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Schriro v. Summerlin: A Fatal Accident of Timing

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SCHRIRO V. SUMMERLIN: A FATAL ACCIDENT OF TIMING

INTRODUCTION

In *Ring v. Arizona*,[1] the U.S. Supreme Court acknowledged that the State of Arizona relied on unconstitutional procedures to sentence Warren Summerlin to death.[2] In *Schriro v. Summerlin*, the Court upheld Arizona's decision to proceed with his execution anyway.[3]

In *Ring v. Arizona*, the Court declared 168 death sentences unconstitutional.[4] In *Schriro v. Summerlin*, the Court authorized the implementation of most of those sentences.[5]

In *Ring v. Arizona*, the Court observed that "the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed" would undermine "our people's traditional . . . veneration for the protection of the jury in criminal cases."[6] In *Schriro v. Summerlin*, the Court sanctioned that spectacle.[7]

In *Ring v. Arizona*, the Court held that capital defendants have a Sixth Amendment right to have a jury determine whether they are eligible for capital punishment.[8] In *Schriro v. Summerlin*, the Court held that the doctrine of *Teague v. Lane*[9] barred capital habeas corpus petitioners with "final" sentences from exercising that right.[10]

Teague established a presumption against retroactivity in federal habeas cases.[11] Under this doctrine, criminal defendants may not receive the benefit of new procedural rules announced after they have exhausted their direct appeals unless one of two exceptions applies.[12]

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1. 536 U.S. 584 (2002).
2. *Id.* at 609.
3. Schriro v. Summerlin, 124 S. Ct. 2519, 2526–27 (2004).
4. *Ring*, 536 U.S. at 609. *See also* Linda Petty, *A Case Stranger Than Fiction* (Sept. 3, 2003), *available at* http://www.cnn.com/2003/LAW/09/03/summerlin.case.
5. *Summerlin*, 124 S. Ct. at 2526–27.
6. *Ring*, 536 U.S. at 612 (Scalia, J., concurring).
7. *See Summerlin*, 124 S. Ct. at 2529 (Breyer, J., dissenting).
8. *Ring*, 536 U.S at 606 (invalidating ARIZ. REV. STAT. § 13-703 (2000), which provided that a sentence for first-degree murder may be enhanced from imprisonment to death if the sentencing judge finds facts constituting aggravating circumstances that sufficiently outweigh any mitigating circumstances).
9. 489 U.S. 288 (1989).
10. *Summerlin*, 124 S. Ct. at 2526–27.
11. *Id.*
12. *Teague*, 489 U.S. at 310.

The first *Teague* exception permits retroactive application of new rules that decriminalize certain acts or exempt certain classes of individuals from a particular type of punishment.[13] The second *Teague* exception allows the retroactive application of procedural rules that both "seriously enhance the accuracy of the proceeding and alter our understanding of bedrock procedural elements essential to the fairness of the proceeding."[14]

Teague therefore requires capital habeas petitioners to demonstrate that the new rule they seek to have applied is either a substantive rule or a "watershed" rule of criminal procedure.[15] In *Summerlin*, the Court held that *Ring* was neither.[16] Warren Summerlin's case highlights the inequities engendered by the Court's restrictive retroactivity doctrine.[17] His is the story of a poorly represented capital defendant, who at every stage of the appellate process asserted his Sixth Amendment right to a jury, yet was sentenced to death by a single, drug-addled judge.[18] After Summerlin's conviction became final, the Supreme Court recognized the unconstitutionality of Summerlin's sentence.[19] But because of *Teague*, he will never exercise his newly announced rights.[20]

This Note concludes that *Summerlin*'s result is incompatible with the Eighth Amendment. Generally, the Constitution does not mandate identical sentences for different defendants convicted of the same crime.[21] Death, however, is different.[22] A sentence of death cannot be imposed in an arbitrary or capricious manner.[23] The Cruel and Unusual Punishment Clause of the Eighth Amendment requires that

13. Saffle v. Parks, 494 U.S. 484, 494 (1990).

14. Summerlin v. Stewart, 341 F.3d 1082, 1109 (9th Cir. 2003) (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)).

15. *See id.*

16. *Summerlin*, 124 S. Ct. at 2526–27.

17. *See Summerlin*, 341 F.3d at 1122 (Reinhardt, J., concurring).

18. Petty, *supra* note 4; *see Summerlin*, 341 F.3d at 1091 (noting that Summerlin's direct appeal, state court post-conviction attempts, and federal habeas corpus petitions each included an attack on the validity of Arizona's death penalty statute); State v. Summerlin, 675 P.2d 686 (Ariz. 1983) (rejecting on direct appeal Summerlin's claim that Arizona's death penalty statute was unconstitutional).

19. *Summerlin*, 341 F.3d at 1091–92.

20. *See Summerlin*, 124 S. Ct. at 2526–27.

21. *See* Solem v. Helm, 463 U.S. 277, 303 (1983) (Burger, C.J., dissenting).

22. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 606 (2002); Ford v. Wainwright, 477 U.S. 399, 411 (1986); Gardner v. Florida, 430 U.S. 349, 357 (1977); Woodson v. North Carolina, 428 U.S. 280, 289 (1976); Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

23. *See* Jones (Louis) v. United States, 527 U.S. 373 (1999); Tuilaepa v. California, 512 U.S. 967 (1994); Romano v. Oklahoma, 512 U.S. 1 (1994); Arave v. Creech, 507 U.S. 463 (1993); Godfrey v. Georgia, 446 U.S. 420 (1980); Gardner v. Florida, 430 U.S. 349 (1977); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

"there [be a] meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[24] To execute Summerlin because his case came too early is unconstitutionally arbitrary.[25]

Part II of this Note traces the relatively brief history of retroactivity as well as the current doctrine as enunciated in *Teague v. Lane*.[26] Part III breaks down the Supreme Court's decision in *Summerlin*.[27] Part IV analyzes the majority opinion of Justice Antonin Scalia and the dissenting opinion of Justice Stephen G. Breyer.[28] Part V considers the impact of *Summerlin* and argues that a capital exception must be made to the *Teague* doctrine.[29]

II. BACKGROUND: CAPITAL PUNISHMENT, HABEAS CORPUS, AND THE PRESUMPTION AGAINST RETROACTIVITY

The Supreme Court often will interpret the Constitution to require new criminal procedures.[30] Questions of retroactivity concern the availability of these new rules to defendants whose convictions are already final.[31] This section summarizes the evolution of the Court's nonretroactivity doctrine. It looks first at Blackstone's "declaratory theory" and the presumption of retroactivity. It then examines the impact of legal positivism upon *Linkletter v. Walker*,[32] the Court's first major rejection of presumptive retroactivity. Finally, this section discusses the second Justice John Marshall Harlan's influence on the modern presumption against retroactivity.

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24. *Gregg*, 428 U.S. at 188 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring)).

25. Summerlin v. Stewart, 341 F.3d 1082, 1122 (9th Cir. 2003).

26. *See infra* notes 30–203 and accompanying text.

27. *See infra* notes 204–326 and accompanying text.

28. *See infra* notes 327–381 and accompanying text.

29. *See infra* notes 382–424 and accompanying text.

30. A "new rule" either: (1) "[B]reaks new ground or imposes a new obligation on the States or the Federal Government;" or (2) "[Is] not *dictated* by precedent existing at the time the defendant's conviction became final." Teague v. Lane, 489 U.S. 288, 301 (1989).

31. A criminal defendant's conviction becomes "final" when his or her time for filing a petition for a writ of certiorari has expired. *See* Lambrix v. Singletary, 520 U.S. 518, 527 (1997). Of course, unfavorable new rules may not be applied retroactively. *See* U.S. CONST., art. I, § 10, cl. 1; Lynce v. Mathis, 519 U.S. 433 (1997) (noting that the Ex Post Facto Clause prohibits laws that (1) apply to events occurring before their enactment, and (2) disadvantage the person affected by it).

32. 381 U.S. 618, 621 (1965).

A. *Declaratory Theory, Legal Positivism, and the Court's Early Retroactivity Jurisprudence*

Questions of retroactivity are relatively new to American jurisprudence.[33] The English common law gave retroactive effect to all judicial decisions.[34] Sir William Blackstone explained that judicial decisions were inherently retroactive because courts did not create new law.[35] Rather, the courts functioned to "maintain and expound" the old law.[36] Blackstone argued that judicial decisions are never "new" pronouncements of law, even when they overrule prior precedent.[37] Instead, they communicate "a prior judicial failure to *discover* the law."[38] Thus, the English courts never had occasion to consider the retroactivity of new laws. They merely corrected mistakes as to "'what is, and therefore had been, the *true* law.'"[39]

This formulation, known as the "declaratory theory," permeated the early jurisprudence of the United States Supreme Court. In *Mar-*

33. Summerlin v. Stewart, 341 F.3d 1082, 1097 (9th Cir. 2003) (stating that "the question of whether a newly announced constitutional rule will apply retroactively on collateral review is a relatively recent inquiry in American jurisprudence"); *see* Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("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."); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

34. *Summerlin*, 341 F.3d at 1097.

35. *Id.*; *see Linkletter*, 381 U.S. at 622–23 (stating that "the duty of the court was not to 'pronounce a new law, but maintain and expound the old one'" (quoting 1 BLACKSTONE COMMENTARIES 69 (15th ed. 1809))).

36. *Id.* Blackstone derived this argument from his belief that society ought to forge and reforge the laws of man to bring them in closer conformity to the natural law:

> "This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original."

Douglas H. Cook, *William Blackstone: A Life and Legacy Set Apart for God's Work*, 13 REGENT U. L. REV. 169, 175 (2000) (citation omitted).

37. John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325, 326 (1991).

38. *Id.* (emphasis added).

39. Note, *supra* note 33, at 908 n.6 (1962) (emphasis added) (quoting Harry Shulman, *Retroactive Legislation*, 13 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 355, 356 (1934)). As one commentator explains:

> From the declaratory nature of a judicial decision, Blackstone derived the necessity that the decision have retrospective effect. If the decision interpreted a law, then it did no more than declare what the law had always been. If subsequently it became necessary to overrule this first interpretation, it was equally clear to Blackstone that the overruling decision also did no more than declare the law—albeit in a more enlightened manner.

Note, *supra* note 33, at 907–08 (citing JOHN CHIPMAN GRAY, NATURE AND SOURCES OF THE LAW 222 (1st ed. 1909)).

bury v. Madison,[40] as the Court first asserted its power of judicial review, it assumed that the act of holding a statute unconstitutional simply reiterated a preexisting status, voiding the law's application both before and after its decision.[41] In *United States v. Schooner Peggy*,[42] the Court applied a similar presumption to give retroactive effect to a recently signed treaty.[43]

The Court's use of declaratory theory continued into the early part of the twentieth century.[44] As time passed, however, some members of the Court became concerned that the Blackstonian perspective imposed "hardship [upon those who had] trusted to its existence."[45] Out of concern for the expectation interest of certain litigants, the Court abandoned the declaratory theory and embraced legal positivism.[46]

The legal positivists eschewed the declaratory theory and other derivatives of natural law.[47] Instead, they proposed a theoretical model

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40. 5 U.S. (1 Cranch) 137 (1803).

41. John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745, 746 (1983).

42. 5 U.S. 103 (1801).

43. *Id.* The *Schooner Peggy* Court agreed to hear an appeal from a condemnation proceeding regarding a seized French ship. *Id.* at 103–04, 108. The lower courts held that the ship was to be condemned. *Id* at 107. Before the Supreme Court could affirm, however, Congress ratified a treaty with France that returned to the original owners any seized property not "definitively condemned." *Id.* The Court held that the treaty controlled, asserting that

> [if] subsequent to the [lower court's] judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs . . . the court must decide according to existing laws, and if it be necessary to set aside judgment . . . which cannot be affirmed but in violation of law, the judgment must be set aside.

Id. at 110.

44. Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 816–17 (2003); *see, e.g.*, Norton v. Shelby County, 118 U.S. 425, 442 (1886) (holding that the government's unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed"); *see also* Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941); Okla. Packing Co. v. Okla. Gas Co., 309 U.S. 4 (1940); Sioux County v. Nat'l Surety Co., 276 U.S. 238 (1928); Moores v. Citizen's Nat'l Bank, 104 U.S. 625 (1881); Kibbe v. Ditto, 93 U.S. 674 (1876).

45. Linkletter v. Walker, 381 U.S. 618, 623–25 (1965) (quoting Benjamin Nathan Cardozo, *Address to the N.Y. Bar Ass'n*, 55 REP. N.Y. STATE BAR ASS'N 263, 296–97 (1932)).

46. *Id.* at 624.

47. LON L. FULLER, ANATOMY OF THE LAW 177–78 (1968). Professor H.L.A. Hart once described legal positivism as the belief that

> "[t]he existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume."

under which legal rules are valid only because the government adopts them, not because they are rooted in any divine law.[48] This model, advanced by Sir Jeremy Bentham and John Austin as a more realistic approach to ascertaining the source of law, observed that "judges do in fact do something more than discover law; they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law."[49]

In *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, the Court adopted a positivist approach and held that the Due Process Clause of the Fourteenth Amendment does not require state courts to retroactively apply their interpretations of state law.[50] In *Sunburst*, the trial court awarded the plaintiff damages against the defendant based on a decision of the Supreme Court of Montana, which held that certain entities that paid excessive intrastate shipment rates were entitled to refunds.[51] The Montana Supreme Court reversed its earlier decision and held that refunds would no longer be available to individuals who paid excessive rates.[52] It also held, however, that its decision would have only proscriptive application.[53]

Arguing that the Montana Supreme Court had violated its due process rights, the defendant appealed to the U.S. Supreme Court.[54] The Court rejected the defendant's argument.[55] It held that because "the Federal Constitution has no voice upon the subject [of retroactiv-

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H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 596 (1958) (quoting JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184–85 (Library of Ideas ed. 1954)).

