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False Hope for Prisoners: The Dangers of Making Apprendi v. New Jersey Retroactively Applicable to Felony Drug Convictionsfalse Hope for Prisoners: The Dangers of Making Apprendi v. New Jersey Retroactively Applicable to Felony Drug Convictions

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NOTES

FALSE HOPE FOR PRISONERS: THE DANGERS OF MAKING *APPRENDI v. NEW JERSEY* RETROACTIVELY APPLICABLE TO FELONY DRUG CONVICTIONS

I. INTRODUCTION

Since June 26, 2000, "tens of thousands of federal prisoners . . . serving drug-related sentences" have been seeking hope in a United States Supreme Court decision.[1] In *Apprendi v. New Jersey*,[2] the Supreme Court held that any fact, other than prior convictions, used to increase a defendant's sentence beyond the maximum prescribed by the applicable statute must be submitted to the jury and proven beyond a reasonable doubt.[3] This initially overlooked[4] and important decision has

1. Brooke A. Masters, *High Court Ruling May Rewrite Sentencing; Changes in Guidelines, Raft of Appeals Feared After Justices' Decision*, WASH. POST, July 23, 2000, at A1.

2. 120 S. Ct. 2348 (2000).

3. *Id.* at 2355.

4. This decision was initially overlooked because it was released the same week as *Stenberg v. Carhart*, 120 S. Ct. 2597, 2605 (2000) (rejecting Nebraska law prohibit-

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called into question the sentences of thousands of prisoners convicted under two major federal drug statutes[5] and threatens to burden criminal prosecutors with an overwhelming number of appeals.[6]

While the *Apprendi* decision will likely mean that facts regarding drug type and quantity used to increase a defendant's sentence beyond the statutory maximum must be proven beyond a reasonable doubt to a jury, it should not be retroactively applied to allow collateral attacks[7] on convictions and sentences finalized[8] prior to the June 26, 2000, decision. First, *Apprendi* does not fall under either excep-

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ing "partial birth" abortions), *Boy Scouts of America v. Dale*, 120 S. Ct. 2446, 2458 (2000) (holding Boy Scouts of America have a right to bar homosexuals from membership), and *Dickerson v. United States*, 120 S. Ct. 2326, 2336–37 (2000) (affirming *Miranda* warnings about the right to remain silent during police interrogation).

5. 21 U.S.C. §§ 841, 960 (1994 & Supp. IV 1998).

6. *Apprendi*, 120 S. Ct. at 2394–95 (O'Connor, J., dissenting) (stating that the decision would provoke "a flood of petitions by convicted defendants seeking to invalidate their sentences").

7. A collateral attack upon a conviction is an effort by a prisoner in custody to seek relief in a proceeding other than that in which the judgment of conviction was rendered. *See* BLACK'S LAW DICTIONARY 255 (7th ed. 1999). A § 2255 motion is the proper means to challenge the validity or lawfulness of a conviction. 28 U.S.C. § 2255 (Supp. V 1999).

A prisoner in federal custody must generally file a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 rather than file a petition for a writ of habeas corpus. *Id.* A prisoner in federal custody may not petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 if he has not filed a § 2255 motion for relief or if he has been denied relief under § 2255, unless he can show that the § 2255 remedy is "inadequate or ineffective to test the legality of his detention." *Id.* *See* discussion *infra* Part IV.B.

8. The courts of appeals have differing views as to when a federal conviction becomes "final" for § 2255(1) purposes. Section 2244(d)(1), which is applicable to collateral review of state court decisions, also provides for a one-year period of limitations. 28 U.S.C. § 2244(d)(1) (Supp. IV 1998). However, § 2244(d)(1) provides that the one-year period begins from the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Id.* Section 2255(1) provides merely that the limitation period runs from the "date on which the judgment of conviction becomes final." 28 U.S.C. § 2255(1) (Supp. V 1999). It is well-settled among the circuits that a judgment becomes final when a petition for certiorari is denied by the Supreme Court or when the Supreme Court issues a decision on the merits if the defendant seeks certiorari. United States v. Thomas, 203 F.3d 350, 354 (5th Cir. 2000).

However, there is conflict among the circuits with respect to when a federal criminal conviction becomes final if the defendant does not petition for writ of certiorari from the judgment of the appellate court. For example, the Third, Fourth, and Tenth Circuits hold the similar view that a judgment becomes final "when a criminal defendant's options for further direct review are foreclosed, rather than when the highest court to consider the case issues its judgment." *Id.* at 352 (citations omitted); United States v. Torres, 211 F.3d 836, 840 (4th Cir. 2000); United States v. Burch, 202 F.3d 1274, 1276 (10th Cir. 2000) (holding that judgment is final after time for seeking certiorari review has expired). However, the Seventh Circuit adheres to the view that where a defendant does not seek further review, a conviction becomes final when the highest court to consider the case issues its mandate in the direct criminal appeal rather than when the time period for seeking further review has expired. *Thomas*, 203 F.3d at 353; *Burch*, 202 F.3d at 1276 (citing Gendron v. United States, 154 F.3d 672, 674 (7th Cir. 1998)).

tion to the general rule that new constitutional rules of criminal procedure are not retroactively applicable on collateral review.[9] Second, making this new decision retroactive would endanger the federal criminal justice system, undercut the principle of finality, and create a flood of unnecessary litigation.[10]

Part II of this Note sets forth the history behind the *Apprendi* decision, the Court's rationale, and *Apprendi*'s impact on prior Supreme Court decisions. Part III argues against the new rule's applicability to felony drug convictions on collateral review. Part IV describes the common law and statutory restrictions that should preclude prisoners from invoking this new procedural rule on collateral attack.

II. *APPRENDI V. NEW JERSEY*

A. *Factual and Procedural Background*

Apprendi involved a racially motivated shooting that took place on December 22, 1994, in Vineland, New Jersey.[11] Before dawn that morning, Charles Apprendi, a white man, fired gunshots into the home of an African-American family because he did not want the family in "his" otherwise all-white neighborhood.[12] The State charged Apprendi with a twenty-three count indictment.[13] Apprendi pleaded guilty to three counts in exchange for dismissal of the remaining twenty counts.[14]

The controversy turned on the sentence that was ultimately imposed. One of the three counts to which Apprendi pleaded guilty—possession of a firearm for an unlawful purpose—carried a term of imprisonment of five to ten years.[15] However, New Jersey's hate crime statute provided for an extended term of ten to twenty years if the trial judge found, "by a preponderance of the evidence, that the defendant . . . committ[ed a] crime . . . with a purpose to intimidate [a person] or group . . . because of race."[16] Immediately before sentencing, the prosecutor moved to enhance Apprendi's sentence pursuant to New Jersey's hate crime law.[17] Subsequently, the judge concluded that Apprendi's actions were motivated by racial bias and enhanced Apprendi's sentence to twelve years in prison.[18]

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9. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion).

10. Masters, *supra* note 1, at A1. *See also* Cherylyn Waibel, Case Note, Apprendi v. New Jersey, *120 S. Ct. 2348 (2000)*, 25 SETON HALL LEGIS. J. 273, 285–86 (2001); Tony Mauro & Jonathan Ringel, *Court's* Apprendi *Hate Crime Decision May Have Broad Impact on Sentencing*, LEGAL INTELLIGENCER, June 28, 2000, at 4.

11. *Apprendi*, 120 S. Ct. at 2351.

12. *Id.*

13. *Id.* at 2352.

14. *Id.*

15. *Id.* (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

16. *Id.* at 2351 (citing N.J. STAT. ANN. §§ 2C:43-7(a)(3), :44-3(e) (West 1995)).

17. *Id.* at 2352.

18. *Id.*

The issue presented to the Supreme Court in *Apprendi* was whether the Due Process Clause of the Fourteenth Amendment permits a state to design a sentencing system that takes sentencing enhancements that expose a defendant to punishment beyond the statutory maximum away from the jury and gives them to the trial judge for determination based on a preponderance of the evidence.[19] The answer was no.[20] The Supreme Court held by a 5-4 majority that this method of sentencing enhancement violated the defendant's notice and jury trial rights under the Sixth Amendment and his due process rights under the Fourteenth Amendment because he was sentenced beyond the maximum penalty under the firearm statute.[21] The Court concluded that, in effect, Apprendi was subjected to punishment designed for a first-degree crime (based on facts neither submitted to the jury nor proven beyond a reasonable doubt) where he was actually charged with and convicted of a second-degree offense.[22]

B. *The Majority's Opinion and Rationale*

The Supreme Court based its reasoning on *Jones v. United States*,[23] which interpreted the text of the multi-part federal carjacking statute, 18 U.S.C. § 2119.[24] In what was then dictum, the Supreme Court stated that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[25]

The statute at issue in *Jones* provides that the maximum sentence for carjacking is fifteen years imprisonment.[26] But the same statute adds that if serious bodily injury results from the offense, the defendant may be sentenced to a term of up to twenty-five years.[27] Additionally,

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19. *Id.* at 2351–52.
20. *Id.* at 2363.
21. *Id.* at 2351, 2362–63.
22. *Id.* at 2363.
23. 526 U.S. 227 (1999), *cited in Apprendi*, 120 S. Ct. at 2355.
24. 18 U.S.C. § 2119 provides that any person who,
> with the intent to cause death or serious bodily harm takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
> (1) be . . . imprisoned not more than 15 years, or . . .
> (2) if serious bodily injury . . . results, be . . . imprisoned not more than 25 years . . . .

