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Comment

Was Death Different Then Than It Is Now? The Opportunity Presented to the Supreme Court by *Summerlin v. Stewart*

Sarah C.S. McLaren*

On July 11, 1982, Warren Summerlin was sentenced to death for the murder of Brenna Bailey.¹ At that time, Arizona law allowed a judge, instead of a jury, to sentence a defendant to death,² and Judge Marquardt, of the Superior Court of Maricopa County, Arizona,³ found two aggravating factors and an absence of mitigating factors that sufficed to impose the death sentence on Summerlin.⁴ Summerlin appealed this sentence.⁵ After the Ninth Circuit Court of Appeals had issued a decision in his case,⁶ the United States Supreme Court granted certiorari in a different case, *State v. Ring*,⁷ leading the Ninth Circuit to withdraw its decision pending the outcome of *Ring*.⁸ After *Ring*, which held that under the Sixth Amendment a jury—not a judge—must find the aggravating factors necessary to impose a death sentence,⁹ was decided, the Ninth Circuit voted that Summerlin's case should be reheard en banc.¹⁰ The Ninth Cir-

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1. See *Summerlin v. Stewart*, 341 F.3d 1082, 1089–90 (9th Cir. 2003) (en banc).

2. See *id.* at 1096.

3. See *State v. Summerlin*, 675 P.2d 686, 686 (Ariz. 1983).

4. See *Summerlin*, 341 F.3d at 1090.

5. For a more thorough discussion of the procedural posture of this case, see *infra* notes 167–78 and accompanying text.

6. See *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001).

7. *Ring v. Arizona*, 534 U.S. 1103 (2002).

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

9. *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

10. See *Summerlin*, 341 F.3d at 1092.

cuit subsequently affirmed Summerlin's conviction of first-degree murder, but reversed the imposition of the death sentence in light of its determination that the Supreme Court's decision in *Ring* applied retroactively to cases on federal habeas corpus review.¹¹

The Ninth Circuit's determination in *Summerlin* marked the third time that a federal court of appeals addressed the issue of the retroactivity of *Ring* to cases on federal habeas corpus review.¹² Although the Ninth Circuit did not base its holding on the retroactivity analysis the Supreme Court formulated beginning in *Teague v. Lane*,¹³ it applied the *Teague* analysis in dicta.¹⁴ The Ninth Circuit found that the rule formulated in *Ring* fell within *Teague's* second exception¹⁵—an exception that the Supreme Court had read very narrowly in the past.¹⁶ The court's holding is significant in at least three ways. First, the *Summerlin* decision vacated the death sentences of all death row inmates on federal habeas corpus review within the Ninth Circuit who had been sentenced to death by a judge instead of a jury.¹⁷ Second, the *Summerlin* decision created a split among the federal circuits regarding whether or not the Supreme Court's decision in *Ring* is retroactive.¹⁸ Finally, the Supreme Court will have a valuable opportunity to reevaluate the way it treats the retroactivity of constitutional rules in capital punishment cases¹⁹ when the Court hears the Ninth Circuit's decision on appeal.²⁰

11. *Id.* at 1121.

12. *See Turner v. Crosby*, 339 F.3d 1247, 1286 (11th Cir. 2003); *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002).

13. 489 U.S. 288 (1989).

14. *Summerlin*, 341 F.3d at 1108.

15. *Id.* at 1121.

16. *See infra* notes 103–10 and accompanying text.

17. *See infra* notes 208, 231 and accompanying text. This ruling overturned the death sentences of prisoners held in states within the Ninth Circuit in which capital sentencing had previously been done by judges—Arizona, Montana, and Idaho. Charles Lane, *Death Row Inmates Get Legal Break: Federal Appeals Court Overturns Sentences in More than 100 Cases*, WASH. POST, Sept. 3, 2003, at A1. The total number of prisoners affected is 112. *See id.*

18. *See infra* notes 127–53, 210 and accompanying text.

19. *See infra* notes 249–76 and accompanying text.

20. The Supreme Court has granted certiorari to review (1) whether the Ninth Circuit correctly characterized the *Ring* rule as substantive and (2) if the Ninth Circuit correctly found the *Ring* rule to be within the second exception of *Teague*. *See Schriro v. Summerlin*, 124 S. Ct. 833, 833 (2003); *Schriro v. Summerlin*, No. 03-526, 2003 WL 22429229, at *i (U.S. Sept. 23, 2003).

This Comment will analyze the Ninth Circuit's decision in *Summerlin* and suggest how its decision should be treated by the Supreme Court on review. Part I briefly describes the basics of habeas review in capital cases as well as the history of the Supreme Court's approach to the retroactivity of its decisions. Part II details the Ninth Circuit's holding and reasoning in *Summerlin*. Part III analyzes *Summerlin*'s reasoning and suggests that when the Supreme Court hears *Summerlin* it should use the opportunity to modify its retroactivity analysis in capital punishment cases. This Comment states that the Ninth Circuit reached the correct holding for the wrong reasons, and proposes that the Supreme Court should announce that all new rules of constitutional law are retroactive to capital cases on federal habeas review if their violation would constitute structural error.

I. A BRIEF HISTORY OF HABEAS CORPUS AND THE SUPREME COURT'S APPROACH TO RETROACTIVITY

A. THE WRIT OF HABEAS CORPUS AND ITS APPLICATION IN THE CAPITAL PUNISHMENT CONTEXT

The writ of habeas corpus—which allows a prisoner to challenge the government's authority to hold him or her—is guaranteed by Article I, Section 9 of the United States Constitution.²¹ The Judiciary Act of 1789 authorized the federal courts' use of the writ,²² and the scope of situations in which the writ could be used greatly expanded in 1867.²³ That year, Congress enabled the federal courts to grant the writ "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United

21. U.S. CONST. art. I, § 9.

22. LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 156 (1994).

23. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 189 (1980). Scholars dispute exactly how broadly the writ's scope was expanded in the 1867 Act. Compare *id.* at 190–93 (stating that even if an 1867 senator was mistaken in his belief—that the bill was not limited to freedmen, but intended as a protection for all those imprisoned because they had violated a state law that itself violated the Constitution—his belief was still important because it influenced votes that allowed the bill to pass), with Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1116 (1995) (arguing that the 1867 Act is best understood as a protection for the rights of freed slaves—who had not yet been convicted of any crime—under the Thirteenth and Fourteenth Amendments).

States.²⁴ Congress has changed the procedure that courts follow when hearing cases brought on the writ several times since 1867, but the basic scope of the writ as defined by its statutory language has changed little.²⁵

There are four basic situations in which the writ in its present form can be invoked,²⁶ the most controversial of which is when state prisoners who allege that they are being held in violation of the federal Constitution use the writ to seek release by the federal courts.²⁷ The federal courts have interpreted the scope of this use of the writ very differently over time.²⁸ Its recent expansive use, in which a writ can issue if a state has failed to meet any constitutional guarantee,²⁹ has troubled many.³⁰ The concern that prisoners who had been sentenced to death were abusing the writ led to Congress's most recent adjustment of the procedures by which the writ operates: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).³¹

The concern over the present scope of the writ is highlighted by the complex stages of the appeal of a death sentence. After an individual is found guilty of murder and sentenced to death in state court, he or she has the opportunity to pursue a direct appeal of his or her conviction and sentence.³² If the de-

24. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2003)).

25. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4261 (2003).

26. The writ can be used (1) on behalf of a foreign citizen who is in custody for "an act done under color of authority from his country," (2) if a person is being held by a state for an action done under federal authority, (3) for any person held in the custody of the United States, or (4) for people "held in violation of the federal Constitution or laws." *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

30. See, e.g., George Cochran Doub, *The Case Against Modern Federal Habeas Corpus*, 57 A.B.A. J. 323, 323 (1971); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970).

31. Antiterrorism and Effective Death Penalty Act of 1996, title I, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.). For an opinion on what post-AEDPA habeas corpus review will look like, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996). For a description of the legislative history of the bill as well as the motivations of its proponents, see *id.* at 422-43.

32. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 1.03[9] (3d ed. 2002).

defendant does not gain relief from state courts, he or she may petition for a writ of certiorari from the Supreme Court.³³ Once the Supreme Court has decided the case or denied the defendant certiorari, or if the period during which a petition for certiorari may be sought has expired, the defendant's conviction is considered final.³⁴ The defendant, however, may still seek review by filing a petition for a writ of habeas corpus.³⁵ An individual must first exhaust any state habeas corpus procedures if they exist, and then he or she may file a petition for a writ of habeas corpus in federal court.³⁶

AEDPA drastically increased the procedural hurdles a defendant must meet to bring a successful habeas petition before a federal court.³⁷ AEDPA also created an optional system in which habeas petitions in capital cases must be brought within a shorter statute of limitations and only a small category of claims is cognizable.³⁸ States are only allowed to take advantage of this system if they meet certain requirements, such as providing indigent defendants with counsel during all stages of the appeals process.³⁹ AEDPA illustrates the mistrust and concern with which many have viewed the use of the habeas statute over the past decades, and it provides a good background against which one can better understand and critique the Supreme Court's approach to the retroactivity of its decisions in capital cases.

