Retroactivity of Judge-Made Rules
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Suppose that on November 19, 2004, the United States Supreme Court issues a ground-breaking Fourth Amendment search and seizure decision. The decision sets a new course for search and seizure analysis and reverses prior case law. What are the implications of this decision to future cases that raise the issue? What are the implications for pending cases that raise the issue? And what are the implications for cases that have decided this issue and have become final? Suppose now that the ground-breaking decision is issued by the North Carolina Supreme Court and interprets the North Carolina Constitution. Are the answers to the questions above any different?

Regardless of whether the new decision is issued by the United States Supreme Court or the North Carolina Supreme Court, the first question is readily answered. So long as it remains good law, the new decision applies to all future cases raising the same issue and decided in courts bound by the new decision. The second and third questions, however, are more complicated and require application of what has become known as retroactivity analysis. This paper explains retroactivity analysis and then applies it to two recent decisions of the United States Supreme Court: *Crawford v. Washington*[1] and *Blakely v. Washington*.[2]

I. Retroactivity Analysis--Generally

Step 1: Determine Whether the Decision Specifies its Retroactive Application

When confronted with an argument that an appellate court's decision applies retroactively, the first step is to review the decision to determine whether it provides guidance on its retroactive application. Although the United States Supreme Court simultaneously has

1. 124 S. Ct. 1354 (2004).
2. 124 S. Ct. 2531 (2004).

adopted new rules and addressed their retroactive application in a single decision,[3] that practice is not uniform.[4] Typically, the Court declines to address retroactivity of new rules in cases that arise on direct review, taking up the issue only in later cases that present it directly.[5] However, when a case involves a collateral attack through a habeas petition and seeks a rule not previously recognized by the Court, the Court will address retroactivity before evaluating the rule on its merits.[6] In these cases, if the Court determines that the sought-for rule is retroactive and required, the decision adopting the rule simultaneously speaks to its retroactive application.[7]

The North Carolina Supreme Court has addressed retroactivity in its initial decisions. For example, *State v. Lucas*[8] came to the North Carolina Supreme Court on discretionary review after the Court of Appeals ordered a new trial. The court also agreed to hear the defendant's motion for appropriate relief. That motion argued that based on two United States Supreme Court cases that were decided after the defendant's trial, imposition of the sixty-month firearm sentencing enhancement violated his constitutional rights. Relying on those Supreme Court cases, the court held that in order for a sentence applying the state's sixty-month firearm enhancement to be valid, the facts supporting application of the enhancement must be plead in the indictment, submitted to the jury, and proved beyond a reasonable doubt. The court went on to state that its ruling applies to cases "in which the defendants have not been indicted as of the

3. *See* Teague v. Lane, 489 U.S. 288, 300 (1989) (citing *Morrissey v. Brewer,* 408 U.S. 471, 490 (1972), and *Witherspoon v. Illinois,* 391 U.S. 510, 523 n.22 (1968), as cases in which the Court addressed the issue of retroactivity in the very case announcing the new rule).

4. *See, e.g., Crawford*, 124 S. Ct. 1354 (not addressing retroactivity); *Blakely,* 124 S. Ct. 2531 (same).

5. *Compare* Ring v. Arizona, 536 U.S. 584 (2002) (on direct review, holding that aggravating factor for imposition of the death penalty must be proved to a jury rather than to a judge), *with* Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (on collateral attack, addressing retroactivity of *Ring*).

6. *See, e.g.,* Penry v. Lynaugh, 492 U.S. 302, 313, 329 (1989) ("Because [defendant] is before us on collateral review, we must determine, as a threshold matter, whether granting him the relief he seeks would create a 'new rule.'"), *overruled on other grounds,* Atkins v. Virginia, 536 U.S. 304 (2002).

7. *See id.*

8. 353 N.C. 568, 597-98 (2001).

certification date of this opinion and to cases that are now pending on direct review or are not yet final."[9] Thus, in the very decision announcing the rule, the court clarified the rule's retroactive effect.

When the courts fail to provide guidance on the retroactive application of their decisions, it becomes necessary to engage in retroactivity analysis. The material that follows set out the relevant steps in this analysis.

Step 2: Determine Whether The Ruling is Based on Federal or State Law

Because the test for retroactivity differs depending on whether the rule is grounded in federal or North Carolina law, it is necessary as a preliminary matter to determine what law is at issue. If the rule is a federal one, the retroactivity test is set forth in Step Three, below. If the rule is grounded in North Carolina law, the retroactivity test is set forth in Step Four, below.

Step 3: For Federal Rules, Apply Griffith and Teague

Under federal law, the second question posed above—how the new decision affects pending cases—can be easily answered. Under *Griffith v. Kentucky,*[10] new rules apply to all cases that are pending on direct review or yet not final.[11] As a general rule, a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari to the United States Supreme Court has elapsed or a timely petition for certiorari has been finally denied.[12]

Answering the third question—how the new decision affects cases that have become final—requires application of the retroactivity test set forth in *Teague v. Lane*,[13] and its

9. *Id.* at 598.
10. 479 U.S. 314, 328 (1987) (dealing with retroactive application of *Batson v. Kentucky,* 476 U.S. 79 (1986)).
11. *See Schriro,* 124 S. Ct. at 2522 (citing *Griffith,* 479 U.S. at 328).
12. *See Griffith,* 479 U.S. at 321 n.6.
13. 489 U.S. 288 (1989).

progeny.[14] In *State v. Zuniga*,[15] the North Carolina Supreme Court adopted the *Teague* test for determining whether new federal rules apply retroactively in state court motion for appropriate relief proceedings.[16] Simply put, the *Teague* test sets out an anti-retroactivity rule for new rules of federal criminal procedure. Under *Teague,* if a rule is both new and procedural, it does *not* apply retroactively unless it falls within a narrow exception.

