas petition including: "frivolous petitions, successive identical petitions from the same prisoner, and petitions raising only issues previously decided on appeal") (footnotes omitted). However, in enacting 28 U.S.C. § 2255 ¶ 8, many of these abuses have been addressed by Congress. *See infra* note 338 and accompanying text.

resources would need to be spent to dispose of even the frivolous claims.[290] Because the consequences to the federal judicial system would admittedly be enormous, the current Court is not likely to retroactively apply *Blakely* to cases on collateral review.[291]

Nevertheless, as shown by the unconstitutional sentences imposed on Mr. Toliver, Mr. DeJohn, and Mr. Gonzalez,[292] there will undoubtedly be countless unconstitutional sentences that do require adjusting. These defendants are entitled to justice, and our American ideal would require they receive nothing less; after all, "we are speaking of the lives of men and women."[293] As one Washington state lawyer has explained: "The sentences are just as unconstitutional, even if they happened prior to the *Blakely* decision."[294] Given these sentiments, the existence of "a powerful institutional impulse to limit how many defendants can return to the courthouse to raise *Blakely* claims" is an unsettling proposition.[295]

C. *The Hopeless Habeas Petition:* Dodd v. United States

The bad news for state and federal prisoners unfortunately does not end there, for the retroactivity issue is not the only impetus to ensuring justice for all pre-*Blakely* sentences. Even if an individual is serving an unconstitutionally imposed sentence and even if the Supreme Court were to hold that *Blakely* should be applied to that individual's case on collateral

---

[290] *See* U.S. Courts Press Release, *supra* note 284 ("These new filings, in addition to requiring judge time, require that pro se law clerks process prisoner-prepared motions, and that district court clerks open new case filings, docket the pleadings and motions, revise and process amended or revised Judgment and Commitment forms, and process any subsequent appeals to the appellate courts.").

[291] *See* Gary Craig, *Jail Terms Facing Scrutiny*, ROCHESTER DEMOCRAT AND CHRON., July 20, 2004, at 1B ("Some prosecutors say they can't imagine a retroactive application [of *Blakely*] because federal courts would be paralyzed by the thousands of appeals from offenders.").

[292] *See supra* Part I; *see also* Prisoner Letter, *supra* note 35.

[293] *See* Prisoner Letter, *supra* note 35; *see also supra* note 1 and accompanying text. *Cf.* Rhodes v. Chapman, 452 U.S. 337, 359 (1980) (Brennan, J., concurring) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations." (quoting Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968))).

[294] Tracy Johnson, *Court to Consider Convicts' Prison Terms; Should Sentences That Exceeded Guidelines Be Cut?*, SEATTLE POST-INTELLIGENCER, Nov. 9, 2004, at B1.

[295] Memorandum from Margaret Colgate Love, Thoughts About Blakely's Retroactivity and Executive Clemency (July 24, 2004), http://sentencing.typepad.com/sentencing_law_and_policy/files/margylovepardonmemo_725.doc [hereinafter Love Memo].

review, that same individual's § 2254 or § 2255 petition is still likely to be relegated to the status of a hopeless habeas petition. This conclusion is the result of *Dodd v. United States*, the Supreme Court's most recent decision interpreting § 2255.[296]

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA).[297] The Act "purportedly address[ed] primarily terrorism concerns" but also included "sweeping new changes in habeas procedure."[298] Among such "sweeping" changes was the imposition of a statute of limitation on the filing of habeas petitions, the first restriction of its kind in the history of the Great Writ.[299] Specifically, *inter alia*, AEDPA established a one-year statute of limitation on the filing of § 2254 and § 2255 petitions.[300] However, due to the somewhat imprecise language that was used to codify the statute of limitation, it was uncertain from which date the limitation period would begin to run.[301] As such, the question presented in *Dodd* was how to interpret § 2255 ¶ 6(3)'s requirement that "[t]he limitation period shall run from the latest of . . . (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."[302] Specifically, "whether the date from which the limitation period begins to run under ¶ 6(3) is the date on which this Court

---

[296] Dodd v. United States, 125 S. Ct. 2478 (2005).

[297] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[298] Peter Sessions, Note, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisioners*, 70 S. CAL. L. REV. 1513, 1514-15 (1997); *see infra* note 323; *see also* 142 CONG. REC. S3454, 3458 (1996) (statement of Sen. Kennedy) ("It is unfortunate that the unrelated and controversial subject of habeas corpus was injected into this bill in the first place.").

[299] *See* Jake Sussman, *Unlimited Innocence: Recognizing an 'Actual Innocence' Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 356 (2002) ("[T]he statute of limitations is a wholly unprecedented restriction on habeas corpus claims. Prior to the enactment of AEDPA, neither Congress nor the courts had ever imposed strict time constraints on filing federal habeas claims."); *see also* Vasquez v. Hillery, 474 U.S. 254, 265 (1986) ("Congress has yet to create a statute of limitations for federal habeas corpus actions."); United States v. Smith, 331 U.S. 469, 475 (1947) ("[H]abeas corpus provides a remedy . . . without limit of time.").

[300] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, §§ 101, 105 (establishing a one-year statute of limitations on the filing of habeas petitions for state prisoners in § 101 and for federal prisoners in § 105).

[301] *See* Dodd v. United States, 365 F.3d 1273, 1277 (11th Cir. 2004) (explaining that "a split among our sister Circuits" had been created and comparing the various approaches taken by courts across the country).

[302] 28 U.S.C. § 2255 ¶ 6(3) (2000).

