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SUMMERLIN V. STEWART AND *RING* RETROACTIVITY

TONYA G. NEWMAN*

INTRODUCTION

The Sixth Amendment guarantees a trial by an impartial jury to all persons accused of a crime.[1] This right to be judged by one's peers is a cornerstone of the criminal justice system. Citing the deprivation of the right to trial by jury among King George's offenses,[2] those who signed the Declaration of Independence recognized the right as an "invaluable heritage [which was] firmly established as a juridical factor long before the rise of the United States."[3] The framers of the United States Constitution shared the view, believing that a trial before a jury of one's peers was a crucial element of the fair dispensation of justice.[4] In fact, so central was the right to trial by jury that the framers included the right not only in the Bill of Rights, but also in the body of the Constitution itself.[5] However, prior to the United States Supreme Court's decision in *Ring v. Arizona*,[6] five states denied capital murder defendants the right to have a jury make factual determinations in sentencing, and an additional four states allowed

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1. U.S. CONST. amend. VI.

2. JOHN GUINTHER. THE JURY IN AMERICA 31 (1988).

3. MAXIMUS A. LESSER, THE HISTORICAL DEVELOPMENT OF THE JURY SYSTEM 151 (William S. Hein & Co. 1992) (1894); *see also, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 151 (1968) ("[B]y the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta.").

4. Alexander Hamilton noted that the attendees of the Constitutional Convention agreed on the necessity of trial by jury, although for different reasons. Some held it "as a valuable safeguard to liberty," while others held it in even greater esteem, "as the very palladium of free government." THE FEDERALIST NO. 83, at 498 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

5. U.S. CONST. art. III, § 2, cl. 3.

6. 536 U.S. 584 (2002).

the jury to render an advisory verdict in capital cases and reserved to the judge the ultimate sentence determination.[7]

In the culmination of a line of cases evaluating the respective roles of juries and judges in factfinding and sentencing, the *Ring* Court held that its recent decision in *Apprendi v. New Jersey*[8] dictated that a jury, must decide the factual issue of whether the prosecution has proven the existence of statutory aggravated circumstances that make a capital defendant eligible for the death penalty.[9] The Court therefore held unconstitutional Arizona's capital sentencing scheme, to the extent that it "allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[10]

The ruling in *Ring* was necessarily a narrow one, as Ring challenged his sentence on narrow grounds. Ring did not challenge the statutory aggravating circumstances themselves,[11] made no claim regarding mitigating circumstances,[12] and did not argue that a jury must "make the ultimate determination whether to impose the death penalty."[13] Nor did Ring argue that his indictment was defective for fail-

7. *Id.* at 608 n.6. Arizona, Idaho, Nebraska, Montana and Colorado required judicial determination of aggravating circumstances necessary for the imposition of the death sentence, while Florida, Alabama, Indiana and Delaware employ a hybrid capital sentencing scheme whereby the jury renders an advisory verdict while the judge makes the final sentence determination. *Id.*

8. 530 U.S. 466 (2000). The *Apprendi* Court held that a judge may not make factual findings that increase the defendant's sentence beyond that for which he or she is eligible based on the jury's verdict. *Id.* at 490. "Other 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." *Id.*

9. *Ring*, 536 U.S. at 609.

10. *Id.* The Court therefore specifically overruled the portion of *Walton v. Arizona*, 497 U.S. 639 (1990), which held that aggravating factors were not elements of an offense but were instead only sentencing considerations guiding the choice between life and death. *Ring*, 536 U.S. at 609.

11. The sentencing judge found as aggravating circumstances that Ring "committed the offense in expectation of receiving something of 'pecuniary value,'" and that Ring committed the murder "in an especially heinous, cruel or depraved manner." *Ring*, 536 U.S. at 594–95. Reviewing the sentence, the Arizona Supreme Court affirmed the death sentence, holding that while Ring did not commit the offense in a depraved manner, he did expect to make a "pecuniary gain." *Id.* at 596. Thus, the Supreme Court noted that *Ring* did not challenge the Court's prior holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which held that a judge may make the factual finding that a defendant has a prior conviction, even if such a finding increases the sentence for which the defendant is eligible. *Ring*, 536 U.S. at 597 n.4.

12. In imposing the death sentence, Ring's sentencing judge found as the only mitigating factor "Ring's 'minimal' criminal record," which did not weigh heavily enough against the aggravating circumstances to "call for leniency." *Ring*, 536 U.S. at 595. On review, the Arizona Supreme Court re-weighed the factors and affirmed the sentence. *Id.* at 596. Ring also did not challenge the court's authority to re-weigh the factors. *Id.* at 598 n.4.

13. *Ring*, 536 U.S. at 597 n.4.

ing to allege the existence of aggravating circumstances.[14] However, because of *Ring*'s narrow scope, the Court failed to speak to an issue of critical importance to many death row inmates sentenced according to capital sentencing statutes similar to Arizona's: may they raise a *Ring* challenge on collateral review?

The Ninth Circuit Court of Appeals recently answered this question affirmatively in *Summerlin v. Stewart*.[15] The *Summerlin* court held that the rule announced in *Ring* was a substantive rule[16] and therefore is "presumptively retroactive."[17] To date, only the United States District Court for the District of Nebraska has agreed, in its recent decision in *Palmer v. Clarke*.[18] The Ninth Circuit further held that despite *Teague v. Lane*'s[19] presumptive bar against retroactively applying new rules of criminal procedure, *Ring* falls within *Teague*'s second exception and therefore applies retroactively on collateral review.[20] In so holding, the Ninth Circuit departed from both federal and state courts that have directly addressed the question. For example, the Eleventh Circuit held in *Turner v. Crosby*[21] that *Ring* announced a new procedural rule and did not apply retroactively to Florida's advisory capital sentencing scheme.[22] Likewise, the Arizona Supreme Court held in *State v. Towery*[23] that *Ring* announced a

14. *Id.* at 598 n.4.

15. 341 F.3d 1082, 1121 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003).

16. *Id; see also id.* at 1102 (holding that "... *Ring* is, as to Arizona, a 'substantive' decision..."); *id.* at 1106 (describing *Ring* as having "an inescapably substantive impact in Arizona...").

17. *Id.* at 1099.

18. 293 F. Supp. 2d 1011, 1055 (D. Neb. 2003). Nebraska has filed an *amicus curae* brief with the Supreme Court in *Schriro v. Summerlin*. Alabama, Colorado, Delaware, Florida, Illinois, Indiana, Montana, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Virginia joined Nebraska's brief. *See* Brief of Amici Curiae Nebraska, et al., Schriro v. Summerlin, No. 03-526, 2004 WL 99341 (Jan. 15, 2004); *see also* http://www.supremecourtus.gov/docket/03-526.htm (last visited April 4, 2004).

19. 489 U.S. 288 (1989) (plurality opinion).

20. *Summerlin*, 341 F.3d at 1108, 1120, 1121.

21. 339 F.3d 1247 (11th Cir. 2003).

22. *Id.* at 1280, 1282, 1283, 1284. The Eleventh Circuit did not reach the merits of Turner's argument that *Ring* made unconstitutional Florida's "hybrid" capital sentencing structure, which requires the jury to render an "advisory verdict to the trial judge," by which the trial judge is not bound. The *Turner* court explained that it need not reach the merits first because Turner was "procedurally barred from bringing a *Ring* claim" and second because it held *Ring* to be non-retroactive. *Id.* at 1280.

For an argument that the Court should replace the Teague doctrine with a procedural default rule, see Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to* Teague v. Lane *and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 AM. J. CRIM. L. 203 (1998).

23. 64 P.3d 828 (Ariz. 2003).

purely procedural rule.[24] With the exception of the Ninth Circuit in *Summerlin* and the district court in *Palmer*, courts have uniformly held that as a procedural rule, *Ring* does not apply retroactively on collateral review.[25] As a result, these courts have held that death row inmates sentenced under unconstitutional capital sentencing statutes, whose convictions became final before June 24, 2002,[26] have no constitutional remedy. Citing the rules of retroactivity, these courts hold that the interests of finality and deterrence underlying those rules are entitled to greater weight when balanced against a defendant's interest in availing himself or herself of a recognized constitutional right.

Given the split among the circuits, the Supreme Court granted Arizona's Department of Corrections' petition for a writ of *certiorari* in *Summerlin*.[27] The Court will answer two questions presented for review. First, the Court will answer whether the Ninth Circuit erred "by holding that the new rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague v. Lane*."[28] Second, the Court will decide whether the *Summerlin* court erred when it held that as a procedural rule, *Ring* satisfied the requirements of the second *Teague* exception and therefore does apply retroactively on collateral review.[29]

This Comment examines the Ninth Circuit's rationale for holding that *Ring* applies retroactively on collateral review as both a substantive and a procedural rule, and suggests that the Supreme Court should affirm the Ninth Circuit. First, Part I will discuss the applicable doctrines of retroactivity and their underlying principles. After establishing this retroactivity framework, Part II will place *Ring* and its predecessors within that framework, discussing the Supreme Court's holdings in the line of cases directly addressing the nature of "sentencing factors" as elements of an offense requiring a jury's factual determination. The *Ring* line of cases reveals the Court's recognition of the jury's fundamental role and its demand that states not erode

24. *Id.* at 832–33.

25. *See, e.g.*, Workman v. Mullin, 342 F.3d 1100, 1115 (10th Cir. 2003); Zeigler v. Crosby, 345 F.3d 1300, 1312 n.12 (11th Cir. 2003); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002); United States. v. Battle, 264 F. Supp. 2d 1088, 1101, 1102 (N.D. Ga. 2003).

26. The Supreme Court decided *Ring v. Arizona* on this date.

27. Schriro v. Summerlin, 124 S. Ct. 833 (2003). The Court heard oral arguments on April 19, 2004.

28. Petition for Writ of Certiorari, Schriro v. Summerlin (No. 03-526), 2003 WL 22429229 (Sept. 23, 2003); *Schriro*, 124 S. Ct. 833.

29. Petition for Writ of Certiorari, Schriro v. Summerlin (No. 03-526), 2003 WL 22429229 (Sept. 23, 2003); *Schriro*, 124 S. Ct. 833.

that role by relying on sentencing factors. This Comment will then turn to *Summerlin v. Stewart* itself, first summarizing its facts and procedural posture in Part III, then, in Parts IV and V, addressing the majority's analysis. Part IV will discuss and analyze the majority's holding that *Ring* announced a new substantive rule and, therefore, applies retroactively on collateral review. This section will compare the Ninth Circuit's analysis to Judge Rawlinson's analysis in dissent, to the *Palmer* court's analysis, and finally to other courts' conflicting holdings. Next, Part V will discuss the second prong of the Ninth Circuit's analysis, in which the court correctly held that as a new rule of criminal procedure, *Ring* overcomes *Teague*'s presumptive bar against retroactive application on collateral review. This section will again compare the majority's analysis to that of the dissent and to those of other courts. This section of the Comment will also discuss the role of juries in safeguarding of accuracy and fairness, a well-established and constitutionally mandated role that is implicit in our concept of ordered liberty. Finally, the Comment will conclude in Part VI by suggesting that the Supreme Court should return to the principles underlying the *Teague* doctrine, which evolved to protect the interests of finality and efficiency in the criminal justice system. Those interests cannot prevail against society's, and an accused's, interest in a constitutionally valid death sentence, which includes a jury verdict that considers every element of the charged offense of capital murder.

I. THE APPLICABLE DOCTRINES OF RETROACTIVITY

A. The Principles Underlying Retroactivity Doctrine

The Court crafted its current retroactivity doctrine, which addresses whether a new rule applies to cases preceding that rule, in order to serve the purpose of habeas corpus, while recognizing the difficulties posed by a substantial increase in the filing of habeas petitions. The basic framework of the doctrine can easily be summarized: new rules of criminal procedure are presumptively non-retroactive on collateral review,[30] while new substantive rules do apply retroactively

30. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion). However, new rules of criminal procedure do apply retroactively on direct review. Griffith v. Kentucky, 479 U.S. 314, 322 (1987).

on collateral review.[31] This distinction between criminal procedural rules and substantive rules underscores and furthers the goals of habeas corpus itself: "[T]o assure that no [person] has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[32] New substantive rules are therefore retroactive because they either redefine the elements of a substantive offense or place certain conduct beyond the authority of the legislature to proscribe, and thus increase the likelihood that an accused is incarcerated for conduct no longer considered criminal.[33] Conversely, new procedural rules raise no similar concerns unless they greatly increase the "likelihood of an accurate conviction."[34]

However, the question of whether to apply decisions retroactively on habeas review was not subjected to a great deal of debate until the Warren Court's many decisions changing criminal procedure.[35] As that Court issued increasing numbers of new rules recognizing criminal defendants' procedural rights,[36] federal courts received correspondingly increased numbers of habeas petitions as inmates sought to avail themselves of the new rules.[37] Consequently, the additional interests of assuring that at some point litigation ceases and criminal verdicts and sentences become final became a part of the

31. Bousley v. United States, 523 U.S. 614, 620–21 (1998).

32. *Teague*, 489 U.S. at 312 (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

33. *Bousley*, 523 U.S. at 620; Palmer v. Clarke, 293 F. Supp. 2d 1011, 1054 (D. Neb. 2003).

34. *Bousley*, 523 U.S. at 620 (quoting *Teague*, 489 U.S. at 313) (internal quotation omitted).

35. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 622–23 (1965) ("At common law there was no authority for the proposition that judicial decisions made law only for the future. Blackstone stated the rule that the duty of the court was not to 'pronounce a new law, but to maintain and expound the old one.'" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 69 (15th ed. 1809))). The Court noted that Blackstone was not alone in what he understood to be the court's role; Sir Matthew Hale expressed a similar view in HISTORY OF COMMON LAW. *Id.* at 623 n.7 (citing GRAY, NATURE AND SOURCES OF THE LAW 206 (1st ed. 1909)). *See also* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) ("I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years.").

36. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467–79 (1966) (holding that the prosecution may not use a defendant's inculpatory or exculpatory statements without demonstrating the use of procedural safeguards to secure the privilege against self-incrimination); Massiah v. United States, 377 U.S. 201, 207 (1964) (holding that the use of a co-conspirator in obtaining a statement in a post-indictment, extrajudicial setting, denies a defendant's Sixth Amendment right to effective assistance of counsel); Gideon v. Wainwright, 372 U.S. 335, 342, 344–45 (1963) (holding that a defendant has a Sixth Amendment right to counsel in all criminal cases); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that the exclusionary rule applies against the states).

37. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 506 n.183 (1963) (noting that between 1950 and 1961, the number of state prisoners' habeas petitions filed increased from 560 to 906).

retroactivity debate.[38] Finality served the interest of society as well as of the defendant because, in most cases, once a defendant and society were assured that a verdict and sentence were final, both could focus on preparing the defendant to eventually assume "a useful place in society."[39] The increase in the number of habeas petitions also concerned states because, as the potential for relitigation of issues on collateral review increased when the Court announced new procedural rules, so too did the potential costs.[40] Clearly, continued relitigation would require the state to expend resources that it could direct elsewhere in the criminal justice system.[41] Moreover, the likelihood of conviction on retrial would decrease, as the state would likely necessarily rely on stale evidence.[42] Thus, this unbalanced system of increased habeas petitions and burdens on the states resulting from the new rules demanded a solution.

B. New Procedural Rules and Retroactivity

With these principles and concerns in mind, and to understand their bearing on habeas petitioners' ability to take advantage of new procedural rules, it is helpful to trace how the Court developed its retroactivity doctrine, noting especially the Court's first attempts to serve both the purposes of habeas review and the competing interests involved. Therefore, this Section will examine the competing theories of the judicial role in creating new law, one of which the Court accepted and incorporated into its first rule on retroactivity. This Section will explain the criticisms of that rule, which the Court recognized and responded to by reformulating the rule into today's *Teague* doctrine. The *Teague* doctrine attempts to re-balance the same underlying principles: deterring lower courts from violating established rules, protecting the criminal defendants' interest in justice,

38. *See* Mackey v. United States, 401 U.S. 667, 690 (1971) (Harlan, J., concurring in part and dissenting in part) (noting the need for a "visible end to the litigable aspect of the criminal process [because] [f]inality in the criminal law is an end which must always be kept in plain view").

39. *Id.* (quoting Sanders v. United States, 373 U.S. 1, 24–25 (1963)).

40. *Id.* at 691. The Court voiced concern that relitigation causes a

> drain on society's resources [which] is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed.

Id.

41. *Id.*

42. *Id.*

and achieving finality to preserve judicial resources and encourage rehabilitation to prepare for reentry into society.

At common law, the theory of retroactivity insisted that judges did not make new law but only discovered the law as it existed, and "expound[ed] the old [law]."[43] According to the traditional view, because the law did not change, whether it applied retroactively simply was not an issue.[44] However, John Austin's competing positivist theory held that judges do make law, "by filling in with judicial interpretation . . . the empty crevices of the law."[45] This different theory posed a thorny retroactivity question, and Austin's theory and its proponents recognized the inherent difficulties that arise when parties and courts rely on a rule later overturned. If a court later overturned the rule, did that upset the judgment arrived at in justified reliance on an existing rule? Positivists argued that cases decided under a rule later overruled should not be relitigated as a result of the later decision.[46] The theoretical debate over retroactivity assumed greater importance during the Warren Court for two reasons: First, the Court held that state prisoners could raise all federal claims on habeas review.[47] Second, the number of state prisoners filing federal habeas petitions greatly increased, resulting in Supreme Court review of the constitutionality of a number of criminal procedures.[48]

Faced with increased filings of habeas petitions and the potential drain on judicial resources, the Supreme Court in *Linkletter v. Walker*[49] articulated a rule on retroactivity, adopting the positivist theory and incorporating into a balancing test those principles that continue to drive the Court's subsequent retroactivity doctrine: the interests in finality of decisions (which encompass the interests of the

43. Linkletter v. Walker, 381 U.S. 618, 622–23 (1965) (quoting 1 BLACKSTONE, *supra* note 35, at 69).

44. Kermit Roosevelt III, *A Little Theory is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1077–78 (1999); *see supra* note 35.

45. *Linkletter*, 381 U.S. at 623–24.

46. *Id.* at 624–25.

47. Summerlin v. Stewart, 341 F.3d 1082, 1097 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003) (noting that "[b]y 1953, the Supreme Court confirmed the cognizability of all federal constitutional claims filed by state prisoners" (citing Brown v. Allen, 344 U.S. 443 (1953))).

48. *Id.* (citing Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 21–22 (1956)). Schaefer dismisses the theory that the increase in state prisoner habeas filings resulted solely from the Supreme Court's expansion of the scope of habeas corpus. Instead, Schaefer credits the rise to transformed prison practices (including a decrease in censorship by prison officials, which prevented many habeas petitions), and improved prisoner literacy. Schaefer, *supra*, at 21–22.

49. *Linkletter*, 381 U.S. 618.

public, the judicial system, and criminal defendants); and private and official conduct in reliance on the rule later overturned.[50] The resulting balance weighed (1) the purpose of the new rule; (2) the reliance on the old rule; and (3) the "effect on the administration of justice of a retrospective application" of the new rule.[51]

However, the *Linkletter* test proved difficult to apply and the doctrine was sharply criticized.[52] Noting *Linkletter*'s problems, Justice Harlan suggested a new retroactivity approach in two opinions, which the Court adopted nearly twenty years later in *Griffith v. Kentucky*[53] and in *Teague v. Lane*.[54] First, Justice Harlan argued in dissent in *Desist v. United States*[55] that courts should not apply the *Linkletter* test to determine if a new rule should apply retroactively to cases pending on direct review, because to deny a defendant the benefit of that rule would be to "depart from [the] basic tradition" of treating "similarly situated defendants" alike.[56] Harlan argued:

> If a 'new' constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; *nor should we affirm those which have rejected the very arguments that we have embraced.* Anything else would belie the truism that it is the task of this Court, like that of any other, *to do justice to each litigant on the merits of his own case.*[57]

Harlan raised this argument again in his concurrence in *Mackey v. United States*,[58] arguing that the Court must decide cases in a prin-

50. *Id.* at 636. The petitioner in *Linkletter* urged the Court to apply the *Mapp* exclusionary rule retroactively. *Id.* at 619–20. Refusing to do so, the Court noted that the rule's purpose was to deter lawless police action by requiring the exclusion of all illegally obtained evidence, and that retroactive application of the rule would not advance that purpose. *Id.* at 636–37. Similarly, both accused individuals and states relied on the old rule, and retroactive application of the rule would not serve the purpose of the old rule. *Id.* at 637. Finally, the Court noted that retroactive application of *Mapp* would seriously disrupt the administration of justice because "[h]earings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed." *Id.*

51. *Id.* at 636.

52. Critics urged the Court to rethink its approach to retroactivity because of what one scholar describes as its "incoherent" approach. Roosevelt, *supra* note 44, at 1091. Illustrating *Linkletter*'s problem, Professor Roosevelt explains: If two defendants against whom the state used the same evidence seized in an invalid search were convicted in separate trials, but only one chose to appeal, only the defendant whose judgment was not yet final when *Mapp* was decided would receive its benefit. *Id.* Thus, *Linkletter* treated similarly situated defendants differently based on their decision to appeal and on their procedural posture.

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

54. 489 U.S. 288 (1989).

55. 394 U.S. 244 (1969) (Harlan, J., dissenting).

56. *Id.* at 258–59.

57. *Id.* at 259 (emphasis added).

58. 401 U.S. 667 (1971) (Harlan, J., concurring in part and dissenting in part).

cipled manner, deciding like cases alike, and "apply[ing] the law as it is at the time, not as it once was."[59] Otherwise, the Court abandons its role and instead becomes a quasi-legislature, choosing whether to make a rule "wholly or partially retroactive or only prospective as it deems wise."[60] A majority of the Supreme Court finally agreed with Harlan, holding in *Griffith v. Kentucky*[61] that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[62]

Justice Harlan's opinions in *Desist* and *Mackey* also influenced the Court's approach to retroactivity on collateral review, announced in *Teague v. Lane*.[63] As mentioned above, Harlan criticized the problems with the *Linkletter* standard, and the *Teague* Court itself noted that the standard led to inconsistent results.[64] The petitioner in *Teague* raised three arguments, the final of which prompted the Court to discard the *Linkletter* standard of retroactivity in favor of a test incorporating the principles articulated by Justice Harlan.[65] To understand how the Court arrived at its current retroactivity doctrine and to understand the rule's bearing on *Summerlin*, it is necessary to examine Teague's final argument and to analyze the Court's holding in detail. Such examination and analysis reveal what the Court attempted to achieve and demonstrates that the Ninth Circuit correctly applied the rule to Summerlin's case.

59. *Id.* at 679–81.

60. *Id.* at 677.

61. 479 U.S. 314 (1987).

62. *Id.* at 322.

63. 489 U.S. 288 (1989) (plurality opinion).

64. *Id.* at 302, 305.

65. *Id.* at 294–310. The *Teague* Court disposed of the petitioner's first two arguments quickly. First, Teague argued that the Court's rule in *Batson v. Kentucky*, 476 U.S. 79 (1986), should apply retroactively to his case, despite the fact that his conviction became final prior to its issuance. *Teague*, 489 U.S. at 294–96. Teague argued that the various concurrences and dissents in *McCray v. New York*, 461 U.S. 961 (1983), "destroyed the precedential effect of *Swain [v. Alabama*, 380 U.S. 202 (1965).]" *Teague*, 489 U.S. at 296. *Batson* changed the evidentiary showing necessary to establish a prima facie case of discrimination in jury selection. *Teague*, 489 U.S. at 295. The Court had previously applied the *Linkletter* test to *Batson* and held that the new rule announced should not apply retroactively to cases already final at the time it decided *Batson*. *Id.* (citing *Allen v. Hardy*, 478 U.S. 255 (1986) (*per curiam*)). Thus, despite Teague's argument that before his case became final the Court had suggested that it should reexamine the rule under which his case was decided, *McCray v. New York*, 461 U.S. 961 (1983), the Court held that the opinions expressed had no bearing on Teague's case. *Teague*, 489 U.S. at 296.

Teague also argued that the prosecutor violated his Equal Protection rights under *Swain v. Alabama*, 380 U.S. 202 (1965). *Teague*, 489 U.S. at 297. However, the Court refused to address the merits of Teague's argument, holding instead that the claim was procedurally barred because Teague failed to raise it at the state court level. *Id.* at 297–99.

Teague argued that the rule in *Taylor v. Louisiana*,[66] which requires that a jury venire be drawn from "a representative cross section of the community,"[67] also applies to petit juries.[68] Noting that Teague urged it to apply a new rule, the Court held that it must first decide whether this new rule, if adopted, should apply retroactively.[69] Treating retroactivity as a threshold issue, Justice O'Connor explained: "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[70] Given the different results reached by lower courts applying *Linkletter*, whereby some defendants on collateral review received the benefit of a new rule while others did not, the Court recognized the need for a new rule.[71] Therefore, the Court sought to avoid such inequitable results by articulating a clear rule that lower courts could easily apply and which "account[ed] for the nature and function of collateral review."[72]

As noted previously,[73] the Court drew heavily from Justice Harlan's opinions in *Desist* and *Mackey*, focusing on the underlying purposes of habeas review: "reducing the controversy to a final judgment not subject to further judicial revision,"[74] and deterring state courts from failing to "conduct their proceedings in a manner consistent with established constitutional standards."[75] Proceedings conducted according to constitutional standards ostensibly assure that no innocent person stands convicted. According to Harlan, these interests of finality and deterrence most often outweigh the "competing

66. 419 U.S. 522 (1975).

67. *Id.* at 528.

68. *Teague*, 489 U.S. at 299.

69. *Id.* at 300.

70. *Id.* Thus, the Court's rationale for deciding retroactivity at the threshold echoes Justice Harlan's concern that all new rules apply retroactively to cases pending on direct review. The only principled difference, therefore, must be the underlying concerns and purposes of habeas review itself.

71. *Id.* at 305. The Court offered as an illustration the rule announced in *Edwards v. Arizona*, 451 U.S. 477, 484–87 (1981), in which it held that police may not infer from the fact that a suspect answered questions that a defendant waived his or her right to counsel during custodial interrogation. *Teague,* 489 U.S. at 305. Before the Court held that the rule did not apply retroactively on collateral review, several circuits reached the opposite conclusion, thereby allowing several defendants the benefit of the rule, while other similarly situated defendants were unable to take advantage of *Edwards*. *Id.*

72. *Teague*, 489 U.S. at 305.

73. *See supra* text accompanying note 63.

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

75. *Id.* (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)).

interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."[76] The *Teague* Court agreed, citing the costs of retroactive application of new rules, which usually outweigh any benefits,[77] and which also detract from the paramount goal of achieving finality in criminal decisions: "Without finality, the criminal law is deprived of much of its deterrent effect."[78] Establishing a controversial retroactivity rule that values finality, the *Teague* Court held that a new constitutional rule of criminal procedure[79] does not apply retroactively to cases already final prior to the new rule's announcement unless it falls within one of two exceptions, both proposed by Justice Harlan in *Mackey* and *Desist*.[80]

First, a habeas petitioner may obtain the benefit of a new rule if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"[81] or if the new rule "prohibit[s] imposition of a certain type of punishment for a class of defendants because of their status or offense."[82] *Atkins v. Virginia*[83]offers a recent example of such a rule. The *Atkins* Court held that the Eighth Amendment's prohibition against cruel and unusual punishment precludes states from imposing the death penalty on mentally retarded offenders.[84]

Under the second *Teague* exception, a new constitutional rule of criminal procedure applies retroactively if it is a "watershed rule[] of criminal procedure,"[85] which requires that it meets two qualifications. First, the rule must "alter our understanding of the *bedrock proce-*

76. *Id.* (quoting *Mackey*, 401 U.S. at 683).

77. *Id.* at 310 (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment)).

78. *Id.* at 309.

