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Criminal Law - The Final Battle in a Two-Front War over Judicial Death Sentencing Schemes

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CASE NOTES

CRIMINAL LAW – The Final Battle in a Two-Front War Over Judicial Death Sentencing Schemes. *Schriro v. Summerlin*, 124 S. Ct. 2519 (2004).

INTRODUCTION

Brenna Bailey, a delinquent-account investigator, paid a morning visit on April 29, 1981 to the home of Warren Wesley Summerlin to inquire about a payment his wife owed on a piano.[1] When Bailey's boyfriend learned she had not returned to work on time, he obtained a schedule of her planned visits for the day and began to retrace her path.[2] That afternoon, he went to the Summerlin residence and spoke with Warren Summerlin.[3] The boyfriend described Bailey to Summerlin, who confirmed she had been by that morning and stated she had left his house at approximately 10:30 a.m.[4] The woman whom Bailey had planned to visit after Summerlin reported to the boyfriend that she had been home all day and had not received a visit from Bailey.[5] Later that evening, after making further attempts to locate Bailey, the boyfriend reported her missing to police.[6]

That evening, the police received a tip from an anonymous female caller who reported that Bailey had been murdered by Summerlin and rolled up in a carpet.[7] The caller was later identified as Summerlin's mother-in-law, who testified that she had obtained her information through her daughter's extra-sensory perception.[8] The next day, police found Bailey's body in the trunk of her car parked near Summerlin's home.[9] Bailey's skull had been crushed and she had been sexually assaulted.[10]

Police obtained a warrant to search the Summerlin residence and when an officer served the warrant, Summerlin said, "I didn't kill nobody."[11]

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1. Arizona v. Summerlin, 675 P.2d 686 (Ariz. 1983).
2. Summerlin v. Stewart, 341 F.3d 1082, 1084 (9th Cir. 2003).
3. *Summerlin*, 675 P.2d at 689.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Summerlin*, 341 F.3d at 1084, 1085.
8. *Id.* at 1085.
9. Arizona v. Summerlin, 675 P.2d 686, 689-90 (Ariz. 1983).
10. *Id.* The day after police received the anonymous psychic tip, a paving crew working outside a store near the Summerlin residence pointed out a brown Mustang in the store parking lot to the store's manager. *Id.* The store manager had served in Vietnam and recognized the smell of a decaying body emanating from the car. *Id.* at 689-90. The store manager also saw a pair of women's underwear and shoes in the back seat of the car and called police. *Id.* at 690; Summerlin v. Stewart, 341 F.3d 1082, 1085 (9th Cir. 2003).
11. *Summerlin*, 675 P.2d at 690.

The detective did not reply and Summerlin then asked, "Is this in reference to the girl that was at my house?"[12] The detective then asked, "What girl?" to which Summerlin replied, "The lady that came to the house about 10:00 in the morning, reference [sic] to [my] wife's piano."[13] Police searched the house and seized several incriminating items including carpet and padding, bloody men's boots, a garden hoe with hair on it, and bloody floor tiles.[14] Summerlin's wife later identified the bloody bedding found with Bailey's body as belonging to her.[15] Police arrested Summerlin and later overheard him making incriminating comments to his wife.[16]

A jury found Summerlin guilty of first-degree murder and sexual assault.[17] At that time, first-degree murder was punishable in Arizona by either life in prison or death.[18] However, to aid in determining the proper sentence, the presiding judge was required to conduct a separate sentencing hearing to determine the existence or nonexistence of aggravating or mitigating circumstances.[19] The judge, as finder of fact, found two aggravating factors related to Summerlin's crime: (1) Summerlin had a prior felony conviction involving the use or threatened use of violence on another person; and (2) the murder was committed in an especially heinous, cruel, or depraved manner.[20] The judge found no mitigating circumstances.[21] On July 12, 1982, Summerlin was sentenced to death.[22]

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12. *Id.*
13. *Id.*
14. *Id.*
15. *Summerlin*, 341 F.3d at 1085.
16. *Id.* During the trial, Detective Fuqua of the Phoenix Police Department testified that when Summerlin and his wife were together, clearly in the presence of police officers, Summerlin said, "I knew this had to happen." Arizona v. Summerlin, 675 P.2d 686, 694 (Ariz. 1983). Summerlin's wife then responded, "What do you mean?" and Summerlin replied, "This was the big crime." *Id.* Summerlin's last statement was, "I don't like to pay bills and all the other bullshit." *Id.* Just before the interview ended, Summerlin told his wife not to worry because the police would not find anything in the house. *Id.*
17. *Summerlin*, 341 F.3d at 1088.
18. *See* ARIZ. REV. STAT. § 13-703(A) (1981).
19. *Id.* § 13-703(F), (G). Aggravating factors a judge could consider included whether the defendant had been convicted of another felony involving the use or threat of violence on another person, if the offense was committed for pecuniary gain, or if the crime was committed in an especially heinous, cruel, or depraved manner. *Id.* § 13-703(F). Mitigating factors included whether the defendant had the capacity to appreciate the wrongfulness of his conduct, was significantly impaired, or whether the defendant was a principal actor in the offense but his participation was relatively minor. *Id.* § 13-703(G).
20. *Summerlin*, 341 F.3d at 1090. Just prior to his sentencing proceedings, Summerlin was convicted of aggravated assault from an incident in which he brandished a pocket knife at a driver who had veered off the road, over the curb, and struck Summerlin's wife. *Id.* at 1084. On direct appeal, the Arizona Supreme Court upheld the trial court's determination that the crime was committed in an especially heinous, cruel, or depraved manner. Arizona v. Summerlin, 675 P.2d 686, 696 (Ariz. 1983). The Arizona Supreme Court explained that "cruelty" involved pain and distress of the victim and "heinous and depraved" related to the mental state and attitude of the one committing the crime. *Id.* (citing Arizona v. Gretzler, 659 P.2d 1,

Following his conviction and sentencing, Summerlin filed several state and federal appeals.[23] Many of these appeals stemmed from unusual events surrounding Summerlin's trial. For example, though Summerlin's court-appointed defense attorney successfully negotiated a favorable plea agreement which would have spared Summerlin from the death penalty, the defense attorney had a "personal involvement of a romantic nature" with the prosecuting attorney following a Christmas party.[24] Four days later, Summerlin's attorney had not taken action to withdraw from the case and represented Summerlin at a hearing where Summerlin appeared to be confused about the plea deal and ultimately withdrew his plea.[25] Withdrawing his plea made Summerlin eligible for the death penalty.[26] As a result of the affair, the court eventually replaced the appointed defense attorney with a private attorney.[27]

The new attorney was ill-prepared to defend Summerlin on his previous assault charge, did not present evidence related to any mitigating circumstances, was unable to support his only defense theory with any evi-

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16 (Ariz. 1983)). Evidence indicating physical and mental pain included the fact the victim was raped and the victim's bruised hand indicated she had attempted to fight off an attack. *Id.* Regarding Summerlin's state of mind, the court said it considered the defendant's "apparent relishing of the murder," "inflicting of gratuitous violence on the victim," "needless mutilation of the victim," and "senselessness of the crime, and helplessness of the victim." *Id.* (citing *Gretzler*, 659 P.2d at 11). Based on a coroner's report, there were far more blows to the victim's head than were necessary to kill her and she was unable to defend herself due to her physical condition. *Id.* In concluding the death penalty was appropriate, the court found two aggravating factors and no mitigating circumstances. *Id.*

21. *Summerlin*, 675 P.2d at 696.

22. Joint Appendix at 1, Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (No. 03-0526); KENT E. CATTANI, ARIZONA ATTORNEY GENERAL'S OFFICE, PROFILES OF ARIZONA DEATH ROW INMATES 105 (2003).

23. Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (2004).

24. Summerlin v. Stewart, 341 F.3d 1082, 1086-87 (9th Cir. 2003).

25. *Id.* at 1087. During the hearing, the judge advised Summerlin that under the plea he could face up to thirty-eight-and-one-half years in prison. *Id.* Summerlin told the court twice that he did not understand the judge's explanation of the sentence and requested new counsel. *Id.* The attorney conferred privately with Summerlin and then told the court, "I believe he understands, your Honor," but Summerlin immediately responded, "No, I don't understand." *Id.* The judge again explained the sentence Summerlin could face under his plea and Summerlin said he understood and added, "Okay. I would like to withdraw from my plea agreement. Is that what you want me to say?" *Id.* The judge explained that he did not want Summerlin to say anything in particular, but wanted to make certain Summerlin understood. Summerlin v. Stewart, 341 F.3d 1082, 1087 (9th Cir. 2003). Summerlin and his attorney entered into another confidential discussion after which Summerlin withdrew from the agreement and the court immediately reinstated pleas of not guilty and ordered that the case be sent to trial. *Id.* At this point, Summerlin again moved for new counsel but his attorney remained silent regarding the affair and the court denied his motion, stating that "the record may further reflect that [Summerlin] failed to establish any grounds upon which counsel should be changed." *Id.*

26. *Id.*

27. *Id.* at 1087-88. Summerlin was never informed of the affair during the trial. *Id.* at 1088.

dence, and failed to present psychological evidence demonstrating Summerlin was functionally retarded and illiterate.[28] A few weeks later, the Arizona Attorney General's Office took control of the prosecution because of the previous prosecutor's romantic involvement with the defense attorney.[29] The Attorney General's Office was not willing to settle the case through any type of plea arrangement.[30]

To make Summerlin's case even stranger, the presiding judge, Phillip Marquardt, had been a heavy user of marijuana at the time of Summerlin's trial, which later led to his removal from the bench.[31] Summerlin al-

28. Summerlin v. Stewart, 341 F.3d 1082, 1088-89 (9th Cir. 2003). The new defense attorney's main theory was the murder lacked premeditation; however, he presented no evidence supporting this theory. *Id.* at 1088. He cross-examined several of the prosecution's witnesses, attempting to cast doubt on the rape charge to show there was no premeditation. *Id.* He did not present any evidence relating to Summerlin's psychiatric condition and therefore could not cross-examine any of the prosecution's witnesses related to psychiatric problems and how they may have affected Summerlin's ability to premeditate the murder. *Id.* The only witness the attorney called was the previous defense attorney who had been removed because of her affair with the prosecutor. *Id.* The case took only four days and the jury deliberated for only three hours before finding Summerlin guilty of first-degree murder and sexual assault. *Id.*

29. Summerlin v. Stewart, 341 F.3d 1082, 1088 (9th Cir. 2003).

30. *Id.* At the time of the trial, Summerlin had not been convicted of the aggravated assault for the "road rage" incident, so it did not qualify as an aggravating circumstance under Arizona's death sentencing statute in 1981. *Id.* at 1086. *See* ARIZ. REV. STAT. § 13-703(F)(2) (1981); *see supra* note 20. Thus, the original prosecutor did not believe Summerlin was guilty of a capital offense. *Summerlin*, 341 F.3d at 1086. However, the prosecution of the murder and sexual assault charges was later transferred to the Arizona Attorney General's Office, but before the trial began, Summerlin's aggravated assault charges from the road rage incident went to trial and Summerlin was convicted of aggravated assault. *Id.* at 1088. This conviction served as one of two aggravating factors in the penalty phase of the murder trial. *Id.*

31. *Id.* at 1089. In his disbarment proceedings, Judge Marquardt admitted he was addicted to marijuana but did not indicate how long he had been addicted. *Id.* at 1089 n.1. A report from the Phoenix Police Department dated June 3, 1991 showed Judge Marquardt had purchased marijuana through the United States mail in May 1991, which was intercepted by police. *Id.* When the delivery did not arrive, Judge Marquardt called his supplier to see if she had informed the authorities. Summerlin v. Stewart, 341 F.3d 1082, 1089 n.1 (9th Cir. 2003). She said she had not and Judge Marquardt told her that everything would be alright because his daughter's boyfriend Butch "was going to take the wrap for the marijuana." *Id.* In the police report, Judge Marquardt's marijuana supplier said Judge Marquardt "was a frequent user of marijuana, had been when she met him [sixteen years earlier], and has continued to be so since." *Id.* Judge Marquardt had also sent a cashier's check to his supplier for the marijuana in an official envelope with the heading "Phillip Marquardt, Superior Court Judge, Phoenix, Arizona." *Id.* In a previous incident, Judge Marquardt was convicted in Texas in 1988 of possession of marijuana when it was found on his person at a port of entry in Houston, but he claimed that a stranger had approached him and stuck a small plastic bag in his pocket. *In re Marquardt*, 778 P.2d 241, 242-43 (Ariz. 1989). For this incident, he was suspended without pay for one year but continued to use marijuana. *Summerlin*, 341 F.3d at 1089 n.1. Judge Marquardt eventually resigned from the bench and following the 1991 incident, both the Arizona Supreme Court and the United States Supreme Court disbarred him. *In re Marquardt*, 169 Ariz. 500 (1991); *In re Disbarment of Phillip Walter Marquardt*, 503 U.S. 902 (1992).

leged that Judge Marquardt confused the facts of Summerlin's case with another first-degree murder case he was presiding over at the same time.[32]

Due to such unusual events, Judge Thomas of the United States Court of Appeals for the Ninth Circuit described Summerlin's case as follows:

> It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge. But as Mark Twain observed, "truth is often stranger than fiction because fiction has to make sense."[33]

In 1983, the Arizona Supreme Court upheld Summerlin's conviction and death sentence.[34] Summerlin then filed an initial application for a writ of habeas corpus in federal district court which was denied; he also undertook four post-conviction attempts in state court to overturn his conviction.[35] The federal district court rejected a second amended writ of habeas corpus in 1997.[36] After Summerlin's motion to vacate the judgment was denied in January 1998, the district court enabled him to appeal through a certificate of probable cause.[37] A divided three-judge panel of the United States Court of Appeals for the Ninth Circuit remanded the case for a hearing to determine whether Judge Marquardt was competent when he deliberated during the sentencing phase of Summerlin's trial.[38]

Soon thereafter, the United States Supreme Court granted *certiorari* in another Arizona case, *Arizona v. Ring*, which involved a potential reexamination of Arizona's death penalty statute pursuant to the Sixth Amendment's guarantee of a right to a trial by jury.[39] The Ninth Circuit withdrew

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32. *Summerlin*, 341 F.3d at 1090-91. On the same day of Summerlin's sentencing, Judge Marquardt also sentenced James Clifford Fisher to death. *Id.* Fisher also murdered a woman whose last name was Bailey (no relation to Brenna Bailey) with a blunt instrument. *Id.* Judge Marquardt also found two aggravating factors in Fisher's case just as he did in Summerlin's—including that the crime was committed in an especially heinous and depraved manner—and found no mitigating circumstances sufficient to call for leniency. *Id.* at 1089-90.