'initially recognized' the right asserted in an applicant's § 2255 motion, or whether, instead, it is the date on which the right is 'made retroactiv[e].'"[303]

Moreover, while *Dodd* only involved a § 2255 habeas petition from a federal prisoner, the holding will also affect § 2254 habeas petitions from state prisoners.[304] This is because AEDPA also imposed a "1-year period of limitation . . . to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."[305] Using identical language as the statute at issue in *Dodd*, the statute applicable to state confinements explained that "[t]he limitation period shall run from the latest of . . . (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[306] As a result, the Court's interpretation of 28 U.S.C. § 2255 ¶ 6(3) can similarly be applied to interpret 28 U.S.C. § 2244(d)(C).

Looking only to the text of § 2255, the *Dodd* Court held that the statute "unequivocally identifies one, and only one, date from which the 1-year limitation period is measured. . . . What Congress has said in ¶ 6(3) is clear: an applicant has one year from the date on which the right he asserts was initially recognized by this Court."[307] Given this holding, one habeas expert has commented that "*Dodd* has major and immediate implications for the AEDPA statute of limitations on *Blakely*/*Booker* claims."[308] As a result of this interpretation, prisoners hoping to receive the benefit of retroactively

---

[303] Dodd v. United States, 125 S. Ct. 2478, 2480 (2005) (alteration in original).

[304] However, the statute relating to state prisoners does permit a tolling of the limitation period during the time a state prisoner is pursuing his state collateral review remedies. *See* 28 U.S.C. § 2244(d)(2) (2000). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." *Id.* As a result, a state prisoner will usually have greater than a one-year time period in which to file his § 2254 petition and may not be as greatly affected by the Court's holding in *Dodd*.

[305] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, § 101 (codified at 28 U.S.C. § 2244(d)(1) (2000)).

[306] 28 U.S.C. § 2244(d)(1)(C) (2000).

[307] *Dodd*, 125 S. Ct. at 2482.

[308] Posting of Peter Goldberger to Sentencing Law and Policy, http://sentencing.typepad.com/ (June 20, 2005, 15:50 EST). It is interesting to note that Goldberger argues that because *Booker* announced only a new "remedy" and not a new "rule," even prisoners seeking retroactive application of *Booker* must file their petitions by June 24, 2005. *See id.* Depending upon whether a court accepts this "new remedy" versus "new rule" distinction, a prisoner seeking retroactive application of *Booker* may have until January 12, 2006, a year from the date *Booker* was decided. For a more detailed discussion of whether *Booker* announced a new rule, see *supra* note 222.

applying *Blakely* had until June 24, 2005 to file their habeas petition.[309] Any petition coming after this date will be held as untimely and therefore denied.

Because *Dodd* was decided on June 20, 2005—a *mere four days* before the statute of limitations would bar a habeas petition citing the rule announced in *Blakely*—the Court's holding is particularly disheartening for those seeking constitutionally just sentences in pre-*Blakely* convictions. To avoid defaulting on a potentially valid habeas petition grounded in the rule announced in *Blakely*, prisoners and their attorneys had only four days to react to the Court's interpretation in *Dodd*. This four-day window is concerning for two reasons. First, some circuits had held a contrary interpretation of § 2255 was controlling in that jurisdiction,[310] which caused some prisoners to have a diminutive amount of time to compose and argue their habeas petition. Second, no jurisdiction has yet to hold that *Blakely* is to be given retroactive effect.[311] Therefore, a prisoner had four days to ask for retroactive application of a case that has yet to be declared retroactive, even if the jurisdiction of his sentence had previously informed him he would have more time. In essence, *Dodd* interprets that the § 2255 statute of limitation begins to run even before the retroactivity cause of action materializes. Despite this "absurd result,"[312] the effect of *Dodd* remains: If a habeas petition seeking the benefit of *Blakely* was filed after June 24, 2005, the petition will likely be unsuccessful.

As this Note has shown, the Court's holding in *Blakely* falls within the second *Teague* exception and should therefore principally be given retroactive effect. However, due to a fear of too much justice or an institutional impulse, the federal judiciary is unlikely to reach such a conclusion. This Note has also shown that even if a court does decide to give *Blakely* retroactive effect, petitioners seeking the benefit of such retroactive application after June 24, 2005 will continue to be out of luck. Recognizing these realities, the following Part will present three separate proposals that

---

[309] State prisoners, however, would have to first exhaust "the remedies available in the courts of the State." *See* 28 U.S.C. § 2254(b)(1)(A) (2000). Because of the tolling of the limitation period during this time, state prisoners will likely have a later date before which they must file their § 2254 petition. *See supra* note 304.

[310] *See, e.g.*, Dodd v. United States, 365 F.3d 1273, 1277 (11th Cir. 2004) ("[W]e join those circuits which have concluded that the limitations period in § 2255(3) is triggered on the date the Supreme Court initially recognizes a new right." (quoting United States v. Lopez, 248 F.3d 427, 432–33 (5th Cir. 2001); Nelson v. United States, 184 F.3d 953, 954 (8th Cir. 1999); Triestman v. United States, 124 F.3d 361, 371 n.13 (2d Cir. 1997); Donaldson v. United States, Nos. 01-CV-1061(NPM) & 92-CR-51-001, 2002 WL 1839213, at *4 (N.D.N.Y. Aug. 6, 2002))).

[311] *See supra* note 184.

[312] Dodd v. United States, 125 S. Ct. 2478, 2488 (2005) (Stevens, J., dissenting).

will help to ensure that in the determinate sentencing era, there is justice for all.