18 U.S.C. § 2119(1)–(2) (Supp. V 1999) (footnote omitted). Furthermore, if death occurs, the defendant faces a maximum of life imprisonment or death. 18 U.S.C. § 2119(3) (1994).
25. *Jones*, 526 U.S. at 243 n.6.
26. 18 U.S.C. § 2119(1) (Supp. V 1999).
27. *Id.* § 2119(2).

if death results, the defendant may be subjected to a maximum penalty of life imprisonment.[28] In *Jones*, the Court adhered to the doctrine that statutes should be construed to avoid constitutional issues and held that each portion of the carjacking statute constitutes a separate element of the offense rather than a mere sentencing provision.[29] The Fifth and Sixth Amendments of the United States Constitution require that criminal convictions rest upon a jury determination that the defendant is guilty of every element of the crime beyond a reasonable doubt.[30] Rather than hold the statute unconstitutional, the Court mandated that serious bodily injury, a sentence-increasing fact under 18 U.S.C. § 2119, was an element that must be submitted to the jury and proven beyond a reasonable doubt.[31]

In *Apprendi,* the Supreme Court formally adopted the dictum from *Jones*.[32] The holding was based on the accused's protection under the Due Process Clause "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[33] The Court held that any fact enhancing a sentence beyond the maximum authorized by the statute "is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict"—even if the fact was previously treated as a sentencing factor to be determined by the court.[34] Facts that have this effect, despite their label, constitute an element of the offense and thus entitle the defendant to a jury determination of each fact beyond a reasonable doubt.[35] The Supreme Court, therefore, declared New Jersey's hate crime statute unconstitutional because it allowed a jury to convict a defendant of a second-degree offense on its finding beyond a reasonable doubt and then permitted a judge to impose punishment designed for first-degree crimes on a finding of certain predicate facts by a preponderance of the evidence.[36] Ultimately, the new rule from *Apprendi* mandates that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[37]

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28. 18 U.S.C. § 2119(3) (1994).

29. *Jones*, 526 U.S. at 243 & n.6.

30. United States v. Gaudin, 515 U.S. 506, 510 (1995).

31. *Jones*, 526 U.S. at 243 & n.6. *Accord* Apprendi v. New Jersey, 120 S. Ct. 2348, 2362–63 (2000).

32. *Apprendi*, 120 S. Ct. at 2362–63.

33. *In re* Winship, 397 U.S. 358, 364 (1970), *cited in Apprendi*, 120 S. Ct. at 2350.

34. *Apprendi*, 120 S. Ct. at 2365 n.19.

35. *See id.* at 2355. "[R]elevant inquiry is one not of form, but of effect," so that Sentencing Guidelines, as well as facts specified within penalty provisions under the statute itself, are considered elements of an offense if their applicability subjects the defendant to a greater punishment than the maximum set forth for the offense itself. *Id.* at 2365.

36. *Id.* at 2363.

37. *Id.* at 2362–63.

C. Apprendi's *Effect on Traditional Criminal Procedure and Precedent*

It is likely that federal prisoners will attempt to overextend the reach of *Apprendi* to collaterally challenge the constitutionality of any sentence enhanced under the Sentencing Guidelines. In fact, Justice O'Connor argued in her dissent that the majority opinion in *Apprendi* would cast doubt on "all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations," predicting that "each new sentence will rest on shaky ground."[38] While this decision appears to provide a strong argument for all persons convicted under certain federal statutes, the actual number of cases it affects is quite limited.

First, *Apprendi* did not hold that all facts enhancing a sentence beyond the statutory maximum must be specifically alleged in the indictment. The Court noted that Apprendi had not raised any question concerning the sufficiency of the indictment, and therefore, did not address whether facts that increase the statutory maximum must be charged in the indictment.[39]

Second, the Supreme Court did not overrule *McMillan v. Pennsylvania*,[40] which upheld the required imposition of a mandatory minimum sentence based on a finding made by the sentencing judge on a preponderance of the evidence standard.[41] *Apprendi* merely limits *McMillan* to those "cases that do not involve . . . imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict."[42]

> If the non-jury factual determination only narrows the sentencing judge's discretion within the range already authorized by the offense . . . , the legislature [may] raise the minimum penalty associated with a crime based on non-jury factual findings, as long as the penalty is within the range specified for the crime for which the defendant was convicted.[43]

Third, a defendant's prior convictions may still be constitutionally treated as a sentencing factor rather than as an element of the offense and may be found by a judge on a preponderance of the evidence, even if doing so increases the applicable statutory maximum penalty.[44]

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38. *Id.* at 2391, 2395 (O'Connor, J., dissenting).

39. *Id.* at 2355–56 n.3.

40. *Id.* at 2361 n.13; McMillan v. Pennsylvania, 477 U.S. 79 (1986).

41. *McMillan*, 477 U.S. at 81–82 (upholding Pennsylvania's Mandatory Minimum Sentencing Act requiring that anyone convicted of certain felonies would be subject to a mandatory minimum penalty of five years imprisonment if the judge found, by a preponderance of evidence, that the person visibly possessed a firearm in the course of committing one of the specified felonies).

42. *Apprendi*, 120 S. Ct. at 2361 n.13.

43. United States v. Aguayo-Delgado, 220 F.3d 926, 933–34 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000).

44. *Apprendi*, 120 S. Ct. at 2361–63.

The Court in *Apprendi* held that this rule, taken from *Almendarez-Torres v. United States*,[45] is a narrow exception to the new rule.[46] In dictum, however, the Court stated that *Almendarez-Torres* could arguably have been decided incorrectly.[47] The Court declined to address the validity of recidivism only because *Apprendi* did not raise it on appeal.[48] This statement foreshadows a possible change in the treatment of prior convictions should the Court ever rule on the issue.

Fourth, *Apprendi* did not invalidate the United States Sentencing Guidelines. Relevant conduct determinations will still be made under the Guidelines to determine a defendant's sentence within the statutory maximum.[49] The Court was not called upon to declare the constitutionality of the Sentencing Guidelines and consequently "express[ed] no view on the subject beyond what this Court has already held."[50] The Sentencing Guidelines have the force and effect of the law,[51] but the "maximum sentence set by statute trumps a higher sentence set forth in the Guidelines."[52] The Sentencing Guidelines are merely used to limit the sentencing judge's discretion by requiring the court to consider specific factors in setting sentences within the statutory maximum.[53] As long as the resulting sentence does not exceed the maximum provided under the applicable statute, courts are still free to use their discretion to increase or decrease punishment based on aggravating or mitigating factors under the Sentencing Guidelines.[54] If courts use the guidelines to channel their discretion

45. 523 U.S. 224, 226–27 (1998). In *Almendarez-Torres*, the Court based its decision on federal courts' long-standing tradition of treating recidivism as punishment enhancers. *Id.* at 243. Prior convictions do not make up a material element or go to part of the definition of the offense, nor does a prior conviction constitute a new crime. *Id.* (citing Graham v. West Virginia, 224 U.S. 616, 624 (1912)). Rather, the Court in *Almendarez-Torres* feared that turning prior convictions into a material element would create potential for jury prejudice. *Id.* at 235. *Accord* Spencer v. Texas, 385 U.S. 554, 560 (1967).

The Court anticipated that juries, despite a limiting instruction, would use the existence of a prior conviction as propensity evidence. See *Almendarez-Torres*, 523 U.S. at 235, for the Supreme Court's rationale behind excluding prior convictions as an element of the offense. The Federal Rules of Evidence prohibit this type of evidence. FED. R. EVID. 404(b) (prohibiting evidence of other crimes, wrongs, or acts to prove character of a person in order to show action in conformity therewith).

46. *Apprendi*, 120 S. Ct. at 2362.

47. *Id.*

48. *Id.*

49. Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000). *See also* Sustache-Rivera v. United States, 221 F.3d 8, 10 (1st Cir. 2000) (stating that serious bodily injury during a carjacking may be treated as a sentencing factor by a judge), *cert. denied*, 121 S. Ct. 1364 (2001).

50. *Apprendi*, 120 S. Ct. at 2366 n.21 (2000).

51. Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

52. Edwards v. United States, 523 U.S. 511, 515 (1998).

53. Witte v. United States, 515 U.S. 389, 402 (1995).

54. *Apprendi*, 120 S. Ct. at 2358; *Edwards*, 523 U.S. at 513–15.

within the statutory range of penalties, there is no issue as to the constitutionality of the Sentencing Guidelines under the *Apprendi* rule.[55]

While the effect of *Apprendi* is not as broad as it first might appear, the decision left open two important issues that remain the focus of this Note. First, *Apprendi* dealt with two separate state statutes having the combined effect of enhancing the defendant's sentence beyond that provided in the firearm statute alone.[56] Thus, the opinion leaves open the issue of *Apprendi*'s applicability to many multi-part federal crime statutes, most obviously the federal drug statutes, 21 U.S.C. § 841(b) and 21 U.S.C. § 960(b).[57] Second, *Apprendi* was a case on direct appeal. Therefore, the Court did not address the impact it would have on federal prisoners attempting to invoke the *Apprendi* principle to vacate, set aside, or correct their convictions or sentences on collateral review.[58]

III. COLLATERAL ATTACKS ON FEDERAL DRUG CONVICTIONS PURSUANT TO THE *APPRENDI* PRINCIPLE

A. Apprendi*'s Applicability to the Federal Drug Statutes*

Section 841(a) of Title 21 of the United States Code prohibits a person from "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance; or . . . a counterfeit substance."[59] Section 960(a) makes it illegal to "import[ ] or export[ ]" or "possess[ ] on board a vessel, aircraft, or vehicle a controlled substance."[60] Both statutes establish sliding scales of maximum penalties to which a narcotics offender may be subject, depending upon: (1) the type and amount of narcotics the defendant distributed or possessed; (2) whether serious bodily injury or death occurred as a result of the violation; and (3)

55. *See Edwards*, 523 U.S. at 515; *Witte*, 515 U.S. at 400–04. "[C]onsideration of information about the defendant's character and conduct at sentencing does not result in 'punishment' for any offense other than the one of which the defendant was convicted." *Witte*, 515 U.S. at 401. Examples of aggravating and mitigating sentencing factors under the Sentencing Guidelines are: (1) whether the defendant was an organizer, leader, or manager in the commission of the offense; (2) whether the defendant's actions constituted an obstruction of justice; and (3) whether the defendant provided substantial assistance to public authority in the prosecution of another defendant. U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.1(c), 3C1.1, 5K1.1 (1998).

