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Habeas Corpus--Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice

Timothy Finley

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HABEAS CORPUS—RETROACTIVITY OF POST-CONVICTION RULINGS: FINALITY AT THE EXPENSE OF JUSTICE

Gilmore v. Taylor, 113 S. Ct. 2112 (1993)

I. INTRODUCTION

In *Gilmore v. Taylor*,[1] the United States Supreme Court held that the Seventh Circuit's ruling in *Falconer v. Lane*,[2] which declared unconstitutional the Illinois Pattern Jury Instructions for murder and voluntary manslaughter, could not be applied retroactively to a state prisoner whose conviction became final before *Falconer* was decided.[3] Applying *Teague v. Lane*,[4] the Court determined that the *Falconer* holding, which invalidated jury instructions practically identical to those given at respondent Kevin Taylor's trial, could not be applied retroactively to Taylor's case because it announced a "new rule" that was not "dictated by precedent" existing at the time of Taylor's trial.[5]

This Note examines the Court's decision in *Gilmore* and concludes that the Court adopted an unreasonably broad definition of what constitutes a new rule under *Teague*. The Court's application of *Teague* suggests that any time a federal habeas petitioner makes a claim that is not directly supported by precedents that are precisely on point, that petitioner asks for the benefit of a new rule that cannot be applied retroactively.[6] In other words, *Gilmore* has made it effectively impossible for a prisoner to bring a successful federal

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1 113 S. Ct. 2112 (1993).

2 905 F.2d 1129 (7th Cir. 1990).

3 *Gilmore*, 113 S. Ct. at 2114.

4 489 U.S. 288 (1989). *Teague* held that a constitutional ruling that was not "dictated by precedent" existing at the time a prisoner's conviction became final constituted a "new rule" which could not be given effect in a post-conviction federal habeas corpus proceeding. *Id.* at 310.

5 *Gilmore*, 113 S. Ct. at 2117-19.

6 Although *Teague*'s bar against retroactive application of "new rules" has two very narrow exceptions, *Teague*, 489 U.S. at 311-12, they are not worth mentioning here because the Court has never used either of these exceptions to apply a rule retroactively. These exceptions will be discussed *infra* parts II.B. and II.C.

habeas claim unless the state imprisoned him in open defiance of constitutional precedents that were on point at the time of conviction. As a result, the Court has practically eliminated the doctrine of federal habeas corpus as Congress envisioned it and wiped away at least forty years of precedent. With the exception of the few criminal cases heard on direct review, this self-imposed limitation makes the Court powerless to overturn erroneous state convictions in all but the most egregious cases of bad-faith state defiance. By placing unreasonable emphasis on preserving the finality of convictions, the Court has relinquished one of its fundamental duties and given the states primary authority to determine what the Federal Constitution requires of their criminal proceedings.

II. BACKGROUND

A. FEDERAL HABEAS CORPUS

The doctrine of federal habeas corpus enables federal courts to order a state to release or retry prisoners held in violation of the Federal Constitution.[7] Federal habeas review can take place only after a state conviction has become final and all other state post-conviction remedies have been exhausted.[8] Typically, federal habeas proceedings begin at the district court level.[9] Because they involve federal district court review of state court decisions, federal habeas claims are often referred to as "collateral" proceedings to distinguish them from direct appeals to the Supreme Court.[10]

Federal habeas corpus has its origins in the Judiciary Act of 1789.[11] Initially, the doctrine of federal habeas corpus acted only to correct jurisdictional errors made by federal courts—relief was granted only to federal detainees who were convicted in courts that did not have jurisdiction over their cases.[12] During the nineteenth and twentieth centuries, federal habeas jurisdiction expanded. The Habeas Corpus Act of 1867 extended federal habeas jurisdiction to state court convictions and allowed federal courts to grant relief in

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7 Brown v. Allen, 344 U.S. 443 (1953).

8 *See* 28 U.S.C. § 2254 (1977).

9 *See* 28 U.S.C. § 2241 (b) (1971) (giving United States Supreme Court and circuit courts authority to decline and transfer habeas proceedings to the district courts).

10 BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

11 Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81.

12 *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830)("[I]mprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the Court has general jurisdiction of the subject, although it should be erroneous.").

cases where the conviction resulted from an unconstitutional law.[13] By 1953, at the latest, federal habeas relief could be granted for the same types of constitutional errors recognizable on direct appeal.[14] As civil rights and constitutional guarantees expanded in the 1960s, the writ of habeas corpus enabled federal courts to enforce the Bill of Rights against the states, establishing minimum standards of due process throughout the nation.[15]

In recent years, the Rehnquist Court has severely limited the scope of federal habeas review through a number of judicial innovations.[16] Among the most effective limitations on federal habeas corpus is the Court's modification of the retroactivity doctrine in federal habeas corpus announced in *Teague v. Lane*.[17]

B. RETROACTIVITY PRIOR TO *TEAGUE V. LANE*

In the context of federal habeas corpus, the term "retroactivity" refers to the issue of whether a "new rule" can be applied to a federal habeas petitioner who, by definition, is a prisoner whose conviction has already become final.[18] A new rule, generally speaking,[19] is a rule that did not exist at the time the petitioner's conviction became final.[20]

Prior to 1965, the Court generally applied new constitutional rules retroactively to collateral appeals, as it did to cases heard on

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13 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241-54 (1988)).

14 Though some commentators have argued for an earlier date, nearly all agree that this expansion of federal habeas review either was established by or had been established before the case of Brown v. Allen, 344 U.S. 443 (1953). *See, e.g.*, Joseph L. Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 176; James S. Liebman, *More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 538 n.3 (1990-91); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 10-11 (1990).

15 *See* Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 327-28 (1987-88).

16 For a discussion of Supreme Court decisions of the past two decades limiting access to federal habeas corpus review, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 28 (2d ed. 1992); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 903-47 (3d ed. 1993).

17 489 U.S. 288 (1989). *Teague* is discussed *infra* part II.C.

18 *See generally Teague*, 489 U.S. at 288; Butler v. McKellar, 494 U.S. 407 (1990); Gilmore v. Taylor, 113 S. Ct. 2112 (1993).

19 A precise definition is difficult to provide here because the Court has been divided over exactly what constitutes a "new rule." More precise formulations and their applications will be discussed *infra* part II.C.

20 *See generally* Linkletter v. Walker, 381 U.S. 618 (1965); *Teague*, 489 U.S. at 288; *Butler*, 494 U.S. at 407.

direct review.[21] In 1965, the Supreme Court held in *Linkletter v. Walker*[22] that the "Constitution neither prohibits nor requires retrospective effect" for new constitutional rules of criminal procedure.[23] Since its decision in *Linkletter*, the Court occasionally refused to apply a new ruling retroactively to cases on both direct and collateral review when it found that the new rule would excessively disrupt preexisting law.[24] Without distinguishing between collateral and direct appeals, the Court considered the following three factors in determining whether to apply a ruling retroactively: "(a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[25]

In a pair of minority opinions that would later have a substantial impact, Justice Harlan criticized the *Linkletter* approach and proposed a retroactivity test that would distinguish between direct and collateral review.[26] Justice Harlan suggested that new rules should always be applied to cases not yet final and that new rules should not be applied to cases that had already become final.[27] Justice Harlan argued that denying retroactive application of new rules to convictions that had already become final would preserve the finality of state court convictions and help prevent burdensome litigation.[28]

Justice Harlan's suggested rule of non-retroactivity in federal habeas cases was not absolute, however. Rather, it contemplated

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21 *See* Roger D. Branigin III, Note, *Sixth Amendment—The Evolution of the Supreme Court's Retroactivity Doctrine: A Futile Search for Theoretical Clarity*, 80 J. CRIM. L. & CRIMINOLOGY 1128, 1133 (1989) (citing United States v. Johnson, 457 U.S. 537, 542 (1982)).

22 381 U.S. at 618.

23 *Id.* at 629.

24 *See, e.g.*, Stovall v. Denno, 388 U.S. 293 (1967) (holding nonretroactive United States v. Wade, 388 U.S. 218 (1967), which applied the Sixth Amendment right to counsel to lineups); Johnson v. New Jersey, 384 U.S. 719 (1966) (holding nonretroactive Miranda v. Arizona, 384 U.S. 436 (1966), which established the right to counsel at interrogations); *Linkletter*, 381 U.S. at 618 (holding nonretroactive Mapp v. Ohio, 367 U.S. 643 (1961), which applied the exclusionary rule to the states).

25 *Stovall*, 388 U.S. at 297.

26 Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256 (1968) (Harlan, J., dissenting).

27 *Mackey*, 401 U.S. at 675 (Harlan, J., concurring in part and dissenting in part); *Desist*, 394 U.S. at 256 (Harlan, J., dissenting).