VI. MULTI-BRANCH PROPOSALS: ACHIEVING JUSTICE FOR ALL

In order to ensure that individuals who were sentenced prior to *Blakely* do in fact receive constitutionally just treatment, all three branches of government—as well as the general citizenry—should begin a dialogue and attempt to find a constitutionally just solution. Toward this end, the Constitution serves as "an obvious focal point . . . for coordination among officials and between government and citizenry."[313] As a general matter, one commentator has argued how "officials of other branches of government" are "morally justified" in upholding our "minimally just Constitution."[314] More specific to an individual's Sixth Amendment *Blakely* rights, sentencing scholar and professor Douglas A. Berman has explained:

> [Retroactivity issues are] not only the concern of courts. All branches of government pledge commitment to the US [sic] Constitution, and thus all branches of government should be concerned if a large number of defendants have been sentenced in an unconstitutional way. Indeed, I think executive and legislative officials have a constitutional responsibility to at least consider possible remedies for already-sentenced defendants with valid *Blakely* claims who, because of judicial retroactivity doctrines, may not get relief in the courts.[315]

In this part of the Note, I will briefly explain three separate proposals that would ensure justice to defendants like Mr. Toliver, Mr. DeJohn, and Mr. Gonzalez, and many others, who were unconstitutionally sentenced under a pre-*Blakely* sentencing scheme.

It is perhaps most important to stress how "[a]ll branches of government pledge commitment to the US [sic] Constitution,"[316] and the Constitution itself explicitly requires nothing less.[317] Both the President and all Members of Congress (as well as all members of the civil service) swear an oath to

---

[313] Akhil Reed Amar, *The Supreme Court, 1999 Term—Forward: The Document and the Doctrine*, 114 HARV. L. REV. 26, 48 (2000).

[314] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1844 (2005).

[315] Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/ (Dec. 4, 2004, 19:04 EST).

[316] *Id.*

[317] *See* U.S. CONST. art. VI, cl. 2-3.

defend and uphold our nation's most cherished document.[318] In light of this, the first two proposals involve the legislative branch and would be most appropriate in helping courts begin to hold that *Blakely* does apply retroactively. The third proposal involves the executive branch and would be most appropriate if—whether out of "fear"[319] or out of an "institutional impulse"[320]—the courts do not find *Blakely* to be retroactive.

A. *Congressional Response to Upholding the Constitution*

Congress—the "people's branch of government"[321]—should be troubled that for hundreds of thousands of American citizens, the Constitution has not been upheld; for such individuals, their Sixth Amendment right was violated and they are currently serving unconstitutional sentences. Congress should be even more troubled that the judicial branch of government will likely offer no recourse for such individuals despite strong arguments suggesting otherwise. In an effort to subdue these concerning realities, Congress should begin to discuss and ultimately implement a legislative response to *Blakely* that would ensure justice for all in a pre-*Blakely* world.

The remedial *Booker* majority explained that as a result of the Court's holding, "[t]he ball now lies in Congress's court. The National Legislature is equipped to devise and install, long-term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of

---

[318] *See* U.S. CONST. art. II, § 1. This provision of the Constitution declares:

> Before [the President] enter[s] on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Id. See also 5 U.S.C. § 3331 (2000). This statute declares:

> An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

Id.

[319] *See supra* Part V.B.

[320] *See* Love Memo, *supra* note 295.

[321] Senator Robert C. Byrd, *Remarks by U.S. Senator Robert C. Byrd*, *The Constitution in Peril*, 101 W. VA. L. REV. 385, 399 (1998) (describing the Congress as "the people's branch"); Senator Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 298 (1998).

justice."[322] The author of this Note appreciates this point and posits that in considering a legislative response to *Blakely* and *Booker*, Congress should ensure that all pre-*Blakely* defendants receive constitutional sentences.

Below are two legislative proposals that Congress could employ that would allow them to fulfill their pledge to uphold the Constitution. The first legislative proposal does not deal specifically with *Blakely*, but rather addresses a larger problem with the habeas petition. The second legislative proposal is more complicated and directly implicates the protection of an individual's Sixth Amendment rights through collateral attack. Before discussing such ideas, however, it must be acknowledged that Congress has not embraced the habeas petition in the recent past.[323] In fact, there are current proposals in both the House and Senate to further restrict the writ of habeas corpus.[324] Despite this less-than-positive outlook and recent efforts at limiting the Great Writ, Congress should begin a sincere and thorough dialogue to ensure that the writ of habeas corpus covers individuals who are currently serving unconstitutional sentences. Guaranteeing justice for all depends upon it.

1. *Legislative Correction of* Dodd

In beginning its pursuit of ensuring justice for all individuals sentenced in the pre-*Blakely* sentencing world, Congress must recognize the need to correct the patently strange outcome of the 5-4 holding of *Dodd v. United States*.[325] Even the *Dodd* majority expressed its concern over the Court's austere holding, but expressed that it was helpless in correcting the result: "Although we recognize the potential for harsh results in some cases, we are not free to rewrite the statute that Congress has enacted."[326] In his dissent, Justice Stevens pointed to two concerns regarding the majority's opinion.

---

[322] United States v. Booker, 125 S. Ct. 738, 768 (2005).

[323] Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1667 (1990) (pointing out that "bills on the subject of habeas have been introduced in every Congress at least since 1953" and in 1990 "for the first time very substantial, some might say radical, amendments appear likely to pass"); *see also* 142 CONG. REC. E592 (1996) (statement of Rep. Stokes). Representative Louis Stokes opined, "the attacks on habeas corpus included in [AEDPA] that purports to address the terrorist threat is so objectionable I must oppose this bill." *Id.*

[324] *See* Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005); H.R. 3035, 109th Cong. (2005). For a compiled list of criticism concerning these proposals, see Posting of Douglas A. Berman to Sentencing Law and Policy, http://sentencing.typepad.com/ (Sept. 28, 2005, 13:26 EST).

[325] Dodd v. United States, 125 S. Ct. 2478, 2483 (2005).

