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Elizabeth A. Hunot

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**YIELDING TO THE TEMPTATION TO OPEN PANDORA'S BOX:
THE NINTH CIRCUIT CREATES A CIRCUIT SPLIT
AND DECLARES *RING v. ARIZONA* RETROACTIVE
IN *SUMMERLIN v. STEWART***

I. INTRODUCTION

In the past three years, the criminal justice process has undergone significant changes concerning the respective roles of the judge and the jury. In June 2000, the Supreme Court in *Apprendi v. New Jersey* decided that the jury — rather than the judge — must find beyond a reasonable doubt any fact which increases a defendant's punishment beyond the prescribed statutory maximum.¹ The Court based its decision on the Fourteenth Amendment's Due Process Clause and the Sixth Amendment right to trial by an impartial jury.²

The legal effect of *Apprendi* was unprecedented. One impact of the doctrine fell upon the shoulders of federal prosecutors, as it affected their strategies in narcotics prosecutions. Prior to *Apprendi*, the judge determined aggravating factors such as the amount or type of drug in the defendant's possession.³ However, after *Apprendi*, prosecutors were faced with the constitutionality of the process because under the federal sentencing guidelines, factors such as the amount or type of narcotics can potentially boost a defendant's sentence beyond the statutory maximum.⁴ Thus, *Apprendi* raised

1. *Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000). The specific issue in *Apprendi* was New Jersey's hate crime statute, which provided for an extended term of imprisonment if a defendant committed an offense "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* at 468-69 (quoting N.J. STAT. ANN. § 2C: 44-3(e) (2000)). The determination that Apprendi's actions were "motivated by racial bias" and made "with a purpose to intimidate," and thus fit within the meaning of the statute, was made by the trial judge by a preponderance of the evidence, and Apprendi's sentence on one count was raised from the ten year statutory maximum to twelve years. *Id.* at 471, 474. Apprendi challenged the constitutionality of his sentence, arguing that the hate-crime aggravator should have been found by the jury and beyond a reasonable doubt. *Id.* at 471. The Supreme Court agreed and held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

2. *Apprendi*, 530 U.S. at 476-77.

3. See Meleah Burch, *Note: False Hope for Prisoners: The Dangers of Making Apprendi v. New Jersey Retroactively Applicable to Felony Drug Convictions*, 8 TEX. WESLEYAN L.REV. 49, 57 (2001).

4. *Id.* at 55-59.

the issue of whether the jury must determine beyond a reasonable doubt factors such as the type and amount of illegal substance the defendant had in his possession or had the intent to distribute.⁵

Other legal questions were posed by *Apprendi*: Is the *Apprendi* doctrine applicable to sentences that are increased within the statutory range? Should the enhancing factor be charged in the indictment? Should the Supreme Court's holding in *Apprendi* be applied retroactively?⁶ One question springing from *Apprendi* quickly worked its way to the Supreme Court: How does *Apprendi* affect state statutes which permit judges to find aggravating circumstances necessary for imposition of the death penalty? That issue was presented in *Ring v. Arizona*.⁷

Just two years after its decision in *Apprendi*, the Supreme Court granted a writ of certiorari to Timothy Ring, who had been convicted of first-degree felony murder by a jury and sentenced to death in a separate proceeding by the presiding judge.⁸ At the time, Arizona's sentencing statute required the presiding judge in a murder trial to determine, outside the presence of the jury and after the jury's decision on guilt of first-degree murder, the existence of aggravating circumstances and the absence of mitigating circumstances as required for imposition of the death penalty.⁹

Ring argued that the Arizona statute infringed upon his Sixth Amendment rights under *Apprendi*.¹⁰ Specifically, because the Arizona statute required a finding of at least one aggravating factor in order to impose the death penalty, the maximum punishment to which Ring could have been sentenced, based upon the jury verdict alone, would have been life imprisonment.¹¹ The Supreme Court agreed with this argument in *Ring* and held that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury."¹²

The Supreme Court's decision in *Ring* proved to be no less significant than *Apprendi* — and presented no fewer perplexing legal questions to the eight states that, at the time of the decision, allowed judicial determination of the

5. *See id.*

6. Heather Jones, *Apprendi v. New Jersey: A True "Watershed" Ruling*, 81 TEX. L. REV. 1361, 1364 (2003).

7. *Ring v. Arizona*, 536 U.S. 584, 588-89, 596 (2002).

8. *Id.* at 591, 594.

9. "At the conclusion of the sentencing hearing, the judge is to determine the presence or absence of the enumerated 'aggravating circumstances' and any 'mitigating circumstances.' The State's law authorizes the judge to sentence the defendant to death only if there is at least one aggravating circumstance and 'there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id.* at 592-93 (citing ARIZ. REV. STAT. ANN. § 13-703(E) (2004)).

10. *Ring*, 536 U.S. at 595.

11. *Id.* at 597.

12. *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494).

death penalty.¹³ The plethora of questions came partly as a result of the Supreme Court's ambiguity in its decision in *Ring*.¹⁴ For example, states with "hybrid" death penalty systems, in which the judge determines the imposition of the death penalty after hearing the recommendation of the jury on the sentence, began questioning the constitutionality of the process.¹⁵ The effect of the *Ring* decision has been serious — some states with hybrid systems have redrafted statutes, and some have even stayed executions.¹⁶

Although many important legal questions were posed by the holding in *Ring*, possibly the most important is an issue that has the potential to affect the integrity of our judicial system, the families of victims murdered by prisoners on death row, and the fate of hundreds of inmates who have been convicted under unconstitutional state statutes.¹⁷ The question of concern is whether the Supreme Court's decision in *Ring v. Arizona* may be retroactively applied to convictions that had already become "final" at the time that the Supreme Court announced the rule in *Ring*.¹⁸

Considering the grave implications surrounding the issue, it is not surprising that many state and federal courts alike have confronted the question

13. See Casey Laffey, *The Death Penalty and the Sixth Amendment: How Will the System Look After Ring v. Arizona?*, 77 ST. JOHN'S L. REV. 371, 383 (2003); Linda Greenhouse, *Supreme Court Roundup; Justices to Revisit Judges' Role in Sentences*, N.Y. TIMES, Oct. 21, 2003, at A19 (discussing Supreme Court's recent decision to review *Blakely v. Washington*, 124 S. Ct. 429 (2003), which poses the issue of the *Ring* decision in the context of state sentencing guidelines).

14. See Laffey, *supra* note 13, at 382. "Several commentators have criticized the decision for not giving other state courts and legislatures a clear rule or guide to determine whether their death penalty systems are constitutional." *Id.*

15. *Id.* at 385.

16. *Id.*

17. See *id.* at 391. "The application of *Ring* to past and future death sentences will be important because most, if not all, convicted defendants will bring direct appeals or habeas corpus petitions in hope that the holding in *Ring* will save their lives." Laffey, *supra* note 13, at 391.

18. The definition of "final," used by the Supreme Court in several cases addressing the issue, is the time at which "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed." *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965). Since 1982, issues of retroactivity have involved the application of new rules to cases on collateral review, as cases on direct appeal were automatically given retroactive effect after *United States v. Johnson*, 457 U.S. 537, 562-63 (1982). A petition for a writ of habeas corpus is one form of collateral review. The purpose of the writ of habeas corpus is to "attack the legality of a petitioner's confinement." Julie B. Richardson-Stewart, *One Full Bite at the Apple: Defining Competent Counsel in Texas Capital Post-Conviction Review*, 9 TEX. WESLEYAN L. REV. 221, 224 (2003). Federal habeas corpus, as opposed to state habeas corpus, is "the mechanism by which violations of a state inmate's federal constitutional rights may be brought before a federal court." Jean K. Gilles Phillips and Elizabeth Cateforis, *Federal Habeas Corpus for Trial Lawyers*, 73 J. KAN. BAR. ASSN. 20, 21 (2004). See 28 U.S.C. §§ 2254-2255 (2004).

of the retroactivity of *Ring v. Arizona*.¹⁹ In September 2003, the issue provoked a split in the United States circuit courts of appeals when the Ninth Circuit in *Summerlin v. Stewart* held that *Ring v. Arizona* is subject to retroactive application.²⁰ In doing so, the Ninth Circuit deviated from the Tenth Circuit's decision in *Cannon v. Mullin* and the Eleventh Circuit's in *Turner v. Crosby* — both holding that *Ring* is not to be applied retroactively to cases on collateral review.²¹ The issue is one that can be resolved only by the United States Supreme Court. In the meantime, this note will provide a history of the doctrine of retroactivity, an analysis of *Summerlin v. Stewart* and the circuit split, and the author's analysis of the Ninth Circuit's decision in light of the history and reasoning of the Supreme Court on the issue.

II. HISTORY AND BACKGROUND OF THE DOCTRINE OF RETROACTIVITY

Legal discussion on the topic of retroactivity traces back to 1809 when Blackstone asserted that courts were not to “pronounce new law, but [were] to maintain and expound the old one.”²² Since that time, in the words of Justice Harlan, the Supreme Court has “created an extraordinary collection of rules to govern the application of [the] principle.”²³ In his dissent in *Desist v. United States*, Justice Harlan observed that prior to *Desist* the Supreme Court had, “in so short a time, generated so many incompatible rules and inconsistent principles” addressing the topic of retroactivity.²⁴ In his concurrence in *Williams v. United States*, Harlan stated that the Court's doctrine of retroactivity had become “almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim.”²⁵ Currently the doctrine governing questions of retroactivity is that derived from *Teague v. Lane*²⁶ and its progeny. However, as this circuit split demonstrates, the rule of *Teague* has proved to be a confusing and difficult rule to apply.²⁷

19. See *Summerlin v. Stewart*, 341 F.3d 1082, 1106 (9th Cir. 2003) (discussing Arizona Supreme Court decisions of *State v. Towery*, 64 P.3d 828 (Ariz. 2003) and *State v. Ring*, 65 P.3d 915 (Ariz. 2003)).

20. *Id.* at 1121.

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

22. *Linkletter*, 381 U.S. at 622-23 (quoting 1 BLACKSTONE COMMENTARIES 69 (15th ed. 1809)).

23. *Desist v. United States*, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting).

24. *Id.* at 258.

25. *Williams v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., concurring in part and dissenting in part).

26. *Teague v. Lane*, 489 U.S. 288 (1989).

27. See generally Mark R. Barr, *The Not-So-Great Writ: An Analysis of Recent Tenth Circuit Decisions Reflecting the Current Difficulty in Obtaining Habeas Corpus Relief for State Prisoners*, 80 DEN. U. L. REV. 497 (2003).