28 *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in part and dissenting in part) (citing Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.")).

two narrow exceptions. The first exception included new rules that "place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[29] The second exception applied only to procedures " 'implicit in the concept of ordered liberty.' "[30]

Gradually, the Court embraced parts of Justice Harlan's view. In *United States v. Johnson*,[31] the Court held that new Fourth Amendment rules should apply to non-final convictions, but not to federal habeas claims.[32] Five years later, in *Griffith v. Kentucky*,[33] the Court accepted the first half of Justice Harlan's proposal and held that new constitutional rules could always provide the basis for relief on direct review. It was not until *Teague v. Lane*,[34] eighteen years after Justice Harlan's separate opinions in *Mackey* and *Desist*, that the Court expressly adopted the second half of Justice Harlan's rule, holding that new rules of criminal procedure could not be applied in federal habeas proceedings.[35] As will be demonstrated below, however, the Court did much more than adopt Justice Harlan's rule. Justice Harlan's separate opinions became the precedential vehicle through which the Court, by nearly all accounts,[36] drastically rewrote the law of retroactivity.

C. THE NONRETROACTIVITY DOCTRINE

In *Teague v. Lane*,[37] Justice O'Connor, writing for a plurality of the Court, held that a habeas petitioner cannot obtain relief on the basis of a "new rule," unless the new rule falls within one of two narrow exceptions.[38] In doing so, the Court overruled nearly twenty-five years of retroactivity law, rejecting the *Linkletter* approach in favor of Justice Harlan's proposed presumption of nonretroactivity of "new rules."

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29 *Id.* at 692 (Harlan, J., concurring in part and dissenting in part).

30 *Id.* at 693 (Harlan, J., concurring in part and dissenting in part) (quoting Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

31 457 U.S. 537 (1982).

32 *Id.* at 562.

33 479 U.S. 314 (1987).

34 489 U.S. 288 (1989).

35 *Id.* at 310.

36 *See, e.g.*, WHITEBREAD & SLOBOGIN, *supra* note 16, at 786-90; Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371 (1991); Louis D. Bilionis, *Legitimating Death*, 91 MICH. L. REV. 1643 (1993); Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797 (1992); Hoffmann, *supra* note 14; Liebman, *supra* note 14; Kathleen Patchel, *The New Habeas*, 42 HASTINGS L. J. 941 (1991).

37 489 U.S. at 288.

38 *Id.* at 310.

This was not the most dramatic of the changes effected by *Teague*, however. The plurality's remaining innovations modified Justice Harlan's rule to such a degree that it has been argued that *Teague* distorted rather than adopted Justice Harlan's views.[39]

The first modification—perhaps the most important aspect of *Teague*—is the plurality's expansion of Justice Harlan's definition of a "new rule."[40] Justice Harlan had defined a new rule as any rule other than settled law at the time of trial and rules that fell within the "logical compass" of established rules.[41] Since Justice Harlan's definition does not regard rules that come within the "logical compass" of established precedents as new, his definition would preserve the Court's habeas corpus function of extending and clarifying constitutional rights to those situations within the "logical compass" of its previous decisions.

The plurality in *Teague* modified this definition in a fashion that was, to say the least, crafty. The plurality achieved this by articulating conflicting definitions of a new rule.[42] The Court first defined a new rule very broadly, then it gave a much narrower definition:

> In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the 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.[43]

The words and examples selected in the first definition suggest that new rules are ground-breaking decisions that overturn established standards. This formulation, like Justice Harlan's, does not seem to prohibit the application of an old rule to a new set of facts.

The second definition, which the plurality offered as a clarification of the first, did far more than "put it differently," however.[44] This second conception of a new rule, as it was applied in *Teague* and its progeny,[45] had enormous consequences for the scope and function of federal habeas review. As Justice Brennan pointed out in

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39 Friedman, *supra* note 36, at 811 ("One might say that the *Teague* decision resembles Justice Harlan's views much like a kidnapping note pasted together from stray pieces of newsprint resembles the newspaper from which it came.").

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

41 Desist v. United States, 394 U.S. 244, 264 (1969) (Harlan, J., dissenting).

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

43 *Id.* (emphasis in original) (citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) ("*[P]er se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf."); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986) ("Eighth Amendment prohibits the execution of prisoners who are insane.")).

44 *Id.*

45 Graham v. Collins, 113 S. Ct. 892 (1993); Wright v. West, 112 S. Ct. 2482 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v.

dissent, "[f]ew decisions on appeal or collateral review are *'dictated'* by what came before. Most such cases involve a question of law that is at least debatable . . . ."[46] Justice Brennan concluded, as has practically every academic who has written about *Teague*, that the plurality's broad definition of a new rule severely curtailed the Court's ability to decide important constitutional questions on collateral review.[47]

The plurality also modified Justice Harlan's approach to the second exception to the bar against retroactivity.[48] Initially, Justice Harlan suggested that the second exception apply to those rules that affected the truth-finding process.[49] Justice Harlan later rejected this view of the second exception in favor of an exception that did not restrict itself only to those procedures determinative of guilt or innocence; his ultimate formulation included any new rule that was "fundamental" or "implicit in the concept of ordered liberty."[50] The plurality combined Justice Harlan's two proposals to create a second exception that was as narrow as possible.[51] To come within the second exception, a new rule had to affect both the accuracy of a conviction *and* the fundamental fairness of the trial process.[52] The plurality made clear that only "watershed rules of criminal procedure"[53] involving "bedrock procedural element[s]"[54] could meet the "fundamental fairness" requirement of its modified second exception. The plurality's constriction of Justice Harlan's second ex-

Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989).

46 *Teague*, 489 U.S. at 333 (Brennan, J., dissenting).

47 *Id.* at 345 (Brennan, J., dissenting); *See generally* Arkin, *supra* note 36; John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1990-91); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731 (1991); Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. LAW & SOC. CHANGE 637 (1990-91); Friedman, *supra* note 36; Liebman, *supra* note 14; Patchel, *supra* note 36; Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALBANY L. REV. 1 (1991); Weisberg, *supra* note 14; Branigin, *supra* note 21; Recent Developments, *The Court Declines in Fairness*—Teague v. Lane, 25 HARV. C.R.-C.L. L. REV. 164 (1990); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160 (1991).

48 *Teague*, 489 U.S. at 310.

49 Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting).

50 Mackey v United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurrring in part and dissenting in part).

51 *Teague*, 489 U.S. at 312 ("We believe it desirable to combine the accuracy of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial.").

52 *Id.* at 315.

53 *Id.* at 311.

54 *Id.* at 315.

ception, like its expansion of his definition of a new rule, placed a greater restriction on habeas corpus than was intended by Justice Harlan.

To complicate matters further, the plurality's holding forced it to rearrange the order in which it decided issues on collateral review. Until *Teague*, the Court would ordinarily decide upon the merits of a case, and upon finding that it had created a new rule, the Court would determine if the rule could be given retroactive effect, either in that case or a subsequent case, to those similarly situated.[55] In *Teague*, the plurality made retroactivity a threshold question that must be decided before reaching the merits.[56]

The plurality's explanation for addressing retroactivity before reaching the merits is somewhat confusing. The Court explained that if it ruled favorably on the merits but found that its ruling constituted a new rule, it would be faced with two unacceptable choices: (1) to permit retroactive application of its ruling to the petitioner but to no others, or (2) to deny retroactive application to everyone, including the petitioner.[57] The plurality rejected the first alternative because it demanded uneven application of new rules to similarly situated persons.[58] The second alternative could not be entertained because it would result in a purely prospective rule, which the Court reasoned would be invalid as an advisory opinion.[59] The plurality concluded by stating:

> We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.[60]

D. *TEAGUE*'S PROGENY

In a series of Supreme Court cases, the major aspects of the plurality's opinion in *Teague* gained support from majorities of the Court.[61] This subsection discusses several of the most important

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55 *See, e.g.*, Brown v. Louisiana, 447 U.S. 323 (1980); Witherspoon v. Illinois, 391 U.S. 510, 523 (1968).

56 *Teague*, 489 U.S. at 316.

57 *Id.* at 315-16.

58 *Id.*

59 *Id.*

60 *Id.* (emphasis in original).

61 *See, e.g.*, Graham v. Collins, 113 S. Ct. 892 (1993); Wright v. West, 112 S. Ct. 2482 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989).

cases applying and elaborating on *Teague*'s nonretroactivity doctrine.