33. *Id.* at 1084.

34. Summerlin v. Stewart, 341 F.3d 1082, 1091 (9th Cir. 2003) (citing Arizona v. Summerlin, 675 P.2d 686 (Ariz. 1983)).

35. *Id.*

36. *Id.*

37. *Id.* Summerlin moved to vacate the judgment under FED. R. CIV. P. 59(e). *Id.* Summerlin's appeal through a certificate of probable cause was allowed under FED. R. APP. P. 22(b)(1). *Id.*

38. *Id.*

39. Summerlin v. Stewart, 341 F.3d 1082, 1091 (9th Cir. 2003). *See* Ring v. Arizona, 536 U.S. 584 (2002).

its decision in Summerlin's case and delayed its submission while it awaited the United States Supreme Court's ruling in *Ring*.[40] In *Ring*, the Court held Arizona's capital sentencing system, centered on a judge's ability to make findings of fact related to aggravating circumstances, violated the right to a jury trial guaranteed by the Sixth Amendment.[41]

Based on the decision in *Ring*, the Ninth Circuit granted a stay to Summerlin so he could petition the Arizona Supreme Court to reconsider his appeal in light of *Ring*.[42] The Arizona Supreme Court denied this request.[43] After that, the Ninth Circuit voted to hear Summerlin's case *en banc*.[44] In his appeal to the Ninth Circuit, Summerlin raised several issues related to lack of effective assistance of counsel, deprivation of due process of the law because the trial judge was addicted to marijuana during his trial and sentencing, and the constitutionality of Arizona's death penalty sentencing scheme, which allowed judges to make findings of fact related to aggravating circumstances.[45]

The Ninth Circuit upheld Summerlin's conviction, holding he had failed to meet the burden of showing there was a "probability sufficient to undermine confidence in the outcome" of the guilt phase of his trial.[46] However, the Ninth Circuit held that the decision in *Ring* applies *retroactively* "so as to require that the penalty of death in [Summerlin's] case be vacated" because Judge Marquardt's findings of fact related to aggravating circumstances violated Summerlin's right to a jury trial.[47] In reaching this conclusion, the Ninth Circuit conducted a *Teague* analysis to determine if the Su-

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40. *Summerlin*, 341 F.3d at 1091.

41. *Ring*, 536 U.S. at 609. The Court stated that "[b]ecause Arizona's enumerated aggravating factors operate as the 'functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)).

42. *Summerlin*, 341 F.3d at 1091.

43. *Id.*

44. *Id.* at 1092; Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002). The Ninth Circuit had jurisdiction to hear this case pursuant to 28 U.S.C. § 2253, part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), which provides that in a habeas corpus proceeding, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *Summerlin*, 341 F.3d at 1092. Summerlin's appeal was filed after the effective date of the AEDPA and therefore, AEDPA rules governed the right to appeal in this case. *Id.* However, Summerlin filed a habeas corpus petition before AEDPA's effective date so pre-AEDPA law governed the petition. *Id.* (citing Lindh v. Murphy, 521 U.S. 320, 327 (1997)).

45. *Summerlin*, 341 F.3d at 1092.

46. *Id.* at 1096 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)). The Ninth Circuit stated that "to prevail on this claim, Summerlin [had to] demonstrate first that the performance of counsel fell below an objective standard of reasonableness, and second that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 1093 (citing *Strickland*, 466 U.S. at 694).

47. *Id.* at 1084.

preme Court's decision in *Ring* should be applied retroactively.[48] A *Teague* analysis helps determine whether a new rule is to be applied retroactively.[49] Under *Teague*, the bar to retroactivity does not apply if a rule is substantive rather than procedural.[50] Procedural rules apply retroactively only if they meet one of two exceptions to the presumption against retroactivity.[51] In its analysis, the Ninth Circuit first ruled that *Ring* was a substantive rule and therefore, *Teague* did not bar retroactivity.[52] Second, the Ninth Circuit held that even if the rule announced by the Supreme Court in *Ring* was procedural, it met the exceptions and should be applied retroactively to those already sentenced to death by a judge rather than a jury within the Ninth Circuit.[53]

The United States Supreme Court granted *certiorari* on December 1, 2003 to determine if *Ring* should be applied retroactively to Warren Wesley Summerlin as well as to over 100 other death row inmates in Arizona, Colorado, Idaho, Montana, and Nebraska.[54] The Court limited its review to whether the rule announced in *Ring* applies retroactively to cases already final on direct review.[55] Under its own *Teague* analysis, the Court held that "*Ring* announced a new *procedural* rule that *does not apply retroactively* to cases already final on direct review."[56] Thus, Summerlin and over 100 death row inmates in Arizona and four other states will remain on death row and will not be eligible for re-sentencing.[57]

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48. Summerlin v. Stewart, 341 F.3d 1082, 1096-1121 (9th Cir. 2003). The United States Supreme Court established the *Teague* standard to determine when a new constitutional rule should be applied retroactively. *See* Teague v. Lane, 489 U.S. 288 (1989).

49. *Summerlin*, 341 F.3d at 1098-99.

50. *Id.* (citing Bousley v. United States, 523 U.S. 614, 620 (1998)).

51. *Id.* at 1098-99 (citing Teague v. Lane, 489 U.S. 288, 311 (1989) (O'Connor, J., plurality)). *See infra* notes 165-70 and accompanying text.

52. *Summerlin*, 341 F.3d at 1099.

53. *Id.* at 1121.

54. Schriro v. Summerlin, 124 S. Ct. 833 (2003) (granting *certiorari* to Summerlin's claim); Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (2004). According to the New York Law Journal, there were 110 death row inmates who would be affected by retroactive application of *Ring*. *Court Hears Arguments in Latest Death Case*, 231 N.Y.L.J. 5 (2004). That group included eighty-six prisoners in Arizona, fifteen in Idaho, five in Nebraska, and four in Montana. *Id.* In her dissent in *Ring v. Arizona*, Justice O'Connor explained that Arizona, Colorado, Idaho, Montana, and Nebraska all had similar sentencing schemes at the time the Court decided *Ring* and had a combined 168 death row inmates. Ring v. Arizona, 536 U.S. 584, 620 (2002) (O'Connor, J., dissenting). *See also infra* note 245 and accompanying text.

55. *Summerlin*, 124 S. Ct. at 2521. Following a trial, either party can appeal the decision to the highest court in the jurisdiction and to the United States Supreme Court if the state's highest court addressed an issue related to the federal Constitution. BLACK'S LAW DICTIONARY 94 (7th ed. 1999). Cases already final on direct review have either already gone through this level of review or no longer can because petition deadlines for writ of *certiorari* have already passed. *See* Lambrix v. Singletary 520 U.S. 518, 527 (1997).

56. *Summerlin*, 124 S. Ct. at 2521 (emphasis added).

57. *Id.* at 2526-27. *See also supra* note 54 and accompanying text.

This case note will examine the judicial and legislative history behind Arizona's capital sentencing scheme, the judicial history of several cases which have resulted in a new rule under which juries must serve as factfinders for all facts used in sentencing, and how case history has treated the retroactive nature of such new rules. Additionally, it will explain why the United States Supreme Court's decision in *Summerlin* was correct and fair. It will also explain that while the *Summerlin* ruling was correct and fair, the Court failed to address a legitimate challenge put forth by the dissent regarding the lack of fairness in denying retroactivity to similarly situated capital defendants and how the Court should have addressed this challenge. Finally, this note will investigate the impacts the Supreme Court's decision in *Summerlin* will have on death penalty sentencing schemes and how it might affect future decisions related to the retroactivity of new constitutional rules affecting non-capital criminal sentencing procedures.

BACKGROUND

The issue the Supreme Court faced in *Summerlin* is similar to two fronts coming together in the final battle of a war. The first front is the protracted battle over the role of judges versus juries in factfinding issues related to sentencing in death penalty cases.[58] The second front is the conflict over whether courts must give retroactive effect to new constitutional rules handed down by higher courts, thereby making the rules applicable to cases already final on direct review.[59] Before engaging those fronts, the history of capital punishment in Arizona must be addressed.

The Role of Judges and Juries Since Capital Punishment's Reinstatement

Dating back to its territorial period, Arizona nearly always had a death penalty statute.[60] For over fifty years, Arizona's death penalty statute vested full discretion in juries to determine if the death sentence would be applied.[61] However, in 1972 the United States Supreme Court decided *Furman v. Georgia*, which declared death penalty sentencing statutes that gave complete discretion to either the judge or a jury unconstitutional.[62] After the Court vacated several Arizona death sentences, the Arizona Su-

58. *See infra* notes 60-138 and accompanying text.

59. *See infra* notes 139-70 and accompanying text.

60. Summerlin v. Stewart, 341 F.3d at 1082, 1102-03 (9th Cir. 2003). The Arizona Territory first established a death penalty statue in 1901 which gave full sentencing discretion to the jury except where the defendant entered a guilty plea. *Id.* (citing Ariz. Territorial Rev. Stat., tit. 8, § 174 (1901)). Arizona became a state in 1912, and in 1916, the death penalty was abolished through voter-initiative only to be reinstated by voter-initiative in 1918. *Id.* at 1102 (citing Act of Dec. 8, 1916, 1917 Ariz. Session Laws, Initiative and Referendum Measures, at 4-5; Act of Dec. 5, 1918, 1919 Ariz. Sess. Laws, Initiative and Referendum Measures, at 18).

61. *Summerlin*, 341 F.3d at 1102.

62. *Id.* (citing Furman v. Georgia, 408 U.S. 238 (1972)).

preme Court declared Arizona's death penalty statute unconstitutional.[63] In response, the Arizona Legislature amended its death sentencing scheme and created a new "capital offenses" statute, which gave sentencing discretion to the *judge*, who was to consider six aggravating factors and four mitigating factors outlined in the statute.[64] However, in 1978, two other United States Supreme Court cases, *Lockett v. Ohio* and *Bell v. Ohio*, determined that

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63. *Id.* at 1103. *See, e.g.*, Alford v. Eyman, 408 U.S. 939 (1972); Kruchten v. Eyman, 408 U.S. 934 (1972); Sims v. Eyman, 408 U.S. 934 (1972); Gause v. Arizona, 409 U.S. 815 (1972). The Arizona Supreme Court determined the 1973 death penalty statute was constitutional in Arizona v. Endreson, 506 P.2d 248, 254 (1973)).

64. Summerlin v. Stewart, 341 F.3d 1082, 1103 (9th Cir. 2003) (citing 1973 Ariz. Sess. Laws Ch. 138, § 5). The six aggravating factors the Arizona Legislature established were:

> (1) The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was impossible,
>
> (2) the defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person,
>
> (3) in the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense,
>
> (4) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value,
>
> (5) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value,
>
> (6) the defendant committed the offense in an especially heinous, cruel, or depraved manner.

1973 Ariz. Sess. Laws Ch. 138, § 5. The Arizona Legislature also established four mitigating factors, which were:

> (1) His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution,
>
> (2) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution,
>
> (3) He was a principal . . . in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution,
>
> (4) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

Id.

death penalty statutes restricting the defendant's right to show mitigating circumstances were unconstitutional.[65] In light of *Lockett* and *Bell*, the Arizona Legislature again amended the State's death penalty statute by adding that any factors offered by the state or the defendant, in addition to factors already enumerated in the statute, could be considered as mitigating factors by the judge.[66]

Following this change, minor modifications were made to Arizona's death penalty sentencing scheme with the essential structure of the statute remaining the same until the *Ring* decision.[67] This statutory scheme became the key to the controversy that arose in *Ring*.[68] The *Ring* Court held it is unconstitutional for a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for the imposition of the death penalty.[69] The *Ring* decision was the culmination of several other cases that challenged judicial factfinding and sentencing under the Sixth Amendment, resulting in an increasingly limited role for judges in determining facts and issuing sentences.[70]

Ring, its Predecessors and Progeny: Challenging Judicial Factfinding

The first notable case in the battle over judicial factfinding was *Walton v. Arizona*.[71] A jury convicted Jeffrey Walton of first-degree murder for the 1986 killing of an off-duty marine in Tucson, Arizona.[72] Finding two aggravating factors and no mitigating factors, a judge sentenced Walton to

65. *Summerlin*, 341 F.3d at 1102-03 (citing Lockett v. Ohio, 438 U.S. 586 (1978) (holding Ohio's capital sentencing statute violated the Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment because it did not allow the sentencer to consider a required range of mitigating factors including the defendant's character, age, record, or the circumstances of the offense); Bell v. Ohio, 438 U.S. 637 (1978) (holding that (1) the Eighth and Fourteenth Amendments required the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense the defendant proffered, and (2) the Ohio death penalty statute violated the Constitution because it did not allow the consideration of individualized mitigating factors as the Eighth and Fourteenth Amendments required)). The Arizona Supreme Court subsequently declared Arizona's death penalty statute unconstitutional in 1978 because it did not allow defendants to prove non-statutory mitigating circumstances. Arizona v. Watson, 586 P.2d 1253, 1257 (1978).

66. *Summerlin*, 341 F.3d at 1103; *see* 1979 Ariz. Sess. Laws Ch. 144, § 1.

67. *Summerlin*, 341 F.3d at 1103-04.

68. Ring v. Arizona, 536 U.S. 584 (2002).

69. *Id.* at 609.

70. *See infra* notes 71-130 and accompanying text.