48. FULLER, *supra* note 47. Professor Fuller explains:

> [I]t will be helpful to offer some comparisons between legal positivism and its counterpart in science. Scientific positivism condemns any inquiry projecting itself beyond observable phenomena; it abjures metaphysics, it renounces in advance any explanation in terms of ultimate causes. Its program of research is to chart the regularities discernible in the phenomena of nature at the point where they become open to human observation, without asking—as it were—how they got there. In the setting of limits to inquiry there is an obvious parallel between scientific and legal positivism. The legal positivist concentrates his attention on law at the point where it emerges from the institutional processes that brought it into being. It is the finally made law itself that furnishes the subject of his inquiries. How it was made and what directions of human effort went into its creation are for him irrelevancies.

Id. at 177–78.

49. *Linkletter*, 381 U.S. at 623–24.

50. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 360 (1932).

51. *Id.* at 364–66.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 364.

ity],"[56] state courts may elect to avoid the hardships that arise when parties rely upon overruled decisions to their detriment.[57]

In *Chicot County Drainage District v. Baxter State Bank*, the Court again refused to retroactively apply a judicial decision.[58] In that case, the defendant defaulted on several bonds, and the plaintiffs sued for damages.[59] The defendant sought the benefit of decree of cancellation, which had been issued after the plaintiffs' purchase.[60] The Court refused, holding that the Blackstonian presumption of retroactivity "must be taken with qualifications."[61] Citing the plaintiffs' expectation interest, the Court noted that any overruled decision "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration."[62]

Sunburst and *Chicot County* signaled a philosophical shift in the Court's approach to questions of retroactivity. In *Linkletter v. Walker*,[63] this shift manifested itself in the criminal context for the first time.[64] *Linkletter* marked the beginning of the modern presumption against retroactivity in federal habeas cases.[65] Prior to that decision, the Court had retroactively applied all new rules to criminal defendants.[66] The *Linkletter* Court, however, broke from the natural law tra-

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56. *Sunburst*, 287 U.S. at 364.

57. *Id.* The *Sunburst* Court held:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature.

Id. Justice Benjamin N. Cardozo, who authored the *Sunburst* opinion, seems to have had a personal stake in retroactivity doctrine. *See* Note, *supra* note 33. One commentator notes:

> It has been suggested that Cardozo's recurrent interest in developing methods to avoid retroactive application of newly-announced rules stemmed from the injustice he felt when Columbia Law School increased the length of its prescribed course to three years after he had entered at a time when the required course was only two years. Cardozo did not finish the three-year course and never received his degree.

Id. at 911 (citing Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 10 n.31 (1960)).

58. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 372 (1940).

59. *Id.*

60. *Id.*

61. *Id.* at 374 (rejecting the *Norton* Court's belief that "the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree").

62. *Id.*

63. 381 U.S. 618 (1965).

64. *See id.*

65. Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus*, 42 ALA. L. REV. 1273, 1276 (1991) (citing Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 58–60 (1965)).

66. *Id.*

dition and declined to give retroactive effect to procedural rules.[67] It articulated a three-part inquiry under which certain new rules of criminal procedure would not be applied to defendants whose trials had concluded.[68]

B. *The* Linkletter *Doctrine*

In *Linkletter*, Victor Linkletter asked the Court to retroactively apply the newly expanded exclusionary rule of *Mapp v. Ohio*.[69] Linkletter's argument was straightforward. His burglary conviction had rested largely on evidence seized in a warrantless search of the defendant's home.[70] The Supreme Court of Louisiana had affirmed his conviction before the *Mapp* Court could extend the exclusionary rule to state court proceedings.[71]

The *Linkletter* Court, however, held that *Mapp* would not be applied retroactively.[72] This marked the first time that a new pronouncement on criminal law would not relate backward in time.[73] In its analysis, the Court attempted to reconcile two conflicting considerations.[74] First, it considered the equitable principle that similarly situated defendants should be treated similarly.[75] Because the *Mapp* rule applied to the defendant Dollree Mapp, it would only be fair to apply it to other state court defendants arrested before *Mapp*. Second, the Court considered the expectation interests of state law enforcement agencies.[76] Unmitigated retroactive application of *Mapp* would defeat many convictions obtained in good faith.[77]

To balance these competing interests, the *Linkletter* Court devised a three-part test to govern questions of retroactivity both on direct appeal and on habeas review.[78] This test would balance the following

67. *Id.*

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

69. *Id.* at 619. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949), and holding that the Fourth Amendment exclusionary rule applied to the states by virtue of the Due Process Clause of the Fourteenth Amendment).

70. *Linkletter*, 381 U.S. at 621.

71. *Id.* at 629.

72. *Id.* at 638.

73. *See* Heald, *supra* note 65, at 1276.

74. Paul E. McGreal, *A Tale of Two Courts: The Alaska Supreme Court, The United States Supreme Court, and Retroactivity*, 9 ALASKA L. REV. 305, 308–11 (1992).

75. *Linkletter*, 381 U.S. at 629. Justice Cardozo believed that any retroactivity doctrine should be rooted in equity and not in the Constitution. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932).

76. *Linkletter*, 381 U.S. at 636. "The thousands of cases that were finally decided on *Wolf* cannot be obliterated." *Id.*

77. *Id.*

78. *Id.*

three factors: (1) the purpose of the new rule; (2) reliance upon the old rule; and (3) whether retroactivity furthers the administration of justice.[79]

The Court applied this test to hold that *Mapp* would not have retroactive application.[80] First, the Court found that the primary purpose of the exclusionary rule was to deter police conduct. It reasoned that retroactive application of *Mapp* would not further that policy because *Mapp* can only influence *future* police actions.[81] Second, the Court found that states had heavily relied upon *Wolf v. Colorado*,[82] the decision overruled by *Mapp*.[83] Finally, the Court found that retroactive application of *Mapp* would not further the administration of justice because it does little to enhance the accuracy of the criminal process.[84] It therefore held that Linkletter could not rely on *Mapp* to challenge his conviction.[85]

Some have suggested that the Warren Court established the *Linkletter* doctrine to minimize the impact of its criminal procedure revolution.[86] As the Court issued an unprecedented number of new procedural rules, many feared that the judiciary would be deluged with challenges to otherwise final convictions.[87] *Linkletter* functioned to protect the government's expectation interest in discarded constitutional interpretations.[88] Unfortunately, it often did so at the expense of the individual's interest in fairness.[89]

Nevertheless, the *Linkletter* doctrine persisted for nearly two decades. In *Tehan v. United States ex rel. Shott*,[90] the Court addressed the retroactivity of *Griffin v. California*.[91] *Griffin* had held that the Fifth and Fourteenth Amendments barred prosecutors and trial judges

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79. *Id.*

80. *Id.* at 638.

81. *Linkletter*, 381 U.S. at 629.

82. 338 U.S. 25 (1949).

83. *Linkletter*, 381 U.S. at 629; *see* text accompanying *supra* notes 72–77.

84. *Id.* at 638 (reasoning that *Mapp* "has no bearing on guilt").

85. *Id.*

86. *See* McGreal, *supra* note 74, at 309. To justify its decision to apply certain new rules prospectively, the Court distanced itself from declaratory theory and embraced the Austinian theory of legal positivism. *Id.* (citing *Linkletter*, 381 U.S. at 623–24).

87. *Id.*

88. *Id.*

89. *See* Teague v. Lane, 489 U.S. 288, 303 (1989) (stating that "commentators 'have had a veritable field day' with the *Linkletter* standard, with much of the discussion being 'more than mildly negative'" (quoting Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1558 (1975))).

90. 382 U.S. 406 (1966). *Tehan*, like *Linkletter*, dealt with retroactivity in the context of the writ of habeas corpus. *Id.* at 408 ("All avenues of direct review of the respondent's conviction were thus fully foreclosed . . . almost two years before our decision in *Griffin v. California* . . . .").

91. 380 U.S. 609 (1965).

from commenting upon a defendant's exercise of his or her privilege against self-incrimination.[92] The *Tehan* Court applied *Linkletter* to hold that *Griffin* would not have retroactive application.[93] First, the Court found that the primary purpose of *Griffin* was to preserve the integrity of the judiciary.[94] Second, the Court found that "[t]here can be no doubt of the States' reliance upon [pre-*Griffin* law] for more than half a century."[95] Finally, the Court found that retroactive application of *Griffin* would not further the administration of justice because it does little to enhance the accuracy of the criminal process.[96] It added that retroactive application of *Griffin* would invalidate as many convictions as would have resulted if *Mapp* was retroactively applied.[97] The Court therefore held that *Griffin* would not have retroactive application.

In *Johnson v. New Jersey*,[98] the Court addressed the retroactivity of *Escobedo v. Illinois*[99] and *Miranda v. Arizona*.[100] Both *Escobedo* and *Miranda* set down new standards governing the custodial interrogation of criminal defendants.[101] The *Johnson* Court applied *Linkletter* and held that neither decision would have retroactive application.[102] First, the Court found that *Escobedo* and *Miranda* functioned to protect criminal defendants from coercive interrogation.[103] It reasoned that retroactive application of the two decisions would not further that policy because the defendants had not presented any evidence of coercion.[104] Second, the Court found that states had heavily relied upon

92. *Tehan*, 382 U.S. at 407.

93. *Id.* at 419.

94. *Id.* at 414–15. "The basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution shoulders the entire load." *Id.* (citation omitted).

95. *Id.* at 417.

96. *Id.* at 414–15.

97. *Tehan*, 382 U.S. at 418 ("A retrospective application of *Griffin v. California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*.").

98. 384 U.S. 719 (1966). As in *Linkletter* and *Tehan*, the Court addressed the retroactivity question in the context of a post-conviction proceeding. *Id.* at 726.

99. 378 U.S. 478 (1964).

100. 384 U.S. 436 (1966).

101. *Johnson*, 384 U.S. at 732.

102. *Id.*

103. *Id.* at 729.

104. *Id.* at 730. The Court also noted that "[p]risoners are [already] entitled to present evidence anew on this aspect of the voluntariness of their confessions if a full and fair hearing has not already been afforded them." *Id.* (citing Townsend v. Sain, 372 U.S. 293 (1963)).

pre-*Escobedo* law.[105] Finally, the Court found that "retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards."[106] The Court therefore concluded that neither *Escobedo* nor *Miranda* would have retroactive application.[107]

The *Johnson* Court, however, did not stop there. For the first time, the Court did not limit its finding of nonretroactivity to the post-conviction context.[108] Instead, it extended its *Linkletter* analysis into the context of direct review.[109] The *Johnson* Court held that defendants may not avail themselves of either *Escobedo* or *Miranda* when appealing their convictions.[110] Rather, *Escobedo* and *Miranda* would only apply to defendants whose trials had begun after the pronouncement of each decision.[111] The Court affirmed this expansion of the *Linkletter* doctrine one term later in the case of *Stovall v. Denno*.[112] The resulting inconsistencies would eventually lead to *Linkletter*'s demise.[113]

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105. *Id.* at 731 (stating that "[l]aw enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*").

106. *Johnson*, 384 U.S. at 731.

107. *Id.* at 732.

108. *Id.* The Court reasoned that "[its] holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered." *Id.*

109. *Id.*

110. *Id.*

111. *Johnson*, 384 U.S. at 731. Of course, Danny Escobedo and Ernesto Miranda would receive the benefit of their namesake decisions. Otherwise, the *Johnson* decision would run afoul of the "case or controversy" requirement of Article III. For a detailed discussion of the Article III ramifications of nonretroactivity, see Note, *supra* note 33.

112. 388 U.S. 293 (1967). In *Stovall*, the Court addressed the retroactivity of *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967). *Stovall*, 388 U.S. at 294. It is interesting to note that *Wade*, *Gilbert*, and *Stovall* were all announced on the same day. *Wade*, 388 U.S. at 218; *Gilbert*, 388 U.S. at 263; *Stovall*, 388 U.S. at 293. Both *Wade* and *Gilbert* addressed the Sixth Amendment right to counsel with respect to line-up identifications. *Stovall*, 388 U.S. at 294. The *Stovall* Court applied *Linkletter* and held that neither decision would have retroactive application. *Id.* at 296. First, the Court found that although *Wade* and *Gilbert* were intended to prevent injustice, "[t]he unusual force of the countervailing considerations" favored only forward operation. *Id.* at 299. Second, the Court found significant state reliance on prior precedent because both *Wade* and *Gilbert* were relatively unanticipated new rules that had only been announced a few minutes before *Stovall*. *Id.* Finally, since retroactive application of *Wade* and *Gilbert* "would seriously disrupt the administration of our criminal laws," the Court denied relief. *Id.* at 300 (quoting *Johnson*, 384 U.S. at 731).

113. *See infra* notes 116–185 and accompanying text.

C. *The* Teague *Doctrine*

The *Linkletter* doctrine stood for more than two decades. In *Teague v. Lane*, the Court overruled *Linkletter* in favor of a retroactivity analysis proposed by Justice Harlan.[114] The next section discusses Justice Harlan's model and its influence on the current presumption against retroactivity.[115]

1. Justice Harlan and the Writ of Habeas Corpus

The *Teague* doctrine was born out of Justice Harlan's disgust with the *Linkletter* doctrine.[116] Like other critics, Justice Harlan believed that *Linkletter*'s case-by-case approach had resulted in "incompatible rules and inconsistent principles."[117] He proposed a new analytical framework to address the problem of retroactivity.[118]

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114. Teague v. Lane, 489 U.S. 288, 310 (1989).

115. For habeas courts reviewing an initial petition for habeas relief, *Teague* remains the controlling retroactivity analysis despite the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, 110 Stat. 1214 (1997). In *Horn v. Banks*, the Court held that *Teague* was still the threshold analysis when considering questions of retroactivity. Horn v. Banks, 536 U.S. 266, 272 (2002).

For habeas courts reviewing successive petitions for habeas relief, retroactivity analysis has been modified. *See* 28 U.S.C. § 2244(b)(2)(A) (2000). Successive habeas petitioners may take advantage of a newly announced rule of criminal procedure only if the Supreme Court expressly holds the rule to be retroactive. *Id.* That is, "[a]bsent an express pronouncement on retroactivity from the Supreme Court, the [new] rule is not retroactive." Summerlin v. Stewart, 341 F.3d 1082, 1096 n.4 (9th Cir. 2003) (citation omitted). Thus, under AEDPA's provisions for successive habeas petitioners, it does not matter if the new rule is a bedrock, accuracy-enhancing rule of criminal procedure. The rule does not apply retroactively until the Court says it does.

116. Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring); Coleman v. Alabama, 399 U.S. 1, 21 (1970) (Harlan, J., dissenting) (asserting that "[f]or reasons explained in my dissent in [*Desist*], I can no longer follow the 'retroactivity' doctrine announced in *Stovall* in cases before us on direct review."); Von Cleef v. New Jersey, 395 U.S. 814, 817 (1969) (Harlan, J., concurring) (stating that "all cases still subject to direct review by this Court should be governed by any 'new' rule of constitutional law announced in our decisions"); Jenkins v. Delaware, 395 U.S. 213, 224 (1969) (Harlan, J., dissenting) (arguing that minimizing incongruity "can only be done by turning our backs on the *ad hoc* approach that has so far characterized our decisions in the retroactivity field").

117. Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

118. *Id.* (Harlan, J., dissenting). Justice Harlan based his retroactivity formulation on several influential essays advocating restrictions on the scope of the writ of habeas corpus. *See, e.g.*, *Mackey*, 401 U.S. at 690 (Harlan, J., concurring) (citing Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970)); *id.* at 684, 690 (Harlan, J., concurring) (citing Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)); *id.* at 690 (Harlan, J., concurring) (citing Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1040 (1970)); *id.* at 686 (Harlan, J., concurring) (citing Daniel J. Meador, *Habeas Corpus and the 'Retroactivity' Illusion*, 50 VA. L. REV. 1115 (1964)); *id.* at 688 n.3 (Harlan, J., concurring) (citing Paul J. Mishkin, *The Supreme Court 1964 Term—Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965)).

The first of Justice Harlan's dissents in this area came in *Desist v. United States*.[119] In that case, the Court considered whether to apply the newly announced rule of *Katz v. United States*[120] to a defendant on direct appeal.[121] *Katz* interpreted the Fourth Amendment to define a search as anything that violates a person's reasonable expectation of privacy.[122] The *Desist* appellants sought reversal of their drug trafficking convictions, which were obtained on the basis of evidence obtained via unwarranted electronic surveillance.[123] The Court refused.[124] It applied *Linkletter* and held that *Katz* would not have retroactive operation.[125]

Justice Harlan dissented.[126] He attacked the *Linkletter* doctrine for its inconsistency: Some new rules applied to all cases not yet final; some new rules applied only to cases that had yet to be tried; and other new rules applied only to the parties in the case that announced the rule.[127] He further noted that

> [w]e do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principles in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.[128]

Justice Harlan recommended a new retroactivity test that would eliminate the inconsistencies of *Linkletter*.[129] His formulation distinguished between direct appeal and habeas review.[130] Defendants appealing their convictions would receive the benefit of new rules,[131] but habeas petitioners collaterally attacking their convictions would not, subject to two exceptions.[132]

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119. 394 U.S. 244 (1969).

120. 389 U.S. 347 (1968).

121. *Desist*, 394 U.S. at 246.

122. *Id.*; *see Katz*, 389 U.S. at 361.

123. *Desist*, 394 U.S. at 246.

124. *Id.* at 247–48.

125. *Id.* at 246. The Court reasoned that *Katz* merely extended the exclusionary rule—a rule that had already been denied retroactive application in *Linkletter*.

126. *Id.* at 258 (Harlan, J., dissenting).

127. *Id.* (Harlan, J., dissenting).

128. *Id.* at 258–59 (Harlan, J., dissenting).

129. *Desist*, 394 U.S. at 258–59 (Harlan, J., dissenting).

130. *Id.* at 259 (Harlan, J., dissenting).

131. *Id.* (Harlan, J., dissenting).

132. *Id.* (Harlan, J., dissenting). The first exception would retroactively apply all rules that place conduct beyond the authority of the government to punish. *Id.* at 261 (Harlan, J., dissent-

Justice Harlan justified his distinction between direct appeal and habeas review by contrasting the purposes each served.[133] On direct appeal, appellate courts must decide upon all properly raised issues.[134] Federal habeas review, however, serves two more limited functions: (1) to minimize the risk of incarcerating the innocent; and (2) to deter state courts from disregarding constitutional commands.[135] The first function justified retroactive application of new rules that "significantly improve the pre-existing fact-finding procedures."[136] The second function, however, justified only the application of "the constitutional standards that prevailed at the time the original proceedings took place."[137]

In *Mackey v. United States*,[138] Justice Harlan elaborated upon his retroactivity formulation.[139] In that case, a plurality applied *Linkletter* and held that *Marchetti v. United States*[140] and *Grosso v. United States*[141] would not be retroactively applied to habeas petitioners.[142] Justice Harlan concurred only to the extent that, in his view, new rules

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ing). The second exception would retroactively apply rules that "substantially affect the fact-finding apparatus of the original trial." *Id.* at 262 (Harlan, J., dissenting).

133. *Desist*, 394 U.S. at 262–63 (Harlan, J., dissenting).

134. *Id.* at 260 (Harlan, J., dissenting).

135. *Id.* at 262–63 (Harlan, J., dissenting). The Great Writ has performed its deterrence function since the Civil War. Ronald J. Bacigal, *The Federalism Pendulum*, 98 W. VA. L. REV. 771, 774 (1996). During Reconstruction, the Radical Republicans who controlled Congress did not trust the former confederate states to uphold the individual rights of the newly freed slaves. *Id.* Congress expanded habeas review and ratified the Fourteenth Amendment "as a powerful brake on runaway state government." *Id.* This gradual expansion culminated in *Brown v. Allen*, which held that a state court's failure to adequately protect a constitutional right would not be res judicata on habeas review. 344 U.S. 443, 511 (1953). In the post-Warren Court era, however, both Congress and the Court have invoked principles of federalism and comity to restrict the scope of the Great Writ. *See generally* Stone v. Powell, 428 U.S. 465 (1976) (restricting the availability of Fourth Amendment claims on habeas review because the state courts are just as capable of defending the Constitution as the federal courts).

136. *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

137. *Id.* at 263 (Harlan, J., dissenting). Professor Mishkin, however, argues that "it is rare that new rules of constitutional law, even retroactively applied, will conflict with reliance of a sort that merits protection." Mishkin, *supra* note 118, at 71.

138. 401 U.S. 667 (1971).

139. *Id.* at 675 (Harlan, J., concurring).

140. 390 U.S. 39 (1968).

141. 390 U.S. 62 (1968).

142. *Mackey*, 401 U.S. at 673. *Marchetti* and *Grosso* each provided a defense to the federal gambling tax statutes based on the Fifth Amendment privilege against self-incrimination. *Id.* The plurality determined that the rule functioned merely to eliminate any appearance of impropriety. *Id.* (citing Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415 (1966)). Balancing this purpose against the government's reliance on prior precedent and the frustration of certain state interests, the plurality held that *Linkletter* barred retroactive application of *Marchetti* and *Grosso*. *Id.* at 674.

should not be applied retroactively on habeas review.[143] His concurrence supplied the crucial fifth vote to deny relief.[144]

Justice Harlan used *Mackey* to expound upon his analysis in *Desist*.[145] He again emphasized the distinction between direct appeal and habeas review.[146] He argued that important state interests attach once a defendant has exhausted his or her direct appeals, including: (1) the "interest in insuring that there will at some point be the certainty that comes with an end to litigation"; (2) the interest in ensuring that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community"; and (3) the interest in conserving judicial resources.[147] Justice Harlan concluded that these goals could not be served by retroactively applying new rules to cases on habeas review.[148]

Justice Harlan's *Mackey* concurrence again identified the two exceptions to his retroactivity formulation.[149] As in *Desist*, the first exception would allow habeas courts to retroactively apply new rules of substantive due process.[150] Unlike *Desist*, however, the second exception no longer encompassed new procedural rules that improved the

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143. *Id.* at 700 (Harlan, J., concurring).

144. *Id.* (Harlan, J., concurring).

145. *Mackey*, 401 U.S. at 673. Justice Harlan also took another swipe at the *Linklettter* doctrine, declaring that it had absolved the Court of responsibility for its constitutional pronouncements by permitting the Court to minimize the impact of its decisions upon cases not yet final. *Id.* at 681 (Harlan, J., concurring). He argued that the Court should consider the consequences of a new constitutional rule *before* it announces the rule, not after. *Id.* (Harlan, J., concurring). Justice Harlan also noted that *Linkletter* encroached upon the legislative function:

> In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation. We apply and definitively interpret the Constitution, under this view of our role, not because we are bound to, but only because we occasionally deem it appropriate, useful, or wise. That sort of choice may permissibly be made by a legislature or a council of revision, but not by a court of law.

Id. at 679 (Harlan, J., concurring). The superior approach to retroactivity, Justice Harlan concluded, would focus not on the purpose of the new rule, but rather on the nature of the proceeding in which retroactivity is sought. *Id.* at 682 (Harlan, J., concurring).

146. *Id.* at 682–83 (Harlan, J., concurring) (stating that "this Court's function in reviewing a decision allowing or disallowing a writ of habeas corpus is, and always has been, significantly different from our role in reviewing on direct appeal the validity of nonfinal criminal convictions").

147. Schriro v. Summerlin, 124 S. Ct. 2519, 2529–30 (2004) (Breyer, J., dissenting) (quoting *Mackey*, 401 U.S. at 690–91 (Harlan, J., concurring)).

148. *Mackey*, 401 U.S. at 683 (Harlan, J., concurring).

149. *Id.* at 692 (Harlan, J., concurring).

150. *Id.* (Harlan, J., concurring). These are rules that place conduct beyond the authority of the government to punish. *Id.* (Harlan, J., concurring). "[T]he obvious interest in freeing individuals from punishment for conduct that is constitutionally protected seems to me sufficiently

fact-finding process.[151] Instead, Justice Harlan narrowed the second exception to include only new procedural rules that are central to the fundamental fairness of the trial.[152]

Justice Harlan retired from the Court shortly after concurring in *Mackey*.[153] His views on *Linkletter*, however, were not forgotten. The Court eventually adopted his retroactivity formulation in *Griffith v. Kentucky*[154] and *Teague v. Lane*.[155] In *Griffith*, the Court held that new rules would be retroactively applied to all cases not yet final.[156] In *Teague*, the Court held that new procedural rules would not generally be available to habeas petitioners.[157]

2. Teague v. Lane

Both *Griffith* and *Teague* addressed the retroactivity of *Batson v. Kentucky*, which reduced the evidentiary showing required to raise an equal protection challenge to the peremptory challenge system.[158] *Griffith* retroactively applied *Batson* to cases on direct appeal.[159] *Teague* barred retroactive application of *Batson* to cases on habeas review.[160]

Justice Sandra Day O'Connor delivered the opinion in *Teague* on behalf of a plurality of four Justices.[161] Her analysis—which came as something of a surprise to the litigants as neither party had briefed nor argued the issue of retroactivity—began by casting retroactivity as a threshold issue.[162] The plurality held that federal habeas courts

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substantial to justify applying current notions of substantive due process to petitions for habeas corpus." *Id.* (Harlan, J., concurring).

151. *See id.* at 693 (Harlan, J., concurring).

152. *Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring) (citing *Gideon v. Wainwright*, 372 U.S. 335, 349 (1963), as an example of such a rule).

153. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 158 (1979).

154. 479 U.S. 314 (1987).

155. 489 U.S. 288 (1989).

156. *Griffith*, 479 U.S. at 322 (holding that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication"). *Griffith* concerned the retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986), to cases on direct review. *Griffith*, 479 U.S. at 322. *Batson* reduced the burden on defendants who attack the prosecution's use of discriminatory peremptory challenges. *Id.*

157. *Teague*, 489 U.S. at 310.

158. *Batson*, 476 U.S. at 96–98.

159. *Griffith*, 479 U.S. at 328.

160. *Teague*, 489 U.S. at 310.

161. *Id.* at 288.

162. *Teague*, 489 U.S. at 300; *see also* Barry Friedman, *Habeas and Hubris*, 45 VAND. L. REV. 797, 810 (1992).

could no longer recognize a new procedural rule without first establishing that such a rule would be retroactive.[163]

The *Teague* plurality continued its analysis by defining a "new rule" as one that "breaks new ground or imposes a new obligation on the States or the Federal Government."[164] Under this broad definition, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[165]

The plurality then directed habeas courts to deny relief to petitioners relying on new rules unless one of two narrow exceptions applies.[166] First, habeas petitioners could benefit from new substantive rules—rules that decriminalize a class of conduct or remove a specific type of punishment for a class of defendants.[167] *Lawrence v. Texas*[168] and *Atkins v. Virginia*[169] serve as examples of such a rule. In *Lawrence*, the Court announced a new rule that decriminalized private, consensual sodomy.[170] In *Atkins*, the Court announced a new rule that barred the execution of mentally retarded defendants.[171] Each of these new rules is available on habeas review under the first *Teague* exception.[172]

Second, habeas petitioners could rely on "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[173] With this second exception, the *Teague* plurality fused Justice Harlan's *Desist* formulation with his *Mackey* formulation.[174] Accordingly, a procedural rule must meet two qualifications to warrant retroactive application: (1) it must "alter our understanding of the *bedrock procedural elements* that must be found to

163. *Teague*, 489 U.S. at 300. *But see id.* at 334–35 (Brennan, J., dissenting) (providing a comprehensive list of procedural rules first recognized on habeas review).

164. *Id.* at 301.

165. *Id.*; *see* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 812 (1994).

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

167. *See id.* at 307.

168. 539 U.S. 558 (2003).

169. 536 U.S. 304 (2002).

170. *Lawrence*, 539 U.S. at 577–78 (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)).

171. *Atkins*, 536 U.S. at 321 (overruling Penry v. Lynaugh, 492 U.S. 302 (1989)).

172. Marc R. Shapiro, *Re-Evaluating the Role of the Jury in Capital Cases After* Ring v. Arizona, 59 N.Y.U. ANN. SURV. AM. L. 633, 648 n.103 (2004) (discussing *Atkins* under the *Teague* exception).