56. *Apprendi*, 120 S. Ct. at 2351.

57. *See* Robyn Blumer, *Court Says Juries, Not Judges, Must Decide the Crime*, ST. PETERSBURG TIMES, Aug. 6, 2000, at 3D. "Susan Klein, a professor at the University of Texas Law School and a former federal prosecutor, said she has identified at least 40 federal criminal statutes that appear to be unconstitutional under these new rules." *Id.*

58. *See* 28 U.S.C. § 2255 (Supp. V 1999) (allowing federal prisoners to challenge the constitutional validity of their convictions and sentences by motion). *See also supra* text accompanying notes 2–5.

59. 21 U.S.C. § 841(a) (1994).

60. *Id.* § 960(a).

whether the defendant has prior drug convictions.[61] For example, 21 U.S.C. § 841(b)(1)(C) provides for a maximum sentence of twenty years imprisonment (or thirty years if the defendant has a prior felony drug conviction) for cocaine trafficking offenses, without regard to drug amount.[62] Section 841(b)(1)(B) prescribes a forty-year maximum sentence (or a maximum of life imprisonment if the defendant has a prior felony drug conviction) for offenses involving 500 grams or more of cocaine.[63] Section 841(b)(1)(A) provides for a maximum sentence of life imprisonment for offenses involving five kilograms or more of cocaine.[64]

Determining drug quantity is crucial to the statutory sentencing range because the severity of the penalties prescribed under §§ 841(b) and 960(b) depend upon the volume and type of drugs manufactured and sold. The issue surrounding the federal drug statutes turns on whether permitting a judge to determine drug quantity and type by a preponderance of the evidence and then punish a defendant with more prison time than he would receive for trace amounts, infringes the defendant's constitutional right to have his guilt judged by a jury of his peers.[65]

The recent practice in federal courts has been that the court, rather than the jury, determines drug type and quantity.[66] This practice occurs because the federal drug statutes only instruct the jury to determine whether the defendant has possessed, manufactured, or distributed a controlled substance to establish guilt.[67] The federal government's burden of proof has been, therefore, to prove quantity only by a preponderance of the evidence rather than beyond a reasonable doubt.[68] The United States Probation Office, in their pre-sentence report (PSR), would then recommend to the district court a sentence based on trial testimony, investigative reports from the DEA and FBI, and reports of arrests, seizures, and undercover drug transactions from local law enforcement agencies.[69] Finally, the district court would apply the Sentencing Guidelines to calculate a defendant's of-

61. *Id.* §§ 841(b)(1), 960(b).

62. *Id.* § 841(b)(1)(C).

63. *Id.* § 841(b)(1)(B).

64. *Id.* § 841(b)(1)(A). See also *id.* § 960(b)(1)–(4), for similar provisions.

65. *See* United States v. Buckland, 259 F.3d 1157, 1163 (9th Cir. 2001) (holding that 21 U.S.C. §§ 841(b)(1)(A) and (B) are facially unconstitutional under *Apprendi* because they permit the judge to determine the quantity of drugs under a preponderance of the evidence standard and increase the maximum penalty). However, the court further stated that the unconstitutional sections "are severable from the remainder of the statute." *Id.* at 1169.

66. United States v. Aguayo-Delgado, 220 F.3d 926, 929 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000).

67. *See* United States v. Grimaldo, 214 F.3d 967, 972–73 (8th Cir.), *cert. denied*, 531 U.S. 939 (2000), *and cert. denied*, 531 U.S. 1081 (2001).

68. *See id.*

69. *See* Witte v. United States, 515 U.S. 389, 393–94 (1995).

fense level and sentence according to drug type and amount found attributable to the defendant in the PSR.[70]

Prior to *Apprendi*, the Eighth Circuit, in *United States v. Grimaldo*,[71] rejected the idea that drug quantity is a material element under the federal drug statutes,[72] recognizing clear legislative intent to make drug quantity a sentencing factor.[73] Historically, all other circuit courts have held the same, interpreting the holding in *Jones*[74] as "a suggestion rather than an absolute rule."[75] The Eighth Circuit was also the first federal appellate court to consider *Apprendi*'s application to drug amounts[76] and found that the new rule applies to federal drug cases.[77] In *United States v. Aguayo-Delgado*,[78] the court discovered it had erred in concluding that the drug type and quantity rules under § 841(b) are sentencing factors rather than elements.[79] On the other hand, the Seventh Circuit has held that *Apprendi* did "not affect the holding of *Edwards v. United States*, that the judge alone determines drug types and quantities when imposing sentences short of the statutory maximum."[80]

A large part of the Supreme Court's reasoning for its decision in *Apprendi* reflects its reaction to the specific facts of the case.[81] The Court invalidated New Jersey's hate crime statute because the statute allowed a trial judge to increase a maximum sentence based on assessment of a defendant's degree of culpability or mens rea by a preponderance of the evidence.[82] The statute required enhancement based on the defendant's state of mind, or "purpose to intimidate."[83] Through its reference to *Black's Law Dictionary*'s definition of the word, the Court implied that a defendant's "purpose" is equivalent to

70. *See Aguayo-Delgado*, 220 F.3d at 928.
71. *Grimaldo*, 214 F.3d at 967.
72. *Id.* at 972.
73. *Id.*
74. Jones v. United States, 526 U.S. 227 (1999).
75. United States v. Angle, 230 F.3d 113, 122 (4th Cir. 2000).
76. *See* Robert Batey, *Sentencing Guidelines and Statutory Maximums in Florida: How Best to Respond to* Apprendi, FLA. B.J., Nov. 2000, at 57, 59 n.2.
77. United States v. Aguayo-Delgado, 220 F.3d 926, 933–34 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000). *See also* United States v. McIntosh, 236 F.3d 968, 975–76 (8th Cir.), *cert. denied*, 121 S. Ct. 1964 (2001); United States v. Lafreniere, 236 F.3d 41, 50 (1st Cir. 2001) (discussing the Eighth Circuit's holding in *Aguayo-Delgado*).
78. *Aguayo-Delgado*, 220 F.3d at 926.
79. *Id.* at 930–33 (recognizing that the court in *United States v. Wood*, 834 F.2d 1382 (8th Cir. 1987), had erred when it determined that drug quantity was a sentencing factor rather than an element of the offense).
80. Talbott v. Indiana, 226 F.3d 866, 869–70 (7th Cir. 2000) (citation omitted) (citing Edwards v. United States, 523 U.S. 511, 513–14 (1998) (recognizing that the Sentencing Guidelines instruct the judge to determine both the amount and kind of controlled substances for which a defendant is held accountable and then "impose a sentence that varies depending upon amount and kind")).
81. Apprendi v. New Jersey, 120 S. Ct. 2348 (2000).
82. *Id.* at 2363–64.
83. *Id.* at 2364.

intent.[84] Thus, the prohibited intent in committing a crime under New Jersey's hate crime statute was "as close as one might hope to come to a core criminal offense 'element.'"[85] The Court found that Apprendi's motives and racial prejudice, therefore, constituted a mens rea element of an aggravated offense rather than a sentencing factor used to increase his punishment.[86]

Aside from the foregoing rationale, the Supreme Court held that "[d]espite . . . the clear 'elemental' nature of the factor here, [racial bias], the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[87] If the finding of any fact exposes the defendant to a penalty beyond the maximum set out in the statutory offense, "[t]he degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense."[88] Thus, the effect that the factual finding has on the defendant's sentence determines whether it is an element of the offense or a sentencing factor.

Under this analysis, it is evident that drug quantity will now be considered an element with respect to the federal drug statutes. The penalty schemes in §§ 841 and 960 are intended and designed to impose more severe penalties upon those who distribute larger quantities of drugs.[89] However, as Justice O'Connor argued in her dissent, *Apprendi* did not overrule *Walton v. Arizona*.[90] There, the Court held that a judge, rather than a jury, "must determine the existence or nonexistence of statutory aggravating and mitigating factors" authorizing the imposition of a death sentence.[91] So it is difficult to understand why the fact of drug quantity, which only subjects a defendant to a broader range of imprisonment, could not be judge-determined when a judge may make the more severe determination of life or death in capital cases.[92]

84. *See id.* at 2364 n.17 (citing BLACK'S LAW DICTIONARY 1137 (rev. 4th ed. 1968)). The Supreme Court further notes, however, that the state appellate court did not need to further define intent because of the applicable statutory language. *Id.*

85. *Id.* at 2364.

86. *See id.* at 2365–66.

87. *Id.* at 2365.

88. *Id.*

89. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 461, 465 (1991) (discussing the Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1986)).

90. *Apprendi*, 120 S. Ct. at 2388 (O'Connor, J., dissenting); Walton v. Arizona, 497 U.S. 639 (1990).

91. *Apprendi*, 120 S. Ct. at 2387 (citing *Walton*, 497 U.S. at 643).

92. *See Walton*, 497 U.S. at 643 (citing ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989)).

