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TO BE OR NOT TO BE A "NEW RULE:" THE NON-RETROACTIVITY OF NEWLY RECOGNIZED CONSTITUTIONAL RIGHTS AFTER CONVICTION

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Consider the reaction of the average member of the lay public to the following scenario taking place in a physician's office: a patient is diagnosed as having a fatal disease and given six months to live. Thereafter, within four months the New England Journal of Medicine reveals that a cure has been found for this terminal illness. Upon application to the doctor for the "new cure" which would save his life, the patient is told that it is unavailable to him, because under existing medical guidelines, the patient may be treated only by the medicine and procedures available to him at the date of diagnosis. Would such a revelation not be shocking to the public at large? Yet, it is precisely this kind of pronouncement that the legal profession now faces.

Ever since the United States Supreme Court handed down its rulings in *Teague v. Lane*[1] and *Penry v. Lynaugh*,[2] the question of which court decisions should apply retroactively has been a continuing source of debate in both state and federal forums; especially in dealing with cases on collateral review. In *Teague*, the United States Supreme Court held that the decision as to whether the "rule" of a case should be given retrospective application turned upon whether it was a "new rule." If it was, that "rule" would not apply retroactively to any case on collateral review. If, however, the "rule" announced in the decision was not a "new rule," then it would be applied retroactively to all cases on collateral review. *Penry* applied the *Teague* doctrine to capital cases as well.

With respect to cases on direct review, in *Teague*, the Supreme Court noted that it had already held in 1987 that where the defendant's conviction was not yet final, all subsequent Supreme Court decisions were retroactive,

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1. 489 U.S. 288 (1989), *reh'g denied*, 490 U.S. 1031 (1989).

2. 492 U.S. 302 (1989).

including those which enunciated "new rules."[3] Thus, the question that remained to be resolved in determining which constitutional decisions were to be given retrospective application in cases on collateral review was simply, what constituted a "new rule."

The answer to this question has been elusive at best, and subject to differing interpretations, even among the Justices of the Supreme Court. In *Taylor v. Gilmore*,[4] however, the Seventh Circuit Court of Appeals attempted to provide specific criteria for determining what does and what does not constitute a "new rule." In so doing, the opinion, authored by Judge Joel Flaum, has made a significant contribution to the emerging jurisprudence of retroactivity in federal habeas corpus cases.

Sections one through five of this article discuss the origin of the "new rule" concept and the difficulty of its application. Section six explores the nature of the criteria comprising Judge Flaum's formula for determining whether or not a decision constitutes a "new rule" for purposes of retroactive application in federal habeas corpus cases. Sections seven and eight analyze and apply Judge Flaum's criteria to recent federal and Supreme Court decisions. Finally, a brief critique of the "new rule" doctrine as it applies to death penalty cases concludes this article.

I. THE ORIGIN OF THE NEW RULE CONCEPT

Prior to *Teague* and *Penry*, the question of when a decision should be given retroactive application had already been the subject of much dispute in the Courts.[5] There was dissatisfaction with the unequal treatment afforded defendants under prior existing law.[6] Although at common law all prece-

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3. 489 U.S. at 304. The Court had held in *Griffith v. Kentucky*, that decisions announcing new constitutional rules of criminal procedure "are to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. 314, 328 (1987). Finality in a criminal conviction occurs when a decision is rendered by the United States Supreme Court, or certiorari denied on direct review, or the time within which to file a petition for writ of certiorari has expired. *Id. See Penry*, 492 U.S. at 314.

4. 954 F.2d 441 (7th Cir. 1992) *cert. granted*, 113 S. Ct. 52 (1992).

5. *See, e.g.*, Desist v. United States, 394 U.S. 244 (1969), *reh'g denied* 395 U.S. 931 (1969); Mackey v. United States, 401 U.S. 667 (1971).

6. *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966), *reh'g denied* 385 U.S. 890 (1966). *Johnson* was handed down one week after the Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). As in *Miranda*, Johnson did not receive any warnings concerning his Constitutional rights, and as a result his confession was introduced against him. Although Miranda was spared, Johnson's conviction and sentence of death were upheld under the retroactivity rules then extant. Those rules did not allow retroactive application of decisions whose main effect was to discipline the police. Under the retroactivity rules laid down by *Teague* and its progeny, Johnson would have obtained relief since his case was still on direct review. *See also* Stovall v. Denno, 388 U.S. 293 (1967), where the Court stated that the "new" constitutional rule it announced in that case would be applied prospectively only, but then allowed an exception for the particular litigant in whose case the rule had been announced. In *Stovall*, the test for retroactivity was formulated as a function of three considerations: "a) the purpose to be served by the new standards, b) the extent of the 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." *Id.* at 297. These cases were criticized by Justice Harlan

dents were retroactive,[7] just prior to *Teague*, existing precedent differentiated between rules aimed primarily at deterring police conduct and those designed to promote the accuracy of criminal proceedings. The former rules were held not to apply retroactively, while the latter rules were held to be retroactive.[8]

In addition, the approach of Justice Harlan, which had been expressed in prior concurring and dissenting opinions as early as 1969,[9] had begun to gain support. Justice Harlan had advocated simply allowing retrospective application of Supreme Court decisions to all cases on direct appeal, and denying retrospective application of those decisions which promulgated new constitutional rules to cases on collateral review, with two stated exceptions.[10] The first exception was for "substantive due process rules" which place as a matter of constitutional interpretation, certain primary, private individual conduct beyond the power of the criminal law making authority to proscribe.[11] The second exception was for bedrock procedural issues which "are implicit in the concept of ordered liberty."[12] In his view, this approach furthered the purpose of the writ of habeas corpus, i.e., to insure that state prisoners were not denied federal constitutional rights, existing at the time of their convictions.[13] At the same time, Harlan's approach did not impose upon the police a higher standard of law in dealing with a defendant than the law existing at the time the defendant's conviction became final.[14]

Prior to *Teague*, in *Yates v. Aiken*[15] the Supreme Court had already indicated that it was considering the Harlan approach to retroactivity. In *Yates*, the defendant and an accomplice robbed a store in South Carolina.[16] After the defendant left, both his accomplice and the storekeeper's wife were

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in *Desist*, 394 U.S. at 257, 258.

7. The reason that all decisions were applied retroactively under English Common Law was the Blackstonian belief that there was a true natural law, and "that the law should be taken to have always been what it is said to mean at a later date." Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring and dissenting). In other words, judges merely discovered the law, as opposed to creating it. Therefore, once a Judge "discovered" the proper applicable law with respect to a case, naturally it would be retroactive. It was not until the legal positivists introduced the notion that "law" was a creation of man, and was determined by what was written in the law books at any given time, that the question of whether a law should be given retroactive application became a real issue. *See* Linkletter v. Walker, 381 U.S. 618, 623-25 (1965).

8. Linkletter v. Walker, 381 U.S. 618 (1965).

9. *See, e.g., Desist*, 394 U.S. at 258-69 (Harlan, J., dissenting); Mackey v. United States, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring and dissenting).

10. *See Mackey*, 401 U.S. at 681, 689.

11. *Id.* at 692.

12. *Id.* at 693 (quoting Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

13. *Id.* at 686.

14. *See* Desist v. United States, 394 U.S. 244, 263 (1969).

15. 484 U.S. 211 (1988).

16. *Id.* at 212.

killed.[17] After the trial court instructed the jury to presume malice from the use of a deadly weapon, he was convicted and sentenced to death[18] The South Carolina Supreme Court affirmed the decision in 1982.[19]

Thereafter, on petition for habeas corpus to the state Supreme Court,[20] the defendant argued that this instruction was contrary to South Carolina law, as determined by subsequent state decisions, and contrary to the prior 1979 decision of the United States Supreme Court in *Sandstrom v. Montana*,[21] and its later 1985 decision in *Francis v. Franklin*.[22] These decisions held that such presumptions impermissibly shifted the burden of proof to the defendant with respect to an element of the offense.[23] The state supreme court denied the defendant's writ of habeas corpus, and the United States Supreme Court granted certiorari.[24]

Justice Stevens delivered the opinion for a unanimous Court. He noted first that the South Carolina Attorney General had suggested that the United States Supreme Court adopt the Harlan approach to retroactivity.[25] Justice Stevens pointed out that the Court had already adopted the first part of the Harlan approach, i.e., with respect to cases on direct appeal, Supreme Court rulings had already been held retroactive.[26] Justice Stevens then noted that the Court did not need to reach the question of the second part of the Harlan approach, i.e., whether "new constitutional rules" should apply to cases on collateral review, in order to decide the case at bar.[27] As Harlan had explained, some decisions, those based clearly on prior constitutional precedents, would not announce a "new rule."[28] The decisions in those cases, therefore, should apply to all subsequent cases, even those on collateral review.[29]

Justice Stevens then held that the 1979 decision in *Sandstrom* controlled in *Yates*.[30] Because that decision predated the affirmance of the defendant's conviction in 1982, there was no question of it being a "new rule."

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17. *Id.*

18. *Id.*

19. *Id.* (citing State v. Yates, 310 S.E.2d 805 (S.C. 1982), *cert. denied*, 462 U.S. 1124 (1983).

20. *Id.*

21. 442 U.S. 510 (1979).

22. 471 U.S. 307 (1985).