173. Saffle v. Parks, 494 U.S. 484, 495 (1990) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

174. 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, 288 (1998); *see* Mackey v. United States, 401 U.S. 667, 693–94 (1971) (Harlan, J., concurring).

vitiate the fairness of a particular conviction;"[175] and (2) it must enunciate "new procedures without which the likelihood of an accurate conviction is seriously diminished."[176] The *Teague* plurality indicated that this class of rules is extremely narrow, and it is unlikely that any has yet to emerge.[177]

Thus, the *Teague* plurality replaced the *Linkletter* doctrine with a four-part retroactivity analysis.[178] First, the habeas court must determine "the date on which the defendant's conviction became final."[179] Second, the habeas court must determine whether the petitioner seeks the benefit of a new rule.[180] If the rule is not new, then *Teague* is inapplicable.[181] Third, the habeas court must determine whether the new rule is procedural or substantive.[182] If the rule is substantive, then *Teague* is inapplicable.[183] Fourth, the habeas court must determine whether the new rule falls within one of the *Teague* exceptions.[184] Applying this formulation, the *Teague* plurality concluded that *Batson* could not be applied retroactively on habeas review.[185]

3. *The* Teague *Doctrine and Capital Punishment*

In *Teague*, the Court adopted Justice Harlan's approach to retroactivity. In *Penry v. Lynaugh*,[186] the Court extended *Teague* into the capital punishment context. To appreciate the significance of this extension, it is important to understand capital sentencing.

Modern death penalty jurisprudence begins with *Furman v. Georgia*.[187] In a five to four decision, the *Furman* Court invalidated forty

175. *Teague*, 489 U.S. at 311; *see* Tanya G. Newman, Note, Summerlin v. Stewart *and* Ring *Retroactivity*, 79 CHI. KENT. L. REV. 755, 788–89 (2004) (describing *Teague* and concluding that *Ring* fit within *Teague*'s second exception).

176. *Teague*, 489 U.S. at 313.

177. Sawyer v. Smith, 497 U.S. 227, 243 (1990) (quoting *Teague*, 489 U.S. at 313).

178. Summerlin v. Stewart, 341 F.3d 1082, 1099 (9th Cir. 2003).

179. *See* O'Dell v. Netherland, 521 U.S. 151, 156–57 (1997).

180. *See id.*

181. *See id.*

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

183. *Id.* In *Schriro v. Summerlin*, the majority acknowledged that the *Bousley* substantive/procedural distinction is sometimes collapsed into the first *Teague* exception. Schriro v. Summerlin, 124 S. Ct. 2519, 2522 (2004). Substantive rules, however, "are more accurately characterized as substantive rules not subject to" the *Teague* presumption against retroactivity. *Id.* at 2522 n.4. It is unclear whether *Bousley* warrants a step of its own or whether it is merely implicit in applying *Teague*'s exceptions. It may even be a logical first step in the *Teague* analysis.

184. *See O'Dell*, 521 U.S. at 156–57.

185. Teague v. Lane, 489 U.S. 288, 310 (1989).

186. 492 U.S. 302 (1989).

187. 408 U.S. 238 (1972).

state death penalty statutes on Eighth Amendment grounds.[188] Because nine Justices delivered nine different opinions on the subject, the impact of *Furman* was not fully understood until *Gregg v. Georgia*.[189] In *Gregg*, a plurality held that while the death penalty is not unconstitutional per se,[190] it could not be administered in "an arbitrary and capricious manner."[191]

The *Gregg* plurality proposed a series of procedural safeguards to protect against arbitrary imposition of the death penalty.[192] The first was the bifurcation of the capital trial into a guilt phase and a penalty phase.[193] Only after the jury has found the defendant guilty of capital murder does it make an "individualized determination" of whether the death penalty is appropriate.[194] The second procedural safeguard involved automatic appellate review of convictions and sentences.[195] The final procedural safeguard was proportionality review by appellate courts to ensure that "there is [a] meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[196]

Since *Gregg*, the Court has repeatedly held that the death penalty "is different in both its severity and finality."[197] It has held that "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[198] When it comes to retroactivity, however, the Court does not hesitate to apply Justice Harlan's pre-*Furman* analysis to post-*Furman* capital cases.[199]

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188. *Id.* (per curiam); *see* NINA RIVKIND & STEVEN F. SHATZ, THE DEATH PENALTY 74 (2001).

189. 428 U.S. 153 (1976); *see* RIVKIND & SHATZ, *supra* note 188, at 74.

190. *Gregg*, 428 U.S. at 188.

191. *Id.* (stating that "*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner"). In the words of Justice Potter Stewart, "[pre-*Furman*] death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

192. *Gregg*, 428 U.S. at 188–95. After *Gregg*, many states adopted these procedures as their own. *See* Death Penalty Information Center, History of the Death Penalty, Part II: Limiting the Death Penalty, *at* www.deathpenaltyinfo.org/article.php?scid=15&did=411#limitationswithinthe UnitedStates (last visited Mar. 8, 2005).

193. *Gregg*, 428 U.S. at 190–92 (holding that a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*).

194. *Id.* at 190–91; *see* Lockett v. Ohio, 438 U.S. 586, 606 (1978).

195. *Gregg*, 428 U.S. at 195.

196. *Id.* at 188 (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring)).

197. Gardner v. Florida, 430 U.S. 349, 357–58 (1977).

198. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

199. Justice Harlan delivered the Court's final major pre-*Furman* decision. *See* McGautha v. California, 402 U.S. 183, 185 (1971) (rejecting the argument that the absence of standards to

In *Penry v. Lynaugh*, the Court held that *Teague* also applied in capital cases.[200] Once again reaching its conclusion without the benefit of briefing or argument, the Court reasoned that "[t]he finality concerns underlying Justice Harlan's approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity."[201] In dissent, Justice William J. Brennan, Jr. prophesized,

> This extension means that a person may be killed although he or she has a sound constitutional claim that would have barred his or her execution had this Court only announced the constitutional rule before his or her conviction and sentence became final. It is intolerable that the difference between life and death should turn on such a fortuity of timing and beyond my comprehension that a majority of this Court will so blithely allow a State to take a human life though the method by which the sentence was determined violates our Constititution.[202]

Since *Penry*, however, the Court has consistently rejected the argument that *Teague* should not apply in capital cases.[203]

III. SUBJECT OPINION: *SCHRIRO V. SUMMERLIN*

In *Schriro v. Summerlin*, the Supreme Court faced the question of whether to retroactively apply *Ring* to capital defendants who had exhausted their appeals prior to *Ring*.[204] The *Summerlin* Court an-

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guide the jury's discretion on the punishment issue violates the Due Process Clause of the Fourteenth Amendment).

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

201. *Id.* Justice Brennan was not pleased with this development:

> [The majority says] merely that not to apply *Teague* would result in delay in killing the prisoner and in a lack of finality. There is not the least hint that the Court has even considered whether different rules might be called for in capital cases, let alone any sign of reasoning justifying the extension. Such peremptory treatment of the issue is facilitated, of course, by the Court's decision to reach the *Teague* question without allowing counsel to set out the opposing arguments.

Id. at 342 (Brennan, J., concurring in part and dissenting in part). Nor did Justice Stevens approve. *Id.* at 349 (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated: "I do not support the Court's assertion, without benefit of argument or briefing on the issue, that *Teague*'s retroactivity principles pertain to capital cases." *Id.* (Stevens, J., concurring in part and dissenting in part).

202. *Id.* at 341 (Brennan, J., concurring in part and dissenting in part).

203. *See, e.g.*, Saffle v. Parks, 494 U.S. 484, 486 (1990) (barring capital habeas petitioners from relying on new rules to challenge the constitutionality of certain jury instructions). *Teague*'s "limitation on the proper exercise of habeas corpus jurisdiction applies to capital and noncapital cases." *Id.*; *see also* Sawyer v. Smith, 497 U.S. 227, 243 (1990) (barring capital habeas petitioners from relying on new rules to challenge the constitutionality of certain prosecutorial statements). "[P]etitioner has not suggested any Eighth Amendment rule that would not be sufficiently 'fundamental' to qualify for the proposed definition of the exception . . . . In practical effect, petitioner asks us to overrule [*Penry*]. This we decline to do." *Sawyer*, 497 U.S. at 243.

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

swered this question in the negative.[205] First, it held that *Ring* announced a rule of procedure as opposed to one of substance.[206] Second, the Court held that *Ring* did not fit *Teague*'s exception for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[207]

This section first discusses the bizarre factual context from which *Summerlin* arose. It then examines the Ninth Circuit's decision to apply *Ring* retroactively and the Supreme Court's reversal of that decision.

A. Factual Background

In 1982, an Arizona jury convicted Warren Wesley Summerlin of first-degree murder.[208] Summerlin was subsequently sentenced to death under then-existing Arizona procedure, which required a judge to determine the suitability of a death sentence rather than a jury.[209] His case is noteworthy not merely for the legal questions it poses, but also for the peculiar circumstances underlying the Supreme Court's decision.[210] Each stage of Summerlin's bizarre proceedings—investigation, trial, and sentencing—was infused with the stuff of "legal fiction."[211]

In April of 1981, the Tempe Police Department conducted a brief but odd investigation into the disappearance of Brenna Bailey, an investigator for Finance America.[212] Bailey had been reported missing after visiting Summerlin's home to discuss his delinquent account.[213] Summerlin became the key suspect after an anonymous tip indicated that he may have murdered Bailey.[214] Summerlin's mother-in-law later identified herself as the caller and testified that her information was the result of her daughter's clairvoyance.[215]

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205. *Id.* at 2526.

206. *Id.* at 2523.

207. *Id.* (citation omitted).

208. Summerlin v. Stewart, 341 F.3d 1082, 1088 (9th Cir. 2003). Summerlin was also convicted of sexual assault. *Id.*

209. Ring v. Arizona, 536 U.S. 582, 609 (2002); *see also* ARIZ. REV. STAT. ANN. § 13-1105(c) (West 2001).

210. *See Summerlin*, 341 F.3d at 1084. In fact, Summerlin's trial and sentencing proceedings prompted the majority to quote Mark Twain, who observed: "truth is often stranger than fiction because fiction has to make sense." *Id.*

211. *Id.* "It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge." *Id.*

212. *Id.* at 1084–85.

213. *Id.*

214. *Summerlin*, 341 F.3d at 1084–85.

215. *Id.* at 1085.

The police recovered Bailey's body shortly thereafter.[216] After obtaining a warrant to search Summerlin's residence, the police discovered several pieces of evidence incriminating Summerlin.[217] Summerlin, described by the Ninth Circuit as "functionally retarded,"[218] made several incriminating statements to the police.[219]

The state of Arizona charged Warren Summerlin with Bailey's murder.[220] It then appointed the public defender's office to represent Summerlin.[221] Over the next year, Summerlin was represented by three different defense attorneys.[222] His first attorney, a public defender, ordered a competency hearing for Summerlin and promptly resigned from the office.[223] His second attorney—also from the public defender's office—took over the case and continued the inquiry into the mental health of her client.[224] She also engaged in a series of successful negotiations with her prosecutorial counterpart and brokered a generous plea agreement on behalf of her client.[225] Unfortunately for Summerlin, his plea agreement was put in jeopardy when his lawyer engaged in a romantic encounter with the prosecutor.[226] Privately citing the obvious ethical complications, she eventually left the case.[227] The court then appointed a third attorney to represent Summerlin, an attorney who consulted with his client very little and investigated even less.[228] A jury convicted Summerlin of first-degree murder and sexual assault.[229]

Summerlin then proceeded to the sentencing phase of his trial.[230] Under then-existing Arizona law, the sentencing judge was the sole arbiter of the decision to impose death.[231] Arizona law inflicted capital punishment if the sentencing judge found facts constituting aggra-

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216. *Id.*

217. *Id.*

218. *Id.* at 1084. Summerlin dropped out of the seventh grade due to dyslexia and is currently diagnosed with organic brain dysfunction. *Id.* at 1086.

219. *Summerlin*, 341 F.3d at 1086.

220. *Id.* at 1085.

221. *Id.*

222. *See id.* at 1085–88.

223. *Id.*

224. *See id.*

225. *Summerlin*, 341 F.3d at 1086.

226. *Id.* at 1086–87.

227. *Id.* at 1088.

228. *Id.* at 1088–89. Today, this failure to investigate would likely constitute a deprivation of Warren Summerlin's Sixth Amendment right to the effective assistance of counsel. *See generally* Wiggins v. Smith, 539 U.S. 510 (2003).

229. *Summerlin*, 341 F.3d at 1088.

230. *Id.*

231. State v. Summerlin, 675 P.2d 686, 695 (Ariz. 1983) (citing ARIZ. REV. STAT. § 13-703 (1977)).

vating circumstances that sufficiently outweighed any mitigating circumstances that called for leniency.[232] At the hearing, despite ample evidence demonstrating Summerlin's mental and psychological deficiencies, his third attorney introduced no mitigating factors.[233]

At the close of the proceedings, the sentencing judge, Judge Philip Marquardt, declared that he would announce his decision after a weekend of deliberation.[234] Unfortunately for Summerlin, his judge would later be disbarred after several convictions for marijuana use.[235] It is unknown how Judge Marquardt spent that weekend or whether he deliberated in a chemically altered state.[236] The record, however, does indicate that when Judge Marquardt returned to his courtroom that Monday, he appeared to have confused the facts and circumstances of Summerlin's case with those of another case over which he was presiding.[237] Undeterred, Judge Marquardt found two aggravating factors and "no sufficiently substantial mitigating factors."[238] He sentenced Summerlin to death.[239]

B. Procedural History

The Arizona Supreme Court heard Summerlin's automatic direct appeal in 1983.[240] It rejected each of Summerlin's arguments for reversal, including his claim that Arizona's death penalty statute[241] was unconstitutional because it required a trial judge rather than a jury to

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232. *Id.* at 695–96 (citing ARIZ. REV. STAT. § 13-703 (1977)).

233. *Summerlin*, 341 F.3d at 1088–89.

234. *Id.* at 1090.