Despite this argument, the Supreme Court recently vacated the Tenth Circuit's judgment in *United States v. Jones* (*Jones II*).[93] In *Jones II*, a grand jury indictment charged Jones with cocaine possession in violation of § 841(b)(1)(C).[94] Based on government evidence, the sentencing judge concluded that the amount of cocaine base involved in the offense was 165.5 grams and sentenced Jones to 360 months imprisonment under 21 U.S.C. § 841(b)(1)(A)(iii).[95] This statute carries a maximum term of life imprisonment for fifty grams or more of a mixture containing cocaine base.[96]

On appeal, Jones argued that he was sentenced above the statutory maximum because quantity was neither alleged in the indictment nor submitted to the jury on a reasonable doubt instruction.[97] The Tenth Circuit declined to re-examine whether the Fifth and Sixth Amendments of the United States Constitution require the issue of drug quantity determinations under § 841(b)(1) to be submitted to the jury and proven beyond a reasonable doubt.[98] Subsequently, the Supreme Court "remanded [that decision] for further consideration in light of *Apprendi*."[99]

On remand, the Tenth Circuit Court of Appeals concluded that drug quantity is an essential element of the offense if it increases a defendant's sentence beyond the statutory maximum and that the sentence imposed upon Jones impermissibly exceeded the maximum penalty charged in the indictment.[100] Thus, the Tenth Circuit vacated Jones's sentence and remanded the case to the district court for resentencing pursuant to § 841(b)(1)(C).[101]

Jones II foreshadows the likely result that *Apprendi does* change the traditional treatment of drug quantity as a sentencing factor.[102] Failure to treat drug quantity as a material element of sentences prior to

93. 194 F.3d 1178 (10th Cir. 1999) [hereinafter *Jones II*], *vacated*, 120 S. Ct. 2739 (2000).

94. *Jones II*, 194 F.3d at 1180.

95. *Id.* at 1181.

96. 21 U.S.C. § 841(b)(1)(A) (1994).

97. *Jones II*, 194 F.3d at 1183.

98. *Id.* at 1183–86.

99. Jones v. United States, 120 S. Ct. 2739 (2000). *See also* United States v. Angle, 230 F.3d 113, 121 (4th Cir. 2000) (recognizing that sentencing factors that support a sentence within the statutorily prescribed range submitted to a judge on a preponderance of the evidence standard are not forbidden by *Apprendi*).

100. United States v. Jones, 235 F.3d 1231, 1238 (10th Cir. 2000).

101. *Id.*

102. *See Angle*, 230 F.3d at 121. *See also* United States v. Nordby, 225 F.3d 1053, 1056 (9th Cir. 2000) (overruling prior cases that did not require drug quantity to be submitted to the jury and proven beyond a reasonable doubt when defendants were sentenced beyond the statutory maximum); United States v. Meshack, 225 F.3d 556, 576 (5th Cir. 2000) (stating that *Apprendi* does not resolve the issue of whether a sentence enhancement that does not exceed the statutory range must be proven to the jury), *cert. denied sub nom.*, Parker v. United States, 531 U.S. 1100 (2001).

the *Apprendi* decision, however, should still not be an issue cognizable on collateral attack.

B. Apprendi *Should Not Apply on Collateral Review*

Federal prisoners are now coming forth to invoke the *Apprendi* principle on collateral attack pursuant to a motion under 28 U.S.C. § 2255,[103] asserting a violation of their constitutional rights due to the prosecutor's failure to charge and submit drug type and quantity to the jury on a reasonable doubt instruction.[104] These prisoners are clinging to false hope by claiming that failure to comply with *Apprendi*'s new procedural standard prior to the date it was issued constitutes error of such magnitude as to justify reversal of otherwise valid sentences. First, *Apprendi* is a new constitutional rule of procedure, which is not applicable to collateral attacks under *Teague v. Lane*.[105] Second, making this new rule retroactively available to prisoners seeking habeas relief threatens the finality of thousands of federal drug convictions and sentences. Third, it is unlikely that the prisoners would be able to show actual and substantial prejudice, infecting the entire trial with error.[106] In fact, it has been held that any error in failing to instruct the jury on an essential element of the charged offense is subject to the harmless error standard.[107]

1. A New Constitutional Rule of Criminal Procedure

A motion to vacate a conviction and sentence pursuant to 28 U.S.C. § 2255[108] is now the general post-conviction remedy for prisoners

103. 28 U.S.C. § 2255 (Supp. V 1999) (stating that a motion pursuant to 28 U.S.C. § 2255 is the proper means for a prisoner in federal custody to challenge the validity or constitutionality of a conviction). *See* Capaldi v. Pontesso, 135 F.3d 1122, 1123 (6th Cir. 1998).

104. *See, e.g.*, *In re* Tatum, 233 F.3d 857 (5th Cir. 2000).

105. 489 U.S. 288 (1989). There is not an issue as to *Apprendi*'s applicability to cases on direct review of drug convictions that have not become final. "[N]ew rules should always be applied retroactively to cases on direct review." *Id.* at 303 (plurality opinion). "'[F]ailure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.'" *Id.* at 304 (plurality opinion) (quoting Griffith v. Kentucky, 479 U.S. 314, 322 (1987) (adopting Justice Harlan's view)).

106. *See* Singleton v. United States, 26 F.3d 233, 237 (1st Cir. 1994); Dalton v. United States, 862 F.2d 1307, 1310–11 (8th Cir. 1988).

107. *See Singleton*, 26 F.3d at 236–37.

108. Title 28, United States Code, § 2255 provides that:

> A prisoner in [federal] custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> . . . If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to

challenging federal judgments.[109] Like the writ of habeas corpus for a state prisoner, the § 2255 motion is an obvious vehicle for the retroactive application of new principles of law announced after the judgment under attack became final.[110]

Although the wording of the statute allows prisoners to challenge their convictions and sentences based on a violation of their constitutional rights or of the laws of the United States,[111] the principle in *Apprendi* should not apply to collateral attacks at all.[112] The new principle adopted by the Supreme Court in *Apprendi*—requiring any fact, other than prior convictions, that exposes a defendant to a penalty beyond the maximum authorized by the statutory offense to be submitted to the jury and proven beyond a reasonable doubt[113]—is a "new rule[ ] of constitutional procedure,"[114] not applicable to cases on collateral review under *Teague v. Lane*.[115] Although prisoners claiming relief under 28 U.S.C. § 2255 are correct in that *Apprendi* sets forth a new rule of constitutional law,[116] it is not one which entitles

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collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

28 U.S.C. § 2255.

109. LARRY W. YACKLE, POSTCONVICTION REMEDIES 154–55 (1981).

110. *See supra* note 8.

111. 28 U.S.C. § 2255.

112. The Eleventh Circuit has left open the question whether *Apprendi* is a "new rule of constitutional law" for purposes of collateral attack. *In re* Joshua, 224 F.3d 1281, 1283 n.3 (11th Cir. 2000).

113. Apprendi v. New Jersey, 120 S. Ct. 2348, 2362–63 (2000).

114. Bilzerian v. United States, 127 F.3d 237, 241 (2d Cir. 1997). With respect to the multi-part federal drug statutes, *Apprendi* does not alter what the government must prove in a criminal matter but only changes to whom the government must prove drug quantity and type. Therefore, it is not a new rule of substantive law but a new rule of criminal procedure. *Cf.* United States v. Shunk, 113 F.3d 31, 35 (5th Cir. 1997) (holding that the new rule established in *United States v. Gaudin*, 515 U.S. 506 (1995), requiring a materiality element for 18 U.S.C. § 1001 to be decided by the jury, not by a judge, beyond a reasonable doubt is a new rule of criminal procedure not retroactively applicable under the *Teague* rule).

115. 489 U.S. 288 (1989).

116. *Apprendi*, 120 S. Ct. at 2362–63; *Teague*, 489 U.S. at 301 (plurality opinion) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."). The *Apprendi* rule was based on dictum set out in *Jones v. United States*, *Apprendi*, 120 S. Ct. at 2362, that "any fact (other than prior conviction)" that increases the maximum penalty for a crime must be charged in an "indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243 n.6 (1999). Therefore, *Apprendi* is a new rule because *Jones* did not "dictate" this rule but merely suggested it. *Id. Apprendi* adopted it as a constitutional right under the due process clauses of the Fifth and Fourteenth Amendments. *Apprendi*, 120 S. Ct. at 2362–63. Furthermore, the Court in *Jones* made clear that its decision "does not announce any new principle of constitutional law." *Jones*, 526 U.S. at 251 n.11.

them to freedom from a conviction that became final before the Supreme Court's decision in *Apprendi.*

The Constitution neither prohibits nor requires retrospective application of new rules to cases litigated before the new rules were established.[117] Rather, the Supreme Court has recognized that the requirement of retroactive application does not automatically turn on the particular provision of the Constitution on which the new rule is based but is a matter of degree.[118] The test consistently employed by the courts to decide whether a new constitutional rule of criminal procedure should be applied retroactively is given in *Teague v. Lane.*[119]

In *Teague*, the Supreme Court held that, "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[120] The Court then defined the exceptions, stating that a "new constitutional rule" may be applied retroactively on federal collateral review only if the rule (1) puts "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"[121] or (2) is a rule of procedure that is "'implicit in the concept of ordered liberty.'"[122] Therefore, most new procedural rules are inapplicable on collateral attack.

The Supreme Court set out in *O'Dell v. Netherland* three steps in determining whether, under the *Teague* doctrine, a "court-made" rule is retroactively applicable on collateral review.[123] First, the court must determine the date upon which the conviction became final.[124] If the conviction became final after the "court-made" rule, then any application of the rule would be retroactive.[125] Second, the court must consider whether the rule is "new."[126] It must be determined in hindsight whether the district court that convicted and sentenced the defendant would have "'felt compelled by existing precedent to conclude that

117. Linkletter v. Walker, 381 U.S. 618, 629 (1965).

118. Johnson v. New Jersey, 384 U.S. 719, 728–29 (1966).

119. *Teague*, 489 U.S. at 288.