B. THE SUPREME COURT'S STRUGGLE FOR A WORKABLE RETROACTIVITY DOCTRINE

1. The Struggle Begins: The Supreme Court's Approach Before *Teague v. Lane*

The Supreme Court has had difficulty formulating a workable approach to the retroactivity of its decisions. At common law, a court's judgment was often assumed to be retroac-

33. *Id.*

34. *Id.* § 1.03[10].

35. *Id.*

36. *Id.* § 1.03[10] n.62.

37. *See, e.g.*, 28 U.S.C. § 2244(b) (2003) (limiting the ability of prisoners to bring successive habeas petitions); 28 U.S.C. § 2254(e) (2003) (stating that factual determinations made by state courts are presumed correct unless the habeas petitioner can show otherwise by clear and convincing evidence).

38. Yackle, *supra* note 31, at 393–97.

39. *See* 28 U.S.C. § 2261 (2003).

tive—applicable to defendants whose convictions were already final.⁴⁰ This stemmed in large part from the view that judges were not creating new law, but merely discovering principles that had always existed. Although the Supreme Court followed this approach for many years, Justices became increasingly skeptical of it,⁴¹ and the Court confronted the issue of retroactivity head-on in *Linkletter v. Walker*.⁴²

In *Linkletter* the Court was faced with the issue of whether or not its holding in *Mapp v. Ohio*⁴³ should be applied retroactively.⁴⁴ *Mapp* held that under the Due Process Clause of the Fourteenth Amendment the states needed to adopt the exclusionary rule—they had to prohibit evidence that had been obtained in violation of the Fourth Amendment from being used in the prosecution's case against a defendant.⁴⁵ The Court determined the *Mapp* rule would only be applied to state cases commencing after *Mapp* was handed down.⁴⁶ The test the Court used in *Linkletter* to determine retroactivity involved the consideration of the purpose of the constitutional rule in question, the extent to which states had relied on the previous rule, and the effect a retroactive application of the new constitutional rule would have on the administration of justice.⁴⁷

Although this multifactored test might seem best suited to a case-by-case balancing analysis, the Court created a bright-line rule to decide the retroactivity issue in *Stone v. Powell*.⁴⁸ There the Supreme Court addressed a split in the circuits regarding whether a state prisoner could have his or her writ of habeas corpus granted based on a federal court's decision that evidence used by the state against the petitioner should have been excluded under the exclusionary rule set forth in *Mapp*.⁴⁹ The Court announced that if a state has "provided an opportunity for a full and fair litigation of a Fourth Amendment

40. See, e.g., *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) (stating that "[j]udicial decisions have had retrospective operation for near a thousand years").

41. See Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 56–57 (1965).

42. 381 U.S. 618 (1965).

43. 367 U.S. 643 (1961).

44. *Linkletter*, 381 U.S. at 619–20.

45. *Mapp*, 367 U.S. at 655.

46. *Linkletter*, 381 U.S. at 636–40.

47. *Id.* at 636.

48. 428 U.S. 465 (1976).

49. *Id.* at 469.

claim”⁵⁰ a state prisoner invoking federal habeas corpus review would be prohibited from obtaining relief on the grounds of the exclusionary rule.⁵¹

The rule developed in *Linkletter* and *Stone* was sharply criticized for allowing the Court to limit retroactivity so that some, but not all, defendants in similar positions within the appeals process would be able to benefit from a new constitutional rule.⁵² The Supreme Court attempted to address these inequities in *Griffith v. Kentucky*,⁵³ by declaring that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final.”⁵⁴ While *Griffith* created a bright-line rule for the retroactivity of constitutional rules for cases on direct review, the problems of the *Linkletter* test remained for cases brought to the courts on federal habeas review.

2. The Birth of the Court’s Modern Approach to Retroactive Application of Rules to Cases on Federal Habeas Review: *Teague v. Lane*

Two years later in *Teague v. Lane*,⁵⁵ Justice O’Connor, writing for the plurality, addressed the question left open by *Griffith* and formulated a test to determine when a new procedural constitutional rule should be applied retroactively to petitioners under federal habeas review.⁵⁶ Justice O’Connor changed the Court’s approach to retroactivity in two key ways. First, she declared that retroactivity is a threshold issue—that a court

50. *Id.* at 494.

51. *Id.*

52. *E.g.*, *Desist v. United States*, 394 U.S. 244, 256–59 (1969) (Harlan, J., dissenting). Justice Harlan argued that it violated basic principle for the Court to decide that new constitutional rules would be applied only to the defendant in the case that announced the new rule and to other cases commencing after the rule was announced. He did not believe that it should be possible for one defendant on direct review to benefit from a new rule just because it was during the review of her case that the Supreme Court decided to announce the new constitutional rule, while another defendant whose case was also on direct review would not receive the benefit of the new rule if the Supreme Court decided to give the new rule prospective application. *Id.*; see also Mishkin, *supra* note 41, at 72–73; *supra* notes 32–36 and accompanying text (outlining the basic stages of the appeals process).

53. 479 U.S. 314 (1987).

54. *Id.* at 328; see also *supra* notes 32–36 and accompanying text (outlining the basic stages of the appeals process).

55. 489 U.S. 288 (1989).

56. *Id.* at 301–13 (plurality opinion).

should decide if a proposed constitutional rule would be applied retroactively to petitioners on federal habeas review before deciding whether the court would adopt the new rule.⁵⁷ If a federal habeas petitioner proposed a new constitutional rule and the court determined that it would not be applied retroactively to petitioners on federal habeas review, the court would not even decide the petitioner's claim on the merits.⁵⁸ Justice O'Connor did not want to adopt a new constitutional rule in a federal habeas case if granting the petitioner's request would allow the petitioner the benefit of the new rule, but deny relief to all other defendants on federal habeas review.⁵⁹

Second, Justice O'Connor took the opportunity to move the Court away from the *Linkletter* test.⁶⁰ Justice O'Connor justified this move with the inconsistencies produced by the *Linkletter* standard⁶¹ and the purposes of habeas corpus relief.⁶² Justice O'Connor described the writ of habeas corpus as an incentive for state courts to conduct their proceedings in a manner consistent with the federal Constitution.⁶³ Given the importance of finality of judgments and the deterrent function of the writ, Justice O'Connor announced that few constitutional rules should be found to be retroactive on federal habeas review.⁶⁴ She declared that a "new rule"—defined as a "result [of a case] not *dictated* by precedent existing at the time the defendant's conviction became final"⁶⁵—of constitutional procedure was not retroactive to petitioners on federal habeas review unless the

57. *Id.* at 300–01 (plurality opinion).

58. *Id.*

59. *Id.*

60. *Id.* at 301 (plurality opinion); see *supra* note 47 and accompanying text.

61. See *Teague*, 489 U.S. at 302 (plurality opinion) ("[The *Linkletter* standard] has been used to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced.").

62. See *infra* note 63 and accompanying text.

63. *Teague*, 489 U.S. at 306 (plurality opinion) ("As [Justice Harlan] explained in *Desist*, 'the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" (quoting *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting))).

64. *Id.* at 306–08 (plurality opinion).

65. *Id.* at 301 (plurality opinion).

rule fell into one of two exceptions.⁶⁶ The rule could only be applied retroactively to petitioners whose convictions had already become final if the rule put “certain kinds of . . . conduct beyond the power of the criminal law-making authority to proscribe”⁶⁷ or the rule is a “watershed rule[] of criminal procedure”⁶⁸ that implicates the fundamental fairness of a trial and whose implementation would increase the accuracy of convictions.⁶⁹ Although Justice O’Connor’s rule only carried a plurality of the Court in *Teague*, subsequent cases have shown that it has become the framework within which the Court is deciding questions of the retroactivity of constitutional rules recognized on federal habeas review.⁷⁰

3. The Development and Application of the *Teague* Retroactivity Standard to Capital Punishment Cases

Supreme Court cases since *Teague* have clarified the test set forth by Justice O’Connor and have given her formulation the backing of a majority of Justices of the Court.⁷¹ These cases have also shown that the Court is willing to apply the *Teague* standard in capital punishment cases—an issue that was expressly left open in the plurality opinion of *Teague* itself.⁷²

The Court first reached this issue in *Penry v. Lynaugh*⁷³—a case that had been argued before *Teague* was decided.⁷⁴ Justice O’Connor wrote the opinion of the Court, but her opinion as a whole was not joined by a majority of the Court.⁷⁵ In *Penry*, a

66. *Id.* at 311 (plurality opinion).

67. *Id.* (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part, dissenting in part)).

68. *Id.*

69. *Id.* at 312 (plurality opinion). Justice O’Connor drew both of these exceptions from the dissenting opinions of Justice Harlan, *id.* at 311–12, but she added the requirement that the rule must greatly increase the chances that only the guilty will be convicted, *id.* at 313.