79. *Teague* is limited by its terms to new rules of criminal procedure. Bousley v. United States, 523 U.S. 614, 620 (1998); *Teague*, 489 U.S. at 310.

80. *Teague*, 489 U.S. at 310–12. The Court defines a "new" rule as one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or that was not "dictated by precedent existing at the time the defendant's conviction became final." Graham v. Collins, 506 U.S. 461, 467 (1993) (quoting *Teague*, 489 U.S. at 301).

The Supreme Court in *Bousley v. United States* notes that *Teague* is limited by its terms to new rules of criminal procedure. *Bousley*, 523 U.S. at 620. However, the *Bousley* Court and other courts treat the two exceptions as the distinction between substantive and procedural rules.

81. *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 692). This exception recognizes that it would be fundamentally unfair to detain a defendant convicted of behavior no longer considered criminal.

82. Sawyer v. Smith, 497 U.S. 227, 241 (1990).

83. 536 U.S. 304, 321 (2002).

84. *Id.*

85. *Teague*, 489 U.S. at 311.

dural elements that must be found to vitiate the fairness of a particular conviction."[86] According to Justice Harlan, such a rule is the result of "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process."[87] Under this exception, a watershed rule is one that "requires observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[88]

Second, to qualify as a "watershed rule," the rule must "significantly improve the preexisting fact-finding procedures,"[89] which the Court explained narrows the scope of the exception to "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[90] Because Teague's proposed new rule did not "undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction," the Court held that the rule requiring representative petit juries is not a "bedrock procedural element" and therefore did not apply retroactively.[91]

Notably, the Court cautioned that very few new rules "so central to an accurate determination of innocence or guilt . . . have yet to emerge."[92] *Gideon v. Wainwright*,[93] "sweeping" in nature and applicable to "all felony cases,"[94] is most often cited as a rule the Court would have applied retroactively under the *Teague* doctrine.[95] The Court's caution rings true. Indeed, the Supreme Court has yet to hold that any new criminal procedural rule applies retroactively under the second *Teague* exception.[96] This seemingly insurmountable hurdle is, in fact, one of the most common criticisms leveled against current retroactivity doctrine.[97]

86. *Id.* (quoting *Mackey*, 401 U.S. at 693–94) (emphasis in *Teague*).

87. *Id.*

88. *Id.* (quoting *Mackey*, 401 U.S. at 693 (internal quotation omitted)).

89. *Id.* at 312 (quoting *Desist*, 394 U.S. at 262).

90. *Id.* at 313.

91. *Id.* at 315.

92. *Id.* at 313.

93. 372 U.S. 335 (1963).

94. O'Dell v. Netherland, 521 U.S. 151, 167 (1997).

95. *Id.*; Saffle v. Parks, 494 U.S. 484, 495 (1990) (noting that to satisfy the second *Teague* exception, the rule must have "the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception").

96. United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000) (compiling cases in which the Supreme Court considered and declined to hold that new rules or proposed new rules satisfied the second *Teague* exception); *see also* United States v. Swindall, 107 F.3d 831, 835–36 (11th Cir. 1997); Spaziano v. Singletary, 36 F.3d 1028, 1043 (11th Cir. 1994).

97. *See, e.g.*, Marc M. Arkin, *The Prisoner's Dilemma: Life in the Lower Federal Courts After* Teague v. Lane, 69 N.C. L. REV. 371, 372, 408 (1991) (noting that the general response to

C. *Substantive Rules and Retroactivity*

Unlike the new criminal procedural rules discussed above, new substantive rules presumptively apply retroactively on collateral review.[98] The Supreme Court announces a substantive rule when it determines "the meaning of a criminal statute."[99] The Supreme Court in *Bousley v. United States*[100] explained the distinction between substantive and procedural rules, noting that while it may "plac[e] conduct 'beyond the power of the criminal law-making authority to proscribe,'"[101] it may not itself determine which conduct is criminal.[102] Making that determination would intrude upon legislative functions and thus violate the separation of powers. However, the Court may clarify the meaning of a statute.[103] When the Court does clarify a statute's meaning, usually by "address[ing] the criminal significance of certain facts or of the underlying prohibited conduct,"[104] the purpose of habeas corpus becomes clear in distinguishing between procedural and substantive rules.[105] The purpose of habeas corpus is to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[106] Such a risk is inherent when the Court announces a substantive rule that defines the elements of a crime, because of the increased likelihood that a jury convicted the defendant based on fewer or different elements. Similarly, the risk is also inherent when the Court announces a new rule that places certain conduct beyond the power of the legislature to proscribe, because the defendant stands convicted for conduct no longer considered criminal. In either case, the benefits

Teague was that the "decision sounded the death knell of habeas corpus as a vehicle for the protection of defendants' rights," and criticizing the dilemma prisoners face in arguing for application of a new rule to thereby avoid the procedural default bar, while also attempting to surmount the *Teague* hurdles to retroactive application of that new rule); Eliot F. Krieger, *Recent Development, The Court Declines in Fairness*—Teague v. Lane, 25 HARV. C.R.-C.L. L. REV. 164, 182 (1990) (predicting that *Teague* might "effectively slam the door on most federal review of state criminal cases").

98. *See* Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001), *cert. denied*, 534 U.S. 1083 (2002).

99. *See* Bousley v. United States, 523 U.S. 614, 620 (1998).

100. *Id.* at 614.

101. *Id.* at 620 (quoting Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion)).

102. *Id.* at 621.

103. This well-established principle can be traced as far back as *Marbury v. Madison*, 1 Cranch 137 (1803).

104. Palmer v. Clarke, 293 F. Supp. 2d 1011, 1055 (D. Neb. 2003) (citing Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 537 U.S. 976 (2002)).

105. *Bousley*, 523 U.S. at 620; *see also Palmer*, 293 F. Supp. 2d at 1055.

106. *Bousley*, 523 U.S. at 620 (quoting *Teague*, 489 U.S. at 312).

of that decision must be available to a defendant seeking collateral review.[107]

II. FROM *WALTON* TO *RING*

In *Ring v. Arizona*, the Supreme Court held that it could not reconcile its recent holding in *Apprendi*, that juries rather than judges must find any fact (except the fact of prior conviction) that increases "the penalty for a crime beyond the prescribed statutory maximum,"[108] with that in *Walton v. Arizona*.[109] This Section briefly examines the evolution of the Court's interpretation of the meaning of sentencing considerations, from *Walton* to *Jones v. United States*,[110] *Apprendi*, and finally to *Ring*. These cases, along with the retroactivity doctrine described above, establish the necessary framework within which to analyze the Ninth Circuit's approach in *Summerlin*.

Jeffrey Alan Walton was convicted of first-degree murder after kidnapping a young Marine in order to steal his car.[111] Walton and his co-defendants drove their victim into the desert; when they stopped the car, Walton forced the Marine out, walked him into the desert, and shot him.[112] The victim died nearly a week later, not from the gunshot, but from dehydration, starvation, and pneumonia.[113] After the jury found Walton guilty, the trial court conducted a sentencing hearing and found that both of the alleged aggravating factors were present,[114] while none of the alleged mitigating circumstances[115] weighed heavily enough to require leniency.[116] Thereafter, the sen-

107. The similarity between substantive rules, which are not subject to the *Teague* analysis, and those procedural rules which satisfy the first *Teague* exception, is striking. *See Palmer*, 293 F. Supp. 2d at 1053 n.36 (explaining that while some courts treat the substantive-procedural distinction as a threshold question to determine whether to undertake a *Teague* analysis, others treat the first *Teague* exception as the inquiry of whether the new rule is substantive or procedural).

108. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

109. 497 U.S. 639 (1990).

110. 526 U.S. 227 (1999).

111. *Walton*, 497 U.S. at 644–45.

112. *Id.* at 644.

113. *Id.* 644–45.

114. *Id.* at 645. The trial court found two aggravating factors. First, the court found that Walton committed the murder "in an especially heinous, cruel or depraved manner." *Id.* (quoting Ariz. Rev. Stat. Ann. § 13-703(F)(6) (1989)). Second, the court found that Walton committed the murder for pecuniary gain. *Id.* (citing Ariz. Rev. Stat. Ann. § 13-703(F)(5) (1989)).

115. *Id.* Walton urged the court to consider as mitigating circumstances (1) his history of substance abuse; (2) his possible sexual abuse as a child; and (3) his young age at sentencing. *Id.* (citing Ariz. Rev. Stat. Ann. §13-703(G)(1), (5) (1989)).

116. *Id.*

tencing judge sentenced Walton to death.[117] After the Arizona appellate courts rejected his appeal, Walton argued before the Supreme Court that aggravating circumstances were elements of an offense and therefore a jury, rather than a judge, must make factual findings as to their existence.[118] Walton further argued that by relying on judicial findings on the existence of aggravating circumstances, state legislatures transferred to judges a portion of juries' Sixth Amendment fact-finding duties.[119] Rejecting Walton's argument, the Court held that the aggravating circumstances weighed by a judge during a capital sentencing proceeding were sentencing considerations rather than elements of an offense.[120]

However, *Walton* was not the Court's final word on the proper meaning and role of sentencing considerations, and in fact the Court reexamined its sentencing jurisprudence over the following decade. The *Jones* Court noted, and the *Apprendi* Court held one year later, that a jury, rather than a judge, must find the facts that increase the penalty for a crime beyond the statutory minimum.[121]

In *Jones* the Court considered a federal carjacking statute that provided three levels of sentencing based on the crime's impact upon its victim: up to fifteen years for the basic carjacking offense, up to twenty-five years if the victim suffers serious bodily injury, and a maximum of life imprisonment if the victim dies.[122] Although Jones was charged with violating the statute, the indictment failed to specify whether the victim suffered serious bodily injury, and the jury therefore made no findings relative to her injury.[123] However, during the sentencing hearing the judge found that the victim did in fact suffer serious bodily injury, and therefore sentenced Jones to twenty-five

117. *Id.*

118. *Id.* at 647; *see also* Brief for Petitioner, Walton v. Arizona, 497 U.S. 639 (1989) (No. 88-7351), 1989 WL 430597, at *27 (1989) ("In every conceivable respect but name Arizona's 'aggravating circumstances are the kind of facts traditionally left to juries—facts which spell out the difference between conviction of a greater or a lesser crime.); *id.* at *29 (arguing that "'aggravating circumstances' . . . are substantively, as well as structurally, equivalent to the kind of factual determinations traditionally made by juries in finding the elements of a criminal offense [because] they encompass issues of actus reus and mens rea").

119. Brief for Petitioner, *Walton*, 497 U.S. 639, 1989 WL 430597, at *27.

120. *Walton*, 497 U.S. at 649.

121. Jones v. United States, 526 U.S. 227, 243 n.6 (1999); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

122. *Jones*, 526 U.S. at 230 (citing 18 U.S.C. § 2119 (1988, Supp. V)). The Court noted that Congress amended the statute in both 1994 and 1996. The 1994 amendment increased the possible range of punishment for those carjacking offenses in which the victim died to include the death penalty. *Jones*, 526 U.S. at 230 n.1.

123. *Id.* at 230–31.

years of imprisonment on the carjacking count.[124] Reversing Jones' conviction, the Supreme Court held that the carjacking statute established three offenses, distinguished by the degree of injury to the victim, the elements of which must all be submitted to the jury.[125] Foreshadowing its ruling in *Apprendi*, the *Jones* Court noted in a footnote that both the Fifth and the Sixth Amendments require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[126]

The following year in *Apprendi*, the Court squarely addressed the sentencing consideration issue intimated in the *Jones* footnote.[127] The statute in controversy was the New Jersey hate crime statute, which elevated a defendant's sentence if the trial judge found by a preponderance of the evidence that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[128] A New Jersey grand jury indicted Apprendi for twenty-three counts related to four alleged shootings.[129] During one of the alleged shootings, Apprendi fired several shots into the home of a neighboring African-American family because, according to a later-retracted statement, he opposed African Americans living in the formerly all-white neighborhood.[130] The indictment, to which Apprendi eventually pled guilty to three counts, did not allege that racial animus motivated Apprendi, nor did it reference the New Jersey hate crime statute.[131] Although two of the counts were eligible for hate crime enhancement, the prosecutor agreed to seek the enhancement only on the charge related to the shooting into Apprendi's neighbors' home.[132] Whereas without the hate crime enhancement Apprendi would have been eligible for a sentence of five to ten years for that count, Apprendi would now be eligible for a sentence of ten to twenty years imprisonment.[133] The trial court found by a prepon-

124. *Id.* at 231. The trial court also sentenced Jones to a consecutive five-year sentence for a firearm offense. *Id.*

125. *Id.* at 252.

126. *Id.* at 243 n.6.

127. Apprendi v. New Jersey, 536 U.S. 466 (2000).

128. *Id.* at 468–69 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999–2000)).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 469–70.

133. *Id.* at 469, 474.

derance of the evidence that Apprendi was indeed motivated by racial animus and sentenced Apprendi to twelve years imprisonment.[134]

Bringing the constitutionality of judicially determined sentencing factors back before the Court, Apprendi challenged the constitutionality of New Jersey's hate crime statute, arguing that the Fifth, Sixth, and Fourteenth Amendments required that the basis for finding that the statute applied to his case must be proven to a jury beyond a reasonable doubt.[135] After the New Jersey appellate courts rejected Apprendi's argument, the Supreme Court reversed.[136] Reaffirming its opinion in *Jones*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[137]

Curiously, the Court attempted to reconcile *Apprendi* with its prior holding in *Walton*.[138] The Court referred to its earlier explanation of *Walton* in *Jones*, where it described the use of sentencing considerations and aggravating factors as aiding the judge in deciding which sentence, within a jury-determined range of sentences, to impose.[139] In other words, once a jury convicts an accused of murder, the defendant is eligible for a sentence within a range—life or death. Thereafter the judge may use aggravating factors and mitigating factors to decide which sentence to impose. The Court's attempt to reconcile the holdings yielded an absurd result: while a hate crime statute cannot expose a defendant to a greater sentence than that for which the jury finds him eligible, a murder statute may expose a defendant to the death sentence before the jury determines the existence of statutory aggravating factors to make him eligible for death. Fortunately the Court recognized the irreconcilability of these holdings and, in *Ring v. Arizona*, overruled *Walton* to the extent that it conflicted with *Apprendi*.