120. *Id.* at 310 (plurality opinion).

121. *Id.* at 311 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

122. Mackey v. United States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part and dissenting in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)), *quoted in Teague*, 489 U.S. at 311 (plurality opinion). The two exceptions to nonretroactivity adopted in *Teague* were originally introduced in *Mackey*, *id.* at 692–93 (Harlan, J., concurring in part and dissenting in part), by Justice Harlan, who believed that new rules generally should not be applied to cases on collateral review. *See id.* (Harlan, J., concurring in part and dissenting in part).

123. O'Dell v. Netherland, 521 U.S. 151, 156–57 (1997).

124. *Id.* at 156.

125. *See Teague*, 489 U.S. at 310 (plurality opinion).

126. *O'Dell*, 521 U.S. at 156.

the [*Apprendi*] rule . . . was required by the Constitution.'"[127] If the district court reasonably[128] would not have felt compelled to rule in the defendant's favor by precedent existing at the time the conviction became final, then the rule is "new."[129] A case announces a new rule when it "breaks new ground," "imposes a new obligation on the States or the Federal Government" or was not "*dictated* by precedent existing at the time the defendant's conviction became final."[130] Third, if the rule that the defendant seeks to invoke pursuant to a § 2255 motion is "new," the court must determine whether the rule falls within one of two narrow exceptions to the non-retroactivity principle set out in *Teague*.[131]

Under this standard, *Apprendi* clearly adopted a "new" rule.[132] No prior decision had "dictated" that any factor that increases the maximum punishment for an offense must be submitted to the jury on a reasonable doubt instruction.[133] In fact, as recently as 1998, the Supreme Court had upheld sentences that were greater than the otherwise applicable statutory maximums, based on facts that were neither charged in the indictment nor found by the jury beyond a reasonable doubt.[134] First, *Apprendi* contradicts the precedent in *Monge v. California*[135] where the court clearly "rejected an absolute rule that an enhancement constitutes . . . element[s] of the offense any time that it increases the maximum sentence to which [the] defendant is exposed."[136] Second, in *Almendarez-Torres*,[137] the Court reasoned that whether a fact is an element of an offense or a sentencing factor is generally a matter of legislative intent.[138] In adherence to these decisions, the circuit courts construed the provisions of the multi-part statutes at issue, 21 U.S.C. §§ 841(b) and 960(b), as penalty provisions and not elements of the offense.[139] *Apprendi* therefore imposes a

127. Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)), *quoted in O'Dell*, 521 U.S. at 156.

128. "[T]he *Teague* doctrine 'validates reasonable, good-faith interpretations of existing precedents made by . . . courts even though they are shown to be contrary to later decisions.'" *O'Dell*, 521 U.S. at 156 (quoting Butler v. McKellar, 494 U.S. 407, 414 (1990)).

129. *Id.*

130. *Teague*, 489 U.S. at 301 (plurality opinion).

131. *O'Dell*, 521 U.S. at 156–57.

132. *See supra* notes 113–15 and accompanying text.

133. *See id.*

134. Monge v. California, 524 U.S. 721 (1998); Almendarez-Torres v. United States, 523 U.S. 224 (1998).

135. *Monge*, 524 U.S. at 721.

136. *Id.* at 729.

137. *Almendarez-Torres*, 523 U.S. at 224.

138. *Id.* at 228.

139. United States v. Angle, 230 F.3d 113, 122 (4th Cir. 2000). Courts look to whether other "courts have justifiably relied on a prior rule of law said to be different from that announced by the decision whose retroactivity is at issue." Solem v. Stumes, 465 U.S. 638, 646 (1984). "When the Court has explicitly overruled past precedent, disapproved a practice it has sanctioned in prior cases, or overturned a long-

new, heightened obligation on federal prosecutors, one the Court would not have felt compelled to impose in light of the precedent existing prior to the *Apprendi* decision.

Apprendi's new rule cannot be applied retroactively on collateral review unless it falls within one of the *Teague* exceptions.[140] The first exception does not apply to *Apprendi* because *Apprendi* does not "'forbid[ ] criminal punishment of certain primary conduct'" or "'prohibit[ ] a certain category of punishment for a class of defendants because of their status or offense.'"[141] It simply imposes *procedural* requirements for the establishment of certain facts.[142] The Court did not hold that a person may not be punished for certain conduct but that he may not be punished in the absence of certain safeguards.[143]

The second *Teague* exception allows retroactive application of "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[144] The scope of the second exception suggested by Justice Harlan is limited to those "new procedures without which the likelihood of an accurate conviction [would be] seriously diminished,"[145] resulting in a "complete miscarriage of justice"[146] in the absence of their administration. "[S]uch procedures would be so central to an accurate determination of innocence or guilt, . . . it [is] unlikely that many such components of basic due process have yet to emerge."[147] "Typically, . . . any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing."[148]

Does *Apprendi* diminish the fundamental fairness and accuracy of those convictions under the federal drug statutes that have become final before June 26, 2000? Requiring the jury to make a factual finding of drug quantity beyond a reasonable doubt when the prosecution alleges a quantity that would subject the defendant to a penalty above the maximum for the specified drug type is not central to the accurate

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standing practice approved by near-unanimous lower-court authority, the reliance and effect factors in themselves 'have virtually compelled a finding of nonretroactivity.'" *Id.* (quoting United States v. Johnson, 457 U.S. 537, 549–50 (1982)).

140. Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion).

141. O'Dell v. Netherland, 521 U.S. 151, 157 (1997) (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

142. Apprendi v. New Jersey, 120 S. Ct. 2348, 2354 (2000) ("The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is.").

143. *Id.*

144. *O'Dell*, 521 U.S. at 157.

145. *Teague*, 489 U.S. at 313 (plurality opinion).

146. Hill v. United States, 368 U.S. 424, 428 (1962).

147. *Teague*, 489 U.S. at 313 (plurality opinion).

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

determination of a defendant's guilt or innocence under §§ 841 or 960.[149] Rather, *Apprendi* applies to the *procedure* in assessing a defendant's sentence.

Of course, the right to a jury determination of guilt beyond a reasonable doubt is an important constitutional protection that helps to ensure that criminal convictions are accurate and reliable. However, the Fifth Circuit Court of Appeals has held in *United States v. Shunk*[150] that failure to give a reasonable doubt instruction to the jury is not a cognizable issue on collateral review because it does not meet the watershed exception under *Teague*.[151] In *Shunk*, two prisoners convicted of conspiracy to misapply bank funds, defraud a bank, and deceive the Federal Home Loan Bank Board by making false statements in reports of and statements for the bank, filed motions pursuant to § 2255 more than one year after their convictions became final.[152] Specifically, the petitioners sought relief under the new rule established in *United States v. Gaudin*,[153] requiring the Government, in a false statement prosecution, to prove "materiality" to the jury rather than the judge.[154] Even though the rule was a clear break from prior decisions, the Court held that the *Gaudin* rule did not "'alter[ ] our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'"[155] "[O]ne can easily envision a system of 'ordered liberty' in which certain elements of a crime can or must be proved to a judge, not to the jury."[156]

Furthermore, the Supreme Court has held that the rule under *Caldwell v. Mississippi*,[157] prohibiting imposition of a death sentence by a sentencer who has been led to falsely believe that the responsibility for determining the appropriateness of a capital sentence lies elsewhere,[158] does not constitute a watershed rule of criminal proce-

149. *See* Singleton v. United States, 26 F.3d 233, 236–37 (1st Cir. 1994). The court determined that an erroneous jury instruction was cognizable under § 2255 unless the court found it "'highly probable' that the challenged action did not affect the [jurors'] judgment." *Id.* (quoting United States v. Hernandez-Bermudez, 857 F.2d 50, 53 (1st Cir. 1988)).

150. 113 F.3d 31 (5th Cir. 1997).

151. *Id.* at 36 (citing *Teague*, 489 U.S. at 311–13 (plurality opinion)).

152. *Id.* at 32–34.

153. 515 U.S. 506 (1995).

154. The *Gaudin* Court held that materiality was an element of the crime of making false statements in a matter within the jurisdiction of a federal agency, and a defendant was entitled to have the jury decide whether the government had proven that element beyond a reasonable doubt. *Id.* at 509–11. *Shunk* involved convictions under 18 U.S.C. § 1006, "making false entries in the records of certain federal banking institutions," of which "materiality" is an element. *Shunk*, 113 F.3d at 34.

155. *Shunk*, 113 F.3d at 37 (quoting United States v. Swindall, 107 F.3d 831, 836 (11th Cir. 1997)).

156. *Id.*

157. 472 U.S. 320 (1985).