A. *Pre-Teague Retroactivity*

The common law doctrine of retroactivity was simple. Due to the underlying idea that judges were not the “makers” of the law, but rather the individuals who discovered what the law had always been, any judgments inconsistent with a newly-announced “discovery” of law were quite simply “never the law.”²⁸ In 1886, the United States Supreme Court adhered to this principle in *Norton v. Shelby*, holding that “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.’”²⁹

In 1965, the Supreme Court decided *Linkletter v. Walker*, which addressed the issue of whether the landmark decision of *Mapp v. Ohio* should be applied to state court convictions that had already become final.³⁰ In *Mapp*, the Court held that evidence seized in violation of the Fourth Amendment was to be excluded in state criminal trials by way of the Due Process Clause of the Fourteenth Amendment.³¹ The *Linkletter* Court was guided by three factors in its determination that *Mapp* was not to be applied retroactively: (1) the purpose of the new rule announced in *Mapp*, (2) the reliance on legal doctrine preceding the decision in *Mapp*, and (3) the effect of retroactive application of the rule on the administration of justice.³²

In applying the factors set out in *Linkletter*, the Court reasoned that the purpose of *Mapp*, which was to deter illegal police searches, “would not be advanced by making the rule retrospective.”³³ Furthermore, both prosecutors and defendants had relied upon the pre-*Mapp* rule, articulated in *Wolf v. Colorado*, which did not require state exclusion of illegally-obtained evidence.³⁴ Finally, the *Linkletter* Court asserted, “[t]o make the rule of *Mapp* retrospective would tax the administration of justice to the utmost.”³⁵ The Court explained that the process of rehearing cases tainted by the admission of evidence that should have been excluded would be next to impossible, considering the destruction of evidence and the unavailability of witnesses.³⁶

Shortly after *Linkletter*, *Johnson v. New Jersey* and *Stovall v. Denno* dispelled any idea that the test of *Linkletter* applied only to cases that had already become final at the time the new rule was decided or that cases

28. *Linkletter*, 381 U.S. at 622-23.

29. *Id.* at 623 (quoting *Norton v. Shelby*, 118 U.S. 425, 442 (1886)).

30. *Id.* at 622. “By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio*.” *Id.* at 622 n.5.

31. See *Mapp v. Ohio*, 367 U.S. 643, 657-60 (1961).

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

33. *Id.* at 637.

34. *Id.* See *Wolf v. Colorado*, 338 U.S. 25 (1949).

35. *Linkletter*, 381 U.S. at 637.

36. *Id.*

pending on direct review should automatically be given retroactive effect.³⁷ Both cases asserted that the *Linkletter* factors should be applied properly not just to convictions already final but also to convictions pending on direct review at the time the new rule was announced.³⁸

It was not until twenty-four years later that the Supreme Court acknowledged the flaws inherent in *Linkletter*. Its major flaw was inconsistency. In its 1989 *Teague v. Lane* decision, the Court explained that the application of the factors set forth in *Linkletter* resulted in different treatment of “similarly situated” defendants on direct review.³⁹ The Court cited *Johnson v. New Jersey*, which held that the rule announced in *Miranda v. Arizona* would only be applied to trials beginning *after* the *Miranda* decision.⁴⁰ The Court observed that “[b]ecause the defendant in *Johnson*, like the defendants in *Miranda*, was on direct review of his conviction, the Court’s refusal to give *Miranda* retroactive effect resulted in unequal treatment of those who were similarly situated.”⁴¹

The problem of inconsistency was not limited to defendants with cases pending on direct review; the problem was equally apparent in cases on collateral review. For example, many courts applied the factors set out in *Linkletter* in order to determine the retroactivity of *Edwards v. Arizona*⁴² and held that the rule in *Edwards* was applicable retroactively to cases that had become final before *Edwards* was decided.⁴³ However, three years after *Edwards*, the Supreme Court held in *Solem v. Stumes* that *Edwards* was *not* to be applied retroactively to such cases.⁴⁴ The result was that those individuals who raised an *Edwards* claim on collateral review before the *Stumes* decision benefited from the holding in *Edwards*; the defendants who raised identical claims after *Stumes* were denied such a benefit.⁴⁵

Despite these problems, the Court continued to apply the *Linkletter* standard. In *Desist v. United States*, the Supreme Court granted certiorari to

37. For a discussion on the confusion of this issue at the time, see *United States v. Johnson*, 457 U.S. 537, 543 (1982) (explaining that “[a]fter *Linkletter* and *Shott*, it appeared that all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the rule was established” (emphasis added)).

38. See *Stovall v. Denno*, 388 U.S. 293, 296-97, 300-01 (1967); *Johnson v. New Jersey*, 384 U.S. 719, 726-34 (1966).

39. *Teague v. Lane*, 489 U.S. 288, 303 (1989).

40. *Id.*

41. *Id.*

42. See *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that once a criminal suspect invokes his right to have counsel present during interrogation, counsel must be present before any further interrogation is conducted, unless communication is initiated by the suspect himself).

43. *Teague*, 489 U.S. at 304-05.

44. *Solem v. Stumes*, 465 U.S. 638, 650 (1984).

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

consider the issue of whether its 1967 holding in *Katz v. United States*⁴⁶ should be applied to illegal searches conducted prior to the date of the *Katz* decision — December 18, 1967.⁴⁷ In *Katz*, the Supreme Court held that electronic surveillance of private conversations requires the approval of a magistrate and a showing of probable cause in order to comply with the protections of the Fourth Amendment.⁴⁸ The defendants in *Desist* were the subjects of an illegal eavesdropping operation under *Katz* standards.⁴⁹ However, the surveillance at issue was conducted before the *Katz* decision, and the petitioners' case was pending on direct review at the time *Katz* was announced.⁵⁰ The *Desist* Court held that *Katz* should not be applied retroactively to such cases, reasoning that although *Katz* was a “clear break with the past,”⁵¹ the *Linkletter* factors supported non-retroactivity.⁵²

Justice Harlan's dissent in *Desist*, which later proved highly influential in the formation of the doctrine of retroactivity,⁵³ asserted that new constitutional rules should be applied to *all* cases pending on direct review at the time the Court announced the rule, notwithstanding any analysis of the factors used in *Linkletter*.⁵⁴ Additionally, Justice Harlan discussed the complexity of the doctrine of retroactivity in habeas corpus cases. He examined the distinct elements of these cases, which, he said, necessitate a rule of retroactivity “much more than the ‘purpose,’ ‘reliance,’ and judicial ‘administration’ standards which have so far been regarded as the tests governing retroactivity in direct review and habeas corpus cases alike.”⁵⁵

In its 1982 decision of *United States v. Johnson*, the Supreme Court considered the first part of Harlan's reasoning, which suggested that new constitutional rules should be applied “at a minimum” to cases pending on direct review at the time the rule was established.⁵⁶ In addition, the Court assigned the rationale of Justice Harlan's proposed rule to a large part of its majority opinion.⁵⁷ The *Johnson* Court presented Harlan's argument in three prongs: the current retroactivity doctrine “conflicts with the norm of principled decision making”; the practice of applying a new constitutional rule purely prospectively, making the exception for the particular fortunate litigant

46. *Katz v. United States*, 389 U.S. 347 (1967).

47. *Desist v. United States*, 294 U.S. 244, 246 (1969).

48. *Katz*, 389 U.S. at 356-57.

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

50. *Id.* at 252, 254.

51. *Id.* at 248 (explaining that because the *Katz* holding was a “clear break” with precedent, the Court is “compelled” to address the issue of its retroactivity).

52. *Id.* at 249-52.

53. See *Teague*, 489 U.S. at 292; *Johnson v. United States*, 457 U.S. 537, 546-49 (1982).

54. *Desist*, 394 U.S. at 258 (Harlan, J., dissenting).

55. *Id.* at 260-69.

56. *Johnson*, 457 U.S. at 548.

57. See *id.* at 546-48.

presently before the court, is inconsistent with the Court's model for judicial review; the rules of retroactivity utilized prior to *Johnson* had the effect of treating similarly situated defendants differently.⁵⁸

Ultimately, the *Johnson* Court held that a Supreme Court decision that interprets the Fourth Amendment is to be applied retroactively to all cases not yet final at the time the decision is announced.⁵⁹ However, the Court stressed that the holding did not apply to cases "clearly controlled by existing retroactivity precedents," such as new rules that were a clear break with past precedent.⁶⁰

The final pre-*Teague* decision was *Griffith v. Kentucky*, which did away with the "clear-break" exception that had been enforced just five years earlier in *Johnson*.⁶¹ The Court explained that the clear-break exception was inappropriate because it placed an emphasis on the very type of case-specific analysis previously criticized and rejected by Justice Harlan.⁶² Additionally, the exception treated similarly situated defendants differently.⁶³

In sum, on the brink of the 1989 decision that would fundamentally alter the way the Court decided issues of retroactivity, the Supreme Court had created a doctrine that was centered on three factors and that had been altered and supplemented a number of times for various reasons.

B. *Teague and its Progeny*

Teague v. Lane, decided by the Supreme Court in 1989, established a new rule of retroactivity that has managed to persist despite the past tendency of the Court to alter its mode of attack with each retroactivity case presented to it. In *Teague*, the Court decided whether Frank Teague could benefit from the reasoning of *Taylor v. Louisiana*, which held that the jury venire must be composed of a fair cross-section of the community.⁶⁴ Although *Taylor* specifically held that this requirement did not apply to the petit jury itself,⁶⁵ Frank Teague nonetheless argued that the reasoning of *Taylor* should not be limited to the jury venire but also should be applicable to the petit jury.⁶⁶ The Court, determining that such an understanding of *Taylor* would constitute a

58. *Id.* at 546-47.

59. *Id.* at 562.

60. *Id.* at 557-58, 562.

61. The Court concluded, "[w]e . . . hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

62. *Id.* at 327.

63. *Id.* at 327-28.

64. *See Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

65. *Id.*

66. *Teague v. Lane*, 489 U.S. 288, 299 (1989).