The first of these cases, *Penry v. Lynaugh*,[62] made *Teague* applicable to death penalty cases. Perhaps the most important aspect of *Penry*, however, is its application of *Teague*'s definition of a new rule. In *Penry*, Justice O'Connor, joined by the dissenters in *Teague*,[63] held that Penry's petition for a writ of federal habeas corpus did *not* ask for the benefit of a new rule.[64] Penry claimed his death sentence was unconstitutional because the jury was not instructed that it could consider mitigating evidence pertaining to Penry's mental retardation when deciding whether to sentence him to death.[65] Justice O'Connor held that the rule sought by Penry was *dictated* by *Lockett v. Ohio*[66] and *Eddings v. Oklahoma*,[67] which held that sentencing juries were entitled to hear all possible mitigating evidence in making capital decisions.[68] However, in light of a previous Supreme Court decision rejecting the same claim made by Penry,[69] the *Penry* Court's holding is permissible only under a very broad understanding of the phrase "dictated by precedent."

Penry demonstrated that the Court was sharply divided over the meaning of a new rule. In dissent, Justice Scalia argued that "it challenges the imagination to think that today's result is 'dictated' by our prior cases."[70] Justice Scalia concluded that the majority's narrow interpretation of a new rule could not be reconciled with *Teague*: "It is rare that a principle of law as significant as that in *Teague* is adopted and gutted in the same Term."[71] The *Penry* dis-

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62 492 U.S. at 302. In *Penry*, the Court decided whether Penry's death sentence was unconstitutional because the Texas death penalty statute failed to instruct juries to consider certain mitigating factors, such as mental retardation, when deciding whether a defendant should be sentenced to death. *Id.* at 274.

63 *Id.* at 314-19 (majority opinion of O'Connor, J., joined by Brennan, Marshall, Blackmun and Stevens, JJ.).

64 *Id.* at 315.

65 *Id.* The Texas statute directed the jury to consider three factors: (a) whether the defendant committed the acts which caused the victim's death deliberately and with the reasonable expectation that the victim or another would die, (b) whether the defendant would continue to pose a threat to society in the future, and (c) whether the conduct of the defendant was unreasonable in response to any provocation the defendant may have received from the deceased. *Id.* at 310 (citing TEX. CODE CRIM. PROC. ANN., art. 37.071(b) (West 1981 & Supp. 1989).

66 438 U.S. 586 (1978).

67 455 U.S. 104 (1982).

68 *Penry*, 492 U.S. at 328.

69 Jurek v. Texas, 428 U.S. 262 (1976) (upholding the constitutionality of the Texas death penalty statute because it could be interpreted broadly enough to permit the jury to consider mitigating evidence).

70 *Penry*, 492 U.S. at 352 (Scalia, J., concurring in part and dissenting in part).

71 *Id.* at 353 (Scalia, J., concurring in part and dissenting in part).

senters seemed to believe that a rule could be "dictated" by prior precedent only if those precedents could support no other result.[72] For the majority, on the other hand, a rule was not new if it had compelling support in previous precedents. The victory of the *Penry* majority, which consisted primarily of the *Teague* dissenters, offered hope that the nonretroactivity doctrine would not be the insurmountable barrier that many critics[73] had feared.

A year later, however, in *Butler v. McKellar*,[74] the *Penry* dissenters, joined by Justice O'Connor, found themselves in the majority.[75] Purporting to clarify the *Teague* standard, the *Butler* Court articulated an even broader definition of a new rule than the one set out in *Teague*. Through Chief Justice Rehnquist, the Court made clear that general interpretations of the phrase "dictated by precedent" would no longer be tolerated: "[T]he fact that a . . . decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule' under *Teague*."[76] The Court concluded that a legal rule requested by a petitioner was new if, in light of precedent existing at the time of the petitioner's trial, the correctness of the rule was "susceptible to debate among reasonable minds."[77] Emphasizing the states' interest in the finality of convictions, the Court created this definition to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[78]

The *Butler* formulation, reaffirmed in two other cases that year,[79] is an enormously powerful tool for restricting access to fed-

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72 *Id.* (Scalia, J., concurring in part and dissenting in part) (all decisions are new except those "that a judge acting in good faith and with care should have known" the Supreme Court would render).

73 *See supra* note 47.

74 494 U.S. 407 (1990). While in police custody on an assault and battery charge, Butler confessed to an unrelated murder, for which he was convicted and sentenced to death. *Id.* at 408-10. Butler sought habeas relief on the ground that police interrogated him about the murder after he had retained an attorney for the assault charge, relying on Arizona v. Roberson, 486 U.S. 675 (1988). *Id.* at 408-11. *Roberson*, decided after Butler's conviction became final, held that interrogation initiated after a suspect has requested counsel for a separate charge violates the Fifth Amendment. 486 U.S. at 682. The Court denied Butler relief, holding that *Roberson* announced a new rule that could not be applied retroactively. *Butler*, 494 U.S. at 409.

75 *Butler*, 494 U.S. at 408-16 (majority opinion of Rehnquist, C.J., joined by White, O'Connor, Scalia, and Kennedy, JJ.).

76 *Id.* at 415.

77 *Id.*

78 *Id.* at 414.

79 Saffle v. Parks, 494 U.S. 484 (1990); Sawyer v. Smith, 497 U.S. 227 (1990).

eral habeas corpus. Under this broad definition, a state prisoner can obtain habeas relief only when "the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist."[80] If taken literally, the "susceptible to debate among reasonable minds" definition of a new rule replaces the independent, *de novo* standard of review that had previously applied to habeas corpus proceedings[81] with a highly deferential standard akin to the minimum rationality standard reserved for the actions of a legislature.[82] This standard renders federal habeas corpus courts powerless to determine the correct interpretation of federal rights. Instead, the federal courts must defer to any state judgment that is reasonable, even if incorrect. This development prompted Justice Brennan to remark, "[t]he Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime."[83]

In two 1992 decisions, *Stringer v. Black*[84] and *Wright v. West*,[85] the Court again changed directions. In *Stringer*, the habeas petitioner challenged his death sentence on the ground that an instruction regarding an aggravating factor given to his trial jury was unconstitutionally vague.[86] The Federal District Court for the Southern District of Mississippi, followed by the Court of Appeals for the Fifth Circuit, denied relief.[87] The Supreme Court reversed. To reach this result, four of the Justices from the *Butler* majority,[88] joined by Justices Blackmun and Stevens,[89] gave retroactive effect to two Supreme Court decisions that had been decided after petitioner Stringer had been convicted.[90] The Court held that both decisions were dictated by precedent and therefore did not announce new

80 *Butler*, 494 U.S. at 417-18 (Brennan, J., dissenting).

81 Miller v. Fenton, 474 U.S. 104 (1985); Brown v. Allen, 344 U.S. 443 (1953).

82 *Cf.* Wright v. West, 112 S. Ct. 2482, 2490 (1992) (plurality opinion) ("[A] federal habeas court must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable.") (internal quotations omitted) (citing *Butler*, 494 U.S. at 422 (Brennan, J., dissenting)).

83 *Butler*, 494 U.S. at 418 (Brennan, J., dissenting).

84 112 S. Ct. 1130 (1992).

85 112 S. Ct. 2482 (1992).

86 *Stringer*, 112 S. Ct. at 1135.

87 *Id.* at 1134.

88 Chief Justice Rehnquist and Justices White, O'Connor and Kennedy. *Stringer*, 112 S. Ct. at 1133.

89 *Id.*

90 *Stringer*, 112 S. Ct. at 1133-40. The cases that were applied retroactively were Maynard v. Cartwright, 486 U.S. 356 (1988) and Clemons v. Mississippi, 494 U.S. 738 (1990), both of which held unconstitutional instructions similar to the one in Stringer's case.

rules.[91]

The *Stringer* decision is somewhat difficult to reconcile with *Butler*. The fact that the lower courts in *Stringer* did not conclude that Stringer's claim for relief and the post-conviction cases upon which he relied were dictated by prior precedent attests that the ruling sought by Stringer was "susceptible to debate among reasonable minds." Consequently, under a literal interpretation of *Butler*, Stringer's claim should have failed as a new rule. The Court explained its result by qualifying the language of *Butler*: "Reasonableness . . . is an objective standard, and the ultimate decision . . . is based on an objective reading of the relevant cases. The short answer . . . is that the Fifth Circuit made a serious mistake . . . ."[92] The *Stringer* Court, with its emphasis on an "objective standard," seemed to equate reasonableness with correctness to a greater extent than did the *Butler* Court.