70. *See infra* Part I.B.3.

71. *See infra* notes 72–111 and accompanying text.

72. *Teague*, 489 U.S. at 314 n.2 (plurality opinion) (“Because petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context.”).

73. 492 U.S. 302 (1989), *overruled on unrelated grounds* by *Atkins v. Virginia*, 536 U.S. 304 (2002).

74. Arguments were made in *Penry* on January 11, 1989, *id.* at 302, while the *Teague* decision was not announced until February 22 of that same year, *Teague*, 489 U.S. at 288.

75. *Penry*, 492 U.S. at 303.

federal habeas petitioner asked the Court to make a certain jury instruction mandatory upon request.⁷⁶ This jury instruction would inform jurors that they are allowed to consider mitigating evidence of mental retardation and an abused childhood as they deliberate about whether or not to impose a death sentence.⁷⁷ The Court determined that the rule the petitioner was seeking to apply in his case was not "new" for *Teague* purposes and therefore never addressed whether or not the rule would have come within the two exceptions of the *Teague* standard.⁷⁸ Justice O'Connor, however, joined by Chief Justice Rehnquist, as well as Justices White, Scalia, and Kennedy, determined in dicta that finality of judgment concerns were also present in the capital sentencing context and that the two exceptions to *Teague*'s rule regarding retroactivity applied in the capital sentencing context as well.⁷⁹ *Penry* declared that proposed constitutional rules regarding capital sentencing were subject to a *Teague* retroactivity analysis, but it did not provide an example of how the *Teague* exceptions should be applied in such a case.⁸⁰

The Court soon had the opportunity to apply the *Teague* analysis in three more cases, each of which involved a federal habeas petitioner on death row asking that a constitutional rule be applied retroactively to his case.⁸¹ Unlike in *Penry*, the Court determined that in each of these three cases the petitioner was proposing a "new" constitutional rule.⁸² Because each petitioner was asking, through a federal habeas petition, for relief via a "new rule,"⁸³ the Court had its first opportunities

76. *Id.* at 315.

77. *Id.* at 312-13.

78. When *Penry*'s conviction became final, the Court had already decided *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). The Court viewed those cases as establishing the principle that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." *Penry*, 492 U.S. at 318 (quoting *Lockett*, 455 U.S. at 113-14). Since the Court viewed this rule as the equivalent of the rule for which *Penry* was asking, it found that *Penry* was not asking for a new rule. *Id.* at 318-19.

79. *Penry*, 492 U.S. at 314.

80. See *supra* note 78 and accompanying text.

81. *Sawyer v. Smith*, 497 U.S. 227, 229 (1990); *Saffle v. Parks*, 494 U.S. 484, 485-86 (1990); *Butler v. McKellar*, 494 U.S. 407, 408-09 (1990).

82. In each of these cases, the Court said the rule the petitioner was seeking was not dictated by Court precedent and was therefore a "new rule." See *Sawyer*, 497 U.S. at 229; *Saffle*, 494 U.S. at 486; *Butler*, 494 U.S. at 415.

83. See *supra* note 82 and accompanying text.

to apply the two *Teague* exceptions to claims made by petitioners currently sentenced to death.⁸⁴ An examination of the substantive claims made by each petitioner as well as the result in each of these cases is vital to understanding how much guidance the Supreme Court gave for future similar cases.

In *Butler v. McKellar*, the first of these three cases to be decided,⁸⁵ the petitioner's claim rested on the Fifth Amendment.⁸⁶ Horace Butler urged the Supreme Court to overturn his capital murder conviction and death sentence by applying the rule the Court had established in *Arizona v. Roberson*⁸⁷ retroactively to his case on federal habeas review.⁸⁸ The *Roberson* rule declared that the Fifth Amendment prohibits police interrogation whether related or unrelated to the arrest once a suspect has requested counsel.⁸⁹ The Court refused to apply this rule retroactively to cases on habeas review, finding that it did not meet either of the *Teague* exceptions.⁹⁰ The Court quickly dismissed the possibility of the *Roberson* rule falling within the first exception.⁹¹ The Court then found that because a violation of the *Roberson* rule was unlikely to result in an inaccurate conviction, Butler could not claim the rule's protection under the second *Teague* exception either.⁹²

In the other two cases the petitioner's proposed rule related not to the conviction stage of a proceeding, but to the sentencing itself.⁹³ In *Saffle v. Parks*, the petitioner claimed that

84. See *supra* notes 78, 80 and accompanying text. In each of these three cases the Court made it clear that it could not reach the merits of the petitioners' claims unless the proposed rule first fell into one of the two exceptions listed in *Teague*. *Sawyer*, 497 U.S. at 229; *Saffle*, 494 U.S. at 486; *Butler*, 494 U.S. at 415.

85. *Butler* was decided on March 5, 1990. *Butler*, 494 U.S. at 407. *Saffle* was decided the same day, but appears after *Butler* in the United States Reports. *Saffle*, 494 U.S. at 484. *Sawyer* was decided June 21, 1990. *Sawyer*, 497 U.S. at 227.

86. *Butler*, 494 U.S. at 411. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

87. 486 U.S. 675 (1988).

88. *Butler*, 494 U.S. at 408-09.

89. *Id.* at 411.

90. *Id.* at 415-16.

91. *Id.* at 415 (stating that the first exception is "clearly inapplicable").

92. *Id.* at 416. The Court stated that police interrogation that continued after a suspect requested counsel would not lessen the chance of an accurate conviction but would in fact increase the chance of an accurate conviction. *Id.*

93. See *infra* notes 95-96 and accompanying text.

his rights under the Eighth Amendment⁹⁴ were violated by a judge's instruction to the jury to avoid the influence of sympathy when evaluating the mitigating evidence during the sentencing portion of the trial.⁹⁵ Similarly, in *Sawyer v. Smith* the petitioner claimed that the prosecutor's statement to the jury that the jurors were not ultimately responsible for the imposition of the capital sentence violated his Eighth Amendment rights.⁹⁶ The Court determined that neither of these rules met either *Teague* exception.⁹⁷

In *Saffle*, after determining that the proposed rule did not meet *Teague*'s first exception,⁹⁸ the Court defined the second exception as "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."⁹⁹ While the Court said that the exact scope of the exception was difficult to determine, it cited the defendant's right to counsel established in *Gideon v. Wainwright*¹⁰⁰ as an example of a constitutional rule that would fall inside *Teague*'s second exception.¹⁰¹

In *Sawyer*, the Court quickly found that the petitioner's proposed rule did not come within the first *Teague* exception.¹⁰² The Court then stated that the petitioner had failed to meet the heavy burden required to fall within *Teague*'s second exception—his proposed rule did not both adequately improve the accuracy and fairness of sentencing judgments and "alter our understanding of the *bedrock procedural elements*" vital to the

94. The Eighth Amendment guarantees that "cruel and unusual punishments [shall not be] inflicted." U.S. CONST. amend. VIII.

95. 494 U.S. 484, 486 (1990).

96. 497 U.S. 227, 231-32 (1990).

97. *Id.* at 245; *Saffle*, 494 U.S. at 494-95.

98. *Saffle*, 494 U.S. at 494-95 (stating that the proposed rule in this case did not fit within the first exception, which covers rules that would decriminalize a class of conduct or forbid the imposition of the death penalty on a certain class of people).

99. *Id.* at 495 (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion)).

100. 372 U.S. 335 (1963).

101. *Saffle*, 494 U.S. at 495.

102. *Sawyer*, 497 U.S. at 241. In particular, the Court stated:

The first [exception] applies to new rules that place an entire category of primary conduct beyond the reach of the criminal law, or new rules that prohibit imposition of a certain type of punishment for a class of defendants because of their status or offense. This exception has no application here.

Id. (citations omitted).

fairness of a sentencing.¹⁰³ Even though the Court was willing to assume that the proposed rule would increase the accuracy of sentencing judgments, the Court declined to find that this rule was a "bedrock procedural element."¹⁰⁴ The Court expressed concern that if *Sawyer's* proposed rule were found to satisfy the "bedrock procedural element" requirement of the second *Teague* exception, then every new rule concerning capital punishment could be found to satisfy this requirement.¹⁰⁵ By setting a high standard a rule must meet in order to qualify as a "bedrock procedural element," the Court saw itself as preventing *Penry* from being overruled.¹⁰⁶ *Penry* had stated that *Teague* applied to new rules of capital sentencing.¹⁰⁷ Unless *Teague's* second exception was viewed narrowly, the Court believed that *Teague* would no longer apply to new rules concerning capital sentencing because, due to the accuracy concerns present in these rules, all such rules would fall within its second exception.¹⁰⁸

Having decided that none of the petitioners' constitutional rules could be applied to cases on federal habeas review, the Court refused to determine any of the cases on their merits.¹⁰⁹ These three cases illustrate the Court's eagerness to read the "new rule" requirement broadly and the *Teague* exceptions narrowly.¹¹⁰ These tendencies reflect the Court's concern that habeas corpus review has become disruptive, costly, and less effective at deterring unconstitutional conduct by state courts.¹¹¹ The Court believes that only by sticking to a narrow interpreta-

103. *Id.* at 242 (quoting *Teague*, 489 U.S. at 311 (plurality opinion) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in part, dissenting in part))).