158. *Id.* at 328–29.

dure.[159] Failure to consider a *Caldwell* claim, one that attacks the accuracy of the sentencing determination, does not constitute a fundamental miscarriage of justice.[160]

For retroactivity purposes, the relevant inquiry is the relative importance of a procedural safeguard to the protection the defendant did in fact receive.[161] However, the Supreme Court has continually denied retroactive application of new constitutional standards when the defendant had the benefit of less stringent standards protecting the same interests.[162] Thus, "[i]t is . . . not enough . . . to say that a new rule [of constitutional procedure] is aimed at improving the accuracy of trial. More is required."[163] New rules that only provide an additional measure of protection to an existing guarantee of due process protection against fundamental fairness are not absolute prerequisites that fall within *Teague*'s second exception.[164] These new rules must improve accuracy *and* "alter our understanding of the *bedrock procedural elements*" that are essential to fairness of trial.[165]

Under *Shunk*, a reasonable doubt instruction as to drug quantity does not meet this test. In addition, *Apprendi*, like *Caldwell*, merely provides an additional measure of due process protection against error in sentencing federal drug offenders because defendants have always been able to file objections to factual findings of drug quantity in the PSR. *Apprendi* "did not confer a substantive constitutional right [with respect to the federal drug statutes] that had not existed before; it 'created a protective umbrella serving to enhance a constitutional guarantee.'"[166] Therefore, neither of the *Teague* exceptions applies to exclude *Apprendi* from the non-retroactivity rule with respect to drug cases.

2. The Principle of Finality

In addition to the foregoing argument, one must consider the application of *Apprendi* on collateral review with regard to the nature and purpose of habeas corpus. Although habeas corpus has always been used to challenge judgments that have otherwise become final, it is

159. Sawyer v. Smith, 497 U.S. 227, 245 (1990).

160. *Id.* at 244.

161. *See* Solem v. Stumes, 465 U.S. 638, 644 (1984). "'[W]hether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.'" *Id.* (quoting Johnson v. New Jersey, 384 U.S. 719, 728–29 (1966)).

162. *Sawyer*, 497 U.S. at 242–43 (citing *Solem*, 465 U.S. at 654 (Powell, J., concurring)). Findings of drug quantity under pre-*Apprendi* law, although less specific, provided considerable safeguards.

163. *Id.* at 242.

164. *Id.* at 244.

165. Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion) (alteration in original) (quoting Mackey v. United States, 401 U.S. 667, 693–94 (1971) (Harlan, J., concurring in part and dissenting in part)).

166. *Solem*, 465 U.S. at 644 n.4 (quoting Michigan v. Payne, 412 U.S. 47, 54 (1973)).

not a substitute for direct review.[167] There is much interest in limiting the scope of habeas relief through § 2255 motions because the motion undermines the finality of criminal judgments and the courts' traditional avoidance of constitutional issues.[168] "[T]he purpose of federal habeas corpus is to ensure that . . . convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine."[169] This concern for finality calls for the "sounder" approach of applying the law prevailing at the time the conviction became final rather than disposing of cases on the basis of intervening changes in constitutional interpretation.[170]

The past cannot always be erased with a new judicial declaration. The fact that life and liberty are at stake in criminal prosecutions does not mean that the "'conventional notions of finality'" have no place in criminal litigation.[171] "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."[172]

If *Apprendi* is applied retroactively on collateral review to the tens of thousands of federal drug convictions, it may lead society to believe that convicted criminals are only tentatively confined to prison with the opportunity every day afterward to re-litigate the imposition of their sentences.[173] Allowing thousands of prisoners to collaterally attack their sentences based on *Apprendi* would cause a flood of costly re-litigation where the defendants' trials and appeals conformed to the then-existing constitutional standards.

One incentive behind the threat of §§ 2255 and 2241[174] motions is to encourage "'trial and appellate courts . . . to conduct their proceedings in a manner consistent with established constitutional standards.'"[175] To do this, the district court "'need only apply the constitutional standards that prevailed at the time the original pro-

167. *Teague*, 489 U.S. at 306 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 682–83 (1971) (Harlan, J., concurring in part and dissenting in part)).

168. *See* YACKLE *supra* note 109, at 155.

169. *Sawyer*, 497 U.S. at 234 (discussing *Teague*).

170. *Teague*, 489 U.S. at 306 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part)).

171. *Id.* at 309 (plurality opinion) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970)).

172. *Id.* at 309 (plurality opinion).

173. *See* Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

174. *See supra* note 7.

175. *Teague*, 489 U.S. at 306 (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)).

ceedings took place.'"[176] Therefore, if the court met the existing constitutional standards regarding drug quantity that were prevalent at the time of conviction, and sentenced the defendant according to the federal statutes and the Sentencing Guidelines, failure to specifically allege and prove drug quantity beyond a reasonable doubt is not grounds for collateral attack.

The burdens and "'costs imposed upon the [government] by retroactive application of new rules of constitutional law on habeas corpus . . . far outweigh the benefits of this application.'"[177] Narcotics prosecutions under 21 U.S.C. § 841 represent a significant percentage of total federal criminal prosecutions. In 1999, United States Attorneys nationwide filed 50,779 criminal cases against 71,673 defendants.[178] Of these totals, 16,617 cases against 29,846 defendants were narcotics cases.[179] Of 57,879 defendants actually convicted of crimes in 1999, 23,133 were defendants in narcotics cases.[180] Narcotics cases, therefore, constitute more than one-third of all criminal cases and include about forty percent of all defendants prosecuted and convicted. Full retroactive application of *Apprendi* would call into question tens of thousands of sentences under the federal drug statutes alone. The fact that a new procedural decision potentially affects a large percentage of all federal convictions is a compelling reason against its retroactive application.[181]

3. No Substantial Harm or Prejudice

If the Supreme Court holds that *Apprendi* is retroactively applicable on collateral review, the grounds for relief under 28 U.S.C. § 2255 will be narrower than those on direct appeal. On direct appeal, any alleged constitutional error requires reversal unless the government can show that the error was harmless beyond a reasonable doubt.[182] However, when a defendant fails to raise an issue at trial or on direct

176. *Id.* (plurality opinion) (quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

177. *Id.* at 310 (plurality opinion) (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring)). The *Teague* Court found this statement and other criticisms against retroactive application persuasive, including "'courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.'" *Id.* (plurality opinion) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)). "[A]pplication of new rules to cases on collateral review . . . *continually* forces the [government] to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Id.* (plurality opinion).

178. U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1999 at 399 tbl.5.6 (2000), *available at* http://www.albany.edu/sourcebook/1995/pdf/t56.pdf.

179. *Id.*

180. *Id.*

181. *See* Halliday v. United States, 394 U.S. 831, 833 (1969).

182. Dalton v. United States, 862 F.2d 1307, 1309 (8th Cir. 1988).

appeal, it is reviewed only under the "'cause' and actual 'prejudice'" standard (the *Frady* standard).[183] A prisoner raising the *Apprendi* issue for the first time on collateral attack, on the basis that drug quantity or type was not submitted to the jury, must show "'cause' for his procedural default and actual 'prejudice'" resulting from the error.[184] The cause and actual prejudice standard is a significantly higher standard than the "plain error" standard applied on direct appeal.[185]

The cause standard requires the petitioner-defendant to show "'some objective factor external to the defense'" that prevented him from raising the issue of drug quantity before the district court and on direct appeal.[186] These factors include a showing of "interference by officials that makes compliance with the procedural rule impracticable, a showing that the factual or legal basis for the claim was not reasonably available to counsel at the prior occasion, and ineffective assistance of counsel in the constitutional sense."[187]

Decisions that overturn a "'longstanding and widespread practice' . . . will excuse a prior failure to raise a claim."[188] If a defendant was sentenced within the least severe penalty range under 21 U.S.C. §§ 841(b) or 960(b) for a specific drug type, then he would not have had any factual or legal basis to invoke the *Apprendi* rule at the prior proceeding. For example, if a defendant was convicted of manufacturing, possessing, and distributing of narcotics under § 841, and sentenced to the lowest maximum penalty of ten years imprisonment under § 841(b)(1)(C), *Apprendi* would not apply because drug quantity was not used to increase his sentence beyond the statutory maximum.[189] On the other hand, prisoners who were subjected to an

183. Bousley v. United States, 523 U.S. 614, 622 (1998); United States v. Frady, 456 U.S. 152, 170 (1982).

184. *Frady*, 456 U.S. at 168; United States v. Shaid, 937 F.2d 228, 232, 234–35 (5th Cir. 1992) (en banc); *Dalton*, 862 F.2d at 1309 (stating that the cause and prejudice standard applies when a petitioner attempts to show, in light of a subsequent decision, that the jury instruction misstated the law).

185. *Shaid*, 937 F.2d at 232 (citing *Frady*, 456 U.S. at 166).

186. Romero v. Collins, 961 F.2d 1181, 1183 (5th Cir. 1992) (quoting Murray v. Carrier, 447 U.S. 478, 488 (1986)), *quoted in* United States v. Guerra, 94 F.3d 989, 993 (5th Cir. 1996).

187. United States v. Guerra, 94 F.3d 989, 993 (5th Cir. 1996).

188. Reed v. Ross, 468 U.S. 1, 17 (1984) (quoting United States v. Johnson, 457 U.S. 537, 551 (1982)), *quoted in Dalton*, 862 F.2d at 1310. *See* United States v. Logan, 135 F.3d 353, 355 (5th Cir. 1998) (stating that although the cause requirement was satisfied because a procedurally defaulted objection was predicated on grounds that had yet to be established at the time of earlier appeals, the prejudice requirement was not met because the new definition of the crime would not invalidate the defendant's conviction). *But see Bousley*, 523 U.S. at 622–23 (stating that the petitioner had procedurally defaulted by failing to raise a claim that his guilty plea had no factual basis because the Supreme Court subsequently changed the definition of the crime charged on direct appeal). Therefore, the petitioner's prior ignorance of the new law did not meet the cause prong of the cause and prejudice test. *See id.*

189. 21 U.S.C. § 841(b) (1994).

enhanced maximum sentence based on a drug amount decided by the judge may be able to establish the cause prong on collateral review.