In *Wright v. West*,[93] the debate over whether *Butler*'s reasonableness standard should be applied literally or objectively continued in dicta.[94] In a plurality opinion joined by Chief Justice Rehnquist and Justice Scalia, Justice Thomas argued for a literal interpretation of *Butler*: "If a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a 'new' rule under *Butler*, and is therefore not cognizable on habeas under *Teague*."[95] Justice Thomas recognized that this approach "implicitly questioned" the previously applicable *de novo* standard of review because it forced federal habeas courts to "defer to the state court's decision rejecting the claim unless that decision is patently unreasonable."[96]

In a concurring opinion joined by Justices Blackmun and Stevens, Justice O'Connor defined a new rule more narrowly:

> Even though we have characterized the new rule inquiry as whether "reasonable jurists" could disagree as to whether a result is dictated by precedent, the standard for determining when a case establishes a new rule is "objective," and the mere existence of conflicting authority does not necessarily mean a rule is new. If a proferred factual distinction between the case under consideration and pre-existing precedent does not change the force with which the precedent's underlying prin-

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91 *Stringer*, 112 S. Ct. at 1140.

92 *Id.*

93 112 S. Ct. 2482 (1992).

94 The Court unanimously agreed that respondent West was not entitled to federal habeas relief, but the Justices disagreed over the standard of review that applied to his unsuccessful claim. *Id.* at 2484-503.

95 *Id.* at 2490 (plurality opinion).

96 *Id.* at 2489-90 (plurality opinion) (quoting Butler v. McKellar, 494 U.S. 417, 422 (1990)).

ciple applies, the distinction is not meaningful, and any deviation from precedent is not reasonable.[97]

Under Justice O'Connor's approach, deference to minimally reasonable state court judgments is not required. Accordingly, Justice O'Connor rejected Justice Thomas' suggestion that the Court's retroactivity jurisprudence conflicted with *de novo* review, insisting that the Court has "always held that federal courts have an independent obligation to say what the law is."[98]

In 1993, a majority of the Court once again endorsed a broad definition of a new rule in *Graham v. Collins*.[99] Relying on *Penry v. Lynaugh*,[100] Graham claimed that his death sentence violated the Eighth and Fourteenth Amendments because the Texas death penalty statute limited the jury's consideration of mitigating evidence of Graham's youth, family background and positive character traits.[101] The majority, comprised of the four dissenters in *Penry* and Justice Thomas, engaged in a narrow reading of *Penry*.[102] The majority maintained that the extension of *Penry*, which involved unique mitigating evidence of mental retardation, to Graham's case, which involved a different sort of mitigating evidence, was not dictated by precedent.[103] Consequently, the Court held that *Penry* could not provide the basis for habeas relief and denied Graham's petition.[104]

In dissent, Justice Souter, joined by Justices Blackmun, Stevens and O'Connor, argued that Graham's claim was controlled by *Penry*.[105] Justice Souter pointed out that both Graham and Penry alleged that the Texas death penalty statute limited a jury's ability to consider mitigating evidence.[106] The fact that the mitigating evidence in Graham's case differed from the evidence in *Penry* had no affect on the applicability of the legal rule behind *Penry*, according to the dissent.[107]

As the above cases indicate, "new rule" jurisprudence had become somewhat unpredictable by the time the Court decided *Gilmore v. Taylor*.[108] Much of this confusion was the unavoidable result of

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97 *Id.* at 2497 (O'Connor, J., concurring) (citations omitted).

98 *Id.* (O'Connor, J., concurring).

99 113 S. Ct. 892 (1993) (majority opinion of White, J., joined by Rehnquist, C.J., and Scalia, Kennedy, and Thomas, JJ.).

100 492 U.S. 302 (1989); *see supra* notes 62-73 and accompanying text.

101 *Graham*, 113 S. Ct. at 895.

102 *Id.* at 901-03.

103 *Id.*

104 *Id.* at 903.

105 *Id.* at 917 (Souter, J., dissenting).

106 *Id.* (Souter, J., dissenting).

107 *Id.* (Souter, J., dissenting).

108 113 S. Ct. 2112 (1993).

Teague, which forces federal habeas courts to draw what one commentator has called a "conceptually impossible distinction between a ruling that follows ineluctably from precedent and one which concededly expands precedent . . . in a judicial world where courts rarely acknowledge that they do any more than draw ineluctable conclusions from precedent."[109] The Court of Appeals for the Seventh Circuit seemed aware of this when it first decided *Gilmore*:

> It is often difficult to determine whether a case extends prior precedent, or merely applies it in a somewhat different factual context. The lines are fuzzy; in drawing them we are keenly aware that terms such as "fact," "law," "precedent," and "reasonable" are pliable, and hence susceptible to contrary interpretations. . . . Suffice it to say that discerning the domain of a given rule and marking the precise point at which its younger sibling, rather than it, applies is more an art than a science.[110]

The remainder of this Note discusses whether the Supreme Court's treatment of this problem in *Gilmore* has done anything to stabilize its doctrine of nonretroactivity.

III. Facts and Procedural History

A. The Facts

On September 14, 1985, Kevin Taylor killed Scott Siniscalchi, his ex-wife's lover.[111] Prior to the homicide, Taylor and Siniscalchi had a tense relationship.[112] According to Taylor, he first encountered Siniscalchi in November 1984, when he came upon Siniscalchi and Joyce, Taylor's wife, "kissing and embracing" in a parked car.[113] After her divorce from Taylor, Joyce began living with Siniscalchi.[114] Taylor and Siniscalchi exchanged heated words on a few occasions when Siniscalchi would bring Taylor's daughter, Katie, to Taylor's trailer for parental visits.[115] Taylor also testified that Siniscalchi "ridiculed and antagonized him when both men were working at a fair."[116]

On the night of the killing, Taylor called Joyce at approximately 1:00 a.m. According to Taylor, he often called her at this time because she worked late. The two agreed that Taylor would pick up

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109 Weisberg, *supra* note 14, at 22-23.
110 Taylor v. Gilmore, 954 F.2d 441, 445-46 (7th Cir. 1992).
111 *Id.* at 442-43.
112 *Id.*
113 Brief of Respondent at 1, Gilmore v. Taylor, 113 S. Ct. 2112 (No. 91-1738) (1993).
114 *Id.*
115 *Taylor*, 954 F.2d at 443.
116 *Id.*

Katie at Joyce's home later that morning.[117] After Taylor remembered that he had made other plans for that morning, he called Joyce back to arrange another time to pick up Katie.[118] This time, Siniscalchi answered and refused to let him speak with Joyce. Taylor then asked if Siniscalchi could bring Katie to meet him at the city pool the next morning. After Siniscalchi declined, Taylor offered to pick up Katie at that moment; Siniscalchi again refused.[119]

Angered by Siniscalchi's obstinancy, Taylor drove to Joyce's home. Upon arriving there, Taylor took a hunting knife out of his car and put it in his pants.[120] Taylor testified that he could hear Katie crying from outside of Joyce's apartment.[121] Taylor pounded on the door, then kicked it in after nobody answered. When Taylor entered the apartment, Katie was sitting on the floor near Joyce and Siniscalchi, who were in bed together.[122] Taylor testified that when he reached for Katie, Siniscalchi "started to roll out of bed and looked like he was reaching for something—I don't know—but that's when I jumped on him."[123] Taylor stated that after struggling with Joyce and Siniscalchi, "finally they threw me into the wall and I hit my head, and that's when I grabbed the knife."[124] Taylor stabbed Siniscalchi seven times.[125] Joyce testified that before leaving, Taylor told her "I love you."[126] Siniscalchi was pronounced dead by paramedics when they arrived at the apartment.[127] Police arrested Taylor at his home later that morning.[128]

B. THE TRIAL

At trial, Taylor admitted that he killed Siniscalchi, but claimed that he was guilty of voluntary manslaughter rather than murder because he had acted under a sudden and intense passion provoked by Siniscalchi.[129] The trial judge concluded that Taylor had presented sufficient evidence to require an instruction on voluntary manslaughter.[130]

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117 *Id.*
118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 Brief of Respondent at 3, Gilmore v. Taylor, 113 S. Ct. 2112 (No. 91-1738) (1993).
124 *Id.* at 3-4.
125 Gilmore v. Taylor, 113 S. Ct. 2112, 2114 (1993).
126 Brief of Respondent at 4, *Gilmore* (No. 91-1738).
127 *Id.*
128 *Gilmore*, 113 S. Ct. at 2114.
129 *Id.*
130 *Id.*

The instructions given to the jury at Taylor's trial were for all practical purposes identical to the Illinois Pattern Jury Instructions on murder and voluntary manslaughter.[131] The instruction for murder and the instruction for manslaughter were somewhat similar.[132] According to the instructions, murder had two elements: (a) that the defendant performed the acts that caused the victim's death and (b) that the defendant intended or knew that his acts would result in death or great bodily harm to the victim.[133] Voluntary manslaughter consisted of three elements. The first two elements were the same as the two elements of murder.[134] The third element of voluntary manslaughter was a mitigating mental state: either a sudden and intense passion resulting from serious provocation or an honest belief that deadly force was necessary to prevent death or serious

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131 *Id.* at 2115. *See* ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL §§ 7.02 and 7.04 (2d ed. 1981).