Step 3(a): Determine if the Rule is New

The first step in a *Teague* analysis is to determine whether the rule is new. The main purpose of federal habeas review is to ensure that state courts conduct criminal proceedings in accordance with the federal Constitution, as interpreted at the time.[17] In the federal system, *Teague*'s new rule requirement reflects that purpose by validating reasonable, good faith interpretations of existing law made by state courts as well as promoting the states' interest in finality and fostering comity between federal and state courts.[18]

From the very start, it was clear that determining whether a rule is new would be no easy task. Writing for a plurality in *Teague*, Justice O'Connor acknowledged this and declined to "define the spectrum of what may or may not constitute a new rule for retroactivity purposes."[19] Over the years, the Court has issued a number of decisions applying the new rule requirement.[20]

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14. *Teague* was a plurality decision that later became a holding of the Court. *See, e.g.,* Gray v. Netherland, 518 U.S. 152 (1996); Caspari v. Bohlen, 510 U.S. 383 (1994).

15. 336 N.C. 508 (1994).

16. *See id*. at 510, 513.

17. *See, e.g.,* Graham v. Collins, 506 U.S. 461, 467 (1993) (quotation omitted).

18. *See id.;* Gilmore v. Taylor, 508 U.S. 333, 340 (1993); Beard v. Banks, 124 S. Ct. 2504, 2511 (2004).

19. *Teague,* 489 U.S. at 301 ("It is admittedly often difficult to determine when a case announces a new rule.").

20. *Compare* O'Dell v. Netherland, 521 U.S. 151, 159-66 (1997) (rule is new); Lambrix v. Singletary, 520 U.S. 518, 527-39 (1997) (same); Gray v. Netherland, 518 U.S. 152, 166-70 (1996) (same); Goeke v. Branch, 514 U.S. 115, 118-20 (1995) (same) (per curiam); Caspari v. Bohlen, 510 U.S. 383, 391-96 (1994) (same); *Gilmore*, 508 U.S. at 339-44 (same); *Graham*, 506 U.S. at 467-77 (same); Sawyer v. Smith, 497 U.S. 227, 223-41 (1990) (same); Saffle v. Parks, 494 U.S. 484, 487-94 (1990) (same); Butler v. McKellar, 494 U.S. 407, 412-15 (1990) (same),

In at least two of those decisions, the Court recognized that its standard for determining whether a rule is new has varied over time.[21]

The Court's most recent retroactivity decisions are *Schriro v. Summerlin*[22] and *Beard v. Banks.*[23] Although the "new rule" distinction was not discussed in any significant way in *Schriro,*[24] it was squarely presented in *Beard*, a 5-to-4 decision written by Justice Thomas. While support for other and perhaps more restrictive formulations of the "new rule" distinction can be found in the Court's earlier decisions, this paper focuses primarily on the standard articulated in *Beard,* as it is the Court's most recent pronouncement.

Under *Beard,* as under the Court's prior cases, to determine whether a rule is new, the court begins by identifying the date on which the defendant's conviction became final.[25] State convictions are final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for writ of certiorari has elapsed or a timely filed petition has been finally denied.[26]

Although determining when a case became final is generally an easy matter, complicated issues do arise. *State v. Wilson,*[27] is an example.[28] In *Wilson*, on June 25, 1996, defendant

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with Penry, 492 U.S. at 313-19 (rule regarding mitigating evidence in capital cases was not new; rule was "dictated" by prior cases); Stringer v. Black, 503 U.S. 222, 227-29 (1992) (rule of *Maynard v. Cartwright,* 486 U.S. 356 (1988), was not new).

Note that *Penry* also held that another rule, that the Eighth Amendment prohibits the execution of mentally retarded persons, was new. *See Penry,* 492 U.S. at 329.

21. *See O'Dell*, 521 U.S. at 156 ("We have stated variously the formula for determining when a rule is new."); *Gilmore,* 508 U.S. at 340 ("we have offered various formulations of what constitutes a new rule").

22. 124 S. Ct. 2519 (2004).

23. 124 S. Ct. 2504 (2004).

24. *See Schriro,* 124 S. Ct. at 2523 (noting that the Ninth Circuit agreed with the state that the relevant rule was new and going on to focus on the procedural/substantive distinction, *see infra* pp. 9-12, and the *Teague* exception for watershed rules, *see infra* pp. 12-14).

25. *See Beard,* 124 S Ct. at 2510; *O'Dell*, 521 U.S. at 156.

26. *See Beard,* 124 S. Ct. at 2510; *see also* State v. Wilson, 154 N.C. App. 127, 130 (2002) (quoting *Zuniga,* 336 N.C. at 511 n.1 (quoting *Griffith,* 479 U.S. at 321 n.6)), *aff'd* 357 N.C. 498 (2003).

27. 154 N.C. App. 127 (2002), *aff'd* 357 N.C. 498 (2003).

pleaded guilty to felony firearm enhancement, second-degree kidnapping, and other crimes. The facts supporting the firearm enhancement were not alleged in the indictment. The trial judge sentenced the defendant on the kidnapping charge and entered a separate judgment imposing a consecutive sentence of sixty to eighty-one months' active imprisonment for the firearm enhancement penalty. On October 5, 2000, after being notified by the Department of Correction that it was error to have two separate judgments for the kidnapping and firearm enhancement penalty, the court ordered a re-sentencing. Before the re-sentencing occurred, however, the North Carolina Supreme Court decided *State v. Lucas*.[29] *Lucas* held that in order for the firearm enhancement to apply, the use of the firearm must be charged in the indictment and proved to a jury beyond a reasonable doubt. And as noted above, *Lucas* stated that the opinion applied to cases in which the defendant have not been indicted as of the certification date of the opinion, August 9, 2001, and to cases that were pending on direct review or not yet final on that date.

