Rematch in the Ring: Giving Death Row Inmates Another Chance to Challenge Their Sentences in Summerlin v. Stewart

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REMATCH IN THE RING: GIVING DEATH ROW INMATES ANOTHER CHANCE TO CHALLENGE THEIR SENTENCES IN SUMMERLIN V. STEWART*

I. INTRODUCTION

During the spring 2004 term, the United States Supreme Court will review the recent Ninth Circuit holding in Summerlin v. Stewart. In Summerlin, the Ninth Circuit became the first federal appeals court to conclude that the Supreme Court's holding in Ring v. Arizona applies retroactively. The Ring Court held that under the Sixth Amendment, in states requiring an aggravating factor as a precondition to a death sentence, a jury must find that factor proven beyond a reasonable doubt. The Ninth Circuit addressed the issue of whether a defendant whose conviction and death sentence became final before Ring was decided could take advantage of this new constitutional rule on collateral review (i.e., habeas corpus). The Ninth Circuit answered in the affirmative, holding that death row inmates who have exhausted their direct appeals can challenge their sentences retroactively.

Not surprisingly, Summerlin elicited mixed reactions. Death penalty opponents heralded the decision and predicted that, if upheld

* Recipient of the 2003-04 Loyola of Los Angeles Law Review Best Student Article Award.
2. 536 U.S. 584 (2002).
3. See Summerlin, 341 F.3d. at 1121.
5. Habeas corpus is designed to give a person whose liberty is restrained an immediate hearing to inquire into and determine the legality of his conviction and sentence. See 39 C.J.S. Habeas Corpus § 6 (2003).
6. See Summerlin, 341 F.3d. at 1121.
by the Supreme Court, "it will slow down the machinery of death in America’s prisons and hasten the day when the death penalty is outright abolished." 7 Others asserted, in part because other circuits have held that Ring does not apply retroactively, 8 that Summerlin is "a clearly erroneous decision which is destined to be reversed." 9

Ring is best understood in the context of an earlier landmark Supreme Court ruling: Apprendi v. New Jersey. 10 In Apprendi, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 11 Therefore, allowing a judge to make such factual determinations, rather than a jury of the defendant’s peers, violated the accused’s Sixth Amendment rights. 12

With its decision in Ring two years later, "the Supreme Court effectively extended its holding in Apprendi to capital cases, concluding that ‘[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.’" 13 In Ring, the petitioner challenged the constitutionality of his death sentence, which the sentencing judge increased from life imprisonment to death upon his finding of aggravating factors. 14 The Arizona Supreme Court held petitioner’s death sentence consistent with the

8. See Turner v. Crosby, 339 F.3d 1247, 1280 (11th Cir. 2003); Moore v. Kinney, 320 F.3d 767 (8th Cir. 2003) (en banc); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002).
Sixth Amendment, but the United States Supreme Court reversed.\textsuperscript{15}  

The Ring Court declared Arizona's capital sentencing statute unconstitutional because "it allow[ed] a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."\textsuperscript{16} Writing for the majority, Justice Ginsberg observed, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years [as in Apprendi], but not the factfinding necessary to put him to death."\textsuperscript{17} Whereas the petitioner in Ring raised his death sentence challenge on direct appeal, the Supreme Court left unanswered the question whether similarly imposed death sentences could be challenged by "petitioners, such as Summerlin, who raised the constitutional challenge in collateral post-conviction proceedings rather than on direct appeal."\textsuperscript{18}  

This Comment addresses the retroactive application of the Ring holding, and explores some of its constitutional implications. Part II of this Comment summarizes the facts of Summerlin and the procedural background leading up to the Ninth Circuit's decision. Part III examines the test for determining whether a new constitutional rule of criminal law may be applied retroactively to cases on collateral review, as set forth in Teague v. Lane.\textsuperscript{19} Part IV presents the Ninth Circuit's analysis of Ring under the Supreme Court's current retroactivity jurisprudence. Part V argues that neither statutory nor legal precedent renders Summerlin erroneous because the purposes of the Teague doctrine of retroactivity and public policy support the holding in Summerlin. Part VI addresses the implications of the Ninth Circuit's unprecedented decision to apply Ring retroactively. Finally, this Comment concludes that the Ninth Circuit correctly interpreted Ring as a new rule of criminal law that must be applied retroactively to cases on collateral review.

\textsuperscript{15} See id. at 596–97. 
\textsuperscript{16} Id. at 609. 
\textsuperscript{17} Id. 
\textsuperscript{19} 489 U.S. 288 (1989).
II. FACTUAL BACKGROUND

The Ninth Circuit appropriately characterized the facts of Summerlin as "the raw material from which legal fiction is forged."\(^{20}\) On April 29, 1981, a collections agent, Brenna Bailey, went to Warren Summerlin's home to inquire about an overdue account.\(^{21}\) After learning that Bailey had not returned to work as expected, Bailey's boyfriend reported her disappearance to the police.\(^{22}\) That same evening, the police received an anonymous tip from a female (later identified as Summerlin's mother-in-law, who based her information on her daughter's "extra-sensory perception") who believed Summerlin had murdered Bailey and "rolled up the victim's body in a carpet."\(^{23}\)