104. *Id.* at 243.

105. *Id.*

106. *Id.*

107. *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989).

108. *Sawyer*, 497 U.S. at 243.

109. See *supra* note 84. Some commentators complain that this refusal to consider potential rules of constitutional law on habeas review has a negative effect on the Court's ability to analyze substantive law. See Markus Dirk Dubber, *Prudence and Substance: How the Supreme Court's New Habeas Retroactivity Doctrine Mirrors and Affects Substantive Constitutional Law*, 30 AM. CRIM. L. REV. 1, 25-26 (1992). Concern also exists regarding the impacts of these refinements of *Teague* on habeas petitioners currently sentenced to death. See Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1991).

110. See *supra* notes 81-109 and accompanying text.

111. See, e.g., *Teague v. Lane*, 489 U.S. 288, 308-10 (1989).

tion of *Teague's* exceptions can state courts rely on their decisions being upheld as long as they adhered to constitutional law as it stood when the conviction occurred.¹¹²

4. Retroactivity Analysis and Cases on Direct Review: *Apprendi v. New Jersey* and *Ring v. Arizona*

Although the retroactivity of cases that reach the Supreme Court on *federal habeas review* is determined as a threshold matter, the retroactivity of cases the Supreme Court adjudicates while on *direct review* is not as clear. In *Apprendi v. New Jersey*¹¹³ and *Ring v. Arizona*,¹¹⁴ the Supreme Court granted certiorari to each petitioner on direct review and found each entitled to the constitutional rule he proposed.¹¹⁵ Each of these cases dealt with a Sixth Amendment¹¹⁶ challenge to a state law's sentencing structure. In *Apprendi*, the appellant pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and later received an enhanced sentence based on the trial judge's finding that the crime was triggered by racial bias.¹¹⁷ In *Ring*, a jury convicted the appellant of felony murder occurring in the course of an armed robbery.¹¹⁸ Ring was sentenced to death after a trial judge determined that Ring was the actual killer during the robbery, that aggravating factors existed, and that no substantial mitigating factors were present.¹¹⁹ In both cases, the Supreme Court found that the defendants' right to a jury trial under the Sixth Amendment was

112. *Id.* Not all would cabin the purposes of habeas corpus so tightly. See *id.* at 327–29 (Brennan, J., dissenting). Some commentators have stated that this quasi-cost/benefit analysis should change in cases involving capital punishment. See David R. Dow, *Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23, 41–50 (1991); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160, 163 (1991). Others question whether the Court's perception of habeas petitions as overly time-consuming and costly is well founded. See Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L & SOC. CHANGE 637 (1991).

113. 530 U.S. 466 (2000).

114. 536 U.S. 584 (2002).

115. *Id.* at 609; *Apprendi*, 530 U.S. at 490.

116. The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. CONST. amend. VI.

117. *Apprendi*, 530 U.S. at 469–70.

118. *Ring*, 536 U.S. at 590.

119. *Id.* at 594–95.

violated¹²⁰ because defendants are entitled to a jury determination of every fact—except for a prior conviction—that is necessary for them to be eligible for the ultimate sentence.¹²¹ Under *Griffith v. Kentucky*¹²² these holdings applied automatically to all defendants whose convictions were not yet final, such as those proceeding through the phases of direct review,¹²³ but the Court did not directly address whether or not these constitutional rules applied retroactively to petitioners on habeas review. To date, at least eight circuit courts have found *Apprendi*'s rule not to be retroactive to cases on habeas review,¹²⁴ but the Ninth Circuit's recent determination in *Summerlin v. Stewart*¹²⁵ has created a split among the federal circuits concerning the retroactivity of *Ring*.¹²⁶

5. Previous Federal Circuit Court Determinations Regarding the Retroactivity of *Ring v. Arizona*

Two federal circuits have already determined that the Supreme Court's decision in *Ring v. Arizona*—a case that was before the court on *direct review*—does not apply retroactively to petitioners on *federal habeas review*.¹²⁷ In 2002, the Tenth Circuit made this determination in *Cannon v. Mullin*.¹²⁸ In this case, the court dealt with a petitioner's request for permission to file a second federal habeas petition.¹²⁹ Cannon, previously sentenced to death by an Oklahoma jury, said that his death sentence violated the Constitution because the jury had not

120. *Id.* at 609; *Apprendi*, 530 U.S. at 491–92.

121. *Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 490.

122. 479 U.S. 314 (1987).

123. See *supra* notes 34, 56 and accompanying text.

124. See *Coleman v. United States*, 329 F.3d 77, 82 (2d Cir. 2003); *Curtis v. United States*, 294 F.3d 841, 843–44 (7th Cir. 2002); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002); *Goode v. United States*, 305 F.3d 378, 382–85 (6th Cir. 2002); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 673 (9th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1256–58 (11th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 997–1000 (8th Cir. 2001); *United States v. Sanders*, 247 F.3d 139, 147–51 (4th Cir. 2001).

125. 341 F.3d 1082 (9th Cir. 2003) (en banc).

126. See *infra* notes 127–53, 210 and accompanying text.

127. See *Turner v. Crosby*, 339 F.3d 1247, 1286 (11th Cir. 2003); *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002).

128. *Cannon*, 297 F.3d at 994.

129. *Id.* at 991; see 28 U.S.C. § 2244(b)(3)(A) (2003) (“Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.”).

been instructed that, in order to impose the death sentence, it needed to find that any aggravating factors it found outweighed any mitigating factors beyond a reasonable doubt.¹³⁰ Cannon claimed that the lack of this jury instruction made his death sentence unconstitutional under *Apprendi* and *Ring*.¹³¹ The Tenth Circuit never reached the merits of this claim, because it found that even if such a jury instruction violated *Apprendi* and *Ring*, those decisions were not retroactive to federal habeas petitioners and consequently the court had no authority to issue a second writ.¹³²

The court denied Cannon's request based on the Supreme Court's holding in *Tyler v. Cain*¹³³ that a rule is not retroactive for the purposes of determining whether a petitioner may bring a successive habeas petition under 28 U.S.C. § 2244(b)(2)¹³⁴ unless the Supreme Court itself has expressly held the rule to be retroactive to federal habeas petitioners.¹³⁵ Drawing on language from Justice O'Connor's concurrence in *Tyler*, the circuit court held that unless Cannon could prove that the Court's holdings in *Apprendi* and *Ring* were not new rules, Cannon could only gain relief from the *Ring* rule if he could show that the Supreme Court had previously made it retroactive to cases on federal habeas review.¹³⁶

The Tenth Circuit also denied Cannon's claim that the *Ring* rule was not subject to a *Teague* retroactivity analysis. The Supreme Court had previously held that only rules of procedure, not substantive criminal statutes, were subject to a

130. *Cannon*, 297 F.3d at 992.

131. *Id.* at 991; see *supra* notes 117–21 and accompanying text (describing the standards established by *Apprendi* and *Ring*).

132. See 28 U.S.C. § 2244(b)(2).

A claim presented in a second or successive habeas corpus application under section 2254 shall be dismissed unless—(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral [habeas corpus] review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

133. 533 U.S. 656 (2001).

134. See *supra* note 132.

135. *Tyler*, 533 U.S. at 663.

136. *Cannon*, 297 F.3d at 993–94.

Teague retroactivity analysis.¹³⁷ The Court found that a *Teague* analysis did not apply to proposed constitutional rules that asked the Court to interpret the meaning of a substantive criminal statute enacted by Congress.¹³⁸ The Tenth Circuit declined to find that the rule established in *Ring* was similar to such a rule.¹³⁹ It held that *Ring*'s rule was procedural for retroactivity purposes because *Ring* was based on the Sixth Amendment and therefore merely an extension of *Apprendi* to the capital sentencing context,¹⁴⁰ and the *Apprendi* rule had recently been found by the Tenth Circuit to be procedural.¹⁴¹

The Eleventh Circuit addressed the issue of *Ring*'s retroactivity even more recently in *Turner v. Crosby*.¹⁴² Turner, who had been convicted of two counts of first-degree murder¹⁴³ and sentenced to death on one of those counts,¹⁴⁴ claimed that his Sixth Amendment rights had been violated under the standard established in *Ring*.¹⁴⁵ Turner asserted that Florida's capital sentencing structure—in which a jury presents an advisory sentence of life imprisonment or death to the trial judge, but the trial judge is not bound by the jury's recommendation—violated *Ring*.¹⁴⁶ The court first determined that since Turner had not raised this claim before the Florida courts, he was procedurally barred from presenting this claim on federal habeas review,¹⁴⁷ but it went on to consider in dicta whether *Ring* would apply retroactively to Turner even if he were not procedurally barred.¹⁴⁸

137. *Id.* at 994 (stating that *Bousley v. United States*, 523 U.S. 614 (1998), held that "*Teague*'s retroactivity analysis does not apply to substantive interpretations of criminal statutes").