In *Wilson,* the defendant was re-sentenced on September 14, 2001 to eighty-nine to one-hundred sixteen months in a single judgment for kidnapping with a firearm penalty. He then appealed, arguing in part that the re-sentencing reopened his case so that it was no longer final and that *Lucas* applied. The Court of Appeals agreed, stating:

> [W]hen the trial court vacated the firearm enhancement judgment and the second-degree kidnapping sentence, the case was no longer "final" for purposes of the *Lucas* rule, since the trial court had voided the original judgments of conviction to enter a new single judgment. Therefore on this specific set of facts, defendant cannot be re-sentenced using the firearm enhancement penalty due to the failure of the State to allege in the original indictment the statutory factors supporting the enhancement, despite the fact that the original indictment occurred before *Lucas* was decided.[30]

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28. *See also Beard,* 124 S. Ct. at 2510-11 (rejecting respondent's argument that because of the Pennsylvania Supreme Court's "relaxed waiver rule," his conviction did not become final until 1995).

29. 353 N.C. 568 (2001).

30. *Id.* at 132 (citing *Griffith,* 479 U.S. at 325-28, for the proposition that new rules should apply to non-final cases).

After the court determines the date on which the case became final, it then must "assay the legal landscape" at the time the conviction became final and ask whether the rule later announced or now sought was "*dictated* by then-existing precedent—whether, that is, the unlawfulness of [defendant's] conviction was apparent to all reasonable jurists."[31] It is not enough that earlier cases support the new rule.[32] The question is "whether reasonable jurists could differ as to whether precedent compels the sought-for rule."[33] Obviously, "precedent" includes decisions of the United States Supreme Court. However, relevant precedent also includes decisions of the lower courts, both state and federal.[34] Another relevant factor may be "institutionalized state practice over a period of years," which has been described as "strong evidence of the reasonableness of interpretations given existing precedent by state courts."[35] And finally, when the rule at issue emerged in a prior case, a lack of unanimity of the deciding Justices is relevant.[36]

When a case explicitly overrules an earlier holding, it clearly creates a new rule.[37] The inquiry is more difficult when the decision extends the reasoning of prior cases.[38] *Beard* is the most recent example of how the analysis plays out in the latter context.

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31. *Beard,* 124 S. Ct. 2511 (quotation omitted); *see also Graham*, 506 U.S. at 467 (new rule was not *"dictated*" by precedent) (quoting *Teague,* 489 U.S. at 301).

32. *See Beard,* 124 S. Ct. at 2509.

33. *Beard,* 124 S. Ct. at 2513 n.5; *see also Graham,* 506 U.S. at 467 ("compelled by existing precedent") (quoting *Saffle*, 494 U.S. at 488).

34. *See Caspari,* 510 U.S. at 395 ("in the *Teague* analysis, the reasonable views of state courts are entitled to consideration along with those of the federal courts"); *O'Dell,* 521 U.S. at 166 n.3 (noting that conclusion that rule is new finds support in the decisions of the state and lower federal courts).

35. *Gilmore,* 508 U.S. at 344 n. 3 (in plurality portion of opinion, noting that jury instructions deemed unconstitutional were virtually identical to state pattern jury instructions adopted five years before defendant's trial but relied upon for 25 years).

36. *See O'Dell,* 521 U.S. at 159-60 (noting that the "array of views expressed in [the opinion] itself suggests that the rule announced there was, in light of the Court's precedent, susceptible to debate among reasonable minds") (quotation omitted). *But see Beard,* 124 S. Ct. at 2513 (noting that because the focus is on reasonable jurists, the "mere existence of a dissent" does not suffice to show that the rule is new).

37. *See Saffle,* 494 U.S. at 488; *Butler,* 494 U.S. at 412; *Graham,* 506 U.S. at 467.

At issue in *Beard* was whether the rules announced in *Mills v. Maryland*[39] and *McKoy v. North Carolina*[40] applied retroactively. Those cases invalidated capital sentencing schemes that required juries to disregard mitigating factors not found unanimously by the jury. The *Beard* Court noted that *Mills* and *McKoy* relied on a line of cases holding that the sentencer in a capital case must be allowed to consider any mitigating evidence.[41] The *Beard* Court concluded that although this line of cases supported the Court's rulings in *Mills* and *McKoy,* it did not mandate their holdings.[42] The Court found that the earlier cases considered only obstructions to the sentencer's ability to consider mitigating evidence whereas *Mills* focused on individual jurors.[43] The Court thought it "clear" that reasonable jurists could have differed as to whether the [earlier cases] "compelled" *Mills*.[44] In fact, it noted that in *Mills* itself, four justices dissented, arguing that the rule from the prior case law did not control.[45] Likewise, three Justices dissented in *McKoy,* asserting that the prior cases did not mandate the holding.[46] The Court was careful to note, however, that "[b]ecause the focus of the inquiry is whether *reasonable* jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new."[47] In the end it concluded: "Given the brand new attention *Mills* paid to individual jurors . . . we must conclude that the *Mills* rule br[o]k[e] new ground."[48]

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38. *See Saffle,* 494 U.S. at 488; *Butler,* 494 U.S. at 412-13; *Graham,* 506 U.S. at 467 (quoting *Saffle*).
39. 486 U.S. 367 (1988).
40. 494 U.S. 433 (1990).
41. *See Beard,* 124 S. Ct. at 2511-12.
42. *See id.* at 2512.
43. *See id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 2513 n.5.
48. *Id.* at 2513 (quotation omitted).

