Bowman v. Leverette: Retroactivity of Criminal Procedure Decisions

Mary Sanders Richards  
*West Virginia University College of Law*

John Michael Hedges  
*West Virginia University College of Law*

Follow this and additional works at: [https://researchrepository.wvu.edu/wvlr](https://researchrepository.wvu.edu/wvlr)

Part of the [Courts Commons](https://researchrepository.wvu.edu/wvlr/vol85/iss2/9), and the [Criminal Procedure Commons](https://researchrepository.wvu.edu/wvlr/vol85/iss2/9)

**Recommended Citation**

Available at: [https://researchrepository.wvu.edu/wvlr/vol85/iss2/9](https://researchrepository.wvu.edu/wvlr/vol85/iss2/9)

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
BOWMAN v. LEVERETTE: RETROACTIVITY OF CRIMINAL PROCEDURE DECISIONS

I. INTRODUCTION

Criminal procedure has undergone significant reforms during the past two decades, most important of which was the application of many new or existing federal standards to the states through the due process clause of the fourteenth amendment.¹

Furthermore, during the 1960’s and early 1970’s, federal habeas corpus proceedings became a more accessible vehicle for an attack upon state court convictions.² Although the United States Supreme Court has recently reinstated substantial limits on federal habeas review,³ both the West Virginia Supreme Court of Appeals⁴ and the State Legislature⁵ have taken significant steps in recent years to increase the procedural safeguards and provide for state habeas corpus proceedings which are as broad as the federal writ.

Together, these developments in procedural rights and remedies have brought a significant amount of attention to the issue of the retroactivity of judicial decisions.⁶ A clear resolution of this issue is especially important when confronting new criminal law decisions, where the availability of post-conviction relief presents a different set of policy considerations from those in civil litigation.⁷

² See Fay v. Noia, 372 U.S. 391 (1963). Prior to Fay, a state prisoner on federal habeas review could only raise constitutional issues which had initially been raised at trial. This, of course, normally precluded any subsequently recognized right. But in Fay, the Court ruled that a petitioner could, based upon a subsequently recognized right, attack a previous conviction. See also Rossum, New Rights and Old Wrongs: The Supreme Court and the Problem of Retroactivity, 23 EMORY L.J. 381, 384-85 (1974).
³ The “cause and prejudice” rule of Wainwright v. Sykes, 433 U.S. 72 (1977), has recently put substantial limits back on federal habeas review. See also infra note 99 and accompanying text.
⁶ The doctrine of retroactivity has various operative forms. Generally speaking though, it can be categorized in four types of rulings: (1) Pure prospectivity - operating at some point in the future, and not even to the litigants at bar; (2) Non-retroactivity - affecting the litigants at hand, plus all future cases not yet begun; (3) Limited retroactivity - applying the new rule to the immediate case, all future cases, plus all appellate cases pending at the time of the decision; and (4) Full retroactivity - applying to the present case, all pending future cases, and would also be applicable to any final judgments which were reviewable by collateral attack.
⁷ See Bradley v. Appalachian Power Co., 256 S.E.2d 879, 888 (W. Va. 1979). Full retroactivity in constitutional decisions allows convicted defendants to collaterally attack their final judgments. Whereas, the class of civil litigants affected by a fully retroactive decision would be limited to cases where direct appeal was still available. See also State v. Gangwer, 283 S.E.2d 839 (W. Va. 1981). "There is, however, a close parallel between retroactivity in a civil case and retroactivity in a criminal case where the new rule is of a nonconstitutional dimension." Id. at 842 (emphasis added).
The traditional common law view was that overruling judgments were always fully retroactive, as if the new rule had always been the law. But the prevailing modern view rests on the assertion that constitutional law neither requires nor prohibits the retroactive operation of an overruling decision. Therefore, courts must decide, based upon legal principles and notions of public policy, whether a rule-changing decision should operate only in the future or should also reach back to give “old” defendants the benefit of a “new” right.