Like Walton, Timothy Stuart Ring was convicted of first-degree murder.[140] Also like Walton, Ring was sentenced to die after a judge

134. *Id.* at 471.

135. *Id.*; *see also* Brief for Petitioner, Apprendi v. New Jersey, 530 U.S. 466 (2000) (No. 99-478), 2000 WL 35843, at *15–20.

136. *Apprendi*, 530 U.S. at 471, 472, 497.

137. *Id.* at 490.

138. *Id.* at 496–97.

139. *Id.* (citing Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)).

140. Ring v. Arizona, 536 U.S. 584, 591 (2002) (quoting Ariz. Rev. Stat. Ann. §§ 13-1105(A) & (B) (West 2001)).

conducted a sentencing hearing, finding that two aggravating factors were present, and that the mitigating circumstance did not sufficiently offset those factors to justify leniency.[141] Echoing Walton's argument, but supported by intervening cases, Ring argued that 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."[142] However, where Walton failed, Ring prevailed. The Court recognized that its holding in *Walton* was no longer valid in light of its intervening decisions; so-called "sentencing factors" expose capital and non-capital defendants alike to greater sentences and therefore constitute elements of greater offenses, all of which must be submitted to the jury.[143] The failure to do so violates a defendant's Sixth Amendment right to trial by jury.[144]

However, if most circuits prevail in their holdings that *Ring* announced neither a substantive rule of law nor a "watershed rule" under the *Teague* doctrine, a death row inmate such as Walton, whose nearly identical argument was rejected by the Court twelve years before *Ring*, would be unable to avail himself of its constitutional protection. In fact, under most circuits' rulings, Walton himself would be unable to benefit from the Court's acceptance of his original argument.[145] The Ninth Circuit's ruling, applying *Ring* retroactively on collateral review, correctly avoids that illogical, unsound, and fundamentally unfair result. The Supreme Court should, as explained in the remainder of this Comment, affirm the Ninth Circuit's decision in *Summerlin* and hold that *Ring v. Arizona* applies retroactively on collateral review.

This Comment, having explained the Court's retroactivity doctrine and holdings that sentencing factors are elements, which under the Sixth and Fourteenth Amendments must be submitted to a jury,

141. *Id.* at 594–95. Ring's sentencing judge found the same aggravating factors as Walton's sentencing judge: (1) Ring committed the murder "in an especially heinous, cruel or depraved manner," Ariz. Rev. Stat. Ann. § 13-703(F)(6), and (2) Ring committed the murder for pecuniary gain. *Id.* (quoting Ariz. Rev. Stat. Ann. § 13-703(F)(5)).

142. *Ring*, 536 U.S. at 597.

143. *Id.* at 609; *see also Apprendi*, 530 U.S. at 494.

144. *Ring*, 536 U.S. at 609.

145. In fact, Professor Arkin expressed concern that *Teague* would lead to just such a result, noting: "While the interests of finality are all well and good, it is a troubling rule indeed which permits one person to be executed and another to stay alive simply because of the date on which a petition for certiorari to the United States Supreme Court is denied." Arkin, *supra* note 97, at 419. However, it must be noted that Walton's sentence has been reduced to life without the possibility of parole for twenty-five years. Arizona Department of Corrections, http://www.adc.state.az.us/DeathRow/DRowTZ.htm (Last visited April 4, 2004).

will next examine in detail the Ninth Circuit's opinion in *Summerlin*. The Comment will first summarize the case's facts and procedural history, and will then focus in greater detail on the majority opinion, concurrence, and dissent. Within this framework and in the context of the doctrines previously explained, the Comment will suggest how the Supreme Court should answer both questions for which it granted *certiorari*.

III. THE FACTS AND PROCEDURAL POSTURE OF *SUMMERLIN V. STEWART*

Summerlin was charged with murdering an account investigator who visited his home to speak with Summerlin's wife regarding an overdue account.[146] Following psychiatric examinations and negotiations, Summerlin entered an *Alford* plea.[147] However, he later withdrew the plea after the sentencing judge announced that he would "not accept the stipulated sentence,"[148] and engaged in a detailed colloquy with Summerlin about the possible thirty-eight and one-half years sentence Summerlin would face if his plea remained in force.[149] Summerlin's decision to withdraw the plea made him eligible for the death penalty.[150]

After a four-day trial, the jury deliberated for little more than three hours and found Summerlin guilty of "first-degree murder and sexual assault."[151] Judge Marquardt conducted a sentencing hearing, during which the State established aggravating circumstances by presenting proof of Summerlin's prior assault conviction and relying on the trial testimony.[152] Summerlin presented no mitigating circum-

146. Summerlin v. Stewart, 341 F.3d 1082, 1084–85 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003).

147. *Id.* at 1085–86. An *Alford* plea allows a criminal defendant to knowingly, voluntarily, and intelligently plead guilty to the charged crime while still maintaining his or her innocence of the offense. North Carolina v. Alford, 400 U.S. 25, 37–38 (1970).

148. *Summerlin*, 341 F.3d at 1086–87. The stipulated sentence allowed Summerlin to receive a sentence of twenty-one years imprisonment in exchange for his guilty plea to second-degree murder and aggravated assault. *Id.* at 1086. At this point, the facts of Summerlin's case took a peculiar turn. His public defender and prosecutor began an amorous affair, and although his attorney believed she could no longer represent him, she took no steps at this point to accomplish her withdrawal from the case. *Id.* at 1087.

149. *Id.*

150. *Id.* Shortly after the hearing, new counsel was appointed to represent Summerlin, and the Arizona Attorney General's office took over the prosecution of the case. *Id.* at 1088.

151. *Id.*

152. *Id.* at 1089.

stances.[153] Judge Marquardt found two statutory aggravating circumstances: first that Summerlin "had a prior felony conviction involving the use or threatened use of violence on another person," and second, "that Summerlin committed the offense in an especially heinous, cruel, or depraved manner."[154]

After the Arizona Supreme Court affirmed Summerlin's convictions and sentence on direct review,[155] Summerlin unsuccessfully sought state relief in four post-conviction motions.[156] Summerlin also filed a petition for a writ of habeas corpus in federal district court, and filed a second amended petition for a writ of habeas corpus on November 22, 1995, which the district court denied on October 31, 1997.[157] The district court also denied Summerlin's subsequent motion to vacate the judgment pursuant to Federal Rule of Civil Procedure 59(e),[158] but issued a certificate of probable cause, thereby allowing Summerlin to continue his appeal pursuant to Federal Rule of Appellate Procedure 22(b)(1).[159]

The Ninth Circuit, speaking through a divided three-judge panel, affirmed the district court in part and reversed in part, remanding the case for an evidentiary hearing to determine "whether Judge Marquardt was competent when he was deliberating on whether to impose the death penalty."[160] Pending the evidentiary hearing, the

153. *Id.* at 1089–90 As further evidence of the peculiar facts behind Summerlin's death sentence, Judge Marquardt "was a heavy user of marijuana" and eventually resigned from the bench and was disbarred. Summerlin alleged that Judge Marquardt confused some of the facts of his case with those of another capital murder defendant he sentenced to death on the same date. *Id.* at 1090.

154. *Id.* at 1090.

155. *Id.* at 1091 (citing State v. Summerlin, 138 Ariz. 426 (1983)).

156. *Id.*

157. *Id.*

158. Federal Rule of Civil Procedure 59(e) allows a defendant to file a motion to alter or amend a judgment within ten days after the entry of the judgment. FED. R. CIV. P. 59(e).

159. *Summerlin*, 341 F.3d at 1091. Federal Rule of Appellate Procedure 22(b)(1) provides:

> In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

F. R. APP. P. 22(b)(1).

160. *Summerlin*, 341 F.3d at 1091 (citing Summerlin v. Stewart, 267 F.3d 926, 957 (9th Cir. 2001)). Summerlin accused Judge Marquardt of confusing the facts of his case with those of another capital defendant whom Marquardt sentenced the same day. *See supra* notes 28, 153.

United States Supreme Court granted certiorari in *State v. Ring*.[161] Because *Ring* raised an issue that Summerlin raised in both state and federal petitions, namely the constitutionality of Arizona's death penalty statute under the Sixth Amendment, the Ninth Circuit panel withdrew its opinion and deferred submission of the case until after the Supreme Court decided *Ring v. Arizona*.[162]

Thereafter, upon the Supreme Court's issuance of its decision in *Ring*, Summerlin moved to stay the circuit court proceedings in order to ask the Arizona Supreme Court to set aside the mandate in his direct appeal and consider *Ring*'s effect on his case, but the Arizona court denied the motion.[163] Thus, in refusing to hear on direct appeal Summerlin's argument that *Ring* applied retroactively and invalidated his death sentence, the Arizona Supreme Court left Summerlin only one option: to collaterally attack his sentence in his petition for writ of habeas corpus, still pending before the Ninth Circuit.[164] The stage was thus set for the Ninth Circuit to hold that *Ring* is available to death row inmates seeking collateral relief from unconstitutionally imposed death sentences.

The Ninth Circuit voted to rehear Summerlin's case *en banc*.[165] The court issued its divided opinion nearly nine months later and in doing so, parted company with the other circuits and two states that have addressed the issue of *Ring*'s retroactive application.[166] The Ninth Circuit held that *Ring* applies retroactively on collateral review for two reasons. First, because *Ring* held that sentencing factors exposing a capital defendant to a maximum penalty beyond that which the jury found "reintroduced 'capital murder' as a separate substan-

161. 25 P.3d 1139 (Ariz. 2001), *cert. granted*, 534 U.S. 1103 (2002).

162. *Summerlin*, 341 F.3d at 1091 (citing *Summerlin*, 267 F.3d at 837).

163. *Id.*

164. *Id.*

165. *Id.* at 1092 (citing Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002)). The Ninth Circuit heard the case on December 10, 2002.

166. *E.g.*, Turner v. Crosby, 339 F.3d 1247, 1285–86 (11th Cir. 2003) (holding that *Ring* did not announce a new substantive rule but instead a new procedural rule, extending *Apprendi* to capital sentencing, and because it fails to satisfy either *Teague* exception, *Ring* does not apply retroactively on collateral review); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002) (holding that *Ring* is an extension of *Apprendi* and is therefore a procedural rule which, because the petitioner sought relief under a second habeas petition, the Supreme Court must explicitly hold to apply retroactively); State v. Towery, 64 P.3d 828, 835 (2003) (holding that *Ring* is a new rule of criminal procedure and does not apply retroactively because it fails to meet either *Teague* exception); Colwell v. State, 59 P.3d 463, 470–73 (Nev. 2002) (*Ring* does not apply retroactively on collateral review under a modified *Teague* test). *Contra* Palmer v. Clarke, 293 F. Supp. 2d 1011, 1055 (D. Neb. 2003) (holding that *Ring* is a substantive rule and applies retroactively on collateral review).

tive offense under Arizona law" and redefined the "substantive elements of this 'separate offense' of capital murder," the *Ring* rule substantively changed Arizona law and therefore applies retroactively on collateral review.[167] Second, the *Summerlin* court held that the *Ring* rule satisfies both prongs of the second *Teague* exception and therefore overcomes the presumptive bar against retroactive application of new criminal procedural rules to cases on collateral review.[168] The following two sections of this Comment will examine in detail both prongs of the Ninth Circuit's analysis, both of which the Supreme Court will address on review.[169]

IV. *RING V. ARIZONA* ANNOUNCED A SUBSTANTIVE RULE

The first question before the Supreme Court corresponds to the first prong of the Ninth Circuit's analysis, in which it departed from its sister circuits and from state courts addressing the question of whether *Ring* applies to habeas petitioners, by holding that *Ring* announced more than a new rule of criminal procedure.[170] Thus, the Supreme Court will first decide whether the Ninth Circuit erred in holding that *Ring* announced a substantive rule of law.[171]

The *Summerlin* majority first noted the deep-rooted and long-held presumption that that new constitutional rules will apply retroac-

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

168. *Id.* at 1121.

169. The Supreme Court granted *certiorari* on two out of three questions presented for review. Schriro v. Summerlin, 124 S. Ct. 833 (2003). Arizona asked the Court to decide first whether the Ninth Circuit erred in holding that *Ring* announced a substantive change of law which is therefore exempt from *Teague* analysis; and second, asked to Court to answer whether *Ring* is a watershed rule of criminal procedure that will greatly increase the chances of an accurate result. Petition for Writ of Certiorari, Schriro v. Summerlin (No. 03-526), 2003 WL 22429229 (Sept. 23, 2003). The Court refused to decide the third question presented in Arizona's Petition, specifically whether the Ninth Circuit erred when it applied *Ring* despite the aggravating circumstance of a prior conviction, which under *Almendarez-Torres v. United States*, 523 U.S. 224, 226–27 (1998), need not be found by a jury. *Summerlin*, 124 S. Ct. 833.

170. Few Circuits have reached the issue, instead treating *Ring* as a purely procedural rule and whether, under *Teague* the rule applies retroactively on collateral review. However, a few courts, have considered and rejected arguments that *Ring* announced a substantive rule. *E.g.*, Turner v. Crosby, 339 F.2d 1247, 1284 (11th Cir. 2003) (holding that because *Ring* is an extension of the rule in *Apprendi*, *Ring* is purely procedural); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002) (rejecting petitioner's argument that *Ring* announced a substantive rule, holding instead that as a clear extension of *Apprendi*, *Ring* does not apply retroactively); State v. Towery, 64 P.3d 828, 822–23 (Ariz. 2003) (holding that *Ring* announced a new procedural rule rather than a substantive rule, noting that because *Apprendi* announced a procedural rule, "logic dictates . . . [that] *Ring* . . . did also").

