

400 F.3d 844

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United States Court of Appeals,  
Tenth Circuit.  
UNITED STATES of America, Plaintiff-Appellant,  
v.  
Joshua PRICE, Jr., Defendant-Appellant.  
No. 04-7058.  
March 8, 2005.

**Background:** Following affirmance on direct appeal of his conviction of various narcotics, firearms and related offenses, [265 F.3d 1097](#), federal prisoner moved to vacate, correct or set aside his conviction. The United States District Court for the Eastern District of Oklahoma, Ronald A. White, J., denied relief, and the Court of Appeals, [118 Fed.Appx. 465](#), denied application for certificate of appealability (COA). Prisoner moved for rehearing, with a suggestion of hearing en banc.

**Holding:** The Court of Appeals, [Ebel](#), Circuit Judge, held that [Blakely](#) was new rule of criminal procedure that was not subject to retroactive application on collateral review.

Motion denied.

## West Headnotes

[\[1\] KeyCite Notes](#) [106](#) Courts[10611](#) Establishment, Organization, and Procedure[10611\(H\)](#) Effect of Reversal or Overruling[106k100](#) In General[106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

Where a Supreme Court decision results in a new rule, that rule applies to all criminal cases still pending on direct review.

[\[2\] KeyCite Notes](#) [106](#) Courts[10611](#) Establishment, Organization, and Procedure[10611\(H\)](#) Effect of Reversal or Overruling[106k100](#) In General[106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

While new substantive rules generally apply retroactively, new procedural rules do not.

[\[3\] KeyCite Notes](#) [106](#) Courts[10611](#) Establishment, Organization, and Procedure[10611\(H\)](#) Effect of Reversal or Overruling[106k100](#) In General[106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

[Blakely](#) decision, which held that state's sentencing procedures violate constitutional rights if facts essential to sentence were not proven to jury or admitted, was new procedural rule, and thus was subject to limited retroactivity rules of [Teague](#).



[4] [KeyCite Notes](#)

🔗 [106](#) Courts

🔗 [10611](#) Establishment, Organization, and Procedure

🔗 [10611\(H\)](#) Effect of Reversal or Overruling

🔗 [106k100](#) In General

🔗 [106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

Conviction becomes final, for purposes of determining whether application of new procedural rule would be retroactive, when the availability of a direct appeal has been exhausted, and the time for filing a certiorari petition with the Supreme Court has elapsed, or the Court has denied a timely certiorari petition.



[5] [KeyCite Notes](#)

🔗 [106](#) Courts

🔗 [10611](#) Establishment, Organization, and Procedure

🔗 [10611\(H\)](#) Effect of Reversal or Overruling

🔗 [106k100](#) In General

🔗 [106k100\(1\)](#) k. In General; Retroactive or Prospective Operation. [Most Cited Cases](#)

[Blakely](#) decision, which held that state's sentencing procedures violate constitutional rights if facts essential to sentence were not proven to jury or admitted, did not place certain kinds of conduct beyond power of criminal lawmaking authority to prescribe or constitute watershed rule of criminal procedure, and thus, as new rule of criminal procedure, [Blakely](#) could not be applied retroactively on collateral review to decision that was final before it was decided. [28 U.S.C.A. § 2255](#).

\*[844 Dennis Fries](#), Asst. U.S. Attorney, Muskogee, OK, for Plaintiff-Appellee.  
Joshua Price, Jr., pro se.

Before [EBEL](#), [MURPHY](#) and [McCONNELL](#), Circuit Judges.

[EBEL](#), Circuit Judge.