Step 3(b): Determine Whether the New Rule is Procedural or Substantive

If the federal rule is determined to be new, the court moves on to the second step in the analysis: whether the new rule is substantive or procedural. This inquiry is required because *Teague* anti-retroactivity doctrine applies only to new procedural rules. New substantive rules "generally" apply retroactively.[49]

In *Schriro,*[50] Justice Scalia, indicated that substantive rules include those that "narrow the scope of a criminal statute by interpreting its terms" and "place particular conduct or persons covered by the statute beyond the State's power to punish."[51] Substantive rules apply retroactively, he explained, because they "carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him."[52] Procedural rules, by contrast, "do not produce a class of persons convicted of conduct the law does not make criminal;"[53] procedural rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."[54] Put another way, substantive rules alter the range of conduct or the class of persons that the law punishes whereas procedural rules regulate only the manner of determining culpability.[55]

Schriro cited *Bousely v. United States*[56] as an example of a decision that was substantive because it narrowed the scope of a criminal statute by interpreting its terms. In *Bousely,* the defendant pleaded guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1). Five years

49. *Schriro,* 124 S. Ct. at 2522.
50. 124 S. Ct. 2519.
51. *Id.* at 2522.
52. *Id.* at 2522-23 (quotation omitted).
53. *Id.* at 2523.
54. *Id.*
55. *Id.* at 2523.
56. 523 U.S. 614, 620-21 (1998).

later, the United States Supreme Court held that the term "use," as employed in that statute requires the government to show active employment of the firearm and that mere possession would not suffice. In federal habeas corpus proceedings, the defendant argued that *Bailey* applied retroactively to his case and that his guilty plea was involuntary because he was misinformed about the elements of a 924(c)(1) offense. The Court rejected the argument that defendant's claim was *Teague*-barred stating: "because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decided the meaning of a criminal statute enacted by Congress."[57]

Constitutional determinations that place particular conduct or persons covered by the statute beyond the state's power to punish would presumably include a decision such as *Lawrence v. Texas,*[58] which held that criminalizing consensual adult sodomy was unconstitutional. *Penry*[59] held that this group of decisions "should be understood to cover not only rules forbidding criminal punishment on certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Thus, *Penry* held that if the Court determined that the Eighth Amendment prohibits the execution of mentally retarded persons, such a rule would be retroactive.[60]

In *Schriro,*[61] the Court rejected the argument that *Ring v. Arizona*[62] established a substantive rule. *Ring* was a post-*Apprendi* decision. In *Apprendi v. New Jersey,*[63] the Court held that any fact, other than that of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable

57. *Bousely,* 523 U.S. at 620.
58. 539 U.S. 558 (2003).
59. 492 U.S. at 300.
60. *Id.*
61. 124 S. Ct. 2519.
62. 536 U.S. 584 (2002).
63. 530 U.S. 466 (2000).

doubt. In *Ring,* the Court applied this holding to Arizona's capital sentencing scheme. *Ring* held that because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proved to a jury rather than a judge. Holding that the *Ring* decision was procedural and not substantive, Justice Scalia explained:

> This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules . . . .[64]

Acknowledging that a decision modifying the elements of an offense would be substantive rather than procedural,[65] Scalia rejected the argument that *Ring* reclassified Arizona's aggravating factors as elements of the offense. He stated: "This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive."[66]

Step 3(c): Determine Whether the Rule is a Watershed Rule of Criminal Procedure

Under *Teague,* if the rule is both new and procedural, it cannot apply retroactively unless it falls within a *Teague* exception.[67] Until *Schriro,*[68] the Court repeatedly said that *Teague* had two narrow exceptions.[69] The first *Teague* exception was described as rules "'forbidding criminal punishment of certain primary conduct [and] . . . prohibiting a certain category of

64. *Schriro,* 124 S. Ct. at 2523.
65. *Id.* at 2524.
66. *Id.*
67. *See O'Dell,* 521 U.S. 156-57.
68. 124 S. Ct. 2519.
69. *See, e.g., O'Dell,* 521 U.S. at 157.

punishment for a class of defendants because of their status or offense.'"[70] However, in *Schriro,* Justice Scalia clarified that although the Court had sometimes characterized these determinations as falling within a *Teague* exception, they are "more accurately characterized as substantive rules not subject to the bar."[71]

The second exception—and the only one after *Schriro*—applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[72] The fact that "a new procedural rule is 'fundamental' in some abstract sense is not enough" to classify it within this *Teague* exception.[73] Nor is the fact that the rule corrects a structural error.[74]

Various formulations of this exception have been asserted including that:

- the rule must be one without which accuracy is "seriously" diminished so that there is an "impermissibly large risk of punishing conduct that the law does not reach;"[75]
- the exception pertains to "small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty;"[76]
- the exception only is available if the new rule "alter[s] our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[77]

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70. *Id.* at 157 (quoting *Penry*, 492 U.S. at 330).
71. *Schriro,* 124 S. Ct. at 2523 n.4; *see also Beard*, 124 S. Ct. at 2510 n.3; *supra* pp. 9-11 (discussing substantive rules).
72. *O'Dell,* 521 U.S. at 157 (quotation omitted).
73. *Schriro,* 124 S. Ct. at 2523.
74. *See* Tyler v. Cain*,* 533 U.S. 656, 666 & n.7 (2001) ("classifying an error as structural does not necessarily alter our understanding of these bedrock procedural elements").
75. *Schriro,* 124 S. Ct. at 2525 (quotation and emphasis omitted).
76. *Beard,* 124 S. Ct. at 2513 (quotation omitted); *O'Dell,* 521 U.S. at 157 (quotation omitted).
77. *Tyler*, 533 U.S. at 666 n.7 (quotations omitted).