171. *Summerlin*, 124 S. Ct. 833.

tively,[172] which presumption was debated after Congress extended habeas corpus remedies to state prisoners, resulting in a marked increase in the number of federal habeas petitions filed.[173] Tracing the development of the *Teague* doctrine and highlighting Justice Harlan's pivotal role in its development, the majority next turned to *Teague*'s threshold question of whether *Ring* is a substantive or procedural rule.[174] Acknowledging the occasional difficulties attending the attempt to distinguish whether a rule is strictly procedural or strictly substantive, the court offered this distinction: "[A] new rule is one of 'procedure' if it impacts the operation of the criminal trial process, and a new rule is one of 'substance' if it alters the scope or modifies the applicability of a substantive criminal statute."[175]

The court thereafter placed the *Ring* rule squarely between the two, holding that *Ring* announced both a substantive *and* a procedural rule.[176]

A. The Majority's Rationale

According to the Ninth Circuit, *Ring* "effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment."[177] The court arrived at this conclusion through a detailed examination of the history of capital sentencing in Arizona, Supreme Court opinions aimed at narrowing the applicability of the death penalty, and its own decisions interpreting the Arizona capital sentencing scheme.[178] Discussing the early history of Arizona's capital sentencing statute, the *Summerlin* court paid particular attention to the jury's sentencing role through each incarnation of the statute.[179] With the exception of a two-year period between 1916 and 1918, the Arizona legislature assigned to the jury's discretion the decision to impose the death sentence for the

172. The majority cites Justice Holmes' observation that "[j]udicial decisions have had retrospective operation for near a thousand years." *Summerlin*, 341 F.3d at 1097 (quoting Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

173. *Id.* at 1097.

174. *Id.* at 1098–99.

175. *Id.* at 1100 (citing Bousley v. United States, 523 U.S. 614, 620 (1998)).

176. *Id.* at 1101–02.

177. *Id.* at 1102.

178. *Id.* at 1102–04.

179. *Id.* at 1102–03.

first seventy-one years of the state's capital sentencing scheme.[180] Responding to the Supreme Court's decision in *Furman v. Georgia*[181] and its progeny,[182] the Arizona legislature subsequently amended its death penalty statutes to assure their constitutionality. First, in 1973, the legislature added a statutory requirement that a court may not impose the death penalty without first finding aggravating circumstances and balancing those against a discrete list of mitigating circumstances.[183] Second, in 1979 the legislature redefined mitigating circumstances to include "any factors offered by the state or the defendant which are relevant in determining whether to impose a sentence less than death."[184]

Following these statutory revisions, the Ninth Circuit reviewed the use of aggravating circumstances in capital cases and, in *Adamson v. Ricketts*,[185] held them to constitute elements of the separate offense of capital murder rather than mere sentencing factors.[186] Notably, the Supreme Court specifically rejected this argument in *Walton*, instead holding that aggravating circumstances "were only 'sentencing considerations,' not 'elements of the offense' of capital murder."[187] Reexamining the question of whether aggravating circumstances constitute sentencing factors or elements of a greater offense twelve years later in *Ring*, in light of *Apprendi*, the Supreme Court overruled that portion of *Walton*, holding instead that "Arizona's enumerated aggravat-

180. *Id.* at 1102. Arizona's first capital sentencing statute, Ariz. Territorial Rev. Stat., tit. 8, §174 (1901), did remove jury discretion in capital sentencing cases in which the defendant pled guilty. Arizona abolished and restored capital sentencing by referendum in 1916 and 1918, respectively. *Summerlin*, 341 F.3d at 1102 (citing Act of Dec. 8, 1916, 1917 Ariz. Session Laws, Initiative and Referendum Measures, at 4–5 (abolishing) and Act of Dec. 5, 1918, 1919 Ariz. Session Laws, Initiative and Referendum Measures, at 18 (restoring)).

181. 408 U.S. 238 (1972).

182. Zant v. Stephens, 462 U.S. 862, 877 (1983) (holding that death penalty statutes must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that, "in all but the rarest" of capital cases, sentencers must be allowed to consider as mitigating factors "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); Bell v. Ohio, 438 U.S. 637, 641–42 (1978) (holding unconstitutional those death penalty statutes restricting a defendant's right to offer mitigating circumstances).

183. *Id.* at 1103 (citing Act of May 14, 1973, ch. 138, § 5, 1973 Ariz. Sess. Laws 966, at 968–70).

184. *Summerlin*, 341 F.3d at 1103 (quoting Act of May 1, 1979, ch. 144, § 1, 1979 Ariz. Sess. Laws 449, at 450–51).

185. 865 F.2d 1011 (9th Cir. 1988) (*en banc*).

186. *Summerlin*, 341 F.3d at 1104 (citing Adamson, 865 F.2d at 1026–27).

187. *Id.* (quoting Walton v. Arizona, 497 U.S. 639, 648 (1990)). For a more detailed discussion of *Walton*, *see supra* notes 111–20 and accompanying text.

ing factors operate as 'the functional equivalent of an element of a greater offense.'"[188] Given the Court's express overruling of *Walton*, the *Summerlin* majority reasoned that *Ring substantively* changed Arizona's death penalty statute, "reintroduc[ing] 'capital murder' as a separate substantive offense under Arizona law, redefining, in the process, what the substantive elements of this 'separate offense' of capital murder are."[189]

B. *Judge Rawlinson's Dissent*

The *Summerlin* dissent faulted what it described as the majority's flawed syllogism and its attempt to distinguish *Ring* from *Apprendi*.[190] Judge Rawlinson argued that the Ninth Circuit previously held *Apprendi* to be procedural rather than substantive, and that the majority could not escape the obvious links between *Apprendi* and *Ring*: *Apprendi*'s hate crime aggravating factor and *Ring*'s aggravating factors both "operate as the functional equivalent of an element of a greater offense."[191] This "creation of a separate substantive offense," according to the dissent, does not "render[] a new rule one of substance rather than procedure for purposes of the *Teague* analysis,"[192] merely because one says so. Thus, the dissent argued, the link between *Apprendi* and *Ring*, and the holding that *Apprendi* is procedural rather than substantive, are fatal to the majority's argument.

C. *Other Courts on* Ring *as a Substantive Rule*

Like the *Summerlin* dissent, courts rejecting the argument that *Ring* announced a substantive rule have relied on the fact that *Ring* followed *Apprendi,* and in doing so applied the *Apprendi* rule to the capital sentencing context. For example, the Arizona Supreme Court held that *Ring* announced a purely procedural rule, relying on its link to and extension of *Apprendi*, and on language within *Apprendi* questioning New Jersey's sentencing "*procedure*."[193] Thus, for example,

188. *Id.* at 1104–05 (quoting Ring v. Arizona, 536 U.S. 584, 609 (2002)).

189. *Id.* at 1106.

190. *Id.* at 1125–26 (Rawlinson, J. dissenting).

191. *Id.* at 1126 (quoting *Ring*, 536 U.S. at 609).

192. *Id.*

193. State v. Towery, 64 P.3d 828, 832–33 (Ariz. 2003) (quoting *Apprendi*, 530 U.S. at 475) (emphasis in *Towery*) (consolidating four capital defendants' post-*Ring* petitions for relief, challenging the constitutionality of their sentences based on judicial finding of aggravating circumstances). The *Summerlin* majority, in distinguishing *Towery*, refers to the later Arizona case of *State v. Ring*, 65 P.3d 915 (2003) as "*Ring II*." This is not to be confused with *Towery*'s

the court in *State v. Towery*[194] notes *Apprendi*'s discussion of an argument's "bearing on [the] procedural question" of a jury finding that an aggravating circumstance exists.[195] The *Towery* court also relied on various other courts' holdings that *Ring* announced a procedural rather than a substantive rule.[196] Similarly, the Seventh Circuit explained that *Apprendi* is about nothing but procedure—who decides a given question (judge versus jury) and under which standard (preponderance versus reasonable doubt).[197] Notably, these courts fail to address the possibility that *Ring* is both a procedural *and* a substantive rule.

D. Analysis

However, not all courts agree, and the *Palmer* district court's analysis of *Ring* as a substantive rule is particularly instructive. By analogizing to substantive new rules announced in other cases, all of which have been held retroactive, the *Palmer* court sets forth a cogent analysis that can be easily adopted by other courts. The Ninth Circuit focused on the Arizona statute's role in both *Walton* and *Ring*, and on changes in Arizona's capital sentencing statute, setting Arizona apart from other jurisdictions and making it more difficult for other jurisdictions to adopt its analysis.[198] On the other hand, the *Palmer* court's approach, compact and straightforward, is not subject to the *Summerlin* dissent's criticism: it explains *why* the rule creating a distinct capital murder offense is a substantive rather than a procedural rule.[199]

First, the *Palmer* court acknowledged that *if Ring* merely stands for the proposition that all elements must be submitted to a jury for a factual determination, it indeed directly descends from *Apprendi* and *could* be understood as a purely procedural matter.[200] However, turning to the substantive nature of the decision in *Ring*, *Palmer* explained first that new substantive rules are those that "determine the

discussion of *Ring II*, which the *Towery* court uses to refer to the United States Supreme Court decision in *Ring v. Arizona*.

194. *Towery*, 64 P.3d 828.

195. *Id.* at 832.

196. *Id.* at 832–33.

197. Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002).

198. Summerlin v. Stewart, 341 F.3d 1082, 1102–06 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003).

199. Palmer v. Clarke, 293 F. Supp. 2d 1011, 1055 (D. Neb. 2003).

200. *Id.* at 1054. The court does not, however, concede that if analyzed under *Teague*, *Ring* would not surmount its presumptive bar against retroactive application on collateral review.

meaning of criminal statutes,"[201] and "often address the criminal significance of certain facts or of the underlying prohibited conduct."[202] Defining the inquiry of whether a new rule is substantive or procedural as whether the claimed error amounts to a "fundamental defect which inherently results in a complete miscarriage of justice, and whether it presents exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent," the *Palmer* court concluded that *Ring* falls squarely within the category of substantive rules.[203] Noting the similarity of the substantive-procedural distinction to the first *Teague* exception, which allows retroactive application of those rules which place a certain category of conduct beyond the ability of the legislature to proscribe, the court explained that decisions altering the definition of a crime must apply retroactively on habeas review to "mitigate the risk" that a defendant seeking habeas relief has not been convicted of an act that is no longer criminal.[204]

Although at first blush it appears counterintuitive to claim that *Ring* creates such a risk, the *Palmer* court's analysis is sound, and upon closer consideration the risk posed by denying *Ring*'s retroactive application on collateral review to death row inmates becomes clear. First, in redefining the elements of murder and capital murder, the *Ring* Court created a category of conduct that the capital murder statute did not reach—murder committed absent any aggravating circumstances. Thus, by creating two classes of murder, the death penalty is no longer available for an entire class of capital defendants. Specifically, the death penalty is no longer available for those defendants in whose trials the judge rather than the jury rendered the verdict as to elemental aggravating circumstances. Further, the decision in *Ring* has created an impermissible risk that any number of death row inmates stand convicted of capital murder, despite the very real possibility that they are, as the *Palmer* court describes it, "innocent of the death penalty," regardless of their guilt or innocence of the underlying offense.[205] In other words, imposing the death penalty in the face of a judicial finding of aggravating circumstances compares to a death

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

202. *Id.* at 1054 (citing Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002), *cert denied*, 537 U.S. 976 (2002)).

203. *Id.* at 1054, 1055 (quoting Davis v. United States, 415 U.S. 333, 345 (1974) (internal quotations omitted)).

204. *Id.* at 1053 n.36, 1054 (citing *Bousley*, 523 U.S. at 619–21).

205. *Id.* at 1055–56.

sentence absent *any* finding of aggravating circumstances, because the judicial finding is the equivalent of *no* finding of aggravating circumstances.

Supporting its holding, the *Palmer* court cited three substantive new rules analogous to *Ring*, each of which various courts have held to apply retroactively on collateral review.[206] Important to the analysis of whether *Ring* applies retroactively as a substantive rule is the point on which the cases cited by *Palmer* are analogous: each clarifies or articulates elements of an offense. For example, the *Palmer* court relied on *Richardson v. United States*,[207] in which the defendant argued that the continuing criminal enterprise ("CCE") statute under which he was indicted[208] required a unanimous jury finding not merely that the defendant engaged in a "series of violations," but also required a unanimous finding "on which three acts constituted [the] series of violations."[209] Explaining its holding, the Court noted that specific legal consequences attach when it designates "a particular kind of fact an 'element,'"[210] and in *Richardson* the legal consequence was that a jury may not convict the defendant absent the Government's proof of each element.[211] In its analysis, the Court focused on the jury's role in evaluating and discussing the facts of each violation, commenting that if each "violation" in the "series" were a means to establishing a series element rather than an element in and of itself, the jury could too easily avoid truly deliberating the facts presented and instead merely gloss over any disagreements among jurors.[212] With that in mind, and to assure a fairer and more accurate verdict, the Court held "that the statute requires jury unanimity in respect to each individual 'violation'"[213] constituting the "series of violations."[214] In so holding, the Court clarified the elements of the CCE statute.

206. *Id.* at 1055 (citing Jones v. United States, 529 U.S. 848, 850 (2000); Richardson v. United States, 526 U.S. 813, 821 (1999); Bailey v. United States, 516 U.S. 137, 142 (1995); and compiling cases holding each new substantive rule to apply retroactively on collateral review).

207. 526 U.S. 813 (1999).

208. 21 U.S.C. § 848(a) (2000).

209. *Richardson*, 526 U.S. at 816.

210. *Id.* at 817 (citing Almendarez-Torres v. United States, 523 U.S. 224, 239 (1998)).

211. *Id.* (citing Johnson v. La., 406 U.S. 356, 369–71 (1972) (Powell, J., concurring); Andres v. United States, 333 U.S. 740, 748 (1948); and F. R. CRIM. P. 31(a)).

212. *Id.* at 819.

213. *Id.* at 824.

214. 21 U.S.C. § 848(c)(2)(A) (2000).