Police discovered Bailey's body the next morning wrapped in a bloody bed sheet in the trunk of her car, which was parked approximately one mile from Summerlin's home.\(^{24}\) In addition to considerable incriminating evidence obtained during a search of Summerlin's home, Summerlin's wife identified the bloody bed sheet as belonging to the Summerlin residence.\(^{25}\) The police then arrested Warren Summerlin for the murder of Brenna Bailey.\(^{26}\)

The psychic tip leading to Summerlin's arrest was just the beginning of this bizarre legal saga. Later chapters depict "an affair between Summerlin's public defender and his prosecutor at a crucial plea-negotiation phase, and a sentencing judge who purportedly experienced difficulty concentrating because of heavy marijuana use."\(^{27}\) Summerlin's own problems went beyond his tendency toward criminal behavior. As the Ninth Circuit noted, Summerlin "has organic brain dysfunction, [and] was described by a psychiatrist as 'functionally retarded.'"\(^{28}\)

After examination by two court-appointed psychiatrists, the judge found Summerlin competent to stand trial.\(^{29}\) The trial lasted only four days, and the jury took just over three hours to find Sum-
merlin guilty of first-degree murder and sexual assault. One month later, the judge held an extremely truncated hearing to hear testimony and argument on aggravating and mitigating circumstances. The State’s entire aggravation case took up only one page of the transcript. The defense called no witnesses for its mitigation case. Several days after the adjournment of the penalty phase, the judge sentenced Summerlin to death upon finding two aggravating circumstances and no mitigating circumstances.

30. See id. at 1088.
31. Id. at 1088.
32. Id. at 1089.
33. See id.
34. See id. at 1090. The two aggravating circumstances were “(1) that the defendant had a prior felony conviction involving the use of threatened use of violence on another person . . . and (2) that Summerlin [murdered Bailey] in an especially heinous, cruel, or depraved manner.” Id.
35. Id. at 1091.
36. See id.
37. Id.
38. Id.
39. See id.
40. Id.
41. See id.
42. Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002).
43. See Summerlin, 341 F.3d. at 1092.
III. THE TEAGUE DOCTRINE FOR RETROACTIVITY

A. Historical Background of the Teague Doctrine

Whether a new rule of constitutional law applies retroactively to cases on collateral review is a relatively new question for the courts.\(^4\) English common law made all new rules retroactive on both direct and collateral review.\(^5\) Similarly, throughout most of American history, new constitutional rules were presumptively retroactive: "[B]oth the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court."\(^6\)

In 1867, following the Civil War and enactment of the Fourteenth Amendment, Congress expanded the scope of habeas corpus review to state court convictions.\(^7\) This expansion "prompt[ed] the Supreme Court to determine the proper scope of federal habeas jurisdiction."\(^8\) In 1953, the Supreme Court in \textit{Brown v. Allen}\(^9\) "confirmed the cognizability of all federal constitutional claims filed by state prisoners," which led to a significant increase in the number of federal habeas petitions filed by state prisoners.\(^10\) At the same time, the Court became concerned "with the impacts of its fast-moving pace of constitutional innovation in the criminal field."\(^11\) Thus arose the "novel discussion" about retroactively applying new constitutional rules of criminal procedure.\(^12\)

In \textit{Linkletter v. Walker},\(^13\) the Supreme Court announced a three-part balancing test for determining whether new constitutional rules would apply retroactively to convictions challenged on direct appeal

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4. See id. at 1097.
7. \textit{Summerlin}, 341 F.3d at 1097.
8. \textit{Id}.
11. \textit{Id}.
and collaterally by writ of habeas corpus. The Linkletter Court held that "a constitutional rule of criminal procedure would not be retroactive unless, under a case-by-case analysis, three factors—the purpose of the new rule, reliance on prior doctrine, and the effect of retroactivity on the administration of justice—favor retroactive application of the rule."  

Six years after Linkletter, in Mackey v. United States, Justice Harlan wrote separately to advocate a new approach to retroactivity. Harlan was dissatisfied with the Linkletter test (which would remain the controlling doctrine of retroactivity for twenty-four years) because it allowed for unacceptably inconsistent results. For example, Linkletter was "used to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials [had] not yet commenced." In time, the Court acknowledged that the Linkletter test led to disparate treatment of similarly situated defendants on both direct and collateral review. Unabashedly recognizing that "commentators have 'had a veritable field day' with the Linkletter standard," the Supreme Court adopted Justice Harlan's approach to retroactivity in Teague.

B. The Presumption Against Retroactivity of New Procedural Rules

In Teague v. Lane, the Supreme Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." It is important to note that the Teague retroactivity doctrine only applies to new rules of criminal procedure because, "unlike strictly proce-

54. See Summerlin, 341 F.3d at 1098.
55. Id. (citing Linkletter, 381 U.S. at 636).
58. See id. at 302.
59. Id.
60. See id. at 304–05.
61. Id. at 303 (quoting Francis S. Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 VA. L. REV. 1557, 1558 (1975)).
62. Id. at 310.
63. See Bousley v. United States, 523 U.S. 614, 620 (1998) (holding that "Teague by its terms applies only to procedural rules").
dural rules, ‘new rules of substantive criminal law are presumptively retroactive.’”