II. Background
A. Bowman v. Leverette

The West Virginia Supreme Court of Appeals recently gave careful consideration to the retroactivity question in Bowman v. Leverette. The petitioner was serving his tenth year of a life sentence for first degree murder. On two previous occasions, Bowman had petitioned for writs of habeas corpus. On the last petition, the Circuit Court of Marshall County refused Bowman's petition without a hearing on the merits on the basis of res judicata.2

Bowman appealed this ruling, contending that there was no res judicata bar since his claim was not “finally adjudicated” under the West Virginia Post-Conviction Habeas Corpus Relief Act. By giving a clear reading to the relevant sections of the Act, the court concluded that a summary refusal may, in some cases, constitute a final judgment on the merits of a habeas petition. However, the court also noted that if there are new constitutionally-mandated criminal procedural rules which operate retroactively, a previous habeas judgment may not necessarily continue to have res judicata effect.

The petitioner in Bowman based his claim for relief on the rule set forth in both Mullaney v. Wilbur and State v. Pendry: it is a violation of due
process to shift the burden of proof by a presumption to a defendant on a material element of an offense. Since these decisions were already fully retroactive, the initial question the court addressed was whether the challenged instruction was similar to the unconstitutional instructions in the Mullaney-Pendry line of cases. The Bowman instruction was "a person is presumed to intend that which he does or which is the natural and necessary consequence of his own act." The Pendry instruction was very similar to the Bowman instruction; the only major differences were that the Pendry instruction added the fact that a weapon was involved and stated "the presumption of the law, arising in absence of proof to the contrary, is that he intended the consequences that resulted from said use of said deadly instrument."

The court found that the Pendry instruction, which contained facts concerning the weapon and the specific mandate to find for the State unless the defendant could disprove the presumption, made the Pendry instruction significantly different from the Bowman instruction. The Pendry instruction explicitly shifted the burden of proof to the defendant; the Bowman instruction only implicitly shifted the burden. Therefore, according to the West Virginia court, Bowman could not be analyzed under the Mullaney-Pendry rule. Rather, the Bowman instruction was determined to be essentially the same instruction found unconstitutional in Sandstrom v. Montana and State v. O'Connell. Neither of these decisions had yet been made fully retroactive. Thus, the important issue before the court in Bowman was whether Sandstrom and O'Connell were to be fully retroactive. The court concluded that the Sandstrom instruction did not raise a fundamental question of guilt or innocence, as the Mullaney-Pendry type of instruction did. Therefore, Sandstrom and O'Connell were not fully retroactive and Bowman's appeal failed.

B. Sandstrom v. Montana

Sandstrom was reviewed by the United States Supreme Court to determine whether the jury instruction, "a person is presumed to intend that which he does," unconstitutionally shifted the burden of proof on the issue of intent to the defendant who had been convicted by a Montana court of first degree murder.

17 227 S.E.2d 210 (W. Va. 1976) (Pendry was based on Mullaney), overruled on other grounds, 241 S.E.2d 914 (W. Va. 1978).
19 289 S.E.2d at 440.
20 227 S.E.2d at 218.
22 256 S.E.2d 429 (W. Va. 1979). The instruction in Sandstrom was like that complained of in O'Connell. Since the error in the instruction and the holding are identical in Sandstrom and O'Connell, this Comment will make reference to Sandstrom as a shorthand method of discussing both cases.
23 The West Virginia Supreme Court of Appeals has given O'Connell limited retroactive effect. See, e.g., State v. Goff, 272 S.E.2d 457 (W. Va. 1980); State v. Young, 273 S.E.2d 592 (W. Va. 1980).
The Court’s first inquiry was to determine the nature of the presumption. In order to do this, the Court paid “careful attention to the words actually spoken to the jury. . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction.” The Court found that the instruction was capable of several interpretations, two of which were unconstitutional. The jury could have interpreted the instruction as either a conclusive or a burden-shifting presumption. The Supreme Court did not exclude the possibility that some jurors may have properly understood the instruction as being merely a permissive presumption which the jury was free to reject. The pivotal point, however, was that if there were any possibility that the instruction could be improperly interpreted, the instruction was unconstitutional.

Although the United States Supreme Court focused its attention on the one infected instruction, the Court did examine other instructions which were given. The jury had been instructed that the accused was presumed innocent until proven guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. These additional instructions did not cure the infected instruction because the Court found they were “not rhetorically inconsistent with a conclusive or burden-shifting presumption.” In other words, the jury could have interpreted the other instructions to mean that the presumption satisfied the State’s burden of proof on the issue of intent.