235. *Id.* at 1089 n.1. In 1988, a Texas court convicted Marquardt of misdemeanor possession of marijuana. *Id.* He was also cited in a 1991 Phoenix Police Department report detailing his attempts to buy marijuana. *See id.*; Matter of Disbarment of Marquardt, 503 U.S. 902 (1992); *see also* Petty, *supra* note 4 (stating that "the trial judge exhibited confusion about the evidence during pretrial hearings and at trial, and that during the trial he made 'quite perplexing, if not unintelligible, statements").

236. *Summerlin*, 341 F.3d at 1090.

237. *Id.* The extent of Judge Marquardt's confusion is unknown, since the district court did not order discovery on this issue. *Id.* at 1090. As the Ninth Circuit noted, the mere fact that Judge Marquardt imposed two sentences of death is troubling. *Id.* at 1114 (stating that "[a] reasonable inference from the habituation brought about by imposing capital punishment under near rote conditions is that a judge may be less likely to reflect the current conscience of the community and more likely to consider imposing a death penalty as just another criminal sentence").

238. *Id.* at 1090.

239. *Id.*

240. State v. Summerlin, 675 P.2d 686 (Ariz. 1983); *see* ARIZ. R. CRIM. P. 26.15 & 31.2(b) (2005).

241. *See* ARIZ. REV. STAT. § 13-703 (2005) (providing that a sentence for first degree murder may be enhanced from imprisonment to death if the sentencing judge finds at least one of several specific aggravating factors and "no sufficiently substantial mitigating" circumstances that call for leniency).

determine the elements necessary for a capital sentence.[242] The Arizona Supreme Court instead relied on the then-existing Supreme Court precedent of *Proffit v. Florida*[243] and held that the Sixth Amendment does not require jury sentencing in capital cases.[244]

After his conviction became final,[245] Summerlin filed his initial petition for writ of habeas corpus in federal court and made four attempts to receive post-conviction relief in Arizona state court.[246] Each time, Summerlin attacked the validity of Arizona's capital punishment statute under the Sixth Amendment, and each time, Summerlin's claim was denied.[247]

Meanwhile, in 1990, the Supreme Court heard an identical attack on Arizona's death penalty. In *Walton v. Arizona*,[248] the Supreme Court rejected Jeffrey Walton's claim that Arizona's capital sentencing scheme was incompatible with the Sixth Amendment right to a trial by jury.[249] Walton argued that aggravating circumstances constituted elements of the offense requiring adjudication by a jury.[250] The Supreme Court disagreed, holding that Arizona's aggravating circumstances were merely sentencing considerations that a judge could con-

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242. *Summerlin*, 675 P.2d at 695 (stating that "we have expressly followed the mandate of *Proffit* in rejecting similar arguments that there is a right under the Sixth Amendment of the United States Constitution to have a jury participate in the capital sentencing decision"). Summerlin's direct appeal also argued the following: (1) The trial court erroneously denied his motion to suppress; (2) the trial court improperly commented on the evidence in front of the jury; (3) the trial court erroneously admitted eight gruesome autopsy photographs into evidence; (4) certain of the prosecution's evidence violated his anti-marital fact privilege; (5) the Arizona death penalty statute was also unconstitutional because it provided no guidance for weighing aggravating and mitigating circumstances; (6) his death sentence was inappropriate; and (7) his death sentence was disproportionate when compared to other similar cases. *Id.* at 689.

243. 428 U.S. 242 (1976).

244. *Summerlin*, 675 P.2d at 695 (quoting Proffit v. Florida, 428 U.S. 242, 252 (1976)). The Supreme Court

> has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Id.

245. *See* Summerlin v. Stewart, 341 F.3d 1082, 1108 (9th Cir. 2003) (noting that Summerlin's appeal became final when the Arizona Supreme Court denied him a rehearing and when his time to file a petition for writ of certiorari with the Supreme Court expired).

246. *Id.* at 1091.

247. *Id.*

248. 497 U.S. 639 (1990).

249. *Id.* at 649.

250. *Id.* at 647; *see* Hamling v. United States, 418 U.S. 87, 117–18 (1974) (indicating that each element of an offense must be: (1) charged in the indictment; (2) submitted to a jury; and (3) proven beyond a reasonable doubt)).

sider alone without violating Walton's Sixth Amendment freedoms.[251] The *Walton* Court thus affirmed both the constitutionality of the Arizona capital punishment scheme and, implicitly, Summerlin's death sentence.[252]

Nevertheless, Summerlin filed his second amended petition for writ of habeas corpus in the United States District Court for the District of Arizona on November 22, 1995.[253] Undeterred by *Walton*, Summerlin again included his challenge to the constitutionality of Arizona's capital punishment scheme among his claims.[254] The district court denied relief, but it issued a certificate of probable cause enabling Summerlin to appeal.[255]

In the interim, the U.S. Supreme Court issued two key decisions regarding the interplay between sentence enhancement and the Constitution. In 1999, the Court decided *Jones v. United States*[256] and reversed that defendant's sentence under the federal carjacking statute.[257] That statute allowed sentencing judges to choose one of three separate punishments, each of which depended solely on the level of harm suffered by the victim.[258] But the statute did not require a jury determination on the facts of the victim's injury.[259] The *Jones* Court found this to be unacceptable:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, 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.[260]

One year after *Jones*, the Supreme Court decided *Apprendi v. New Jersey*.[261] *Apprendi* involved a defendant convicted of second-degree possession of a firearm.[262] New Jersey law assigned a maximum pen-

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251. *Walton*, 497 U.S. at 647.

252. *Id.*

253. *Summerlin*, 341 F.3d at 1091; *see* 28 U.S.C. § 2254 (2000).

254. *See Summerlin*, 341 F.3d at 1091. Summerlin raised the following five issues: (1) His second court-appointed public defender engaged in a romantic encounter with his prosecutor, resulting in a reversible conflict of interest; (2) he received ineffective assistance of counsel at the guilt phase of his capital trial; (3) he received ineffective assistance of counsel at the penalty phase of his capital trial; (4) the aggregate ineffectiveness of his legal representation prejudiced his defense; and (5) his trial judge's heavy marijuana use deprived him of due process. *Id.*

255. *Id.* at 1091; *see* FED. R. APP. P. 22(b)(1) (2003).

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

257. *Id.* at 252; *see* 18 U.S.C. § 2119 (1994).

258. *Jones*, 526 U.S. at 229, 251–52.

259. *See id.*

260. *Id.* at 243 n.6.

261. 530 U.S. 466 (2000).

262. *Id.* at 469–70.

alty of ten years imprisonment to the defendant's crime.[263] The sentencing judge, however, found racism to be the motivation underlying the crime and sentenced the defendant to twelve years under New Jersey's hate crime enhancement.[264] The Supreme Court, relying on *Jones*, invalidated the defendant's sentence because the penalty enhancement constituted "the functional equivalent of an element of a greater offense"[265] to be "submitted to a jury and proved beyond a reasonable doubt."[266]

On October 12, 2001—one year after *Apprendi*—a three-judge panel of the United States Court of Appeals for the Ninth Circuit reviewed the district court's decision to deny habeas relief to Summerlin.[267] Relying on the newly announced *Apprendi* decision, Summerlin reiterated his constitutional attack upon Arizona's death penalty statute.[268] The panel upheld Arizona's system and noted that although *Apprendi* contradicted much of *Walton*, it was bound to follow *Walton* until the Supreme Court determined otherwise.[269] The panel affirmed the district court's denial of relief in part but reversed with respect to Summerlin's claim that his trial judge's heavy marijuana use deprived him of due process.[270] It remanded Summerlin's cause for an evidentiary hearing on the matter.[271]

On February 11, 2002, however, the panel withdrew its opinion.[272] It deferred submission of its decision pending the final disposition of *Ring v. Arizona*.[273] In *Ring*, the Court once again analyzed the constitutionality of Arizona's capital sentencing scheme, this time with respect to Timothy Ring's right to a trial by jury.[274] Holding that its decision in *Apprendi* compelled a contrary interpretation of the Sixth Amendment, *Ring* expressly overruled its prior decision in *Walton*.[275] It held that Arizona's enumerated aggravating factors—like the hate crime aggravator in *Apprendi*—"operate as the functional equivalent

263. *Id.* at 470.
264. *Id.* at 471.
265. *Id.* at 494 n.19.
266. *Id.* at 490.
267. Summerlin v. Stewart, 267 F.3d 926 (9th Cir. 2001), *vacated by* 281 F.3d 836 (9th Cir. 2002).
268. *Id.* at 930.
269. *Id.* at 956–57 (quoting Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001)) (stating that "while *Apprendi* may raise some doubt about *Walton*, it is not our place to engage in anticipatory overruling").
270. *Id.*
271. *Id.* at 957.
272. Summerlin v. Stewart, 281 F.3d 836, 837 (9th Cir. 2002).
273. *Id. See generally* State v. Ring, 25 P.3d 1139 (Ariz. 2001).
274. Ring v. Arizona, 536 U.S. 584 (2002).
275. *Id.* at 589.

of an element of a greater offense."[276] Thus, the Supreme Court invalidated Arizona's death penalty statute, vacating Timothy Ring's death sentence.[277]

The *Ring* decision prompted the Ninth Circuit to rehear Summerlin's case en banc to consider whether to apply *Ring* retroactively to capital petitioners in collateral proceedings.[278] In *Summerlin v. Stewart*,[279] the Ninth Circuit granted Summerlin's second petition for habeas corpus and agreed to apply *Ring* retroactively.[280] It articulated two alternative rationales for reaching its conclusion that *Ring* applied retroactively to Summerlin. First, the Ninth Circuit found that the *Ring* rule was substantive in nature and, thus, automatically retroactive.[281] Alternatively, it found that, if the *Ring* rule was to be classified as procedural, it may still be applied retroactively because it: "(1) seriously enhance[s] the accuracy of the proceeding and (2) alter[s]

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276. *Id.* at 609 (citation omitted).

277. Justice Sandra Day O'Connor, writing in dissent, supplied some foreshadowing:

> The Court effectively declares five States' capital sentencing schemes unconstitutional. There are 168 prisoners on death row in these States, each of whom is now likely to challenge his or her death sentence. I believe many of these challenges will ultimately be unsuccessful, either because the prisoners will be unable to satisfy the standards of harmless error or plain error review, or because, having completed their direct appeals, they will be barred from taking advantage of today's holding on federal collateral review.

Id. at 620–21 (O'Connor, J., dissenting) (citations omitted).

278. Summerlin v. Stewart, 341 F.3d 1082, 1091 (9th Cir. 2003). The Ninth Circuit waited a few months before voting to rehear Summerlin's case en banc. *Id.* Summerlin had petitioned the Arizona Supreme Court to reopen his direct appeal to consider *Ring*'s application to his case, an extraordinary remedy available under Arizona law, and the Ninth Circuit wished to assure that Summerlin exhausted all of his potential state remedies before proceeding to federal court. *Id.* (citing Woods v. Kenna, 13 F.3d 1244, 1245–46 (8th Cir. 1994)). When the Arizona Supreme Court denied Summerlin's motion, a majority of nonrecused, regular judges voted to rehear the case en banc. Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002).

279. 341 F.3d 1082 (9th Cir. 2003).

280. *Id.* More accurately, the Ninth Circuit held that *Ring* applied retroactively to habeas petitioners who filed prior to the enactment of the AEDPA. *See id.* at 1096 n.4 (noting that "[t]he question of whether a rule has retroactive application under AEDPA is a different inquiry from the question of whether *Teague* precludes retroactive application of a rule"). Because Warren Summerlin's second petition was filed before the AEDPA's effective date, the Ninth Circuit applied pre-AEDPA law. *Id.* at 1092 (citing Lindh v. Murphy, 521 U.S. 320, 327 (1997)).

281. *Id.* at 1108. In holding that *Ring* announced a substantive rule, the Ninth Circuit majority began by acknowledging that "the distinction between 'substantive' and 'procedural' is not always easy to divine." *Id.* at 1099 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). It reasoned that *Ring* declared a substantive rule of law because it provoked the Arizona legislature into amending its death penalty statute. *Summerlin*, 341 F.3d at 1108. Because the *Teague* standard—which bars retroactive application of new rules of criminal procedure—is inapplicable to substantive rules, the majority held the *Ring* rule to be exempt from *Teague* analysis and agreed to apply it retroactively to Summerlin's cause. *Id.*

the understanding of bedrock procedural elements essential to the fairness of the proceeding."[282]

C. The Supreme Court's Decision

In *Summerlin*, the Court reversed the decision of the Ninth Circuit and refused to apply *Ring* retroactively to cases already final on direct review.[283] Justice Scalia delivered the opinion of the *Summerlin* Court.[284] He was joined by Chief Justice William H. Rehnquist and Justices O'Connor, Anthony M. Kennedy, and Clarence Thomas.[285]

In *Summerlin*, the Court held that *Ring* did not announce a substantive rule.[286] To reach this conclusion, the Court articulated some distinctions between substantive rules and procedural rules.[287] It defined a substantive rule as one that "alters the range of conduct or the class of persons that the law punishes."[288] Typically, it reasoned, substantive decisions modify the elements of an offense, thereby altering the range of conduct subject to sanction.[289] Procedural rules, on the other hand, regulate who determines the defendant's culpability and how that determination is made.[290]

The Court rejected Summerlin's contention that *Ring* modified the elements of capital murder in Arizona.[291] It found that the State of Arizona had delineated the facts necessary to support a death sentence.[292] *Ring* merely held that a jury must find those facts.[293] Be-

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282. *Id.* at 1109 (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990)). The Ninth Circuit majority found that even if the *Ring* rule was to be classified as procedural, it may still be applied retroactively through the second *Teague* exception. *Id.* at 1121. It reasoned that *Ring* improved the accuracy of capital determinations because "[o]ne of the critical functions of a jury in a capital case is to 'maintain a link between contemporary community values and the penal system.'" *Id.* (quoting Witherspoon v. Illinois, 391 U.S. 510, 520 n.15 (1968)). By curing the structural defects in the sentences of Timothy Ring and others, the Ninth Circuit also explained that *Ring* "alter[ed] the understanding of bedrock procedural elements essential to the fairness of the proceeding." *Id.* at 1109, 1116 (citation omitted).