[326] *Id.*

First, "there is a real risk that the 1-year limitation period will expire before the cause of action accrues."[327] Second, "the Court's myopic reading of [¶] 6(3) effectively nullifies 28 U.S.C. § 2244(b)(2)(A), which allows prisoners to file second or successive applications based on a retroactive rule."[328] Justice Ginsburg, writing a separate dissent, echoed Justice Stevens's concerns by lamenting that the *Dodd* majority's holding "will bar most 'new rule' petitioners from presenting their claims" in a federal court.[329] Because of these concerns expressed by both the majority and dissenters in *Dodd*, Congress should act to correct the statutory language of the one-year statute of limitations contained in § 2255 ¶ 6 and § 2244(d).

Congress's recognition of the need to correct the statutory interpretation contained in *Dodd* and legislative action toward this end would well serve the cause of American justice. This is true not just for those prisoners who have suffered a Sixth Amendment violation via *Blakely* and *Booker*, but also for all current and future individuals who may be faced with a hopeless habeas petition.[330] Furthermore, not only will a legislative response to *Dodd* be in the interest of federal prisoners and be in the public interest of ensuring justice for all Americans, but it would also serve the public interest of ensuring the efficient use of courtroom proceedings. As mentioned earlier, the Court's result in *Dodd* encourages—indeed requires—a federal prisoner to file his § 2255 petition in a narrow window of time regardless of whether the Supreme Court (or any court for that matter) has ruled on whether a valid claim exists. In essence, *Dodd* encourages and requires the potentially frivolous filing of habeas petitions.

To better understand this problem and to fully appreciate the problems caused by the statutory interpretation contained in *Dodd*, recall the state of the federal judiciary post-*Blakely* and post-*Booker* even without the interpretation contained in *Dodd* having been established. Sentencing courts were in chaos,[331] approaching their new sentencing responsibilities in a different manner,[332] and appellate courts were engaged in an appellate "three ring circus" of plain-error review.[333] What's more, the federal judiciary requested $91.3 million to deal with fallout from the case.[334] Now, if

---

[327] *Id.* at 2486 (Stevens, J., dissenting).

[328] *Id.* at 2489.

[329] *Id.* at 2491 (Ginsburg, J., dissenting).

[330] *See supra* Part V.C.

[331] *See supra* notes 43, 47, and accompanying text.

[332] *See supra* note 59 (comparing different amounts of weight sentencing judges are giving the Guidelines following *Booker*).

[333] *See* Three Ring Circus Circuit Split, *supra* note 125.

[334] *See* Mecham Letter, *supra* note 282.

possible, imagine how much more muddled this scene would look if every prisoner who wanted even a chance at receiving the retroactive benefit of *Blakely* or *Booker* were required to file their habeas petition within one year of the decision. Within a condensed one-year window, the federal judiciary would be required to undergo a massive opening of habeas "floodgates,"[335] regardless of whether the case had yet to be held retroactive. It should go without saying that this is a situation Congress should want to avoid in the future.

As a result of these realities, Congress must correct the legislative interpretation contained in *Dodd*. Congress should specify that the one-year statute of limitation contained in § 2255 ¶ 6 and § 2244(d) begins to run on the date that the right is made retroactive by the Supreme Court. The Court's current interpretation of these sections has the potential to deny justice to thousands of prisoners and will result in requiring prisoners to file potentially frivolous habeas petitions. In the interest of ensuring justice for all and in the interest of ensuring efficient use of the judiciary's resources, a legislative correction of *Dodd* is needed.

2. *SAVE Letters*

Enacting a legislative fix to the statutory interpretation contained in *Dodd* will not, in and of itself, ensure that our nation's ideal of justice for all is realized. Such a fix would not address the fact that, despite valid arguments to the contrary, the federal judiciary is unlikely to give *Blakely* retroactive effect. As a result, Congress must also begin to consider legislative options that would result in the ability of prisoners who are currently serving unconstitutional sentences to have their sentences reviewed. Towards this goal, one possible way to ensure justice to pre-*Blakely* defendants is for Congress to develop a plan that would minimize the impact § 2254 and § 2255 petitions would have on the federal judiciary. To see how such a proposal may work, Congress need not look far into history; Congress could utilize a similar framework recently used to minimize excessive habeas petition filings.[336]

In 1996, Congress was faced with what it perceived to be a problem with too many second or successive habeas corpus petitions.[337] In order to remedy

---

[335] *See* Burke, *supra* note 283.

[336] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. Title I of the AEDPA contains "Habeas Corpus Reform" provisions. *Id.*

[337] *See* 142 CONG. REC. S3454, 3462 (1996) (statement of Sen. Feingold) ("Many of my colleagues want very sincerely to address what they perceive to be abuses in the use of habeas corpus."). *Cf.* 142 CONG. REC. S3427, 3439 (1996) (statement of Sen.

this problem, the Legislature added ¶ 8 to § 2255 of Title 28. This paragraph prohibited successive habeas petitions unless the petitioner could make certain showings.[338] In order to ensure that the procedure was adequately enforced, Congress required that a three-judge panel of a court of appeals must first approve the petition before a successive habeas petition could be filed in a federal district court.[339] This appellate court panel will only approve the successive habeas petition if it: 1) is based on newly discovered evidence that would seriously undermine the jury's verdict, or 2) involved new constitutional rights that the Supreme Court has declared should be given retroactive effect.[340] Although this approach has been greatly criticized by many in the defense bar[341] and has been attacked as "effectively[,] . . . a total suspension of the writ of habeas corpus,"[342] the defense bar should not be as critical of an effort modeled on this provision if it would allow prisoners to obtain justice in their pre-*Blakely* sentences.