Accordingly, “[t]he threshold question in a Teague analysis is whether the rule the petitioner seeks to apply is a substantive rule or a procedural rule . . . .”

If the new rule is procedural, the court must undertake a three-step analysis to determine whether it applies retroactively on collateral review. First, the court must establish when the defendant’s conviction became final. Second, the court must survey “the legal landscape as it then [at the time of conviction] existed” because, “[i]f existing precedent already required application of the rule, the Teague bar does not apply.” Accordingly, a rule is not “new” for Teague purposes and applies retroactively if application of the rule was mandated by then-existing precedent.

On the other hand, if a court determines that a constitutional rule of criminal procedure is in fact new, the court must proceed with the third step, which is to determine whether the rule falls within one of two narrow exceptions to the general rule of nonretroactivity. Even if a procedural rule is new, it will not apply retroactively to appeals from final convictions unless one of two exceptions applies.

C. Teague’s Two Exceptions for Overcoming the Presumption Against Retroactivity

After adopting Justice Harlan’s general rule against retroactivity, the Teague plurality likewise adopted Harlan’s exceptions as set forth twenty-four years earlier in Mackey. Under the first exception, a new rule will be applied retroactively “if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.’” In other words, this

65. Id.
66. See id.
67. Id.
69. Summerlin, 341 F.3d at 1099.
70. See id.
71. See id.
72. See, e.g., Jones, supra note 12, at 1369.
74. Id. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971))
exception only applies when "certain primary conduct has been de-
criminalized" or when "certain classes of individuals are immunized
from specified forms of punishment by the newly announced rule." 75

Although the Teague plurality adopted Harlan’s first exception
in its entirety, it adopted Harlan’s second exception to the general
rule against retroactivity "with a modification." 76 In Mackey, Harlan
argued that a new rule should apply retroactively if it requires the ob-
servance of "those procedures that... are 'implicit in the concept of
ordered liberty.'" 77 The Teague plurality stated that "[t]he language
used by Justice Harlan... leaves no doubt that he meant the second
exception to be reserved for watershed rules of criminal proce-
dure." 78 Accordingly, the plurality limited the second Teague excep-
tion "to those new procedures without which the likelihood of an ac-
curate conviction is seriously diminished." 79

Following Teague, district courts were unclear as to the scope of
the second exception, especially in the death penalty context, where
there was conflict over whether this exception "include[d] new rules
of capital sentencing that only 'preserve the accuracy and fairness of
capital sentencing judgments.'" 80 In Sawyer v. Smith, 81 the Supreme
Court addressed the conflict and formulated the controlling definition
of Teague’s second exception:

It is thus not enough under Teague to say that a new rule is
aimed at improving the accuracy of trial. More is required.
A rule that qualifies under this exception must not only im-
prove accuracy, but also "‘alter our understanding of the
bedrock procedural elements'” essential to the fairness of a
proceeding. 82

Therefore, a new procedural rule only applies retroactively if it falls

(Harlan, J., concurring in part and dissenting in part)).

75. Summerlin, 341 F.3d at 1109.
76. Teague, 489 U.S. at 311.
77. Mackey, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting
in part) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
78. Teague, 489 U.S. at 311.
79. Id. at 313.
80. Karl N. Metzner, Note, Retroactivity, Habeas Corpus, and the Death
Petitioner at 30, Sawyer v. Smith, 497 U.S. 227 (1990)).
82. Id. at 242 (quoting Mackey, 401 U.S. at 693) (emphasis in original).
within one of Teague's two narrow exceptions.

IV. THE NINTH CIRCUIT'S TEAGUE ANALYSIS OF RING V. ARIZONA

The significance of Summerlin is not only that the Ninth Circuit concluded Ring applies retroactively, but also that the court found two separate grounds upon which to base its conclusion. First, the court decided that Ring was a new rule of substantive criminal law, so that it applies retroactively without any consideration of the Teague doctrine. In addition, to the extent that Ring is procedural, the court interpreted it as a "watershed rule" that "satisfies the criteria of Teague and must be given retroactive effect on habeas review."

A. Ring Announced a New Substantive Rule

The Ninth Circuit began by addressing "the threshold Teague question, namely whether Ring announced a substantive rule or a procedural rule." This initial inquiry is critical to the determination of retroactivity because "[u]nlke strictly procedural rules, 'new rules of substantive criminal law are presumptively retroactive.'" The court explained the difference between substantive and procedural rules as follows: "[F]or Teague purposes, a new rule is one of procedure if it impacts the operation of the criminal trial process, and a new rule is one of 'substance' if it alters the scope or modifies the applicability of a substantive criminal statute."