“new rule,” declined to address the argument on the merits and held that the rule was not subject to retroactive application.⁶⁷

On a larger scale, the *Teague* Court admitted that it was finally “time to clarify how the question of retroactivity should be resolved for cases on collateral review”⁶⁸ and held that new rules of law were not subject to retroactive application to convictions already final when the new rule was announced, unless the rule fit within one of two limited exceptions.⁶⁹

The plurality opinion commenced with a discussion of the threshold question in a retroactivity analysis: whether the rule at issue is a “new rule.”⁷⁰ While declining to “define the spectrum” of what constitutes a new rule for retroactivity purposes, the Court did offer one piece of guidance: “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”⁷¹ Concluding that the rule at issue in *Teague* did, in fact, constitute a “new rule,” the Court proceeded to its analysis of whether the fair cross-section rule was subject to retroactive application.⁷²

The *Teague* Court adopted Justice Harlan’s once dismissed view that, generally, new rules should not be subject to retroactive application in cases on collateral review and supported the decision with policy reasoning such as the need for finality.⁷³ Ultimately the Court held that, subject to certain exceptions, new rules are not to be applied retroactively to cases on collateral review.⁷⁴ The first exception applies to situations in which a rule places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”⁷⁵ In analyzing the facts of

67. *Id.*

68. *Id.* at 300.

69. *Id.* at 310.

70. *Id.* at 301.

71. *Teague*, 489 U.S. at 301 (emphasis in original). Subsequent cases have analyzed this threshold question in more detail. See *Butler v. McKellar*, 494 U.S. 407 (1990). The *Butler* Court explained that a decision that overrules a previous case should be characterized as a “new rule.” *Id.* at 412. However, the Court admitted that the inquiry is more challenging when a rule is based upon an “extension of the reasoning of previous cases.” *Id.* at 412-13. For instance, the defendant in *Butler* argued that the rule announced in *Arizona v. Roberson*, 486 U.S. 675 (1988), from which he wished to benefit, was “merely an application [of a previous holding in *Edwards v. Arizona*, 451 U.S. 477 (1981)] to a slightly different set of facts.” *Butler*, 494 U.S. at 414. The Supreme Court disagreed, explaining that many times the determination of whether a holding is governed by a previous decision is reasonably debatable, and concluded that the rule at issue did in fact constitute a “new rule.” *Id.* at 415.

72. *Teague*, 489 U.S. at 301-02.

73. “Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system.” *Id.* at 309-10.

74. *Id.* at 310.

75. *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

Teague, the Court determined that the fair cross-section rule did not fit within this exception because the rule did not “accord constitutional protection to any primary activity whatsoever.”⁷⁶

Although the *Teague* Court offered little guidance to lower courts in applying this exception, as the application of the facts in *Teague* to the exception appeared in one short paragraph, later Supreme Court decisions have filled in this gap. One such decision is *Penry v. Lynaugh*.⁷⁷ In *Penry*, the Court discussed the retroactive effect of a rule that rendered it unconstitutional to execute a mentally retarded person with the reasoning capacity of a seven-year old.⁷⁸ The Court determined that if such a rule were created by the Court, it would be retroactive in effect because it would satisfy the first exception to the *Teague* rule.⁷⁹ The Court went on to say that “the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.”⁸⁰ This is the only time that the Court has held such a rule to satisfy the first exception.⁸¹

In *Teague*, the Court provided another way in which a “new rule” could be subject to retroactive application to cases on collateral review: where the new rule mandates that a court observe a procedure “implicit in the concept of ordered liberty.”⁸² The Court supplemented the second exception with a requirement that the rule be a “bedrock procedural element,” without which the fundamental fairness underlying a conviction would be undermined and the accuracy of the conviction diminished.⁸³ The fair cross-section rule at issue in

76. *Id.*

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

78. *Id.* at 328-29. The Court actually held, on the merits, that the Eighth Amendment did *not* preclude “the execution of any mentally retarded person of Penry’s ability convicted of a capital offense simply by virtue of his or her mental retardation alone.” *Id.* at 340. This holding was overturned by *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

79. *Penry*, 492 U.S. at 330.

80. *Id.*

81. Examples of cases holding the first *Teague* exception inapplicable include *Sawyer v. Smith*, 497 U.S. 227, 241 (1990); *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990); and *Butler v. McKellar*, 494 U.S. 407, 415 (1990). However, because the *Penry* Court did not, in fact, create such a new rule, the issue of retroactivity was moot. *See Penry*, 492 U.S. at 335.

82. *Teague*, 489 U.S. at 311 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

83. *Id.* at 315. The Court explained that:

because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a ‘bedrock procedural element’ that would be retroactively applied under the second exception we have articulated.

Id.

Teague was, according to the Court, a “far cry from the kind of absolute prerequisite to fundamental fairness that is ‘implicit in the concept of ordered liberty.’”⁸⁴ In fact, Justice O’Connor’s opinion set the bar high for rules that would fit within this exception. She asserted that “[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.”⁸⁵

Sawyer v. Smith, decided in 1990, provides guidance in applying the second *Teague* exception. The facts of *Sawyer* are as follows: a man was convicted and sentenced to death for the mutilation and murder of a guest in his home.⁸⁶ The prosecutor’s closing statement to the jury during the penalty phase of trial included the following language:

Don’t feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so . . . believe me there will be others who will be behind you to either agree with you or to say you are wrong.⁸⁷

Over a year after Robert Sawyer’s conviction was final, the Supreme Court decided in *Caldwell v. Mississippi* that it is a violation of the Eighth Amendment to allow imposition of the death penalty where the sentencing body believes that it is not responsible for the determination of whether to impose the capital sentence.⁸⁸ Thus, Sawyer filed a federal habeas corpus petition, arguing that the closing argument of the prosecutor violated the Eighth Amendment “by diminishing the jury’s sense of responsibility for the capital sentencing decision.”⁸⁹

The Court held that the rule announced in *Caldwell* did not satisfy the second *Teague* exception, rejecting Sawyer’s assertion that the second exception applied because the new rule improved the accuracy of capital sentences.⁹⁰ The Court stressed that the second exception combines the “accuracy element” with the requirement that the newly announced rule be a “watershed rule of fundamental fairness.”⁹¹ Furthermore, “[i]t is thus not enough under *Teague* to say that a new rule is aimed at improving the accuracy of trial A rule that qualifies under this exception must . . . also ‘alter our

84. *Id.* at 314.

85. *Id.* at 313.

86. *Sawyer*, 497 U.S. at 229-30.

87. *Id.* at 231-32 (quoting the record).

88. *Id.* at 233 (discussing the Court’s holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985)).

89. *Id.* at 232.

90. *Id.* at 242.

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

understanding of the bedrock procedural elements essential to the fairness of a proceeding.”⁹²

Saffle v. Parks, decided in 1990, also provided a narrow reading of the second exception. The Court explained that an appropriate illustration of the type of rule that satisfies the second *Teague* exception is *Gideon v. Wainwright*, which held that a criminal defendant has the right to counsel in trials for serious offenses.⁹³ The *Saffle* Court ultimately held that the rule allowing a defendant’s sentence to be determined by the emotions of the jury did *not* fall within the second exception to *Teague* because: (1) the rule lacked the “primacy and centrality” of the *Gideon* rule, and (2) such a rule does not promote the policies of fairness and accuracy, which are the bases for the exception.⁹⁴

As evident from the history provided above, several post-*Teague* Supreme Court decisions have interpreted, explained, and clarified the *Teague* rule.⁹⁵ *Bousley v. United States*, decided by the Supreme Court in 1998, exemplified one crucial point of the *Teague* doctrine: the *Teague* bar against retroactivity is only applicable to procedural rules.⁹⁶ The *Bousley* Court explained that after a Supreme Court decision has been found to be a “new rule,” the threshold question in a *Teague* analysis is whether the new rule is procedural or substantive, as the *Teague* bar against retroactivity applies only to procedural rules.⁹⁷

In *Bousley*, the issue was whether the Supreme Court’s 1995 holding in *Bailey v. United States*⁹⁸ should be applied retroactively to Kenneth Bousley’s 1990 conviction under 18 U.S.C. section 924(c)(1), which made it a crime to “knowingly and intentionally use[] . . . firearms during and in relation to a drug trafficking crime.”⁹⁹ While Bousley’s appeal from a dismissal of his petition for habeas corpus was pending, the Court decided *Bailey* and held that “use” of a firearm under section 924(c)(1) required “active employment” of the

92. *Id.* (quoting *Teague*, 489 U.S. at 311).

93. *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (discussing the holding in *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

94. *Id.*

95. As discussed above, *Penry*, *Sawyer*, and *Saffle* served to explain and interpret the exceptions to the *Teague* bar against retroactivity. See *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Sawyer*, 497 U.S. at 227; *Saffle*, 494 U.S. at 484. In addition, *Butler* clarified the threshold question of whether a case announced a “new rule” for purposes of *Teague* retroactivity. See *Butler v. McKellar*, 494 U.S. 407 (1990).

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

97. *Id.*

98. *Bailey v. United States*, 516 U.S. 137 (1995).

99. *Bousley*, 523 U.S. at 616-18.

firearm.¹⁰⁰ The Court held that the question of whether the *Bailey* rule should be applied retroactively to Bousley was not governed by *Teague* because it was a question of substantive law.¹⁰¹ The Court went on to say that “because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.”¹⁰²

C. *Where the Rule Stands Now*

The doctrine of retroactivity as it currently stands can be explained very simply — if a new rule of criminal procedure is announced after a criminal defendant’s conviction is final, that individual will likely not benefit from the rule. Although the possibility always exists that the rule could fit into one of the *Teague* exceptions, the odds of that happening are low. Only once has the Supreme Court declared that a rule satisfied the first exception, and never has it held a rule to satisfy the second exception.¹⁰³ This track record, although seemingly harsh, is consistent with the original holding of *Teague*: new rules of criminal procedure will not be applied retroactively to cases on collateral review unless they fit within one of two *narrow* exceptions.

III. ANALYSIS — *SUMMERLIN V. STEWART* AND THE CIRCUIT SPLIT

Judge Thomas introduced his opinion in *Summerlin v. Stewart* with a colorful commentary on the facts: “[i]t is the raw material from which legal fiction is forged . . . [b]ut, as Mark Twain observed, ‘truth is often stranger than fiction because fiction has to make sense.’”¹⁰⁴ The facts are as follows. An investigator of delinquent accounts for Finance America, Brenna Bailey, arrived at the home of Warren Summerlin, an “extremely troubled man” who was severely mistreated as a child; had been diagnosed with organic brain dysfunction, explosive personality disorder with impaired impulse control, and paranoid schizophrenia; and was, according to a psychiatrist, functionally retarded.¹⁰⁵ When Bailey never returned from work, her boyfriend retraced her work route and discovered that Summerlin’s home was the last place that she had visited. The next day, Bailey’s body was found in the trunk of her car, which was parked outside of a market.¹⁰⁶

100. *Id.* at 617. “[A]ctive employment includes uses such as ‘brandishing, displaying, bartering, striking with, and . . . firing or attempting to fire’ . . . but does not include mere possession of a firearm.” *Id.* (quoting *Bailey*, 516 U.S. at 148).