The “possibility” of misinterpretation, which rendered the Sandstrom instruction unconstitutional, represents a very high standard for measuring the prejudicial effect of errors. However, since the issue of harmless error had not been considered by the Supreme Court of Montana, the Court did not decide whether the infected instruction was or could ever be harmless error.

Finally, the Supreme Court in Sandstrom did not indicate whether the decision was to be given retroactive effect. In the absence of the Supreme Court’s resolution of this question, the lower federal and state courts must determine whether someone convicted before Sandstrom can claim the benefit of this new rule.

III. THE RETROACTIVITY DOCTRINE

A. United States Supreme Court Precedent

Bowman brought the Sandstrom retroactivity issue before the West Virginia court. But, without a decision by the United States Supreme Court on the specific question, the court was forced to anticipate. In order to keep its decision consistent, a prediction, of sorts, was required. To accomplish this, the court took the logical approach of interpreting Supreme Court precedent and applying it to the facts of Bowman in much the same way it believed precedent

24 442 U.S. at 514.
25 Id. at 517 n.7.
26 Id.
27 Id. at 527.
would be interpreted and applied to Sandstrom.

The West Virginia court was guided by the three criteria that were first enunciated in Linkletter v. Walker, the United States Supreme Court's first decision to limit the retroactivity of a new constitutional ruling. In a retroactivity case which followed two years later, Stovall v. Denno, the Court stated the Linkletter criteria in their clearest and most often quoted form. The Court declared that the retroactivity inquiry should focus on "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Another factor that has been an important consideration when determining whether a particular decision should operate retroactively was also alluded to in Linkletter. The Linkletter Court noted that three earlier criminal rights decisions were given complete retroactive effect because the new rules announced in these cases "went to the fairness of the trial — the very integrity of the fact-finding process."

However, the following term, when the retroactivity question was considered in Johnson v. New Jersey, the Court acknowledged the difficulty inherent in determining whether new rules fit under the "fairness-integrity" factor. It was conceded that "the question whether 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," and that it was "a question of probabilities" as to whether the new rule would have affected past trials.

The other important concept that has been integrated into the Supreme Court's retroactivity doctrine is the "major purpose" rule which fits the above-mentioned "fairness-integrity" factor into the Linkletter test. This rule is essentially a threshold consideration under the first prong of the test. The "major purpose" rule states: "Where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect."

When a new rule fits this description, the first criterion, purpose, is wholly

\[\text{[Notes]}\]
determinative of the retroactivity question. The other two criteria, reliance and effect, are immaterial. The Supreme Court felt that "neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." This "major purpose" rationale has indeed been determinative in a number of the Court's retroactivity decisions.

Policy-laden factors which are reflected in the final two prongs of the Linkletter test (such as reliance on the prior rule by police and prosecutors, the burdening effect of retroactivity in requiring new trials, and the interest society has in the finality of judgments) all reflect very important values which should be considered. But it should be recognized that once the purpose of the rule is defined, the final result of the retroactivity inquiry is essentially determined.

Justice Marshall spoke out against this conclusory effect in his dissent in Michigan v. Payne. He wrote that "principled adjudication requires the Court to abandon the charade of carefully balancing considerations when deciding the question of retroactivity." Justice Marshall found that the Court's decisions dealing with retroactivity fell into three categories: 1) cases where the Court lacked the power to convict or punish; 2) cases where the Court found the new rule to be central to the guilt-determination process; and 3) all other new criminal procedure rules. He noted that all cases in the first two categories were always given retroactive effect while those cases which fell into the final category were not. Since these categories, rather than the Linkletter test, dictated the outcome, Justice Marshall saw "little point in forcing lower courts to flounder in the morass of our cases," when "it is the classification, not the three-prong test, that determines the result.