Defendant-Appellant Joshua Price, Jr., seeks rehearing, with suggestion for en banc consideration, from this panel's decision denying him a certificate of appealability (COA), see [28 U.S.C. § 2253\(c\)](#), to appeal the district court's decision denying him [28 U.S.C. § 2255](#) relief from his federal \*[845](#) drug trafficking convictions. See [United States v. Price, 265 F.3d 1097, 1100-01 \(10th Cir.2001\)](#) (listing Price's twenty-one federal convictions). In his rehearing petition, Price asks us to reconsider his claims that [Blakely v. Washington, --- U.S. ---, 124 S.Ct. 2531, 159 L.Ed.2d 403 \(2004\)](#), requires us to vacate his sentences because the jury never found the type and quantity of drugs for which the district court sentenced him, and never found that Price killed a government witness, a factual finding the district court made in applying [U.S.S.G. § 2A1.1](#) to enhance Price's sentence. [\[FN1\]](#) See [Price, 118 Fed.Appx. at 471](#). In [Blakely](#), the Supreme Court invalidated Washington's sentencing scheme, holding that scheme violated the Sixth Amendment because it required a sentencing court to impose a sentence "not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" [United States v. Booker, --- U.S. ---, ---, 125 S.Ct. 738, 749, --- L.Ed.2d ---, --- \(2005\)](#) (quoting [Blakely, --- U.S. at ---, 124 S.Ct. at 2537](#)).


[FN1](#). Although Price previously requested COA on a number of other [§ 2255](#) claims, see

[United States v. Price](#), 118 Fed.Appx. 465, 467-68 (10th Cir. Dec.16, 2004) (unpublished), he now seeks rehearing only on his [Blakely](#) claims. (Reh'g petition at 1-2.)

In our prior decision in this case, we denied Price a COA on his [Blakely](#) claims because the Supreme Court had not extended [Blakely's](#) holding to the federal sentencing guidelines and because, even if the Court did apply [Blakely](#) to the federal guidelines, [Blakely](#) would not apply retroactively to initial [§ 2255](#) motions for collateral relief. See [Price](#), 118 Fed.Appx. at 471. After our panel decision, however, the Supreme Court did extend [Blakely](#) to the federal sentencing guidelines. See [Booker](#), --- U.S. at ---, ---, ---, 125 S.Ct. at 749-50, 755-56. In light of [Booker](#), Price asks us to reconsider our prior holding that [Blakely](#) does not apply retroactively to initial [§ 2255](#) motions. (Reh'g petition at 1-2.) Reviewing this question de novo, see [United States v. Mora](#), 293 F.3d 1213, 1216, 1217-19 (10th Cir.2002), we reaffirm that [Blakely](#) does not apply retroactively to Price's initial [§ 2255](#) motion. Therefore, we deny his petition for rehearing, with its suggestion for rehearing en banc.

#### I. Does [Blakely](#) set forth a substantive or a procedural rule?


  [1] [2] Where a Supreme Court decision "results in a 'new rule,' that rule applies to all criminal cases still pending on direct review. As to convictions [like Price's,] that are already final, however, the rule applies only in limited circumstances." [Schriro v. Summerlin](#), --- U.S. ---, ---, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442 (2004) (citation omitted). While new substantive rules generally apply retroactively, new procedural rules do not. See [id.](#) at 2522-23. As an initial matter, therefore, we must decide whether [Blakely](#) announced a procedural or a substantive rule. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural." [Summerlin](#), --- U.S. at ---, 124 S.Ct. at 2523 (citations omitted).

 [3] It is clear that [Blakely](#) did not alter the range of conduct or the class of persons that the law punishes. Rather, [Blakely](#) "altered the range of permissible methods for determining" the appropriate length of punishment. [Summerlin](#), --- U.S. at ---, 124 S.Ct. at 2523. "Rules that allocate decision-making authority in \*846 this fashion are prototypical procedural rules." [Id.](#) (concluding holding in [Ring v. Arizona](#), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), that jury, rather than judge, had to find existence of aggravating factors that would make capital defendant eligible for death sentence, was procedural rather than substantive rule). [Blakely](#), therefore, sets forth a procedural, rather than a substantive, rule. See [McReynolds v. United States](#), 397 F.3d 479, 480-81 (7th Cir.2005) (reaching same conclusion); [United States v. Siegelbaum](#), 2005 WL 196526, at \*2 (D.Or. Jan.26, 2005) (same).