Determining whether a new rule is substantive or procedural is not always a simple task. Quoting Chief Judge Becker of the Third Circuit, the Ninth Circuit observed that "[i]n the habeas context in particular . . . there are those cases that do 'not fall neatly under either the substantive or procedural doctrinal category' . . . . In such cases, 'the best approach is to recognize that [the new rule] is neither entirely substantive nor procedural.'" According to the Ninth Cir-

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83. See, e.g., CRIM. L. REPORTER, supra note 11.
85. Id. at 1121.
86. Id. at 1099.
87. Id. (quoting Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001)).
88. Id. at 1100.
89. Id. at 1101 (quoting United States v. Woods, 986 F.2d 669, 677 (3d Cir. 1993)).
The court conceded that by requiring a jury, rather than a judge, to find aggravating circumstances necessary to impose the death penalty, *Ring* addressed "the procedure by which any capital trial must be conducted." Nevertheless, the court emphasized that *Ring* is not strictly a procedural rule:

More 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. That is, as applied to the particular Arizona murder statute at issue here, *Ring*'s holding was "substantive" for *Teague* purposes.

Unlike most new procedural rules, new rules of substantive criminal law apply retroactively. Therefore, in holding that *Ring* is a new substantive rule, the court gave Summerlin and others in Ninth Circuit states with judge-imposed death sentences the right to challenge their sentences on collateral review.

**B. Alternatively, Ring Announced a New Procedural Rule that Overcomes Teague's Presumption Against Retroactivity**

The Ninth Circuit's conclusion that *Ring* announced a new rule of substantive criminal law immediately entitled Summerlin to retroactive application of that rule. Accordingly, it was unnecessary to go through a full *Teague* analysis because "[a]ny new substantive interpretation will automatically be applied retroactively without having to meet any other requirements." Nevertheless, the Ninth Circuit seized the opportunity to present an alternative basis for applying *Ring* retroactively.

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90. *Id.*
91. *Id.*
92. *Id.* at 1102.
94. When *Summerlin* was decided, more than 122 prisoners on death row in Arizona, Montana, Nevada, and Idaho had been sentenced to death by a judge. *See* Elaine Cassel, *Bad News for Prosecutors: 122 Condemned Prisoners May Not Be Executed*, at http://babelogue.citypages.com:8080/ecassel/2003/09/03 (Sept. 3, 2003). For more on the implications of *Summerlin*, see infra Part VI.
1. *Ring* is a “new rule” as defined by *Teague*

The court began its *Teague* procedural analysis by considering whether the rule announced in *Ring* was in fact “new.” A procedural rule is not new for *Teague* purposes if, at the time a defendant’s conviction became final, “the result . . . was dictated by then existing precedent.”

Consistent with the *Teague* three-step analysis, the court first determined that Summerlin’s conviction became final in 1984. Next, the court “survey[ed] the legal landscape’ as it existed in 1984 to determine whether the result in *Ring* was dictated by then existing precedent.” The court pointed out that Summerlin’s conviction became final before the Supreme Court decided *Ring*, which overruled a prior Supreme Court decision, *Walton v. Arizona*. Because “there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision,” the Ninth Circuit had “no doubt that *Ring* announced a new rule as that term is construed for *Teague* purposes.”

2. *Ring* falls within the second *Teague* exception

After concluding that the rule announced in *Ring* was new, the court proceeded to the third step in the *Teague* analysis, “namely

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96. See *Summerlin*, 341 F.3d at 1099.
97. *Id.* at 1108. For a more comprehensive discussion of the *Teague* doctrine, see supra Part III.
98. That year, Summerlin failed to file a writ of certiorari with the Supreme Court following the Arizona Supreme Court’s refusal to rehear its opinion affirming his conviction and death sentence. *Summerlin*, 341 F.3d at 1108.
99. *Id.* (quoting Graham v. Collins, 506 U.S. 461, 468 (1993)).
102. *Summerlin*, 341 F.3d at 1109.
whether either of Teague’s two exceptions apply.”\textsuperscript{103} The first exception applies only if a new rule decriminalizes certain primary conduct or immunizes certain classes of people from specific types of punishment.\textsuperscript{104} The second exception applies only if a new rule “(1) seriously enhance[s] the accuracy of the proceeding and (2) alter[s] our understanding of bedrock procedural elements essential to the fairness of the proceeding.”\textsuperscript{105}

It took but a single paragraph for the court to dismiss any notion that Teague’s first exception applies to Ring.\textsuperscript{106} As the court noted, “[b]ecause Ring did not ‘decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons,’ the first exception is inapplicable.”\textsuperscript{107} In stark contrast, the court invested considerable time and ink explaining how Ring meets both requirements of Teague’s second exception. First, the court decided that the new rule announced in Ring would seriously enhance the accuracy of capital murder trials in Arizona.\textsuperscript{108} Second, the court concluded that Ring was a watershed rule that “altered the fundamental bedrock principles applicable to capital murder trials.”\textsuperscript{109}