Using the 1996 habeas amendments as a guide, Congress should limit the potential negative impact that § 2254 and § 2255 Sixth Amendment petitions have on the federal judiciary. First, Congress could amend federal habeas jurisdictional statutes by requiring all habeas petitions alleging a Sixth Amendment violation to first be approved by either: i) a three-member panel of the appeals court, as in the case of successive habeas petitions; or ii) a newly created *Blakely*/*Booker* review agency that specializes in sentencing law. Upon submitting a Sixth Amendment habeas petition to this group, the prisoner would be required to also submit portions of the sentencing record that would permit the group to decide whether a *Blakely* violation occurred.[343] In doing so, the review body would be able to quickly review

---

Moynihan) ("I make the point that the abuse of habeas corpus—appeals of capital sentences—is hugely overstated.").

[338] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, § 105.

[339] *See* Alan Ellis et al., *It's Not Too Late, Part II: Filing Second and Successive 2255 Motions Under the New Habeas Corpus Reform Law*, 21 CHAMPION 16, 17 (1997); *see also* 28 U.S.C. § 2244 (2000).

[340] *See* 28 U.S.C. § 2255 ¶ 8 (2000); *see also* H.R. REP. NO. 104-518, at 111 (1996) (Conf. Rep.).

[341] *See, e.g.*, Ellis et al., *supra* note 339, at 17 ("This subsection creates a truly unique and bizarre procedure . . . .").

[342] *Id.*; *accord* 142 CONG. REC. S3454, 3458 (1996) (statement of Sen. Kennedy) ("It eviscerates the ancient Writ of Habeas Corpus . . . .").

[343] Such portions of the record would potentially include the transcript from the sentencing hearing, any pre-sentence report, and any other official document that would illuminate how the judge determined the sentence.

whether the prisoner actually did suffer a Sixth Amendment violation.[344] A quick review would be especially possible when it is clear that a judge used acquitted conduct,[345] obstruction of justice allegations,[346] or an increased drug quantity[347] to determine the appropriate sentence. While the petitioner may submit a brief containing his argument that he is entitled to relief, no prosecutorial involvement is necessary and the process would occur without an adversarial hearing. Such limitations would ensure a minimal expenditure of state resources while granting the prisoner the opportunity to present his argument.

Just as in the case of successive habeas petitions, the review panel would have a specific amount of time to review a Sixth Amendment violation petition.[348] Should the review group find that a Sixth Amendment violation is likely to have occurred at the petitioner's sentencing proceeding, the review panel would issue him a "Sixth Amendment Violation Evaluation letter" ("SAVE letter"). This SAVE letter will enable the prisoner to have his sentence evaluated or reviewed in the district court where he was sentenced. In turn, Congress would require a defendant to present the SAVE letter to the district court in which he was originally sentenced in order for the court to have jurisdiction over the Sixth Amendment claim.[349] Without this letter, the

---

[344] *See* Love Memo, *supra* note 295 ("[E]xamination of a particular case to determine whether there is a '*Blakely* violation' in the guideline sentencing 'does not take more than half an hour, and often much less, once the needed portions of the record are reassembled.'").

[345] *See, e.g.*, United States v. Watts, 519 U.S. 148, 157 (1997) ("[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

[346] *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (2004).

[347] *See, e.g.*, United States v. Goodine, 326 F.3d 26, 27 (1st Cir. 2003) ("We find that drug quantity in § 841(b) is a sentencing factor, not an element of separate crimes[,]" and therefore can be found by a judge using a preponderance of the evidence standard.).

[348] *See, e.g.*, 28 U.S.C. § 2244(b)(3)(D) (2000) (requiring the three-member panel to review a successive habeas petition within thirty days of it being filed).

[349] In addition to the similarities between this proposal and a successive habeas proceeding, Congress has adopted a similar procedure when granting federal courts jurisdiction over claims arising under the Americans with Disabilities Act. Prior to litigating such a case, a complaining party must file the complaint with the Equal Employment Opportunities Commission (EEOC) so the agency can review the complaint. *See* 42 U.S.C. §§ 2000e-5(b), (e) (2000). The Commission will investigate the complaint within a set amount of time from the filing. *Id.* The EEOC is then authorized to "issue a so-called 'right-to-sue' letter to an 'aggrieved person' in certain circumstances so that the person may commence a private lawsuit." *See* King v. Dunn Mem'l Hosp., 120 F. Supp. 2d 752, 753 (S.D. Ind. 2000). An individual may not engage in litigation without

federal court can summarily deny a habeas petition alleging a Sixth Amendment violation, and Congress should be able to legislate such a process while staying within the bounds of the non-suspension clause.[350] The purpose of this process would be to allow a defendant an opportunity to have his case reviewed but to do so with minimum cost, time, and resources borne by the state.[351] In doing so, the Courts could—without the fear of negative consequences—recognize that *Blakely* is a fundamental, watershed rule of criminal procedure that affects the fairness and accuracy of sentencing proceedings.

Should Congress adopt such a proposal, it would be necessary for the federal judiciary to give *Blakely* retroactive effect.[352] Otherwise, a prisoner whose sentence was unconstitutionally imposed would receive his SAVE letter, but would not be entitled to relief in the district court. If the federal judiciary maintains its insistence in not giving *Blakely* retroactive effect, this would not absolve the legislative branch of its sworn duty to uphold the Constitution.[353] Therefore, Congress should still be concerned about the imposition of unconstitutional sentences in a pre-*Blakely* world. In the pursuit of justice for all, then, Congress should consider all of its options, including enacting possible statutory remedies for prisoners who are currently serving unconstitutional sentences. Moreover, Congress could attempt to create an independent agency in the judicial branch—much like the United States Sentencing Commission[354]—that could review and alter prisoner sentences

---

first exhausting this option. *See* Dao v. Auchan Hypermarket, 96 F.3d 787, 789 (5th Cir. 1996).