71. Walton v. Arizona, 497 U.S. 639 (1990).

72. *Id.* at 644-45. Walton and two associates robbed an off-duty marine at gunpoint and then drove to the desert outside of Tucson, Arizona, where they marched the victim away from the road and shot him once in the head. *Id.* at 644. A medical examiner later determined the victim did not die immediately but was blinded by the shot, regained consciousness, and died several days later from dehydration, starvation, and pneumonia. *Id.* at 644-45.

death.[73] After the Arizona Supreme Court upheld Walton's conviction, he petitioned the United States Supreme Court for *certiorari* claiming Arizona's death sentencing statute violated his right to a jury trial guaranteed by the Sixth Amendment because a judge, rather than a jury, made the findings of fact used during sentencing.[74]

The Court granted *certiorari* and held Arizona's sentencing scheme did not violate the Sixth Amendment.[75] The Court held that aggravating and mitigating circumstances were not elements of a crime but were simply factors a judge, and not necessarily a jury, needed to consider when issuing a sentence.[76] The Court cited *Clemons v. Mississippi*, in which it stated that "[a]ny argument that the Constitution requires that a jury impose the sentence of death . . . has been soundly rejected by prior decisions of this Court."[77] The Court also reasoned that it has repeatedly "rejected Constitutional challenges to Florida's sentencing scheme, which provides for sentencing by the judge, not the jury."[78] Thus, by not requiring juries to find all facts necessary to issue a death sentence, *Walton* strengthened the sentencing authority of judges.[79]

The United States Supreme Court diminished the power it granted in *Walton*, however, when it decided *Jones v. United States*.[80] In 1992, Nathaniel Jones and two others robbed two men and left the scene in the men's car.[81] Jones and his accomplices were indicted for using a firearm during

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73. *Id.* at 645. The judge found two aggravating circumstances: (1) the murder was committed in an especially heinous, cruel or depraved manner, and (2) the murder was committed for pecuniary gain. *Id.* at 695. The defense presented evidence related to mitigating factors but the judge ruled the circumstances were not sufficient to call for leniency. Walton v. Arizona, 497 U.S. 639, 695 (1990).

74. *Id.* at 646-48.

75. *Id.* at 649.

76. *Id.* at 647-48.

77. *Id.* (quoting Clemons v. Mississippi, 494 U.S. 738, 745 (1990)).

78. *Id.* (citing Hildwin v. Florida, 490 U.S. 638 (1989); Spaziano v. Florida, 468 U.S. 447 (1984); Proffitt v. Florida, 428 U.S. 242 (1976)).

79. Walton v. Walton, 497 U.S. 639, 648 (1990). Regarding whether aggravating and mitigating factors are elements of the offense, the Court quoted a 1986 Arizona capital punishment case, which stated:

> Aggravating circumstances are not separate penalties or offenses, but are standards to guide the making of [the] choice between the alternative verdicts of death and life imprisonment. Thus, under Arizona's capital sentencing scheme, the judge's finding of any particular aggravating circumstance does not of itself 'convict' a defendant (i.e., require the death penalty), and the failure to find any particular aggravating circumstance does not 'acquit' a defendant (i.e., preclude the death penalty).

Id. (quoting Poland v. Arizona, 476 U.S. 147, 156 (1986)).

80. Jones v. United States, 526 U.S. 227 (1999).

81. *Id.* at 229-30.

and in relation to a violent crime and carjacking.[82] The federal carjacking statute increased the maximum sentence from fifteen years to twenty-five years if the crime resulted in serious bodily injury.[83] However, the possibility of this increased sentence was not part of the indictment at Jones' arraignment.[84] The judge told Jones the maximum penalty he faced was fifteen years in prison, and the court did not instruct the jury on the possibility of an increased penalty if the crime resulted in serious bodily injury.[85] The jury convicted Jones of carjacking and using a firearm during and in relation to a violent crime.[86] Following the conviction, a presentencing report recommended Jones be sentenced to twenty-five years in prison, citing a physician's conclusion that one of the victims had suffered a serious injury to his ear.[87] Jones objected to the recommended increased sentence because "serious bodily injury was an element of the offense" defined by the statute "which had been neither pleaded in the indictment nor proven before the jury."[88] The District Court disagreed, finding the serious bodily injury was supported by a preponderance of the evidence and sentenced Jones to twenty-five years in prison for carjacking.[89] The Ninth Circuit upheld the sentence, reasoning that the structure of the statute and the legislative history behind it indicated the statute did not outline separate crimes but merely sentencing factors.[90]

The United States Supreme Court granted *certiorari* and reversed the Ninth Circuit decision.[91] The majority stated the case "turn[ed] on whether the federal carjacking statute . . . defined three distinct offenses or a single crime with a choice of three maximum penalties . . . ."[92] While the statute appeared to outline elements followed by mere sentencing considerations, the Court reasoned that two of those considerations seemed as important as elements because they were based on further facts and resulted in significantly higher penalties.[93] The Court concluded the statute had two meanings. First, the Court found the "fairest reading of [the statute] treats

82. *Id.* Using a firearm during and in relation to a crime of violence violated 18 U.S.C. § 924(c). *Id.* Jones and his accomplices were also indicted for carjacking under 18 U.S.C. § 2119 (1988). *Id.*

83. *Jones*, 526 U.S. at 230-31 (quoting 18 U.S.C. § 2119(2) (1998)).

84. *Id.* at 230-31.

85. *Id.*

86. *Id.* at 231.

87. *Id.* During the commission of the crime, Jones had stuck a gun into the victim's ear and also struck him on the head. *Id.* at 229. The victim testified that the gun caused "profuse bleeding" and that a physician determined the victim's ear drum had been perforated, there was numbness in the ear, and there was permanent hearing loss. Jones v. United States, 526 U.S. 227, 231 (1999).

88. *Id.*

89. *Id.* Jones also received a consecutive five year sentence for the firearm offense. *Id.*

90. *Id.* at 231-32 (citing United States v. Oliver, 60 F.3d 547, 552-53 (1995)).

91. *Id.* at 228.

92. Jones v. United States, 526 U.S. 227, 229 (1999) (internal citation omitted).

93. *Id.* at 232-33.

serious bodily harm as an element, not a mere enhancement."[94] Second, the Court acknowledged the statute was ambiguous enough to be read as only outlining sentence enhancements.[95] It reasoned "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter."[96] Thus, "any fact (other than a 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."[97]

The Court strengthened the *Jones* decision the very next term in *Apprendi v. New Jersey*.[98] In 1994, Charles C. Apprendi Jr. fired a .22-caliber rifle several times into the home of an African-American family that had recently moved into what had been an all-white neighborhood.[99] Under a separate "hate crime" law, a term of imprisonment for a crime could be extended ten to twenty additional years if the trial judge found by a preponderance of the evidence that the crime was committed "with a purpose to intimidate an individual or group of individuals because of race."[100] After Apprendi pleaded guilty, the prosecutor made a motion for an extended sentence under the New Jersey hate crime statute.[101] The judge later concluded the evidence showed racial bias motivated Apprendi to commit the crimes and issued an enhanced sentence of twelve years on one of the counts.[102]

Apprendi appealed to the New Jersey Supreme Court, arguing the Due Process Clause of the United States Constitution did not allow a judge to find Apprendi's purpose in committing the crimes was to intimidate an individual or group of individuals based on race, but that such facts must be

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94. *Id.* at 239.

95. *Id.*

96. *Id.* (quoting United States ex rel. Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)). The Court also stated it adheres to this position out of respect for Congress assuming it "legislates in light of constitutional limitations" and the Court has held this view for so long it is "beyond debate." *Id.* at 239-40 (quoting Rust v. Sullivan, 500 U.S. 173, 191 (1991); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)).

97. Jones v. United States, 526 U.S. 227, 243 n.6 (1999).

98. Apprendi v. New Jersey, 530 U.S. 466 (2000).

99. *Id.* at 469. When arrested, Apprendi admitted he was the shooter and stated he shot into the home because "they are black in color he does not want them in the neighborhood." *Id.* at 469. Possession of a firearm for an unlawful purpose was punishable by imprisonment for between five and ten years under New Jersey law at the time. *Id.* at 468; N.J. STAT. ANN. §2C:39-4(a) (1995).

100. *Apprendi*, 530 U.S. at 468-69; N.J. STAT. ANN. § 2C:44-3(e) (2000). The statute also provided additional penalties for crimes meant to intimidate an individual or group of individuals because of "color, gender, handicap, religion, sexual orientation or ethnicity." N.J. STAT. ANN. § 2C:44-3(e) (2000).

101. *Apprendi*, 530 U.S. at 470.

102. *Id.* at 471.

proved to a jury beyond a reasonable doubt.[103] The New Jersey Supreme Court upheld the enhanced sentence but the United States Supreme Court granted *certiorari* and reversed.[104] The Court reasoned that a sentencing scheme that allows a judge, rather than a jury, to determine facts "exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[105] It also held a sentencing judge is constrained by the facts alleged in an indictment and found by the jury, and that facts that expose a defendant to a greater punishment are elements of a separate legal offense.[106] Because the *Apprendi* judge determined facts that led to an increased sentence for Apprendi, the enhanced sentence and the procedures that issued it violated the Constitution.[107] According to the Court, "[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."[108]

The dissent in *Apprendi* criticized the majority by arguing that *Apprendi* was in conflict with *Walton* because *Walton* allowed a post-jury trial sentencing proceeding while the Court in *Apprendi* held that any fact that could increase a penalty (other than a prior conviction) had to be submitted to a jury and proven beyond a reasonable doubt.[109] The dissent wrote that the majority's opinion in *Apprendi* is inconceivable given the Court's previous decision in *Walton*.[110] The majority addressed this criticism by explaining that its decision in *Apprendi* does not apply to capital punishment cases because a sentencing judge in a capital case has the discretion to impose the maximum penalty, or alternatively, may determine the lesser punishment of life in prison may be appropriate.[111] The dissent in *Apprendi* called the ma-

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103. *Id.* at 469-71.
104. *Id.* at 472, 497 (citing New Jersey v. Apprendi, 159 N.J. 7 (N.J. Sup. Ct. 1999)).
105. *Id.* at 482-83.
106. *Id.* at 483 n.10.
107. Apprendi v. New Jersey, 530 U.S. 466, 483, 497 (2000).
108. *Id.* at 490. In *Walton*, the Court held that a state can authorize a judge to make factual determinations resulting in either a life or death sentence; but in *Apprendi*, the majority held a state cannot do the same with factual determinations resulting only in a possible sentence increase of ten years. *Id.* at 537 (O'Connor, J., dissenting).
109. *Id.* at 536-41 (O'Connor, J., dissenting).
110. *Id.* at 537 (O'Connor, J., dissenting). Writing for the dissent, Justice O'Connor opined that:

> If a State can remove from the jury a factual determination that makes the difference between life and death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a ten-year increase in the maximum sentence to which a defendant is exposed.

Id. (O'Connor, J., dissenting).
111. Apprendi v. New Jersey, 530 U.S. 466, 496-97 (2000). The Court had already considered and rejected arguments that the reasoning in *Apprendi* invalidated state capital sen-

jority's distinction of *Walton* "baffling" and "demonstrably untrue."[112] The Supreme Court revisited the distinction just two years later in *Ring v. Arizona*.[113]

Ring v. Arizona: Finality on the First Front

In 1994 in Glendale, Arizona, Timothy Ring and two accomplices robbed an armored van of over $800,000 in cash and checks and shot the driver.[114] A jury convicted Ring of felony murder but was split on whether Ring was guilty on the charge of premeditated murder.[115] The Arizona Supreme Court later concluded that "the evidence at the trial failed to prove, beyond a reasonable doubt, that [Ring] was a major participant in the armed robbery or that he actually murdered [the driver]."[116] Under Arizona law, Ring could not be sentenced to death unless further findings were made by the judge who presided over the trial.[117] In Ring's case, he could be eligible for the death penalty only if he was the actual killer or a major participant in the armed robbery that led to the van driver's death.[118] An Arizona statute directed the judge to "conduct a separate sentencing hearing to determine the existence or non-existence of [certain enumerated] circumstances . . . for the

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tencing schemes requiring judges, after a jury found a defendant guilty of a capital crime, to find aggravating factors necessary for imposing a death sentence. *Id.* at 496. The majority said capital cases are not controlling on this issue and quoted a previous decision which had already addressed the case law on this subject:

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

Id. at 496-97 (Scalia, J., dissenting) (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (1998)).

112. *Id.* at 538 (O'Connor, J., dissenting).

113. Ring v. Arizona, 536 U.S. 584, 602-03 (2002).

114. *Id.* at 589. On a tip from an informant, Glendale police began to investigate Ring and his accomplices through wiretaps. *Id.* at 589-90. Ring and his accomplices made several incriminating statements and police eventually searched Ring's residence and found a duffel bag containing more than $271,000 in cash with written statements indicating how the money would be divided among Ring and his accomplices. *Id.* As part of the investigation, the Glendale Police Department created a staged reenactment of the crime that was full of intentional inaccuracies and had it broadcast on a local television news program. *Id.* Wiretaps placed by police recorded the reactions of some of the perpetrators, including Ring, stating they found the news story humorous and that they were less worried about being caught. *Id.*

115. Ring v. Arizona, 536 U.S. 584, 591 (2002).

116. *Id.* (quoting Arizona v. Ring, 200 Ariz. 267, 280 (2001)).

117. *Id.* at 592 (citing ARIZ. REV. STAT. ANN. § 13-1105(c) (2001)).