\textbf{a. Ring enhances the accuracy of capital trials}

The Ninth Circuit found “several reasons why fact-finding by a jury, rather than by a judge, is more likely to heighten the accuracy of capital sentencing proceedings.”\textsuperscript{110} For example, in capital proceedings prior to Ring, a “sentencing judge receive[d] an inordinate amount of inadmissible evidence,”\textsuperscript{111} including pre-sentence reports, victim impact statements, and letters from victims’ families.\textsuperscript{112} The sentencing judge in Summerlin received exactly this kind of inadmissible evidence “[b]efore hearing any presentation by the parties.”\textsuperscript{113} Although courts presume that sentencing judges can distinguish ad-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{103}] Id.
\item[\textsuperscript{104}] See id.
\item[\textsuperscript{105}] Id. (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)).
\item[\textsuperscript{106}] Id.
\item[\textsuperscript{107}] Id. (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).
\item[\textsuperscript{108}] See id. at 1116.
\item[\textsuperscript{109}] Id. at 1121.
\item[\textsuperscript{110}] Id. at 1110.
\item[\textsuperscript{111}] Id. at 1111.
\item[\textsuperscript{112}] Id.
\item[\textsuperscript{113}] Id. at 1112.
\end{enumerate}
\end{footnotesize}
missible evidence from inadmissible evidence, the court pointed out that such judicial prudence was not the issue.\textsuperscript{114} "The relevant question is not whether judges have been able to do so, but whether subjecting penalty-phase evidence to the crucible of a formal trial by jury would reduce the risk of error. There is little doubt that it would."\textsuperscript{115} Therefore, the court concluded that by requiring a jury, rather than a judge, to find the aggravating factors necessary to impose the death penalty, \textit{Ring} enhances the accuracy of capital convictions and "diminish[es] the risk of . . . erroneous verdict[s]."\textsuperscript{116}

In addition to the inherent evidentiary concerns discussed above, the court suggested two other reasons why jury fact-finding in capital sentencing would improve the accuracy of convictions.\textsuperscript{117} The first relates to one of the jury’s "critical functions" to express and act in accordance with contemporary community values.\textsuperscript{118} The court observed that, while most jurors would not sit on a capital case more than once, Arizona judges routinely preside over capital cases.\textsuperscript{119} The risk, then, is that judges may become habituated to "imposing capital punishment under near rote conditions."\textsuperscript{120} According to the Ninth Circuit, \textit{Summerlin} clearly illustrates this point—the judge who sentenced Summerlin to death "imposed capital punishment on [another convict] in a separate case on the same day."\textsuperscript{121} The court concluded that the rule announced in \textit{Ring}, which entrusts the jury with authority to impose a death sentence, established "an important procedural safeguard, because the jury members 'are more attuned [than judges] to the community's moral sensibility,' 'reflect more accurately the composition and experiences of the community as a whole,' and act to 'express the conscience of the community on the ultimate question of life or death.'"\textsuperscript{122}

Another reason for the Ninth Circuit's conclusion that juror fact-finding would improve the accuracy of capital convictions is that,

\begin{itemize}
  \item \textsuperscript{114} See \textit{id.} at 1113.
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} See \textit{id.} at 1113-15.
  \item \textsuperscript{118} \textit{Id.} at 1113.
  \item \textsuperscript{119} See \textit{id.} at 1114.
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{122} \textit{Id.} at 1113-14 (quoting \textit{Ring v. Arizona}, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring)).
\end{itemize}
unlike judges, jurors do not stand for election in Arizona. Citing empirical evidence and legal commentary, the court asserted, “Judges who face election are far more likely to impose the death penalty than either juries or appointed judges.” Therefore, the court reasoned that jurors are less likely than judges to be influenced by external considerations when deciding whether to sentence someone to death.

b. Ring alters our understanding of bedrock procedural elements essential to the fairness of capital murder trials

To fall within Teague’s second watershed rule exception, a new rule must do more than enhance the accuracy of the proceeding. The new rule must also “alter[] our understanding of bedrock procedural elements essential to the fairness of the proceeding.” According to the Ninth Circuit, Ring met this requirement because it “fundamentally altered the procedural structure of capital sentencing applicable to all states.”

In deciding whether Ring satisfies Teague’s second exception, a critical consideration is whether Ring error is structural or harmless. The Ninth Circuit concluded that structural error occurs where a judge—a “constitutionally-disqualified factfinder”—decides whether to impose the death penalty. Moreover, “[i]f structural error is present, ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.’” Relying on three Supreme Court decisions, the court stated, “where an im-

123. See id. at 1115.
124. Id.
125. Id.
126. Id. at 1116 (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)).
127. Id.
128. See id. at 1119.
129. See id. at 1116. The Supreme Court has defined a structural error as a “defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” Arizona v. Fulminante, 499 U.S. 279, 310 (1991).
130. Summerlin, 341 F.3d at 1116 (quoting Rose v. Clark, 478 U.S. 570, 577–78 (1986)).
properly constituted or situated tribunal reaches a decision, that decision is infected with a 'plain defect' and must be vacated." Finally, the Ninth Circuit held that because Ring seriously enhances the accuracy of death penalty cases and alters our understanding of bedrock procedural elements essential to the fairness of capital trials, Ring is a watershed rule of criminal procedure that applies retroactively on collateral review.

V. ANALYSIS

In Summerlin, the Ninth Circuit correctly held that Ring is a new constitutional rule of criminal law that applies retroactively on collateral review. Despite being the first circuit to so hold, neither statutory nor case precedent dictates a contrary holding. Furthermore, the purposes of the Teague doctrine of retroactivity and public policy support the Ninth Circuit's conclusion that Ring challenges must be available to death row inmates like Summerlin, whose convictions became final before Ring was decided.