101. *Id.* at 620.

102. *Id.*

103. See *infra* Part IV.B. For cases holding the second *Teague* exception inapplicable, see *Sawyer*, 497 U.S. at 241; *Saffle*, 494 U.S. at 494-95; and *Butler*, 494 U.S. at 415.

104. *Summerlin v. Stewart*, 341 F.3d 1082, 1084 (9th Cir. 2003).

105. *Id.* at 1084-85.

106. *Id.* at 1085.

Summerlin was convicted of first-degree murder and sexual assault.¹⁰⁷ In a separate proceeding after the jury's verdict, the judge found the existence of two aggravating circumstances and no mitigating circumstances and sentenced Summerlin to death in accordance with the Arizona statute.¹⁰⁸ The statutory aggravating factors included Summerlin's prior conviction involving threats of violence and that he had committed the murder in "an especially heinous, cruel, or depraved manner."¹⁰⁹

On October 12, 2001, the Ninth Circuit affirmed in part and reversed in part the district court's denial of Summerlin's motion to vacate judgment.¹¹⁰ The case was remanded for a determination of whether the sentencing judge was competent to impose the death penalty.¹¹¹ However, before that issue could be resolved, the Supreme Court decided *Ring v. Arizona*, which held that the very statute under which Summerlin was sentenced violated the Sixth Amendment.¹¹² Consequentially, the question of whether the holding in *Ring* could be applied retroactively to Summerlin shot back up to the Ninth Circuit.

A. *Majority Opinion*

Admittedly, the Ninth Circuit's opinion in *Summerlin* sets out the structural analysis of the doctrine of retroactivity currently in effect.¹¹³ The *Summerlin* Court condensed the scattered law of recent Supreme Court holdings on the doctrine and provided a step-by-step process for determining questions of retroactivity.¹¹⁴ Foremost, the threshold question of *Bousley* must be decided: If the newly-announced rule is substantive, the *Teague* bar does not apply; if the rule is procedural, the question of retroactivity is based upon a three-step analysis.¹¹⁵ The first step requires the deciding court to determine the date on which the conviction became final. The next step is to determine whether, on the date of the final conviction, governing precedent compelled a determination that the Constitution mandated the rule. If the rule was required by the Constitution on that date, there is no *Teague* bar against retroactivity, as the rule in question is not characterized as a "new rule."¹¹⁶ If the rule was not constitutionally mandated when the conviction became final, the bar against

107. *Id.* at 1088.

108. *Id.* at 1090. *See also* ARIZ. REV. STAT. ANN. § 13-703(E) (2004).

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

110. *Id.* at 1091.

111. *Id.*

112. *Id.*

113. However, as argued below, it is the court's application of that analysis to the facts of *Summerlin* that is flawed. *See infra* Part IV.

114. *See Summerlin*, 341 F.3d at 1099.

115. *Id.*

116. *Id.*

retroactivity governs, and the court must then determine as the last step whether either of the two exceptions provided in *Teague* are applicable.¹¹⁷

After providing a thorough account of the history of the doctrine of retroactivity, the majority in *Summerlin* provided two independent and alternative legal theories which support a conclusion that *Ring v. Arizona* is subject to retroactive application. The Ninth Circuit's first independent argument is that *Ring* is a substantive rule of law and therefore is not subject to the bar against retroactivity announced in *Teague v. Lane*.¹¹⁸ The court admitted that "in one sense," the rule announced in *Ring* is procedural, just as the rule announced in *Ring*'s predecessor, *Apprendi*, is procedural.¹¹⁹ However, the court distinguished *Ring* from *Apprendi*, explaining that *Ring*, unlike *Apprendi*, announced a rule that is substantive in nature "even if its form is partially procedural."¹²⁰

The majority centered this proposition on its definition of procedural and substantive rules, explaining that procedural rules implicate the functions of the trial processes, while substantive rules decide the "meaning, scope, and application of substantive criminal statutes."¹²¹ The Ninth Circuit also cited its own holding in *United States v. Montalvo*,¹²² which declared that the Supreme Court's holding in *Richardson v. United States* announced a substantive rule of law.¹²³ The effect of *Richardson* was to mandate that juries unanimously decide which violations constitute a "continuing series of violations" under 21 U.S.C. section 848(a), the statute making it a crime to engage in continuing criminal enterprises.¹²⁴ The *Summerlin* Court recalled that because the *Richardson* rule explained or redefined the elements of a criminal offense, it was substantive in nature.¹²⁵

Furthermore, the Ninth Circuit asserted that "[m]ore than a procedural holding, *Ring* effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment."¹²⁶ In other words, the holding in *Ring* turned the statutory aggravating factors into substantive elements of a new crime — capital murder. Ultimately, the Ninth

117. *Id.*

118. *Id.* at 1108.

119. *Summerlin*, 341 F.3d at 1101-02.

120. *Id.*

121. *Id.* at 1100.

122. *United States v. Montalvo*, 331 F.3d 1052 (9th Cir. 2003).

123. *See Summerlin*, 341 F.3d at 1100.

124. *Richardson v. United States*, 526 U.S. 813, 815 (1999).

125. *Summerlin*, 341 F.3d at 1100-01.

126. *Id.* at 1102.

Circuit insisted that because the Supreme Court's holding in *Ring* is substantive in nature, the *Teague* bar is inapplicable.¹²⁷

In the alternative, the *Summerlin* Court held that even if the *Ring* rule is not substantive, it falls within the second exception to the presumption against retroactivity announced in *Teague*, which allows retroactive application where the new rule "requires the observance of those procedures that . . . are 'implicit in the concepts of ordered liberty.'"¹²⁸

In *Summerlin*, the Ninth Circuit made its way through the three-step analysis outlined above.¹²⁹ First, the court determined that Summerlin's conviction became final in 1984 and asked whether the existing precedent in 1984 dictated the result in *Ring*.¹³⁰ The court asserted that a state court in 1984 would not have acted "objectively unreasonably" by not applying the *Ring* rule at that time.¹³¹ More importantly, the majority accurately quoted Supreme Court precedent holding that decisions "expressly overrul[ing]"¹³² previous decisions indisputably announce "new rule[s]"¹³³ and cited *Ring* as such a holding.¹³⁴ For these reasons, the court determined that *Ring* announced a "new rule" and proceeded to the third step — an analysis of the *Teague* exceptions.

The majority quickly dismissed the first exception, stating that *Ring* did not place the conduct of first-degree murder beyond the law-making authority to proscribe, nor did it immunize individuals from the death penalty.¹³⁵ However, the court *did* determine that the rule announced in *Ring* both enhances the accuracy of the criminal proceeding and "alters our understanding of bedrock procedural elements essential to the fairness of the proceeding," as required for the second exception per *Sawyer v. Smith*.¹³⁶ The majority provided a lengthy argument detailing how the rule announced in *Ring* improves the accuracy of capital murder sentences.¹³⁷ Specifically, the court reasoned that the arguments and presentations made during the sentencing phase to juries are more formal and better prepared than those made to judges.¹³⁸ Furthermore, presentations to juries prevent the introduction of

127. *Id.*

128. *See* *Teague v. Lane*, 489 U.S. 288, 307 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., dissenting)).

129. *Summerlin*, 341 F.3d at 1099 (outlining the analytical framework of a *Teague* question).

130. *Id.* at 1108.

131. *Id.* at 1109 (quoting *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997)).

132. *Id.* (discussing the holding in *Graham v. Collins*, 506 U.S. 461, 467 (1993)).

133. *Id.*

134. *Summerlin*, 341 F.3d at 1108-09 (explaining that *Ring* overturned *Walton v. Arizona*, 497 U.S. 639 (1990)).

135. *Id.* at 1109.

136. *Id.* at 1116, 1121; *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990).

137. *See Summerlin*, 341 F.3d at 1110-15.

138. *Id.* at 1112.

inadmissible evidence, thus reducing the risk of an unwarranted capital sentence.¹³⁹ Finally, juries, as “microcosms” of the community, appropriately “maintain a link between contemporary community values and the penal system,”¹⁴⁰ are not habituated to the process of capital sentencing,¹⁴¹ and are less influenced by external factors such as elections.¹⁴²

The majority also determined that the *Ring* rule satisfies the second requirement to the second *Teague* exception in that it alters understanding of a bedrock procedural element essential to the fairness of a criminal proceeding.¹⁴³ The court first argued that because *Ring* error is not subject to harmless-error analysis and constitutes structural error, or a “defect affecting the framework within which the trial proceeds,” it logically alters the understanding of a procedural element of capital sentencing.¹⁴⁴

Next, the court asked whether *Ring* was a “watershed” case in accordance with the second *Teague* exception. It set out the legal standard of a “watershed” ruling to be one that is ground-breaking and one that enhances accuracy and fairness and “dictate[s] observance of those procedures that . . . are implicit in the concept of ordered liberty.”¹⁴⁵ In arguing that *Ring* is groundbreaking, the Ninth Circuit compared the impact of *Ring* to the impact of the “*Mills/McKoy* Rule,”¹⁴⁶ which has been determined by some circuits to be a watershed rule.¹⁴⁷ The court then reasoned that because *Ring* declared judges constitutionally unqualified to impose a capital sentence and altered

139. *Id.* at 1110-13.

140. *Id.* at 1113 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.15 (1968)).

141. *Id.* at 1114.

142. *Summerlin*, 341 F.3d at 1115. The majority also pointed out that, considering the accusations that Judge Marquardt, Summerlin’s sentencing judge, was under the influence of marijuana during the trial, Summerlin’s sentence arguably would have been more accurate if a jury was responsible for the sentencing. *Id.* at 1115-16. The majority opinion provided that “[t]he amount of marijuana that Judge Marquardt may have used during the trial or deliberations is unknown because the district court did not allow discovery on this issue, although there is record support for Summerlin’s claim that Judge Marquardt was either having difficulty concentrating or experiencing memory loss.” *Id.* at 1090. The majority stressed, however, that the circumstances of Summerlin’s sentencing proceedings are not representative of other sentencing proceedings and other state trial judges. *Id.* at 1115.