138. *Bousley*, 523 U.S. at 620.

139. *Cannon*, 297 F.3d at 994.

140. *Id.*

141. *Id.* (stating that in *United States v. Mora*, 293 F.3d 1213 (10th Cir. 2002), the court found *Apprendi* to establish a rule that was procedural for *Teague* purposes).

142. 339 F.3d 1247 (11th Cir. 2003).

143. *Id.* at 1261.

144. *Id.* at 1267.

145. *Id.* at 1280; see *supra* notes 117–21 and accompanying text (describing the standards established by *Apprendi* and *Ring*).

146. *Turner*, 339 F.3d at 1280.

147. *Id.* at 1281–82 (stating that when a state habeas corpus petitioner does not properly raise federal claims in state court, the petitioner is barred from presenting the same claim in federal court unless there is a showing of cause for and actual prejudice from the default).

148. *Id.* at 1282.

The Eleventh Circuit first found that *Ring* was a procedural rule for the purposes of a *Teague* analysis.¹⁴⁹ Like the Tenth Circuit, the Eleventh Circuit had previously found *Apprendi* to be a rule of criminal procedure,¹⁵⁰ and the *Turner* court determined that *Ring* merely extended the *Apprendi* rule to the capital sentencing context and was procedural for retroactivity purposes.¹⁵¹ The court then evaluated whether or not the *Ring* rule fell within the *Teague* exceptions.¹⁵² The court concluded that *Ring*'s rule clearly did not fall within the first *Teague* exception and that because the rule did not enhance the likelihood of more accurate sentencing determinations, *Turner* could not find protection in the second exception either.¹⁵³

In light of these decisions of the Tenth and Eleventh Circuits, a close examination and analysis of the Ninth Circuit's holding in *Summerlin*—determining that *Ring* is retroactive for *Teague* purposes—is both intriguing and valuable.

II. A NEW APPROACH TO *RING* v. *ARIZONA*: *SUMMERLIN* v. *STEWART*

Like the petitioners in *Turner* and *Ring*,¹⁵⁴ Warren Summerlin was found guilty of murder by a jury, and he was then sentenced to death based on the determination of a trial judge.¹⁵⁵ A closer look at the facts of *Summerlin*, however, demonstrates that the unique qualities of this case extend far beyond the holding ultimately reached by the Ninth Circuit.

After Brenna Bailey, a delinquent-account investigator for Finance America, was reported missing on April 29, 1981, an anonymous caller informed police that Summerlin had murdered Bailey.¹⁵⁶ The next day police officers found Bailey's car a

149. *Id.* at 1284–85.

150. *See McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001).

151. *Turner*, 339 F.3d at 1284 (“Just as *Apprendi* ‘constitutes a procedural rule because it dictates what fact-finding procedure must be employed,’ *Ring* constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing.” (quoting *United States v. Sanders*, 247 F.3d 139, 147 (4th Cir. 2001), *cited with approval in McCoy*, 266 F.3d at 1256)).

152. *Id.* at 1285–86; *see also supra* notes 102–03 and accompanying text (describing the two exceptions of *Teague*).

153. *Turner*, 339 F.3d at 1285–86.

154. *See supra* notes 119–46 and accompanying text.

155. *Summerlin v. Stewart*, 341 F.3d 1082, 1088, 1090 (9th Cir. 2003) (en banc); *see supra* notes 1–4 and accompanying text.

156. *Summerlin*, 341 F.3d at 1084–85. The caller was later found to be

mile from Summerlin's house with Bailey's body in the trunk.¹⁵⁷ While a search warrant was being executed at Summerlin's house, Summerlin made some incriminating statements, which precipitated his arrest for the murder of Bailey.¹⁵⁸

The state trial court appointed an attorney from the public defender's office to represent Summerlin.¹⁵⁹ This attorney negotiated an extremely favorable plea agreement with the prosecutor under which Summerlin would plead guilty to second-degree murder and aggravated assault.¹⁶⁰ This deal fell through, however, in part due to the fact that Summerlin's attorney had a romantic encounter with the prosecutor.¹⁶¹ As a result of this conflict of interest, Summerlin's attorney withdrew, and the Arizona Attorney General's Office took control of the prosecution of the case—taking the plea off the table.¹⁶² After the jury convicted Summerlin of first-degree murder and sexual assault,¹⁶³ Judge Marquardt sentenced Summerlin to death.¹⁶⁴ The judge was later discovered to be a heavy user of marijuana,¹⁶⁵ and although the district court did not allow discovery on the issue of the amount of marijuana that he was using during Summerlin's sentencing, the Ninth Circuit found support in the record for Summerlin's contention that the judge was having "short-term memory loss" or "difficulty concentrating."¹⁶⁶

Like the facts of *Summerlin*, the procedural posture of the case differs from any of the cases this Comment has so far examined. After Summerlin's conviction and death sentence had been affirmed on direct appeal by the Arizona Supreme Court,¹⁶⁷ Summerlin made an initial petition for habeas corpus in federal district court as well as four postconviction attempts in state court to overturn his conviction.¹⁶⁸ After these endeav-

Summerlin's mother-in-law. *Id.* at 1085. She stated that she knew Summerlin had murdered Bailey because of her daughter's "extra-sensory perception." *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 1086.

161. *Id.* at 1086–87.

162. *Id.*

163. *Id.* at 1088.

164. *Id.* at 1090.

165. *Id.* at 1089.

166. *Id.* at 1090.

167. *State v. Summerlin*, 675 P.2d 686 (Ariz. 1983).

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

ors proved unsuccessful, Summerlin filed an amended petition in federal court for a writ of habeas corpus under 28 U.S.C. § 2254.¹⁶⁹ The federal district court denied Summerlin's petition, and Summerlin moved to vacate the district court's judgment under Federal Rule of Civil Procedure 59(e).¹⁷⁰ The district court denied this motion, but did issue a certificate of probable cause, which made it possible for Summerlin to appeal under Federal Rule of Appellate Procedure 22(b)(1).¹⁷¹ On appeal to the Ninth Circuit, a three-judge panel issued an opinion and remanded the case to the district court for an evidentiary hearing to determine whether the judge who sentenced Summerlin was competent at the time when he deliberated the imposition of the death penalty.¹⁷² Soon after the case was remanded, the Supreme Court granted certiorari in *Ring*.¹⁷³ Since this enabled the Supreme Court to reconsider the constitutionality of judges making factual determinations necessary for the imposition of the death penalty—an issue that Summerlin had raised in his habeas petition—the Ninth Circuit withdrew its decision and waited for the Supreme Court's decision in *Ring*.¹⁷⁴ After *Ring*, Summerlin moved to stay the Ninth Circuit's proceedings in his case so he could ask the Arizona Supreme Court to recall the mandate in his direct appeal¹⁷⁵ and consider *Ring*'s application in his case.¹⁷⁶ After the Arizona Supreme Court de-

169. *Id.*

170. *Id.*; see also FED. R. CIV. P. 59(e) (stating that parties may file a motion to amend or alter a judgment within ten days of the entry of that judgment).

171. *Summerlin*, 341 F.3d at 1091; see also FED. R. APP. P. 22(b)(1) ("In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court . . . the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability . . ."). A certificate of appealability, referred to by the Ninth Circuit as a "certificate of probable cause," *Summerlin*, 341 F.3d at 1091, may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2000).

172. *Summerlin v. Stewart*, 267 F.3d 926 (9th Cir. 2001), *rev'd on reh'g en banc*, 341 F.3d 1082 (9th Cir. 2003). In its en banc opinion, the Ninth Circuit acknowledged that there was evidence in the record that Judge Marquardt had been heavily using marijuana the weekend during which he deliberated on Summerlin's sentence. *Summerlin*, 341 F.3d at 1090.

173. *Ring v. Arizona*, 534 U.S. 1103 (2002).

174. *Summerlin v. Stewart*, 281 F.3d 836 (9th Cir. 2002).

175. Recalling the mandate is a possibility under Arizona law. For a description of this procedure, see *Lindus v. Northern Insurance Co. of New York*, 438 P.2d 311, 313 (Ariz. 1968).