23. *Francis*, 471 U.S. at 317-18; *Sandstrom*, 442 U.S. at 523-24.

24. *Yates*, 484 U.S. at 213-14.

25. *Id.* at 215.

26. *Id.* (citing Griffith v. Kentucky, 479 U.S. 314, 322 (1987) (holding that Batson v. Kentucky, 476 U.S. 79 (1986), applies retroactively to all cases pending on direct appeal)).

27. *Yates*, 484 U.S. at 215-16.

28. *Id.* at 216 (quoting Desist v. United States, 394 U.S. 244, 263-64 (1969) (Harlan, J., dissenting)).

29. *Id.* at 216-17.

30. *Id.*

Therefore, the Court reversed and remanded *Yates*[31] because it was dictated by prior precedent.

Thereafter, on February 22, 1989 in *Teague v. Lane,* the Supreme Court issued what appeared to be a clear new principle of retroactivity concerning issues raised on collateral review. The *Teague* principle provided, as a general rule, that no "new constitutional rules" would be applied or announced in cases on collateral review.[32]

II. DEFINITIONS OF A "NEW RULE"

Accepting the "Harlan" approach turned out to be the easiest part of the Supreme Court's effort to resolve the problem of retroactivity in a fair and just manner. The real question of what constituted a "new rule" also devolved upon the Court in *Teague* to resolve. On that issue, Justice O'Connor, speaking for the majority, defined a "new rule" as one which "breaks new ground or imposes a new obligation on the states or Federal government."[33] The Court further defined a rule as new, "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[34] The Court reserved two exceptions: the first for a retroactive application of a "new rule" if it would decriminalize a class of conduct, and the second for "bedrock procedural" rules[35] "without which the likelihood of an accurate conviction is seriously diminished."[36]

Of course in *Teague*, there was no question but that had the petitioner prevailed, a "new rule" would have been announced on collateral review. There, the habeas petitioner questioned the retroactivity of the decision in *Batson v. Kentucky*,[37] relating to the abolition of discriminatory practices in jury selection. *Batson* had expressly overruled the decision in *Swain v. Alabama*.[38]

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31. *Id.* at 218.

32. 489 U.S. 288, 310 (1989).

33. *Id.* at 301.

34. *Id.*

35. *Id.* at 311 (quoting Justice Harlan's dissenting and concurring opinion in Mackey v. United States, 401 U.S. 667, 693-94 (1971)).

36. *Id.* at 313. The next year, in Saffle v. Parks, 494 U.S. 484 (1990), Justice Kennedy would characterize the "bedrock procedural" rule exception as applying only to "watershed" decisions, such as the right to counsel guaranteed in Gideon v. Wainwright, 372 U.S. 335 (1963).

37. 476 U.S. 79 (1986). In *Batson*, the Court held that it was a denial of the Fourteenth Amendment's guarantee of equal protection of the laws for a prosecutor to dismiss prospective jurors, even on peremptory challenge, if the sole reason for the dismissal was due to race. *Id.* at 84-89.

38. 380 U.S. 202 (1965). In *Swain*, which was overruled by *Batson*, the Court had ruled that in order to prove a Constitutional violation, it was the defendant's burden to show a systematic pattern of exclusion of blacks from the jury by the prosecution. As a practical matter, it was a burden almost impossible to prove by an individual defendant, as it involved examining the prosecution's *modus operandi* in a number of cases in order to show that the exclusion due to race in a particular case was not a isolated instance.

Then in *Penry v. Lynaugh*,[39] the Court held that granting Penry's petition for writ of federal habeas corpus would *not* constitute the announcement of a "new rule." Penry requested a rule that, when mitigating evidence such as that of mental retardation was offered, jury instructions must be given which would allow the jury to give effect to that mitigating evidence in determining whether the defendant should live or die.[40] Justice O'Connor, speaking for a majority of the Court, held that the result in *Penry* was *dictated* by the prior decisions of the Supreme Court in *Lockett v. Ohio*[41] and *Eddings v. Oklahoma*,[42] which had held that sentencing juries were entitled to hear all possible mitigating evidence prior to making a capital decision.[43]

Based upon its application in *Penry*, the *Teague* rule seemed reasonable, or at least tolerable, and there was little hue or cry about the case. Seemingly unnoticed was the fact that there were four dissenters as to whether *Penry* announced a "new rule." Justices Scalia, Rehnquist, White, and Kennedy would have held that *Penry* did announce a "new rule," and relief would therefore have been barred under *Teague*.[44] It was not until the decision of the Court in *Butler v. McKellar*[45] that the ramifications of *Teague* hit home with a driving force to the majority of capital litigants on habeas corpus review and their lawyers.[46]

III. APPLICATIONS OF *TEAGUE*

In order to understand why *Butler* brought home the implications of *Teague* so dramatically, we must review the backdrop of cases that led up to the Supreme Court's decision in *Butler*. These antecedent cases included a trio of cases arising out of Arizona: *Miranda v. Arizona*,[47] *Edwards v. Arizona*,[48] and *Arizona v. Roberson*.[49]

Miranda established the responsibility of law enforcement agents to advise custodial suspects of their constitutional rights, including that of their right to remain silent and to request counsel to enforce their Fifth Amend-

39. 492 U.S. 302 (1989).

40. *Id.* at 312.

41. 438 U.S. 586 (1978).

42. 455 U.S. 104 (1982)).

43. 492 U.S. at 318-19.

44. *Id.* at 350-52 (Scalia, J., dissenting).

45. 494 U.S. 407 (1990).

46. *See generally* Shelvin Singer & Marshall J. Hartman, *Collateral Attack on State Conviction: State Post-Conviction Hearing Act; State and Federal Habeas Corpus Proceedings, in* ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, DEFENDING ILLINOIS CRIMINAL CASES ch. 13S (1988, Supp. 1991).

47. 384 U.S. 436 (1966).

48. 451 U.S. 477 (1981).

49. 486 U.S. 675 (1988).

ment rights.[50]

In *Edwards*, the Court had upheld the suppression of a confession, where police detectives had reinitiated questioning of a defendant about a series of offenses, after the suspect had earlier expressed his desire not to talk to the police without a lawyer present.[51] The Court held that *once an accused asserted his request to deal with the police only through counsel*, the police were barred from further interrogation of the defendant until counsel had been provided, unless the accused himself initiated further communication with the police.[52]

Thereafter, in *Roberson*, Arizona sought an exception to the *Edwards* rule for the case where instead of two interrogations about the same offense, there were two interrogations about separate and unrelated offenses.[53] Roberson had been arrested for a burglary. When he requested an attorney, interrogation ceased, but three days later, another officer questioned Roberson about a second unrelated burglary.[54]

Roberson had not consulted with counsel in the three day interval between his request for an attorney on the original charge and the interrogation on the second charge.[55] The officer who questioned Roberson on the second burglary was not aware that he had asked for an attorney at the initial interrogation.[56] Further, prior to questioning, this officer advised Roberson of his *Miranda* rights, and this time Roberson waived his right to remain silent.[57] The State used Roberson's statements against him at the trial for the second burglary.[58]

Justice Stevens wrote the opinion of the Court, holding that a request for an attorney differed from a refusal to answer questions.[59] When he asks for a lawyer, the defendant raises the presumption that he cannot proceed through the criminal justice system without one.[60] Thereafter, the police cannot even ask him to waive his right to be silent without a lawyer present.[61] However,when he merely declines to answer questions,the suspect makes no such assertion.[62] In that context, a subsequent waiver of his Fifth Amendment rights may still arise, with or without the provision of

50. 384 U.S. 436 (1966).
51. *See Edwards*, 451 U.S. at 480.
52. *Id.* at 485.
53. 486 U.S. at 677.
54. *Id.*
55. *Id.* at 686.
56. *Id.* at 678.
57. *Id.*
58. *Id.*
59. *Id.* at 683.
60. *Id.*
61. *Id.* at 681.
62. *Id.* at 683.

counsel.[63]

Justice Stevens then held that because Roberson had requested counsel before being questioned on the first burglary, his statements relating to the second burglary were inadmissible as well.[64] There could be no exception or deviation from *Edwards* merely because the questioning was on an unrelated charge.[65] Justice Stevens concluded by noting that *Edwards* itself was soundly grounded on principles espoused in *Miranda v. Arizona*.[66]

The *Butler* case involved two separate incidents. Pamela Lane, a store clerk, was found dead near a pond in July 1980.[67] Six weeks later, Butler was arrested for assault and battery and, after invoking his Fifth Amendment right to counsel, Butler retained counsel, who appeared in Bond Court with him.[68] Butler, unable to make bail, was returned to the county jail after the hearing.[69] The next morning he was taken to the police station and questioned about the murder of Pamela Lane.[70] After receiving *Miranda* warnings, Butler confessed to the murder.[71] This time he did not request counsel at the police station.[72]

Butler was charged and convicted of first degree murder and sentenced to death.[73] The jury concluded that Butler had committed the murder during the course of a rape and was therefore eligible for the death penalty.[74] The South Carolina Supreme Court upheld the conviction, and the United States Supreme Court denied certiorari in 1982.[75]

In May, 1986 Butler filed a petition for federal habeas corpus relief.[76] He questioned, "whether police had the right to initiate questioning about the murder, knowing petitioner had retained an attorney for the assault charge."[77] The federal district court denied Butler's petition,[78] and the Court of Appeals for the Fourth Circuit affirmed.[79] The same day that Butler's petition for rehearing in the circuit court was denied, the Supreme

63. *Id.*
64. *Id.* at 686.
65. *Id.* at 685.
66. *Id.* at 680.
67. Butler v. McKellar, 494 U.S. 407, 409 (1982).
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 409-10.
72. *Id.* at 409.
73. *Id.* at 410.
74. *Id.*
75. State v. Butler, 290 S.E.2d 1 (S.C. 1982), *cert. denied*, 459 U.S. 932 (1982).
76. Butler v. McKeller, 494 U.S. at 410.
77. *Id.*
78. *Id.*
79. Butler v. Aiken, 846 F.2d 255 (1988).