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

144. *Summerlin*, 341 F.3d at 1116-19 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

145. *Id.* at 1119 (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989)) (internal quotation marks omitted).

146. The Ninth Circuit provided that the *Mills/McKoy* rule, derived from the holdings in *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990), “struck down state procedures that limited any given juror’s consideration of mitigating circumstances in capital sentencing to such evidence that the entire jury had found relevant.” *Summerlin*, 341 F.3d at 1120 n.21.

147. *Id.* at 1120.

bedrock principles of death penalty trials, it “redefined the structural safeguards implicit in our concept of ordered liberty.”¹⁴⁸

In sum, because the Ninth Circuit found that both requirements of the second exception are satisfied, the court held that even if the rule announced in *Ring* is procedural and not substantive, the *Teague* presumption against retroactivity is overcome because the rule fits squarely within an exception to the presumption provided by the terms of *Teague* itself.¹⁴⁹

The final portion of the majority opinion in *Summerlin* is dedicated to an acknowledgment of, and counter-argument to, the dissenting opinion. First, the majority reiterated its distinction between *Ring* and *Apprendi*, which was held by the Ninth Circuit in *United States v. Sanchez-Cervantes* to be non-retroactive in effect.¹⁵⁰ The court explained that one difference between the two cases, which in effect renders *Ring* substantive, is that *Ring* declared the statute in question unconstitutional; *Apprendi* did not.¹⁵¹ Next, the court argued that *Apprendi* errors, unlike *Ring* errors, are subject to harmless-error analysis.¹⁵² The court’s third point of distinction was that the rule in *Apprendi* did not satisfy the two prongs of the second *Teague* exception: enhancement of accuracy and classification as a watershed rule. The Ninth Circuit explained that the *Apprendi* rule was not a “sweeping rule” for purposes of the *Teague* exception because it applies in only a narrow set of cases.¹⁵³ The fourth point of distinction between *Apprendi* and *Ring*, according to the Ninth Circuit, was the structural differences between capital and non-capital trials.¹⁵⁴ Finally, the court noted the “heightened analysis” demanded by the Eighth Amendment in capital trials.¹⁵⁵ The majority opinion ends with the simple assertion that the retroactive effect of *Apprendi* does not govern the court’s determination of the retroactivity of *Ring*.¹⁵⁶ This topic appears abundantly in the debate over whether *Ring* is retroactive.

B. *The Dissenting Opinion*

Judge Rawlinson¹⁵⁷ centered his dissent in *Summerlin* on two propositions: (1) that *Ring* announced a procedural rule of law, and (2) that *Ring* does not

148. *Id.* at 1120-21.

149. *Id.* at 1121.

150. See *United States v. Sanchez-Cervantes*, 282 F.3d 664, 673 (9th Cir. 2002); *Summerlin*, 341 F.3d at 1121 (explaining, “[o]ur analysis in *Sanchez-Cervantes* does not conflict with our conclusion that *Ring* must be applied retroactively”).

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

152. *Id.*

153. *Id.* (quoting *Sanchez-Cervantes*, 282 F.3d at 669).

154. *Id.*

155. *Id.*

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

157. Rawlinson was joined by Circuit Judges O’Scannlain and Tallman. *Id.* at 1125.

satisfy the second exception of *Teague v. Lane*. Rawlinson argued that because of *Ring*'s "reliance upon and similarity to" *Apprendi*, it cannot be found to announce a substantive rule of law when *Apprendi* has been determined by the Ninth Circuit to announce a procedural rule of law.¹⁵⁸ Rawlinson wisely and perceptively focused on what he calls the "linchpin" of the majority's rationale that *Ring* is distinguished from *Apprendi* as a substantive rule of law: that "Arizona's enumerated aggravated factors [necessary for imposition of the death penalty] operate as the functional equivalent of an element of a greater offense."¹⁵⁹ Judge Rawlinson invalidated this argument by pointing out that the Supreme Court itself stated that the hate-crime aggravating factor in *Apprendi* had the same effect as the aggravators in *Ring* of creating an element of a greater offense.¹⁶⁰

Thus, the very point of distinction relied upon by the majority — the very thing that the majority stated is *different* about *Ring* and *Apprendi* — is one of the characteristics that the Supreme Court has stated is the *same* about *Ring* and *Apprendi*. Furthermore, because the premise of the majority's argument that *Ring* is substantive lies upon the fact that *Ring* can be distinguished from *Apprendi* in that *Ring* created a separate criminal offense of capital murder, the majority's argument is ineffective.¹⁶¹ The dissent reinforced this argument with a discussion of the Tenth and Eleventh Circuit decisions in *Cannon v. Mullin* and *Turner v. Crosby*,¹⁶² noting that both the Tenth and Eleventh Circuits based their determinations that *Ring* announced a procedural rule on *Ring*'s "status as an extension of *Apprendi*."¹⁶³

Next, in adhering to the structure employed by the majority, the dissent argued that the rule announced in *Ring* is not subject to retroactive application

158. *Id.* at 1125-27 (Rawlinson, J., dissenting).

159. *Id.* at 1126 (quoting *Ring v. Arizona*, 536 U.S. 584, 609 (2002)) (brackets in original).

160. *Summerlin*, 341 F.3d at 1126. In fact, the *Summerlin* dissent pointed out that the *Ring* opinion quoted Justice Thomas's concurrence in *Apprendi*, which stated, "if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating fact together constitute an aggravated crime The aggravating fact is an element of the aggravated crime." *Id.* (quoting *Ring*, 536 U.S. at 605).

161. *Id.* The dissent asserted:

merely saying that creation of a separate substantive criminal offense renders a rule one of substance rather than procedure does not make it so. If that were true, *Apprendi* would have been a substantive rather than a procedural ruling. As the Supreme Court noted in *Ring*, the "hate crime" aggravator in *Apprendi* operated in the same manner as the death penalty factors . . . to establish a "greater offense."

Id. at 1126.

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

163. *Summerlin*, 341 F.3d at 1128-29 (quoting *Turner*, 339 F.3d at 1248 and discussing *Cannon*, 297 F.3d at 994).

because it is not covered by either exception provided in *Teague v. Lane*. The dissent explained that neither requirement of the second exception is satisfied. First, the *Ring* rule did not “seriously enhance[] the accuracy” of the death penalty proceedings; although there might be imperfections in judge-determined sentences, “juries have their own problems in the capital sentencing context.”¹⁶⁴ This conclusion was based on the results of *The Capital Jury Project*, a study of jury-determined death penalty sentences that was funded by the National Science Foundation.¹⁶⁵ Among the many “problems” cited in the study is the tendency of juries to resolve indecisive deliberations in favor of death.¹⁶⁶ The study also showed that many jurors prematurely decide the punishment of the defendant, before the guilt stage of the trial, before the judge delivers jury instructions regarding the punishment decision, and before both sides have had the opportunity to present evidence or arguments on the appropriate sentence.¹⁶⁷

Furthermore, the dissent asserted that the *Ring* rule did not fulfill the second prong of the second *Teague* exception, which requires that the new rule alter the understanding of bedrock procedural principles. The opinion states, “*Ring*’s application is limited to capital cases in [nine] states, a far cry from the majority’s ambitious description of *Ring* as ‘affect[ing] the structure of every capital trial.’”¹⁶⁸ In conclusion, Judge Rawlinson announced that the majority opinion “is not compatible with Supreme Court precedent, our prior rulings, or the law of our sister circuits”¹⁶⁹ and accused the majority of causing “an unwarranted circuit split.”¹⁷⁰

C. *The Circuit Split: An Analysis of Cannon v. Mullin and Turner v. Crosby*

Not only has the Arizona Supreme Court disagreed with the holding of the *Summerlin* majority,¹⁷¹ but the Ninth Circuit is also in the minority among federal circuit courts. At the time of the *Summerlin* opinion, both the Tenth and Eleventh Circuits had determined that the rule announced in *Ring v. Arizona* was not retroactive in effect. Although neither opinion matched the length of the *Summerlin* decision, *Cannon v. Mullin* and *Turner v. Crosby* presented persuasive arguments opposing retroactivity.

164. *Id.* at 1129.

165. *Id.*

166. *Id.*

167. *Summerlin*, 341 F.3d at 1129-30.

168. *Id.* at 1132.

169. *Id.*

170. *Id.*

171. *See State v. Towery*, 64 P.3d 828 (Ariz. 2003).

1. *Cannon v. Mullin*

In *Cannon*, the Tenth Circuit was presented with the question of the constitutionality of Oklahoma's death penalty statute in light of the Supreme Court's holdings in *Apprendi* and *Ring*.¹⁷² Oklahoma's death penalty statute, unlike the statute at issue in *Ring*, *did* require that the jury find beyond a reasonable doubt the statutory aggravating circumstances required for imposition of the death penalty.¹⁷³ However, the Oklahoma statute further provided that if any aggravating circumstances were outweighed by one or more mitigating circumstances, the death penalty would not be imposed.¹⁷⁴ The statute did not require the finding that mitigating circumstances outweigh aggravating circumstances beyond a reasonable doubt.¹⁷⁵

The appellant's argument in *Cannon* for the retroactive effect of *Ring* was premised on two legal theories. He first argued precisely what the Ninth Circuit later held in *Summerlin*: the rule announced in *Ring* is not governed by *Teague* because it is substantive.¹⁷⁶ The Tenth's Circuit's response to this argument was precisely the response of the *Summerlin* dissenting opinion: the rule announced in *Ring* is "simply an extension" of the rule announced in *Apprendi*, and because the *Apprendi* doctrine had been determined to be a rule of procedure, *Ring* is thereby a rule of procedure.¹⁷⁷

The appellant also argued that the Supreme Court "has made *Ring* retroactive to cases on collateral review."¹⁷⁸ The court interpreted Cannon's argument to assert that the *Ring* and *Apprendi* rules are "watershed" rules of criminal procedure within the meaning of the second *Teague* exception.¹⁷⁹ The court's response was simple: the Supreme Court, per *Tyler v. Cain*,¹⁸⁰ has declared that the only way a new rule can be given retroactive effect to cases on collateral review is by action of the Supreme Court in the form of a judicial holding.¹⁸¹ In this sense, the Tenth Circuit's analysis is quite different from the analyses in *Summerlin* and *Turner*. The Tenth Circuit argued that the appropriate question to determine the retroactivity of a new rule to habeas corpus petitions under 28 U.S.C. section 2244(b) is not whether the rule fits into a *Teague* exception, but rather whether any specific language in Supreme

172. *Cannon v. Mullin*, 297 F.3d 989, 991 (10th Cir. 2002).