132 The instructions given at Taylor's trial were as follows:

To sustain the charge of murder, the State must prove the following propositions:

First: That the Defendant performed the acts which caused the death of Scott Siniscalchi; and

Second: That when the Defendant did so he intended to kill or do great bodily harm to Scott Siniscalchi; or he knew that his act would cause death or great bodily harm to Scott Siniscalchi; or he knew that his acts created a strong probability of death or great bodily harm to Scott Siniscalchi; or he was committing the offense of home invasion.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

To sustain the charge of voluntary manslaughter, the evidence must prove the following propositions:

First: That the Defendant performed the acts which caused the death of Scott Siniscalchi; and

Second: that when the Defendant did so he intended to kill or do great bodily harm to Scott Siniscalchi; or he knew that such acts would [sic] death or great bodily harm to Scott Siniscalchi; or he knew that such acts created a strong probability of death or great bodily harm to Scott Siniscalchi;

Third: That when the Defendant did so he acted under a sudden and intense passion, resulting from serious provocation by another.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses.

Id. at 2114-15.

133 *Id.*

134 *Id.*

injury.[135]

The jury found Taylor guilty of murder, and he was sentenced to prison for a term of thirty-five years.[136]

C. THE STATE POSTCONVICTION PROCEEDINGS

After Taylor's direct appeal failed, he filed a petition for state postconviction relief.[137] The circuit court dismissed Taylor's petition.[138] While Taylor's appeal was pending, the Illinois Supreme Court invalidated the Illinois Pattern Jury Instructions on murder and voluntary manslaughter in *People v. Reddick*.[139] Nevertheless, the court of appeals affirmed the denial of postconviction relief because *Reddick* invalidated the jury instructions on the basis of state law rather than constitutional error, which must exist before postconviction relief can be granted.[140] The Illinois Supreme Court denied Taylor's request for leave to appeal.[141]

D. THE FEDERAL HABEAS CORPUS ACTION

With no other state remedies available, Taylor brought a federal habeas corpus action in the United States District Court for the Central District of Illinois, asserting that the pattern jury instructions given at his trial violated due process.[142] Eleven days later, the Court of Appeals for the Seventh Circuit declared precisely that in the separate case of *Falconer v. Lane*.[143] *Falconer* held the instructions unconstitutional because they failed to explain to the jury that it could not return a murder verdict if it found that the defendant possessed a mitigating mental state.[144] Nonetheless, the district court denied Taylor relief, holding that *Teague v. Lane* precluded application of *Falconer* to Taylor's claim because *Falconer* announced a "new rule" that was not settled at the time of Taylor's conviction.[145]

The Seventh Circuit, in an unanimous opinion written by Judge Flaum, reversed.[146] In an effort to make sense of the Supreme Court's doctrine of nonretroactivity, the court articulated a two-part

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135 *Id.*
136 *Id.* at 2115.
137 *Id.*
138 *Id.*
139 526 N.E.2d 141 (Ill. 1988).
140 *Gilmore*, 113 S. Ct. at 2115.
141 *Id.*
142 *Id.* at 2116.
143 905 F.2d 1129 (7th Cir. 1990).
144 *Id.* at 1137.
145 *Gilmore*, 113 S. Ct. at 2116.
146 Taylor v. Gilmore, 954 F.2d 441 (7th Cir. 1992), *rev'd*, 113 S. Ct. 2112 (1993).

test to determine whether or not a case announced a new rule under *Teague*.[147] The first part of the test asks whether the case clearly falls into one of two categories—if it overrules or makes a clear break from prior decisions, it is a new rule, while if it applies a case that is almost directly on point to an analagous set of facts, it is not.[148] If the case does not clearly fall into either of the categories, then the second part of the test is used to determine "(1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of the factual context in which that precedent arose."[149]

Applying part one of its test, the court determined that *Falconer* did not depart from precedent and that there was no precedent directly on point at the time *Falconer* was decided.[150] Consequently, the court concluded that the *Falconer* rule was neither new nor old in an obvious sense.[151]

Next, the Seventh Circuit applied the second step of its analysis.[152] First, the court explained that *Falconer* did not depart from the holdings of any lower federal or state courts, since no court ever held that the instructions at issue in *Falconer* and *Taylor* were constitutionally adequate.[153]

Moving to part two of the second step—"the level of generality of prior precedent in light of the factual context in which that precedent arose"—the court looked for cases that stated rules specific enough to invalidate the instructions given at Taylor's trial.[154] The court cited two cases that satisfied this criterion: *Boyde v. California*[155] and *Connecticut v. Johnson*.[156] *Boyde* held that when ambiguous jury instructions create a reasonable likelihood that a jury will apply the instructions in an invalid manner, such instructions are themselves invalid.[157] *Johnson* held that an instruction that prevented the jury from considering evidence that may have exculpated the defendant violated his due process rights.[158] The court pointed out that any distinctions that could be made between its case and *Boyde*

147 *Id.* at 448.
148 *Id.*
149 *Id.*
150 *Id.* at 451.
151 *Id.*
152 *Id.*
153 *Id.* at 452.
154 *Id.*
155 494 U.S. 370 (1990).
156 460 U.S. 73 (1983).
157 *Boyde*, 494 U.S. at 380.
158 *Johnson*, 460 U.S. at 84-85.

and *Johnson* were insignificant.[159] The Court therefore concluded that *Falconer* did not announce a new rule but was simply an application of the rules in *Boyde* and *Johnson* to a similar set of facts.[160] Accordingly, the Court allowed retroactive application of *Falconer* and granted Taylor's petition for a writ of habeas corpus.[161]

The United States Supreme Court granted certiorari to decide whether *Falconer* could be retroactively applied to federal habeas cases under *Teague* and the line of cases that followed it.[162]

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

In a 7-2 decision, the United States Supreme Court reversed the Court of Appeals for the Seventh Circuit. Writing for the majority,[163] Chief Justice Rehnquist held that *Falconer* was not compelled by precedent existing at the time of Taylor's conviction and was therefore a new rule that could not be applied retroactively under *Teague*.[164] To support this conclusion, the Court first distinguished *Boyde v. California*[165] and *Connecticut v. Johnson*,[166] the cases cited by the Seventh Circuit in support of its holding.[167] The Court also rejected the Respondent's argument that the line of cases establishing a right to present a defense mandated the result in *Falconer*.[168] Finally, the Court concluded that the *Falconer* rule did not fall into one of the *Teague* exceptions.[169]

The Supreme Court found *Boyde* inapposite because that case involved a capital sentencing instruction.[170] Claiming that capital sentencing cases implicate the Eighth Amendment, the Court reasoned that the Constitution requires a greater degree of accuracy in fact finding in capital sentencing cases than it does in other types of proceedings.[171] The Court asserted that outside of the capital sentencing context, instructions involving errors of state law may not

159 Taylor v. Gilmore, 954 F.2d 441, 453 (7th Cir. 1992).
160 *Id.*
161 *Id.* at 454.
162 Gilmore v. Taylor, 113 S. Ct. 2112, 2116 (1993).
163 Chief Justice Rehnquist was joined by Justices Scalia, Kennedy, Thomas, and, in all but footnote 3 of the majority opinion, Souter.
164 *Gilmore*, 113 S. Ct. at 2119.
165 494 U.S. 370 (1990).
166 460 U.S. 73 (1983).
167 *Gilmore*, 113 S. Ct. at 2117-18.
168 *Id.* at 2118-19.
169 *Id.* at 2119.
170 *Id.* at 2117.
171 *Id.*

provide the basis for federal habeas relief.[172]

The Court distinguished *Johnson* because the instruction in that case created a presumption of fact that had the effect of relieving the State of its burden of proving an element of the crime, whereas *Taylor* only involved an error which created the risk that a jury would disregard the respondent's affirmative defense.[173] The Court refused to accept the Seventh Circuit's contention that the distinction between an element of a crime and an affirmative defense were insignificant as long as a defendant's right to present exculpating evidence was at stake.[174] Instead, the Court insisted that affirmative defenses were not entitled to constitutional protection.[175]

In addition to the precedents cited by the Seventh Circuit, the Respondent cited additional cases that related to the fundamental right of a defendant to present a defense.[176] The Court acknowledged that it had previously recognized that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."[177] The Court reasoned, however, that these words did not apply to restrictions imposed on a defendant's ability to present an affirmative defense because no prior case specifically prohibited such restrictions.[178]

Having determined that the *Falconer* rule was new, the Court turned to the issue of whether the rule fell under one of the two *Teague* exceptions.[179] The Court quickly decided that the rule did not decriminalize a class of conduct and moved on to the second exception.[180] The Court held the second exception inapplicable as well, acknowledging that while the new rule may improve the accuracy of criminal convictions, it was not the sort of procedure that the Court regarded as so fundamental that it was "implicit in the concept of ordered liberty."[181]

B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor, in a concurring opinion joined by Justice

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172 *Id.*
173 *Id.* at 2118.
174 *Id.*
175 *Id.*
176 *Id.* (citing Crane v. Kentucky, 476 U.S. 683 (1986); California v. Trombetta, 467 U.S. 479 (1984); Chambers v. Mississippi, 410 U.S. 284 (1973); Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14 (1967)).
177 *Id.* (internal quotations omitted).
178 *Id.* at 2118.
179 *Id.* at 2119.
180 *Id.*
181 *Id.* (internal quotations omitted).