Court handed down the decision in *Roberson*.[80]

Citing *Roberson*, Butler then filed a petition for a writ of certiorari in the Supreme Court.[81] Prior to *Teague*, Butler's writ of habeas corpus would clearly have been granted on the basis of *Roberson*. Even after *Teague*, one might have surmised that relief would not be denied by the Supreme Court since a majority of the *Roberson* Court had held that the result in *Roberson* was controlled by its prior decision in *Edwards v. Arizona*.[82] This would lead one to believe that *Roberson* had not announced a "new rule." However, Chief Justice Rehnquist, speaking for a majority,[83] comprised of the dissenters in *Penry* plus Justice O'Connor, held in *Butler* that *Roberson* had not been sufficiently dictated by *Edwards* to survive the *Teague* test.[84] Therefore *Roberson* had announced a "new rule," which was not available for retroactive application to *Butler* on habeas corpus review.[85] The Court therefore denied habeas corpus relief to Butler, over the vigorous dissents of Justices Brennan, Marshall, Blackmun, and Stevens.[86]

This, then, was the legacy of *Teague* as interpreted by the Chief Justice in *Butler*. So restrictive was this interpretation that, in the words of Justice Brennan, it effectively barred relief to any state prisoner unless he or she could show "that 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. With this requirement, the Court finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime."[87]

In his dissenting opinion, Justice Brennan further pointed out that under Chief Justice Rehnquist's interpretation of *Butler*, "a legal ruling sought by a federal habeas petitioner is now deemed 'new' as long as the correctness of the rule, based on precedent existing when the petitioner's conviction became final, is 'susceptible to debate among reasonable minds.'"[88] Justice Brennan summarized the Court's ruling by noting that, "under the guise of fine-tuning the definition of 'new rule,' the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration."[89]

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80. Butler v. McKeller, 494 U.S. at 412.

81. *Id.*

82. Arizona v. Roberson, 486 U.S. 675, 685-86 (1988).

83. This majority was comprised of the dissenters in Penry v. Lynaugh, 492 U.S. 302 (1989), *plus* Justice O'Connor.

84. *Butler*, 494 U.S. at 414-15.

85. *Id.*

86. *Id.* at 417.

87. *Id.* at 417-18 (Brennan, J. dissenting).

88. *Id.* (quoting the majority opinion, 494 U.S. at 415).

89. 494 U.S. at 417 (Brennan, J., dissenting).

IV. RETROACTIVITY BECOMES A THRESHOLD QUESTION

Another application of the "new rule" doctrine which denied retroactivity occurred in *Saffle v. Parks*,[90] decided shortly after *Butler*. In *Parks*, a gas station attendant was found shot to death in his station in Oklahoma City.[91] Parks was charged and convicted of capital murder.[92] At the sentencing hearing, the defense argued that Parks' youth, race, and broken home were mitigating factors that the jury should consider.[93] The trial judge then instructed the jury they "must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence."[94] The jury sentenced Parks to death.[95]

His conviction and sentence were upheld on direct appeal,[96] and the Supreme Court denied certiorari in 1983.[97] Thereafter, Parks filed a petition for writ of habeas corpus, alleging that by this "antisympathy instruction" the trial judge had in effect told the jury to disregard the mitigation that Parks had presented at the sentencing hearing.[98] Sitting en banc, the Court of Appeals reversed the denial of the writ by the District Court, holding that the instruction violated the Eighth Amendment for the reasons advanced by Parks.[99] This time the Supreme Court granted certiorari and reversed the Court of Appeals.[100]

Justice Kennedy, speaking for the same five person majority that decided *Butler*,[101] began his analysis by noting that Parks' case was on collateral review.[102] The first question, therefore, was "whether the relief sought would create a new rule under . . . [*Teague*] and *[Penry*]."[103] Justice

90. Saffle v. Parks, 494 U.S. 484 (1990).

91. *Id.* at 486.

92. *Id.*

93. *Id.*

94. *Id.* at 487.

95. *Id.*

96. Parks v. State, 651 P.2d 686 (1982), *cert. denied*, 459 U.S. 1155 (1983).

97. Parks v. Oklahoma, 459 U.S. 1155 (1983).

98. Parks relied on the earlier decisions of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 105 (1982). *See infra* notes 108 and 109. These cases stood for the proposition that the jury was entitled to hear all relevant mitigating evidence. He also relied on California v. Brown, 479 U.S. 535, 545 (1987). *Brown*, decided after Parks' conviction became final, approved an instruction telling the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Brown*, 479 U.S. at 539. However, this was interpreted as applying to sentiment not based upon the evidence. Parks argued that the corollary to *Brown* was that such an instruction could not be given to preclude jurors from utilizing sympathy or sentiment based upon mitigating evidence. Saffle v. Parks, 494 U.S. at 494.

99. Parks v. Brown, 840 F.2d 1496 (10th Cir. 1988).

100. 490 U.S. 1034 (1989).

101. *See supra* notes 67-90 and accompanying text. The majority Justices in both *Butler* and *Parks* were Chief Justice Rehnquist, and Justices White, O'Connor, Scalia and Kennedy.

102. Saffle v. Parks, 494 U.S. at 487.

103. *Id.*

Kennedy then observed that when the Court explicitly overruled a prior precedent, clearly a new rule was created.[104] But the more difficult question raised in *Butler* was whether, even in the case of a decision which was dictated by prior precedent, the Court "announce[s] a new rule when a decision extends the reasoning of [its] prior cases."[105] Since the goal of habeas corpus was to insure that state court procedure comported with interpretations of the Constitution at the time of petitioner's conviction, Justice Kennedy's test was to determine whether precedent existing at the time petitioner's conviction became final would have "compelled" the state court to conclude that the rule sought was required by the Constitution. If not, then the decision constituted a "new rule."[106] Under this reasoning, a state court decision would withstand a habeas corpus attack even if it was shown to be contrary to later decisions. This would occur, so long as when made, the state court decision was a reasonable interpretation of existing precedents.

Kennedy then concluded that the rule sought by Parks was not dictated by prior decisions in cases such as *Lockett v. Ohio*[107] and *Eddings v. Oklahoma*,[108] which had held that the State cannot bar relevant mitigating evidence from being considered by the jury. But they did not deal with "*how* it must consider the mitigating evidence."[109] Therefore, the rule Parks sought would have been a new rule, of which retroactive application to him was prohibited by *Teague* and *Butler*.[110] Consequently, Justice Kennedy never reached the question of whether the action of the trial court in giving the "antisympathy instruction" violated Parks' constitutional rights. Thus "retroactivity" had become a threshold question, and the merits of a case would never be reached in the future unless it was determined that retroactive relief was not barred by a "new rule."

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented.[111] He began his analysis by observing that the Court "displays undue eagerness to apply the new standard for retroactivity announced in

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104. *Id.* at 488.

105. *Id.*

106. *Id.*

107. In Lockett v. Ohio, 438 U.S. 586 (1978), a plurality of the Court decided that an Ohio death penalty statute that limited the jury's consideration to specified mitigating circumstances violated the constitutional requirement of individualized sentencing in capital cases. It held that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Id.* at 604.

108. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court ruled that a sentencing judge may not refuse to consider mitigating evidence presented by a capital defendant concerning his family history and troubled childhood.

109. *Parks*, 494 U.S. at 490.

110. *Id.* at 494.

111. *Id.* at 495.

Butler, at the expense of thoughtful legal analysis."[112] Justice Brennan then pointed out that what was at issue in *Parks* was the possibility that the "anti-sympathy" instruction prevented the jury, or at least some of them, from considering Parks' mitigation evidence.[113] To that extent, he argued, that result would be prohibited by *Eddings* and *Lockett*, which held that "a sentencer may 'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"[114] It is significant to note here that the four dissenting justices of the Supreme Court were in agreement with the Court of Appeals for the Tenth Circuit, which had held that the result in *Parks* was dictated by *Eddings* and *Lockett*.

Justice Brennan also noted the similarity to the question in *Penry*, i.e. whether *Lockett* and *Eddings* dictated the result, when there was a question of a jury not being able to utilize mitigating information in an effective manner.[115] Justice Brennan then pointed out that the result in *Parks* was also contrary to that reached by the Supreme Court in *Penry*.[116] However, that is interesting, because the dissenters in *Penry* became the majority of the Court in *Parks*, with the addition of Justice O'Connor, who had written the majority opinion in *Penry*.