Regardless of the formulation, the United States Supreme Court has stated more than once that it is "unlikely" that many such rules have yet to emerge.[78] Although the Court has repeatedly referred to *Gideon v. Wainwright*,[79] a case establishing an affirmative right to counsel in all criminal trials for serious offenses, as an example of a rule that would fall within the scope of this exception,[80] the Court actually has never once held a rule to be excepted from *Teague* on these grounds.[81] It has, however, on many occasions, declined to find that a rule falls within this exception.[82]

In North Carolina, *State v. Zuniga,*[83] has been offered as the example of a decision finding a new rule to fall within this exception. At issue in *Zuniga,* was whether *McKoy v. North Carolina*,[84] which invalidated the unanimity requirement of North Carolina's capital sentencing

78. *Teague,* 489 U.S. at 313; *Tyler,* 533 U.S. at 666 n.7; *Beard,* 124 S. Ct. at 2514 (quotation omitted).

79. 372 U.S. 335 (1963).

80. *See O'Dell* , 521 U.S. at 167 (noting that Gideon was a "sweeping rule"); *Gray,* 518 U.S. at 170 (referring to *Gideon* as the "paradigmatic example"); *Saffle,* 494 U.S. at 495 (noting that *Gideon* is usually cited as an example); *see also Beard,* 124 S. Ct. at 2514 ("*Gideon,* it is fair to say, alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.") (quotation omitted).

81. *See Beard,* 124 S. Ct. at 2513-14.

82. *See Schriro,* 124 S. Ct. at 2525 (*Ring,* 536 U.S. 584 (aggravating factor necessary for imposition of death penalty must be proved to a jury rather than to a judge), did not fall within *Teague* exception); *Beard,* 124 S. Ct. at 2513-14 (same holding as to *Mills,* 486 U.S. 367 (holding invalid a capital sentencing scheme that required juries to disregard mitigating factors not found unanimously)); *O'Dell,* 521 U.S. at 167 (same holding as to *Simmons v. South Carolina,* 512 U.S. 154 (1994) (holding that a capital defendant must be allowed to inform the sentencing jury that he or she would be ineligible for parole if the prosecution argues future dangerousness)); *Lambrix,* 520 U.S. at 539-40 (no retroactivity for rule of *Espinosa v. Florida,* 505 U.S. 1079 (1992)); *Goeke*, 514 U.S. at 120 (no retroactivity for proposed new rule relating to the fugitive dismissal rule); *Sawyer,* 497 U.S. at 241-45 (same holding as to rule of *Caldwell v. Mississippi,* 472 U.S. 320 (1985)); *Gray*, 518 U.S. at 170 (no retroactivity for proposed new rule concerning notice to a defendant of evidence to be used against him); *Caspari*, 510 U.S. at 396 (same holding as to proposed new rule that Double Jeopardy Clause prohibits successive non-capital sentence proceedings); *Graham*, 506 U.S. at 477-78 (same holding as to rule regarding mitigating evidence in capital sentencing); *Gilmore*, 508 U.S. at 345 (same holding as to new rule regarding jury instructions); *Butler*, 494 U.S. at 416 (same holding as to *Arizona v. Roberson,* 486 U.S. 675 (1988)); *Saffle,* 494 U.S. at 495 (same holding as to proposed rule that a judge in a capital case was barred from telling the jury to avoid any influence of sympathy).

83. 336 N.C. 508 (1994).

84. 494 U.S. 433 (1990).

scheme, should be applied retroactively under *Teague*. The unanimity requirement prevented the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury had not unanimously found. Following the lead of the United States Court of Appeals for the Fourth Circuit, the North Carolina Supreme Court held that the *McKoy* rule fell within the second *Teague* exception and thus retroactively applied to the defendant's case.[85] In light of *Beard,* it is not clear whether *Zuniga* remains good law. In *Beard,* the United States Supreme Court held that *McKoy* and the related rule in *Mills* were not retroactive, in part, because they did not fall within this *Teague* exception.[86]

Step 4: If the Rule is Grounded in North Carolina Law, Apply Rivens

If the sought-for rule is grounded in North Carolina law, the relevant retroactivity rule is that articulated in *State v. Rivens.*[87] Under *Rivens*, overruling decisions are presumed to operate retroactively unless there is a compelling reason to make them prospective only.[88]

Rivens defined retroactive application as covering application of a decision to the following situations: (1) the parties and facts of the case in which the new rule is announced; (2) cases in which the factual event, trial and appeal are all at an end but in which a collateral attack is brought; (3) cases pending on appeal when the decision is announced; (4) cases awaiting trial; and (5) cases initiated in the future but arising from earlier occurrences.[89]

Later cases have clarified that for purposes of determining whether compelling reasons exist for prospective application only, the court must look to the "purpose and effect of the new rule and whether retroactive application will further or retard its operation" as well as "the

85. *See Zuniga*, 336 N.C. at 514.
86. *See Beard,* 124 S. Ct. 2504.
87. 299 N.C. 385 (1980); *see Zuniga*, 336 N.C. at 513 (noting that *Rivens* "correctly states the retroactivity standard applicable to new *state* rules") (emphasis in original).
88. *See Rivens*, 299 N.C. at 390.
89. *Id.* at 389.

reliance placed upon the old rule and the effect on the administration of justice of a retrospective application."[90] *State v. Honeycutt*,[91] decided only months after *Rivens*, found compelling reasons for prospective-only application of a new evidence rule. In *Honeycutt,* the defendant filed a motion for appropriate relief asserting that after his case was decided, the North Carolina Supreme Court issued a decision in *State v. Haywood,*[92] changing the law regarding the admissibility of declarations against penal interest. For more than a century, the North Carolina courts had ruled that declarations against penal interest were inadmissible for any purpose. Then, in *Haywood,* the North Carolina Supreme Court changed course and held that such declarations may be admitted under certain conditions. The defendant in *Honeycutt* asserted that although he had litigated this evidentiary issue in his case and lost, he was entitled to retroactive application of the new *Haywood* rule. The superior court judge agreed and ordered a new trial. The state appealed, contending that the new rule should have prospective application only.