The Supreme Court's most recent opinion on retroactivity is United States v. Johnson. This case was decided three months after Bowman, and the Supreme Court did express the view that certain defined categories of cases did not require a test since the result was predetermined. This view was also reflected in the holding that any fourth amendment decision by the Court is to be applied retroactively to all convictions not final at the time of the particular decision. It is yet to be seen whether this is the beginning of a shift away from the broad application of the traditional Linkletter test. However, it is important to any analysis of the Bowman or Sandstrom decisions that the United States v. Johnson Court indicated the three-prong analysis is still the appro-

---

56 Id.
59 Id. at 61.
60 Id. at 61-2 (cases cited therein).
61 Id. at 62.
BOWMAN V. LEVERETTE

appropriate test to apply to rules related to the truth-finding function.\textsuperscript{43}

B. Procedural Devices Which Circumvent the Retroactivity Question: Waiver & Harmless Error

The West Virginia Supreme Court of Appeals recently reaffirmed its belief that a defendant can only waive a particular right when it is done "intelligently and knowingly."\textsuperscript{44} Moreover, the wording of section 53-4A-1(d) of the West Virginia Post-Conviction Habeas Corpus Act appears to rule out the possibility of any contention being considered previously waived when it is based upon a new constitutionally-based procedural or substantive standard.\textsuperscript{45}

Nevertheless, other jurisdictions, when confronted with the issue of the retroactive effect of Sandstrom, have followed the suggestion of the United States Supreme Court in Hankerson v. North Carolina,\textsuperscript{46} the decision which extended full retroactive effect to Mullaney. That suggestion was that states may nullify retroactivity by "the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error."\textsuperscript{47} This, in effect, means that a defendant is expected to recognize a new right even before the courts recognize it.

This "waiver by judgment" approach is illustrated by Spratt v. State,\textsuperscript{48} an Iowa post-conviction review case similar to Bowman. In Spratt, the Iowa Court of Appeals declined to apply Sandstrom retroactively because the petitioner had failed to object at his trial to the Sandstrom-type instruction. However, since the petitioner's trial was two years before Sandstrom was decided, it is not surprising that the Sandstrom-type instruction was not challenged at the trial.

To the West Virginia Supreme Court of Appeals' credit, it expressly refused to utilize the Hankerson suggestion as a means of avoiding the impact of retroactivity in its recent decision in Jones v. Warden.\textsuperscript{49} Justice Neely aptly described the Hankerson approach as a "trap of procedure, the last avenue of escape for the third rate legal technician, even to achieve a laudatory result."\textsuperscript{50}

Another procedural device that is often used to mitigate the effect of a retroactive ruling is the doctrine of harmless error. This approach was debated in the two concurring opinions in Jones. Justice Neely maintained that state courts should dismiss collateral challenges to prior convictions based on Mullaney where "the evidence is so overwhelmingly against the defendant; his defense is so utterly unrelated to any of the intricacies of the question of intent which is the subject of the offending instruction; and the defective instruction

\textsuperscript{43} Id. at 2594.
\textsuperscript{44} Losh v. McKenzie, 277 S.E.2d 606 (W. Va. 1981).
\textsuperscript{45} W. VA. CODE § 53-4A-1(d) (1981).
\textsuperscript{46} 432 U.S. 233 (1977).
\textsuperscript{47} Id. at 244 n.8.
\textsuperscript{48} 315 N.W.2d 844 (Iowa Ct. App. 1981). \textit{See also} Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980); \textit{In re} Taylor, 95 Wash. 2d 940, 632 P.2d 56 (1981).
\textsuperscript{50} Id. at 917 (Neely, J., concurring).
was harmless error in all other regards beyond a reasonable doubt.”

In the second Jones concurrence, Justice Miller criticized the above description of the harmless error test. His main objection to Justice Neely's definition was that it placed undue emphasis on the amount of evidence against a defendant. Stated briefly, the doctrine of harmless error can only be relied upon where the prosecution can show that the error complained of was harmless beyond a reasonable doubt. From this premise, Justice Miller concluded that because the Mullaney-type instructions were found to substantively impair the truth-finding process at trials, they could not possibly be considered harmless error beyond a reasonable doubt in any trial where these instructions were utilized. Precisely the same reasoning became the basis for the decision in Angel v. Mohn, which held that the harmless error doctrine would not operate to cure a Mullaney-type instruction. This view is clearly in line with the notions of due process that are reflected in the reasonable doubt standard. Furthermore, Justice Miller's conclusion is consistent with the United States Supreme Court's observations in Chapman v. California, that some errors can never be harmless.