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

284. *Id.* Justice Scalia concurred in both *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). He also delivered the majority opinion in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which was announced on the same day as *Summerlin*. *Blakely* sought to reconcile *Apprendi* with determinate sentencing schemes. *Id.*; *see also* United States v. Booker, 125 S. Ct. 738 (2005); United States v. Fanfan, 125 S. Ct. 26 (2004).

285. *Summerlin*, 124 S. Ct. at 2519.

286. *Id.* at 2523.

287. *Id.*

288. *Id.* (citing Bousley v. United States, 523 U.S. 614, 620–21 (1998)).

289. *Id.* at 2524.

290. *Id.* at 2523 (citing Bousley v. United States, 523 U.S. 614, 620 (1998)).

291. *Summerlin*, 124 S. Ct. at 2524.

292. *Id.*

293. *Id.*

cause "the range of conduct punished by death in Arizona was the same before *Ring* as after," the Court held that *Ring* announced a "prototypical" procedural rule.[294]

The Court held that *Ring* did not fall within the *Teague* exception for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[295] It held that *Teague* required Summerlin to establish that *Walton* seriously diminished the accuracy of his capital sentencing hearing such that "there [was] an 'impermissibly large risk' of punishing conduct the law [did] not reach."[296] The Court reasoned that Summerlin failed to meet this burden for two key reasons. First, the Court cited several arguments that suggest juries are no more accurate than judges: (1) juries' inability to grasp legal standards; (2) juries' inability to overcome emotional facts or personal bias; (3) juries' relative inexperience with factfinding; (4) and the success of foreign judicial systems that rely upon judicial factfinding.[297] Second, the Court noted that *Duncan v. Louisiana*[298] had not been retroactively applied during the *Linkletter* era.[299] *Duncan* held that the Fourteenth Amendment incorporates the Sixth Amendment right to trial by jury.[300] The *Summerlin* Court reasoned that "[i]f under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating facts could be."[301] It concluded that *Ring* was *Teague*-barred.[302]

Justice Stephen G. Breyer dissented.[303] He was joined by Justices John Paul Stevens, David H. Souter, and Ruth Bader Ginsburg.[304] The dissent did not challenge the majority's conclusion that *Ring* announced a procedural rule. Rather, it focused its attack on the majority's conclusion that *Ring* did not fall within the second *Teague*

294. *Id.*

295. *Id.* (citation omitted).

296. *Id.* at 2525 (quoting Teague v. Lane, 489 U.S. 288, 312–13 (1989) (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

297. *Summerlin*, 124 S. Ct. at 2525 (citing Summerlin v. Stewart, 341 F.3d 1082, 1129–31 (9th Cir. 2003) (Rawlinson, J., dissenting)).

298. 391 U.S. 145 (1968).

299. *Summerlin*, 124 S. Ct. at 2525 (citing DeStefano v. Woods, 392 U.S. 631 (1968)).

300. *Duncan*, 391 U.S. at 152.

301. *Summerlin*, 124 S. Ct. at 2526.

302. *Id.*

303. *Id.* at 2526–31 (Breyer, J., dissenting). Justice Breyer dissented in *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000), and again in *Blakely v. Washington*, 124 S. Ct. 2531, 2551 (2004). In *Ring v. Arizona*, however, he concurred in the judgment because of his belief that the Eighth Amendment requires jury sentencing in capital cases. Ring v. Arizona, 536 U.S. 584, 613–14 (2002).

304. *Summerlin*, 124 S. Ct. at 2526–31 (Breyer, J. dissenting).

exception for accuracy-enhancing, "watershed" rules of criminal procedure.[305]

The dissent presented four arguments supporting its conclusion that *Ring* is "central to an accurate determination that death is a legally appropriate punishment."[306] First, Justice Breyer supplied his personal belief that "the Eighth Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution."[307] He acknowledged, however, that his views had not carried the day in *Ring*.[308]

Second, the dissent argued that juries are better equipped to make the "community-based value judgments" that often accompany capital sentencing.[309] It cited as an example an Arizona aggravating factor, arguing that "[w]ords like especially heinous, cruel, or depraved—particularly when asked in the context of a death sentence proceeding—require reference to community-based standards, standards that incorporate values."[310] The dissent did not respond to the majority's contention that Arizona "does not condition death eligibility on whether the offense is heinous, cruel, or depraved *as determined by community standards*. . . . It is easy to find enhanced accuracy in jury determination when one redefines the statute's substantive scope in such [a] manner as to ensure that result."[311]

Third, the dissent argued that retroactive application of *Ring* would not compromise *Teague*'s underlying values.[312] Specifically, it addressed the policies of finality, rehabilitation, and judicial economy.[313] The dissent contended that the state's interest in finality and rehabilitation are "unusually weak where capital sentencing proceedings are at issue."[314] After all, capital habeas proceedings often consume de-

305. *Id.* (Breyer, J., dissenting); *see supra* notes 12–14 and accompanying text.

306. *Summerlin*, 124 S. Ct. at 2527 (Breyer, J., dissenting) (citing Teague v. Lane, 489 U.S. 288, 313 (1989)).

307. *Id.* (Breyer, J., dissenting) (citing *Ring*, 536 U.S. at 614 (Breyer, J., concurring)); Harris v. Alabama, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting); Spaziano v. Florida, 468 U.S. 447, 467–90 (1984) (Stevens, J., concurring in part and dissenting in part)); *see also* Witherspoon v. Illinois, 391 U.S. 510, 519 (1968) (holding that juries "express the conscience of the community on the ultimate question of life or death").

308. *Summerlin*, 124 S. Ct. at 2528 (Breyer, J., dissenting).

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

310. *Id.* (Breyer, J., dissenting) (citation omitted).

311. *Id.* at 2526 (Breyer, J., dissenting).

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

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

314. *Summerlin*, 124 S. Ct. at 2530 (Breyer, J., dissenting). "A major reason that Justice Harlan espoused limited retroactivity in collateral proceedings was the interest in making con-

cades in spite of finality interests.[315] Thus, the ordinary meaning of "finality" is inapplicable to an unexecuted sentence of death, which, as the dissent urged, is "an entirely future event."[316]

As for rehabilitation, the dissent noted that "where the issue is life or death, the concern that attention ultimately should be focused on whether the prisoner can be restored to a useful place in the community is barely relevant."[317] And as for judicial economy, the dissent noted that *Ring* would not "require inordinate expenditure of state resources" because it affects only about "110 individuals on death row."[318]

Finally, the dissent argued that the Court's decision in *DeStefano* does not necessarily foreclose retroactive application of *Ring*.[319] It distinguished *DeStefano* on two grounds.[320] First, *DeStefano* analyzed the retroactivity of *Duncan* under the *Linkletter* standard, not the *Teague* doctrine.[321] Second, retroactive application of *Duncan* "would have thrown the prison doors open wide."[322] *Ring*, however, "involve[d] only a small subclass of defendants deprived of jury trial rights."[323] In fact, it is likely that *Ring* would be retroactively applicable under the *Linkletter* standard.[324] Therefore, the dissent concluded that the majority's reliance on *DeStefano* was misplaced.[325] Summarizing its major points, the dissent concluded:

> [T]he majority does not deny that *Ring*'s rule makes *some* contribution to greater accuracy. It simply is unable to say "confidently" that the absence of *Ring*'s rule creates an "'"impermissibly large risk"'" that the death penalty was improperly imposed. For the reasons stated, I believe that the risk is one that the law need not and should not tolerate. Judged in light of *Teague*'s basic purpose,

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victions final, an interest that is wholly inapplicable to the capital sentencing context." *Id.* (Breyer, J., dissenting) (citation omitted).

315. *Id.* at 2529 (Breyer, J., dissenting).

316. *Id.* (Breyer, J., dissenting). In describing Justice Breyer's *Summerlin* dissent, Professor Bickers noted that "whatever may be said of the importance of finality for decisions which confine people for a period of time, the common understanding of finality would preclude the use of that term about a death sentence while the sentenced prisoner remains alive." John M. Bickers, *Maybe Death Isn't So Different After All* (July 18, 2004), http://jurist.law.pitt.edu/forum/bickers1.php. Professor Bickers also reviewed *Teague*'s application to new capital mitigation procedures in *Beard v. Banks*, 124 S. Ct. 2504 (2004), a case not considered by this Note.

317. *Summerlin*, 124 S. Ct. at 2530 (Breyer, J., dissenting).

318. *Id.* (Breyer, J., dissenting) (citations omitted).

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

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

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

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

323. *Summerlin*, 124 S. Ct. at 2531 (Breyer, J., dissenting).

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

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

> *Ring*'s requirement that a jury, and not a judge, must apply the death sentence aggravators announces a watershed rule of criminal procedure that should be applied retroactively in habeas proceedings.[326]

IV. ANALYSIS

A great deal is missing from the *Summerlin* Court's analysis. The Court began its analysis by whitewashing over the outlandishness of the representation and process afforded to Warren Summerlin. Where the Ninth Circuit devoted over 5,000 words to Summerlin's story,[327] the Supreme Court devoted only eighty-one.[328] In a single paragraph, the Court recited the gruesome details of the victim's death, the anonymous identification of the suspect, and Summerlin's self-incrimination.[329] Absent from the Court's opinion was any reference to Summerlin's mental and psychological deficiencies.[330] Also missing was any mention of the inadequacy of Summerlin's revolving-door representation, which included one attorney who became romantically involved with the prosecutor and another who called only one witness.[331] The Court also omits the fact that "Summerlin's fate was determined by a drug-impaired judge, habituated to treating penalty-phase trials the same as non-capital sentencing, who relied upon inadmissible evidence in making the factual findings that sentenced Summerlin to death."[332]

Most importantly, the *Summerlin* Court failed to frame the question of *Ring*'s retroactivity in the context of the Eighth Amendment. This section discusses that failure. Specifically, it presents the following three observations relating to the Eighth Amendment and its interre-

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

327. Summerlin v. Stewart, 341 F.3d 1082, 1084–92 (9th Cir. 2003).

328. *Summerlin*, 124 S. Ct. at 2521.

329. *Id.* The Court, of course, failed to acknowledge the role of extrasensory perception in Summerlin's arrest. *See id. But see Summerlin*, 341 F.3d at 1084–85 (stating that "the police received a tip from a female caller to an anonymous crime hotline service . . . . The caller later was identified as Summerlin's mother-in-law who testified that the basis of her information was her daughter's extra-sensory perception.").

330. *See generally Summerlin*, 124 S. Ct. 2519. *But see Summerlin*, 341 F.3d at 1084 (stating that Summerlin "has organic brain dysfunction, was described by a psychiatrist as 'functionally retarded,' and has explosive personality disorder with impaired impulse control"). The Eighth Amendment forbids the execution of the mentally retarded. *See generally* Atkins v. Virginia, 536 U.S. 304 (2002). There is no question that *Atkins* is retroactively applicable to cases on collateral review. *See* Penry v. Lynaugh, 492 U.S. 302, 330 (1989) ("if we held, as a substantive matter, that the Eighth Amendment prohibits the execution of mentally retarded persons . . . such a rule would fall under the first exception to the general rule of nonretroactivity and would be applicable to defendants on collateral review").

331. *Summerlin*, 341 F.3d at 1086–88.

332. *Id.* at 1115–16.

lationship with *Schriro v. Summerlin*: (1) *Summerlin* ignores the Eighth Amendment's direction that "a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution;"[333] (2) the retroactivity doctrine upheld by *Summerlin* cannot be reconciled with an Eighth Amendment that draws its meaning from evolving standards of decency; and (3) *Summerlin* highlights the arbitrariness of a capital habeas system that is so dependent upon the "fortuity of timing."[334]

A. The Eighth Amendment Mandates Jury Sentencing in Capital Cases

The *Summerlin* Court did not convincingly dispose of Justice Breyer's argument that the Eighth Amendment mandates jury sentencing in capital cases. In his concurrence to *Ring*, Justice Breyer noted that retribution is the primary justification for capital punishment.[335] Jury sentencing, therefore, is required because the jury is in a superior position to determine whether retribution is appropriate.[336]

The Court acknowledges that "[c]entral to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment."[337] Jurors are better equipped to make this determination because they

> reflect more accurately the composition and experiences of the community as a whole. Hence they are more likely to express the conscience of the community on the ultimate question of life or death and better able to determine in the particular case the need for retribution, namely, an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[338]

Jury sentencing is also necessary because the Constitution requires that death penalty determinations bear "the hallmarks of the trial on guilt or innocence."[339] Submitting questions of fact to a jury would

333. *Summerlin*, 124 S. Ct. at 2527 (Breyer, J., dissenting) (citing Ring v. Arizona, 536 U.S. 584, 614 (2002)). Furthermore, the interest in the accuracy of a criminal proceeding that jeopardizes an individual's life or liberty is uniquely compelling. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.6(c), at 44 (1984).

334. *Penry*, 492 U.S. at 341 (1989) (Brennan, J., concurring in part and dissenting in part).

335. *Ring*, 536 U.S. at 614 (Breyer, J., dissenting) (citing Harris v. Alabama, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting); Spaziano v. Florida, 468 U.S. 447, 467–90 (1984) (Stevens, J., concurring in part and dissenting in part)).

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

337. Woodson v. North Carolina, 428 U.S. 280, 288 (1976).

338. *Ring*, 536 U.S. at 615–16 (Breyer, J., dissenting) (citations omitted); *see* Gregg v. Georgia, 428 U.S. 153, 184 (1976).

339. Summerlin v. Stewart, 341 F.3d 1082, 1110 (9th Cir. 2003) (quoting Bullington v. Missouri, 451 U.S. 430, 439 (1981)).

improve the accuracy of capital determinations in two ways.[340] First, it would add some much-needed formality to Arizona's penalty phases.[341] As the Ninth Circuit noted, Arizona's pre-*Ring* penalty phases were less formal than traditional capital punishment determinations.[342] Second, the submission of questions of fact to a jury would avoid the problems caused by Judge Marquardt's unfortunate drug problem. As the Ninth Circuit noted, Warren Summerlin's disastrous trial "highlights the potential risk of accuracy loss when a capital decision is reposed in a single decision-maker who may be habituated to the process."[343] The people of Tempe, Arizona never authorized Warren Summerlin's death sentence.[344] Devoid of "a community-based judgement,"[345] his death sentence violates the Eighth Amendment. Therefore, the *Summerlin* Court's decision to withhold *Ring* from Summerlin effectively constitutes an unwarranted imposition of the death penalty.