White, agreed with the majority that the *Falconer* holding constituted a new rule.[182] She wrote separately, however, to express her belief that the majority engaged in an overly narrow reading of the Court's cases that was subject to misapplication.[183] According to Justice O'Connor, the majority came too close to declaring that the *Falconer* rule was not only new but incorrect.[184] Justice O'Connor believed that the "susceptible to debate among reasonable minds" standard set out in *Butler v. McKellar*[185] would have provided a more parsimonious means of achieving the result reached by the majority.[186] According to Justice O'Connor, the *Falconer* rule was new because it was at least subject to debate among reasonable minds.[187]

C. JUSTICE BLACKMUN'S DISSENT

Justice Blackmun, in a dissent joined by Justice Stevens, criticized the Court for failing to acknowledge the applicability of the second *Teague* exception, which permits retroactive application of "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[188] Justice Blackmun explained that the rule announced in *Falconer* fell under the second exception because it was essential to a fair trial and an accurate conviction.[189]

The dissent tried to demonstrate this by calling attention to the unconstitutional treatment that Taylor suffered in the absence of the *Falconer* rule. First, Justice Blackmun claimed that the erroneous instructions in this case applied an *ex post facto* law by equating murder with manslaughter at Taylor's trial, while at the time Taylor committed the offense Illinois law distinguished between the two.[190] Second, Justice Blackmun contended that since the jury instructions prevented the jury from even considering Taylor's provocation defense, the accuracy of his conviction was severely diminished.[191] Finally, the dissent asserted that the judge violated Taylor's Sixth and Fourteenth Amendment rights to a fair trial by preventing the jury from considering his defense.[192]

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182 *Id.* at 2120 (O'Connor, J., concurring).
183 *Id.* (O'Connor, J., concurring).
184 *Id.* at 2123 (O'Connor, J., concurring).
185 494 U.S. 407 (1990).
186 *Gilmore*, 113 S. Ct. at 2120 (O'Connor, J., concurring).
187 *Id.* (O'Connor, J., concurring).
188 *Id.* at 2123 (Blackmun, J., dissenting) (internal quotations omitted).
189 *Id.* at 2129 (Blackmun, J., dissenting).
190 *Id.* at 2126 (Blackmun, J., dissenting).
191 *Id.* at 2127 (Blackmun, J., dissenting).
192 *Id.* at 2128 (Blackmun, J., dissenting).

V. ANALYSIS

This Note criticizes the *Gilmore* decision because it denied Respondent Kevin Taylor a just resolution of the constitutional issue raised by his claim. Two factors effected this denial—the Court's excessively broad nonretroactivity doctrine and the Court's unprincipled application of that doctrine. Given the existence of these factors, an accurate predictive theory that will enable lower courts to resolve retroactivity issues remains elusive. In an attempt to address this problem, this Note will discuss reforms designed to narrow the definition of a new rule and reduce the uncertainty surrounding the Court's approach to retroactivity.

A. THE NONRETROACTIVITY BARRIER

The Court's nonretroactivity doctrine is more concerned with a state's interest in the finality of its judgments than it is with determining whether justice has been served. The majority's treatment of Kevin Taylor's claim provides an example. In order to avoid reaching the merits of the constitutional issue raised by Taylor, the majority engaged in a complicated discussion of the threshold issue of retroactivity.[193]

In the absence of a *Teague* inquiry, the issue in *Gilmore* would have been fairly clear, and the Court would have decided Taylor's claim. Taylor argued that he was erroneously convicted because the jury instructions given at his trial precluded the jury from returning his requested verdict of voluntary manslaughter.[194] It was undisputed that the instructions given at Taylor's trial created the possibility that the jury could return a verdict of guilty on the murder charge even if they found that Taylor had proven the elements of manslaughter.[195] Giving such instructions in a state that distinguishes between murder and manslaughter is an obvious error. For a unanimous Seventh Circuit, as well as Justice Blackmun and Justice Stevens, that error violated the Constitution.[196] At the very least, one would expect that the issue presented in *Gilmore*—whether or not the instructions given at his trial violated the Constitution—would be resolved by the majority.

However, the majority's *Teague* analysis prevented it from reaching this issue. Under *Teague* and its progeny, the Court could

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193 *Id.* at 2116.

194 Taylor v. Gilmore, 954 F.2d 441, 442 (7th Cir. 1992).

195 Brief of Petitioner at 12, *Gilmore* (No. 91-1738); *Taylor*, 954 F.2d at 450; *Gilmore*, 113 S. Ct. at 2118.

196 *Taylor*, 954 F.2d at 450; *Gilmore*, 113 S. Ct. at 2129 (Blackmun, J., dissenting).

not decide upon the constitutionality of the jury instructions unless it first determined that the ruling sought by Taylor was "dictated by precedent" and that the state courts' rejection of Taylor's claim was unreasonable.[197] Otherwise, the Court's decision would constitute a "new rule" which cannot be announced on collateral review under *Teague*.[198] The Court concluded that Taylor's claim did not meet these requirements and reversed the Seventh Circuit's grant of federal habeas relief.[199]

As *Gilmore* demonstrates, the bar against retroactivity detracts from analysis of constitutional issues. Rather than determining the merit of a claim under the Constitution, federal habeas review has degenerated into a determination of whether one decision dictates another or whether reasonable persons may take exception to a given application of precedent.

B. TAYLOR'S CLAIM DID NOT INVOLVE A NEW RULE

While the nonretroactivity barrier may itself be undesirable, perhaps the most disturbing aspect of the Court's decision in *Gilmore* is that Taylor's claim should have surmounted that barrier. This section argues that the Seventh Circuit's approach, which led to the conclusion that Taylor did not seek the benefit of a new rule, was more sensible than the analyses employed in any of the Supreme Court's three opinions in *Gilmore*.[200] In rejecting the Seventh Circuit's analysis or, in the dissent's case, failing to defend it, the Court only added to the confusion surrounding the *Teague* inquiry.

1. The Majority Opinion

In order to conclude that Taylor sought the benefit of a new rule, the majority had to distinguish three sources of support for Taylor's claim.[201] The first two were the precedents cited by the Seventh Circuit as dictating the result in *Falconer*: *Boyde v. California*[202] and *Connecticut v. Johnson*.[203] The third basis of support con-

197 *Gilmore*, 113 S. Ct. at 2116.

198 *Id.*

199 *Id.* at 2119.

200 For praise of the Seventh Circuit's analysis, see Marshall J. Hartman, *To Be or Not to Be a "New Rule": The Non-Retroactivity of Newly Recognized Constitutional Rights After Conviction*, 29 CAL. W. L. REV. 53 (1992).

201 *Gilmore*, 113 S. Ct. at 2117-19.

202 494 U.S. 370 (1990) (holding that a jury instruction is void where there is a reasonable chance that the jury applied the instruction in a way that prevents consideration of "constitutionally relevant" evidence).

203 460 U.S. 73 (1983) (holding that jury instructions are unconstitutional if they lead the jury to ignore exculpatory evidence).

sisted of a separate line of cases cited by Taylor that established the right to present a defense.[204] Taylor argued that these cases dictated the conclusion that the jury instructions given at his trial violated due process, even if *Falconer*, *Boyde*, and *Johnson* did not exist.[205] Justice Rehnquist distinguished these precedents from Taylor's case by overstating the importance of factual differences.