Finally, Justice Brennan noted that even if *Parks* would announce a new rule by outlawing this "anti-sympathy instruction," it should fall under the second exception to the retroactivity rule enunciated in *Teague*, which related to "bedrock procedural" issues.[117] He would not limit this exception to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding"[118] as the majority would. His view was that individualized sentencing in a life or death situation was of sufficient importance to invoke the retroactivity of *Teague*'s stated exceptions.[119]

V. THE WORST OF BOTH POSSIBLE WORLDS

Sawyer v. Smith[120] reinforced the definition of a "new rule," as interpreted by *Butler v. McKellar*.[121] In *Sawyer*, the Court denied relief

112. *Id.* at 496.
113. *Id.* at 498-99.
114. *Id.* at 501 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978); and citing Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982)).
115. *Id.* at 502.
116. *Id.* at 503.
117. *Id.* at 505.
118. *Id.* (quoting Teague v. Lane, 489 U.S. 288, 311 (1989))).
119. *Id.* at 505-06.
120. Sawyer v. Smith, 497 U.S. 227 (1990).
121. *See supra* notes 67-89 and accompanying text.

to a habeas petitioner whose murder conviction and sentence of death became final prior to the decision of the United States Supreme Court in *Caldwell v. Mississippi*.[122] The Court employed the "new rule doctrine to bar federal habeas corpus relief to Sawyer where he had apparently failed to raise the Caldwell issue on direct review.[123] However, in another case decided in 1989, in which a habeas petitioner failed to raise the identical *Caldwell* issue, the Court barred relief on the grounds of waiver, i.e. that the issue was not novel enough to justify not having been raised by the petitioner in his direct appeal in the state court.[124]

In *Sawyer*, petitioner and a co-defendant were convicted of killing a female visitor who resided in his house. The killing was brutal, as it involved stripping the victim, beating her, dousing her with lighter fluid, and finally setting her afire.[125] The prosecutor told the jury in closing argument that a sentence of death would be "merely a recommendation," and that others would be able to correct it if it turned out to be wrong.[126] Actually, this statement was a misstatement of the law, since review by the Louisiana Supreme Court was limited to the question of whether the sentence was excessive.[127] More importantly, it shifted the jury's sense of responsibility to a higher authority.[128] The jury sentenced the defendant to death,[129] and his conviction and sentence were affirmed by the Louisiana Supreme Court.[130] After various petitions were granted and denied, petitioner filed a writ of federal habeas corpus, citing *Caldwell*, which was handed down one year after Sawyer's conviction became final.[131]

In *Caldwell*, the prosecutor had informed the jury during closing argument that they need not worry if they imposed the death penalty on the defendant, since the state Supreme Court would review the sentence automatically on appeal.[132] The United States Supreme Court held that such a statement, attempting to shift responsibility for the decision, was inconsistent with the Eighth Amendment's heightened need for reliability in the determination that death was the appropriate punishment for a specific defendant.[133] The Court then vacated Caldwell's sentence of death.[134]

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122. 472 U.S. 320 (1985).

123. *See* Louisiana v. Sawyer, 422 So. 2d 95 (La. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983). Although the Louisiana Supreme Court did consider certain statements made by the prosecutor in the sentencing hearing, those statements did not involve the reversibility of the death sentence. *Id.* at 104-05.

124. *See* Dugger v. Adams, 489 U.S. 401 (1989).

125. *Id.* at 230-32.

126. *Id.* at 245 (Marshall, J., dissenting).

127. *See id.*

128. *Id.* at 232.

129. *Id.* at 230.

130. *Id.* at 232.

131. *Id.*

132. *Caldwell*, 472 U.S. at 325-26.

133. *Id.* at 341.

Sawyer argued in his petition for federal habeas corpus that *Caldwell* required reversal of his death sentence, because the same attempt to shift responsibility for the jury's decision was made in his case as well.[135] The Supreme Court's majority opinion in *Sawyer*, written by Justice Kennedy, and joined in by Chief Justice Rehnquist, and Justices White, O'Connor, and Scalia denied federal habeas relief, citing *Teague v. Lane*.[136] Justice Kennedy noted first that in *Teague*, the Court had held that a "new rule" of constitutional law established after a petitioner's conviction had become final could not be used to attack the conviction on federal habeas corpus, unless the rule fell into one of two narrow exceptions.[137] Kennedy then went on to hold that *Caldwell* had announced such a new rule, and therefore retroactive relief was barred to Sawyer because he failed to qualify for either exception.[138]

The dissent authored by Justice Marshall, and joined in by Justices Brennan, Blackmun, and Stevens argued that *Caldwell* did not announce a "new rule" of constitutional law. The dissent began its analysis by pointing out that even under the *Teague-Butler* standard, if the answer to a legal question was not susceptible to debate among legal minds, or if existing precedent would have compelled state courts to provide relief at the time the defendant's conviction became final, the decision would not announce a "new rule."[139] In the case of *Caldwell*, the shifting of the burden from the jury to some higher authority tainted the entire decision making process of the jury, and was central to the reliability of the procedure.[140] A number of earlier Supreme Court decisions had emphasized the importance of the sentencer confronting the "truly awesome responsibility of decreeing death for a fellow human...with due regard for the consequences of their decision."[141] Justice Marshall then noted that by the time of *Caldwell*, it was "a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the state."[142] Thus *Caldwell* was virtually "dictated" by prior precedent, and therefore did not announce a "new rule" within the meaning of *Teague v. Lane*, and its progeny.[143]

The dissent also tried to get around *Teague's* retroactivity bar by fitting Sawyer's case into one of the narrow exceptions noted by *Teague*. Even

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134. *Id.*

135. *Sawyer*, 497 U.S. at 232.

136. *Id.* at 234.

137. *Id.* at 241. *See supra* notes 34-36 and accompanying text (discussing *Teague* and exceptions).

138. *Id.* at 245.

139. *Id.* at 246-47.

140. *Id.* at 247-88.

141. *See id* at 247 (citing Lockett v. Ohio, 438 U.S. 586, 598 (1978)).

142. *Id.* at 247 (quoting *Caldwell*, 472 U.S. at 329).

143. *Sawyer*, 497 U.S. at 247 (quoting *Caldwell*, 472 U.S. at 329).

under the *Teague-Butler* formulation, if it were a rule "without which the likelihood of an accurate [verdict] is seriously diminished,"[144] that rule would be available on federal habeas corpus. Justice Marshall noted that such an approach was consistent with the prior rules of retroactivity which had always recognized the difference between rules primarily aimed at deterring police conduct and those designed to promote the accuracy of criminal proceedings.[145]

The dissent argued that telling the jury not to worry because someone else would correct their mistake if they voted to kill the defendant, seriously undermined the accuracy of the jury deliberations, and therefore *Caldwell* should be applied retroactively, even if it did announce a new rule.[146] Notwithstanding the vigorous dissent by four justices, the merits of Sawyer's petition for habeas relief was never ruled upon, since it failed to pass the threshold requirement of retroactivity. Moreover, for the majority, it was not such a watershed decision that went to the accuracy of the criminal proceeding, and was therefore not retroactive on that ground either.

Thus, Sawyer's conviction and sentence of death were affirmed. Justice Marshall summed up his view of this line of decisions when he concluded, "the Court is less concerned with safeguarding constitutional rights than with speeding defendants, deserving or not, to the executioner. I dissent."[147]

It is ironic to note that, in a prior term of the Supreme Court, the Court refused to overturn the death sentence of a defendant on Federal Habeas Corpus review who raised a *Caldwell* type issue, on wholly different grounds. In *Dugger v. Adams*, the petitioner, had failed to raise the *Caldwell* issue in the Florida Supreme Court three years before *Caldwell* was decided by the United States Supreme Court, but the Court did not deny relief because *Caldwell* had enunciated a new rule, but rather because the issue was not novel enough under existing Florida law to justify not raising the issue in the first instance.[148]

In *Dugger*, the trial judge had instructed the jury not to worry about imposing the death sentence in a murder case because it was just a recommendation to him, which he was free to disregard. The trial judge concluded by telling the jury, "that's only my decision to make and it has to be on my conscience. It cannot be on yours."[149] As in *Sawyer*, that statement was contrary to state law. The Florida Supreme Court had held that a judge could disregard a jury sentencing decision only "if the facts were 'so clear and

144. *Id.* (alteration in original) (quoting *Teague*, 489 U.S. at 313).

145. *Id.* at 258. *See* Linkletter v. Walker, 381 U.S. 618 (1965) (holding rules aimed at deterring police conduct not to be retroactive, but holding those designed to promote the accuracy of the criminal proceedings to be retroactive).

146. *Sawyer*, 497 U.S. at 254-57.

147. *Id.* at 260.