The *Honeycutt* court concluded without difficulty that *Haywood* involved a new rule.[93] It then turned to the more difficult question of whether the new rule applied retroactively. The court concluded that the new rule should be given prospective application only, finding that retroactive application "could easily disrupt the orderly administration of [the] criminal law."[94] The court found this conclusion bolstered by its belief that the change in evidentiary law did not

90. Faucette v. Zimmerman, 79 N.C. App. 265, 271 (1986) (civil case applying the *Rivens* rule).

In this respect, North Carolina retroactivity analysis is similar to pre-*Teague* federal law. *See Griffith,* 479 U.S. at 320-21.

Rivens indicated that in determining whether a case operates retroactively, no distinction is drawn between civil and criminal cases. *See Rivens,* 299 N.C. at 392.

91. 46 N.C. App. 588 (1980).

92. 295 N.C. 709 (1978).

93. *See Honeycutt,* 46 N.C. App. at 590.

94. *Id.* at 591 (quotation omitted).

"rise to the magnitude of a constitutional reform," which "most likely would mandate retroactivity."[95]

Examples of cases that have declined to find compelling reasons warranting prospective-only application include *Rivens*,[96] *Faucette,*[97] and *State v. Funderbunk*.[98]

II. Retroactivity Analysis—Applied

In 2004, the United States Supreme Court issues two very significant criminal law cases. In the first, *Crawford v. Washington,*[99] the Court struck a new course regarding Confrontation Clause analysis, holding that the testimonial statement of non-testifying declarant is not admissible under the Confrontation Clause unless the declarant is unavailable and there has been a prior opportunity for cross-examination. In so holding, the court overruled its decision in *Ohio v. Roberts,*[100] at least as to testimonial evidence.

Three months later, the Court issued its decision in *Blakely v. Washington.*[101] In that case, the Court applied *Apprendi v. New Jersey*[102] and held that Washington state's determinate sentencing scheme was unconstitutional. *Apprendi* had held that any fact other than a prior conviction that increases the prescribed statutory maximum, must be submitted to a jury and proved beyond a reasonable doubt. *Blakely* applied this ruling and held that as used in *Apprendi,* the statutory maximum was the maximum sentence that could be imposed on the basis of a guilty

95. *Id.* at 591-92.
96. 299 N.C. at 390, 392 (applying a new rule to a case for which the court of appeals had awarded a new trial but was in the court of appeals awaiting certification to the trial court at the time that the new rule was announced; court held that new rule applied retroactively "because there is no compelling reason why it should not apply").
97. 79 N.C. App. at 271 (no compelling reasons for only prospective application of new civil rule).
98. 56 N.C. App. 119 (1982) (no compelling reason why *State v. Freeman,* 302 N.C. 591 (1981) (modifying the common law rule of general disqualification in criminal proceedings of the testimony of a defendant's spouse involving communications between the spouse and the defendant), should not apply retroactively).
99. 124 S. Ct. 1354 (2004).
100. 448 U.S. 56 (1980).
101. 124 S. Ct. 2531 (2004).
102. 530 U.S. 466 (2000).

plea or jury verdict. Thus, it invalidated sentencing schemes that allowed the sentencing judge to elevate a sentence on the basis of certain aggravating factors that had not been found by the jury.

While *Crawford* was an earthquake in the field of criminal evidence, *Blakely* was one in the world of sentencing. Both cases have spawned numerous motions for appropriate relief in the North Carolina courts, in which defendants are seeking to have these holdings applied to cases which became final before *Blakely* or *Crawford* were decided. Such motions put the issue of retroactivity directly before the court.

Step One in the analysis above requires an examination of the decisions to see if they specify their retroactive effect.[103] Neither *Crawford* nor *Blakely* specify their retroactive application. Step Two requires a determination of whether the new rule is grounded in federal or state law.[104] Because both *Crawford* and *Blakely* turn on interpretations of federal Constitutional law, they are federal rules. Step Three provides that if the new rule is federal, apply *Griffith* and *Teague.*[105] *Griffith*[106] requires that the rules set out in *Crawford* and *Blakely* apply to all cases that were pending on appeal or not yet final at the time those decisions were rendered.[107] For cases that had already become final when the decisions were issued, the *Teague* test applies.[108]

The first step in the *Teague* analysis is to determine whether the rule is new.[109] This step is required because the *Teague* anti-retroactivity rule only applies to "new" rules.[110] *Crawford* was decided on March 8, 2004. Because *Crawford* overruled *Roberts* with respect to testimonial evidence, it is fairly easy to conclude that *Crawford* is a new rule as to cases that became final

103. *See supra* pp. 1-3 (discussing this step).
104. *See supra* p. 3 (discussing this step).
105. *See supra* pp. 3-14 (discussing this step).
106. 479 U.S. at 314.
107. *See supra* p. 3 (discussing *Griffith* and defining "final" cases).
108. *See supra* pp. 4-5.
109. *See supra* pp. 4-8 (discussing the "new rule" determination).
110. *See supra* p. 4.