[350] If Congress adopts such a proposal, opponents of the proposal may seek to challenge it on the grounds that it violates the "non-suspension" clause of the Constitution. *See* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). However, the Supreme Court has approved of Congress's regulation of successive habeas petitions in a manner similar to the proposal made here. *See, e.g.*, Felker v. Turpin, 518 U.S. 651, 661–62 (1996). The Court has also long held the interpretation that "the power to award the writ by any of the courts of the United States, must be given by written law." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807). Furthermore, "judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker*, 518 U.S. at 664 (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996)).

[351] Similar once again to a successive habeas petition filing, a decision by the "SAVE" review panel would not be appealable, nor would the Supreme Court have certiorari jurisdiction over such a decision. *Cf.* 28 U.S.C. § 2244(b)(3)(E) (2000). This would further minimize the resources and costs associated with the proposal.

[352] To see why the Court should make such a ruling under its current *Teague* analysis, see *supra* Part IV.F.2.

[353] 5 U.S.C. § 3331 (2000).

[354] 28 U.S.C. § 991 (2000).

based upon Sixth Amendment violations at sentencing. While these latter options may invoke constitutional challenges on federalism[355] and separation of powers[356] grounds, the intention here is to stress that Congress has an equal obligation with the judiciary to uphold the Constitution. Congress is the branch with the closest link to the citizens of this nation, and therefore, "justice for all" should be a primary concern for every federal legislator.

B. *Executive Response to Upholding the Constitution: A "Historic Remedy" to Correcting Injustice*

In addition to Members of Congress, the members of the executive branch also maintain a sworn duty to ensure that the Constitution is defended and upheld.[357] Therefore, even if *Blakely* is not given retroactive application by the federal judiciary and Congress responds with inaction, both the state and federal executive branches—including governors, the President, and the Department of Justice—should continue to be concerned about the imposition of unconstitutional sentences in a pre-*Blakely* determinate sentencing system. Fortunately, perhaps one of the most readily available means to remedy this problem can be found in the executive branch: the gubernatorial and presidential power of clemency.[358]

---

[355] Certainly, Congress would not have the ability to alter a state prisoner's sentence, which was imposed under state law. Such a process would require action by a federal court acting under the authority of the Constitution. Whether an independent judicial agency created by Congress would qualify as such an authority remains to be seen. Therefore, in order to effectuate justice for state prisoners, Congress would likely need the federal judiciary's willingness to apply *Blakely* retroactively.

[356] *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) ("We know of no previous instance in which Congress has enacted retroactive legislation requiring an Article III court to set aside a final judgment, and for good reason. The Constitution's separation of legislative and judicial powers denies it the authority to do so."). The two main principles behind separation of power, however, were to: 1) disperse power so to prevent tyranny of the majority, and 2) ensure the people are governed by an elected Congress, and not another unelected branch. *See* Alan B. Morrison, *A Non-Power Looks at Separation of Powers*, 79 GEO. L.J. 281, 282 (1990). Neither of these principles is hindered by Congress acting to ensure just sentences to pre-*Blakely* defendants. In fact, the second principle calls for congressional action.

[357] *See* U.S. CONST. art. II, § 1; 5 U.S.C. § 3331 (2000). The Department of Justice has also confirmed a commitment to justice for all Americans. *See supra* note 1.

[358] *See* U.S. CONST. art. II, § 2, cl. 1 (The President has the "Power to grant Reprieves and Pardons for Offenses against the United States . . . ."); *see, e.g.*, N.Y. CONST. art. IV, § 4 ("The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment . . . ."). Under some state constitutions, the legislature also has the ability to regulate pardons and sentencing commutations. *See* ALA. CONST. art. V, § 124 ("The

For people who have studied executive clemency, it is apparent that this power has been used over time to carry out the pursuit of justice when other means of doing so have failed. In a comment remarkably relevant to addressing the problem of the judiciary's fear of too much justice,[359] one expert has astutely phrased the issue in the following way: "Clemency can be used to rectify unjust results in individual cases that have not been cured through the judicial channels upon which we normally rely to accommodate changes in the law. It can correct general failings of our criminal justice system that arise from inequities in our society."[360]

Because our current judicial channels are failing to ensure justice for all prisoners sentenced pre-*Blakely*, the clemency power should be viewed as an appropriate remedy. Therefore, along with the judicial and legislative branches' proposals, the executive branch of our state and federal governments should begin to explore "creative ways of dealing with the problem of [*Blakely*] retroactivity through the clemency process."[361]

To begin, it is observed that clemency and executive power over punishment is "justified" when it "corrects injustice."[362] The Supreme Court itself has opined that "[c]lemency is deeply rooted in our Anglo-American tradition of law, and is *the historic remedy for preventing miscarriages of justice where judicial process has been exhausted*."[363] Often times, the correction of this injustice will not involve a full-on pardon of a convicted individual, but rather a sentence commutation,[364] which the term "clemency" does encompass.[365] More notably, it is not unheard of for a member of the

---

legislature shall have power to provide for and to regulate the administration of pardons, paroles, remission of fines and forfeitures, and may authorize the courts having criminal jurisdiction to suspend sentence and to order probation.").

[359] *See supra* Part V.B.

[360] Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1, 2 (1993) (footnotes omitted).

[361] *See* Love Memo, *supra* note 295.

[362] KATHLEEN D. MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 213 (1989).

[363] Herrera v. Collins, 506 U.S. 390, 411–12 (1993) (emphasis added).

[364] *See* Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 2–3 (1994) (illustrating that many actions taken by the executive branch involve sentence commutations and not pardons).