173. *Id.* at 991-92.

174. *Id.*

175. *Id.* at 992.

176. *Id.*

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

178. *Id.* at 992.

179. *Id.* at 993.

180. *Tyler v. Cain*, 533 U.S. 656 (2001).

181. *Cannon*, 297 F.3d at 993. "[T]he mere fact [that] a new rule *might* fall within the general parameters of overarching retroactivity principles established by the Supreme Court (i.e., *Teague*) is not sufficient." *Id.* (emphasis in original).

Court decisions has declared the rule retroactive to cases on collateral review. Because Cannon failed to identify a Supreme Court case containing such specific language, the Tenth Circuit rejected his argument and held that the rule announced in *Ring* was not to be applied retroactively to Cannon's habeas corpus petition.¹⁸²

2. *Turner v. Crosby*

One year after the *Cannon* decision and just weeks before the *Summerlin* opinion was announced, the Eleventh Circuit heard William Turner's appeal from a district court decision to deny his petition for writ of habeas corpus. The facts leading to Turner's conviction and death sentence are as follows. Turner, in the presence of their seven-year old daughter, murdered his wife.¹⁸³ That same day, in front of about forty people on the street and the fifteen-year old daughter of the victim, he stabbed his wife's friend with whom his wife and children were living.¹⁸⁴ Turner was convicted of two counts of first-degree murder by a jury.¹⁸⁵ During the penalty phase of the trial, the jury was instructed that it was to "advise the Court as to what punishment should be imposed upon the defendant," based upon a finding of aggravating circumstances "to justify the imposition of the death penalty" or mitigating circumstances "to outweigh any aggravating circumstances."¹⁸⁶ The trial judge adopted the advisory sentence of the jury and sentenced Turner to death for the second murder.¹⁸⁷

After unsuccessful attempts to appeal, to file a motion for Post Conviction Relief, and to file a state habeas corpus petition, Turner filed a federal habeas corpus petition, which was also denied.¹⁸⁸ The Eleventh Circuit granted a certificate of appealability to determine (1) whether, as a procedural matter, Turner was entitled to argue a Sixth Amendment violation under *Ring*, and (2) whether *Ring* is subject to retroactive application to cases on collateral review.¹⁸⁹ The court first determined that because Turner failed to raise his Sixth Amendment claim in the state court proceedings, he was barred from bringing the claim in federal court "absent a showing of cause for and actual prejudice from the default."¹⁹⁰

182. *Id.* at 993-94.

183. *Turner v. Crosby*, 339 F.3d 1247, 1250 (11th Cir. 2003).

184. *Id.*

185. *Id.* at 1261.

186. *Id.* at 1264. Florida's death penalty system, like that of Oklahoma, can be described as a "hybrid" structure: the judge determines the sentence after hearing the recommendation of the jury.

187. *Id.* at 1267.

188. *Turner*, 339 F.3d at 1269-73.

189. *Id.* at 1273.

190. *Id.* at 1280.

Secondly, the court held that the rule announced in *Ring* does not apply retroactively to Turner's habeas petition. The court began its analysis on retroactivity with the notion that because the Eleventh Circuit had held in *McCoy v. United States*¹⁹¹ that *Apprendi* announced a new rule of criminal procedure, did not fit within any of the *Teague* exceptions, and therefore did not apply retroactively to cases on collateral review, *Ring* likewise should not be applied retroactively to cases on collateral review.¹⁹² The court then went through a step-by-step analysis of the doctrine of retroactivity, determining first that the rule announced in *Ring* was a new rule of criminal procedure under *Teague*.¹⁹³ The court explained that *Ring*, in determining "only who decides" aggravating or mitigating circumstances for imposition of the death penalty, left unaltered the prosecutor's burden of proof, the underlying conduct of the offense, and the necessary factors for a finding of aggravating or mitigating circumstances.¹⁹⁴ To conclude the first step in its analysis, the court articulated an argument common to the Eleventh Circuit, the Tenth Circuit, and the *Summerlin* dissent: "[o]ur conclusion that *Ring* announces a procedural rule is bolstered by *Ring*'s status as an extension of *Apprendi*."¹⁹⁵

The next step in the *Turner* Court's retroactivity analysis was a determination of whether the *Ring* rule falls into either of the *Teague* exceptions. The court stated that *Ring* did not satisfy the standard for the first exception — decriminalizing conduct or prohibiting a certain form of punishment for a class of individuals.¹⁹⁶ Additionally, in reliance upon the narrow interpretation of the exception given in *Sawyer v. Smith*, the court also determined that *Ring* did not meet the second exception of announcing a "watershed" rule of criminal procedure.¹⁹⁷

The Eleventh Circuit's analysis of this second exception, like the analysis of the *Summerlin* court, rested upon two prongs: the rule must "seriously diminish the likelihood of obtaining an accurate conviction" and must "alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding."¹⁹⁸ With respect to the first prong, the court came to the conclusion that the rule announced in *Ring* would have little to no impact on

191. *McCoy v. United States*, 266 F.3d 1245, 1256-58 (11th Cir. 2001).

192. *Turner*, 339 F.3d at 1283.

193. *Id.* at 1284-85.

194. *Id.* at 1284 (emphasis in original).

195. *Id.* "Just as *Apprendi* 'constitutes a procedural rule because it dictates what fact-finding procedure must be employed,' *Ring* constitutes a procedural rule because it dictates what fact-finding procedure must be employed in a capital sentencing hearing." *Turner*, 339 F.3d at 1284. The court went on to say, "[w]e agree with other courts who have concluded that because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule." *Id.*

196. *Id.* at 1285.

197. *Id.* at 1285-86.

198. *Id.* at 1285 (emphasis in original).

the accuracy of the proceeding.¹⁹⁹ The court also considered the purpose of the *Ring* rule, which is to guard the Sixth Amendment right to a trial by an impartial jury, and not the “need to enhance accuracy or fairness of the fact-finding in a capital sentencing context.”²⁰⁰ Ultimately, the Eleventh Circuit concluded that because *Ring* did not satisfy the requirements for either *Teague* exception and Turner’s conviction became final before the *Ring* rule was announced, Turner would not benefit from the rule requiring a jury to determine beyond a reasonable doubt the presence of aggravating factors necessary for imposition of the death penalty.²⁰¹

IV. AUTHOR’S ANALYSIS

A. *The Three Flaws in the Ninth Circuit’s Analysis of “Substance” and “Procedure” in the Context of Retroactivity*

1. A Distinction that is “Difficult to Locate”

In the eyes of a layperson, the distinction between a procedural rule of law and a substantive rule of law may not seem enormously complex. *Black’s Law Dictionary* defines procedural law, as opposed to substantive law, as “[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.”²⁰² Unfortunately, the practical distinction between “substance” and “procedure” is much more complicated than the words in the definition, and the meanings of “substantive” rules of law and “procedural” rules of law are different depending upon the legal context. Thus, in order to understand the distinction in different areas of the law, one must look to court precedent defining the terms in the relevant context. Such searches at times can be unfruitful, considering the lack of legal writing and clarity on the general topic.²⁰³

With the exception of *Bousley*, the Supreme Court has not provided much guidance on how to distinguish rules of substance from rules of procedure in the context of retroactivity. Consequentially, the Court’s reasoning in *Bousley*

199. “Pre-*Ring* sentencing procedure does not diminish the likelihood of a fair sentencing hearing; instead, *Ring*’s new rule, at most, would shift the fact-finding duties during Turner’s penalty phase from (a) an impartial judge after an advisory verdict by a jury to (b) an impartial jury alone.” *Turner*, 339 F.3d at 1286.

200. *Id.*

201. *Id.*

202. BLACK’S LAW DICTIONARY 1221 (7th ed. 1999).

203. Even the *Summerlin* Court admits that the distinction is difficult to locate. *Summerlin v. Stewart*, 341 F.3d 1082, 1100 (9th Cir. 2003). See also Ethan Isaac Jacobs, *Is Ring Retroactive?*, 103 COLUM. L. REV. 1805, 1828 (explaining that “[r]elatively little has been written about the distinction between substantive and procedural law in general”); *Robinson v. Neil*, 409 U.S. 505, 509 (1973) (explaining that rules will not be easily classified as rules of substance or procedure).

is crucial to an understanding of the doctrine of retroactivity as it currently stands. In *Bousley*, the Court found that the rule announced in *Bailey*, which defined the “use” of a firearm under 18 U.S.C. section 924(c)(1) as “active employment,” rather than mere possession, was a rule of substantive law.²⁰⁴ The Court determined that the *Bailey* rule is one of substantive law because it interpreted the meaning of a criminal statute.²⁰⁵ However, the rationale did not stop there. The Court made the distinction between procedural rules of law and substantive rules of law based upon what it called the “doctrinal underpinnings of habeas review.”²⁰⁶

One such underpinning, the Court explained, is the need to combat the risk “that a defendant stands convicted of ‘an act that the law does not make criminal.’”²⁰⁷ For this reason, the bar against retroactivity does not extend to Supreme Court decisions “holding that a substantive federal criminal statute does not reach certain conduct.”²⁰⁸ Based upon its consideration of these “underpinnings,” the *Bousley* Court determined the *Bailey* rule to be substantive.²⁰⁹

Bousley provides some guidance in determining whether the rule announced in *Ring* is procedural or substantive. However, as evident from the circuit split, the distinction between procedural rules and substantive rules in the context of *Teague* retroactivity is far from resolved. This section will argue that the Ninth Circuit’s conclusion that *Ring* announced a substantive rule of law, which is not subject to the restrictions of *Teague v. Lane*, is flawed in three respects.

2. The Ninth Circuit Fails to Adhere to the Rationale of *Bousley*

The Ninth Circuit used the words of Chief Justice Rehnquist to support its holding that *Ring* is a substantive rule of law and therefore is not bound by *Teague*: “[b]ecause *Teague* by its terms only applies to procedural rules . . . [it] is inapplicable to the situation in which this Court decides the meaning of a criminal statute.”²¹⁰ However, the Ninth Circuit failed to look beyond the words of this statement to the context in which the statement is used and the rationale of the Supreme Court in arriving at the *Bousley* holding.

The *Bousley* Court found the *Bailey* rule to be substantive in nature because it would be inconsistent with the “underpinnings of habeas review” to

204. *Bousley v. United States*, 523 U.S. 614, 617, 620 (1998) (discussing *Bailey v. United States*, 516 U.S. 137, 144 (1995)).