148. Dugger v. Adams, 489 U.S. 401 (1989).

149. *Id.* at 403.

convincing that virtually no reasonable person could differ.'"[150]

The jury imposed the death sentence, which was affirmed by the Florida Supreme Court in 1982, without the defendant having raised this issue.[151] After *Caldwell* was decided in 1985, Dugger filed post conviction and federal habeas corpus petitions, citing *Caldwell*.[152] The Eleventh Circuit vacated the death penalty,[153] and the Supreme Court granted certiorari,[154] and reversed the Eleventh Circuit.[155]

Justice White, writing for the majority of the Supreme Court, found that the claim was not "novel" enough under Florida law to excuse the failure of the petitioner to raise the issue first on direct appeal to the Florida Supreme Court, prior to the United States Supreme Court's decision in *Caldwell*.[156] Since the *Caldwell* issue had not been raised in the first instance, the petitioner was barred from application of the *Caldwell* rule due to waiver and procedural default.[157]

The effect of these two decisions, considered together are reminiscent of the fate of those who slept in the "Bed of Sodom." According to an ancient Biblical folktale, visitors coming to an inn in the wicked Biblical city of Sodom, were given a specially designed bed. If their legs were too long for the bed, their legs were cut off. If their legs were too short for the bed, their legs were stretched to fit. In either event, death and pain soon followed. So, too, petitioners seeking to redress their grievances in the federal courts now are caught in a virtual "Bed of Sodom." Barred by waiver, if the principle of law first sought to be raised on collateral attack was known at the time of conviction, or barred because its application would announce a "new rule" if it was not known at the time of conviction, these defendants are condemned to die, as their non-retroactive constitutional claims cry out in vain for justice in the highest courts of the land.

VI. THE FLAUM APPROACH

In *Taylor v. Gilmore*,[158] the defendant was charged with the murder of his wife's lover.[159] He admitted the killing, but maintained that he was only guilty of manslaughter.[160] The jury received the Illinois Pattern

150. *Id.* at 403 (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)).
151. *Dugger*, 489 U.S. at 404.
152. *Id.* at 405.
153. *Id.* at 406 (citing Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), *modified on denial of rehearing*, 816 F.2d 1493 (1987)).
154. 485 U.S. 933 (1988).
155. *Dugger*, 489 U.S. at 406.
156. *See id.* at 408.
157. *Id.* at 410.
158. 954 F.2d 441 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 52 (1992).
159. *Id.* at 442.
160. *Id.*

Instructions for both murder and manslaughter as well as verdict forms for both crimes.[161] The jury returned a verdict of murder, instead of manslaughter.[162] The conviction was affirmed by the Illinois Appellate Court, and leave to appeal was denied by the Illinois Supreme Court.[163] Taylor then filed a post-conviction petition, which was dismissed by the trial court.[164] Thereafter, the Illinois Supreme Court acknowledged in *People v. Reddick*, that the Illinois Pattern Instructions for manslaughter, which were used in Taylor's case, were faulty.[165] Taylor appealed from the denial of his post conviction petition, citing *Reddick*, but the Illinois Appellate Court affirmed, holding that *Reddick* was decided on state grounds, and therefore not a basis for post-conviction relief in Illinois.[166]

Taylor then filed a petition for a writ of habeas corpus in the federal district court, raising the same issue.[167] Eleven days later in *Falconer v. Lane*,[168] the Seventh Circuit decided that the Illinois Pattern instructions for murder and manslaughter, when read together, violated due process as well as state law.[169] However, the federal district court denied Taylor's petition on the grounds that both *Reddick* and *Falconer* had announced "new rules" as defined by *Teague v. Lane*.[170] Therefore, the district court denied Taylor post-conviction relief under *Teague*. He appealed to the Seventh Circuit Court of Appeals.

The case was assigned to a panel consisting of Judges Posner, Flaum, and Manion.[171] Judge Flaum began his analysis of whether or not the decisions in *Falconer* and *Reddick* in fact enunciated "new rules" by first characterizing the easy case for a "new rule," i.e., "any decision that explicitly overrules a prior case, significantly departs from precedent, or decides a question previously reserved. Conversely, a decision clearly does not announce a new rule if it merely applies precedent, almost directly on point, to a [closely] analogous set of facts."[172]

However, Justice Flaum noted that determining whether a case extends prior precedent or merely applies it in a somewhat different factual setting,

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161. *Id.* at 444.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Reddick*, 526 N.E.2d 141, 145-46 (Ill. 1988), *cited in* Taylor v. Gilmore, 954 F.2d at 444.
166. People v. Taylor, 536 N.E.2d 1312 (Ill. App. Ct. 1989). Thereafter the Illinois Supreme Court denied leave to appeal. Taylor v. Gilmore, 954 F.2d at 444.
167. Taylor v. Gilmore, 954 F.2d at 444.
168. 905 F.2d 1129 (7th Cir. 1990).
169. *Id.* at 1136.
170. Taylor v. Gilmore, 954 F.2d at 445 (citing United States *ex rel.* Taylor v. Gilmore, 770 F. Supp. 445, 448 (C.D. Ill. 1990)).
171. Taylor v. Gilmore, 954 F.2d at 442.
172. *Id.* at 445 (citations omitted).

"is more an art than a science."[173] In order to aid in distinguishing "old rules" from "new rules" in a close case, Judge Flaum suggested two criteria for identifying a "new rule." The first criterion was whether any lower courts, federal or state, had reached a contrary conclusion as to the precise legal issue; if it had, then the rule was "new."[174] The second criterion was the level of generality of its underlying precedent: the more general a precedent was, the more likely it was that its progeny would announce a new rule.[175] Conversely, the more specific a precedent was, the less likely it was that its progeny would announce a new rule.

As an example of the first criterion, Judge Flaum cited the controversy over *Roberson*.[176] The habeas petitioner in *Butler*[177] argued that *Roberson* was dictated by *Edwards*,[178] and therefore did not announce a new rule. However, there had been a split in the federal circuits over this issue (i.e. whether the Fifth Amendment prohibited further questioning by police in a second unrelated charge after the defendant requested counsel on the first charge) after *Edwards* came down, and until *Roberson* decided it. That split indicated that the *Roberson* decision was not compelled by precedent, and "hence that it announced a new rule."[179]

Judge Flaum also analyzed the holding that *Roberson* announced a new rule, utilizing his second criterion. Under this analysis the rule of *Edwards* was simply too general.[180] In order to have compelled *Roberson*, *Edwards* would have to have been more specific, e.g. it could have stated, "police shall refrain from all further interrogation after a defendant asks for counsel, whether or not the second interrogation involves the same crime than [sic] the first."[181] Thus, according to Judge Flaum, the United States Supreme Court in *Butler* viewed *Roberson* as a new rule because the general rule in *Edwards* had a latent ambiguity, i.e. it did not specifically forbid subsequent interrogation on matters unrelated to the first interrogation.[182]

VII. DID FALCONER ANNOUNCE A NEW RULE?

Having identified the criteria, Judge Flaum now set about to apply them to the *Falconer*[183] situation to determine whether its holding should be

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173. *Id.* at 445-46.
174. *See id.* at 446.
175. *Id.*
176. *See supra* notes 48, 53-66 and accompanying text (discussing *Roberson*).
177. *See supra* notes 45, 67-90 and accompanying text (discussing *Butler*).
178. *See supra* notes 47, 51-52 and accompanying text (discussing *Edwards*).
179. Taylor v. Gilmore, 954 F.2d at 446.
180. *Id.* at 447.
181. *Id.*
182. *Id.*
183. Falconer v. Lane, 905 F.2d 1129 (7th Cir. 1990). *See supra* notes 168-69 and accompanying text.

given retrospective application to cases on collateral review. The decision in that case was based upon a federal constitutional claim, and therefore appropriate as grounds for federal habeas relief. In *Falconer*, the Seventh Circuit had considered the same murder and manslaughter instructions used in Taylor's trial.[184] The federal court determined that when read together, the two sets of instructions could have left the jury "with the false impression that it could convict the petitioner of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction."[185] Therefore, the court held that this violated petitioner's due process rights, and reversed Falconer's murder conviction.[186]

Both the state and the defense agreed that based upon *Falconer*, the jury instructions given in *Taylor* violated Taylor's due process rights. The State argued however that *Falconer* announced a "new rule" since the decision departed from previously expressed views of the Seventh Circuit itself on the Illinois murder and voluntary manslaughter statutes.[187] If that were true, Judge Flaum argued, then that would be the easy case, and *Falconer* would indeed announce a new rule. However, after distinguishing two earlier Seventh Circuit cases provided by the state, in which manslaughter instructions were not given because the defendant below could not establish the factual basis for the instructions,[188] Judge Flaum concluded that the easy case could not be justified, and that *Falconer* did not clearly depart from established precedent.[189] Therefore, in order to resolve the question of whether it announced a new rule, he was required to engage in the two part analysis that he had suggested above for close cases.

The first part of the analysis related to whether any lower state or federal court had previously disagreed with the ruling handed down in *Falconer*. After reviewing the state's contentions, Judge Flaum concluded that there were no cases that would indicate a split in authority.[190] The only cases cited by the state were cases in which the trial judge refused to tender manslaughter instructions because the defendant failed to present sufficient evidence to justify such an instruction,[191] or cases which based their decisions on state law, and not on the Due Process Clause of the 14th Amendment.[192] Therefore, under the first criterion, *Falconer* did not announce a new rule, and must be given retrospective application.

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184. *Taylor*, 954 F.2d at 448, 450.

185. *Falconer*, 905 F.2d at 1136.

186. *Taylor*, 954 F.2d at 450 (discussing *Falconer*).

187. *Id.*

188. *See* Peery v. Sielaff, 615 F.2d 402 (7th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); and Bacon v. DeRobertis, 728 F.2d 874 (7th Cir.), *cert. denied*, 469 U.S. 840 (1984).

189. *Taylor*, 954 F.2d at 451.

190. *Id.* at 452.