A. The AEDPA Does Not Preclude Summerlin from Applying Ring Retroactively

In the Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996, Congress codified the Teague doctrine of retroactivity. The AEDPA provides in pertinent part:

A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

... the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavail-

that deficient reasonable doubt jury instruction is structural error); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (holding entire administrative scheme unconstitutional where bankruptcy judges were delegated powers beyond those conferred to non-Article III judges).

132. Summerlin, 341 F.3d at 1118 (quoting Nguyen, 123 S. Ct. at 2137–38.

133. See id. at 1121.


135. See Gehring, supra note 45, at 208–09.
On its face, the AEDPA imposes a more restrictive standard than *Teague* for applying new rules retroactively. In particular, Congress declined to include *Teague*’s two exceptions for overcoming the presumption against nonretroactivity. Following the AEDPA’s enactment, two issues were unclear: (1) what Congress meant by the words “made retroactive,” and (2) whether *Teague*’s two exceptions were still good law.

In *Tyler v. Cain*, the Supreme Court stepped in to address the first issue. The Court held in *Tyler* that “a new rule is not ‘made retroactive to cases on collateral review’ unless the Supreme Court holds it to be retroactive.” Therefore, in cases governed by the AEDPA, post-conviction challenges based on new constitutional rules are permitted only when the Supreme Court has held that the new rules apply retroactively to cases on collateral review.

As to the second issue, some scholars have argued that the Supreme Court’s holding in *Tyler* “effectively eliminate[d] the two exceptions in *Teague v. Lane*, which in turn ma[de] the doctrine in *Teague* obsolete.” To the contrary, the *Teague* doctrine is not obsolete—*Teague* continues to determine a new rule’s retroactivity in cases like *Summerlin*, where the habeas corpus petition was filed before the AEDPA became effective.

When the Ninth Circuit issued its ruling in *Summerlin*, all but one of the circuits to consider *Ring*’s retroactivity analyzed the rule under the AEDPA standard. The Ninth Circuit, however, appro-

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137. See Gehring, *supra* note 45, at 209.
138. See id.
140. *Id.* at 663.
141. See *id.* at 662.
143. Moreover, a *Teague* analysis may be required even in cases governed by the AEDPA. “[I]n addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state.” Horn v. Banks, 536 U.S. 266, 272 (2002).
144. See Moore v. Kinney, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (en banc) (*Ring* not retroactive under AEDPA because the Supreme Court did not expressly hold *Ring* retroactive); Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002) (noting that *Ring* is not retroactive under AEDPA). At the time *Sum-
appropriately analyzed *Ring* under the *Teague* doctrine, not the AEDPA. As the court explained, "[b]ecause [Summerlin’s] petition for habeas corpus was filed before AEDPA’s effective date, pre-AEDPA law governs the petition."\(^{145}\) As a result, the Ninth Circuit was free to consider *Ring* in light of the *Teague* exceptions and decide that the second watershed rule exception provides a basis for applying *Ring* retroactively.

**B. Apprendi Does Not Preclude Ring From Applying Retroactively**

As discussed in Part I, the Supreme Court’s landmark holding in *Apprendi* declared 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."\(^{146}\) *Ring* is widely recognized as an extension of *Apprendi* to death penalty cases.\(^{147}\) Consequently, a frequently raised argument for not applying *Ring* retroactively is that courts have held *Apprendi* nonretroactive. Numerous courts addressing the issue, including the Ninth Circuit,\(^{148}\) have concluded that *Apprendi* is not a substantive rule, but rather a procedural rule that fails to meet the stringent requirements of *Teague*’s second exception.\(^{149}\) Therefore, some courts have held that, by logical necessity, "*Ring*, like *Apprendi*, does not apply retroactively on collateral review."\(^{150}\)

Concluding that *Ring* cannot be retroactive simply because *Apprendi* is not retroactive is unconvincing because it fails to recognize significant distinctions between *Apprendi* and *Ring*. For example, "the Supreme Court made clear in *Apprendi* that it was announcing a

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merlin was decided, only the Eleventh Circuit had addressed whether *Ring* is retroactive under the *Teague* doctrine. See Turner v. Crosby, 339 F.3d 1247, 1282–86 (11th Cir. 2003) (holding that *Ring* is a new procedural rule that does not fall within *Teague*’s second exception).


146. *Apprendi* v. New Jersey, 530 U.S. 466, 490 (2000); see also CRIMINAL LAW REPORTER, *supra* note 11 (discussing the *Ring* Court’s reliance on *Apprendi*).

147. See, e.g., Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002); Aumann, *supra* note 100, at 875.

148. See United States v. Sanchez-Cervantes, 282 F.3d 664, 670 (9th Cir. 2002).

149. See *Turner*, 339 F.3d at 1284.

150. Id. at 1286.
procedural rule only." The Supreme Court made no such pronouncement in Ring, which necessarily means the Court did not foreclose the Ninth Circuit's interpretation of Ring as a new substantive rule with retroactive effect. More significantly, Apprendi applies only to non-capital criminal cases. Ring, on the other hand, applies specifically to capital cases, where the Eighth Amendment demands heightened standards of fairness. Death penalty cases are fundamentally different than other criminal cases, so even if Apprendi is not retroactive, that fact does not necessarily mean Ring is not retroactive. Summerlin raised an issue of first impression in the Ninth Circuit, and absent an express pronouncement from the Supreme Court that Ring is not retroactive, case precedent does not decide Summerlin one way or the other.