205. *Id.* at 620.

206. *Id.* at 621.

207. *Id.* at 620.

208. *Id.*

209. *See Bousley*, 523 U.S. at 621.

210. *Summerlin v. Stewart*, 341 F.3d 1082, 1099-1100 (9th Cir. 2003) (quoting Rehnquist’s majority opinion in *Bousley*, 523 U.S. at 620).

not allow *Bousley* to use the rule in his habeas argument.²¹¹ In other words, because the *Bailey* holding stated that the act of merely possessing a firearm was not a crime under 18 U.S.C. section 924(c)(1), *Bailey* should not be punished for merely possessing a firearm. This is what the Court means when it speaks of an “act that the law does not make criminal.” This is what the Court means when it speaks of “interpreting the meaning of a substantive federal statute.”

Considering the rationale of *Bousley*, the *Summerlin* Court’s assertion that *Ring* is substantive because it “effected a redefinition of Arizona capital murder law” is not convincing. Nothing in the *Ring* rule stated that murdering someone in an especially heinous, cruel, or depraved manner is no longer a crime for which someone can be executed. The *Ring* rule merely stated that the jury must determine what constitutes “heinous, cruel, or depraved.”

The Ninth Circuit’s reasoning would be more persuasive if the *Bousley* Court had said the following: the *Bailey* rule is substantive because although “mere possession of a firearm” still constitutes “use of a firearm” under 18 U.S.C. section 924(c)(1), the *Bailey* rule now requires “mere possession” to be determined by the jury instead of the judge. Likewise, the *Summerlin* Court’s reasoning would have been more persuasive if the *Ring* Court had held that the act of committing murder in an especially “heinous, cruel, or depraved” manner no longer constituted an aggravating factor for which the death penalty could be imposed.

Similar reasoning is found in the Fifth Circuit’s determination that the rule announced in *United States v. Gaudin* was a rule of procedure.²¹² In *Gaudin*, the Supreme Court announced that the element of “materiality” needed to establish a violation of 18 U.S.C. section 1001 was to be decided by the jury rather than the judge.²¹³ Two years after *Gaudin* was decided, the Fifth Circuit held the rule to be one of criminal procedure, reasoning that “*Gaudin* did not change what the government must prove; materiality was always an element of a section 1001 offense. Instead, *Gaudin* changed the party to whom the government must prove materiality — from judge to jury.”²¹⁴

The rule announced in *Ring* is much like the rule announced in *Gaudin*. The presence of aggravating factors and the absence of mitigating factors is something that the government had always been required to show for imposition of the death penalty in Arizona. The holding in *Ring* merely changed who is to determine such factors.

211. *Id.* at 621.

212. *United States v. Gaudin*, 515 U.S. 506 (1995). The Fifth Circuit held that the *Gaudin* rule was a rule of procedure in *United States v. Shunk*, 113 F.3d 31 (5th Cir. 1997).

213. *Gaudin*, 515 U.S. at 506.

214. *Shunk*, 113 F.3d at 35.

In conclusion, because the *Ring* rule does not “prevent convictions based upon actions that law does not make criminal” in the same way that the *Bailey* rule did, it would be consistent with the underpinnings of collateral review and the doctrine of retroactivity to determine that the rule announced in *Ring* is a new rule of criminal procedure not to be applied retroactively.

3. The Ninth Circuit Forgets that Rules of Procedure Are Governed by *Teague*

The Ninth Circuit’s view is that *Ring*’s holding — although partly procedural — announced a substantive rule of law because it interpreted a criminal statute.²¹⁵ The Tenth and Eleventh Circuits, along with the *Summerlin* dissent, on the other hand, argue that the rule announced in *Ring* is one of procedure, quite simply, because the rule announced in *Apprendi* is one of procedure.²¹⁶ The Eleventh Circuit added another layer of reasoning: the rule did not affect the burden of proof, the underlying conduct of the offense, and the necessary elements used to determine mitigating or aggravating factors.²¹⁷ Therefore, the newly-announced rule was not substantive.

Admittedly, many people have agreed with the *Summerlin* Court’s assertion that the *Ring* rule is both procedural and substantive. For instance, an article in the *Capital Defense Journal* explains that the Supreme Court’s holding in *Ring* is “no doubt procedural . . . [because] it requires the jury, not the judge, to make factual findings during the sentencing phase.”²¹⁸ The author goes on to say that the rule is also substantive because it makes aggravating factors “an element of a greater offense.”²¹⁹ Likewise, another author asserts that the *Ring* rule “includes characteristics” of both substantive and procedural rules of law, explaining that the rule is substantive because it “redefined the elements of murder” and is procedural because it “merely orders the way in which a criminal trial is conducted.”²²⁰

While an adoption of the middle-of-the-road approach may be quite tempting, especially in such a complex area of law, the reality is that the Supreme Court has not provided a separate rule governing the retroactivity of new rules that are partly procedural and partly substantive. The Supreme Court has stated that new rules of criminal procedure are not to be applied retroactively to cases on collateral review unless the rule fits into two narrow exceptions. This is a very straightforward rule. If a rule is procedural, *Teague* bars its retroactive application. If the Supreme Court had meant otherwise, it

215. See *supra* Part III.A.

216. See *supra* Parts III.B and C.

217. See *supra* Part III.C.

218. Janice L. Kopec, *Daniels v. Lee*, 15 CAP. DEF. J. 457, 464 (2003).

219. *Id.* (quoting *Ring v. Arizona*, 536 U.S. 584, 609 (2002)).

220. Victoria Johnson, *Elemental Facts: Did Ring v. Arizona Redefine Capital Sentencing?*, 16 REGENT U. L. REV. 191, 220 (2003-2004).

would have included a third exception to the *Teague* bar — one for hybrid rules that “in one sense” are procedural and can also be argued to be substantive. Thus, because the rule announced in *Ring* is a new rule of criminal procedure — as even the Ninth Circuit admits that it is — it is subject to the restrictions in *Teague*.

4. The Ninth Circuit Inadvertently Destroys its Lynchpin Argument

The final flaw in the *Summerlin* Court’s distinction between substance and procedure in the *Teague* context is its failure to address the dissent’s response to its argument that *Ring* is substantive because it can be distinguished from *Apprendi* as creating a separate offense of capital murder.²²¹ Considering contemporary thought on the doctrine of retroactivity at the time of the *Summerlin* decision, the need for the Ninth Circuit to make a distinction between *Ring* and *Apprendi* is obvious. *Apprendi* was almost indisputably viewed as a rule of procedure that was subject to the *Teague* bar against retroactivity,²²² and the holding in *Ring* was based upon, and was a direct response to, the rule of procedure announced in *Apprendi*.²²³ Thus, any assertion that *Ring* was substantive for *Teague* purposes bore the risk of appearing to be an evasion of common sense.²²⁴ The Ninth Circuit accordingly reconciled this disparity by stating that *Ring* could be distinguished from *Apprendi* because *Ring*, unlike *Apprendi*, created a separate substantive offense of capital murder.²²⁵

As mentioned previously, the dissent invalidated the premise of the majority’s distinction by reminding the majority of the Supreme Court’s assertion that the hate crime aggravator in *Apprendi* also had the effect of creating a separate aggravated crime.²²⁶ Judge Rawlinson correctly concluded that this “linkage” between *Ring* and *Apprendi* is “fatal” to the majority’s reasoning. Without an effective distinction between the rule announced in *Apprendi* and the rule announced in *Ring*, the majority’s argument not only

221. The Ninth Circuit had previously held that *Apprendi* was not a substantive rule of law. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 668, 673 (9th Cir. 2002).

222. The Supreme Court declared that its holding in *Apprendi* was procedural when it said, “[t]he substantive basis for New Jersey’s enhancement is . . . not at issue.” *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000). In addition, the Ninth Circuit admitted that *Apprendi* had “no impact on substantive criminal law.” *Summerlin v. Stewart*, 341 F.3d 1082, 1101 (9th Cir. 2003). See also *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001); *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001) (all holding that *Apprendi* is not to be applied retroactively to cases on collateral review).

223. See *Ring*, 536 U.S. at 609 (overturning *Walton v. Arizona*, 497 U.S. 693 (1990), because “*Walton* and *Apprendi* are irreconcilable”).

224. See *Towery*, 64 P.3d at 833 (explaining that “[l]ogic dictates that if *Apprendi* announced a procedural rule, then, by extension, [*Ring*] did also”).

225. *Summerlin*, 341 F.3d at 1101.

226. See *supra* Part III.B.

haphazardly deviates from the current interpretation and application of the concept of *Teague* retroactivity evident in numerous holdings of the circuit courts, but it also, without explanation, directly contradicts its own holding in a previous case which the Ninth Circuit insists is still good law.

B. *The Second Teague Exception: Is the Ring Rule a "Component of Basic Due Process"?*

Teague allows new rules of procedure to be applied retroactively to cases on collateral review where the rule prohibits lawmakers from imposing a category of punishment on a class of individuals or from making a class of conduct illegal.²²⁷ The *Summerlin* Court correctly concluded that the *Ring* holding did neither of these things, as *Ring* did not prohibit imposition of the death penalty to a certain class of individuals, and did not decriminalize the act for which Summerlin was convicted — or any act for that matter. The Ninth Circuit, the Eleventh Circuit, and the Arizona Supreme Court are specifically in agreement on this point.²²⁸

Teague also allows retroactive application of new rules of criminal procedure to cases already final where the rule is "implicit in the concept of ordered liberty."²²⁹ Such a rule must be a "bedrock procedural element" without which fairness and accuracy is diminished.²³⁰ Justice O'Connor warned that it would be "unlikely that many such components of basic due process have yet to emerge," and since the holding in *Teague* the Court has yet to find a rule that fits within the second exception.²³¹ Despite this high standard, the Ninth Circuit in *Summerlin* ambitiously concluded that the *Ring* rule satisfied the second *Teague* exception.

The *Summerlin* Court came to this conclusion after arguing two points. First, the court argued that the *Ring* rule enhances the accuracy of capital sentences, and thus fulfills the exception's requirement of accuracy.²³² Next, the court argued that *Ring* is a "watershed rule that alters our understanding of bedrock procedural elements essential to the fairness of the trial" for two reasons: (1) *Ring* is not susceptible to harmless error analysis, and (2) the *Ring* rule is "groundbreaking" because it "affects the structure of every capital trial and has rendered unconstitutional every substantive statute in conflict with its dictates."²³³

In truth, the second exception to the rule announced in *Teague* is a narrow exception and has been applied in a manner very different from the application

227. See *supra* Part II.B.

228. See *supra* Parts III.A and C; *Towery*, 64 P.3d at 833.

229. *Teague v. Lane*, 489 U.S. 288, 290 (1989).