B. The Teague *Doctrine Cannot Be Reconciled with an Eighth Amendment that Draws Its Meaning from Evolving Standards of Decency*

Summerlin perpetuates a retroactivity regime built on the tenets of the legal positivists.[346] Before *Linkletter*, the Court subscribed to the Blackstonian view that judges never prescribe new law, even when they overrule prior precedent.[347] Instead, they communicate "a prior judicial failure to *discover* the law."[348] Thus, the early American courts would have applied *Ring* to Warren Summerlin without hesitation.[349] *Ring* was "'not a new law but the application of what is, and therefore had been, the *true* law.'"[350]

Since *Linkletter*, however, the Court has embraced the Austinian view that "judges do in fact do something more than discover law;

340. *Id.* at 1110–16.

341. *See id.* at 1110.

342. *Id.* (stating that "penalty-phase presentations to Arizona judges are capable of being extremely truncated affairs with heavy reliance on presentence reports and sentencing memoranda, and with formal court proceedings frequently limited to a brief argument by counsel").

343. *Id.* at 1114. Of particular concern is when that "single decision-maker" is an elected Arizona judge subject to various political pressures. *Id.* at 1115.

344. *See* Schriro v. Summerlin, 124 S. Ct. 2519, 2527 (2004) (Breyer, J., dissenting).

345. *Id.*

346. *See supra* notes 33–68 and accompanying text.

347. Blume & Pratt, *supra* note 37, at 326.

348. *Id.* (emphasis added).

349. *See supra* notes 69–113 and accompanying text.

350. Note, *supra* note 33, at 908 n.6 (emphasis added) (quoting Harry Shulman, *Retroactive Legislation*, 13 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 355, 356 (1934)).

they make it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law."[351] Justice Harlan believed in the duty of "a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review," to "apply the law as it is at the time, not as it once was."[352] His formulation rejects "the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time."[353] The *Teague* doctrine, therefore, is premised on a legal philosophy that views *Ring* as nothing more than, as the *Summerlin* Court phrases it, a judicial "change of heart."[354]

The Eighth Amendment, on the other hand, is interpreted with a more Blackstonian bent. Since *Trop v. Dulles*,[355] the Court has repeatedly recognized that "the words of the [Eighth Amendment] are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[356] These evolving standards of decency are informed by "objective factors to the maximum possible extent."[357] Objective factors include state legislation, sentencing decisions of juries, and other indicia of community standards.[358] Judges, therefore, do not *decide* what punishments are cruel and unusual; rather, they merely *discover* what punishments are cruel and unusual.

The *Teague* doctrine is also premised on the assumption that our justice system has reached its evolutionary peak. In *Teague*, the Court explained that its exception for procedural rules is extremely narrow because "it is unlikely that many such components of basic due process have yet to emerge."[359] History tells us that this assertion is both arrogant and incorrect.[360] As one commentator phrased it, "To assume that government already has discovered every possible way to

351. Linkletter v. Walker, 381 U.S. 618, 623–24 (1965).

352. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1743 (1991) (citation omitted).

353. Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring).

354. Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004) (stating that after "a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart").

355. Trop v. Dulles, 356 U.S. 86 (1958).

356. *Id.* at 101; *see, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002); Ford v. Wainwright, 477 U.S. 399, 406 (1986); Gregg v. Georgia, 428 U.S. 153, 171 (1976).

357. Coker v. Georgia, 433 U.S. 584, 592 (1977).

358. *Id.*

359. Teague v. Lane, 489 U.S. 288, 312 (1989).

360. Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 30 (1992).

act arbitrarily, and that no new forms of due process violations can occur seems amazingly optimistic. As new situations arise, so will new due process violations."[361] Put differently, there will always be room for improvement in the judicial process.[362]

Summerlin illustrates *Teague*'s incompatibility with an Eighth Amendment that draws its meaning from contemporary standards of decency. The Court held in *Sawyer v. Smith*[363] that

> [t]he rule of *Teague* serves to "validate reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." Thus, we have defined new rules as those that were not "*dictated* by precedent existing at the time the defendant's conviction became final." The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered. This is but a recognition that the purpose of federal habeas corpus is to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.[364]

Thus, even in capital cases, the *Teague* doctrine favors comity and finality at the expense of accuracy, consistency, and "heightened reliability." This is especially frustrating given Justice Breyer's observation that the state's interest in finality and rehabilitation are "unusually weak where capital sentencing proceedings are at issue."[365]

C. *The* Teague *Doctrine Cannot Be Reconciled with an Eighth Amendment that Forbids Arbitrary and Capricious Imposition of the Death Penalty*

The *Summerlin* Court also fails to address the arguments of Judge Stephen Reinhardt, who concurred in the Ninth Circuit decision granting Warren Summerlin's petition for habeas relief.[366] Judge

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361. *Id.* (footnote omitted).

362. *See id.* Professor Rutherford bolsters her point by quoting *Weems v. United States*, 217 U.S. 349, 373 (1910), a cornerstone of Cruel and Unusual Punishment Clause jurisprudence:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be."

Rutherford, *supra* note 360, at 30 (quoting *Weems*, 217 U.S. at 373).

363. 497 U.S. 227 (1990).

364. *Id.* at 234 (citations omitted) (quoting Butler v. McKellar, 494 U.S. 407, 414 (1990), and *Teague*, 489 U.S. at 301).

365. Schriro v. Summerlin, 124 S. Ct. 2519, 2530 (2003) (Breyer, J., dissenting).

366. Summerlin v. Stewart, 341 F.3d 1082, 1122 (9th Cir. 2003) (Reinhardt, J., concurring).

Reinhardt noted that denying Summerlin the benefit of *Ring* would violate the Constitution's proscription against arbitrary and capricious punishments.[367] Emphasizing that the Constitution demands heightened reliability in capital cases, Judge Reinhardt argued that to execute Summerlin because his case came too early would be unconstitutionally arbitrary.[368] Thus, even if traditional retroactivity law compelled a different result in "run-of-the-mill" cases, those rules cannot be applied in the capital context if it results in arbitrary treatment of capital defendants.[369]

Judge Reinhardt bases his contention on the fact that "death is different."[370] Since the beginning of modern death penalty jurisprudence, the Court has repeatedly held that the death penalty "is different in both its severity and finality."[371] It has held that "[b]ecause of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[372] When it comes to retroactivity, however, the Court does not hesitate to apply Justice Harlan's pre-*Furman* analysis to post-*Furman* capital cases.[373]

Despite Justice Brennan's warning in *Penry*,[374] the Court has consistently rejected the argument that *Teague* should not apply in capital cases.[375] In so holding, the Court ignores the fact that the "foremost concern" of the Court's Eighth Amendment jurisprudence "is that the death sentence not be imposed in an arbitrary and capricious manner."[376] Capital punishment must be reserved for the worst of the worst, and similarly situated defendants must be treated similarly.[377]

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367. *See id.* (Reinhardt, J., concurring).

368. *Id.* at 1122–23 (Reinhardt, J., concurring) (citing Gardner v. Florida, 430 U.S. 349, 357 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring)).

369. *Id.* at 1123 (Reinhardt, J., concurring).

370. *Id.* (Reinhardt, J., concurring) (citing Ring v. Arizona, 536 U.S. 584, 606 (2002); Ford v. Wainwright, 477 U.S. 399, 411 (1986); Gardner v. Florida, 430 U.S. 349, 357 (1977); Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Furman v. Georgia, 408 U.S. 238, 289 (1972) (Brennan, J., concurring)).

371. Gardner v. Florida, 430 U.S. 349, 357 (1977).

372. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

373. Justice Harlan delivered the Court's final major pre-*Furman* decision. *See* McGautha v. California, 402 U.S. 183, 185 (1971) (rejecting the argument that the absence of standards to guide the jury's discretion on the punishment issue violates the Due Process Clause of the Fourteenth Amendment).

374. *See supra* notes 201–203 and accompanying text.

375. *See supra* note 203.

376. Saffle v. Parks, 494 U.S. 484, 507 (1990) (Brennan, J., dissenting).

377. Gregg v. Georgia, 428 U.S. 153, 187 (1976); Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting).

Traditionally, the Court has carried out this command by requiring the States to "narrow the class of defendants eligible for the death penalty and . . . ensure that the decision to impose the death penalty is individualized."[378] It is for this reason that the *Summerlin* dissenters so valued the use of juries in capital sentencing. But the risk of arbitrariness does not end once the verdict is announced. As Justice Harlan reminded us in *Desist*, similarly situated defendants must be treated similarly.[379]

Summerlin fails to carry out this command. In Judge Reinhardt's words,

> [E]xecuting people because their cases came too early—because their appeals ended before the Supreme Court belatedly came to the realization that it had made a grievous constitutional error in its interpretation of death penalty law, that it had erred when it failed to recognize that the United States Constitution prohibits judges, rather than jurors, from making critical factual decisions regarding life and death in capital cases—is surely arbitrariness that surpasses all bounds.[380]

Justice Harlan's distinction between direct appellants and capital habeas petitioners is no longer compatible with an Eighth Amendment that has changed dramatically since his retirement.[381] The *Summerlin* Court failed to recognize this. Consequently, Warren Summerlin is subject to an arbitrary imposition of the death penalty.

V. IMPACT: PRELUDE TO A CAPITAL *TEAGUE* EXCEPTION

Schriro v. Summerlin could lead to a possible regime change regarding questions of retroactivity in capital cases. Fifteen years of *Teague* jurisprudence, however, have attached a stigma of futility to such arguments.[382] In *Summerlin*, four Justices stopped short of renewing the

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378. *Saffle*, 494 U.S. at 507 (Brennan, J., dissenting).

379. *Desist*, 394 U.S. at 258–59 (Harlan, J., dissenting).

380. *Summerlin*, 341 F.3d at 1122 (Reinhardt, J., concurring).

381. *Compare* Powell v. Texas, 392 U.S. 514, 531–32 (1968) (noting that the Cruel and Unusual Punishment Clause is "directed at the method or kind of punishment imposed"), *with* Roper v. Simmons, 125 S. Ct. 1183 (2005) (holding that capital punishment of a defendant under the age of 18 at the time that the crime was committed violates the Eighth Amendment).

382. During oral arguments, however, Justice Breyer was careful not to couch his argument as one in favor of a general capital sentencing exception to *Teague*:

> JUSTICE BREYER: [H]ere we will have the spectacle of a person going to his death when he was tried in violation of a rule that the majority of the Court found to be a serious procedural flaw. See, I'm not calling it absolutely overwhelming. So I'm giving you that, but on the other side, I'm trying to focus your attention on the spectacle of the man going to his death, having been sentenced in violation of that principle. What do you want to say about that?

argument for a capital exception to *Teague*.[383] Justice Breyer's dissent, however, illustrates that capital habeas petitioners can be exempted from *Teague* without compromising any of the values that *Teague* serves.

Part IV highlighted the arbitrariness of a capital habeas regime so dependent on the "fortuity of timing."[384] This section proposes a limited capital exception to *Teague* that should provide a more meaningful basis for distinguishing the successful capital habeas petitioner from the unsuccessful capital habeas petitioner.[385] It also demonstrates that, in limited circumstances, capital habeas petitioners can be exempted from retroactivity analysis without compromising the values underlying *Teague*.

A. A Proposal Resurrected

Summerlin illustrates the Court's reluctance to adopt a general capital exception to *Teague*.[386] Today's Court is hesitant to adopt such an exception for the same reason that the *Linkletter* Court was hesitant to retain declaratory theory.[387] A capital habeas petitioner could ex-

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> MR. TODD: Your Honor, in our view Teague answers that question, that if the Apprendi/Ring rule would come within the Teague exception, then certainly in fairness, it should be applied retroactively.
>
> JUSTICE SCALIA: Justice Breyer is—is arguing for a—a general capital sentencing exception to Teague. I mean, you—you could make that statement that he just made in any capital case.
>
> JUSTICE BREYER: No, but—but anyway . . . .

Tr. of Oral Argument, 2004 WL 937652, at *13–14 (2004). Summerlin's appellate counsel, Ken Murray, was also hesitant to disturb *Teague*:

> MR. MURRAY: I'd like to first go right to the heart of the issue of the questions that were between Justice Breyer and Justice Scalia and point out that we are not, in fact, asking for an exception in death penalty cases of *Teague*, but we are asking the Court to look at the specific issues involved in capital cases and how the *Teague* exception that—that implicates accuracy and fairness is applied in those contexts.

Id. at *23.

383. Schriro v. Summerlin, 124 S. Ct. 2519, 2529 (2003) (Breyer, J., dissenting).

384. Penry v. Lynaugh, 492 U.S. 302, 341 (1989) (Brennan, J., concurring in part and dissenting in part).

385. *See* Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) (finding that Georgia's capital punishment scheme violated the Eighth Amendment). In *Furman*, Justice White argued that "capital punishment within the confines of [pre-*Furman* statutes] has for all practical purposes run its course" because "the death penalty is exacted with great infrequency even for the most atrocious crimes and [because] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* (White, J., concurring).

386. *See supra* note 382 and accompanying text.

387. *See supra* notes 33–46 accompanying text. As Professor John M. Bickers noted:

> In most cases, perhaps, the need for stability within the field of criminal law justifies the ideological cost of the [*Teague*] dilemma. Perhaps it is simply too horrific to think of retrying or releasing vast numbers of prisoners each time the Court announces a new

ploit such an exception to "litigate his claims indefinitely" with every new procedural rule.[388] Thus, if the Eighth Amendment is to play any role in the Court's retroactivity analysis, it will have to be a limited role.