C. Summerlin Is Consistent with the Purposes of the Great Writ

The current Supreme Court Justices hold differing views on the fundamental purpose of the writ of habeas corpus (the "Great Writ") and the retroactivity doctrine. As one commentator noted, "[t]his debate lies at the heart of Teague." Despite the fundamental difference between the minority and majority views of the Great Writ's purpose, both illustrate that the Ninth Circuit decided Summerlin correctly.

The minority believes that "the function of habeas corpus is to ensure that the conviction or sentence complies with the dictates of the Constitution, regardless of the good faith of the state courts." This interpretation allows a convicted prisoner to benefit from a favorable change in constitutional law even though he was properly convicted under the former law. Under the minority view, the Ninth Circuit correctly held that Summerlin was entitled to challenge his death sentence on collateral review despite the fact that, at the time of his conviction, Arizona's capital sentencing scheme was con-
The Supreme Court majority adheres to Justice Harlan's view that the primary purpose of habeas review is to "police the states and prevent unconstitutional practices."\(^{157}\) Indeed, *Teague*'s general rule against applying new procedural rules of criminal law retroactively appears to support Harlan's interpretation of the Great Writ's purpose. Certainly it is not misconduct for states to act in accordance with the Supreme Court's understanding of the Constitution. Thus, according to the majority view, most new constitutional rules of criminal procedure should not apply in a post-conviction collateral challenge "because at the time of the conviction, the states were operating within the dictates of the Constitution as it was then interpreted."\(^{158}\)

However, even the majority recognizes two significant exceptions to the general rule of nonretroactivity, as evidenced by the *Teague* doctrine. The first exception applies when a new procedural rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe."\(^{159}\) The second exception applies when a new procedural rule "seriously enhance[s] the accuracy of the proceeding" and "alter[s] our understanding of bedrock procedural elements essential to the fairness of the proceeding."\(^{160}\) When either of these two exceptions arises, the Supreme Court majority advocates retroactive application.

Clearly, then, the majority view allows a new rule of criminal procedure to have retroactive effect even in situations that have nothing to do with correcting state misconduct. Therefore, the majority view does not preclude the holding in *Summerlin* simply because Arizona convicted and sentenced Summerlin under a death penalty statute that was constitutional in 1984. On the contrary, even under the majority view, the Ninth Circuit decided *Summerlin* properly because *Ring* is a new procedural rule that applies retroactively under *Teague*'s second exception.

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157. *Id.*

158. *Id.*


D. Timing Should Not Make the Difference Between Life and Death

In *Summerlin*, the Ninth Circuit correctly decided that *Ring* applies retroactively. Had it reached a contrary decision, the court would have given its stamp of approval to a system in which "prisoners [would] now be executed by the state solely because of the happenstance that the Supreme Court recognized the correctness of their constitutional arguments too late."[^1]

Judge Reinhardt's impassioned concurrence reveals the injustice of denying a convicted criminal the right to collaterally challenge his unconstitutionally imposed death sentence. Reinhardt asked, "Can we justify executing those whose legal efforts had reached a certain point in our imperfect legal process on the day the Supreme Court changed its mind, while invalidating the death sentences of those whose cases were waiting slightly further down the line?"[^2] Commentator Michael Tigar, writing thirteen years before *Summerlin*, provided an answer to this very question: "[A] death sentence [sh]ould only be carried out if the standards of justice that led to it were fair as measured at the time of the proposed execution, and not at the time of the crime or at some point during the review process."[^3]

As announced by the Supreme Court in *Ring*, the Sixth Amendment mandates that a jury, not a judge, find the aggravating factors, other than a prior conviction, necessary to increase a defendant's sentence from life imprisonment to death. *Ring* extended the Court's holding in *Apprendi*, a decision in which "liberal and conservative Justices alike agreed . . . how very fundamental and basic is the principle that juries, not judges, must find sentence-determining facts."[^4] Whether *Ring* announced a new substantive rule or a "watershed rule" of criminal procedure, the constitutional rights it guarantees must be available to all defendants without regard to the timing of their appeals.

[^1]: Id. at 1124 (Reinhardt, J., concurring).
[^2]: Id. at 1125 (Reinhardt, J., concurring).
[^4]: Cassel, supra note 7.
VI. IMPLICATIONS OF SUMMERLIN

Summerlin has the potential to greatly affect death penalty jurisprudence. The immediate consequence of the decision was to grant death row inmates in Ninth Circuit states the ability to reopen their cases by challenging their unconstitutionally judge-imposed sentences on collateral review. Summerlin, therefore, "could lead to the technical commutation of sentences of more than 122 prisoners in Arizona, Montana, Nevada, and Idaho . . . the four states within the jurisdiction of the Ninth Circuit that utilize judges, not juries, to sentence defendants in capital cases."165

Not surprisingly, one criticism of Summerlin is that allowing post-conviction Ring challenges will open the floodgates and significantly burden our judicial system.166 This argument has the support of Justice O'Connor, who dissented in both Apprendi and Ring. In her Ring dissent, O'Connor reminded the majority of her earlier prediction that Apprendi would "unleash a flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of [that decision]."167 Arguably, by extending Apprendi to the death penalty context in Ring, and then by allowing Ring challenges on both direct and collateral review in Summerlin, an even greater number of convicted defendants will seek relief in the federal courts.