118. *Id.* at 594.

purpose of determining the sentence to be imposed."[119] The statute further instructed that "the hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section . . ."[120]

As the finder of fact, the trial judge concluded Ring was "the one who shot and killed [the van driver]" and Ring was a major participant in the robbery.[121] The judge found two aggravating factors: (1) Ring committed the crime for pecuniary gain; and (2) the crime was committed in an especially heinous, cruel or depraved manner.[122] The judge found one mitigating factor—that Ring had a minimal criminal record—but in the judgment of the court, that mitigating circumstance did not call for leniency and therefore the judge entered a "Special Verdict" sentencing Ring to death.[123]

Ring appealed on the grounds that Arizona's capital sentencing statutes violated the Sixth Amendment's guarantee to a jury trial by allowing a judge to be the finder of key facts enabling a defendant to receive the death penalty rather than life in prison.[124] On appeal, the Arizona Supreme Court rejected Ring's Constitutional attack and affirmed the trial court's findings and the death sentence.[125] The United States Supreme Court granted *certiorari* to determine whether an "aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury."[126]

Writing for the majority, Justice Ginsburg addressed the conflict between *Walton*, which allowed a judge rather than a jury to make findings of

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119. *Id.* at 592 (quoting ARIZ. REV. STAT. ANN § 13-703(C) (2001)).
120. *Id.*
121. Ring v. Arizona, 536 U.S. 584, 593 (2002). During the sentencing hearing, an accomplice who had entered a plea deal testified that Ring was the leader of the group, that he planned all the logistics of the crime, and that Ring was the one who shot the van's driver. *Id.* The accomplice also testified that Ring shoved the driver's body out of the way and drove the van away. *Id.* He testified that as the group was dividing up the money, Ring chastised the others for "forgetting to congratulate [Ring] on [his] shot." *Id.* at 593-95. On cross-examination, however, he acknowledged he had previously said Ring had nothing to do with the planning but claimed he said so because Ring had threatened his life and was now testifying against Ring as "pay back." *Id.*
122. *Id.* at 594-95. In support of finding the crime was committed in an especially heinous, cruel, or depraved manner, the judge noted the comment Ring had made, as reported by the testifying accomplice, that Ring bragged and expressed his satisfaction in his marksmanship exhibited by his shot of the van driver. Ring v. Arizona, 536 U.S. 584, 595-96 (2002).
123. *Id.*
124. *Id.* at 584. The Arizona Supreme Court also observed that both the United States Supreme Court decisions in *Jones* and *Apprendi* had raised serious concerns regarding the viability of *Walton*, which had upheld Arizona's death sentencing scheme, and the interpretation of Arizona law contained in the majority opinion in *Apprendi* was wanting. *Id.* at 584.
125. *Id.* at 584-85.
126. *Id.* at 597.

fact that could authorize the death penalty, and *Jones* and *Apprendi*, which held that findings of fact not made by a jury violate the Sixth Amendment.[127] The Court resolved this conflict by holding in *Ring* that it is unconstitutional for a judge, sitting without a jury, to find an aggravating circumstance necessary to issue a death sentence.[128] The Court resolved what the dissent had called "baffling" and "demonstrably untrue" in *Apprendi*, because it held there was "no reason to differentiate capital crimes from all others in this regard."[129] The *Ring* Court overruled *Walton* by holding that "*Walton* and *Apprendi* are irreconcilable" and "our Sixth Amendment jurisprudence cannot be home to both."[130]

Post-Script to Ring: Blakely v. Washington

Ring upheld the rule announced in *Apprendi* and established a new constitutional rule in federal habeas corpus review cases.[131] In addition to applying *Apprendi* to federal habeas corpus proceedings, the United States Supreme Court upheld the application of the *Apprendi* rule to all criminal cases in *Blakely v. Washington*, a 2004 case which dealt with a similar set of judicial circumstances as *Apprendi* and *Ring*.[132] Ralph Howard Blakely Jr. pleaded guilty to the 1998 kidnapping of his estranged wife and received a significantly longer sentence than the facts to which he pleaded guilty merited because of a judicial determination that Blakely had committed the crime with "deliberate cruelty."[133] The Court reasoned that Blakely's increased sentence based on judicial factfinding is no different than either the sentence increase Apprendi received after a judge determined there was a hate crime or an increase from a life sentence to the death penalty sentence Ring received after a judge determined there was an aggravating factor.[134]

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127. Ring v. Arizona, 536 U.S. 584, 597-604 (2002).

128. *Id.* at 609. The Court held that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

129. *Id.* at 603, 607.

130. *Id.* at 609.

131. Schriro v. Summerlin, 124 S. Ct. 2519, 2521-22 (2004).

132. Blakely v. Washington, 124 S. Ct. 2531 (2004). *Apprendi*, *Ring*, and *Blakely* are similar in that all cases involved a defendant who was convicted of a crime and received a significantly increased sentence through a statutory sentencing scheme that allowed factual determinations to be made by a judge rather than a jury. *Id.* at 2537-38.

133. *Id.* at 2534. Based on the facts Blakely admitted in his plea, he was eligible for a maximum sentence of fifty-three months. *Id.* However, under Washington state law, the court's judicial determination that Blakely committed the crime with "deliberate cruelty" allowed the court to give Blakely an "exceptional" sentence of ninety months. *Id.* The Washington statute allowed a judge to impose a sentence above the standard range for the crime itself if the judge had found "substantial and compelling reasons justifying an exceptional sentence." *Id.* at 2550; WASH. REV. CODE ANN. § 9A.40.010(1) (2000).

134. Blakely v. Washington, 124 S. Ct. 2531, 2537-38 (2004).

Blakely upheld and strengthened the Court's line of reasoning in *Apprendi* and *Ring* by expanding the rule announced in *Apprendi* to all criminal cases, holding "[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."[135] Thus, through *Apprendi*, *Ring*, and *Blakely*, the battle over judicial factfinding in sentencing was quelled via the power of the Sixth Amendment's guarantee to a public trial by an impartial jury.[136] However, in the *Blakely* dissent, Justice O'Connor expressed serious concern that the consequences of *Blakely* "will be as far reaching as they are disturbing" because it "casts constitutional doubt over [all federal and state-enacted sentencing guidelines], and in so doing, threatens untold number of criminal judgments."[137] Justice O'Connor reasoned any sentence imposed under such guidelines is in jeopardy—including those already made final since *Apprendi* was decided in 2000.[138] Justice O'Connor's concerns foreshadowed the battle on the second front—whether the rules from *Apprendi*, *Ring*, and *Blakely* should be applied retroactively.

The Second Front: When Are New Rules Applied Retroactively?

While *Ring* established that juries have the sole responsibility to make findings of fact used during sentencing proceedings, it did not address whether the new rule applied to petitioners, such as Summerlin, who challenged the constitutionality of their sentences in collateral post-conviction proceedings and not on direct appeal.[139] The Supreme Court announces a new constitutional rule when a case "breaks new ground or imposes a new obligation on the States or the Federal Government[;]" or, in words used by the Court, a new rule is announced if "the result was not dictated by prece-

135. *Id.* at 2536; Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
136. *See supra* notes 98-134 and accompanying text; U.S. CONST. amend. VI.
137. *Blakely*, 124 S. Ct. at 2548-49 (O'Connor, J., dissenting).
138. *Id.* at 2549 (O'Connor, J., dissenting).
139. Summerlin v. Stewart, 341 F.3d 1082, 1096 (9th Cir. 2003). Summerlin's conviction became final in 1984 because the Arizona Supreme Court denied rehearing its own opinion that affirmed the conviction and Summerlin did not file a petition for writ of *certiorari* with the United States Supreme Court. *Id.* at 1108 (citing Lambrix v. Singletary 520 U.S. 518, 527 (1997) (noting when the time for filing a petition for a writ of certiorari expired, the defendant's conviction became final)). Summerlin's claim that his death sentence was unconstitutional in light of *Ring* was therefore a constitutional challenge in a collateral *post-conviction* proceeding. *Id.* at 1096. A *direct appeal* differs in that the conviction is not yet final as either party can appeal a trial court's decision to the highest court in the jurisdiction and then to the United States Supreme Court if the state's court of highest authority addressed an issue related to the federal Constitution. BLACK'S LAW DICTIONARY 94 (7th ed. 1999); *see also Lambrix*, 520 U.S. at 527. Once a defendant's state criminal conviction is final, federal law allows a state prisoner to seek federal habeas corpus relief by claiming the state trial or sentencing proceedings violated his or her constitutional rights. 28 U.S.C. § 2254 (2004); *see also* 39 AM. JUR. 2D *Habeas Corpus and Postconviction Remedies* § 24 (2004).

dent existing at the time the defendant's conviction became final."[140] Historically, the Court has taken two different approaches in determining whether such rules should be applied retroactively.[141] At times, the Court has set the new rule and determined whether it should be applied retroactively in the same case.[142] Yet, in other cases, the Court has issued a new rule and has confronted whether that new rule should be applied retroactively in a subsequent case where another defendant, similarly situated, has sought relief based on the new rule.[143]

The Court has debated the retroactivity of new rules since the early twentieth century. As Justice Holmes argued in 1910, "[j]udicial decisions have had retrospective operation for near a thousand years."[144] But even now, "a presumption exists that 'a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary.'"[145] This debate intensified during the 1950s when United States Supreme Court decisions expanded the "cognizability of all federal constitutional claims filed by state prisoners," and several more prisoners began filing federal

140. Teague v. Lane, 489 U.S. 288, 301 (1989) (O'Connor, J., plurality).

141. *See infra* notes 142-43 and accompanying text.

142. *Teague*, 489 U.S. at 300 (O'Connor, J., plurality); *see, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 490 (1972) (holding the requirements of due process in general applied to all *future* parole revocations); Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968) (holding that rejecting potential jurors in a possible death penalty case because they did not support the death penalty violated the Sixth and Fourteenth Amendments and that such a rule should be applied retroactively).

143. *Teague*, 489 U.S. at 299-300 (O'Connor, J., plurality). *See, e.g.*, Brown v. Louisiana, 447 U.S. 323 (1980) (applying a rule retroactively from Burch v. Louisiana, 441 U.S. 130 (1979), in which the Court held that when a state reduced jury size to the minimum number of jurors permitted by the Constitution, the further authorization of nonunanimous verdicts by such juries threatened constitutional principles to the extent that any countervailing state interest should yield); Robinson v. Neil, 409 U.S. 505 (1973) (applying a rule retroactively from Waller v. Florida, 397 U.S. 387 (1970), in which the Court held a city and its state were not dual sovereigns and that a defendant could not lawfully be tried by both the city and the state because it would constitute double jeopardy in violation of the Fifth and Fourteenth Amendments); Stovall v. Denno, 388 U.S. 293 (1967) (declining to apply a rule retroactively from United States v. Wade, 388 U.S. 218 (1967), in which the Court held a post-indictment identification lineup was a critical stage of the proceedings, so respondent was entitled to have his attorney present, and Gilbert v. California, 388 U.S. 263 (1967), in which the Court held that testimony of a witness's identification of the defendant was inadmissible in court because it was the direct result of the illegal lineup because the defendant's counsel was not present); Tehan v. Shott, 382 U.S. 406 (1966) (declining to apply a rule retroactively from Griffin v. California, 380 U.S. 609 (1965), in which the Court struck a state rule that allowed the state the privilege of tendering to the jury for its consideration the failure of the accused to testify).

144. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910).

145. Summerlin v. Stewart, 341 F.3d 1082, 1097 (9th Cir. 2003) (quoting Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 711 (1974)).

habeas petitions, which gave the Court the opportunity to address several claims of constitutional deprivations.[146]

This ongoing debate received careful scrutiny in *Linkletter v. Walker*, wherein the Court attempted to set a standard for reviewing retroactivity.[147] In *Linkletter*, the defendant was convicted upon evidence that was obtained through a warrantless search, but challenged this conviction because a year later the Court decided *Mapp v. Ohio*, which held evidence seized through means that violated the Fourth Amendment's unreasonable search and seizure protections be excluded in state criminal proceedings as applied through the Due Process Clause of the Fourteenth Amendment.[148] In holding *Mapp* would not be applied retroactively to the defendant, the Court set forth a tripartite test for retroactivity through which it considered three factors: (1) the purpose of the rule; (2) the reliance placed upon the rule; and (3) the effect retroactive application of the rule would have on the administration of justice.[149] The *Linkletter* standard would be applied to both convictions pending direct review and those on collateral review through federal habeas corpus petitions.[150]

While *Linkletter* set the first standard for retroactivity, the tripartite test proved difficult to apply, and as Justice Harlan noted in his dissent in *Desist v. United States*, it created "an extraordinary collection of rules to govern the application of the principle."[151] He argued *Linkletter* produced very unfair results because similarly situated defendants were treated differ-

146. *Id.* at 1097 (citing Brown v. Allen, 344 U.S. 443 (1953); Walter v. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 21-22 (1956)).

147. Linkletter v. Walker, 381 U.S. 618, 636 (1965).

148. *Id.* at 621; Mapp v. Ohio, 367 U.S. 643, 655-56 (1961).

149. *Linkletter*, 381 U.S. at 636.

150. Johnson v. New Jersey, 384 U.S. 719, 732 (1966). In *Johnson*, the Court reviewed whether new constitutional rules announced by the landmark decisions in *Miranda* and *Escobedo* were to be applied retroactively. *Id.* Miranda v. Arizona, 384 U.S. 436 (1966) (holding criminal defendants had to be informed of their rights before being questioned); Escobedo v. Illinois, 378 U.S. 478 (1964) (holding statements made by a criminal defendant could not be used against the defendant in court if the defendant had not been warned of his right to remain silent and who had requested and been denied an opportunity to consult with a lawyer). The Court held that such new rules were only to be applied to cases in which the trial was started after those decisions became final. *Id.* at 721. Largely based on policy considerations, the Court reasoned that retroactive application of *Miranda* and *Escobedo* "would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Id.* at 731.

151. Desist v. United States, 394 U.S. 244, 256-57 (Harlan, J., dissenting); *see* Summerlin v. Stewart, 341 F.3d 1082, 1098 (9th Cir. 2003). In *Desist*, the Court held that the rule announced in Katz v. United States, 389 U.S. 347 (1968), that electronic eavesdropping does not comply with constitutional provisions against unreasonable search and seizure protected by the Fourth Amendment unless it is authorized by a magistrate on a showing of probable cause, was only to be applied prospectively. *Desist*, 394 U.S. at 254.

ently.[152] Justice Harlan argued new constitutional rules should be applied to all cases not final on direct review.[153] Additionally, he argued that a new procedural rule should not apply retroactively to cases on habeas review unless the claim dealt with procedures which were "implicit in the concept of ordered liberty," or if it dealt with rules that "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[154]

Justice Harlan's objections to the Court's retroactivity standards were not successful during his tenure on the Court, but they ultimately prevailed.[155] In 1987, the Court decided *Griffith v. Kentucky* and adopted Justice Harlan's position that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates the basic norms of constitutional adjudication."[156] The Court thus held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final."[157] However, the *Griffith* decision did not address whether such rules should be applied to cases already *final* on direct review.[158]

While the Court moved away from the *Linkletter* standard in *Griffith*, it clarified its position on retroactivity more completely two years later through its plurality decision in *Teague v. Lane*.[159] In *Teague*, the Court adopted the remainder of Justice Harlan's framework and 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."[160] Justice Harlan's first exception (adopted by the Court in *Teague*) was that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."[161] The Court modified Justice Harlan's second exception by combining aspects of his dissenting opinions in *Desist* and *Mackey* and held that new "watershed

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152. *Desist*, 394 U.S. at 256 (Harlan, J., dissenting). In his dissent, Justice Harlan argued that following *Miranda*, eighty or so cases presented the same question and the Court disposed of all the cases except four which had a new rule applied to them retroactively while denying relief to the numerous others. *Id.* (Harlan, J., dissenting).

153. Mackey v. United States, 401 U.S. 667, 678-80 (1971) (Harlan, J., concurring in judgment in part and dissenting in part).