The Eighth Amendment forbids the use of arbitrary distinctions when separating those who deserve the death penalty from those who do not.[389] In the context of capital punishment, questions of retroactivity should not hinge upon the date and time a petitioner's conviction becomes final. Rather, retroactivity should hinge upon a more meaningful distinction. Otherwise, we create a situation where, in the words of Judge Reinhardt, "additional people [are] put to death following unconstitutional proceedings even though the Court has recognized the unconstitutionality inherent in those future executions and even though had the Court not erred initially, the death sentences in question would previously have been set aside."[390]

A limited capital exception modeled after the doctrine of procedural default would strike the proper balance between the Eighth Amendment and *Teague*. In a 1998 article, Professor Tung Yin proposed such a model as an alternative to *Teague*'s retroactivity analysis.[391] Although his model seeks to supplant rather than modify *Teague*, its application as a limited capital exception to *Teague* is more relevant to the thesis of this Note.[392] Professor Yin's model articulates a more principled approach to determining which litigants would receive the benefit of new procedural rules and which litigants would not:

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rule. Perhaps, too, the lack of a *Teague* bar would be counterproductive to the Constitution: it might well be that the Court would avoid the retrial problem by simply refraining from ever recognizing a procedural right which some states had previously not allowed. Fear of opening the prison doors might tie the Court's hands even where they saw what they believed to be a Constitutional wrong. In death cases, though, that price seems unacceptably high.

Bickers, *supra* note 316.

388. *Summerlin*, 124 S. Ct. at 2526.

389. *See supra* notes 376–377 and accompanying text.

390. *Summerlin*, 341 F.3d at 1122 (Reinhardt, J., concurring).

391. Yin, *supra* note 174, at 232. Professor Yin wrote his article during his clerkship with the Honorable J. Clifford Wallace of the United States Court of Appeals for the Ninth Circuit. *Id.* at 203 n.*.

392. *Id.* at 232. This author does not suggest that Professor Yin's model does not warrant broader application. It does. This author merely suggests that the *Teague* doctrine does not offend as many constitutional directives when applied outside of the capital context. Abolition of the *Teague* doctrine, therefore, is not as necessary as a capital exception to the *Teague* doctrine.

> [W]hether a habeas petitioner can claim the benefit of a Supreme Court case decided after his conviction has become final depends on whether the petitioner raised this claim on direct appeal.
>
> If the petitioner did not raise the claim before, and is therefore simply relying on a subsequently decided favorable case, then he would not be able to obtain habeas relief. On the other hand, if the petitioner did raise the claim on direct review, he would be able to rely on a subsequently decided case that validates his claim.[393]

Professor Yin's approach is modeled on the doctrine of procedural default, which holds that the federal courts lack jurisdiction to review the merits of a habeas petition if the relevant state court declined to hear the claim because of the petitioner's failure to raise it pursuant to reasonable state court procedures.[394] His model applies the "cause and prejudice" standard enunciated in *Wainwright v. Sykes*,[395] arguing that capital petitioners could not avail themselves of new procedural rules absent a showing of good "cause" for the default and "prejudice" should the federal court refuse to hear the matter.[396] Under Professor Yin's model, the novelty of a claim would not excuse its default.[397]

B. A Proposal Validated

The *Summerlin* Court's refusal to apply *Ring* retroactively to Warren Summerlin's pre-*Walton* conviction is arbitrary and unfair. Warren Summerlin asserted his Sixth Amendment rights at every stage of the appellate process.[398] By the time the Court acknowledged the unconstitutionality of Arizona's capital sentencing statute, however, Mr. Summerlin's conviction had become final and his claim *Teague*-barred.[399]

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393. *Id.* (citations omitted).

394. *Id.*; *see* Harris v. Reed, 489 U.S. 255 (1989). The doctrine of procedural default is a corollary of the doctrine of independent and adequate state grounds, which dictates that federal courts must abstain from reviewing state court decisions that are partially based on state law if a decision on the federal question would not alter the result. *Harris*, 489 U.S. at 260–62. A habeas petitioner's procedural default is considered independent and adequate state grounds. *Id.* at 262.

395. 433 U.S. 72 (1977).

396. Yin, *supra* note 174, at 232–33.

397. *Id. But see* Reed v. Ross, 468 U.S. 1, 16 (1984) (finding adequate cause to exist "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel").

398. Summerlin v. Stewart, 341 F.3d 1082, 1091 (9th Cir. 2003) (noting that each of Summerlin's appellate attempts included an attack on the validity of Arizona's death penalty statute); State v. Summerlin, 675 P.2d 686 (Ariz. 1983) (rejecting on direct appeal Summerlin's claim that Arizona's death penalty statute was unconstitutional).

399. *Summerlin*, 341 F.3d at 1091–92.

Under Professor Yin's approach[400] *Ring* would apply to Mr. Summerlin's petition. Because the Arizona courts ruled on the merits of Summerlin's Sixth Amendment challenge, it was not procedurally defaulted. Thus, Mr. Summerlin would be entitled to a decision on the merits. Given *Ring*, it is clear that the Court would have granted the writ under a procedural default approach. Mr. Summerlin would therefore be entitled to a new sentencing proceeding before a jury of his peers.

Such a result would not be inconsistent with the policies underlying *Teague*. The *Teague* doctrine attempts to balance the same interests that underlie the Great Writ itself: (1) "comity interests and respect for State autonomy;"[401] (2) finality interests and the State's interest in rehabilitation;[402] (3) protecting the innocent against erroneous conviction;[403] (4) assuring fundamentally fair procedures;[404] and (5) judicial economy.[405] None of these policies would be unduly frustrated by adopting Professor Yin's model or by applying *Ring* to Mr. Summerlin's petition.

First, Professor Yin's model promotes, rather than frustrates, principles of federalism. He argues that "*Teague* provides no incentive to the state courts [or lower federal courts] to do anything but apply current doctrine in a mindless mechanical fashion."[406] Recall that after *Apprendi* but before *Ring*, a panel of the Ninth Circuit rejected Mr. Summerlin's challenge to the Arizona capital sentencing statute, noting that while *Apprendi* contradicted much of *Walton*, it was bound to follow *Walton* until the Supreme Court determined otherwise.[407] Professor Yin's model is far less paternalistic. It inspires both state courts and lower federal courts to develop their own interpretations of the federal Constitution—a document all courts are sworn to uphold.[408]

400. *See* Yin, *supra* note 174, at 297–305.

401. Schriro v. Summerlin, 124 S. Ct. 2519, 2530 (2004) (Breyer, J., dissenting) (citing Teague v. Lane, 489 U.S. 288, 308–10 (1989)).

402. *Id.* at 2529–30 (Breyer, J., dissenting) (quoting Mackey v. United States, 401 U.S. 667, 690–91 (1971) (Harlan, J., concurring)).

403. *Id.* at 2528 (Breyer, J., dissenting) (citing *Teague*, 489 U.S. at 312–13).

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

405. *Id.* at 2530 (Breyer, J., dissenting).

406. Yin, *supra* note 174, at 242.

407. *Summerlin*, 267 F.3d at 956 ("[W]hile *Apprendi* may raise some doubt about *Walton*, it is not our place to engage in anticipatory overruling." (quoting Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001))).

408. *Id.* at 242–43.

The procedural default model encourages state courts to "serve as a laboratory" as they experiment with new constitutional safeguards.[409]

Second, the State's interest in finality and rehabilitation are "unusually weak where capital sentencing proceedings are at issue."[410] As Justice Breyer noted, "where the issue is life or death, the concern that attention ultimately should be focused on whether the prisoner can be restored to a useful place in the community is barely relevant."[411] As for finality, the ordinary meaning of that term is inapplicable to an unexecuted sentence of death, which, as the *Summerlin* dissenters observe, is "an entirely future event."[412] But whatever the state's interest in upholding capital convictions, it would not be significantly weakened by a capital exception to *Teague*. Capital habeas proceedings often consume decades in spite of finality interests.[413] Furthermore, as Professor Yin notes,

> *Teague* does not protect states from relitigation completely; it simply provides a fairly effective defense against such habeas petitions. The states must still respond to habeas petitions based on newly decided law. Moreover, because *Teague* applies only if the rule is new, the states must argue this truly baffling issue. Thus, the real difference in terms of finality between *Teague* and [the procedural default approach] is that under the latter, there may be more successful habeas petitions.[414]

Third, retroactive application of *Ring* is appropriate because Warren Summerlin is probably "innocent" of the death penalty.[415] The

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409. *Id.* *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

410. *Summerlin*, 124 S. Ct. at 2530 (Breyer, J., dissenting). *See also id.* (Breyer, J., dissenting) (citing *Teague*, 489 U.S. at 321 n.3 (Stevens, J., concurring)). "A major reason that Justice Harlan espoused limited retroactivity in collateral proceedings was the interest in making convictions final, an interest that is wholly inapplicable to the capital sentencing context." *Id.* (Breyer, J., dissenting) (quoting *Teague*, 489 U.S. at 321 n.3 (Stevens, J., concurring)).

411. *Id.* (Breyer, J., dissenting) (citations omitted).

412. *Id.* at 2529 (Breyer, J., dissenting). In describing Justice Breyer's dissent in *Summerlin*, Professor Bickers notes that "whatever may be said of the importance of finality for decisions which confine people for a period of time, the common understanding of finality would preclude the use of that term about a death sentence while the sentenced prisoner remains alive." Bickers, *supra* note 316.

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

414. Yin, *supra* note 174, at 241–42.

415. An individual is "innocent" of the death penalty when it is likely that he or she would not have been sentenced to death but for constitutional error. Deutscher v. Whitley, 946 F.2d 1443, 1445 (9th Cir. 1991), *vacated by* Hatcher v. Deutscher, 506 U.S. 935 (1992). Warren Summerlin was probably innocent of the death penalty because his functional retardation made it likely that he would not have been sentenced to death now that the Constitution forbids the execution of the mentally retarded. *Summerlin*, 341 F.3d at 1084. *See generally* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the execution of mentally retarded offenders constitutes cruel and unusual punishment).

Teague doctrine maintains that "[n]ew rules of procedure . . . do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of [the] invalidated procedure might have been acquitted otherwise."[416] This principle ignores the Eighth Amendment, which "requires a greater degree of accuracy . . . than would be true in a noncapital case."[417] Had today's standards of capital sentencing and ineffective assistance of capital counsel applied,[418] a jury might have heard about Warren Summerlin's organic brain dysfunction, his psychiatric problems, and other powerful mitigating circumstances—facts wholly ignored in *Summerlin*. In this sense, then, Professor Yin's model strikes a superior balance between Eighth Amendment values and the values underlying habeas jurisprudence.

Fourth, rules like *Ring* promote fairness in capital sentencing proceedings. The *Teague* doctrine, however, impedes fundamental fairness instead of promoting it. In *Summerlin*, the Court conceded that "[t]he right to a jury trial is fundamental to our system of criminal procedure."[419] Yet it withheld retroactive application of *Ring* because judicial factfinding did not "seriously diminish" accuracy in capital sentencing—a result it could not have reached under either of Justice Harlan's original formulations.[420] Moreover, the Court's refusal to apply *Ring* retroactively was particularly harsh given Mr. Summerlin's repeated objections to judicial factfinding in his capital sentencing proceeding.[421] A procedural default model of retroactivity would not produce such a result.

Finally, a capital *Teague* exception would have little impact on judicial economy. Professor Yin's model does not "require inordinate expenditure of state resources,"[422] because it limits relief to petitioners who have not procedurally defaulted on their claims.[423] Further, as the *Summerlin* dissenters note, rules like *Ring* only affect about "110 individuals on death row. This number . . . is small compared with the approximately 1.2 million individuals presently confined in state prisons. Consequently, the impact on resources is likely to be much less

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

417. *Id.* at 2529 (Breyer, J., dissenting) (quoting Gilmore v. Taylor, 508 U.S. 333 (1993)).

418. *See* Wiggins v. Smith, 539 U.S. 510 (2003).

419. *Summerlin*, 124 S. Ct. at 2526.

420. *Id.* at 2525 (quoting Teague v. Lane, 489 U.S. 288, 312–13 (1989)).

421. *See* cases cited *supra* note 398.

422. *Summerlin*, 124 S. Ct. at 2530 (Breyer, J., dissenting).

423. Yin, *supra* note 174, at 288.

than if a rule affecting the ordinary criminal process were made retroactive."[424]

VI. CONCLUSION

The Supreme Court's decision to bar retroactive application of *Ring* undercut several values protected by the Eighth Amendment. First, *Summerlin* ignores the Eighth Amendment's direction that "a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution."[425] Second, the retroactivity regime upheld by *Summerlin* cannot be reconciled with an Eighth Amendment that draws its meaning from evolving standards of decency.[426] Finally, *Summerlin* highlights the arbitrariness of a capital habeas regime so dependent upon the "fortuity of timing."[427]

If *Teague* is to be squared with the Eighth Amendment, capital habeas petitioners must be excused from its presumption against retroactivity. The *Summerlin* dissenters illustrated that capital habeas petitioners can be so exempted without compromising any of the values that *Teague* serves. And retroactivity formulations, like that of Professor Yin, provide more meaningful bases for distinguishing the successful capital habeas petitioner from the unsuccessful capital habeas petitioner.[428] Whatever the solution, it is clear that "retroactivity must be rethought."[429] The Court has acknowledged that Warren Summerlin's death sentence violates the Sixth Amendment.[430] Its decision to proceed with his execution violates the Eighth Amendment.[431]

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424. *Summerlin*, 124 S. Ct. at 2530 (Breyer, J., dissenting) (citations omitted).

425. *Id.* at 2527 (Breyer, J., dissenting) (citing Ring v. Arizona, 536 U.S. 584, 614 (2002)).

426. Trop v. Dulles, 356 U.S. 86 (1958).

427. Penry v. Lynaugh, 492 U.S. 302, 341 (1989) (Brennan, J., concurring in part and dissenting in part).

428. *See* Yin, *supra* notes 391, 423 and accompanying text.

429. Desist v. United States, 394 U.S. 217, 258 (1969) (Harlan, J., dissenting).

430. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (invalidating Arizona's death penalty statute).

431. *See supra* notes 376–381.

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