before March 8, 2004.[111] The second step in the *Teague* analysis is to determine whether the new rule is procedural or substantive.[112] While new substantive rules generally apply retroactively, new procedural rules are subject to the *Teague* anti-retroactivity rule.[113] Because *Crawford* does not "narrow the scope of a criminal statute by interpreting its terms" or "place particular conduct or persons covered by the statute beyond the State's power to punish,"[114] it is not substantive. As a procedural rule, *Crawford* cannot operate retroactively unless, in the third step in the *Teague* analysis, it is found to fall within the exception for watershed rules of criminal procedure.[115] As noted above, the United States Supreme Court has offered *Gideon* as the paradigmatic example of a rule that falls within this exception but has never actually held a rule to fall within its scope.[116] Given how narrowly the Court has defined the scope of this exception and the types of rules that it has concluded do not fall within its scope,[117] it is unlikely that the *Crawford* rule will be determined to be a watershed rule. In fact, all of the cases to date that have addressed this issue have concluded that *Crawford* does apply retroactively.[118]

Applying retroactivity analysis to *Blakely* is more complex and requires an understanding of the line of cases leading up to *Blakely.* In *Apprendi,*[119] decided on June 26, 2000, the United States Supreme Court interpreted the constitutional due process and jury-trial guarantees to require that other than a prior conviction, any fact that increases the penalty for a crime beyond

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111. *See supra* p. 7 (when a case overrules prior law, it is clearly a new rule).
112. *See supra* pp. 9-11 (discussing the procedural/substantive distinction).
113. *See supra* p. 9.
114. *See id.*
115. *See supra* pp. 11-14 (discussing this exception in more detail).
116. *See supra* p. 13.
117. *See supra* p. 13 & n.82 (citing cases).
118. *See* Brown v. Uphoff, 381 F.3d 1219, 1225-27 (10th Cir. 2004) (*Crawford* is not retroactive); Hutzenlaub v. Portuondo, 325 F. Supp. 2d 236 (E.D.N.Y. 2004) (same); Garcia v. Unites States, 2004 WL 1752588 *2-4 (N.D.N.Y. Aug. 4, 2004) (same); People v. Edwards, 2004 WL 1575250 (Col. Ct. App. July 15, 2004) (same); People v. Kahn, N.Y.S.2d , 2004 WL 1463027 (N.Y. Sup. Ct. June 23, 2004) (same); Wheeler v. Dretke, 2004 WL 1532178 n.1 (N.D. Tex. July 6, 2004) (suggesting same).
119. 530 U.S. 466.

the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Then, in *Ring v. Arizona,*[120] decided on June 24, 2002, the Court applied that principle and concluded that because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proved to a jury rather than to a judge. And finally, in *Blakely,* the Court invalidated Washington state's determinate sentencing scheme, holding that the term "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.[121] Put another way, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum the judge may impose without any additional findings.[122] Thus, the Court invalidated Washington's sentencing scheme because it allowed a sentencing judge to increase the sentence on the basis of aggravating factors not submitted to and found by the jury beyond a reasonable doubt.

For defendants whose convictions became final before *Apprendi* was decided, it would be an uphill battle to assert that before *Apprendi,* it was apparent to all reasonable jurists that guideline sentencing schemes were unconstitutional for the reasons asserted in *Blakely*.[123] This assertion is supported by the vast majority of case law from around the country holding that *Apprendi* was a new rule.[124] If *Apprendi* is a new rule, *Blakely,* which applied *Apprendi,*[125] would have the same status with respect to pre-*Apprendi* cases.

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120. 536 U.S. 584 (2002).
121. *See Blakely,* 124 S. Ct. at 2537.
122. *See id.*
123. *See supra* p. 7 (discussing the "reasonable jurists" standard).
124. *See, e.g.,* Coleman v. United States, 329 F.3d 77, 82 (2nd Cir. 2003) (holding that *Apprendi* was a new rule, citing seven other federal circuit courts that have held the same and noting that no circuit has held otherwise), *cert. denied,* 124 S. Ct. 840 (2003); *see also Schriro,* 124 S. Ct. at 2523 (treating *Ring* as a new rule); *Blakely,* 124 S. Ct. at 2549 (O'Connor, J., dissenting) (noting that on the same day that *Blakely* was decided, the Court held that *Ring* "and *a fortiori Apprendi*" does not apply retroactively).

Defendants whose convictions became final after *Apprendi* may assert that rather than being a new rule, *Blakely* was mandated by *Apprendi* and at the very least, by *Ring.* Consider first the class of defendants whose convictions became final after *Apprendi* but before *Ring.* These defendants may concede that *Apprendi* was new but argue that *Blakely* was not. They would argue that *Apprendi* compelled *Blakely* with its holding that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty *exceeding* the maximum he would received if punished according to the facts reflected in the jury verdict alone."[126] In fact, Justice O'Connor predicted this argument in her dissent in *Blakely.*[127]

However, in her dissenting opinion Justice O'Connor also noted that prior to *Blakely*, only one court had ever applied *Apprendi* to invalidate application of a determinate sentencing scheme.[128] Meanwhile, she cited sixteen decisions, including North Carolina's *State v. Lucas,*[129] that had declined to do so.[130] In the face of this case law, it is difficult to argue that reasonable jurists could not differ as to whether *Apprendi* compelled *Blakely*. In fact, to do so in North Carolina would require a criminal defendant to convince the decisionmaker that the entire North Carolina Supreme Court was unreasonable in concluding to the contrary when it decided *Lucas*.[131] Proponents of the argument that *Blakely* was not compelled by *Apprendi,* may note that in *Schriro,* the Court took no issue with the ruling by the Ninth Circuit below that *Ring*

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125. *See Blakely,* 124 S. Ct. 2536 ("This case requires us to apply the rule we expressed in *Apprendi.*").