[365] There are five forms of clemency in the American legal system: pardon, amnesty, commutation, remission of fines, and reprieve. Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991). *See Herrera*, 506 U.S. at 411 n.12 ("The term 'clemency' refers not only to full or conditional pardons . . . , but also commutations, remissions of fines, and reprieves.").

judiciary to recommend sentence commutation when justice warrants it, but, because of current circumstances, the judiciary is powerless.[366]

Because sentencing commutations can be such an effective means of achieving otherwise unjust results, President Bush[367] and governors around the country[368] should consider a systematic proposal for achieving constitutional justice for all pre-*Blakely* defendants.

Clemency expert Margaret Love has helpfully explained the role that the executive branch may play in ensuring constitutional sentences.[369] Similar to the legislative proposal of *Blakely* review panels, which would screen prisoners' Sixth Amendment claims and only then issue SAVE letters,[370] Love proposes a screening mechanism that would help the executive branch review prisoner claims. Through the use of "teams [at the district level] composed of federal prosecutors and defenders," Love suggests that a review of a defendant's *Blakely* claim can quickly occur.[371] After such review, the team would make clemency recommendations to the executive.[372] In the federal system, Congress is not able to review such decisions made by the executive, and the President's power is plenary in this area.[373]

Finally, Love explains that mass clemencies are not uncommon. Indeed, just as the SAVE letter proposal to Congress looked to recent history in developing a response to *Blakely*, Love's proposal does the same. She explains that similar clemency review groups have been established in the past when—like present circumstances—historical situations called for the

---

366 *See, e.g.*, United States v. Angelos, 345 F. Supp. 2d 1227, 1261 (D. Utah 2004) ("While I must impose the unjust sentence, our system of separated powers provides a means of redress" which can be found in the President's constitutional power to grant reprieves and pardons.).

367 In addition, any future President should also be concerned about this issue, especially if President Bush does not act to resolve the injustices experienced by pre-*Blakely* defendants.

368 This is especially true of governors of states where the sentencing scheme has been called into question following *Blakely*. *See supra* note 61 (listing state statutes and cases therein); *supra* note 169 (listing state court cases therein).

369 *See* Love Memo, *supra* note 295.

370 *See supra* Part VI.A.2.

371 *See* Love Memo, *supra* note 295.

372 *Id.*

373 *See Ex parte* Grossman, 267 U.S. 87, 120 (1925) ("The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.").

issuance of mass clemencies.[374] In fact, a significant percentage of past Presidents have used systematic clemency procedures to enhance justice in our criminal justice system.[375] Unfortunately, however, until recently President Bush and Attorney General Gonzales did not have a propitious history with the clemency process.[376] In fact, "close examination" of the pair's clemency experience in Texas shows only a "cursory" concern about the issue, even though such decisions often involved capital sentences.[377] Nevertheless, President Bush and Attorney General Gonzales—as well as the rest of the executive branch—should use recent presidential history as a lesson and fashion a process whereby injustices not corrected by the judiciary are seriously considered under the executive's clemency power. Under such an executive response to *Blakely*, an individual can receive a thorough review of his sentence, while—once again—imposing a minimal burden on the state. In making these minor changes in the Office of the Pardon Attorney, the executive branch would be able to efficiently ensure that pre-*Blakely* defendants receive a constitutional sentence.[378]

---

[374] *See* Love Memo, *supra* note 295. Love explains that similar clemency review groups were established during the Wilson administration following a landmark Supreme Court case. Similarly, Presidents Truman and Ford also established clemency review boards to review a large quantity of clemency petitions.

[375] *See* Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 139 (2001) ("At least a third of all United States presidents, including many of our greatest presidents, . . . have used systematic pardons.").

[376] As the legal counsel to then Texas Governor Bush, Alberto Gonzales drafted clemency memoranda used by Governor Bush to review clemency requests. One commentator notes:

> [M]any [had] a clear prosecutorial bias, and all seem[ed] to assume that if an appeals court rejected one or another of a defendant's claims, there is no conceivable rationale for the governor to revisit that claim. This assumption ignores one of the most basic reasons for clemency: the fact that the justice system makes mistakes.

Alan Berlow, *The Texas Clemency Memos*, ATL. MONTHLY, July/August 2003, at 92. Recent history, however, shows that President Bush might be more willing to use the pardon and clemency process in the future. As noted by Margaret Love, President Bush's recent pardoning actions "confirm a return to regular and frequent pardoning that had characterized federal practice until the Clinton administration." Posting of Ellen S. Podgor to White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog/2005/09/more_on_pardons.html (Sept. 20, 2005) (quoting comments by Margaret Love) [hereinafter Posting of Ellen Podgor].

[377] Berlow, *supra* note 376. For a review of the pair's recent pardon experience, see Posting of Ellen Podgor, *supra* note 376 (hoping that "President Bush will make more of his pardoning power in the months ahead").

[378] *See* Love Memo, *supra* note 295.

Finally, as we have seen, it must be recognized that, for a variety of reasons, many executives may be reluctant to grant sentencing commutations to all prisoners who have suffered a *Blakely*-like violation. Most noteworthy, a governor or President may not want to engage in such broad sentencing commutations due to perceived political pressures, which may or may not be realistic.[379] This concern could be remedied by limiting sentencing commutations to defendants who suffered a flagrant and obvious Sixth Amendment violation while denying relief to others.[380] Specifically, through the use of executive clemency, a governor or President would be able to set independent criteria that must be met before providing the petitioner with relief.[381] For example, such criteria of flagrant violations would include prisoners whose sentences were enhanced based upon either conduct that the

---

[379] These perceived pressures to avoid pardons and clemency may not be realistic. For example, President Bush's recent pardoning activity has been met with "only encouragement from the press, and no criticism at all from the political opposition." Posting of Ellen Podgor, *supra* note 376 (quoting comments made by Margaret Love). Despite this observation, commentators have long alleged that "political pressure" might make an executive reluctant to issue pardons and commutations. *See* Ammons, *supra* note 364, at 5. ("A governor can be legally and morally justified in [granting certain sentencing commutations]. However, political pressure and public opinion can inhibit the exercise of this power . . . ."). Supporting this foreshadowed reluctance, governors have been counseled to use their clemency and commutation power "sparingly." *See id.* at 35 n.127.