It is difficult to imagine, however, that the federal court system is so overburdened that it could not handle a few hundred more cases. As one commentator observed, "If our federal court system cannot handle these cases, when the challengers' very lives are at stake, what good is it?"168

Moreover, a Ring challenge on collateral review does not overturn the conviction so as to require a whole new trial.169 Instead, "[o]nly the sentence would be overturned . . . so all the evidence from the transcript of the previous trial would be available at the resentencing."170 The resentencing procedure would be relatively

165. Cassel, supra note 94.
166. See, e.g., Cassel, supra note 7.
168. Cassel, supra note 7.
169. See, e.g., Metzner, supra note 80, at 189.
170. Id.
straightforward, with the state presenting to the jury its aggravating circumstances, and the defendant offering any mitigating factors.\textsuperscript{171} It is unthinkable that the federal courts would deny defendants the right to challenge their unconstitutional death sentences simply because they are too busy. When the issue is a matter of life or death, the federal courts must find time to review unconstitutional sentences.

While \textit{Summerlin}'s impact on Ninth Circuit states that allow judges to impose death sentences is evident, it is premature to speculate how the case will affect states with "hybrid sentencing schemes in which the jury renders an advisory verdict but the judge makes the ultimate sentencing determination."\textsuperscript{172} Alabama, Delaware, Florida, and Indiana have such death penalty statutes, and when the Ninth Circuit decided \textit{Summerlin}, there were 632 inmates on death row in these states.\textsuperscript{173} At present, the Supreme Court has not decided that death sentences imposed under hybrid sentencing schemes violate the Sixth Amendment. However, \textit{Summerlin} seems to suggest that they do. Even when a jury finds the aggravating factors necessary to impose the death penalty, a judge, "a constitutionally-disqualified factfinder,"\textsuperscript{174} has the ability to override the jury's determination. When a judge uses his power to sentence a defendant to death over the jury's recommendation of life imprisonment, the effect is to render the jury's fact-finding authority moot. Perhaps addressing this issue will be the next step in the Supreme Court's evolving capital sentencing jurisprudence.

\textbf{VII. CONCLUSION}

The Supreme Court limited its grant of certiorari in \textit{Summerlin} to two questions:\textsuperscript{175}

(1) Did the Ninth Circuit err by holding that the new rule announced in \textit{Ring} is substantive, rather than procedural,

\begin{itemize}
\item \textsuperscript{171} See \textit{id}.
\item \textsuperscript{172} Ring v. Arizona, 536 U.S. 584, 621 (2002) (O'Connor, J., dissenting).
\item \textsuperscript{174} Summerlin v. Stewart, 341 F.3d 1082, 1116 (9th Cir. 2003) (en banc), \textit{cert. granted sub nom.} Schriro v. Summerlin, 124 S. Ct. 833 (2003).
\item \textsuperscript{175} Schriro v. Summerlin, 124 S. Ct. 833 (2003).
\end{itemize}
and therefore exempt from the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)?

(2) Did the Ninth Circuit err by alternatively holding that the new rule announced in *Ring* applies retroactively to cases on collateral review under *Teague*’s exception for watershed rules of criminal procedure that alter bedrock principles and seriously enhance the accuracy of the proceedings?176

As this Comment illustrates, the answer to each of these questions must be “no.” In *Summerlin*, the Ninth Circuit correctly concluded that *Ring* announced a new constitutional rule that must be applied retroactively to habeas corpus petitions. On the one hand, *Ring* is a substantive rule, in that it substantively changed the death penalty statutes in Arizona and other states that formerly allowed judges to determine facts necessary to increase a defendant’s sentence from life imprisonment to death. As a new substantive rule, *Ring* is presumptively retroactive without further consideration of the *Teague* doctrine of retroactivity. Additionally, *Ring* is a watershed rule of criminal procedure, and as such, applies retroactively under the second *Teague* exception.

Although statutory or legal precedent does not dictate the decision reached in *Summerlin*, the purposes of the *Teague* doctrine clearly warrant *Ring*’s retroactive application. Furthermore, there are strong public policy reasons for not condemning someone to death simply because of the timing of his appeal. The federal courts should provide a forum for convicted prisoners to challenge their death sentences whenever it becomes clear that the imposition of their sentences was unconstitutional. While *Summerlin* will undoubtedly impact states that allow judge-imposed death sentences, we have yet to see how the decision will affect other states with hybrid sentencing schemes.

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Capital sentencing demands the highest degree of fairness and patience. Therefore, the Supreme Court should uphold and affirm the fundamental principles and procedural safeguards recognized in *Summerlin*.

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* J.D. Candidate, May 2005, Loyola Law School, Los Angeles. My gratitude goes out to the editors and staff of the *Loyola of Los Angeles Law Review* for their valuable advice and assistance. Special thanks to Geoffrey Kertesz for working so tirelessly to bring this Comment to print. Above all, I thank my husband Dennis for his constant encouragement, love, and inspiration.