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

nied this request, the Ninth Circuit panel asked for a vote of the Ninth Circuit judges to determine whether Summerlin's case should be heard en banc.¹⁷⁷ The majority of the nonrecused active judges of the Ninth Circuit Court of Appeals voted to hear Summerlin's case, which was heard en banc on December 10, 2002.¹⁷⁸

Thus, the Ninth Circuit became the third circuit court to decide whether or not the Supreme Court's determination in *Ring v. Arizona* should be applied retroactively to petitioners on federal habeas corpus review.¹⁷⁹ The court did not limit itself to determining this question, however, but proceeded in dicta to apply a *Teague* retroactivity analysis to the *Ring* rule.¹⁸⁰

The Ninth Circuit first determined that it had jurisdiction to hear Summerlin's case under 28 U.S.C. § 2253 and found Summerlin's claim that he was denied effective assistance of counsel to be unpersuasive.¹⁸¹ The court then turned to the issue of whether the Supreme Court's decision in *Ring* was subject to a *Teague* retroactivity analysis.¹⁸² The Ninth Circuit stated that if the *Ring* decision was one of substantive law, the *Teague* analysis would not be applicable in determining whether the *Ring* rule applies retroactively to cases on federal habeas corpus review.¹⁸³ If the *Ring* decision was procedural, it would apply retroactively to petitioners like Summerlin only if it was a rule that had essentially existed before *Ring* or if it fell within one of the two *Teague* exceptions.¹⁸⁴ After acknowledging that the rule in *Ring* had some procedural aspects,¹⁸⁵ the Ninth Circuit determined that *Ring* should be considered substantive and not subject to a *Teague* retroactivity analysis.¹⁸⁶ The Ninth

177. *Id.* at 1092.

178. *Id.*

179. See *supra* notes 127–53 and accompanying text; *infra* note 182 and accompanying text.

180. See *Summerlin*, 341 F.3d at 1108 (stating that “a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review”).

181. *Id.* at 1092–96.

182. *Id.* at 1096.

183. *Id.* at 1099 (“The threshold question . . . is whether the rule the petitioner seeks to apply is a substantive rule or a procedural rule, because ‘*Teague* by its terms only applies to procedural rules.’” (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998))).

184. *Id.*

185. *Id.* at 1101 (stating that the *Ring* rule is procedural in the sense that it affects the process by which capital sentencing must take place).

186. *Id.* at 1108.

Circuit reasoned that because the *Ring* Court found Arizona's capital murder statute to violate the Sixth Amendment's right to a jury trial,¹⁸⁷ *Ring* was more analogous to *Bousley v. United States*¹⁸⁸ and *Richardson v. United States*¹⁸⁹—two cases in which the proposed rules were ones of substantive law—than to the rule created in *Apprendi v. New Jersey*.¹⁹⁰ The Ninth Circuit noted that the Arizona Supreme Court had previously held that *Ring* was not a substantive decision,¹⁹¹ but stated that since these decisions ultimately rested on an interpretation of federal cases, it was not bound by a state supreme court decision.¹⁹²

Although the Ninth Circuit could have declared *Ring* to be retroactive to cases on federal habeas review after determining the rule to be substantive,¹⁹³ the court performed a full *Teague* analysis on *Ring* as “an independent basis upon which to apply *Ring* retroactively to cases on collateral review.”¹⁹⁴ The court organized its analysis into a three-fold inquiry. The court first determined the date on which Summerlin's conviction became final.¹⁹⁵ The court then analyzed whether or not the result in *Ring* was compelled by the existing legal precedent on that date—whether or not it was a “new rule” for *Teague* analysis purposes.¹⁹⁶ Finally, the court considered whether the *Ring* rule fit either of the exceptions to the retroactivity bar found in *Teague*.¹⁹⁷

187. *Id.* at 1104–05.

188. 523 U.S. 614, 620 (1998) (stating that the *Teague* retroactivity analysis does not apply to a decision in which the Supreme Court had interpreted a statute).

189. 526 U.S. 813 (1999). The Ninth Circuit found the *Richardson* rule, which required that juries be unanimous when finding individual violations as pieces of a continuing criminal enterprise, to be substantive for *Teague* purposes. *United States v. Montalvo*, 331 F.3d 1052, 1055 (9th Cir. 2003) (*per curiam*).

190. 530 U.S. 466 (2000). The Ninth Circuit found the rule in *Apprendi* to not be retroactive under *Teague*. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 673 (9th Cir. 2002). In *Apprendi*, the Supreme Court stated that “[t]he substantive basis for New Jersey's enhancement is thus not at issue.” *Apprendi*, 530 U.S. at 475.

191. *State v. Towery*, 64 P.3d 828, 832 (Ariz. 2003).

192. *Summerlin*, 341 F.3d at 1106.

193. *See id.* at 1099, 1108.

194. *Id.* at 1108.

195. *See infra* note 198 and accompanying text.

196. *See infra* note 199 and accompanying text.

197. *See infra* note 200.

After determining that Summerlin's conviction had become final when his opportunity for direct review of his conviction expired¹⁹⁸ and that legal precedent at that time did not compel the decision later rendered in *Ring*,¹⁹⁹ the Ninth Circuit examined *Teague*'s two exceptions.²⁰⁰ The court decided that the first exception did not apply to the *Ring* rule,²⁰¹ but determined that since the *Ring* rule "seriously enhance[d] the accuracy of [capital sentencing hearings] and . . . alter[ed] our understanding of bedrock procedural elements essential to the fairness of [these hearings]"²⁰² it fell within *Teague*'s second exception.²⁰³ The court stated that the *Ring* rule would enhance the accuracy of a capital sentencing—a proceeding demanding an especially high degree of accuracy under the Eighth Amendment²⁰⁴—by requiring that such a weighty decision rest with a jury instead of a single judge.²⁰⁵ Juries, the Ninth Circuit stated, can be better isolated from inadmissible evidence, are more insulated from the political process, and are more representative of the moral pulse of the community.²⁰⁶ The court also decided that by enforcing the Sixth Amendment's guarantee to a trial by a jury the *Ring* rule "redefined the structural safeguards implicit in our concept of ordered liberty."²⁰⁷ The court based this decision on its findings that any future failure to follow the *Ring* rule would "constitute structural error"²⁰⁸ and that *Ring*'s impact would far exceed that of other rules which circuit courts have found to be within the second *Teague* exception.²⁰⁹ For these reasons, the Ninth Circuit determined that *Ring* met the remaining requirements of *Teague*'s second exception, and there-

198. *Summerlin*, 341 F.3d at 1108 (determining that Summerlin's conviction became final in 1984 when his opportunity to file a petition for a writ of certiorari with the Supreme Court expired).

199. *Id.* at 1109 (stating that "there is no doubt that *Ring* announced a new rule").

200. *Id.* at 1109–22.

201. *Id.* at 1109.

202. *Id.* The *Ring* rule states that under the Sixth Amendment only a judge, not a jury, can make the factual findings necessary to impose the death sentence on a defendant. *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

203. *Summerlin*, 341 F.3d at 1121.

204. *Id.* at 1109–10; *cf.* *Dow*, *supra* note 112, at 42–50; *Metzner*, *supra* note 112, at 163.

205. *Summerlin*, 341 F.3d at 1110–11.

206. *Id.* at 1113–15.

207. *Id.* at 1121.

208. *Id.* at 1117.

209. *Id.* at 1120; *see also infra* notes 244–47 and accompanying text.

fore, even if the *Ring* rule was procedural, Summerlin's death sentence would have to be vacated.²¹⁰

III. CONCURRING IN THE JUDGMENT: AN ANALYSIS OF *SUMMERLIN* AND THE POSSIBILITIES IT PRESENTS TO THE SUPREME COURT

A. THE NINTH CIRCUIT'S REASONING IS FAULTY, BUT IT REACHED THE RIGHT RESULT

1. The *Ring* Rule Was Substantive, Not Procedural

While the Ninth Circuit reached the correct determination in *Summerlin*, its opinion can be justly criticized for finding that the *Ring* rule was substantive and not procedural. Judge Rawlinson dissented from the majority opinion in *Summerlin*, declaring that the court's treatment of the *Ring* rule as one of substantive law could not be reconciled with Ninth Circuit precedent²¹¹ that the *Apprendi* rule was procedural for retroactivity purposes.²¹² Judge Rawlinson's belief that the *Ring* rule cannot be viewed as a rule concerning substantive criminal law as long as the *Apprendi* rule is seen as one of procedural law is strengthened by the Tenth and Eleventh Circuits' similar determinations. Both circuits found *Ring*'s rule to be one of procedure for *Teague* retroactivity purposes, and both emphasized that the *Ring* rule was merely an extension of the rule in *Apprendi*.²¹³

In addition to the problem of the Ninth Circuit's own precedent and the persuasive authority of two other circuits, the court's determination that *Ring*'s rule is substantive is likely outside of its authority. The Arizona Supreme Court had previously found the *Ring* rule to be one of criminal procedure.²¹⁴ The majority opinion in *Summerlin* tries to discount this by stating that the Arizona Supreme Court's determination was based on federal law and was therefore not binding on a

210. *Summerlin*, 341 F.3d at 1121.

211. *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002).

212. *Summerlin*, 341 F.3d at 1126–27 (Rawlinson, J., dissenting); see *Sanchez-Cervantes*, 282 F.3d at 668 (citing *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000)).