Similarly, in *Bailey v. United States*,[215] the Court explained the elements necessary to convict a defendant under a statute criminalizing the use or carrying of a firearm "during and in relation to any crime of violence or drug trafficking crime,"[216] holding that the terms "use" and "carries" "requires evidence sufficient to show active employment of the firearm by the defendant."[217]

Likewise, the Court in *Jones v. United States*[218] (*Jones II*) again clarified the elements of a statute.[219] The statute at issue in *Jones II* was a federal arson statute criminalizing the damage or destruction by fire of "property used in interstate or foreign commerce."[220] Defining commercial property, the court held that the statute did not reach arson of purely residential property.[221]

Because they clarify, explain, or define elements of an offense, *Richardson*, *Bailey*, and *Jones II* are substantive rules.[222] As such, each applies retroactively on collateral review.[223] Thus, the *Palmer* court altogether avoids the *Summerlin* dissent's primary criticism of the majority's analysis by not merely saying that a rule altering elements is substantive, but instead pointing to specific examples in which courts have held similar element-clarifying rules to be substantive and therefore retroactively applicable on collateral review.[224]

Against this background, the *Summerlin* majority's reliance on Justice Scalia's opinion in *Sattazahn v. Pennsylvania*[225] more clearly and directly supports the argument that *Ring* announced a substantive rule.[226] Distinguishing capital murder from murder *simpliciter*, the Ninth Circuit's analysis is consistent with the *Sattazahn* Court's analysis, which expressly recognized the distinction between the offenses.[227] Addressing the applicability of the Fifth Amendment's Double Jeopardy Clause to capital sentencing proceedings, the *Sattazahn* Court

215. 516 U.S. 137 (1995).

216. 18 U.S.C. §924(c)(1)(A) (2000).

217. Bailey v. United States, 516 U.S. 137, 142–43 (1995).

218. 529 U.S. 848 (2000).

219. *Jones II*, 529 U.S. at 850–51.

220. *Id.* at 850 (quoting 18 U.S.C. §844(i) (2000)).

221. *Id.* at 850–51.

222. *See* Bousley v. United States, 523 U.S. 614, 620–21 (1998).

223. *See* Palmer v. Clarke, 293 F. Supp. 2d 1011, 1055 (D. Neb. 2003) (compiling cases holding *Richardson*, *Bailey*, and *Jones II* retroactive on collateral review).

224. *Id.*

225. 537 U.S. 101 (2003).

226. The *Palmer* court also relied on *Sattazahn* to support its holding that *Ring* announced a new substantive rule. *Palmer*, 293 F. Supp. 2d at 1054–55.

227. *Sattazahn*, 537 U.S. at 112.

noted the difficulty of applying the Clause to sentencing proceedings which, despite the "hallmarks of a trial" they bear, still "dealt only with the *sentence* to be imposed for the 'offense' of capital murder."[228] Therefore, according to the Court, the rule establishing that jeopardy attaches where a jury considers the merits of imposing the death sentence and subsequently acquits the defendant in a death sentence proceeding, "continually tripped over the text of the Double Jeopardy Clause."[229] However, the Court explained that both *Apprendi* and *Ring* clarified its capital sentencing doctrine and eased the difficulty. Restating the *Apprendi* holding, Justice Scalia explained,

> [*Apprendi*] clarified what constitutes an "element" of an offense for purposes of the Sixth Amendment's jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt.[230]

Likewise, Justice Scalia restated the Court's *Ring* holding that "aggravating circumstances that make a defendant eligible for the death penalty 'operate as the functional equivalent of an element of a *greater offense*.'"[231]

Finally, Justice Scalia noted that for the purposes of the Sixth Amendment's guarantee of a jury trial, the offenses of "murder" and "murder plus one or more aggravating circumstances" are distinct from each other because the offenses expose the defendant to distinct maximum penalties: life imprisonment and death, respectively.[232] For purposes of *Sattazahn*, the Court held that this substantive difference

228. *Id.* at 110 (quoting Bullington v. Missouri, 451 U.S. 430, 439 (1981)). The *Bullington* Court held that double jeopardy applies to capital sentencing proceedings bearing "the hallmarks of the trial on guilt or innocence," because a trial-like sentencing proceeding subjects the defendant to emotional stresses and stigma similar to those he or she faces at trial, and because the sentencing proceeding requires the jury to evaluate whether the prosecution has proven its case. *Bullington*, 451 U.S. at 439, 444–45.

Sattazahn's first trial resulted in guilty verdicts for, among other charges, first-, second- and third-degree murder. *Sattazahn*, 537 U.S. at 103. The jury was unable to reach a unanimous verdict during its penalty phase deliberation, considering the one aggravating circumstance presented by the prosecutor and two mitigating circumstances presented by Sattazahn. *Id.* at 103–04. The trial court therefore discharged the jury and sentenced Sattazahn to life imprisonment. *Id.* at 104–05. Following reversal by the Pennsylvania Superior Court due to erroneous jury instructions, the prosecution again sought the death penalty. *Id.* at 105. Sattazahn appealed to the United States Supreme Court, arguing that Pennsylvania violated the Double Jeopardy Clause when it sought the death penalty on retrial. *Id.* at 105.

229. *Id.* at 110–11.

230. *Id.* at 111 (quoting Apprendi v. N.J., 530 U.S. 466, 482–84, 490 (2000)).

231. *Id.* (quoting Ring v. Arizona, 536 U.S. 584, 609 (2002)) (emphasis added by *Sattazahn*).

232. *Id.*

between the two offenses is not limited to the Sixth Amendment jury trial guarantee, but extends to Fifth Amendment Double Jeopardy protection as well.[233] The point remains, though: the Court's explanation of both *Apprendi* and *Ring* strongly suggests that the Supreme Court views *Apprendi* and *Ring* as substantive rules.

Thus, those circuits and state courts arguing that *Ring* merely "altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings,"[234] fail to recognize that *Ring* also effectively altered *what* the factfinder must decide: whether the defendant is guilty of murder *simpliciter* or capital murder. Moreover, both *Towery* and the circuit and district courts whose cases the Arizona Supreme Court cites failed to address the possibility that *Ring* is, as the Ninth Circuit held, both a procedural and a substantive rule. Although *Apprendi* discusses the sentencing procedure, extended to capital sentencing in *Ring*, those courts interpreting the cases together ignore the underlying substantive change in both cases, recognized by the Supreme Court in *Sattazahn*. And as *Summerlin* correctly held, *Ring* reintroduced that distinction into capital sentencing law.[235] Because it clarified the elements of murder *simpliciter* and capital murder, *Ring* is indeed a substantive rule and therefore applies retroactively on collateral review.

However, Arizona asks the Court to decide whether *Ring* is a substantive rule, distinguishable from *Apprendi*, a case recognized as purely procedural by most courts considering the question.[236] For example, the Eleventh Circuit in *McCoy v. United States*[237] held *Apprendi* to be a procedural rule, rejecting the concurring opinion's argument and explaining that the *Apprendi* Court already addressed the issue.[238] The *McCoy* court explained,

233. *Id.* 111–12.

234. State v. Towery, 64 P.3d 828, 833 (Ariz. 2003) (emphasis in original).

235. Summerlin v. Stewart, 341 F.3d 1082, 1102, 1106 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003).

236. *E.g.*, United States v. Swinton, 333 F.3d 481, 489 (3d Cir. 2003) (holding that *Apprendi* announced a new procedural rule); United States v. Brown, 305 F.3d 304, 305, 310 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 1919 (2003) (rejecting Brown's argument that *Apprendi* announced a substantive rule, instead, holding that *Apprendi* was purely procedural); Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 537 U.S. 976 (2002) (explaining that *Apprendi* is concerned only with the "identity of the decision-maker, and the quantum of evidence required for a sentence, rather than with what primary conduct is unlawful," and holding that *Apprendi* therefore announced a procedural rather than a substantive new rule).

237. 266 F.3d 1245 (11th Cir. 2001).

238. *Id.* at 1257 n.16.

> In *Apprendi*, the Supreme Court specifically noted that "[t]he substantive basis for New Jersey's enhancement . . . is not at issue; the adequacy of New Jersey's procedure is." The application of *Apprendi* merely changes the method or procedure for determining drug quantity and [the defendant's] sentence; it does not make [the defendant's] conduct not criminal, thereby raising the spectre of actual innocence. . . Thus, as other circuits have, we conclude *Apprendi* announced a new rule of criminal procedure.[239]

However, the Eleventh Circuit takes out of context the language from *Apprendi*: rather than discussing the substantive or procedural nature of the holding, the *Apprendi* Court instead addressed the constitutionality of using racial bias as an aggravating circumstance.[240] And while it is true that the *Apprendi* Court discussed the rule in a procedural context,[241] it did not do so in a manner foreclosing the possibility that the rule is also substantive.

In fact, the Supreme Court has *not* specifically held *Apprendi* to be substantive or procedural, and should not rely on circuit and state courts' interpretation of *Apprendi* as purely procedural to answer whether the rule announced in *Ring* is substantive or procedural. Although there is a strong argument that the cases are inextricably linked, with *Ring* merely extending *Apprendi*'s rule into the capital sentencing context, their similarity does not answer the critical question: are *both Apprendi* and *Ring* substantive or procedural rules? Both are substantive rules, because both *Apprendi* and *Ring* alter the elements of the offenses. *Apprendi* makes the choice of victim based on race (here the hate crime aggravating circumstance, although different cases present different aggravating circumstances) an element of a different offense, eligible for a greater sentence, while *Ring* makes an aggravating circumstance an element of a different offense, eligible for a greater sentence. Both *Apprendi* and *Ring* therefore alter not only *who* must decide the defendant's guilt, they alter *what* the decisionmaker must decide. If the jury fails to find the defendant guilty of the greater offense, the defendant is simply *not guilty* of that offense.[242] Thus, the jury's finding is not merely one that a defendant

239. *Id.* (quoting Apprendi v. New Jersey, 530 U.S. 466, 475 (2000)).

240. *Apprendi*, 530 U.S. at 475.

241. *Id.* ("The strength of the state interests that are served by the hate crime legislation has no more bearing on this procedural question than the strength of the interests served by other provisions of the criminal code.").

242. Palmer v. Clarke, 293 F. Supp. 2d 1011, 1055–56 (D. Neb. 2003) (citing Sawyer v. Whitley, 505 U.S. 333, 349–50 (1992)).

is eligible for a particular sentence, but is instead one of either guilty or not guilty of a distinct offense.[243]

Therefore, because *Ring* defines the elements of an offense and announces a substantive rule of law, it is not subject to *Teague*'s retroactivity analysis. Moreover, because the *Summerlin* court correctly held that *Ring* announced a substantive rule, the Supreme Court should affirm the Ninth Circuit's holding that the rule applies retroactively on collateral review.

V. *RING V. ARIZONA* ANNOUNCED A NEW RULE OF CRIMINAL PROCEDURE

In addition to finding that *Ring* announced a substantive rule, the *Summerlin* majority also found that as a new criminal procedural rule, *Ring* satisfies the *Teague* doctrine's second exception and should therefore apply retroactively on collateral review.[244] Agreeing with other courts that have considered *Teague*'s bearing on *Ring*, the court held that *Ring* is indeed a new rule.[245] However, the Ninth Circuit parted company with other circuits when it correctly held that, because *Ring* is a "watershed rule" which "defines structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials,"[246] it overcomes the

243. *See id.* at 1055–56 (noting that a capital defendant can be guilty of the underlying offense but "innocent" of the death penalty).

244. Summerlin v. Stewart, 341 F.3d 1082, 1121 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003).

245. The Ninth Circuit rejected Summerlin's argument that relied on the Ninth Circuit's decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*), (holding that Arizona law defined two levels of murder, for one of which the aggravating factors were elements of capital murder). In 1984, Summerlin had raised an argument similar to that in *Adamson*, which argument the Arizona Supreme Court rejected based on the United States Supreme Court's holding in *Proffitt v. Florida*, 428 U.S. 242 (1976) (holding that the constitution did not require jury sentencing in capital murder proceedings). *Summerlin*, 341 F.3d at 1109.

246. *Id.* at 1121. The court briefly addressed the first *Teague* exception, noting cursorily that it does not apply to *Ring*. *Id.* at 1109. The United States Supreme Court in *Saffle v. Parks* held that the first Teague exception also encompasses new rules that "address[] a 'substantive categorical guarante[e] accorded by the Constitution,' such as . . . a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Saffle*, 494 U.S. 484, 494 (1990) (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)). However, Janice L. Kopec argues that *Ring* satisfies the first *Teague* exception by converting the offense of capital murder into two separate offenses: capital murder which may result in a sentence of life and capital murder which may result in a sentence of death, depending on whether the prosecutor proves the elements to a jury beyond a reasonable doubt. Thus, the offense of capital murder with unproven aggravating circumstances "creates a class of defendants against whom a certain category of punishment, death, is now prohibited." Janice L. Kopec, Ring v. Arizona, *122 S. Ct. 2428 (2002) and* Allen v. United States, *122 S. Ct. 2653 (2002)*, 15 CAP. DEF. J. 143, 149 (2002). As explained previously, this argument is better suited to the *Summerlin* court's holding that

Teague hurdles and therefore applies retroactively on collateral review.[247] The second question before the Supreme Court corresponds to this second prong of the Ninth Circuit's analysis, as the Court will decide whether the *Summerlin* majority erred in holding that *Ring* satisfied *Teague*'s requirements.[248] This Section will first discuss the majority and dissent positions on each prong of the *Teague* exception, and will briefly examine other courts' conclusions that *Ring* fails to satisfy the exception. This Section will then conclude by confirming the jury's role in substantially increasing the likelihood of an accurate result and the *Summerlin* court's conclusion that *Ring* is indeed a watershed rule.

A. The Requirement that a Jury Find All Facts Substantially Increases the Likelihood of an Accurately Imposed Death Penalty

As noted above, to qualify as an exception under *Teague*, a new rule must first be one that "significantly improve[s] the pre-existing fact-finding procedures"[249] to "seriously enhance the accuracy of the proceeding."[250] Noting that sentencing proceedings are analogous to trials in their considerations of guilt or innocence, and that jeopardy attaches when a jury considers and rejects the imposition of the death penalty (thereby precluding its use in a subsequent prosecution),[251] the *Summerlin* majority concluded that the accuracy to which *Teague* refers applies equally to the guilt and the penalty phases.[252] Relying on *Sawyer v. Smith*,[253] the majority argued that *Ring* satisfies *Teague*'s accuracy requirement "on its face."[254] A brief summary of *Sawyer* will clarify the *Summerlin* court's reliance on the case.