Sandstrom declared the presumption of intent instruction unconstitutional because it was capable of invading the process of truth-determination. In the West Virginia counterpart to Sandstrom, State v. O'Connell, the West Virginia Supreme Court of Appeals stated, “we have no doubt that a reasonable juror could have interpreted the instant instruction containing the word ‘presume’ as placing the burden of persuasion on the accused.” Yet the West Virginia Supreme Court of Appeals in Bowman gave little weight to the reasoning of Sandstrom and O'Connell when it stated that Sandstrom “is not designed to overcome an aspect of trial that substantially impairs the truth-finding function.” The court was able to make this statement because of the way in which it distinguished the Sandstrom instruction from the Mullaney instruction. Yet both the Sandstrom and O'Connell holdings relied on Mullaney; and the Sandstrom, O'Connell, and Bowman petitioners all based their objections to the intent instruction on Mullaney.

Therefore, it appears that the West Virginia court, in an effort to limit the far-reaching impact of Sandstrom, chose to implicitly place misleading jury

---

51 Id. at 918.
52 Id. at 919 (Miller, J., concurring).
54 253 S.E.2d 63 (W. Va. 1979) (Justice Miller wrote the opinion in this case).
55 386 U.S. 18, 23 (1967).
57 Id. at 431-32.
58 289 S.E.2d at 447.
59 See supra notes 19-21 and accompanying text.
60 442 U.S. at 524.
61 256 S.E.2d at 450-31.
62 442 U.S. at 513.
63 256 S.E.2d at 430.
64 289 S.E.2d at 440.
instructions which may "possibly" shift the burden of proof in the realm of harmless error. Yet, the Sandstrom "possibility" of misinterpretation standard does not appear to be capable of harmless error analysis since it requires the court to determine beyond a reasonable doubt that the infected instruction did not affect the verdict. The Sandstrom Court noted that there is no way to know beyond a reasonable doubt that the jury did not rely on the presumption since the verdict is general.65

The Arizona Supreme Court took note of this aspect of Sandstrom in the recent case of State v. Mincey,66 where that court came to the conclusion that the Sandstrom intent instruction was not harmless beyond a reasonable doubt because "it is unclear from the record that the jury was not influenced beyond a reasonable doubt by the erroneous instructions. . . ."67

C. Application of the Retroactivity Doctrine

Other courts which have considered the issue of the retroactivity of Sandstrom, and have not skirted the issue by use of a procedural rule, have concluded that Sandstrom should be given retroactive effect because its holding is merely a logical extension of the principles established by the United States Supreme Court in In re Winship67.1 and Mullaney.67.2 For example, the Eighth Circuit in Dietz v. Solem,68 held Sandstrom retroactive. The Dietz court concluded that the Sandstrom intent instruction substantially impaired the truth-finding function at trial. "In light of the fact that the Sandstrom decision heavily relied on Mullaney and addressed a due process claim almost identical to Mullaney, . . . Sandstrom must be applied retroactively."69 The Dietz court also stated that the Sandstrom intent instruction cannot be harmless error because it goes to the necessity of proof of a key element of the offense — intent.70

As previously noted, the West Virginia court relied almost exclusively upon United States Supreme Court precedent when deciding the retroactivity issue in Bowman. This followed their approach to retroactivity inquiries in other recent criminal rights decisions.71 The West Virginia Supreme Court of Appeals focused heavily on the purpose behind the Sandstrom rule. Under this "major purpose" inquiry, the court extended its reasons for distinguishing between the Mullaney and Sandstrom cases to a conclusion that the main purposes behind the rulings were also different. The court's rationale was that the

65 442 U.S. at 526.
67 Id. at 646.
67.2 See supra note 16.
69 640 F.2d at 130.
70 Id. at 131.
**Mullaney** rule was designed to correct a substantial impairment which raised serious questions about past verdicts, but the **Sandstrom** objective was merely to reduce the risk of possible jury misinterpretation.\(^7\) This led the court to conclude that the major purpose of the **Sandstrom** rule was only to protect against the possibility of "substantial impairment" from a **Mullaney**-type error.