First, Justice Rehnquist contended that *Boyde*, which held that a jury instruction is unconstitutional when there is a reasonable likelihood that the jury applied that instruction in a way that prevented the consideration of "constitutionally relevant" evidence, could not compel the Seventh Circuit's decision in *Falconer*.[206] Justice Rehnquist claimed that since *Boyde* involved a capital case, requiring a "greater degree of accuracy and fact-finding" under the Eighth Amendment, it could not be applied to *Falconer*, a noncapital case.[207] In noncapital cases, the Court "never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, . . . instructions that contain errors of state law may not form the basis for federal habeas relief."[208]

The majority's distinction between capital and noncapital cases cannot be defended. As both the concurrence and the dissent pointed out, "*Boyde* did not purport to limit . . . that standard to capital cases, nor have we so limited it."[209] The concurrence and the dissent asserted that the majority's limitation contradicted *Estelle v. McGuire*,[210] a case in which the *Boyde* standard was applied to uphold an instruction in a noncapital case.[211]

The immediate ramifications of the majority's capital/noncapital distinction reveal its weaknesses. First of all, it implies that erroneous jury instructions cannot create constitutional error except in capital cases relating to the Eighth Amendment. As Justice O'Connor pointed out, this implication results from the majority's inaccurate interpretation of *McGuire*.[212] What *McGuire* really held was that a "*mere* error of state law, one that *does not rise to the level*

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204 *Gilmore*, 113 S. Ct. at 2118 (citing Crane v. Kentucky, 476 U.S. 683 (1986); California v. Trombetta, 467 U.S. 479 (1984); Chambers v. Mississippi, 410 U.S. 284 (1973); Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14 (1967)).

205 Brief of Respondent at 23-38, *Gilmore* (No. 91-1738).

206 *Gilmore*, 113 S. Ct. at 2117-18.

207 *Id.* at 2117.

208 *Id.* (citing Estelle v. McGuire, 112 S. Ct. 475 (1991)).

209 *Id.* at 2121 (O'Connor, J., concurring). *See also id.* at 2125 n.2 (Blackmun, J., dissenting).

210 112 S. Ct. 475 (1991).

211 *Gilmore*, 113 S. Ct. at 2121 (O'Connor, J., concurring).

212 *Id.* (O'Connor, J., concurring).

of a constitutional violation, may not be corrected on federal habeas."[213] Although the Court in *McGuire* did not hold that the erroneous instruction at issue violated the Constitution, the fact that the Court applied the *Boyde* standard to the instruction at all "belies any assertion that erroneous instructions can violate due process only in capital cases."[214]

By limiting the *Boyde* standard to the capital context, the majority also implied that evidence cannot be "constitutionally relevant" unless it relates to a capital case.[215] If this were true, a noncapital defendant could be denied the opportunity to testify, cross-examine witnesses and present a defense. It is hard to imagine how such an assertion can be reconciled with the Fourteenth Amendment's due process guarantee. As the concurrence pointed out, constitutional provisions other than the Eighth Amendment have established a right to present "constitutionally relevant" evidence.[216] Without the opportunity to have this evidence considered, this right would be meaningless.

The majority dismissed the remaining bases of support for Taylor's claim because they did not deal with an affirmative defense, as Taylor's case did.[217] Justice Rehnquist disagreed with the Seventh Circuit's interpretation of *Connecticut v. Johnson*[218] as establishing a "due process principle" that instructions are unconstitutional if they lead "the jury to ignore exculpatory evidence in finding the defendant guilty of murder beyond a reasonable doubt."[219] Justice Rehnquist stressed that *Johnson* involved an instruction which created an erroneous presumption as to an element of a crime, whereas Taylor's instruction created the risk that the jury would disregard evidence that supported his affirmative defense, with respect to which due process did not apply.[220] The majority did not explain, however, why the distinction between an element of a crime and an affirmative defense should make a difference. Indeed, the distinction

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213 *Id.* (O'Connor, J., concurring) (emphasis added).

214 *Id.* (O'Connor, J., concurring).

215 *Id.* at 2118 ("[I]n a noncapital case . . . there is no counterpart to the Eight Amendment doctrine of 'constitutionally relevant evidence' in capital cases.").

216 *Id.* at 2121 (O'Connor, J., concurring) (citing Rock v. Arkansas, 483 U.S. 44, 51 (1987) ("The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution."); Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination . . . .") (internal quotations omitted)).

217 *Gilmore*, 113 S. Ct. at 2118-19.

218 460 U.S. 73 (1983).

219 *Gilmore*, 113 S. Ct. at 2118 (quoting Taylor v. Gilmore, 954 F.2d 441, 453 (7th Cir. 1992)).

220 *Id.*

seems insignificant in a case like Taylor's, in which the defendant had admitted to the elements of the crime and the only remaining issue was the existence vel non of an affirmative defense.

The majority rejected Taylor's "right to present a defense" argument for the same reason. Although the majority acknowledged that "the Constitution guarantees criminal defendants a meaningful opportunity to present a defense,"[221] it noted that the cases establishing this right did not specifically deal with affirmative defenses.[222] Justice Rehnquist asserted that the right to present a defense did not include affirmative defenses, and concluded that "such an expansive reading of our cases would make a nullity of the rule reaffirmed in *Estelle v. McGuire* . . . that instructional errors of state law generally may not form the basis for federal habeas relief."[223]

Justice Rehnquist would have been wise to omit the word "generally," because this word reveals that granting Taylor's claim would in no way "nullify" the *McGuire* rule. The phrase "generally may not," unlike "cannot" or "never," contemplates a rule that has exceptions. The obvious exception to the *McGuire* rule are errors of state law that also violate due process and are therefore unconstitutional.[224] Taylor never argued that habeas corpus be granted because of an error of state law per se. Taylor alleged that his instruction violated due process.[225] Justice Rehnquist's circular explanation did not respond to the claim.

Once this flaw becomes apparent, no justification remains for carving out an affirmative defense exception to the right to present a defense. As Chief Justice Rehnquist put it, the Court's precedents establish that "the Constitution guarantees criminal defendants a meaningful opportunity to present a defense."[226] These precedents did not state that the Constitution guarantees a meaningful opportunity to present a defense in limited circumstances, nor did they hold that criminal defendants have a right to present all defenses except affirmative defenses. As the majority's post hoc limitation of precedent illustrates, the Court has let its preoccupation with finality cloud its judgment.

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221 *Id.* (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)) (internal quotations omitted).

222 *Id.*

223 *Id.* at 2118-19.

224 *See id.* at 2121 (O'Connor, J., concurring).

225 *Id.* at 2116.

226 *Id.* at 2118 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)) (internal quotations omitted).

2. *The Concurrence*

Although Justice O'Connor's criticisms of the majority were well-founded, her approach left much to be desired. Her opinion attacked the majority for its narrow reading of precedent and acknowledged that whether Taylor's jury instructions violated due process presented a difficult issue.[227] Justice O'Connor then concluded that because the answer was not clear, it was therefore "susceptible to debate among reasonable minds," and the inquiry could go no further under *Butler*.[228] While the majority engaged in an unprincipled analysis of the retroactivity issue, the concurrence offered almost no analysis at all.

The concurrence reasoned that it was not "begrudging or unreasonable" for the Illinois courts "to hold that jury instructions that create a reasonable likelihood the jury will not consider the [affirmative] defense do not violate the Constitution."[229] Such a holding is not "begrudging or unreasonable," according to Justice O'Connor, because the Constitution does not require the State to provide an affirmative defense of sudden and provoked passion that reduces murder to manslaughter in the first place.[230] While this argument may not be "begrudging or unreasonable" according to Justice O'Connor, she revealed that she was less than convinced when she admitted "our cases do not resolve conclusively the question."[231]

This assumption—that an affirmative defense can be disregarded because the Constitution does not require a state to provide it in the first place—can survive scrutiny only under a standard of subjective reasonableness that can be afforded only by a very strict interpretation of *Butler*. However, under the standard of "objective reasonableness" promulgated in *Stringer v. Black*,[232] an opinion in which Justice O'Connor herself joined, the argument fails. While it is true that states are not required to distinguish between murder and manslaughter, once a state has created the distinction by law, due process does forbid the arbitrary application of that law. If this was not true, and the concurrence's reasoning was correct, then tremendous injustice and absurdity would be possible. For example, a defendant who argues an affirmative defense could be deprived of his lawyer, or his jury could be taken away, or, as was a likely possi-

227 *Id.* at 2120-22 (O'Connor, J., concurring).
228 *Id.* at 2120-23 (O'Connor, J., concurring).
229 *Id.* at 2123 (O'Connor, J., concurring).
230 *Id.* at 2122 (O'Connor, J., concurring).
231 *Id.* at 2123 (O'Connor, J., concurring).
232 112 S. Ct. 1130 (1992).

bility in Taylor's case, the jury could be permitted to disregard his defense. Due process would tolerate these deprivations because the state does not have an obligation to provide the affirmative defense at all.[233]

Justice O'Connor's concurrence affords to state courts precisely the sort of deference that she implicitly and explicitly argued against in previous decisions. In *Penry v. Lynaugh*,[234] in which she wrote the majority opinion, and *Stringer v. Black*,[235] in which she joined the majority, the Court retroactively applied rules in spite of objections that those rules were quite susceptible to debate. Of *Teague*'s progeny, these two decisions define a "new rule" the most narrowly and are therefore the least deferential to state court interpretations of constitutional guarantees.[236]

In *Wright v. West*,[237] Justice O'Connor's concurring opinion flatly rejected the proposition that *Teague* established a deferential standard of review of state court determinations of federal law.[238] Justice O'Connor argued that "the standard for determining a new rule is objective," and she rejected the notion that "a state court's incorrect legal determination has ever been allowed to stand because it was reasonable."[239] On the contrary, she claimed, "[w]e have always held that federal courts, even on habeas, have an independent obligation to say what the law is."[240]

In *Gilmore*, however, Justice O'Connor let stand a state court interpretation based on a barely colorable argument precisely because she did not think it "begrudging or unreasonable."[241] Satisfied that the answer was not clear, Justice O'Connor concluded that she could go no further without announcing a new rule.[242] Whether one calls this deference or the nonretroactivity doctrine, the result was the same: a minimally reasonable state court interpretation of the Constitution went unchallenged, and the "independent obligation to say what the law is" was ignored.