154. *Id.* at 693-94 (Harlan, J., concurring in judgment in part and dissenting in part).

155. *See infra* text accompanying notes 160-62.

156. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

157. *Id.* at 328.

158. *Id.* at 329 (Powell, J., concurring).

159. Summerlin v. Stewart, 341 F.3d 1082, 1098 (9th Cir. 2003) (citing Teague v. Lane, 489 U.S. 288, 310 (1989)).

160. Teague v. Lane, 489 U.S. 288, 310 (1989) (O'Connor, J., plurality).

161. *Id.* at 311 (O'Connor, J., plurality) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring)). *See also* Desist v. United States, 394 U.S. 244, 262 (1969).

rules of criminal procedure," which "alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction," should be applied retroactively.[162]

Though the *Teague* Court did not express how the *Teague* retroactivity standard would apply to new rules affecting death penalty sentences, it later applied *Teague* to several death penalty-related cases.[163] In *Bousley v. United States*, the Court clarified that the *Teague* standard of retroactivity applies only to procedural rules, and thus a threshold question for any *Teague* analysis is whether the rule in question is substantive or procedural.[164]

In summary, a *Teague* analysis consists of two parts. First, a court must determine whether a new rule is substantive or procedural, as substantive rules of criminal law are presumptively retroactive.[165] "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."[166] Second, if a new rule is procedural rather than substantive, it will be applied retroactively if it falls within one of two exceptions under *Teague*.[167] Under the first exception, a procedural rule should be applied retroactively if it "placed certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe," or if the rule "required the observance of those procedures that . . . are im-

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162. *Teague*, 489 U.S. at 311-12 (O'Connor, J., plurality) (quoting *Mackey*, 401 U.S. at 693-94).

163. *Id.* at 314 n.2 (O'Connor, J., plurality). Following *Teague*, the Court applied the *Teague* retroactivity standard to several cases involving death row inmates. In *Penry v. Lynaugh*, the Court held that a new rule that made it unconstitutional to execute a mentally retarded person would satisfy *Teague's* first exception because it "should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." Penry v. Lynaugh, 492 U.S. 302, 330 (1989). The Court applied *Teague* in *Sawyer v. Smith*, which related to the retroactivity of a rule that stated that diminishing the jury's sense of responsibility in issuing the death penalty violated the Eighth Amendment's guarantee against infliction of cruel and unusual punishments. Sawyer v. Smith, 497 U.S. 227, 232-33, 242 (1990). In *Saffle v. Parks*, the Court held a rule allowing the emotions of the jury to determine a defendant's sentence did not meet the second *Teague* exception. Saffle v. Parks, 494 U.S. 484, 495 (1990).

164. Bousley v. United States, 523 U.S. 614, 620 (1998). In *Bousley*, the defendant was convicted of using a firearm "during and in relation to a drug trafficking crime" governed by 18 U.S.C. § 924(c)(1). While an appeal related to the defendant's habeas corpus writ was pending, the Court decided *Bailey v. United States*, in which the Court held that "use" under the statute required an "active employment" of the firearm. *Id.* at 617 (citing Bailey v. United States, 516 U.S. 137, 144 (1995)). The Court determined that *Teague's* retroactivity standard should not be applied to a law passed by Congress because it was an issue of substantive law. *Id.* at 617, 620.

165. Summerlin v. Stewart, 341 F.3d 1082, 1099 (9th Cir. 2003); *see also Bousley*, 523 U.S. at 620.

166. Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004); *see also Bousley*, 523 U.S. at 620-21.

167. Teague v. Lane, 489 U.S. 288, 307 (1989) (O'Connor, J., plurality).

plicit in the concept of ordered liberty."[168] The second exception has two parts and is limited to "watershed rules of criminal procedure" that both (1) "alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction" *and* (2) "without which the likelihood of an accurate conviction is seriously diminished."[169] The *Teague* test thus became the standard courts now implement when determining whether new constitutional rules, such as the rule announced in *Ring*, are to be applied retroactively to cases, such as *Summerlin*, which have become final before the new rules are announced.[170]

PRINCIPAL CASE

When the United States Court of Appeals for the Ninth Circuit heard Summerlin's case *en banc*, it conducted a *Teague* analysis to determine if the new rule announced in *Ring v. Arizona* should be applied retroactively.[171] First, the Ninth Circuit held that "the rule announced by the Supreme Court in *Ring*, with its restructuring of Arizona murder law and its redefinition of the separate crime of capital murder, is necessarily a 'substantive rule.'"[172] In the alternative, should the rule announced in *Ring* be considered procedural, the Ninth Circuit held that the first exception to *Teague's* bar against retroactivity is inapplicable because *Ring* did not "decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons."[173] However, the Ninth Circuit held that *Ring* met the second exception.[174] The court noted that "a requirement of capital findings made by a jury will improve the accuracy of Arizona capital murder trials," and that *Ring* "established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty."[175] The court reversed Summerlin's death sentence, concluding, "both on substantive and procedural grounds, that *Ring* has retroactive application to cases on federal habeas review."[176]

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168. *Summerlin*, 341 F.3d at 1098-99 (quoting *Teague*, 489 U.S. at 311 (O'Connor, J., plurality)).
169. *Summerlin*, 341 F.3d at 1099 (quoting Mackey v. United States, 301 U.S. 667, 693 (1971)).
170. *Id.* at 1098-99 (quoting *Teague*, 489 U.S. at 310 (O'Connor, J., plurality)).
171. *Id.* at 1099-1122.
172. *Id.* at 1108.
173. *Id.* at 1109 (citing Graham v. Collins, 506 U.S. 461, 477 (1993) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)); *see also Teague*, 489 U.S. at 309 (O'Connor, J., plurality).
174. *Summerlin*, 341 F.3d at 1116.
175. *Id.*
176. *Id.* at 1121.

However, the Ninth Circuit's *en banc* decision created a split among the circuit courts, some of which had held *Ring* was not retroactive.[177] The Eleventh Circuit conducted a *Teague* analysis of *Ring* in *Turner v. Crosby* and held *Ring* was a procedural rule that should not be applied retroactively.[178] As a matter of first impression for the Eleventh Circuit, the court relied on two state supreme courts that had analyzed *Ring* under the *Teague* standard and found that *Ring* should not be applied retroactively.[179] The Eleventh Circuit also pointed out it had previously held *Apprendi* was procedural and did not meet any *Teague* exception for retroactivity.[180] The Eleventh Circuit reasoned its *Teague* analysis for *Apprendi* applied equally to *Ring* because *Ring* was based on the United States Supreme Court's ruling in *Apprendi*.[181] Therefore, the Eleventh Circuit held *Ring* did not apply retroactively in *Turner*.[182]

In *Summerlin*, the United States Supreme Court addressed whether *Ring* applied retroactively to cases already final on direct review.[183] Justice Scalia, writing for the 5-4 majority, stated that when a decision of the Supreme Court announces a new rule as it did in *Ring*, it "applies to all criminal cases still pending on direct review."[184] However, for convictions already final, there are few instances where the rule applies.[185] The majority emphasized that substantive rules are generally applied retroactively but the class of procedural rules that are applied retroactively is extremely narrow.[186]

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177. *Id.* at 1096 n.4. Other circuits have reviewed the retroactivity of *Ring* under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), which states in 28 U.S.C. § 2244(b)(2)(A) (2004) that a court shall dismiss a second or successive habeas corpus application that was present in a prior application unless "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A) (2004); *see* Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002) (holding *Ring* was not retroactive under the AEDPA, but not conducting a *Teague* analysis of *Ring*); *see also* Whitfield v. Bowersox, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003) (declining to address whether a death sentence was inapposite to *Ring* because the Supreme Court had not expressly made *Ring* retroactive under the AEDPA).

178. Turner v. Crosby, 339 F.3d 1247, 1282-86 (11th Cir. 2003).

179. *Id.* at 1283 (citing Arizona v. Towery, 64 P.3d 828, 835 (Ariz. 2003); Colwell v. Nevada, 59 P.3d 463, 470-73 (Nev. 2002)).

180. *Id.* at 1283 (citing McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001)).

181. *Id.*

182. *Id.*

183. Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (2004).

184. *Id.* at 2522 (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas. *Summerlin*, 124 S. Ct. at 2520.

185. *Summerlin*, 124 S. Ct. at 2522. *See also Griffith*, 479 U.S. at 328.

186. *Summerlin*, 124 S. Ct. at 2523. The Court explained:

> New substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or

The Court began with an analysis of whether the rule announced in *Ring* was substantive or procedural.[187] The Court restated the difference between substantive and procedural rules: "A rule is substantive . . . if it alters the range of conduct or the class of persons that the law punishes," but procedural rules are those that "regulate only the *manner of determining* the defendant's culpability."[188] Under this standard, the majority held that *Ring*'s holding was procedural.[189] *Ring* held that a jury and not a sentencing judge had to find aggravating circumstances necessary to issue the death penalty but "this holding did not alter the range of conduct Arizona law subjected to the death penalty."[190] The Court reasoned the new rule in *Ring* was based entirely upon the Sixth Amendment's jury-trial guarantee, which does not affect the range of conduct a state may criminalize.[191] *Ring* only altered the methods states had to use in deciding whether the criminal conduct was punishable by death.[192] While Summerlin argued that *Ring* is substantive because it modified elements of the offense for which he was convicted, the majority contended the elements of the crime did not change, rather the only change was that aggravating circumstances had to be determined by a jury

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> persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment the law cannot impose upon him.

Id. (internal quotations and citations omitted). *See also* Bousley v. United States, 523 U.S. 614, 620-21 (1998); Saffle v. Parks, 494 U.S. 484, 494-95 (1990); Teague v. Lane, 489 U.S. 288, 311 (1989) (O'Connor, J., plurality).

187. *Summerlin*, 124 S. Ct. at 2523.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* The Court explained why *Ring* was a procedural rule:

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

Id. (quoting *Ring*, 536 U.S. at 609). For other contexts in which the Court has held that rules are procedural if they allocate decsionmaking authority, *see* Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 426 (1996) (*Erie* doctrine); Landgraf v. USI Film Prod., 511 U.S. 244, 280-81 (1994) (antiretroactivity presumption); Dobbert v. Florida, 432 U.S. 282, 293-94 (1977) (*Ex Post Facto Clause*).

192. Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004).

rather than a judge.[193] The Court in *Ring* did not require a particular fact be found before a state could impose the death penalty—which would have been a substantive rule.[194] The majority also stated the Ninth Circuit's conclusion that *Ring* reshaped the structure of Arizona's murder law was "remarkable in the face of the Arizona Supreme Court's previous conclusions to the contrary."[195]

The majority also refuted Summerlin's alternative claims that if the *Ring* rule was procedural and not substantive, it nonetheless met the *Teague* exception to the retroactivity bar because it was a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.[196] Summerlin argued, that for many reasons, juries are more accurate finders of fact than judges, and therefore, because *Ring* required jury factfinding, *Ring* met one of the *Teague* exceptions because it improved the accuracy of criminal proceedings.[197] The Court responded to this claim as follows:

> The question here is not, however, whether the Framers believed that juries are more accurate factfinders than judges . . . . Nor is the question whether juries actually are more accurate factfinders than judges. Rather, the question is whether judicial factfinding so "*seriously* diminishe[s]" accuracy that there is an "impermissibly large risk" of punishing conduct the law does not reach. The evidence is simply too equivocal to support that conclusion.[198]

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193. *Id.* at 2524.

194. *Id.*

195. *Id.* (citing Arizona v. Towery, 64 P.3d 828, 832-33 (Ariz. 2003)). In *Towery*, the Arizona Supreme Court heard the consolidated claims of three defendants who claimed their death sentences violated their Sixth Amendment right to a jury trial in light of the new rule announced in *Ring*. *Towery*, 64 P.3d at 828. The Arizona Supreme Court held *Ring* was a procedural rule that should not be applied retroactively because it was not a watershed rule of criminal procedure and retroactive application would have disrupted the administration of justice. *Id.* at 833-35. As the Arizona Supreme Court explained:

> [*Ring*] changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered *who* decides whether any aggravating circumstances exist . . . ."

Id. at 833.

196. Schriro v. Summerlin, 124 S. Ct. 2519, 2524 (2004).

197. *Id.*

198. *Id.* at 2525 (citing Teague v. Lane, 489 U.S. 288, 312-13 (1989) (O'Connor, J., plurality) (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

The majority reasoned that "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[199] Because there are so many reasonable disagreements over whether juries are better factfinders than judges, the Court concluded it could not "confidently say that judicial factfinding *seriously* diminishes accuracy."[200]

The Court also cited its previous decision in *DeStefano v. Woods*, in which the Court refused to give retroactive effect to a new rule announced in *Duncan v. Louisiana* which applied the Sixth Amendment's guarantee of a jury trial to the states.[201] In *DeStefano*, the Court "would not assert . . . that every criminal trial . . . held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury."[202] The majority reasoned "[i]f under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be."[203]

The majority did not accept or deny that the new rule announced in *Ring* met the first exception to the *Teague* bar to retroactivity, but held it was a procedural rule not retroactively applicable to cases already final on direct review and reversed the Ninth Circuit's vacation of Summerlin's death sentence.[204]

Justice Breyer wrote for the dissent and criticized the majority's major foci related to the value of juries versus judges as factfinders and the Court's reliance on reasoning from *DeStefano*.[205] Justice Breyer gave three main arguments that led him to the opposite conclusion as the majority.[206] First, Justice Breyer reasoned that juries are required to do much more than just find brute facts, they also make community-based judgments.[207] For example, the most often cited aggravating factor that leads to a death sentence is that the crime was committed in an "especially heinous, cruel, or depraved manner."[208] Justice Breyer contended that terms such as these, must be determined by using community-based standards that a "jury is better equipped than a judge to identify and to apply . . . accurately," especially

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199. *Id.*
200. *Id.*
201. *Id.* (citing DeStefano v. Woods, 392 U.S. 631 (1968)); Duncan v. Louisiana, 391 U.S. 145 (1968)).
202. Schriro v. Summerlin, 124 S. Ct. 2519, 2525 (2004) (quoting *DeStefano*, 392 U.S. at 633-34).
203. *Id.* at 2526.
204. *Id.* at 2526-27.
205. *Id.* at 2527-31 (Breyer, J., dissenting). Justice Breyer was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 2520.
206. *Id.* at 2528 (Breyer, J., dissenting).
207. Schriro v. Summerlin, 124 S. Ct. 2519, 2528 (Breyer, J., dissenting).
208. *Id.* (Breyer, J., dissenting) (citing ARIZ. REV. STAT. ANN. § 13-703(F)(6) (2003)).