213. See *supra* notes 138–41, 149–51 and accompanying text.

214. *State v. Towery*, 64 P.3d 828, 833 (Ariz. 2003).

federal court.²¹⁵ This argument runs into trouble, however, when viewed in light of the Supreme Court's previous deference to the Arizona Supreme Court's portrayal of its capital sentencing law.²¹⁶ In *Ring*, the Supreme Court's holding rested in part on the Arizona Supreme Court's decision that under Arizona law a judge's factual findings were a necessary part of a defendant's death sentence.²¹⁷ The Court used this decision to help support its conclusion that the *Apprendi* majority—which had said that a jury's verdict carried the maximum penalty of death under Arizona law—had incorrectly characterized Arizona's capital punishment law.²¹⁸ Whether Arizona's death sentence is authorized by a jury's verdict or a judge's findings is key because the Supreme Court has held that under the Sixth Amendment every factual finding necessary to make a defendant eligible for a sentence must be found by a jury.²¹⁹ Similarly, whether the *Ring* decision is seen as affecting the process by which a sentence determination is made or as changing substantive criminal law is key to whether Summerlin's claim is subject to a *Teague* retroactivity analysis. While each determination has enormous implications concerning an appellant's or petitioner's fate in federal court, each is at its core a determination of the character of state law and rests properly within the authority of the state courts.²²⁰

2. The *Ring* Rule Falls Within *Teague*'s Second Exception

Even though the Ninth Circuit erred in holding that *Ring*'s rule was procedural for *Teague* purposes, the Ninth Circuit's judgment in that case—that Summerlin should be afforded the benefit of the *Ring* rule even though he is a federal habeas petitioner—is sound. This is because the Ninth Circuit correctly found that the *Ring* rule is within *Teague*'s second exception.

The Ninth Circuit based the requirements of the second *Teague* exception on Supreme Court precedent,²²¹ stating that such a rule “must (1) seriously enhance the accuracy of the proceeding and (2) alter our understanding of bedrock procedural

215. *Summerlin*, 341 F.3d at 1106.

216. *Id.* at 1127–28 (Rawlinson, J., dissenting).

217. *Ring v. Arizona*, 536 U.S. 584, 603 (2002).

218. *See id.* at 603, 609

219. *See supra* note 121 and accompanying text.

220. *See* *Fid. Union Trust Co. v. Field*, 311 U.S. 169, 177 (1940) (“The highest state court is the final authority on state law . . .” (citations omitted)).

221. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

elements essential to the fairness of the proceeding.²²² The court first found the accuracy for sentencing hearings to be enhanced by *Ring's* requirement that only juries, not judges, can impose the death sentence on an individual.²²³

In order to evaluate *Summerlin* one must first determine what an "accurately decided" death sentence entails. In a decision of guilt or innocence, jurors are required to determine whether or not the facts necessary to constitute the elements of the crime have been proven beyond a reasonable doubt.²²⁴ In capital sentencing decisions, jurors still must determine whether or not aggravating factors are present beyond a reasonable doubt, but they are allowed to take into consideration any substantial mitigating factor.²²⁵ This more flexible framework for sentencing decisions reflects the unique need for individualized sentencing in a capital context,²²⁶ which is based not only on the lack of usual instruments used to modify a sentence—such as probation or work release²²⁷—but also on the Court's recognition that "in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'"²²⁸ The accuracy of a capital sentencing decision, therefore, is properly viewed as dependent on whether or not the sentencing party has applied community moral values when considering mitigating and aggravating factors. It is counterintuitive to ask one judge to act in accordance with the community's conscience because twelve jurors selected from all walks of life are likelier to have a fuller view of what the community actually values. Given the goals of capital sentencing, jury sentencing decisions are inherently more accurate, and *Ring's* rule "improve[s] [the] accuracy"²²⁹ of capital sentencing decisions.

In addition to increasing the accuracy of capital sentencing proceedings, *Ring's* rule also "alter[ed] our understanding of

222. *Summerlin v. Stewart*, 341 F.3d 1082, 1109 (9th Cir. 2003) (en banc); see *Sawyer*, 497 U.S. at 242 (citing *Desist v. United States*, 394 U.S. 244, 262 (1969) and *Teague v. Lane*, 489 U.S. 288, 311 (1989)).

223. See *supra* notes 205–06 and accompanying text.

224. *In re Winship*, 397 U.S. 358, 364 (1970).

225. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

226. *Id.*

227. See *id.*

228. *Jones v. United States*, 527 U.S. 373, 382 (1999) (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)).

229. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

bedrock procedural elements essential to the fairness of the proceeding.²³⁰ The Ninth Circuit determined that the *Ring* rule met this criterion in part based on its determination that *Ring* violations will be considered structural error—not subject to harmless error analysis.²³¹ Structural error is defined as a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.”²³² In contrast, the Supreme Court has found that harmless error—“error that does not affect a party’s substantive rights or the case’s outcome”²³³—does not require a conviction to be overturned.²³⁴

The Court has found structural error to exist in the Sixth Amendment context in situations such as that in *Sullivan v. Louisiana*.²³⁵ In that case, the Court found that a deficient reasonable-doubt instruction was not subject to harmless error analysis.²³⁶ The *Sullivan* Court stated that a constitutionally defective reasonable-doubt instruction corrupts all of the jury’s findings.²³⁷ If the Court is not willing to allow a conviction to stand where a jury received a constitutionally defective reasonable-doubt instruction, findings that were never made by the constitutionally mandated body, such as by a judge rather than a jury in *Summerlin*, are arguably more corrupted and should be viewed as structural error.

In his dissent in *Summerlin*, Judge Rawlinson countered this argument by stating that the *Ring* Court clearly held that *Ring* violations would not constitute structural error.²³⁸ Although the Court stated in a footnote that it would allow the lower courts to decide whether the alleged error in this case was harmless,²³⁹ it is a stretch to characterize this as a statement that the Supreme Court will not view *Ring* violations as structural. The Supreme Court did not explicitly decide whether errors under *Ring* would be structural or harmless,

230. See *supra* note 221–22 and accompanying text.

231. *Summerlin v. Stewart*, 341 F.3d 1082, 1119 (9th Cir. 2003).

232. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

233. BLACK’S LAW DICTIONARY 243 (2d pocket ed. 2001).

234. See *Chapman v. California*, 386 U.S. 18, 22 (1967).

235. 508 U.S. 275 (1993).

236. See *id.* at 280.

237. *Id.* at 281.

238. *Summerlin v. Stewart*, 341 F.3d 1082, 1131–32 (9th Cir. 2003) (Rawlinson, J., dissenting).

239. *Ring v. Arizona*, 536 U.S. 584, 609 n.7 (2002).

and in light of its precedent in *Sullivan*,²⁴⁰ the Ninth Circuit was correct to determine that the errors are structural.

Having determined that *Ring* errors are structural, they can be found to meet the final criterion of *Teague*'s second exception more easily.²⁴¹ The Court has said that once structural error is present in a proceeding, "no criminal punishment may be regarded as fundamentally fair."²⁴² Having determined *Ring*'s error to be structural, the Ninth Circuit vacated the death sentences of all capital defendants in its jurisdiction who had been sentenced to death by a judge rather than a jury.²⁴³ The impact of the court's ruling demonstrates how the *Ring* rule alters procedural notions of justice and thus meets *Teague*'s second exception. This determination is strengthened when considered alongside the other rules that have been found by other circuits to meet *Teague*'s second exception.²⁴⁴ For example, the Fourth Circuit found that the *Mills/McKoy* rule²⁴⁵ was retroactive under *Teague*'s second exception.²⁴⁶ The Court in *Mills* struck down the petitioner's capital sentence due to the likelihood that the verdict form made jurors think they were unable to consider mitigating evidence unless they unanimously agreed that a mitigating circumstance existed.²⁴⁷ Sentencing decisions made in violation of *Mills/McKoy* dealt only with potential juror misunderstandings and consequent constitutional violations. *Ring* violations are more damaging as they are a clear deprivation of Sixth Amendment rights, and they therefore meet the second exception of *Teague* even more easily.

For the above reasons, the Ninth Circuit correctly found the *Ring* rule to be within *Teague*'s second exception, and the judgment in *Summerlin* is justified on those grounds.

240. See *supra* notes 235–37 and accompanying text.

241. See *supra* note 103 and accompanying text (describing the final criterion for the second *Teague* exception).

242. *Rose v. Clark*, 478 U.S. 570, 578 (1986).

243. See *supra* note 17.

244. See *Summerlin v. Stewart*, 341 F.3d 1082, 1120 (9th Cir. 2003) (en banc).

245. *Mills v. Maryland*, 486 U.S. 367 (1988); *McKoy v. North Carolina*, 494 U.S. 433 (1990).

246. *Williams v. Dixon*, 961 F.2d 448, 459 (4th Cir. 1992).