230. See *supra* Part II.B.

231. See *Jones*, *supra* note 6, at 1375-76 n.122 (quoting *Teague*, 489 U.S. at 313).

232. *Summerlin*, 341 F.3d at 1109-10.

233. See *supra* Part III.A; *Summerlin*, 341 F.3d at 1119.

of the Ninth Circuit. The guidance provided by the Supreme Court makes it clear that the *Summerlin* Court erred in finding that the holding in *Ring* fits within the parameters of this exception.

The first requirement of the *Teague* exception is that the new rule must enhance the accuracy of the proceeding.²³⁴ The *Summerlin* Court stated that the *Ring* holding enhanced the accuracy of capital sentences because: (1) arguments presented to juries are more detailed and formal than those made to judges; (2) presentations to judges are more likely to contain inadmissible evidence; (3) juries are linked to “contemporary community values”; (4) juries are not habituated to the death penalty as judges are; and (5) juries are not preoccupied with elections.²³⁵ The dissent, on the other hand, counter-argued that jury-determined capital sentences are tainted with numerous problems such as premature determinations of the defendant’s sentence.²³⁶ The dissent also rebutted the five arguments of the majority with data from the *Capital Jury Project* and other studies and pointed to portions of the majority’s reasoning that are unsupported by empirical data.²³⁷

Due to the majority’s lack of empirical evidence showing the inaccuracy of judge-determined death sentences and the dissent’s use of the findings from the *Capital Jury Project*, the dissent’s argument is necessarily more persuasive. For instance, the majority provided a survey of Ninth Circuit cases to illustrate the informal nature of arguments presented to judges as opposed to those presented to juries.²³⁸ The survey shows informalities such as failing to present mitigating evidence, asking the court for advice on what issues are relevant to mitigation, and presenting only brief arguments.²³⁹ However, the Ninth Circuit provided no support for a finding of a correlation between such informalities and inaccuracy in capital sentencing. On the other hand, the dissent used an empirical study of 916 capital jurors to assert that jurors do not consider the judge’s instructions in making their sentencing decisions and are generally confused about when the death sentence is legally justified.²⁴⁰

In sum, although the dissent’s argument is more persuasive and better supported, Judge Rawlinson is accurate in his observation that “[a]s with most

234. *See supra* Part II.B.

235. *See supra* Part III.A.

236. *See supra* Part III.B.

237. *Summerlin*, 341 F.3d at 1130-31.

238. *Id.* at 1110-11.

239. *Id.*

240. *Id.* at 1129-30 (explaining that more than 50% of jurors interviewed believed that repeat murder, premeditated murder, and multiple murder automatically warranted imposition of the death penalty). The study also indicated that many jurors who formulated an opinion of appropriate punishment at the guilt phase of trial and adhered to that opinion during sentencing believed that “overwhelming proof of guilt” justified a death sentence. *Id.* at 1130.

other matters there is another side to the story.”²⁴¹ The Supreme Court could very well agree with the reasoning of either the majority or the dissent. The Court might also choose to rely upon its own empirical data or other reasoning to determine that judge-determined sentences are more accurate than jury-determined sentences, or vice-versa. Even if the Court agrees with the *Summerlin* majority on this issue of accuracy, such a finding will likely have no effect on the retroactivity of *Ring*, as the Court is unlikely to find that the second requirement of the second *Teague* exception is satisfied.

In order for the *Ring* rule to be applied retroactively to cases on collateral review via the second *Teague* exception, it must also be determined by the Court to be a “watershed rule,” which alters the understanding of a “bedrock procedural element” essential to the fairness of the proceeding.²⁴² The Supreme Court has stated that an example of a “watershed rule” is a rule such as that of *Gideon*.²⁴³ Based upon this guidance, many courts and scholars have understood that the intent of the Supreme Court was for the second *Teague* exception to be applied very narrowly.²⁴⁴ For instance, in their article entitled *Après Apprendi*, Nancy J. King and Susan R. Klein assert that, based upon the guidance of the Court, the rule announced in *Apprendi* did not fall within the second exception to *Teague*. The authors argue that the *Apprendi* rule falls short of the “primacy” of the rule announced in *Gideon*, particularly because “it does not protect the blameless from punishment” but rather affects only the degree of punishment to be imposed.²⁴⁵ Several circuit courts have also determined that the rule announced in *Apprendi* does not fit into this exception.²⁴⁶

Additionally, the Supreme Court has repeatedly validated Justice O’Connor’s prediction that few rules would emerge as bedrock procedural elements. Time after time, the Court has been presented with new rules that are argued to be “watershed rules” within the meaning of *Teague*, and time after time the Court has rejected the argument.²⁴⁷ For instance, in 1997 the Court considered in *O’Dell v. Netherland* whether the rule announced in *Simmons v. South Carolina* was “on par” with the rule announced in *Gideon*

241. *Summerlin*, 341 F.3d at 1129.

242. *Id.* at 1099.

243. *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (discussing *Gideon v. Wainwright*, 372 U.S. 335 (1963), which upheld a defendant’s right to representation in all criminal trials for serious offenses).

244. *See Jones*, *supra* note 6, at 1375.

245. Nancy J. King and Susan R. Klein, *Après Apprendi*, 12 FED. SENT. R. 331, 333 (2000).

246. For cases holding that *Apprendi* does not fit within the second *Teague* exception *see* *United States v. Sanchez-Cervantes*, 282 F.3d 664, 669 (9th Cir. 2002); *United States v. Sanders*, 282 F.3d 139, 148 (4th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 1001 (8th Cir. 2001); and *McCoy v. United States*, 266 F.3d 1245, 1249 (2001).

247. *See O’Dell v. Netherland*, 521 U.S. 151, 153 (1997). *See also* discussion of *Sawyer v. Smith*, 497 U.S. 227 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990), in *supra* Part II.B.

and thus within the parameters of the second *Teague* exception.²⁴⁸ The *Simmons* rule provided that in situations where a capital defendant is ineligible for parole and the defendant's future dangerousness is an issue raised by the prosecution, the jury must be instructed of the fact that the defendant is ineligible for parole.²⁴⁹ The *O'Dell* Court determined that the *Simmons* rule did not fit into *Teague*'s second exception, explaining:

Unlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all felony cases, the narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases has hardly 'altered our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding.²⁵⁰

Other rules that have been held not to satisfy the second requirement to the second exception are: the requirement that the fair-cross section rule be applied to the petit jury;²⁵¹ the rule prohibiting imposition of the death penalty where the jury believes that it is not fully responsible for the sentence;²⁵² and the rule permitting a sentencing determination to be based upon the emotions of the jury.²⁵³

Based upon the guidance provided by legal scholars, circuit courts, and the Supreme Court, the *Ring* holding would not be logically classified as a watershed rule that redefines an understanding of a bedrock procedural element. Like the rule announced in *Apprendi*, the *Ring* rule does not, in the words of King and Klein, "protect the blameless from punishment." It merely changes who is to decide the punishment. Furthermore, like the rule announced in *Simmons*, the *Ring* rule will impact defendants in a limited class of cases, as only capital sentencing schemes in nine states are affected by the rule.²⁵⁴ Finally, like the rules announced in *Sawyer* and *Saffle*, the *Ring* rule addresses sentencing determinations made by juries. Because the Supreme Court has not yet found such rules to be groundbreaking, it is unlikely to happen in this case. In conclusion, based upon the Supreme Court's narrow interpretation of the second *Teague* exception, the Court is likely to hold that the *Ring* rule falls considerably short of a watershed rule within the parameters of the exception to *Teague*. The Ninth Circuit was mistaken to find otherwise.

248. *O'Dell*, 521 U.S. at 167.

249. *Simmons v. South Carolina*, 512 U.S. 154, 168-69 (1994).

250. *O'Dell*, 521 U.S. at 167 (quoting *Sawyer*, 497 U.S. at 242).

251. *Teague*, 489 U.S. at 290 (explaining that the rule was a "far cry from the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty'").

252. *Sawyer*, 497 U.S. at 242-43.

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

254. *See* *Summerlin v. Stewart*, 341 F.3d 1082, 1132 (9th Cir. 2003).

V. CONCLUSION

The Ninth Circuit's two independent and alternative arguments supporting retroactive application of the *Ring* rule deviate from Supreme Court precedent establishing the current doctrine of retroactivity. The arguments also deviate from common sense. The *Summerlin* Court's first assertion that *Ring* announced a substantive rule of law that is also partly procedural does nothing more than admit that *Teague* bars its retroactive effect. Like the holding in *Apprendi*, the holding in *Ring* mandated that factors increasing a defendant's sentence beyond the statutory maximum, which was life imprisonment in *Summerlin*, must be decided by the jury beyond a reasonable doubt. Furthermore, like the holding in *Apprendi*, the holding in *Ring* had the effect of creating a separate aggravated crime. The Ninth Circuit's attempt to distinguish the two cases in order to justify its assertion that *Ring* announced a substantive rule of law is unsuccessful. Finally, the first argument deviates from the Supreme Court's rationale expressed in *Bousley*.

The second argument supporting the *Summerlin* holding — that the *Ring* rule fits within the parameters of the second *Teague* exception — is equally unsupported. Through its actions and express words, the Supreme Court has consistently said that the exception should be applied narrowly. The Ninth Circuit in *Summerlin* interpreted the exception broadly, and in doing so ignored the high standard of the *Gideon* rule, as well as the intent of the Supreme Court.

In conclusion, a finding that *Ring v. Arizona* is not retroactive to cases on collateral review would have been the only logical way for the Ninth Circuit to adhere to Supreme Court precedent. In holding otherwise, the Ninth Circuit leaves the Supreme Court no option other than to overturn *Summerlin*. In fact, if the Court were to agree with the *Summerlin* decision, it would, in effect, alter the doctrine of retroactivity once again and revert to the confusing pre-*Teague* era in which the doctrine was uncertain and Supreme Court decisions, in the words of Justice Harlan, were "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim."²⁵⁵

ELIZABETH A. HUNOT*

255. *Williams v. United States*, 401 U.S. 667, 676 (Harlan, J., concurring in part and dissenting in part).

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