when used in the context of a death sentence proceeding.[209] In response the majority explained that the capital sentencing statute in question did not require that community standards be used when determining if the crime was heinous, cruel, or depraved.[210]

Second, Justice Breyer argued that the very purposes of the *Teague* standard for retroactivity "strongly favor application of *Ring*'s rule."[211] Among those purposes, Justice Breyer emphasized the importance of "assuring fundamentally fair procedures" and assuring a "uniformity of ultimate treatment among prisoners."[212] According to the dissent, "the risk of error that the law can tolerate is correspondingly diminished" in death penalty cases because of its severity and irrevocability.[213] Regarding uniformity, Justice Breyer asked, "[i]s treatment 'uniform' when two offenders each have been sentenced to death through the use of procedures that we now know violated the Constitution—but one is allowed to go to his death while the other receives a new, constitutionally proper proceeding?"[214] Justice Breyer addressed the clearly apparent unfairness of such a proposition:

> Certainly the ordinary citizen will not understand the difference. That citizen will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing. How can the Court square this spectacle with what it has called the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason?"[215]

The dissent acknowledged that *Teague* also recognized the interest that at some point there will be the "certainty that comes with an end to litigation."[216] While there are restraints on public resources for retrials, Justice Breyer called such interests "unusually weak where capital sentencing proceedings are at issue" because making the rule in *Ring* retroactive would only affect approximately 110 individuals on death row, which is a relatively

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209. *Id.* (Breyer, J., dissenting).
210. *Id.* at 2526. The majority explained that "the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved *as determined by community standards*." *Id.*
211. *Id.* at 2528 (Breyer, J., dissenting).
212. Schriro v. Summerlin, 124 S. Ct. 2519, 2529 (2004) (Breyer, J., dissenting) (quoting Teague v. Lane, 489 U.S. at 288, 312-13 (1989) (O'Connor, J., plurality)); Mackey v. U.S., 401 U.S. 667, 693 (1971).
213. *Summerlin*, 124 S. Ct. at 2529 (Breyer, J., dissenting).
214. *Id.* (Breyer, J., dissenting).
215. *Id.* (Breyer, J., dissenting) (quoting Beck v. Alabama, 447 U.S. 625, 637-38 (1980)).
216. *Id.* at 2529 (Breyer, J., dissenting).

small number compared to the total number of persons presently incarcerated in state prisons.[217]

Third, the dissent attacked the majority's reliance on the Court's decision in *DeStefano*, which held that a prior ruling that the Sixth Amendment jury trial right applies to the states should *not* be applied retroactively.[218] *DeStefano* was decided before *Teague* and followed a different standard.[219] The dissent argued that two factors of that pre-*Teague* standard, "reliance" and "effect on the administration of justice," mitigated against retroactive application of a new rule in that situation because it would have "thrown the prison doors open wide."[220] However, according to the dissent, that was not at issue with the relatively small subclass of death row inmates who would be affected by retroactive application of *Ring*.[221] The *DeStefano* Court, according to the dissent in *Summerlin*, also would argue that, unlike *Ring*, the "purpose" of the rule at issue in *DeStefano* favored prospective application only and the purpose of the rule "would not measurably be served by requiring retrial of *all* persons convicted in the past without a jury."[222]

The dissent concluded that "[j]udged in light of *Teague*'s basic purpose, *Ring*'s requirement that a jury, and not a judge, must apply the death sentence aggravators announces a watershed rule of criminal procedure that should be applied retroactively in habeas proceedings" including Summerlin's.[223]

ANALYSIS

The Court's ruling in *Summerlin* appears to have brought two long-fought battles over judicial factfinding and retroactivity of new constitutional rules to a conclusion. However, just as World War I left many conflicts unresolved, leading to a larger conflict in World War II, legal practi-

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217. *Id.* at 2530 (Breyer, J., dissenting) (citing *Court Hears Arguments in Latest Death Case*, 231 N.Y.L.J. 5 (2004)). In May 2004, there were approximately 1.2 million individuals confined in state prisons according to the U.S. Department of Justice. U.S. Dept. of Justice, Bureau of Justice Statistics Bulletin 2 (May 2004).

218. Schriro v. Summerlin, 124 S. Ct. 2519, 2530 (2004) (Breyer, J., dissenting) (citing DeStefano v. Woods, 392 U.S. 631 (1968)).

219. *Id.* (Breyer, J., dissenting) (citing *DeStefano*, 392 U.S. at 633). *DeStefano* pre-dated *Teague* and followed the retroactivity standard established in previous cases which evaluated: (1) the purpose of the new rule; (2) the extent law enforcement authorities rely on the old standards; and, (3) the effect that applying the new rule retroactively would have on the administration of justice. *Id.* (Breyer, J., dissenting) (citing *DeStefano*, 392 U.S. at 633). *See also* Stovall v. Denno, 388 U.S. 293 (1967); Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. United States, 382 U.S. 406 (1966); Johnson v. New Jersey, 384 U.S. 719 (1966).

220. Schriro v. Summerlin, 124 S. Ct. 2519, 2530 (2004) (Breyer, J., dissenting) (citing *DeStefano*, 392 U.S. at 633).

221. *Id.* (Breyer, J., dissenting) (citing *DeStefano*, 392 U.S. at 634).

222. *Id.* at 230-31 (Breyer, J., dissenting) (quoting *DeStefano*, 392 U.S. at 633-34).

223. *Id.* at 230 (Breyer, J., dissenting).

tioners may still see other battles before there is complete peace on the retroactivity front. This analysis will first discuss why the Court's decision in *Summerlin* was correct and fair because it properly applied the *Teague* standard which determines when new rules must be applied retroactively. Second, it will explain that even though the court decided *Summerlin* correctly, it failed to adequately address the dissent's challenge that it is unfair not to apply *Ring* retroactively to death row inmates similarly situated to Timothy Ring. Third, this analysis will examine why this failure could make the future legitimacy and viability of the death penalty more tenuous. Finally, this note will discuss future impacts *Summerlin* will have on current death row inmates and issues that will likely come forward in the coming years related to the retroactivity of other rules.

Summerlin Was Correct and Fair

The Court correctly ruled that *Ring* should not be applied retroactively by properly applying the *Teague* standard which bars retroactivity unless it changed the law so that the act being punished is no longer criminal or if the rule impugns the fairness of the original proceeding.[224] First, the Court properly applied the *Teague* analysis for retroactivity to the facts of the case, correctly holding that *Ring* was not a substantive rule and that it failed to meet either of the *Teague* exceptions.[225] Second, the Court ended the possibility of further delays to executions and provided finality to death sentences in several states—sparing those states from the burden of resentencing scores of death row inmates.[226]

The threshold question under the *Teague* retroactivity standard is whether the rule is substantive or procedural.[227] The Court correctly found that the *Ring* rule was not substantive under the definition established in *Bousley v. United States*.[228] The Court defined the meaning of a substantive rule in *Bousley* as one that alters the range of conduct or the class of persons the law punishes.[229] *Ring* did not alter what conduct could be punished by the law or alter any aspect of the class of persons that the law punishes.[230] *Ring* only altered the *procedural* methods for determining whether a defendant's conduct is punishable by death by requiring that juries, rather than

224. *See infra* notes 227-40 and accompanying text.
225. *Summerlin*, 124 S. Ct. at 2526. *See also infra* notes 227-43 and accompanying text.
226. *See infra* notes 245-261 and accompanying text.
227. Summerlin v. Stewart, 341 F.3d 1082, 1099 (9th Cir. 2003) (citing Bousley v. United States, 523 U.S. 614, 620 (1998)). The Court in *Bousley* held "*Teague* by its terms only applies to procedural rules." *Bousley*, 523 U.S. at 620.
228. *See infra* notes 263-78 and accompanying text. *See also Bousley*, 523 U.S. at 620.
229. Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004) (citing *Bousley*, 523 U.S. at 620). As the Court explained, "[t]his Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty." *Id.* at 2524.
230. *Id.* at 2523-24.

judges, determine those facts.[231] The same aggravating and mitigating factors remained in place following *Ring*, but now a jury must determine such facts.[232] The dissent in *Summerlin* did not contest the procedural nature of

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231. *Id.* at 2524.

232. *See* 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 § 1. In 2002, in response to *Ring*, the Arizona Legislature amended its death penalty sentencing statutes to provide for juries to determine aggravating factors beyond a reasonable doubt and mitigating factors by a preponderance of the evidence. *Id. See also* Summerlin v. Stewart, 341 F.3d 1082, 1107 (9th Cir. 2003). However, the Arizona Legislature did not alter any of the aggravating and mitigating factors that had existed prior to *Ring*. Schriro v. Summerlin, 124 S. Ct. 2519, 2524 (2004); 2002 Ariz. Legis. Serv. 5th Sp. Sess. Ch. 1 § 1. As Justice Scalia explained, "[T]he range of conduct punished by death in Arizona was the same before *Ring* as after." *Summerlin*, 124 S. Ct. at 2524. Arizona's death sentencing statute now includes the following aggravating circumstances:

> 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> 2. The defendant has been or was previously convicted of a serious offense, whether preparatory or completed. Convictions for serious offenses committed on the same occasion as the homicide, or not committed on the same occasion but consolidated for trial with the homicide, shall be treated as a serious offense under this paragraph.
>
> 3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered during the commission of the offense.
>
> 4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
>
> 5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.
>
> 6. The defendant committed the offense in an especially heinous, cruel or depraved manner.
>
> 7. The defendant committed the offense while: (a) In the custody of or on authorized or unauthorized release from the state department of corrections, a law enforcement agency or a county or city jail. (b) On probation for a felony offense.
>
> 8. The defendant has been convicted of one or more other homicides . . . that were committed during the commission of the offense.
>
> 9. The defendant was an adult at the time the offense was committed or was tried as an adult and the murdered person was under fifteen years of age or was seventy years of age or older.
>
> 10. The murdered person was an on duty peace officer who was killed in the course of performing the officer's official duties and the defendant

Ring, and the Ninth Circuit in *Stewart v. Summerlin* failed to properly look at the plain language of the definition of substantive rules as outlined in *Bousley*.[233] The Ninth Circuit missed the mark by finding that *Ring* was a substantive rule because it resulted in changes to Arizona's sentencing statutes.[234]

The United States Supreme Court also countered the Ninth Circuit's alternative argument, that even if *Ring* is a procedural rule it should be applied retroactively because it meets the second exception to *Teague*'s bar against retroactivity for new procedural rules.[235] The Ninth Circuit's holding relied on the idea that juries are inherently more accurate factfinders and therefore it held that *Ring* met the second exception because it "(1) seriously enhance[d] the accuracy of the proceeding and (2) alter[ed] our understanding of bedrock procedural elements essential to the fairness of the proceeding."[236]

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knew, or should have known, that the murdered person was a peace officer.

ARIZ. REV. STAT. § 13-703(F) (2004). Additionally, any mitigating factor put forth by the defendant must also be considered in any death sentencing proceeding in addition to the following mitigating factors:

> 1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.
>
> 2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.
>
> 3. The defendant was legally accountable for the conduct of another under the provisions of section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.
>
> 5. The defendant's age.

Id. § 13-703(G) (2004).

233. *Summerlin*, 124 S. Ct. at 2527-31; Summerlin v. Stewart, 341 F.3d 1082, 1099-1108 (9th Cir. 2003); *see supra* note 227 and accompanying text.

234. *Summerlin*, 341 F.3d at 1108. *See supra* note 172 and accompanying text.

235. *Summerlin*, 124 S. Ct. at 2524-25. The Court did not need to analyze whether *Ring* met the first exception to the *Teague* bar against retroactivity because the Ninth Circuit had already determined that the first exception was inapplicable to *Ring* because it did not decriminalize any conduct or prohibit the imposition of specific punishments upon a particular class of individuals. *Summerlin*, 341 F.3d at 1109.

236. *Summerlin*, 341 F.3d at 1109 (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)).

The Court properly rejected this line of reasoning by clarifying that the question is not whether juries are more accurate but whether judicial sentencing *seriously* diminishes accuracy such that there is an "impermissibly large risk" of punishing conduct the law does not reach.[237] Summerlin failed to show that juries are more accurate, but more importantly, he did not even attempt to show that judges seriously diminish accuracy or that judicial factfinding creates an impermissible risk of punishing conduct the law does not reach.[238] The Ninth Circuit and Summerlin both cited cases and studies contending juries are more accurate, but the Court held these studies cannot be conclusive when there are reputable studies to the contrary.[239] Historically, the Court frequently has declined to legitimize one side of a subjective argument when there are legitimate differences of opinion on both sides of the issue.[240]

Indeed, the debate over the benefits and detriments of jury deliberation has been a part of American jurisprudence for a long time. For example, in 1873, the United States Supreme Court praised the role of juries:

> Twelve men of the average of the community, comprising of men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer

237. *Summerlin*, 124 S. Ct. at 2524-25 (quoting Teague v. Lane, 489 U.S. 288, 312-13 (1989) (O'Connor, J., plurality)).

238. *See Summerlin*, 124 S. Ct. at 2524-26; Brief for Respondent at 32-43, Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (No. 03-0526).

239. *Summerlin*, 341 F.3d at 1129-31; Brief for Respondent at 32-43, Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (No. 03-0526); *Summerlin*, 124 S. Ct. at 2525.

240. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); United States v. Scheffer, 523 U.S. 303 (1998). In *Roe v. Wade*, the Court would not rule whether the life of a fetus or unborn child begins at conception, reasoning that "[w]hen those trained [in] medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe*, 410 U.S. at 159. Likewise, in *United States v. Scheffer*, a United States Air Force airman claimed that the exclusion of polygraph evidence by a military judge violated the Constitution because it deprived him of a "weighty interest" in a criminal proceeding. *Scheffer*, 523 U.S. at 308-09. However, the Court refused to rule that a polygraph test constituted a "weighty interest" because "[t]o this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." *Id.*

> conclusions from admitted facts thus occurring than can a single judge.[241]

But others have not held such reverence for juries. As one commentator argued, "The American jury has been the target of relentless criticism throughout the nation's . . . existence."[242] Judge Jerome N. Frank of the Second Circuit expressed his contempt for juries in 1930 when he wrote in his book, *Law and the Modern Mind*, that jurors:

> [A]re hopelessly incompetent as fact-finders. It is possible, by training, to improve the ability of our judges to pass upon facts more objectively. But no one can be fatuous enough to believe that the entire community can be so educated that a crowd of twelve men chosen at random can do, even moderately well, what painstaking judges now find difficult to do . . . . The jury makes the orderly administration of justice virtually impossible.[243]

In addition to properly ruling that *Ring* should not be applied retroactively under the *Teague* analysis, the United States Supreme Court's ruling bolstered two important policy concerns.[244] First, the Court provided finality to death sentences in Arizona and several other states which will spare the criminal justice system from significant burdens.[245] As Justice O'Connor argued in her *Ring* dissent, applying rules such as *Ring* retroactively can cause "an enormous increase in the workload of an already overburdened judiciary."[246] This sentiment was also strongly presented by sixteen state attorneys general in an *amicus curiae* brief opposing retroactive application of *Ring* because:

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241. Railroad Co. v. Stout, 84 U.S. 657, 664 (1873).

242. Mark Curriden, *Putting the Squeeze on Juries*, 86 A.B.A.J. 52, 53 (2000).

243. JEROME N. FRANK, LAW AND THE MODERN MIND 180-81 (1930). *See also* Warren E. Burger, *Thinking the Unthinkable*, 31 LOY. L. REV. 205, 210-11 (1985) (Chief Justice Warren Burger commenting on the inadequacy of juries in civil trials).

244. *See infra* notes 245-61 and accompanying text.

245. In her dissent in *Ring*, Justice O'Connor expressed serious concerns that the Court's ruling would subject the court system to numerous appeals from the prisoners on death row in Arizona, Colorado, Idaho, Montana, and Nebraska, which all had similar sentencing schemes. Ring v. Arizona, 536 U.S. 584, 619-20 (2002) (O'Connor, J., dissenting). In 2002, just before the Court's ruling in *Ring*, there were 168 prisoners on death row in these five states. *Id.* (O'Connor, J., dissenting) (citing Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc., Death Row U.S.A. (Spring 2002)). Justice O'Connor also feared that 629 other death row inmates in Alabama, Delaware, Florida, and Indiana could pose challenges under *Ring* as the Court has identified those states as "as having hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination." *Id.* at 621 (O'Connor, J., dissenting).

246. *Ring*, 536 U.S. at 620 (O'Connor, J. dissenting).

> [T]he cost to the states of affording retroactive application of new rules of federal constitutional law is significant. Retroactivity consumes time and drains finite state resources. More importantly, retroactivity conflicts directly with the desire of the states, their citizens and American society in general to achieve the finality of criminal judgments.[247]

If the Court had ruled that *Ring* should be applied retroactively, it would have required several states to re-sentence scores of death row inmates; however, such a ruling could have opened the door to a far more ominous burden. On the same day it decided *Summerlin*, the Court ruled in *Blakely v. Washington* that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment."[248] Writing for the dissent in *Blakely*, Justice O'Connor again expressed fears of the burden the ruling in *Blakely* could have on the judicial system.[249]

However, it can be argued that because the Court ruled that *Ring*, a case similar in its ruling to *Blakely*, should not be applied retroactively, it is less likely the Court would ever apply *Blakely* retroactively.[250] In *Summerlin*, the Court declined to apply *Ring* retroactively, a case that involves the irrevocable and most severe form of punishment, and it does not follow that the Court would ever apply a rule such as *Blakely* retroactively, which involves lesser punishments.[251] Finally, although the dissent in *Summerlin* argued that applying *Ring* retroactively would *not* place a significant burden on the courts of re-sentencing over 100 death row inmates in comparison to the 1.2 million inmates in state prisons, applying *Blakely* retroactive certainly would.[252]

A second reason that denying retroactivity for the rule in *Ring* was the correct decision is that it prevented further delays in a sentencing system

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247. Brief of Nebraska, Alabama, Colorado, Delaware, Florida, Illinois, Indiana, Montana, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner at 13, Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (No. 03-0526).

248. Blakely v. Washington, 124 S. Ct. 2531, 2538, 2543 (2004).

249. *Id.* at 2549 (O'Connor, J., dissenting).

250. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004). Mr. Cattani opined that *Blakely* will not be applied retroactively as it was just an extension of *Apprendi* and the United States Supreme Court has already had the opportunity to apply *Apprendi* retroactively in *Ring* and declined to do so. *Id.*

251. Schriro v. Summerlin, 124 S. Ct. 2519, 2526-27, 2529 (2004) (Breyer, J., dissenting).

252. *See* Blakely v. Washington, 124 S. Ct. 2531, 2549 (2004) (O'Connor, J., dissenting). Expressing serious concerns that despite the Court's rulings that *Ring* and *Apprendi* do not apply retroactively, Justice O'Connor argued *Blakely* could "cast constitutional doubt" on sentencing systems in several states and "threaten an untold number of criminal judgments." *Id.* at 2548-49.

already plagued by seemingly endless delays.[253] According to the sixteen attorneys general's amicus brief, the litigation process to bring a death sentence to closure "moves at a glacial pace in this country."[254] As an example, Summerlin committed his crime in 1981 and was convicted and sentenced to death in 1982, but there are eight others on death row in Arizona who committed their crimes before Summerlin's.[255] Arizona has had to stay all executions while awaiting rulings in *Ring* and *Summerlin*, and Arizona has not conducted an execution since November 2000.[256] A ruling that *Ring* applied retroactively would have added significant delay to an already lengthy process.[257] According to the Chief Counsel of the Arizona Attorney General's Office's Capital Litigation Section, Kent E. Cattani, retroactive application of *Ring* would have required numerous briefings and proceedings and most executions would have been delayed for approximately five additional years.[258] Such delays are significant in light of recent debates whether lengthy stays on death row violate the Eighth Amendment's guarantee against cruel and unusual punishment.[259]

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253. *See infra* notes 254-61 and accompanying text.

254. Brief of Nebraska, Alabama, Colorado, Delaware, Florida, Illinois, Indiana, Montana, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner at 14, Schriro v. Summerlin, 124 S. Ct. 2519 (2004) (No. 03-0526).

255. *See* Cattani, *supra* note 22, at xi, 105.

256. *See* Cattani, *supra* note 22, at ix. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004).

257. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004); *see* Cattani, *supra* note 22, at ix. Of the twenty-two individuals who have been executed in Arizona since 1993, five of them had committed their crime over twenty years prior to their execution—the longest being twenty-five years and five months after the crime had been committed. *Id.* Ten others had committed their crime at least fifteen years prior to execution. *Id.* Executions in Arizona in the 1950s and 1960s did not see such delays, with the longest time between a crime and execution involving Manuel E. Silvas, who was executed by lethal gas four years and one month after committing his crime. *Id.* at viii. The shortest time between the crime and the execution during this period was the execution of Carl J. Folk, who was executed by lethal gas one year and three months after committing his crime. *Id.* at viii.

258. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004). According to Mr. Cattani, approximately ninety percent of capital cases would have been delayed. *Id.* Some cases would not have faced such delays because they could have been held harmless. *Id.* For example, if the defense presented no mitigating factors, there would be less to dispute related to the appropriateness of the death penalty. *Id.*

259. *See, e.g.*, Richard E. Shugrue, *A Fate Worse Than Death: An Essay on Whether Long Times on Death Row are Cruel Times*, 29 CREIGHTON L. REV. 1 (1995) (suggesting the scientific community should conduct more research to determine if lengthy stays on death row are cruel so that judges and the court systems can make decisions based on fact rather than passion); Amber A. Bell, Note, *McKenzie v. Day: Is Twenty Years on Death Row Cruel and Unusual Punishment?*, 26 GOLDEN GATE U.L. REV. 41 (1996) (suggesting the courts ought to further address whether lengthy stays on death row constitute cruel and unusual punishment); Dan Crocker, Note, *Extended Stays: Does Lengthy Imprisonment on Death Row Undermine*

Such problems were avoided because the Court ruled that *Ring* should not apply retroactively.[260] Death row inmates affected by *Summerlin* will not receive new sentencing proceedings, and while the Court acknowledged the fundamental right to a jury trial, it reasoned:

> It does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart.[261]

Following Justice Scalia's reasoning, Summerlin did receive a fair trial under the law as it existed at the time of his trial and thus, *Teague* bars retroactive application of *Ring* to *Summerlin*.[262] Such results under *Teague* can have consequences that appear very harsh, especially in Summerlin's case as he will, in all likelihood, go to his death through execution rather than receiving a new sentencing trial as Timothy Ring received.[263] However, this unfairness is distinct from any unfairness related to Summerlin's trial that may have existed because a judge served as a factfinder, which now under *Ring*, violates the Sixth Amendment's guarantee to a trial by jury.[264]

There are three possible fairness issues related to Summerlin's case that are important to distinguish so as to avoid confusion.[265] First, the only fairness question related to the issue of retroactive application of *Ring* to

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the Goals of Capital Punishment?, 1 J. GENDER RACE & JUST. 555 (1998) (claiming lengthy death row stays constitute mental torture and do not serve the principles of retribution and deterrence and therefore are unconstitutional and should be abolished); Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 N.E. J. ON CRIM. & CIV. CON. 101 (1997) (claiming the Anti-Terrorism and Effective Death Penalty Act of 1996 has not been effective for thousands of death row inmates and the current capital punishment system violates the Eighth Amendment's guarantee against cruel and unusual punishment and should be abolished); Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187 (1999) (claiming lengthy stays on death row cause severe mental pain and psychological suffering and thus violate the Eighth Amendment's guarantee against cruel and unusual punishment); Ryan S. Hedges, Note, *Justices Blind: How the Rehnquist Court's Refusal to Hear a Claim for Inordinate Delay of Execution Undermines its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577 (2002) (analyzing arguments that extended death row stays are cruel and unusual punishment and claiming the courts have improperly denied *certiorari* to death row inmates claiming extended death row stays constitute cruel and unusual punishment, thus creating further delays which make death row stays even longer).

260. *See supra* notes 183-204 and accompanying text.
261. Schriro v. Summerlin, 124 S. Ct. 2519, 2526-27 (2004).
262. *Id.*
263. *Id.* at 2529 (Breyer, J., dissenting).
264. *Id.* at 2521-22.
265. *See infra* notes 266-71.

Summerlin is whether judicial factfinding seriously diminished accuracy, and the United States Supreme Court held that it did not.[266] The second involves the bizarre facts surrounding Summerlin's trial and whether such issues as a romantic affair between the defense and prosecuting counsels, an ill-prepared replacement defense counsel, and a marijuana-smoking judge indicate that Summerlin's trial was not fair.[267] One could certainly argue that these events kept Summerlin from obtaining a fair trial, but this has no relation to fairness questions posed by the rule announced in *Ring*, and does not mean that *Ring* should be applied retroactively.[268]

The third fairness issue was the subject of the dissent in *Summerlin* and addresses whether it is fair to apply a new constitutional rule to one criminal defendant (such as Ring) and not to other similarly situated criminal defendants (such as Summerlin).[269] This argument is not new to discussions of retroactivity. In *Teague*, the Court emphasized the purpose of collateral remedies such as habeas corpus is to serve as a final check on the trial court and to act as an "incentive for trial and appellate courts . . . to conduct their proceedings in a manner consistent with established constitutional standards" and not to reopen final convictions whenever the Court announces a new rule.[270] The *Teague* Court recognized "the fact that [a] new rule may constitute a clear break with the past has no bearing on the 'actual inequity

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266. *See supra* notes 196-204 and accompanying text.

267. *See supra* notes 7-33 and accompanying text.

268. *See supra* notes 45-46 and accompanying text. In his federal habeas corpus petition to the United States District Court for the Ninth Circuit, Summerlin claimed he was denied the assistance of effective counsel during his trial but the district Court ruled against this claim and the Court of Appeals for the Ninth Circuit upheld the District Court's ruling. Summerlin v. Stewart, 341 F.3d 1082, 1097 (9th Cir. 2003).

269. Schriro v. Summerlin, 124 S. Ct. 2519, 2527-30 (2004) (Breyer, J., dissenting); *see infra* notes 270-78 and accompanying text.

270. Teague v. Lane, 489 U.S. 288, 306 (1989) (O'Connor, J., plurality) (quoting Desist v. United States, 394 U.S. 244, 262-263 (1969) (Harlan, J., dissenting)). The *Teague* Court also quoted Justice Harlan's view on habeas corpus proceedings when he stated:

> Habeas Corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ [of habeas corpus] to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed . . . . [It is] sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.