Ring issued a substantive rule of law which defined the elements of the crime because the class of individuals for whom a certain category of punishment is now prohibited are unidentifiable as members of the class until *after* their sentencing proceedings. In fact, some courts treat the substantive-procedural distinction as the first *Teague* exception. *See Palmer*, 293 F. Supp. 2d at 1053 n.36.

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

248. Schriro v. Summerlin, 124 S. Ct. 833 (2003).

249. Teague v. Lane, 489 U.S. 288, 312 (1989) (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

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

251. *Id.* at 1110 (quoting Sattazahn v. Pennsylvania, 537 U.S. 101, 107 (2003)).

252. *Id.*

253. 497 U.S. 227 (1990).

254. *Summerlin*, 341 F.3d at 1110.

Sawyer sought the benefit of a new rule on collateral review, arguing that the rule preserved a proceeding's accuracy and fairness.[255] The rule at issue was that in *Caldwell v. Mississippi*,[256] in which the Court held that because of the potential unreliability and bias favoring death sentences, the Eighth Amendment requires that a jury considering a capital sentence not be misled to believe that it is not responsible "for determining the appropriateness of the defendant's capital sentence."[257] Although the Court rejected the petitioner's argument and refused to apply the rule retroactively, its decision was not because the rule sought failed to increase the likelihood of an accurate result. Instead, the *Sawyer* Court held that the *Caldwell* rule failed to satisfy the second prong of the *Teague* exception.[258] Importantly, in explaining its reasons for refusing to hold the rule as a bedrock principle, the *Sawyer* Court noted that if it accepted the petitioner's argument that the rule should apply retroactively because of its accuracy-enhancing quality, all of the Court's Eighth Amendment jurisprudence should apply retroactively because it is all "directed toward the enhancement of reliability and accuracy in some sense."[259] Allowing such extensive retroactive application would defeat the very purpose of the *Teague* doctrine and its underlying cost-benefit balancing.[260]

Unlike *Sawyer*, *Ring* is grounded in the Sixth Amendment rather than the Eighth Amendment. However, despite the distinction, the Supreme Court's warning that merely enhancing reliability and accuracy fails to satisfy the second *Teague* exception is instructive. Indeed, the Ninth Circuit established at great lengths the degree to which submitting aggravating and mitigating factors to a capital sentencing jury increases the likelihood of an accurate result. For example, the majority noted that presenting evidence to prove the existence of aggravating factors to a jury rather than a judge assures a more orderly, thorough, and formal presentation and also assures that prosecutors do not submit inadmissible evidence, which they later expect

255. *Sawyer*, 497 U.S. at 242.

256. 472 U.S. 320 (1985).

257. *Sawyer*, 497 U.S. at 233 (citing *Caldwell*, 472 U.S. at 328–29).

258. *Id.* at 242, 243.

259. *Id.* at 243.

260. *Id.* at 242–43 (noting that the retroactivity cost-benefit analysis generally favors nonretroactivity).

the trier of fact to ignore.[261] Additionally, the *Summerlin* majority explained the jury's role in determining whether the prosecution has proven aggravating factors beyond a reasonable doubt greatly increases the likelihood of an accurate result because, "as a microcosm of the community," the factfinder must use current community values and standards by which to evaluate some of the more subjective aggravating factors.[262] Finally, the Ninth Circuit voiced two concerns regarding capital sentencing judges: first, they are likely to be more accustomed than the average juror to death penalty issues, and therefore less likely to truly reflect the community's views on the death penalty as an extraordinary measure; and second, judges facing reelection face political pressure to impose the death penalty.[263]

However, Judge Rawlinson, writing for the dissent, claimed that it is far from clear whether requiring that a jury determine the existence of aggravating circumstances in capital cases will enhance the accuracy of a capital sentencing proceeding.[264] In reaching this conclusion, he attacked the majority for ignoring evidence that juries often make the death penalty decision before reaching the sentencing phase, and that jurors who are undecided are more likely to vote for death.[265] Moreover, the dissent rejected the majority's contention that formal and thorough jury presentations are likely to be more accurate than a presentation to a judge, countering that in fact such presentations confuse juries, who do not provide "necessarily the fairest adjudication for a capital defendant" in their role as the "conscience of the community."[266] Turning to the majority's concern that judicial experience with capital sentencing renders judges more jaded and less affected by imposing the sentence, the dissent posited that judges' experience with capital sentencing might benefit a capital defendant.[267] Addressing the majority's final concern with judicial sentencing and its effect on the accuracy of the verdict, the dissent assailed the majority's data, and noted that juries are also subject to pressure.[268] Thus, arguing that *Ring* fails to satisfy even the first prong of

261. Summerlin v. Stewart, 341 F.3d 1082, 1110–11 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003).

262. *Id.* at 1113–14 (quoting Harris v. Alabama, 513 U.S. 504, 517 (1995) (Stevens, J., dissenting).

263. *Id.* at 1114.

264. *Id.* at 1131.

265. *Id.* at 1129–31.

266. *Id.* at 1130–31.

267. *Id.* at 1131.

268. *Id.*

the *Teague* exception, the dissent claimed that the rule should not apply retroactively.[269] Before discussing the correctness of the majority's analysis, this Comment will first explain both the majority and dissent positions, as well as the concurrence, regarding *Ring*'s satisfaction of the *Teague* exception's second prong.

B. The Requirement that a Jury Must Find all Facts Necessary to Impose a Death Sentence is a "Bedrock Principle," "Implicit in Our Concept of Ordered Liberty"

Having satisfied the accuracy prong of the *Teague* exception, a new procedural rule will apply retroactively if it "alter[s] our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[270] To establish that *Ring* meets this requirement, the *Summerlin* majority began by holding that *Ring* error is structural rather than harmless error because the error, "[d]epriving a capital defendant of his constitutional right to have a jury decide whether he is eligible for the death penalty[,] is an error that necessarily affects the framework within which the trial proceeds."[271]

According to *Summerlin*, presenting to a judge aggravating circumstances, which are in fact elements of a capital crime, results in structural error because "an improperly constituted or situated tribunal reaches a decision, [and] that decision is infected with a 'plain defect' and must be vacated."[272]

Having established *Ring* error as structural rather than harmless error, the majority continued its analysis, likening *Ring* to *Furman* in

269. *Id.*

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

271. *Summerlin*, 341 F.3d at 1116 (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991)); *Summerlin*, 341 F.3d at 1119 (citing Neder v. United States, 527 U.S. 1, 8 (1999)).

272. *Summerlin*, 341 F.3d at 1118 (quoting Nguyen v. United States, 123 S. Ct. 2130, 2137–38 (2003), and citing Sullivan v. Louisiana, 508 U.S. 275 (1993); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 83–85 (1982)).

However, the Supreme Court in *Tyler v. Cain* cautioned that merely classifying an error as structural error does not fulfill the requirements of the second *Teague* exception. Tyler v. Cain, 533 U.S. 656, 666–67 (2001). Thus, the *Tyler* Court rejected an argument that when it held the error under the rule announced in *Cage v. Louisiana*, 498 U.S. 39 (1990), was structural error, see Sullivan v. Louisiana, 508 U.S. 275, 282–83 (1993), *Cage* thereby satisfied the second *Teague* exception and applied retroactively on collateral review. *Tyler*, 533 U.S. at 665–67.

its far-reaching structural effect on capital trials.[273] The majority explained that the *Ring* Court "declar[ed] that judges are constitutionally unqualified to decide whether a defendant is eligible for the death penalty,"[274] and affected nearly one-fourth of then-existing capital murder statutes.[275] Given its structural nature and the extent of its impact, the court continued, *Ring* is in fact a watershed rule that "fundamentally altered our view of how the Sixth Amendment right to a jury trial affected the Eighth Amendment's requirement that state statutes narrow the class of individuals eligible for the penalty of death."[276] Therefore, according to *Summerlin, Ring* should apply retroactively on collateral review.

Judge Reinhardt's concurrence focused on the unique nature of the punishment at issue, specifically noting the arbitrariness of denying capital defendants the benefit of *Ring* because the judgment in their cases became final prior to the Court's decision.[277] He likened *Ring*, as a correction of *Walton*'s "error," to *Brown v. Board of Education*[278] as a correction of the Court's error in constitutional interpretation in *Plessy v. Ferguson*.[279] Importantly, Judge Reinhardt pointed out that a number of the habeas petitioners for whom the dissent would deny the rule of *Ring* would not have been sentenced under unconstitutional methods absent the Court's initial error in interpreting the requirements of the Sixth Amendment.[280] Given the inarguable fact that "death is different,"[281] Reinhardt questioned whether the society should allow a state to "deliberately execute persons knowing that their death sentences were arrived at in a manner that violated their constitutional rights?"[282]

273. *Summerlin*, 341 F.3d at 1119–20. The court notes that *Ring* will affect "the structure of every capital trial and has rendered unconstitutional every substantive statute in conflict with its dictates." *Id.* at 1119.

274. *Id.* at 1120.

275. *Id.*

276. *Id.*

277. *Id.* at 1122 (Reinhardt, J., concurring).

278. 347 U.S. 483 (1954).

279. *Summerlin*, 341 F.3d at 1122 (Reinhardt, J., concurring) (citing Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

280. *Id.* at 1122 (Reinhardt, J., concurring).

281. *Id.* at 1123 (Reinhardt, J., concurring) (quoting Ring v. Arizona, 536 U.S. 584, 606 (2002); Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion); Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring)).

282. *Id.* at 1124 (Reinhardt, J., concurring).

This dissent summarily criticized the majority's treatment of *Ring* as not subject to harmless error analysis, relying on a footnote to *Ring* in which the Court noted its failure to reach the harmless error issue, leaving it instead to the Arizona courts.[283] The *Ring* footnote, taken with what the dissent described as *Ring*'s *limited* applicability (because so few states remained whose capital sentencing laws did not require juries to find every aggravating factor/element) led the dissent to conclude that *Ring* therefore is not a watershed rule.[284]

C. *Other Courts on* Ring*'s Retroactive Application under* Teague

Other courts analyzing *Ring*'s retroactivity as a procedural rule likewise have concluded that *Ring* is not a watershed rule and therefore does not apply retroactively. For example, the Eleventh Circuit in *Turner v. Crosby*[285] explained that an impartial factfinder considered the aggravating circumstance element pre-*Ring* as well as post-*Ring*.[286] According to the court, the only difference was the identity of that factfinder.[287] The *Turner* court further explained that *Ring*'s basis in the Sixth Amendment right to a trial by jury precluded the possibility that *Ring* is based on a "need to enhance accuracy or fairness of the fact-finding in a capital sentencing context."[288]

Similarly, the Tenth Circuit has held that *Ring* fails to satisfy *Teague*'s narrow exceptions. For example, the court in *Cannon v. Mullin*[289] considered *Ring*'s retroactive application to a habeas petition governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[290] Under AEDPA, an applicant filing a second or successive habeas petition, relying on a new constitutional rule, must demonstrate that the Supreme Court has made the rule "retroactive

283. *Summerlin*, 341 F.3d at 1127, 1131 (Rawlinson, J., dissenting) (citing *Ring*, 536 U.S. at 609 n.7). Arizona courts subject *Ring* error to harmless error analysis. State v. Ring, 65 P.3d 915, 936 (Ariz. 2003).

284. *Id.* 1131–32 (Rawlinson, J., dissenting).

285. 339 F.3d 1247 (11th Cir. 2003).

286. *Id.* at 1286.

287. *Id.* Turner was convicted in Florida, which used a 'hybrid' capital sentencing scheme. The jury found Turner guilty of two counts of first-degree murder on August 16, 1985. *Id.* at 1261. Following the penalty phase, the jury rendered advisory sentences, recommending a "sentence of life imprisonment without the possibility of parole for twenty-five years" for one murder, and recommending the death penalty for the other murder. *Id.* at 1265. Thereafter, the trial court conducted a sentencing hearing and on November 1, 1985 sentenced Turner in accordance with the jury's recommendations. *Id.* at 1267.

288. *Id.* at 1286.

289. 297 F.3d 989 (10th Cir. 2002).

290. 28 U.S.C. § 2244 *et seq.* (2000).

to cases on collateral review."[291] The Supreme Court in *Tyler v. Cain*[292] interpreted this provision of AEDPA, holding that it must either explicitly hold a rule retroactive, or in the case of two cases combining to hold a rule retroactive, if "the holdings in those cases necessarily dictate retroactivity of the new rule."[293] Cannon argued that the Supreme Court has already held *Ring* to apply retroactively on collateral review.[294] The Tenth Circuit rejected Cannon's argument that through *Teague*, *Ring*, and the "*Apprendi* line" of cases the Supreme Court had effectively held that *Ring* applies retroactively on collateral review.[295] While the *Cannon* court's analysis appeared to leave open the possibility that *Ring* applies retroactively to habeas petitions not subject to AEDPA's strict requirements, the Tenth Circuit has since conclusively held that *Ring* does not apply retroactively on collateral review.[296]

D. Analysis

Thus, according to the Ninth Circuit, the rule requiring that a jury rather than a judge decide every element of capital murder substantially increases the likelihood of an accurate result. Further, the error in a pre-*Ring* trial is structural, and *Ring*'s impact profound, altering our understanding of the bedrock elements necessary for a fair conviction of capital murder. Therefore, just as the Supreme Court should affirm the Ninth Circuit's holding that *Ring* announced a substantive rule which applies retroactively on collateral review, the Court should likewise affirm *Summerlin*'s holding that *Ring* announced a watershed rule that satisfies the second *Teague* exception.