The prejudice requirement of *Frady* is equally difficult to meet. It demands a showing of actual prejudice, not merely that the errors at trial created a *possibility* of prejudice.[190] A showing of actual prejudice requires the petitioner to establish that, but for the error, he might not have been convicted.[191] The defendant must prove that the erroneous jury instruction, omitting an element from the jury, "worked to his *actual* and substantial disadvantage, infecting his entire trial with error."[192]

Considering the information that the district court has traditionally used (prior to *Apprendi*) to determine drug quantity, the prejudice prong is a tough hurdle to clear. Based on information provided in PSRs, evidence presented at trial, and witness testimony, if any, it will be difficult for a drug offender to argue that the district court did not properly determine the type and quantity for which he was held accountable.[193] If the government had been held to the *Apprendi* standard at the time of the defendant's indictment and trial, it is unlikely that the outcome regarding drug quantity would have been different.

Only after a petitioner has met both requirements (cause and prejudice) should a reviewing court determine the merits of his claim.[194] Additionally, any error in failing to instruct the jury on an essential element of the offense is reviewed under the harmless error standard.[195] First, it must appear beyond a reasonable doubt, on the whole record, that the error contributed to the verdict and sentence. Otherwise, any failure to instruct the jury on drug quantity is harmless.[196] Second, if evidence at trial on drug quantity was "uncontroverted," then the error is harmless.[197] Therefore, if the prosecution's

190. *Dalton*, 862 F.2d at 1310.

191. *Guerra*, 94 F.3d at 994.

192. United States v. Frady, 456 U.S. 152, 170 (1982).

193. *See* Sustache-Rivera v. United States, 221 F.3d 8 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 1364 (2001).

194. *Frady*, 456 U.S. at 168. Some circuits have held that, in certain circumstances, a showing of cause and prejudice is not required where a defendant raises a claim of ineffective assistance of counsel for the first time in a § 2255 motion. *E.g.*, Smullen v. United States, 94 F.3d 20, 23 (1st Cir. 1996); Ciak v. United States, 59 F.3d 296, 303 (2d Cir. 1995).

195. Neder v. United States, 527 U.S. 1, 10–11 (1999) (quoting Johnson v. United States, 520 U.S. 461, 469 (1997)) ("recogniz[ing] that improperly omitting an element from the jury can 'easily be analogized to improperly instructing the jury on . . . an error which is subject to harmless-error analysis'" even though the verdict may not be seen as a "complete verdict" on every element of the offense); United States v. Perez-Montanez, 202 F.3d 434 (1st Cir.), *cert. denied*, 531 U.S. 886 (2000); Peck v. United States, 106 F.3d 450, 457 (2d Cir. 1997) (stating that no prejudice was shown when the jury was given incomplete instruction regarding an essential element of the offense charged because, subject to harmless error standard, a rational juror would have found the element beyond a reasonable doubt despite the omission).

196. *See* United States v. Rogers, 94 F.3d 1519, 1526 (11th Cir. 1996).

197. *Neder*, 527 U.S. at 18.

evidence sufficiently established, without dispute, the drug quantity attributable to the defendant, any error in failing to give the jury a reasonable doubt instruction as to drug quantity was harmless and without prejudice to the defendant.[198]

In *Bousley v. United States*,[199] the Court held that a petitioner who had procedurally defaulted by failing to raise a claim on direct appeal and had failed to meet the cause prong of the cause and prejudice test, may still overcome the default if he can show that he was actually innocent of the crime.[200] The petitioner's innocence must be proven to an extent that no reasonable juror would convict him.[201] However, this standard is a higher threshold than the cause and prejudice standard. The defendant's burden of proof is subject to any government evidence of the petitioner's guilt, even beyond that presented at trial.[202]

IV. STATUTORY RESTRICTIONS

A. *The Statute of Limitations and Second or Successive Motions*

Once a defendant's chance to file a direct appeal has been waived or expired, the courts are entitled to presume that he stands fairly and finally convicted. To ensure finality in criminal proceedings, the legislature, through the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, imposed several bars to federal prisoners' efforts to obtain post-conviction relief.[203] The AEDPA provides that "[a] 1-year period of limitation shall apply to a motion" under 28 U.S.C. § 2255.[204] Additionally, the statute includes provisions limiting application of second or successive motions. Under § 2255, the one-year limitation period

> shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final;

198. *Id.* at 17–19. "[W]here a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." *Id.* at 19. If a 28 U.S.C. § 2255 motion plainly shows on its face that the movant is not entitled to relief, the judge who presided over the movant's trial and imposed sentence must dismiss the motion. 28 U.S.C. § 2255 (Supp. V 1999). Where the court does not dismiss such a motion, it may review the record and examine any additionally ordered materials to determine whether an evidentiary hearing is required. *Id. See also* Biami v. United States, 144 F.3d 1096, 1096–97 (7th Cir. 1998) (stating that the petitioner was entitled to an evidentiary hearing to determine the type of cocaine he possessed when the drug's form affected the sentence and the record was inconclusive).

199. 523 U.S. 614 (1998).

200. *Id.* at 622.

201. *Id.*

202. *Id.* at 623–24.

203. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104–132, § 105, 110 Stat. 1214.

204. *Id.*; 28 U.S.C. § 2255 (Supp. V 1999).

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.[205]

Those defendants whose drug convictions have been final for more than one year under subsection (1) above are attempting to invoke provision (3) of § 2255 to circumvent the one-year limitation period, based on the new *Apprendi* decision. However, the Supreme Court has not "made [*Apprendi*] retroactively applicable to cases on collateral review."[206] The courts of appeals have held that the Supreme Court must have actually issued a decision making a new rule retroactive to cases on collateral review.[207] The Seventh Circuit Court of Appeals recognized that "*Apprendi* does not state that it applies retroactively to other cases on collateral review."[208] Furthermore, no other Supreme Court decision retroactively applies *Apprendi* to cases on collateral review.[209] The Seventh Circuit has even warned prisoners against "wasting everyone's time with futile applications" for filing § 2255 motions pursuant to the *Apprendi* rule.[210] Therefore, the temporal limitation for the purpose of § 2255 should not be extended merely because the defendant previously lacked the ability to assert an *Apprendi* claim.

Defendants filing second or successive motions pursuant to 28 U.S.C. § 2255, even within the one-year period following the finality of their convictions, must meet the requirements and obtain permission as provided by the statute. Under § 2255:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

205. 28 U.S.C. § 2255. The limitations imposed by the AEDPA apply only to cases filed after the Act's effective date of April 24, 1996. David v. United States, 134 F.3d 470, 473 n.1 (1st Cir. 1998).

206. 28 U.S.C. § 2255.

207. *See* Bennett v. United States, 119 F.3d 470, 471 (7th Cir. 1997); *In re* Vial, 115 F.3d 1192, 1197 (4th Cir. 1997) (en banc). *See also In re* Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000) (stating that *Apprendi* has not been made retroactive, even if it does satisfy the criteria for retroactive application in *Teague v. Lane*, 489 U.S. 288 (1989)).

208. Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000). *Accord* Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 1364 (2001).

209. *Talbott*, 226 F.3d at 869.

210. *Id.*

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact-finder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[211]

On a second or successive motion pursuant to 28 U.S.C. § 2255, a federal prisoner may no longer contend that his sentence was imposed in violation of the laws of the United States. He is restricted to constitutional claims by permission of the court.[212] Even if the defendant could not have reasonably presented this constitutional claim in his earlier petition, that fact does not exclude the motion from being second or successive.[213]

Under the first provision regarding subsequent § 2255 motions, a "factually unavailable" *Apprendi* claim must be based on newly discovered evidence that would demonstrate the applicant's actual innocence.[214] It is arguable that the "actual innocence" exception does not even apply to an *Apprendi* claim. First, it is doubtful that the actual innocence exception applies to non-capital cases.[215] Second, it is unlikely that a prisoner convicted for a felony drug offense will put forth new evidence that demonstrates his innocence of the underlying crime.[216] This actual innocence standard is highly stringent and extremely difficult to pass.[217] As stated above, the defendant's burden of proof is subject to any evidence the government may present, even beyond that presented at trial.[218] At the same time, the investigation and possible retrial to assess the substantiality of the petitioner's claim could be hindered "by problems of lost evidence, faulty memory, and missing witnesses."[219]

A petitioner relying on the new rule in *Apprendi* for relief on a second § 2255 motion under subsection (2) above must establish that *Apprendi* (1) constitutes a "new rule of constitutional law," (2) was "made retroactive to cases on collateral review by the Supreme Court," and (3) "was previously unavailable" in order for the court to

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211. 28 U.S.C. § 2255.

212. *Sustache-Rivera*, 221 F.3d at 12.

213. *Id.* at 13.

214. Bousley v. United States, 523 U.S. 614, 622 (1998).

215. *See, e.g.*, United States v. Wiley, 245 F.3d 750, 752 (8th Cir. 2001) (citing Embrey v. Hershberger, 131 F.3d 739, 740–41 (8th Cir. 1997) (en banc)).

216. *See, e.g.*, United States v. Bailey, 235 F.3d 1069, 1075 (8th Cir. 2000), *cert. denied*, 70 U.S.L.W. 3239 (U.S. Oct. 1, 2001) (No. 00-10797); United States v. Roberson, 194 F.3d 408, 413 n.3 (3d Cir. 1999); Dyer v. United States, 23 F.3d 1421, 1423 (8th Cir. 1994).

217. *See Bousley*, 523 U.S. at 623–24.

218. *Id.* at 624.