Teague, 489 U.S. at 306 (1989) (O'Connor, J., plurality) (quoting Mackey v. United States, 401 U.S. 667, 682-83 (1971) (Harlan, J., dissenting)).

that results' when only one of many similarly situated defendants receives the benefit of the new rule."[271]

However, the point of *Teague* is to ensure that original trial proceedings were fair and not whether it is fair that a criminal defendant get the benefit of a new constitutional rule while similarly situated criminal defendants do not.[272] That is why the *Summerlin* majority called the minority's reasoning a rejection of *Teague* that would call for the Court to revisit *Teague*.[273] Such changes to *Teague* would jeopardize the finality of death penalty sentences and other criminal sentences every time a new constitutional rule is announced.[274] For example, retroactive application of the rule the Court announced in *Miranda v. Arizona*, that criminal defendants had to be informed of their rights before being questioned, would have undone the finality of numerous convictions that had become "final" before the new rule was announced.[275] Such would also be the case if the new rule the Court announced in *Blakely v. Washington* were ever applied retroactively.[276] Such treatment of new constitutional rules would mean there would never be meaningful finality to any conviction because the law is constantly changing.[277] Such treatment would also undo the policy reasons behind habeas corpus.[278]

The Court Should Have Addressed Fairness More Completely

The dissent attacked the fairness of the Court's decision in *Summerlin* by emphasizing that Ring received a new and constitutionally proper sentencing proceeding, but that others similarly situated to Ring will go to their deaths only because Ring made his claim first.[279] This unfairness is the very reason for Justice Harlan's dissenting opinion in *Desist v. United States*, which was later adopted by the Court in *Teague* as part of the standard for retroactivity questions.[280] Justice Harlan did not like to see a myriad of different retroactivity applications.[281] That a rule can be found to be un-

271. *Teague*, 489 U.S. at 315 (O'Connor, J., plurality) (quoting Griffith v. Kentucky, 479 U.S. 314, 327-29 (1987)).
272. *See supra* notes 165-70 and accompanying text.
273. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004).
274. *Id. See supra* note 150 and accompanying text; *see also infra* note 277 and accompanying text.
275. *See supra* note 150 and accompanying text.
276. *See infra* notes 308-09 and accompanying text.
277. Teague v. Lane 489 U.S. 288, 305-07 (1989) (citing Mackey v. United States, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)).
278. *See supra* notes 270-71 and accompanying text.
279. Schriro v. Summerlin, 124 S. Ct. 2519, 2529 (2004) (Breyer, J., dissenting).
280. *Teague*, 489 U.S. at 306 (citing Desist v. United States, 394 U.S. 244, 257-69 (1969) (Harlan, J., dissenting)).
281. *Desist*, 394 U.S. at 260 (Harlan, J., dissenting) (citing Stovall v. Denno, 388 U.S. 293 (1967); DeStefano v. Woods, 392 U.S. 631 (1968)). In particular, Justice Harlan disapproved

constitutional for one person but not for another similarly situated certainly does not seem fair to the lay person.[282] *Ring*'s and *Summerlin*'s application to death sentences, which have a "qualitative difference . . . from all other punishments" due to their severity and irrevocability, magnifies the Court's need to address fairness concerns in *Summerlin*.[283]

The Court did argue that judicial sentencing does not seriously diminish accuracy, but there are several things the Court could have done to address the issue of fairness better. First, the Court should have done more to emphasize that the very purpose of a *Teague* analysis is to ensure fairness, allowing retroactive application only to rules that would put the defendant's conduct beyond the law to proscribe or to remedy any fundamental unfairness in the original proceeding.[284] Summerlin was guilty of the crimes of first-degree murder and sexual assault regardless of the ruling in *Ring*, and nothing in *Ring* suggests that Summerlin did not receive a fair trial as judges are arguably as accurate as juries.[285] It is true that the procedures followed to sentence Summerlin were declared unconstitutional by *Ring*, but the *Teague* analysis is intended to provide relief if such proceedings caused harm to the defendant.[286] After *Ring*, Summerlin is still guilty of the same crime and received a fair trial, and thus there was nothing unfair about denying him a new sentencing hearing.[287]

Second, Summerlin likely would not receive any real benefit from retroactive application of *Ring*. He would have avoided execution for a time while prosecutors, his defense counsel, and the courts went through the sentencing process anew.[288] However, he would still face the likelihood of execution because no mitigating circumstances were presented at his trial, and he had been convicted of a previous felony which alone would have been sufficient to impose the death penalty.[289] Further, it is likely that a jury would re-sentence Summerlin to death because Arizona juries have issued

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of situations in which a new rule is applied to the party involved in the case and to all future cases—catching a class of defendants in between. *Desist*, 394 U.S. at 260 (Harlan, J., dissenting).

282. *Summerlin*, 124 S. Ct. at 2529 (Breyer, J., dissenting).

283. *Id.* (Breyer, J., dissenting) (quoting California v. Ramos, 463 U.S. 992, 998-99 (1983)).

284. *See supra* notes 224-43 and accompanying text. *See also* Teague v. Lane, 489 U.S. 288, 319 (1989) (Blackmun, J., concurring).

285. *Summerlin*, 124 S. Ct. at 2524-26.

286. *Id.* at 2523.

287. *Id.* at 2524, 2526.

288. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004).

289. Summerlin v. Stewart, 341 F.3d 1082, 1088-89 (9th Cir. 2003); ARIZ. REV. STAT. 13-703(F)(2) (1981). Prior to his first-degree murder conviction, Summerlin was convicted of aggravated assault stemming from an altercation in which Summerlin brandished a pocket knife at a driver who struck Summerlin's wife with his vehicle. *Summerlin*, 341 F.3d at 1084; *see supra* note 30.

the death sentence a majority of the time when given the opportunity since the sentencing duty was fully vested in juries after *Ring*.[290]

Third, the fundamental fairness issue argued by the dissent in *Summerlin* would be true under any application of *Teague* because it would always leave similarly situated defendants without a remedy.[291] Following the dissent's argument would lead to a re-evaluation of *Teague* as the standard for determining if new rules should be applied retroactively.[292] However, even the dissent acknowledged that fairness is already at the heart of the *Teague* analysis because a court must look to see if the original proceeding was inherently unfair in relation to the new rule.[293] The dissent argued that death is "dramatically different" than other penalties, and therefore, the Court should take a broader view to "balance competing considerations."[294] The majority countered that this line of reasoning is not an application of *Teague* but a rejection of it.[295] Fairness is already the major consideration of *Teague*, and the majority should have explained this point more clearly.

Failing to Address Fairness Will Weaken Death Penalty Jurisprudence

Even though addressing the dissent's fairness would have been primarily dicta, there are three main reasons why the United States Supreme Court's failure to do so could weaken death penalty jurisprudence. First, as the dissent in *Summerlin* argued, the ordinary citizen will not understand the different treatment of similarly situated criminal defendants, but dicta addressing the dissent's challenges would have helped explain this to the public.[296] Public opinion of whether the death penalty violates the Eighth Amendment's guarantee against cruel and unusual punishment is vital because, as the Court held in *Gregg v. Georgia*:

> [T]he Eighth Amendment has not been regarded as a static concept . . . . [T]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . . . It requires, rather, that we

290. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004). According to Mr. Cattani, twenty-one capital sentencing cases have gone before a jury since the *Ring* decision and the jury issued death sentences sixteen times. *Id.*

291. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004).

292. Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004).

293. *Id.* at 2528-29 (Breyer, J., dissenting).

294. *Id.* (Breyer, J., dissenting)

295. *Id.* at 2526.

296. *Id.* 2529 (Breyer, J. dissenting).

> look to objective indicia that reflect the public attitude toward a given sanction.[297]

Secondly, there have been several challenges to the legitimacy of the death penalty in recent years, and therefore, courts should stem further controversy.[298] Several factors, including continued concerns of racial bias in sentencing and improved DNA technology, have led to increased scrutiny of the death penalty.[299] On February 3, 1997, the American Bar Association adopted a resolution urging jurisdictions that carry out the death penalty to halt all executions until the jurisdiction can "(1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed."[300] Notably, after thirteen Illinois death row inmates were exonerated, then Governor George Ryan commuted the sentences of 164 Illinois death row inmates, and Illinois now has a moratorium on the death penalty.[301] According to the Death Penalty Information Center, 117 death row inmates have been exonerated since 1973 and DNA evidence was a major factor in fourteen of those exonerations.[302]

Third, Summerlin was a 5-4 decision with compelling arguments from the dissent, and previously, there had been a split among federal circuits, which means rulings against retroactivity are somewhat vulnerable.[303] The Court in *Blakely* came to a similar conclusion as it did in *Ring* and it is only a matter of time before the Court will need to hear an appeal from a

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297. Gregg v. Georgia, 428 U.S. 153, 172-73 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

298. *See infra* notes, 299-302 and accompanying text.

299. *See generally* James S. Liebman, Comment, *The New Death Penalty Debate: What's DNA Got to Do With It?*, 33 COLUM. HUMAN RIGHTS L. REV. 527 (2002). *See also* JANET NAPOLITANO, ARIZONA ATTORNEY GENERAL'S OFFICE, CAPITAL CASE COMMISSION: FINAL REPORT 26-7 (2002). Arizona Attorney General Janet Napolitano formed the Arizona Attorney General's Capital Case Commission in 2000 "to study key issues and make recommendations to try to ensure that the death penalty process in Arizona is just, timely, and fair to defendants and victims." *Id.* at 1. Regarding racial bias in the administration of the death penalty in Arizona, the Commission could not arrive at a consensus regarding the effects of the victim's race. *Id.* at 26. The Commission did agree on a recommendation to "encourage all participants in the criminal justice system to promote practices that ensure race-neutral decisions, and encourage the use of empirical [data gathered by the Commission] in internal reviews and discussions regarding the death penalty process." *Id.* at vi.

300. To review the American Bar Association's 1997 resolution, *see* Death Penalty Moratorium Implementation Project at http://www.abanet.org/moratorium/resolution.html (last visited December 6, 2004).

301. Maurice Possley & Steve Mills, *"There is No Honorable Way to Kill," He Says*, Chi. Trib., Jan. 12, 2003 at 1; *see also* Kelly Christine Elmore, Notes and Comments, *Atkins v. Virginia: Death Penalty for the Mentally Retarded—Cruel and Unusual—The Crime, Not the Punishment*, 53 DEPAUL L. REV. 1287 n.10 (2004).

302. For a count of exonerated death row inmates, *see* Death Penalty Info. Ctr., at http://www.deathpenaltyinfo.org/innoc.html (last visited December 6, 2004).

303. Schriro v. Summerlin, 124 S. Ct. 2519, 2520 (2004); *see also* Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003); Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003).

convict arguing that he or she was convicted under a procedure the Court determined to be unconstitutional through *Blakely*.[304] Factors such as public opinion towards the fairness of *Summerlin* or impending turnover among the Court's justices could lead to a different outcome in a future United States Supreme Court decision related to retroactivity challenges to *Blakely*. The Court should have seen this inevitability and inoculated its decision against future attacks related to fairness.

Future Impacts of Summerlin

Now that the Court has ruled *Ring* will not be applied retroactively, there is less speculation as to the future impacts *Summerlin* will have. The immediate effect of *Summerlin* is that Arizona and other states affected by *Ring* and *Summerlin* will be able to proceed with executions.[305] Additionally, *Summerlin* resolved a conflict among at least the Eleventh and Ninth Circuits.[306] Further, it prevented Arizona and other states from the burdens associated with re-sentencing procedures.[307] Finally, *Summerlin* may serve as a guidepost when the Court inevitably decides whether *Blakely* should be applied retroactively.[308] Retroactive application of *Blakely* would have drastic implications to the court system's resources and twenty years of criminal sentencing jurisprudence.[309]

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304. Blakely v. Washington, 124 S. Ct. 2531, 2537 (2004). The Court decided Blakely on June 24, 2004 and since then, all circuits have heard appeals from convicted criminals in light of the Court's ruling in Blakely. *Id.* at 2531. *See, e.g.*, United States v. Morgan, 384 F.3d 1, 7 (1st Cir. 2004); United States v. Frampton, 382 F.3d 213, 216 (2d Cir. 2004); United States v. Trala, 386 F.3d 536, 547 (3d Cir. 2004); United States v. Lane, No. 03-4181, 2004 U.S. App. LEXIS 23025 (4th Cir. Nov. 4, 2004); United States v. Owen, 104 Fed. Appx. 1001, 1002 (5th Cir. 2004); United States v. Lubowa, No. 02-5653, 2004 U.S. App. LEXIS 24018 (6th Cir. Nov. 12, 2004); United States v. Booker, 375 F.3d 508, 510 (7th Cir. 2004); United States v. Ceballos, No. 04-1412, 2004 U.S. App. LEXIS 24331, at *5-6 (8th Cir. Nov. 23, 2004); United States v. Butler, No. 02-50182, 2004 U.S. App. LEXIS 24341 (9th Cir. Nov. 23, 2004); United States v. Bey, No. 04-3139, 2004 U.S. App. LEXIS 23915 (10th Cir. Nov. 16, 2004); United States v. Njau, 386 F.3d 1039 (11th Cir. 2004); United States v. Holland, No. 04-3070, 2004 U.S. App. LEXIS 24139 (D.C. Cir. Nov. 17, 2004).

305. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (October 24, 2004).

306. *See supra* notes 177-82 and accompanying text. In *Turner v. Crosby*, the Eleventh Circuit held *Ring* should not be applied retroactively concluding it was a procedural rule that failed to meet either of the exceptions to the *Teague* bar to retroactivity. Turner v. Crosby, 339 F.3d 1247, 1282-86 (11th Cir. 2003). In *Summerlin v. Stewart*, the Ninth Circuit held that under a *Teague* analysis, *Ring* should be applied retroactively on both substantive and procedural grounds. Summerlin v. Stewart, 341 F.3d 1082, 1121 (9th Cir. 2003).

307. Telephone interview with Kent E. Cattani, Chief Counsel, Capital Litigation Section, Arizona Attorney General's Office (September 24, 2004).

308. Blakely v. Washington, 124 S. Ct. 2531, 2550 (2004) (O'Connor, J., dissenting). In her dissent, Justice O'Connor asserted her fear that *Blakely* could eventually be applied retroactively: "Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy." *Id.* (O'Connor, J., dissenting).

309. *Id.*

CONCLUSION

For death row inmates, *Summerlin* appears to have closed a window which had been creeping open because of the Court's decisions in *Jones*, *Apprendi*, and *Ring*. While the Court may have closed this window for now through *Summerlin*, it failed to address the dissent's compelling argument about the lack of fairness of *Summerlin* even though such arguments have always run along side retroactivity discussions and do not attack the fairness of Summerlin's original trial. Thus, the issue of the retroactivity of *Ring* may resurface at a later time. For the moment, the death penalty and those sitting on death row in affected states will have ironically different paths ahead of them. Execution appears more imminent for current death row inmates who appear to have reached the end of a protracted battle that gave them hope. In contrast, the death penalty appears to be as alive and well as it has been in several years.

Despite any observer's legal training or experience, and regardless of his or her personal feelings towards the death penalty, there appears to be an element of unfairness in *Summerlin*. The process the Court ruled was unconstitutional for Timothy Ring will still be applied to Warren Wesley Summerlin simply because he got in line behind Ring. However, Summerlin received a fair trial and the outcome of a new sentencing trial under *Ring* would likely end with the same result. The purpose of habeas corpus proceedings is to verify that the original proceedings did not violate the defendant's constitutional rights as they were understood at the time, not to undo the finality of criminal convictions each time the Court announces a new constitutional rule. These are all things the Court should have explained better in light of *Teague*'s purpose of applying new rules that implicate the fairness or accuracy of the original proceeding. Though such explanations would have been mere dicta, the Court could have helped prevent more negative public opinion concerning the death penalty and provided additional insight to future Court decisions related to this issue. This shortcoming in the Court's opinion could be the Achilles heel to the longevity of this 5-4 decision. It could also have greater implications if changes on the Court or other factors lead to a future challenge of whether *Blakely* should be applied retroactively.

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