191. *Id.* at 451; *see* Fleming v. Huch, 924 F.2d 679 (7th. Cir. 1991).

192. *Id.* at 452; *see* People v. Howard, 487 N.E.2d 656 (1985) and People v. McGee, 443 N.E.2d 1057 (1982).

Regarding the second criterion (the level of generality of the case law underlying the court's decision in *Falconer*), Judge Flaum concluded that the case law preceding *Falconer* was specific enough to have compelled *Falconer's* result, and therefore *Falconer* did not announce a new rule.[193] Judge Flaum began this analysis by breaking up the decision in *Falconer* into two basic premises: the first was that the instructions were ambiguous and susceptible to more than one interpretation,[194] and the second was that a murder verdict reached without the jury ever considering the defendant's manslaughter defenses violated due process.[195]

With respect to the first premise, Judge Flaum began by citing *Cupp v. Naughton*,[196] as authority for the proposition that a federal court may overturn a state conviction if the "ailing" jury instructions "so infected the trial that the resulting conviction violates due process."[197] That holding alone would have been too general to have compelled the result in *Falconer*. However, Judge Flaum also considered *Boyde v. California*,[198] which asked whether there was a reasonable likelihood that the jury could have applied the challenged instructions in an invalid manner.[199] *Falconer*, therefore, was a reasonable application of the principles in *Cupp* and *Boyde* because it impliedly held that there was a reasonable likelihood that the jury applied the Illinois murder and manslaughter instructions in an erroneous manner.[200] Flaum conceded that *Falconer* was the first case to assert that these particular instructions were ambiguous and susceptible to more than one interpretation, but to hold *Falconer* as announcing a new rule for that reason "alone would obliterate the distinction between rules and their applications, and thereby contravene the principles of *Teague*."[201] With respect to the second premise underlying *Falconer*, that instructions violate due process where they permit a jury to reach a murder verdict without considering mitigating evidence that might warrant a finding of voluntary manslaughter, Judge Flaum cited *Connecticut v. Johnson*.[202] That case invalidated a murder conviction because the instructions created an erroneous presumption on the element of intent.[203] This led the jury to ignore exculpatory evidence.[204] The fact that *Johnson* dealt with intent, an element of the crime, and *Falconer* dealt with a mitigating mental state, which is an affirmative defense

193. *Taylor*, 954 F.2d at 453.
194. *Id.* at 452.
195. *Id.* at 453.
196. 414 U.S. 141 (1973).
197. Taylor v. Gilmore, 954 F2d at 452 (quoting *Cupp*, 414 U.S. at 146-47).
198. 494 U.S. 370 (1990).
199. Taylor v. Gilmore, 954 F.2d at 452-53.
200. *Id.* at 453.
201. *Id.*
202. 460 U.S. 73 (1983).
203. Taylor v. Gilmore, 954 F.2d at 453.
204. *Id.* (citing *Johnson*, 460 U.S. at 84-85).

in Illinois, was held to be a distinction without a difference.[205] The key is that similar to the effect of the instructions in *Johnson*, as a result of the instructions in *Falconer*, the jury did not weigh evidence that may have led to an acquittal of the charge for which the defendant was ultimately convicted. The Supreme Court found a violation of due process in *Johnson*, and Judge Flaum found that decision specific enough to have dictated the result in *Falconer*.

Thus, with respect to both premises underlying the *Falconer* decision, prior case decisions existed which were of a level of specificity sufficient to have compelled the result in *Falconer*. This met the second criterion suggested by Judge Flaum to determine whether a decision announced a new rule.

Hence, under both criteria, the lack of a prior split in lower court decisions before the holding of the Seventh Circuit in *Falconer*, and the specificity of prior precedent by both the Seventh Circuit itself and the United States Supreme Court, *Falconer* did not announce a new rule.

VIII. A TEST OF THE FLAUM THEORY—*STRINGER V. BLACK*

After Judge Flaum promulgated his suggested criteria for determining whether a decision handed down a "new rule," the United States Supreme Court decided the case of James Stringer.[206]

In June, 1982 Ray McWilliams and his wife Nell were shot and killed in Jackson, Mississippi during an armed robbery of their home.[207] Reputedly, James Stringer planned and took part in the robbery and murder, although he did not fire the fatal shots.[208] Stringer dealt in gold and jewels, as did the victim.[209] Knowing that McWilliams kept a lot of money in his home, Stringer and several accomplices planned to go to his home, lure him into opening his door by attempting to sell him jewelry, and then cut his throat and that of his wife, since they would recognize the defendant.[210] McWilliams resisted, but he was shot by one of the defendant's accomplices, and Mrs. McWilliams was shot in the head with a riot gun as she attempted to crawl away.[211]

Stringer received the death penalty after this jury was instructed *inter alia* that one of the aggravating circumstances they could use in determining whether or not to impose the death penalty was whether the capital murder

205. Taylor v. Gilmore, 954 F.2d at 453.
206. Stringer v. Black, 112 S. Ct. 1130 (1992).
207. *Id.* at 1134.
208. *Id.*
209. Stringer v. State, 454 So.2d 468, 471-72 (Miss. 1984), *cert. denied* 469 U.S. 1230 (1985).
210. *Id.*
211. *Id.*

was "especially heinous, atrocious, or cruel."[212] The Supreme Court of Mississippi affirmed the conviction and sentence, and the United States Supreme Court denied certiorari in 1985.[213]

Thereafter, in 1988 the United States Supreme Court decided the case of *Maynard v. Cartwright*.[214] In *Maynard*, the Court vacated the death penalty because that jury had been similarly instructed that if the crime committed by the defendant was "especially heinous, atrocious, or cruel," a valid aggravating factor existed upon which they could impose the death penalty.[215]

In that case, the victims, the Riddles, were shot in their home by Cartwright, a disgruntled ex-employee.[216] Mr. Riddle died, while Mrs. Riddle, who was also stabbed with a hunting knife, survived, and called the police.[217] At trial, the defendant was convicted of the first degree murder of Mr. Riddle, and sentenced to death.[218] The jury found two aggravating factors to support their decision: first that the defendant had "'created a great risk of death to more than one person,' second, that the murder was 'especially heinous, atrocious, or cruel.'"[219] These factors, according to the jury, outweighed the mitigating evidence, and justified the imposition of the death penalty.[220]

After the case was affirmed on direct appeal by the Oklahoma Court of Criminal Appeals,[221] and the defendant filed a habeas corpus petition in federal court. The Tenth Circuit Court of Appeals, en banc, reversed, finding that the words, "heinous, atrocious, and cruel" were unconstitutionally vague under the Eighth Amendment.[222] The court held that the words did not offer sufficient guidance to the jury as required by *Furman v. Georgia*.[223]

The Supreme Court granted certiorari[224] to resolve the conflict between the state and federal courts, and upheld the ruling of the Tenth Circuit. The unanimous decision of the Court, authored by Justice White, first differentiated between challenges of "vagueness" under the Due Process clause and such

212. Stringer v. Black, 112 S. Ct. at 1134.
213. *See* Stringer v. State, 454 So.2d at 468.
214. 486 U.S. 356 (1988).
215. *Id.* at 359.
216. *Id.* at 358.
217. *Id.*
218. *Id.* at 359.
219. *Id.* (quoting Crimes and Punishment Code, OKLA. STAT. tit. 21 §§ 701.12(2) and (4) (1981).
220. *Id.*
221. Cartwright v. State, 695 P.2d 548 (Okla. Crim. App. 1985), *cert. denied*, 473 U.S. 911 (1985).
222. *See* Cartwright v. Maynard, 822 F.2d 1477, 1483-92 (10th Cir. 1987).
223. Maynard v. Cartwright, 486 U.S. at 359-60 (citing Furman v. Georgia, 408 U.S. 238 (1972)).
224. 484 U.S. 1003 (1988).

challenges under the Eighth Amendment. Under a Due Process analysis, objections to vagueness rested on the lack of notice, and thus could be overcome where the facts of the case gave reasonable notice that their conduct was at risk.[225] But, under the Eighth Amendment, claims of vagueness asserted that the aggravating circumstance challenged failed to adequately inform the jury of the criteria necessary to impose the death penalty, leaving them with the open ended discretion condemned in *Furman*.[226] Justice White then found that the instruction void for vagueness under the Eighth Amendment.[227]

In deciding *Cartwright*, Justice White relied on *Godfrey v. Georgia*, where the defendant had shot his wife and mother-in-law in the head with one bullet each.[228] Godfrey's death penalty sentence was reversed by the United States Supreme Court where the single aggravating circumstance found by the jury was that the killing was "outrageously or wantonly vile, horrible and inhuman."[229] The *Godfrey* Court found that aggravating circumstance so vague as to fail adequately to guide the jury, with the result that arbitrary and capricious sentences of death could be imposed.[230]

Then, in *Clemons v. Mississippi*,[231] the United States Supreme Court also vacated the death penalty where a trial court had instructed the jury to consider as an aggravating circumstance whether the murder was "especially heinous, atrocious, or cruel."[232] In that case, Clemons and two others, were accused of robbing and killing a pizza delivery man. Clemons allegedly shot the victim because he had seen Clemons' face.[233] Clemons later admitted the offense to his sister and her friend, and was convicted and sentenced to death.[234] At the sentencing hearing, the state relied on two aggravating factors, a) that the shooting was done in the course of a robbery, and b) that the crime was "especially heinous, atrocious, or cruel."[235] On appeal, the Mississippi Supreme Court noted that the second aggravating factor was similar to the one invalidated for vagueness by the United States

225. Maynard v. Cartwright, 486 U.S. at 361.
226. *Id.* at 362. *See* Furman v. Georgia, 408 U.S. 238 (1972).
227. *Id.* at 364.
228. 446 U.S. 420, 425 (1980).
229. *Id.* at 426.
230. *Id.* at 428-29.
231. 494 U.S. 738 (1990).
232. *Id.* at 742. The United States Supreme Court held that although the jury considered an improper aggravating factor, the death sentence could have been valid if the state reviewing court had properly reweighed the aggravating and mitigating factors, or conducted a proper "harmless error" review. *Id.* at 748. However, because the Supreme Court could not be sure that this process was conducted properly by the state reviewing court, it vacated the death sentence. *Id.* at 754.
233. *Id.* at 741-42.
234. *Id.* at 742-43.
235. *Id.* at 742.