The **Bowman** court had little trouble concluding that the final two prongs of the **Linkletter** test, "reliance" and "effect," both militated against giving **Sandstrom** fully retroactive operation. This conclusion should never be very difficult. Both of these factors will almost invariably point toward non-retroactivity when the "purpose" factor is not as heavily weighted as it is when the purpose is found to be aimed at correcting a substantial impairment of the truth-finding function of trials.

However, at this point it is important to recall that the West Virginia court had already extended the benefit of the **Sandstrom** rule to cases not yet final.\(^7\) So, the only question involved in **Bowman** was whether a habeas petitioner could reap the benefits of **Sandstrom**. The West Virginia court agreed that the instruction, "a person is presumed to intend that which he does. . . ." would violate a defendant's right to due process if given today.\(^7\) That instruction, however, was not given today, but was given with approval ten years ago. This presented the difficult problem of balancing the importance of the finality of decisions against the importance of even-handed justice.

### IV. IMPACT ON HABEAS CORPUS REVIEW

The West Virginia Legislature has provided a very liberal post-conviction relief statute.\(^7\) West Virginia courts are directed to "cautiously" declare a habeas corpus proceeding final.\(^7\) However, the West Virginia court does not look favorably on more than one habeas hearing unless the petitioner is addressing one of three exceptions: ineffective assistance of counsel at the omnibus habeas corpus hearing; newly discovered evidence; or, a change in the law which may be applied retroactively.\(^7\)

The third exception, which Bowman sought to use, posed a potentially large avenue for collateral attack. The presumptive intent instruction had been part of West Virginia law since 1882\(^7\) and used as recently as 1974.\(^7\) If **Sandstrom** were fully retroactive, all the cases which used this instruction to convict had the potential to be retried.\(^8\) This would pose serious problems for the

---

\(^7\) 289 S.E.2d at 447.  
\(^8\) See supra note 23.  
\(^9\) 289 S.E.2d at 440.  
\(^12\) Id. at 611.  
\(^15\) State ex rel. Johnson v. McKenzie, 226 S.E.2d 721 (W. Va. 1976) (where the court stated that when a writ of habeas corpus is issued, the person is still responsible for the crime; the State
criminal justice system. As Justice Powell noted in his separate opinion in *Hankerson*:

> Convictions long regarded as final must be reconsidered on collateral attack; frequently they must be overturned for reasons unrelated to the guilt or innocence of the prisoner, and in spite of good-faith adherence on the part of police, prosecutors, and courts to what they understood to be acceptable procedures. Society suffers either the burden on judicial and prosecutorial resources entailed in retrial or the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible. . . .

The United States Supreme Court has explicitly stated that a reviewing court should not make a distinction between cases on direct review and cases which are attacking a final conviction when determining the retroactivity question. However, the very nature of the two types of situations makes distinctions a necessity. When a final conviction is attacked, only those issues of substantial constitutional dimension which were not waived at a prior hearing are reviewable. The possibility that a new trial might render a different result is not a basis for relief. A great conflict exists between retroactivity and finality considerations which does not exist on direct review. In many instances, the interest in bringing litigation to an end may outweigh the competing interest of conforming the conviction to legal standards currently in effect.

In considering this functional aspect of retroactivity, the Supreme Court in *United States v. Johnson*, for the first time, "embrace[d] Justice Harlan's views in *Desist* and *Mackey*." In *Desist v. United States* and *Mackey v. United States*, Justice Harlan had taken the two-fold position that: 1) even-handed justice required that all new constitutional rules be applied retroactively to all cases still pending on direct appeal; and 2) the functions of habeas review, being more limited than direct review, would usually call for the reviewing court to consider the claim under the rule applicable when the habeas petitioner's conviction became final.

This functional approach to the retroactivity question has been echoed more recently in the two concurring opinions in *Hankerson v. North Carolina*. “[T]his approach is closer to the ideal of principled, even-handed judicial review than is the traditional retroactivity doctrine. At the same time it is

merely resumes the proceedings at the point reached prior to the unlawful action by the court).
more attuned to the historical limitations on habeas corpus. . .and to the importance of finality in a rational system of justice."