126. *Apprendi,* 530 U.S. at 483.

127. *See Blakely,* 124 S. Ct. at 2549 (O'Connor, dissenting) (noting that "all criminal sentences imposed under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack").

128. *See Blakely,* 124 S. Ct. at 2547 n.1 (O'Connor, J., dissenting).

129. 353 N.C. 568 (2001).

130. *See Blakely,* 124 S. Ct. at 2547 n.1 (O'Connor, J., dissenting).

131. 353 N.C. at 596-97 (holding that rather than being the maximum sentence that defendant could receive based on a jury verdict or guilty plea, the statutory maximum is determined by assuming that the offense was aggravated and that the defendant had a criminal history record level of VI).

announced a new rule.[132] Given that *Ring* overruled *Walton v. Arizona,*[133] this is not surprising.[134] However, in *Schriro,* the defendant's conviction became final before *Apprendi.* Thus, the *Schriro* Court did not have occasion to consider whether *Ring* was a new rule vis-à-vis defendants whose convictions became final *after Apprendi.*

The argument that all reasonable jurists would have agreed that *Blakely* was mandated by *Ring*—an argument available only to the small class of defendants whose convictions became final after *Ring*—is stronger. In fact, in *Blakely,* Justice Scalia cited *Ring* for the proposition that "[o]ur precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict of admitted by the defendant."*[135] This language is strong support for the argument that *Blakely* was "dictated" by *Ring.*[136] However, support for a contrary position may be found in the differences between *Ring* and *Blakely* (e.g., that *Ring* dealt only with the allocation of decisionmaking authority between judge and jury and not with the additional issue, addressed in *Blakely,* of the standard of proof), the fractured nature of the *Blakely* decision,[137] the institutionalized practice of structured sentencing in North Carolina,[138] and the post-*Ring* case law from around the country—both federal and state—upholding determinate sentencing schemes even after *Ring.*[139]

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132. *See Schriro,* 124 S. Ct. at 2523.
133. 497 U.S. 639 (1990).
134. *See Ring,* 536 U.S. at 2443 (overruling *Walton*); *supra* p. 7 (when a case overrules an earlier holding, it clearly creates a new rule).
135. *Blakely,* 124 S. Ct. at 2537 (emphasis in original).
136. *See supra* p. 7; *see also Ring,* 536 U.S. at 597 ("Based solely on the jury's verdict finding Ring guilty of first-degree felony murder, the maximum punishment he could have received was life imprisonment.").
137. *See supra* p. 7 (discussing relevance of this fact).
138. *See id.*
139. *See, e.g., Blakely,* 124 S. Ct. at 2547 n.1 (O'Connor, J., dissenting).

If *Blakely* is determined to be a new rule as to any of the classes of defendants discussed above, it cannot operate retroactively unless it is determined to be either a substantive rule or a watershed rule of criminal procedure.[140] In *Schriro,* the Court rejected both arguments as to *Ring.* Rejecting the argument that *Ring* was a substantive rule, Justice Scalia explained:

> *Ring*'s holding is properly classified as procedural. *Ring* held that a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty. Rather, the Sixth Amendment requires that [those circumstances] be found by a jury. This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules . . . .[141]

Like *Ring, Blakely* "requir[es] that a jury rather than a judge find the essential facts bearing on punishment."[142] The fact that *Blakely* also dealt with the standard of proof is unlikely to warrant a different holding on the substantive versus procedural issue.

Similarly, the *Schriro* Court rejected the notion that *Ring* was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings. Recognizing that *Ring* reallocated factfinding from the judge to the jury, Justice Scalia indicated that key question in determining whether this change was a watershed rule is "whether judicial factfinding so *seriously* diminishe[s] accuracy that there is an impermissibly large risk of punishing conduct that the law does not reach."[143] On that issue, he found the evidence "simply too equivocal," noting, in part, that for

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The United States Supreme Court's decision in *Harris v. United States,* 536 U.S. 545 (2002), issued the same day as *Ring*, does not add to the analysis. *Harris* held that allowing a judge to find facts supporting a mandatory *minimum* sentence was consistent with *Apprendi.*

140. *See supra* pp. 9-14 (discussing these issues).
141. *Schriro,* 124 S. Ct. at 2523 (quotation omitted).
142. *Id.*
143. *Schriro,* 124 S. Ct. at 2525 (quotations omitted).

every argument why juries are more accurate factfinders, there are others why they are less accurate.[144] It is not clear whether the fact that *Blakely* also dealt with the burden of proof is enough to distinguish it from *Ring* in this regard. Finally, the few cases selected for publications that have considered the issue have held that *Blakely* does not operate retroactively under *Teague*.[145]

144. *Id.*

145. *See* Morris v. United States, 333 F. Supp. 2d 759 (2004) (citing other federal cases); People v. Dunlap, __ P.3d __, 2004 WL 2002439 *36 (Col. App. Ct. Sept. 9, 2004); People v. Schrader, __ N.E.2d __, 2004 WL 2192550 *4 (Ill. App. Ct. Sept. 30, 2004); *see also* Garcia v. United States, 2004 WL 1752588 (N.D.N.Y. Aug. 2004) (holding that *Blakely* did not apply retroactively but also and inconsistently, holding that *Blakely* was not a new rule).