Supreme Court in *Maynard v. Cartwright*.[236] Unlike Oklahoma, however, Mississippi had a procedure for salvaging death penalties when one aggravating factor was invalid. The death penalty could stand under Mississippi law, if the state supreme court found the other aggravating factor sufficient to justify death.[237] The Mississippi Supreme Court found that the jury could have imposed the death penalty at issue without the other invalid aggravating factor, and therefore affirmed the sentence of death.[238] The United States Supreme Court granted certiorari,[239] and reversed.[240]

Prior to the decision in *Clemons*, Stringer had filed a petition for a writ of habeas corpus in the District Court for the Southern District of Mississippi alleging that the aggravating circumstance, "especially heinous, atrocious, or cruel" was void for vagueness.[241] The District and Appellate Courts denied relief, but the Supreme Court granted certiorari and remanded the case back to the Court of Appeals in the light of *Clemons* and *Cartwright*.[242] The Court of Appeals then held that these cases enunciated a "new rule," and therefore relief to Stringer was barred by the retroactivity doctrine of *Teague*. [243]

The United States Supreme Court granted certiorari to *Stringer* again[244] and reversed, holding that relief was not barred by *Teague*, since these cases did not enunciate a new rule. Justice Kennedy wrote the opinion of the Court, joined by Chief Justice Rehnquist, and Justices White, Blackmun, Stevens, and O'Connor. Justice Souter dissented, joined by Justices Scalia and Thomas.[245]

Justice Kennedy began his analysis by stating that the result in *Maynard*

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236. *Id.* at 743. *See supra* notes 215-231 and accompanying text.

237. *Id.* at 743-44.

238. *Id.* at 743. *See* Clemons v. State, 535 So. 2d 1354 (Miss. 1988).

239. 491 U.S. 904 (1989).

240. In the Supreme Court, Clemons argued that under Mississippi law, only a jury could give the death penalty, and therefore only a jury could re-evaluate the case without the invalid aggravating circumstance. Moreover, he argued, a reviewing court could not weigh the aggravating and mitigating circumstances as a jury would. The United States Supreme Court, speaking through Justice White, rejected that proposition, and held that appellate courts were quite capable of engaging in such a weighing process. 494 U.S. at 745-46, 748-50. In this particular case, however, the United States Supreme Court was not sure whether the Mississippi Supreme Court had affirmed the sentence by simply relying on the "other" valid aggravating factor, without doing a careful reweighing of the aggravation and mitigation. *See id.* at 751. Another possibility was that the State Supreme Court considered the "heinous" factor "narrowly," instead of disregarding it entirely. If the state court had construed the "heinous" factor narrowly, which would have been consistent with Mississippi law, their harmless error analysis would be faulty as well. Either course would be improper, so the United States Supreme Court vacated the sentence of death, and remanded for further proceedings. *See id.* at 738.

241. *See* Stringer v. Scroggy, 675 F. Supp. 356, 366-67 (1987), *aff'd* 862 F.2d 1108 (5th Cir. 1988).

242. Stringer v. Black, 494 U.S. 1074, 1075 (1990).

243. Stringer v. Black, 112 S. Ct. at 1135.

244. 111 S. Ct. 2009 (1991).

245. Stringer v. Black, 112 S. Ct. at 1133.

v. Cartwright was dictated by *Godfrey*.[246] Though the language in the two cases was somewhat different, the principle of vagueness was the same. Both phrases, "outrageously or wantonly vile, horrible and inhuman" and "especially heinous, atrocious, or cruel" were equally imprecise and offered no real guidance to the sentencing jury.[247]

However, in deciding *Stringer*, Kennedy stated that even if a decision did not state a new rule, that was not the end of the inquiry. One must ask whether "granting the relief sought would create a new rule because the prior decision is applied in a novel setting, thereby extending the precedent."[248] Kennedy pointed out that the application of an old rule in a manner not dictated by precedent could undermine the values of finality, predictability, and comity just as easily as the application of a new rule.[249] The question to be resolved then was whether the application of *Godfrey*, which arose out of Georgia's procedure, would constitute a new rule if applied in Mississippi.[250]

Although the State conceded that the application of *Godfrey* in Oklahoma did not constitute a new rule and that *Cartwright*, which arose in Oklahoma, was dictated by *Godfrey*, it argued that *Clemons* was not because the methodologies employed by the juries in Georgia and Mississippi were different.[251] In Mississippi, a "weighing state," the jury "weighed" all aggravating factors against the mitigating factors, while, in Georgia, a "non-weighing" state, once the jury found an aggravating factor, the decision to impose death was based upon all the evidence in the case, (i.e. evidence derived from the guilt-innocence phase as well as from the sentencing phase).[252]

Justice Kennedy, rejected the state's argument that applying *Godfrey* to a "weighing state" constituted such a novel application of the decision so as to announce a new rule.[253] In a "weighing state," Kennedy noted, the jury must consider the invalid factor in determining the sentence. In contrast, in a "non-weighing" state, once the jury finds a valid aggravating factor, it is less critical if there is also an invalid aggravating factor, because thereafter the jury does not rely only on the other aggravating factors, but instead reviews all the evidence in the case before it makes up its mind.[254] Therefore, the Mississippi Supreme Court should have realized that *Godfrey*, arising out of a "non-weighing state," would be applicable, *a fortiori*, to a

246. *Id.* at 1135-36.
247. *Id.*
248. *Id. See* Butler v. McKellar, 414 U.S., 407, 414-15 (1990).
249. Stringer v. Black, 112 S. Ct. at 1135.
250. *Id.* at 1136.
251. *See id.*
252. *Id.* at 1136. Even though Oklahoma was a weighing state, there was no procedure in Oklahoma to salvage a death penalty. *See* Clemons v. Mississippi, 494 U.S. 743, 743 (1990).
253. Stringer v. Black, 112 S. Ct. at 1136.
254. *Id.* at 1137.

weighing state. Therefore, *Clemons* did not announce a new rule.[255]

In dissent, Justice Souter noted first that in Georgia's *Godfrey* case, there was only one aggravating circumstance submitted to the jury.[256] Once that was determined to be invalid, there was no instruction to prevent the jury from inflicting the death penalty in an arbitrary and capricious manner.[257]

But, to view this decision in Judge Flaum's terms, there was a latent ambiguity in the decision. In other words, the question remained as to whether *Godfrey* would also apply to a case where the jury had been instructed on more than one aggravating factor, and where in addition to an invalid factor, there were valid aggravating factors.

In his dissent, Justice Souter noted that the very next case decided by the Supreme Court after *Clemons* answered that question in the negative. In *Zant v. Stephens*, the Court upheld the death penalty where the jury had received instructions on both valid and invalid aggravating factors.[258] In that case the Court held that the instruction on the valid factor sufficiently narrowed the class of those entitled to receive the death penalty.[259]

In addition, Souter cites *Barclay v. Florida*,[260] where the Court upheld a death sentence in a weighing state imposed after the jury was instructed with both valid and invalid aggravating instructions. Again, the Court's theory was that the remaining valid instructions sufficiently narrowed the field of those eligible to receive the death penalty, so as to satisfy the requirements of *Furman*.[261]

Given those two cases, Souter poses the question, "whether it would have been reasonable to believe in 1985 [the year Stringer's conviction became final for *Teague* purposes] that a sentencer's weighing of a vague aggravating circumstance does not offend the Eighth Amendment so long as the sentencer has found at least one other aggravating circumstance."[262] Justice Souter concedes that the question of whether the *Stephens* decision would apply to a weighing state was left open in *Stephens*, but after reading *Barclay*, one could reasonably assume that it had been absolutely resolved.[263]

Looking at these cases in the light of Judge Flaum's "specificity" criterion, (which looked to the level of generality in prior authority) the decision by the majority in *Stringer*, that *Clemons* was dictated by *Godfrey* and therefore did not lay down a new rule, is suspect. Was the decision in

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255. *See id.* at 1140.
256. *Id.* at 1141.
257. *Id.*
258. 462 U.S. 862 (1983).
259. *See* Stringer v. Black, 112 S. Ct. at 1141-43 (Souter, J., dissenting) (citing *Zant*, 462 U.S. at 878).
260. Stringer v. Black, 112 S. Ct. at 1142 (citing Barclay v. Florida 463 U.S. 939 (1983)).
261. *See* Stringer v. Black, 112 S. Ct. at 1144-45.
262. *Id.* at 1143-44 (footnotes omitted).
263. *See id.* at 1144.