#### II. Does [Blakely's](#) procedural rule apply retroactively to initial [§ 2255](#) motions?

Because [Blakely](#) announces a procedural rule, we apply [Teague v. Lane](#), 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality), to determine whether [Blakely](#) applies retroactively to initial [§ 2255](#) motions. See [Mora](#), 293 F.3d at 1218; see also [Bousley v. United States](#), 523 U.S. 614, 619-20, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). [Teague](#) requires a three-step analysis. See [O'Dell v. Netherland](#), 521 U.S. 151, 156, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997). First, was Price's conviction final prior to the Supreme Court's decision in [Blakely](#)? See [O'Dell](#), 521 U.S. at 156, 117 S.Ct. 1969. Second, would a court considering Price's claims "at the time his conviction became final[, feel] compelled by existing precedent to conclude" [Blakely's](#) rule "was required by the Constitution"? [O'Dell](#), 521 U.S. at 156, 117 S.Ct. 1969 (quotation omitted). If not, then [Blakely's](#) rule is new. See [O'Dell](#), 521 U.S. at 156, 117 S.Ct. 1969. If it is new, then the third [Teague](#) inquiry is whether the new rule fits into "one of the two narrow exceptions to the [Teague](#) doctrine." [O'Dell](#), 521 U.S. at 156-57, 117 S.Ct. 1969. Only if it fits into a [Teague](#) exception will a new procedural rule apply retroactively.

#### A. Did Price's conviction become final before the Supreme Court decided [Blakely](#)?

 [4] We must first determine when Price's conviction became final. For [Teague](#) purposes, a conviction becomes final when the availability of a direct appeal has been exhausted, and the time for filing a certiorari petition with the Supreme Court has elapsed, or the Court has denied a timely certiorari petition. See [Caspari v. Bohlen](#), 510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994).

In Price's case, we denied his direct appeal on September 11, 2001, see [Price](#), 265 F.3d at 1097, and the Supreme Court denied his certiorari petition May 28, 2002, see [Price v. United States](#), 535 U.S. 1099, 122 S.Ct. 2299, 152 L.Ed.2d 1056 (2002). His convictions, therefore, were final on May 28, 2002, prior to the Supreme Court deciding [Blakely](#) on June 24, 2004.

**B. Would a court, considering Price's claim on May 28, 2002, have felt compelled by existing precedent to conclude [Blakely's](#) rule was constitutionally required?**

We turn to the next [Teague](#) inquiry, which is whether, at the time Price's convictions became final, on May 28, 2002, a court considering Price's Sixth Amendment claims would have felt compelled by existing precedent to conclude [Blakely's](#) rule was constitutionally required; that is, at that time, would a court have felt compelled by existing precedent to conclude that the Sixth Amendment precluded a federal sentencing court from imposing a sentence that was "not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'" [Booker](#), --- U.S. at ---, 125 S.Ct. at 749 (quoting \*847 [Blakely](#), --- U.S. at ---, 124 S.Ct. at 2537). We conclude a court would not have felt so compelled. Therefore, we hold that [Blakely](#) announced a new rule. See [O'Dell](#), 521 U.S. at 156, 117 S.Ct. 1969.

"In general, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government"; that is, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." [Teague](#), 489 U.S. at 301, 109 S.Ct. 1060. "The new rule principle ... validates reasonable, good-faith interpretations of existing precedents, ... even if those good-faith interpretations are ... contrary to later decisions." [Graham v. Collins](#), 506 U.S. 461, 467, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (quotation omitted). [Blakely](#) is part of a line of Sixth Amendment cases starting with [Jones v. United States](#), 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and, most importantly, [Apprendi v. New Jersey](#), 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). See [Booker](#), --- U.S. at ---, 125 S.Ct. at 748. At the time Price's convictions became final, the Supreme Court had already decided [Apprendi](#). In [Apprendi](#), the Court held 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." [Apprendi](#), 530 U.S. at 490, 120 S.Ct. 2348. [Apprendi](#), itself, stated a new constitutional rule. See [Mora](#), 293 F.3d at 1218.