219. Solem v. Stumes, 465 U.S. 638, 650 (1994).

grant leave to file the petition.[220] When considering whether the court will grant permission to file, the proper inquiry is whether reasonable jurors could differ on these three points.[221] Although *Apprendi* is a "new rule of constitutional law,"[222] it has not been "made retroactive to cases on collateral review."[223] Thus, collateral attack of an enhanced sentence based on an *Apprendi* claim does not meet the requirements for a second or successive petition.[224]

B. *The "Savings Clause" Provision of 28 U.S.C. § 2255*

The final question regarding the retroactive application of *Apprendi* becomes whether a prisoner serving an enhanced sentence under the federal drug statutes, who has been denied relief from his conviction or denied permission to petition for relief under § 2255 pursuant to *Apprendi*, may rely on § 2255's "savings clause" to subsequently seek a remedy under traditional habeas corpus pursuant to 28 U.S.C. § 2241.[225] Invoking the "savings clause" allows a federal prisoner to file a successive habeas corpus petition pursuant to § 2241 if the court has denied him relief by a § 2255 motion, and it "appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."[226] In other words, if *Apprendi* is a "constitutional rule of criminal procedure," and thus not applicable on collateral attack under *Teague v. Lane*,[227] may the petitioner re-file a § 2241 habeas corpus motion as an alternative? Further, may a petitioner avoid the "gatekeeping function" of the court of appeals by filing an application for relief under 28 U.S.C. § 2241?

The Fifth Circuit Court of Appeals recognized a third narrow exception to the non-retroactivity doctrine under *Teague* regarding this issue.[228] In *Jackson v. Johnson*,[229] the court stated that "[w]hen an alleged constitutional right is susceptible of vindication *only* on habeas review, application of *Teague* to bar full consideration of the claim would effectively foreclose any opportunity for the right ever to be recognized,"[230] indicating that absolute preclusion under *Teague* may

220. Sustache-Rivera v. United States, 221 F.3d 8, 15 (1st Cir. 2000) (citing 28 U.S.C. § 2255 (Supp. V 1999)), *cert. denied*, 121 S. Ct. 1364 (2001).
221. *Id.* (citing Slack v. McDaniel, 120 S. Ct. 1595, 1604 (2000)).
222. *Id.* (citing 28 U.S.C. § 2255 (Supp. V 1999)).
223. *Id.* (citing 28 U.S.C. § 2255 (Supp. V 1999)).
224. *Id.* at 15 n.12. "The Supreme Court may . . . hold that the . . . *Apprendi* rule is to be retroactively applied to cases on collateral review. (This likely depends upon whether the Court considers the . . . *Apprendi* rule procedural or substantive.) Until that time, any second or successive petition seeking retroactive application . . . must be considered premature." *Id.*
225. 28 U.S.C. § 2255 (Supp. V 1999).
226. *Id.*; *Sustache-Rivera*, 221 F.3d at 15.
227. 489 U.S. 288 (1989).
228. Jackson v. Johnson, 217 F.3d 360, 364 (5th Cir. 2000).
229. *Id.* at 360.
230. *Id.* at 364.

be inappropriate. However, this "exception" is unrecognized by other courts.[231]

Additionally, *Apprendi* does not fall within the "savings clause" exception, rendering 28 U.S.C. § 2255 "inadequate or ineffective." The fact that (1) *Apprendi* was not an available claim at trial or on appeal, (2) the AEDPA's one-year statute of limitations has expired for purposes of § 2255, or (3) the defendant does not meet the requirements for second or successive motions, does not render the remedy under 28 U.S.C. § 2255 inadequate or ineffective, entitling a defendant to refile under 28 U.S.C. § 2241.[232] That would contradict interests in finality and render meaningless the AEDPA's 1996 limitations period and amended requirements. Therefore, the "savings clause" is used only in limited circumstances and would not apply to a prisoner's claim that the trial court failed to submit drug quantity (used to enhance the defendant's maximum sentence) to the jury to be determined beyond a reasonable doubt.

The "savings clause" under § 2255 applies when a new statute is enacted or new meaning is attributed to an existing statute to establish the prisoner's innocence.[233] Therefore, *Apprendi*, a new *constitutional* rule of law, does not fit under this exception. Additionally, *Apprendi* does not establish innocence merely because a sentence was enhanced based on drug amount found by the district judge on a preponderance of the evidence.

If the Supreme Court makes the rule in *Apprendi* retroactively applicable, then a prisoner may, at that time, extend the statute of limitations to file a § 2255 motion or attempt to obtain permission to file a second or successive motion. The First Circuit in *Sustache-Rivera v. United States*[234] stated that there may be an argument in that, until the Supreme Court issues such a decision, it would be unfair to preclude a prisoner from invoking the "savings clause."[235] On the other hand, if the Supreme Court never makes *Apprendi* retroactively applicable, the prisoner would be "no worse off than before."[236] Finally, most courts have construed the motion remedy under § 2255 to be the "functional equivalent of habeas corpus."[237] It should, therefore, replace habeas corpus as a collateral remedy for constitutional error in federal criminal prosecutions.

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231. *E.g.*, United States v. Guardino, 972 F.2d 682, 687 n.7 (6th Cir. 1992); Cowell v. Leapley, 458 N.W.2d 514, 517 (S.D. 1990).

232. *See* Sustache-Rivera v. United States, 221 F.3d 8, 16 n.13 (1st Cir. 2000), *cert. denied*, 121 S. Ct. 1364 (2001).

233. *Id.* at 16. *See also*, *e.g.*, Wofford v. Scott, 177 F.3d 1236, 1242–45 (11th Cir. 1999); Triestman v. United States, 124 F.3d 361, 373–80 (2d Cir. 1997).

234. *Sustache-Rivera*, 221 F.3d at 8.

235. *Id.* at 17 n.15.

236. *Id.* at 16.

237. YACKLE, *supra* note 109, at 155.

V. CONCLUSION

It seems inevitable in light of the United States Supreme Court's decision in *Apprendi* that drug quantity and type will now be considered elements of a felony drug offense.[238] Prisoners serving time for felony drug convictions that became final prior to the *Apprendi* decision, however, should dismiss the idea that *Apprendi* provides them any relief. The fact that a trial court adhered to precedent existing before the *Apprendi* decision to determine a defendant's offense level and sentence should not be a cognizable issue on collateral review of a conviction under the federal drug statutes. Prior to *Apprendi*, the Supreme Court declined to establish a rule that required a sentence enhancement to be considered as "an element of the offense any time that it increase[d] the maximum sentence to which a defendant [was] exposed."[239] Furthermore, no case prior to *Apprendi* has dictated that facts, other than prior convictions, used to enhance a defendant's sentence beyond the statutory maximum must be submitted to the jury and proven beyond a reasonable doubt. Therefore, *Apprendi* sets forth a "new" constitutional rule, but it does not entitle every defendant serving a sentence under 21 U.S.C. § 841(b) to collaterally attack his conviction and sentence because the court enhanced his sentence based on facts determined by a preponderance of the evidence.

Apprendi requires any fact, other than a prior conviction, which subjects a defendant to a sentence above the statutory maximum to be proven as an element of the offense at trial.[240] Failure to comply with the new procedural standard in *Apprendi* is a viable claim on direct appeal.[241] However, new constitutional rules of criminal procedure are generally not applicable on collateral review unless they fall within one of the exceptions set out in *Teague v. Lane*; *Apprendi* does not. *Apprendi v. New Jersey* does not change the substance of any federal criminal statutory offense or threaten the reliability of a criminal proceeding that adhered to the constitutional standards in place. Even if *Apprendi* is a new rule aimed at improving accuracy, that is not enough to make it retroactively applicable on collateral review. Finally, retroactive application would thwart the principle of finality,

238. On January 31, 2001, the author observed a jury trial for a drug charge under 21 U.S.C. § 841 in the United States District Court for the Northern District of Texas with the Honorable Terry R. Means presiding. During the government's delivery of its case to the jury, the prosecution presented into evidence two boxes full of a white powdery substance, alleged to be cocaine. Additionally, before closing arguments, Judge Means informed the government and defense counsel that he had amended the pattern jury instruction to include a reasonable doubt instruction regarding drug type and quantity.

239. Monge v. California, 524 U.S. 721, 729 (1998).

240. Apprendi v. New Jersey, 120 S. Ct. 2348, 2355 (2000).

241. *See, e.g.*, United States v. Buckland, 259 F.3d 1157, 1169 (9th Cir. 2001) (vacating a petitioner's conviction on direct appeal because he was sentenced beyond the statutory maximum when drug quantity was not submitted to the jury on a reasonable doubt instruction).

forcing the federal government to re-litigate a mountain of cases involving the federal drug statutes.

Even if the Supreme Court issues a decision making the *Apprendi* rule retroactively applicable, prisoners will have difficulty establishing harm or prejudice resulting from the alleged error, requiring them to present evidence that the trial judge incorrectly determined drug quantity attributable to the defendant. Alternatively, if the defendant prevails in his claim that evidence at trial was insufficient to support the specified drug quantity, the appropriate remedy would be to remand the case for re-sentencing according to the least severe maximum penalty imposed for the lesser-included statutory offense,[242] not to invalidate the conviction.

The incentive and purpose behind both state and federal habeas corpus is to ensure that courts consistently adhere to the constitutional standards existing at the time the original proceedings take place. The more logical approach is, therefore, one that is consistent with this idea and that would avoid potential re-litigation of tens of thousands of federal narcotics convictions.

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242. *See* Rutledge v. United States, 517 U.S. 292, 305 (1996) (quoting Austin v. United States, 382 F.2d 129, 140 (D.C. Cir. 1967)) (holding that a district court may modify an erroneous judgment by reducing to a lesser included offense and correcting the sentence "where the evidence is insufficient to support an element of the [greater] offense stated in the verdict" without vacating the underlying conviction). *Accord* United States v. Hunt, 129 F.3d 739, 744–745 (5th Cir. 1997).