Godfrey clearly applicable to a weighing state where the jury was instructed on a valid aggravating circumstance in addition to an invalid one ? The answer is no! If one applies the analysis that Judge Flaum made with respect to the latent ambiguity in *Edwards*, which resulted in the holding that *Roberson* set forth a "new rule,"[264] to the *Godfrey-Clemons* situation, the Court in *Godfrey* should have specified that its holding would apply in a weighing state even if the jury were instructed on valid aggravating circumstances as well as invalid ones. That would have avoided any possible "latent ambiguities" in the *Godfrey* decision. In the absence of such specificity, Judge Flaum's criterion requires that *Stringer* should have been barred relief after *Teague*.

Moreover, even under Judge Flaum's "prior precedent" criterion, (which ascertained whether a prior lower court decision had reached a contrary result) at least four cases were cited in the majority and dissenting opinions of the Supreme Court which would have led to the conclusion that *Godfrey* was not binding in Mississippi. Justice Souter noted that in two prior cases, the Fifth Circuit held that the rule in *Stephens* applied to a weighing state.[265] In addition, Justice Kennedy conceded that in two other cases prior to *Clemons*, the Fifth Circuit held that the *Godfrey* decision did not apply to Mississippi.[266] Therefore, based upon both prongs of the Flaum analysis, it must be acknowledged that the dissenters made a valid case for the proposition that the result in *Cartwright* and *Clemons* may not have been dictated by *Godfrey*, and that perhaps *Stringer* should have not received retroactive relief.

IX. CRITIQUE AND CONCLUSION

Since neither of the criteria suggested by Judge Flaum and the Seventh Circuit panel that decided *Taylor* are exact, Judge Flaum's statement that law is an art, and not science, is most relevant when making decisions as to the future scope of the "new rule" doctrine. Although his analysis of the criteria which determine whether a decision constitutes a "new rule" is the clearest which has emerged from the myriad of decisions on the topic, even his criteria could not accurately predict the result in the next Supreme Court case. Therefore, lower courts ought to proceed with great caution before they deny habeas petitioners relief if their constitutional rights have been violated.

For example, with respect to Judge Flaum's first criterion, which looks to see whether there has been a prior split in lower court decisions, Judge

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264. *See supra* notes 181-183 and accompanying text.

265. Stringer v. Black, 112 S. Ct. at 1145 (citing Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), *vacated*, 494 U.S. 1074 (1990) and Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989).

266. *See id.* at 1140 (citing Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987), *cert. denied*, 483 U.S. 1033 (1987); and Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986) *cert. denied*, 480 U.S. 951 (1987)).

Flaum cautions that although his general argument was that a prior contrary decision will result in a determination that the new "corrective" decision lays down a "new rule," if the lower federal or state court decision which the decision in question departs from, was blatantly wrong, then the new "corrective" decision may not necessarily be a "new rule."[267]

An example of this kind of reasoning is found in the United States Supreme Court's discussion of *Stringer*.[268] If a justice wanted to hold that *Stringer* should get retroactive relief, that justice could argue that the four prior contrary lower court opinions (cited by Justice Souter in his dissent, and acknowledged by Justice Kennedy in the majority opinion)[269] were blatantly wrong, and therefore the *Clemons* decision would not constitute a "new rule" for Mississippi. In fact, that is precisely what Justice Kennedy did to minimize the impact of the cases cited by the State in opposition to his position. He simply stated in his opinion, "[t]he short answer to the State's argument is that the Fifth Circuit made a serious mistake in *Evans v. Thigpen* and *Johnson v. Thigpen*."[270]

Conversely, Judge Flaum points out that a decision does not automatically hand down an "old rule" just because there are no prior contrary decisions. The issue could still have been one that was in dispute, in which case a decision resolving the dispute would still constitute a "new rule."[271]

Secondly, let us critically examine his discussion of *Roberson* and *Edwards* in the light of his second criterion, which looks to the level of generality of prior precedent, and to whether prior decisions were specific enough and sufficiently free of ambiguities so as to dictate the result in the decision in question. He states that a latent ambiguity existed in *Edwards* as to whether it applied to subsequent interrogations of unrelated offenses.[272] That may have been the opinion of the majority of the Supreme Court in *Butler,* but the argument may also be made that there was no such ambiguity in *Edwards*. In that event, *Roberson* would not have announced a "new rule." After all, one could argue that although the facts in *Edwards* involved but a single crime, the rationale of *Edwards* was applicable to multiple crime suspects as well. The rationale of the majority of the Supreme Court Justices in *Edwards* was that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available."[273] It is submitted that when the United States Supreme Court characterizes a custodial defendant's affirmative response to his *Miranda* warnings, as "expressing his

267. Taylor v. Gilmore, 954 F.2d at 446.
268. *See supra* part VIII.
269. *See supra* notes 265-66 and accompanying text.
270. Stringer v. Black, 112 S. Ct. at 1140.
271. Taylor v. Gilmore, 954 F.2d at 496.
272. *Id.* at 447.
273. 451 U.S. at 484.

desire to deal with the police only through counsel;" it is arguable that the police may not interrogate him thereafter on *any* crime without counsel present. It stands to reason that if he did not want to deal with the police without a lawyer with respect to the crime for which he has been arrested, he would not now feel emboldened to want to deal with the police on some other crime they are considering charging him with. If that were the interpretation of *Edwards*, there would be no ambiguity on this issue, the result in *Roberson* would be compelled by *Edwards*, and *Roberson* would not announce a new rule. The subsequent decision in *Minnick v. Mississippi*,[274] supports that more expansive interpretation of *Edwards*. In that case the Supreme Court held that the protection of *Edwards* did not cease when the suspect had merely conferred with counsel, but that the *presence* of counsel was required before questioning could take place.

Just as one could argue persuasively, using Judge Flaum's criteria, that *Roberson* did not lay down a new rule, one could also argue that *Clemons v. Mississippi* was not dictated by *Godfrey v. Georgia*, and therefore announced a new rule, even though the instructions in the two cases were almost identical, and a majority of the Supreme Court found that *Clemons* did not announce a new rule.

Judge Flaum's two criteria are very helpful for analyzing whether a given United States Supreme Court or federal court decision is to be given retrospective application on collateral review. They are logical and in line with the finest critical thinking in this field. But the Supreme Court's decisions on this issue have seemingly applied shifting criteria, so that Judge Flaum's analysis cannot yet be regarded as a reliable predictor of whether a case will be characterized as announcing a "new rule" or not.

The confusion that has characterized the decisions of state and federal courts as to what is and is not determined to be a "new rule," becomes especially critical in death penalty cases. Denial of habeas relief in these cases on the grounds that a specific decision of the United States Supreme Court is a "new rule" has implications of major magnitude.

Consider again what the American public would think of the medical profession if a person diagnosed as having a fatal disease were to be denied a new cure for his terminal illness just because under existing medical guidelines, the patient may only be treated by medicine and procedures available to him at the date of diagnosis. Yet, that is the import of the legal decisions on the non-retroactivity of "new rules." The prisoner is to be accorded only those constitutional guarantees existing at the time of his conviction.

The proposition that a habeas petitioner on death row would be denied retrospective application of a decision by a federal court which had found a law or procedure used in his case violative of the Constitution, "shocks the conscience" in much the same way. Add to that, the uncertainty generated

274. 498 U.S. 146 (1990).

by the lack of clarity as to what constitutes a "new rule," and the suggestion made by Justice Brennan in his dissent in *Saffle v. Parks*,[275] takes on new meaning. Justice Brennan argued that capital sentencing errors should fall under the second *Teague* exception for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[276] Therefore, the "new rule" doctrine would simply not apply in cases where constitutional violations were found in the sentencing process, which resulted in the imposition of the death penalty. If this were the case, there can be no compelling justification for allowing the "new rule" jurisprudence to govern the guilt-innocence phase of a capital trial either. First of all, this phase is often inextricably interwoven with the sentencing phase, and constitutional errors during the adjudicatory phase which result in the imposition of death should not be tolerated in a society whose Constitution, reinterpreted or not, is the governing law of the land.

To the extent that Judge Flaum's insightful and careful analysis will attempt to put some order into the decision making process by which some rules will be declared "new" and others compelled by prior precedent, the *Taylor* decision is an important contribution to the field of federal habeas corpus. But, as Justice Scalia recently acknowledged concerning another issue in *Harmelin v. Michigan*, "death is different."[277] Therefore capital cases should be exempted from this "new rule" analysis, and should not be sacrificed upon the altar of the god of finality for finality's sake. The "evolving standards of decency that mark the progress of a maturing society" demand no less.[278]

275. 494 U.S. 484, 506 (1990). *See supra* notes 111-19 and accompanying text.

276. *Id.* at 505. *See also* Sawyer v. Smith, 497 U.S. 227 (1990); Williams v. Dixon, 961 F.2d 448 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 510 (1992) (applying the "bedrock procedural" exception of *Teague* to the question of requiring unanimity of jury with respect to mitigating evidence in a capital case.)

277. 111 S. Ct. 2680, 2682 (1991).

278. Trop v. Dulles, 356 U.S. 86, 101 (1958).