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233 Interview with Lawrence C. Marshall, Counsel for Respondent, in Chicago, Illinois (Sept. 22, 1993).

234 492 U.S. 303 (1989).

235 112 S. Ct. 1130 (1992).

236 *See supra* part II.D.

237 112 S. Ct. 2482 (1992).

238 *Id.* at 2497 (O'Connor, J., concurring).

239 *Id.* (O'Connor, J., concurring).

240 *Id.* (O'Connor, J., concurring).

241 Gilmore v. Taylor, 113 S. Ct. 2112, 2122-23 (1993) (O'Connor, J., concurring).

242 *Id.* at 2123 (O'Connor, J., concurring).

3. *The Dissent*

The dissent proved disappointing because it avoided the new rule debate altogether, arguing instead that the rule sought by Taylor could be applied retroactively through *Teague*'s second exception.[243] The second exception permits the retroactive application of "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[244] Justice Blackmun argued that the *Falconer* rule came within this exception because the instructions at Taylor's trial created an *ex post facto* law, misinformed the jury as to the governing legal principles, and denied Taylor his right to a fair trial.[245]

The problem with this argument is that even if Justice Blackmun is correct, these constitutional violations are probably not enough to make the *Falconer* holding into the type of rule contemplated by the second exception, which the Court has designed and interpreted very narrowly.[246] While the *Falconer* ruling probably would have an affect on the accuracy of convictions, it does not satisfy the requirement of a "watershed" rule implicating the fundamental fairness of the trial.[247] Given the limited nature of the second exception, the dissent should have claimed that its reasons for finding Taylor's jury instructions unconstitutional provided reinforcement for the Seventh Circuit's conclusion that *Falconer* did not announce a new rule.

C. CONGRESSIONAL REFORM

Congress could substantially correct the problems in *Gilmore* and other applications of *Teague* in two simple ways: (a) it could directly repeal *Teague* or (b) it could cut back on the Court's broad definition of a new rule.[248]

Congressional repeal of *Teague* offers the best solution to the "new rule" problem. First, a repeal would eliminate the blanket prohibition on retroactive application of new rules, allowing federal

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243 *Id.* (Blackmun, J., dissenting).

244 *Id.* (Blackmun, J., dissenting) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

245 *Id.* at 2129 (Blackmun, J., dissenting).

246 *See supra* part II.C.

247 The Court has never retroactively applied a rule through this exception, and it has cited the ruling in Gideon v. Wainwright, 372 U.S. 335 (1963) (establishing the right to counsel in all criminal trials for serious offenses), as an example of the type of rule that is sufficiently groundbreaking to come within the second exception. Saffle v. Parks, 494 U.S. 484, 495 (1990).

248 *But see* Friedman, *supra* note 36, at 827 (speculating that Congress would probably not exercise its power to expand federal habeas jurisdiction because of public hostility toward criminal defendants).

courts to adjudicate claims based on their merits instead of devoting most of their resources to announcing complicated definitions of what is "new," "dictated by precedent," "reasonable," and "fundamental."[249] Eliminating the blanket prohibition on retroactivity would also allow federal courts to take into account other interests besides finality.[250] Under the pre-*Teague* standards for determining whether to apply a rule retroactively,[251] federal courts could also consider the government's interests in enforcing the Bill of Rights, perfecting and clarifying constitutional guarantees, prescribing minimum standards of due process that are consistent between the states, and overturning unconstitutional convictions. Of course, Congress would also do away with the Court's overinclusive definition of a new rule by repealing *Teague*.

Congress could also cut back on the Court's definition of a new rule without repealing *Teague* by disclaiming the "susceptible to debate among reasonable minds" standard announced in *Butler v. McKellar*.[252] In its place, Congress should articulate a narrower definition of a new rule that, like the definition proposed by Justice Harlan,[253] does not include logical and predictable applications of precedent. Proposals designed to accomplish this have been in Congress for the past several years, but as of yet, no habeas corpus reforms have been enacted.[254] The most recent proposal defines a new rule as "a rule that *changes* the constitutional or statutory standards that prevailed at the time the petitioner's conviction and sentence became final on direct appeal."[255] This proposal also prescribes a *de novo* standard of review for federal habeas claims,

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249 *See* Liebman, *supra* note 14, at 630-32 (arguing for congressional repeal of nonretroactivity doctrine in part because it increases litigation and adds to the burden of the courts).

250 For strong criticism of the Court's finality rationale, see Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 MINN. L. REV. 1015 (1993).

251 The pre-*Teague* standards included: (a) the purpose of the new rule, (b) extent of reliance by state officials on the old standards and (c) the effect of retroactive application of the new rule on the administration of justice. Stovall v. Denno, 388 U.S. 293, 297 (1967).

252 494 U.S. 407 (1990).

253 *See supra* note 41 and accompanying text.

254 *See, e.g.*, S. 1441, 103d Cong., 1st Sess. § 4 (1993) (defining a new rule as one that "changes . . . constitutional or statutory standards"); H.R. 3371, 102d Cong., 1st Sess. § 1104 (1991) ("[T]he term 'new rule' means a clear break from precedent, announced by the Supreme Court . . . that could not reasonably have been anticipated at the time the claimant's sentence became final in State court."); H.R. 5269, 101st Cong., 2d Sess. § 1305 (1990) (defining a new rule as "a sharp break from precedent" that "explicitly and substantially changes the law" and explaining that a rule "is not new merely because, based on precedent existing before the rule's announcement, it was susceptible to debate among reasonable minds").

255 S. 1441, 103d Cong., 1st Sess. § 4 (1993).

replacing the deferential standard implicitly established by *Butler*.[256]

By repealing the bar against retroactivity or by redefining a new rule in such a way that logical extensions of precedent are not regarded as new, Congress could eliminate the severe restrictions that *Teague* and its progeny have placed on federal habeas corpus. Such reforms would restore the federal courts' power to determine the correct interpretation of federal rights.

VI. CONCLUSION

In *Gilmore v. Taylor*,[257] the majority incorrectly reversed the Seventh Circuit, ruling that the nonretroactivity doctrine barred respondent Kevin Taylor's claim for federal habeas relief. To reach this result, the majority engaged in a narrow reading of its own cases. These cases, even under the standards set out in the Court's complicated "new rule" jurisprudence, dictated the decision reached by the Seventh Circuit. Exaggerating the legal relevance of insignificant factual differences, the majority failed to provide a meaningful basis for distinguishing these precedents.

Gilmore is the latest in a series of cases in which the Court manipulated the nonretroactivity doctrine to curtail the scope of federal habeas corpus. Under *Gilmore*, any time a federal habeas court announces a rule that differs with a minimally reasonable state court judgment, that federal court impermissibly makes "new" law. Consequently, the primary authority to determine the correct interpretation of federal constitutional rights rests not with federal courts, but with the states. By placing too high a value on the finality of state court convictions, the Court has forgotten what had once been the central issue of federal habeas corpus—whether or not a prisoner's conviction is constitutional. In the place of constitutional adjudication, the Court has erected a complicated jurisprudence of nonretroactivity. As *Gilmore* illustrates, this shift has altered the Court's approach to habeas corpus cases. Instead of using federal habeas to lend uniformity and clarity to constitutional criminal procedure, the Court in *Gilmore* seemed interested only in generating enough confusion to ensure that Taylor's claim would fail for seeking the benefit of a new rule.

TIMOTHY FINLEY

256 *Id.*

257 113 S. Ct. 2112 (1993).