247. See *Mills*, 486 U.S. at 383–84.

B. *SUMMERLIN* PROVIDES THE SUPREME COURT WITH A VALUABLE OPPORTUNITY TO REVISE ITS APPROACH TOWARD RETROACTIVITY IN HABEAS APPEALS BY CAPITAL PRISONERS

An analysis of the Ninth Circuit's reasoning in *Summerlin* is worthwhile in light of the guidance it can give to other courts, but *Summerlin* itself is also interesting because of the opportunity it provides to the Supreme Court. The Supreme Court has granted certiorari and agreed to review the Ninth Circuit's decision,²⁴⁸ enabling the Court to refine the approach it takes towards retroactivity analysis in cases dealing with capital sentencing. When reviewing the Ninth Circuit's decision in *Summerlin*, the Court should declare that any new constitutional rule whose violation the Court would deem to constitute *structural error* should be found to meet the requirements of *Teague's* second exception in capital sentencing cases.²⁴⁹ The Court should announce this approach because (1) the Court's approach to capital punishment sentencing decisions would be more consistent, (2) AEDPA has already ensured that states' interest in finality is safe-guarded, and (3) this new rule would not require the Court to overrule any existing precedent.

Perhaps the most powerful reason for the Supreme Court to adopt this proposed rule is that it would make the Court's approach to capital punishment sentencing decisions more consistent. Many of the Supreme Court's decisions concerning capital sentencing decisions emphasize that the Eighth Amendment creates a heightened requirement for procedural rights in the capital context that does not exist in the normal sentencing context. For example, under *Lockett v. Ohio*,²⁵⁰ a capital defendant can appeal his or her sentence based on the fact that the jury was not allowed to consider a relevant mitigating factor.²⁵¹ In any sentencing context outside of the capital context, there is no similar requirement.²⁵² In *Ring*, while the

248. See *supra* note 20 and accompanying text.

249. See Metzner, *supra* note 112, at 187 (proposing this solution, but not discussing all of the following rationales).

250. 438 U.S. 586 (1978).

251. See *supra* note 225 and accompanying text.

252. See *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) ("[O]ur cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.").

Court based its holding on the Sixth Amendment,²⁵³ the Court reaffirmed its position that the Eighth Amendment places substantive restraints on capital sentencing procedures.²⁵⁴

Justice Ginsburg's opinion of the Court in *Ring* was joined by four other Justices.²⁵⁵ Although Justice Scalia, who joined the opinion of the Court, wrote separately to state that the Eighth Amendment ought not to impose procedural requirements on states,²⁵⁶ Justice Breyer's concurrence states that jury sentencing in capital cases is required by the Eighth Amendment.²⁵⁷ Therefore, in a very recent opinion of the Supreme Court, a majority of Justices continue to believe that the Eighth Amendment limits a state's discretion more greatly in the capital sentencing context—that death is different. It is odd for the Court to insist that the Eighth Amendment requires more from states in capital sentencing than in other criminal contexts, yet to apply *Teague's* second exception—designed to allow all defendants to exercise key procedural rights—no differently in capital sentencing situations.²⁵⁸ By declaring that any new constitutional rule whose violation the Court would deem to constitute structural error falls within *Teague's* second exception in capital sentencing cases, the Court would affirm its stance that death is different.

In addition to increasing the consistency of the Court's treatment of capital punishment, the adoption of AEDPA²⁵⁹ has addressed the apprehensions of those concerned with states' interest in the finality of judgments and in timely execution of death-row inmates. The Supreme Court has made it clear that federal habeas review must be exercised with respect for states' interest in finality of judgments.²⁶⁰ Finality, however, cannot be the only value to consider when formulating rules to apply in

253. See *supra* note 120 and accompanying text.

254. *Ring v. Arizona*, 536 U.S. 584, 606 (2002) (“[O]ur cases have insisted that the channeling and limiting of the sentencer’s discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.” (citing *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988))).

255. *Id.* at 587.

256. *Id.* at 610 (Scalia, J., concurring).

257. *Id.* at 614 (Breyer, J., concurring).

258. For a similar argument, but one made in 1991 without the benefit of the *Ring* opinion, see Metzner, *supra* note 112, at 180–81.

259. See *supra* notes 31, 37–39 and accompanying text (describing AEDPA).

260. See *supra* notes 63–64, 79 and accompanying text.

federal habeas review. If it was, the existence of federal habeas review of state court judgments could not be explained. Habeas review is also concerned with the policy "that [at least some] federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."²⁶¹

The states' interest in finality of judgments has also been addressed through the recent enactment of AEDPA.²⁶² For example, AEDPA amends 28 U.S.C. § 2244 so that state prisoners now have a one-year statute of limitations on the time in which they can file an application for a writ of habeas corpus in federal court.²⁶³ AEDPA also imposes strict limits on a prisoner's ability to file successive petitions for habeas corpus.²⁶⁴ Given these new and significant limitations on a prisoner's ability to gain relief in federal court based on the writ, it is appropriate for the Court to consider interests besides finality when considering its approach to retroactivity in the capital sentencing context. The structural error rule embodies an individual's interest in being able to benefit from full constitutional protections, and thus would be a good counterweight to AEDPA's protection of states' interest in finality.

In addition to the above justifications for the structural error rule, it is important to note that its adoption would not require the Supreme Court to overrule any precedent. While this is not in itself an independent reason to enact a rule, it does make adoption of a new legal approach less frightening to judicial conservatives.²⁶⁵ While Supreme Court precedent has made it clear that constitutional rules concerning capital sentencing determinations are subject to the *Teague* retroactivity analysis,²⁶⁶ no previous decision has precluded the Court from treating capital sentencing cases differently within the *Teague* framework. In *Penry v. Lynaugh*,²⁶⁷ the Court did not even apply the petitioner's proposed rule to the *Teague* exceptions.²⁶⁸ In

261. *Fay v. Noia*, 372 U.S. 391, 424 (1963).

262. *See supra* notes 37–38 and accompanying text.

263. 28 U.S.C. § 2244(d)(1) (2003).

264. *See id.* § 2244(b); *supra* note 132.

265. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) ("[T]he doctrine of *stare decisis* is of fundamental importance to the rule of law.").

266. *See supra* note 79 and accompanying text.

267. 492 U.S. 302 (1989).

268. *See supra* note 78 and accompanying text (stating that the *Penry* rule was not a "new rule" and therefore not subject to *Teague's* retroactivity analy-

Butler v. McKellar,²⁶⁹ *Saffle v. Parks*,²⁷⁰ and *Sawyer v. Smith*,²⁷¹ the Court found that the proposed rules fell outside of *Teague*'s second exception,²⁷² but the Court did not define the exact scope of the exception.²⁷³ In *Sawyer*, the Court did express concern of finding capital sentencing rules to automatically meet the requirements of *Teague*'s second exception because of fear that this would require the Court to overrule *Penry*.²⁷⁴ The proposed rule, however, would not require *Penry* to be overruled.²⁷⁵ The Court could adopt the proposed rule and still use the *Teague* retroactivity framework in capital sentencing cases. The Court could recognize that due to the heightened concern for accuracy and fairness in capital sentencing decisions (embodied in stricter procedural requirements under the Eighth Amendment), both criteria of *Teague*'s second exception²⁷⁶ are more easily met by rules in capital sentencing cases. Given the Supreme Court's heightened concern for correct procedure in capital cases, and AEDPA's emphasis on helping states to execute capital sentences within a reasonable amount of time, the adoption of the proposed rule would neither constitute a grave departure from precedent nor an abandonment of the principles of finality which the Court has emphasized in the past.

CONCLUSION

Summerlin v. Stewart presents an intersection of capital sentencing jurisprudence and retroactivity analysis. By determining that *Ring v. Arizona* applies retroactively to petitioners on federal habeas review, the Ninth Circuit has created a circuit split and has given the Supreme Court the opportunity to revisit its approach to the retroactivity of constitutional rules relating to capital sentencing decisions.

The Ninth Circuit's conclusion is based on the faulty premise that the *Ring* rule is substantive for *Teague* purposes, but

sis).

269. 494 U.S. 407 (1990).

270. 494 U.S. 484 (1990).

271. 497 U.S. 227 (1990).

272. See *supra* notes 92, 97 and accompanying text.

273. See *supra* note 101 and accompanying text.

274. See *supra* note 108 and accompanying text.

275. See *supra* note 107 and accompanying text (stating that *Penry* held that constitutional rules dealing with capital sentencing were subject to a *Teague* analysis).

276. See *supra* note 222 and accompanying text.

its analysis of the *Ring* rule and its relation to the second *Teague* exception provides valuable guidance for other circuits. In addition, the *Summerlin* opinion is a good springboard for a refinement of the Supreme Court's retroactivity analysis. On review, the Supreme Court should find that any new constitutional rule whose violation the Court would deem to constitute structural error should be found to meet the requirements of *Teague's* second exception in capital sentencing cases. This rule is justified on three grounds. First, it would make Supreme Court precedent regarding the Eighth Amendment and capital punishment more consistent. Second, in light of the limitations placed on federal habeas petitions under AEDPA, it is necessary to recognize values besides finality that are present in habeas review. Finally, existing retroactivity precedent has left the door open for this type of refinement of retroactivity analysis.