Even though the Johnson Court limited the effect of its decision to fourth amendment rulings, the fact that the Court gave substantial attention to Justice Harlan’s approach and expressly applied it to this case, may signal a trend toward drawing a clear distinction between direct appeal and habeas corpus review with respect to the reach of the retroactivity doctrine.

Justice Harlan has also written that it is not the purpose of a new rule (the first prong of the Linkletter test) which is important for determining the retroactivity of a new rule for habeas corpus petitions. Rather, retroactivity is "none other than a problem as to the scope of the habeas writ." His method for determining retroactivity would be to first decide what issues can be brought up on habeas. This standard requires that only those issues which raise serious questions about guilt or innocence would be available to attack a final conviction.

Clearly, habeas review requires considerations not present in a case on timely direct review. The three-prong test formulated in Linkletter simply does not answer all the issues raised by a habeas corpus hearing. Besides purpose, reliance, and burden on the administration of justice, a court addressing habeas corpus must also consider: 1) The cost to society of duplicating the judicial effort; 2) The possible stifling effect a retroactive decision will have on needed criminal justice reforms; 3) The possible undermining of the corrective function of prisons by reopening a conviction; and most importantly, 4) the reliability of a new trial with stale facts. While substantial error in a conviction should always be reviewable through habeas proceedings, courts must balance the seriousness of the error against the likelihood that a new trial would benefit the petitioner and society. In three very recent habeas cases, the United States Supreme Court has made a petitioner’s ability to obtain collateral relief more difficult. Furthermore, Justices Powell, Stevens, and White, at a recent ABA meeting, collectively remarked that their workloads were too great and consequently the Court’s work was not staying current. Justice Powell stated, “the time has come for considering means of limiting collateral review by federal courts of state convictions to cases of manifest injustice —where the issue is guilt or innocence.”

The Bowman decision is in line with the recent movement of the United

---

90 Id. at 248 (Powell, J., concurring) (citations omitted).
91 401 U.S. at 682, (Harlan, J., concurring).
92 Id. at 684.
93 Id. at 685.
94 Id. at 693-95.
95 See Mishkin, The Supreme Court 1964 Term, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965).
States Supreme Court in limiting collateral attack on final convictions. The question remains whether the United States Supreme Court will decide this question differently. Sandstrom's extreme sensitivity to the way an instruction sounds to the ear of a juror may be a clue that the Court would extend full retroactive effect. On the other hand, the Court's apparent willingness to limit collateral attack on final convictions may signal a decision in line with Bowman.

The Sandstrom retroactivity issue came before the United States Supreme Court just this year in Burton v. Bergman. The petition for certiorari raised three questions concerning Sandstrom: 1) Should Sandstrom be applied retroactively to a 1975 state court conviction; 2) If Sandstrom is retroactive, did the instructions violate Sandstrom; and 3) If the state court instructions violate Sandstrom, is the violation nevertheless harmless beyond a reasonable doubt under the doctrine of Chapman v. California? Unfortunately, these issues were left undecided since the Court vacated and remanded the case for consideration in light of Rose v. Lundy, which requires the Court to dismiss habeas petitions which contain unexhausted state claims. Burton or another case presenting these issues will eventually reach the Supreme Court and the Sandstrom retroactivity issue will ultimately have to be decided.

V. Conclusion

The West Virginia court may or may not have correctly anticipated what the Supreme Court will do with Sandstrom retroactivity. But whatever the outcome, the Bowman decision illustrates the difficulties that are inherent in trying to consistently apply the Linkletter "major purpose" test to a somewhat broad and hard to classify rule such as the one in Sandstrom. The retroactivity question still needs to be answered with every new rule. Automatic and full retroactivity is not always necessary with every new decision and would probably result in more procedural avoidance through the misuse of the waiver and harmless error doctrines.

Although the need to serve the fundamental due process rights of fairness and liberty through the availability of habeas review while still preserving the principle of finality of judgments makes the question of retroactivity a difficult one, these same considerations make it fundamentally important to our system of criminal justice.

Mary Sanders Richards
John Michael Hedges

---

98 649 F.2d 428 (6th Cir. 1981), vacated and remanded on other grounds, 102 S. Ct. 2026 (1982).
100 102 S. Ct. 1198 (1982).