Based upon [Apprendi's](#) language addressing situations where a sentencing court "increase[d] the penalty for a crime beyond the statutory maximum," 530 U.S. at 490, 120 S.Ct. 2348, this court subsequently applied [Apprendi](#) only where a sentencing court had imposed a sentence above the statutory maximum permitted by the statute of conviction, regardless of what fact finding the court, rather than the jury, conducted to impose a sentence within that statutory maximum. See, e.g., [United States v. O'Flanagan](#), 339 F.3d 1229, 1232 n. 2 (10th Cir.2003) (holding defendant could not assert [Apprendi](#) error because "his sentence does not exceed the statutory maximum"); [United States v. Bennett](#), 329 F.3d 769, 778 (10th Cir.2003) ("[Apprendi](#) is not implicated ... where judges find facts increasing the mandatory minimum sentence below the maximum sentence for the crime committed"); [United States v. Fredette](#), 315 F.3d 1235, 1245 (10th Cir.2003) ("[Apprendi](#) does not apply to sentencing factors that increase a defendant's guideline range but do not increase the statutory maximum."). So did other circuit courts. See [Simpson v. United States](#), 376 F.3d 679, 681 (7th Cir.2004) (noting that, "before [Blakely](#) was decided, every federal court of appeals had held that [Apprendi](#) did not apply to guideline calculations made within the statutory maximum," citing cases). The Supreme Court also seemingly approved that interpretation of [Apprendi](#) when, in [Harris v. United States](#), 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), the Court held that judicial fact finding that increased a mandatory minimum sentence did not violate [Apprendi](#) so long as the resulting sentence was still below the statutory maximum authorized by the offense of conviction. See 536 U.S. at 550, 567-69, 122 S.Ct. 2406.

It was not until [Blakely](#) that the Supreme Court clarified that "the 'statutory maximum' for [Apprendi](#) purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." [Blakely](#), --- U.S. at ---, 124 S.Ct. at 2537; see also [Simpson](#), 376 F.3d at 681 (7th Cir.2004) (noting "[Blakely](#) ... \*848 alters courts' understanding of [[Apprendi's](#)] 'statutory maximum' "). Therefore, at the time Price's convictions became final, after [Apprendi](#) but before [Blakely](#), a court would not have felt compelled to conclude [Blakely's](#) rule was constitutionally required. [Blakely](#), therefore, announced a new rule. See [United States v. Sanchez-Cruz](#), 392 F.3d 1196, 1201 (10th Cir.2004) (referring to [Blakely](#) as announcing new criminal rule).

**C. Does [Blakely's](#) new rule fit into one of [Teague's](#) two narrow exceptions to the non-retroactive application of new procedural rules?**



[5] A new procedural rule, such as that announced in *Blakely*, will apply retroactively only if it falls into one of two narrow exceptions. See *Teague*, 489 U.S. at 307, 109 S.Ct. 1060. The first exception applies to a new rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307, 109 S.Ct. 1060 (quotation omitted). *Blakely* does not implicate that exception. [FN2] See *Mora*, 293 F.3d at 1218 (holding *Apprendi* does not implicate *Teague's* first exception).

FN2. *Summerlin* notes that, although the Court "sometimes referred to rules ... falling under" *Teague's* first exception, "they are more accurately characterized as substantive rules not subject to [*Teague's* ]

bar." --- U.S. at ---- n. 4, 124 S.Ct. at 2522 n. 4. *Blakely's* rule does not implicate this category of rules, whether we call those rules substantive, rather than procedural, or procedural rules falling under *Teague's* first exception.