The Ninth Circuit's analysis is sound. The rule announced in *Ring* is truly a watershed rule, because it enhances both accuracy and fundamental fairness in capital trials. These accuracy and fundamental fairness prongs of the *Teague* exception are interrelated in the jury context. Specifically, the history of the jury's role in American jurisprudence demonstrates that the jury was designed to both increase

291. 28 U.S.C. § 2244(b)(2)(A) (2000).

292. 533 U.S. 656 (2001).

293. *Id.* at 663, 666.

294. Cannon v. Mullin, 297 F.3d 989, 992 (10th Cir. 2002). Cannon filed an Emergency Application for Stay of Execution and Emergency Motion for an Order Pursuant to 28 U.S.C. § 2244(b)(3)(A) for Permission to File a Second Petition for Habeas Corpus Relief Under § 2254. *Id.* at 990.

295. *Id.* at 992–93.

296. *See e.g.*, Workman v. Mullin, 342 F.3d 1100, 1115 (10th Cir. 2003).

accuracy in criminal trials and to protect a proceeding's fundamental fairness. This analysis will first discuss the Supreme Court's recognition of the fundamental protections offered by the jury and its concern that the increased use of sentencing factors marks a troubling departure from that valued tradition. Thereafter, the analysis will focus on how the use of the jury increases the likelihood of a more accurate result. Finally, this Comment will conclude by suggesting that holding that *Ring* applies retroactively on collateral review is consistent with the principles underlying the *Teague* doctrine.

Ring does indeed satisfy the prerequisites to retroactive application on collateral review. The case culminates a line of cases wherein the Court reemphasized the jury's fundamental factfinding role with respect to *all* elements, regardless of whether the state refers to those elements as sentencing factors. First, analyzing *Ring* in the context not only of *Apprendi*, but of *Walton* and *Jones* as well, reveals the Court's increasing awareness and concern that the states devalued the jury's role in criminal trials. This devaluation diminished the fairness of those trials, which has long been recognized as a primary purpose of the Sixth Amendment.[297] In response, and after recognizing that the increased use of judicially determined sentencing factors marked a departure from allowing the jury to play its fundamental role as the buffer between the defendant and the state, the Supreme Court thus reshaped its sentencing jurisprudence.

The Court's concern that states not use "sentencing factors" to skirt the protections of the Sixth Amendment is clear in *Jones*, the first of the post-*Walton* cases in the *Apprendi* line. The *Jones* Court devoted several paragraphs to describing the jury's traditional and fundamental role in American jurisprudence.[298] The *Jones* Court noted that juries in the English system traditionally considered "lesser included offenses" to thwart parliamentary and royal power.[299] The parliamentary response of attempting to restrict juries' ability to control the outcome of trials must certainly have been in the constitutional framers' mind.[300] In fact, the *Jones* Court noted that colonial

297. *See, e.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 276 (1942) ("[P]rocedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.'").

298. Jones v. United States, 526 U.S. 227, 244–48 (1999).

299. *Id.* at 245 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 238–39 (1769)).

300. *Id.* Professor Reid notes that to colonists, "[p]arliament's claim, to have the constitutional power to alter the fundamental right of trial by jury and to sweep aside a provincial char-

Americans understood "that the jury right could be lost not only by gross denial, but by erosion."[301]

Following *Jones*, the *Apprendi* Court again expressed concern that sentencing factors eroded the jury's fundamental role, noting that "the historical foundation for our recognition of these principles extends down centuries into the common law."[302] The Court explained that trial on every element of an accusation was central to our inherited jury system, and during the country's formative years, "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court."[303] The issue of whether to allow a sentencing judge to make factual findings about elements was thus one of "surpassing importance,"[304] which the Court held to be an "unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system."[305] Moreover, the Court suggested that rather than issuing a novel rule of criminal procedure by which it requires that a jury determine what were traditionally considered merely sentencing factors, it was in fact displacing a novel legislative approach and requiring a *return* to a bedrock principle:

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, 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.[306]

In fact, four *Apprendi* dissenters predicted that *Apprendi* would "surely be remembered as a *watershed* change in constitutional law."[307]

ter with all its customary and historical rights and privileges, meant slavery by legislative authority." JOHN PHILLIP REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 96 (1988) (internal quotation omitted).

301. *Jones*, 526 U.S. at 247–48.

302. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (citing 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873); 4 BLACKSTONE, *supra* note 299, at 343).

303. *Id.* at 478.

304. *Id.* at 476.

305. *Id.* at 497; *see also* GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 146 (1989) ("Trial by jury reflects substantial popular control over judges.").

306. *Apprendi*, 533 U.S. at 482–83 (emphasis in original).

307. *Id.* at 524 (O'Connor, J., dissenting) (emphasis added). For further discussion of *Apprendi* as a watershed ruling, *see e.g.*, Heather Jones, Note, Apprendi v. New Jersey: *A True "Watershed" Ruling*, 81 TEX. L. REV. 1361, 1377 (2003) ("Because *Apprendi* did redefine what

The *Apprendi* line of cases preceding *Ring*, taken together with the Court's attention to the jury's traditional role in criminal trials, present a framework within which the rule protecting the jury's role as factfinder, especially in the capital sentencing context, is in fact a bedrock principle. This is true for the rule in *Apprendi* and it is for the rule in *Ring*. In fact, it is precisely in matters of life and death that the jury must play its traditional role—bringing community standards into the deliberations and protecting against the possibility of an unduly harsh sentence. Indeed, no defendant is more in need of a jury to safeguard his or her liberty against the potential abuse of prosecutorial power or the arbitrary decision of a sole judge than one facing a sentence of death. The Supreme Court in *Ring* halted the legislative erosion of the Sixth Amendment's guarantees, and in doing so "alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding"[308] by declaring that it will permit neither legislative convenience nor presumed superiority of judgment to deny a criminal defendant a jury trial on every element of the charged offense.

Having established that *Ring* altered our understanding of bedrock procedural elements, the *Summerlin* court also correctly held that *Ring* substantially increased the likelihood of an accurate result.[309] The jury has historically acted as the conscience of the community, placing itself as a buffer between an accused and the full power and authority of the state. This is precisely why the Sixth Amendment jury trial guarantee is so important. Representing the community, the jury must weigh all of the evidence presented and reach a unanimous verdict as to whether the prosecutor has established beyond a reasonable doubt each element of capital murder. It must be noted that to recognize that a jury substantially increases accuracy is not to say that judges are inevitably inaccurate. Instead, it recognizes that twelve people discussing and evaluating whether evidence proves inherently subjective elements are more likely to reach an accurate result than a lone judge considering the same evidence. And indeed, aggravating circumstance elements are highly subjective. The subjectivity is readily apparent in examining one of *Summerlin*'s

is essential to the fairness of criminal proceedings, it should be considered a watershed decision.").

308. Sawyer v. Smith, 497 U.S. 227, 242 (1990) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion) (internal quotations omitted, emphasis in original)).

309. Summerlin v. Stewart, 341 F.3d 1082, 1116 (9th Cir. 2003), *cert. granted in part sub nom.*, Schriro v. Summerlin, 124 S. Ct. 833 (2003).

aggravating circumstances: whether Summerlin committed his crime in an "especially heinous, cruel, or depraved manner."[310] Certainly the likelihood of an accurate result increases when twelve people, each bringing to the process different worldviews and experiences, consider such a subjective element. Jurors' definitions of "heinous," "cruel," and "depraved" will likely vary, and the jury's unanimous verdict will thus better reflect community opinions and values regarding whether it is appropriate to impose the death penalty for the offense. Moreover, despite the dissent's dismissal of the jury's role as the conscience of the community, the Supreme Court has expressly recognized that role.[311]

Thus, allowing a jury to consider and evaluate facts and evidence substantially increases the likelihood of an accurate result. However, the jury's role in enhancing accuracy is also closely linked to its role in preserving the fundamental fairness of a criminal trial. As Professor Barkow explains, criminal juries, with their ability to render a verdict of guilty or not guilty, "have the kind of ameliorative power Aristotle deemed critical for producing equitable results."[312] The equity to which Professor Barkow refers also assures a more accurate result, especially in the capital sentencing context, when weighing such subjective factors as the heinous nature of an offense. The jury must balance the evidence against the alleged elemental aggravating circumstance, and render a value-laden judgment about whether the defendant should be put to death for his or her crime. When a defendant's life hangs in the balance, the only accurate result is an equitable one—one in which the jury of twelve rather than a lone judge plays its constitutionally required role.

Finally, despite the dissent's casual dismissal of the *Summerlin* majority's concern that judges will be either hardened to the considerations surrounding the imposition of the death penalty or will face

310. *Id.* at 1090 (citing Ariz. Rev. Stat. § 13-703(F)(6) (1981) (amended in 1993)).

311. Jones v. United States, 527 U.S. 373, 382 (1999); *see also* Witherspoon v. Illinois, 391 U.S. 510, 519–20 (1968) (explaining that jurors must act as the community's conscience, bringing to the deliberations their views on the suitability of capital punishment); Recent Cases, *Criminal Procedure—Habeas Corpus—Ninth Circuit Holds That the Supreme Court's Decision in* Ring v. Arizona *Applies Retroactively to Cases on Habeas Corpus Review*—Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) (en banc), 117 HARV. L. REV. 1291, 1297–98 (2004) (arguing that the 9th Circuit should have focused on the jury's role as the conscience of the community, thereby enhancing "procedural accuracy").

312. Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36 (2003) (citing ARISTOTLE, NICOMACHEAN ETHICS, bk. 5, ch. 10, pt. 1137b, II, 17–24, at 144–45 (Terence Irwin trans., 1985) (n.d.)).

political pressure, the concern is valid and longstanding. In fact, concerns about judicial acclimation date to the Bill of Rights, as evidenced by Thomas Jefferson's reflection:

> In truth, it is better to toss up cross and pile [heads or tail] in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still a better chance of just decision, than the hazard of cross and pile.[313]

Indeed, the Court has long recognized the jury's role in assuring that the community may "guard against the exercise of arbitrary power" and afford the defendant the benefit of its "commonsense judgment... as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge."[314]

Finally, reexamining Justice Harlan's explanation of the rule confirms that *Ring* satisfies the requirements of a "watershed rule." Harlan explained that a watershed rule is one which alters our understanding of bedrock elements, resulting from "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process."[315] Surely the decision that the Sixth Amendment requires that a capital defendant receive a trial before a jury on both the issue of factual guilt of the underlying crime and of the elemental aggravating factors reflects growing uncertainty surrounding capital punishment in recent years, and indeed the increasing numbers of Americans opposed to the death penalty.[316] The recent shift in public attitudes has been described as nothing less than "a sea change."[317] As societal perception and acceptance of capital

313. THOMAS JEFFERSON, *Notes on the State of Virginia* (1781–1785), *in* THE COMPLETE JEFFERSON 567, 656 (Saul K. Padover ed., 1943) (1785).

314. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citing Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968)).

315. Teague v. Lane, 489 U.S. 289, 311 (1989) (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 693–94 (1971) (Harlan, J., concurring in part and dissenting in part)) (emphasis in *Teague*).

316. Professor Carol Streiker notes that the Court's new position on capital sentencing jurisprudence "reflects a recent and more widespread cultural and political shift in popular attitudes and concerns about the death penalty." Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty,* 77 N.Y.U. L. REV. 1475, 1477 (2002). Steiker argues that "the shift in public attitudes has its roots . . . in the erosion of public confidence in the existence of extensive safeguards surrounding the use of capital punishment in our country." *Id.* at 1482–83.

317. *Id.* at 1483. Professor Steiker cites the passage or pendency of "[a] wide variety of legislation reforming the capital process to better protect the innocent," evidence in public polls of dramatically decreased "public support for capital punishment," and "substantial" support for a "moratorium on executions until problems in the system can be studied and remedied." *Id.*

punishment shift, so too will jurors' evaluation of such subjective aggravating factors as whether a crime was committed in a particularly heinous manner sufficient to warrant imposing the ultimate penalty.

VI. *RING V. ARIZONA* SHOULD APPLY RETROACTIVELY ON COLLATERAL REVIEW

The Ninth Circuit correctly held that *Ring* applies retroactively on collateral review, both as a substantive and procedural rule. First, *Ring* clarified the elements of murder *simpliciter* and capital murder, and by requiring a jury verdict on every element of capital murder before rendering a capital defendant eligible for the death penalty, the Supreme Court "address[ed] the criminal significance of certain facts."[318] As such, this substantive rule of law, similar to those announced in *Richardson*, *Bailey*, and *Jones II*, is not subject to the *Teague* analysis and applies retroactively on collateral review. Additionally, as a procedural rule *Ring* overcomes the *Teague* hurdles to retroactive application on collateral review, because by reaffirming the jury's traditional role in criminal trials, *Ring* announced a watershed rule that fundamentally alters our understanding of bedrock elements necessary for a fair trial. In short, the *Ring* Court altered both *who* decides a capital defendant's eligibility for the death penalty, restoring to the jury its role as the conscience of the community, and also altered *what* the jury must decide.

The Court should therefore affirm the Ninth Circuit's holding. Applying *Ring* retroactively on habeas review is wholly consistent with the purposes of habeas corpus and indeed with the *Teague* doctrine's concern that judgments must at some point become final. As Justice Harlan explained,

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.[319]

This concern is inapplicable in the context of *Ring* and its retroactive application. *Ring*'s retroactive application will affect a discrete number of capital defendants, for whom the benefit of *Ring* will not

318. Palmer v. Clarke, 293 F. Supp. 2d 1011, 1054 (D. Neb. 2003) (citing Curtis v. United States, 294 F.3d 841, 843 (7th Cir. 2002), *cert. denied*, 537 U.S. 976 (2002)).

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

result in fresh litigation. At most it will result in a new sentencing hearing, which does not implicate the concerns about stale evidence and places only a minimal burden on state resources. Moreover, society *does* benefit from *Ring*'s retroactive application on collateral review, whether under *Teague* or simply in accordance with the principles of collateral review: allowing criminal defendants the benefit of a jury's finding that the defendant is eligible for the death penalty assures that society fulfills its civic and political role, that it shares the burden of imposing the death penalty, and that such penalty reflects the opinion of a representative section of the community rather than the discretion of one person sitting in judgment on another.