> Executive clemency should be extended to inmates serving their sentences (usually in the form of a commutation) only after a careful review of all relevant information and only where the sentence is clearly inappropriate and can be shown to be so to any reasonable person. The same caution applies to clemency decisions concerning persons discharged from their sentences and to extradition decisions. Cautiousness, deliberateness, and restraint are required to overcome public and local anxiety about the Governor's alleged "interference" with the judicial system and to allow the Governor to feel confident about making those clemency and extradition decisions which justice requires.

Id. (quoting Legal Advice for the Governor, Nat. Governor's Conf., Center for Pol. Res. and Analysis, Governor's Office Series 4 (1976) (emphasis omitted)).

[380] However, if an executive decided to limit the scope of sentencing commutations in this way, then the process would not ensure "justice for all." This is because not every prisoner whose sentence was unconstitutionally imposed would fall into a heavily restricted group. For example, a judicial finding of "deliberate cruelty" may not meet an executive's heightened standard. *See, e.g.*, Blakely v. Washington, 124 S. Ct. 2531, 2538 (2004). Nevertheless, even this limited review process would provide greater justice to pre-*Blakely* defendants than would otherwise be available.

[381] *See* Ammons, *supra* note 364, at 23–24 ("[Clemency] is both legal and political in nature: . . . political because an executive can consider factors that judges and juries cannot.").

defendant had been acquitted of[382] or conduct that would constitute a more serious unproved crime.[383] At a minimum, it would be justice-enhancing for an executive to grant sentencing commutations to all prisoners who, prior to *Blakely*, appropriately raised a Sixth Amendment claim at sentencing or on appeal.[384] Such defendants correctly argued that their sentence was unconstitutionally imposed, but because the Supreme Court had not yet held so, they were erroneously denied the benefit of their ultimately correct argument. The executive should especially recognize the injustice suffered by such prisoners and, as a result, grant them their deserved sentencing commutations.

VII. CONCLUSION

In a country that strives to achieve justice for all, all three branches of government have a responsibility to ensure constitutionally just sentences for all prisoners in our criminal justice system. As such, the federal judiciary, Congress, and state and federal executive branch officials should all be concerned that a significant number of American prisoners are currently serving out unconstitutionally imposed sentences. Just like the prisoners who were introduced in Part I, prisoners across America were sentenced prior to the Supreme Court's holding in *Blakely v. Washington* and were denied their Sixth Amendment right to jury factfinding using a beyond a reasonable doubt standard of proof. These prisoners are entitled to justice, and this Note has attempted to analyze the question: "Who is going to mount the vigorous and spirited campaign this cause so deserves?"[385]

The most obvious way to achieve constitutionally just sentences in cases that became final prior to *Blakely* is for the federal courts to retroactively apply *Blakely*'s holding. Using the Court's current retroactivity jurisprudence (epitomized in the seminal case *Teague v. Lane*), there is a strong argument that the judiciary should do exactly that. *Blakely*, with its requirements for jury factfinding, coupled with the 'proof beyond a reasonable doubt' standard, articulated a watershed rule of criminal procedure; in the determinate sentencing era, it altered our understanding of the bedrock procedural elements necessary for fairness and accuracy at sentencing.

---

[382] *See* United States v. Watts, 519 U.S. 148, 157 (1997) (noting that a sentencing judge could consider acquitted conduct "so long as that conduct has been proved by a preponderance of the evidence").

[383] *See supra* notes 31–34 and accompanying text.

[384] Under this criterion, for example, Mr. Toliver, Mr. DeJohn, and Mr. Gonzalez would be entitled to sentencing commutations since they raised a Sixth Amendment claim on appeal. *See supra* note 11.

[385] Prisoner Letter, *supra* note 35.

However, despite the fact that *Teague* requires the beyond a reasonable doubt standard of proof to be applied retroactively, the federal courts are reluctant to actually declare such a holding. The institutional impulses of the federal courts or the Supreme Court's fear of too much justice will prevent the judiciary from giving *Blakely* retroactive effect.

Nevertheless, prisoners who were given unconstitutionally imposed sentences may still find their deserved constitutional justice in the legislative or executive branches of government. In the legislative branch, Congress should correct the recent Supreme Court interpretation of the habeas statute articulated in *Dodd*, and then consider ways in which it can alleviate the problems associated with retroactive application of *Blakely*. Specifically, Congress should implement a Sixth Amendment review group that would quickly consider *Blakely* claims made by prisoners and then grant or deny such prisoners a newly created SAVE letter.

In the executive branch, the historic clemency power of the governor or President can be utilized as an effective means to remedy injustices that the judicial branch cannot or will not address. Specifically, the executive branch should formulate a plan that would allow for mass review of sentencing decisions, and then implement an efficient way to issue sentencing commutations for defendants whose Sixth Amendment rights were violated. In formulating these proposals, both Congress and the executive branch should look to the recent past, where similar review panels or mass clemency actions were taken.

Ultimately, justice is a concern for all Americans, and certainly a concern for officials in all three branches of government. A dialogue needs to begin within all three branches as to how to ensure just sentences for pre-*Blakely* defendants. The three proposals contained and outlined in this Note are meant to be a starting point for this discussion. As has been displayed, justice for all can and should be accomplished for pre-*Blakely* defendants, and our government must continue to strive to achieve the ideal of justice for all.