*Teague's* second exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *O'Dell*, 521 U.S. at 157, 117 S.Ct. 1969 (quotation omitted). "To qualify as a 'watershed' rule of criminal procedure, the rule must not only improve the accuracy with which defendants are convicted or acquitted, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of the proceeding." *Mora*, 293 F.3d at 1218-19 (quotations omitted). "This exception is defined narrowly." *Id.* at 1219. *Blakely* did not announce a new watershed rule of criminal procedure that implicates the "fundamental fairness and accuracy of the criminal proceeding." *O'Dell*, 521 U.S. at 157, 117 S.Ct. 1969. First, *Blakely* does not affect the determination of a defendant's guilt or innocence. Rather, it addresses only how a court imposes a sentence, once a defendant has been convicted. Further, the Supreme Court has previously determined that a change in the law requiring that juries, rather than judges, make the factual findings on which a sentence is based did not announce a watershed rule of criminal procedure. [FN3] See *Summerlin*, --- U.S. at ---- - ----, 124 S.Ct. at 2524-26. Similarly, we have previously held that a change in the law requiring juries to find these sentencing facts beyond a reasonable doubt, rather than by a preponderance of the evidence, also does not announce a watershed rule of criminal procedure. See *Mora*, 293 F.3d at 1219 (holding *Apprendi*, including its \*849 quantum of proof requirement, did not announce watershed rule); see also *Sepulveda v. United States*, 330 F.3d 55, 61 (1st Cir.2003) (holding, in addressing *Apprendi's* retroactivity, that " 'a decision ... by a judge (on a preponderance standard) rather than a jury (on the reasonable-doubt standard) is not the sort of error that necessarily undermines the fairness ... of judicial proceedings,' " quoting *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir.2002)); *Coleman v. United States*, 329 F.3d 77, 88-90 (2d Cir.2003) (rejecting argument that *Apprendi's* requiring Government to prove sentencing factors beyond a reasonable doubt was watershed rule of criminal procedure). We conclude, therefore, that *Blakely* did not announce a watershed rule of criminal procedure that would apply retroactively to initial § 2255 motions. See, e.g., *Rowell v. Dretke*, 398 F.3d 370, 2005 WL 151916, at \*8 (5th Cir. Jan.25, 2005); *Rucker v. United States*, 2005 WL 331336, at \*1 (D.Utah Feb.10, 2005); *Gerrish v. United States*, 353 F.Supp.2d 95, 2005 WL 159642, at \*1 (D.Me. Jan.25, 2005); *United States v. Johnson*, 353 F.Supp.2d 656, 2005 WL 170708, at \*1 (E.D.Va. Jan.21, 2005); see also *In re Anderson*, 396 F.3d 1336, 1339 (11th Cir.2005) (noting "the Supreme Court has strongly implied that *Blakely* is not to be applied retroactively"); cf. *McReynolds*, 397 F.3d at 481 (7th Cir.2005) (holding *Booker* does not apply retroactively in initial § 2255 motions).

FN3. *Summerlin* addressed only the retroactive application of *Apprendi's* holding, applied to Arizona's death penalty scheme in *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, that a jury rather than the court make factual findings underlying the sentence imposed. See *Summerlin*, --- U.S. at ---- - ----, 124 S.Ct. at 2521-22. *Summerlin* did not consider the retroactive application of *Apprendi's* holding that sentencing facts necessary to increase a maximum statutory sentence be found beyond a reasonable doubt rather

than by a preponderance of the evidence. See [Summerlin, --- U.S. at ---- n. 1, 124 S.Ct. at 2522 n. 1.](#)

### III. Conclusion.

For these reasons, we hold that [Blakely](#) does not apply retroactively to convictions that were already final at the time the Court decided [Blakely](#), June 24, 2004. Because Price's convictions were clearly final by that date, we DENY his petition for rehearing.

Price's suggestion for rehearing en banc was transmitted to all the judges of the court who are in regular active service as required by [Fed. R.App. P. 35](#). No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc.

Therefore, the suggestion for rehearing en banc is also DENIED.

C.A.10,2005.

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- [04-7058](#) (Docket) (Jun. 17, 2004)

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