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Death Anyways: Federal Habeas Corpus Retroactivity Law and the Decision in *Schriro v. Summerlin*

It is the raw material from which legal fiction is forged: a vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge. But, as Mark Twain observed, "truth is often stranger than fiction because fiction has to make sense."[1]

The above commentary by the Ninth Circuit on Warren Wesley Summerlin's trip through the criminal justice system illustrates the bizarre circumstances of his case. In short, the criminal justice system failed him. After being charged with murder and having been appointed a lawyer who had a love affair with the prosecutor,[2] Summerlin was sentenced to death by a judge who may have confused the facts of Summerlin's case with those of another capital defendant sentenced to death by the same judge on the same day.[3] Summerlin challenged the constitutionality of having a judge determine his sentence at every turn, but he was continually denied relief.[4] Years after Summerlin exhausted his

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[1] Summerlin v. Stewart, 341 F.3d 1082, 1084 (9th Cir. 2003), *rev'd sub nom*. Schriro v. Summerlin, 124 S.Ct. 2519 (2004).

[2] *Summerlin*, 341 F.3d at 1085-87.

[3] *Id*. at 1089-91. The judge was later disbarred for marijuana use (including usage of marijuana during the period when Summerlin was sentenced to death). *Id*. at 1091; *see also In re* Disbarment of Marquardt, 503 U.S. 902 (1992); *In re* Marquardt, 821 P.2d 161 (Ariz. 1991).

[4] *Summerlin*, 341 F.3d at 1091-92.

direct appeals, the U.S. Supreme Court in *Ring v. Arizona* executed an about-face, overturning itself and embracing the argument Summerlin had pushed for so long: Arizona's capital sentencing scheme violated the Sixth Amendment right to a jury trial.[5] Despite the Supreme Court's decision that Arizona's capital sentencing structure was constitutionally flawed at the time Summerlin was sentenced, the state of Arizona continued its plan to execute him,[6] because new rules of criminal procedure do not usually apply retroactively.[7]

The Ninth Circuit heard Summerlin's case en banc and despite its observation that new rules of criminal procedure usually do not apply retroactively, the court held *Ring* should apply retroactively to Summerlin's case.[8] The court held there were two primary reasons for applying *Ring* retroactively: (1) the Supreme Court's holding in *Ring* was not a new rule of criminal procedure, but a new substantive rule of criminal law; and (2) even if the *Ring* holding was perceived as procedural, it fit one of the exceptions to the general presumption that new rules of criminal procedure do not apply retroactively.[9] This holding had the practical effect of overturning the death sentences of over one hundred prisoners in five different states.[10] Arguably, it also had the effect of lowering the bar for applying new constitutional rules of criminal procedure retroactively. Not surprisingly, the United States Supreme Court granted certiorari to review the Ninth Circuit's decision.[11]

In a five-to-four decision, the Supreme Court overturned the Ninth Circuit, holding that *Ring* does not apply retroactively to prisoners challenging their capital sentences in a collateral proceeding.[12] The Supreme Court first held that, contrary to the Court of Appeals' finding, *Ring* was not a new substantive rule, but a new constitutional rule of criminal *procedure*.[13] The Court also held that *Ring* did not apply retroactively under the *Teague* "watershed" exception because having a judge as the fact-finder

5 536 U.S. 584, 609 (2002).
6 *Summerlin*, 341 F.3d at 1091.
7 *Id*. at 1096.
8 *Id*. at 1084.
9 *Id.* at 1121.
10 *See* Adam Liptak, *Judges' Rulings Imposing Death are Overturned*, N.Y. TIMES, Sept. 3, 2003, at A1.
11 Schriro v. Summerlin, 540 U.S. 1045 (2003).
12 Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004).
13 *Id*. at 2524.

during the sentencing proceeding did not "seriously diminish" the accuracy of the sentencing proceeding.[14] The Supreme Court's opinion clarified *Teague* retroactivity law, reemphasized the "accuracy" element of the watershed exception to *Teague's* retroactivity bar, and maintained the overall narrowness of the watershed exception.

This Comment discusses both the Ninth Circuit's *Summerlin* and Supreme Court's *Schriro* opinions in an attempt to explain the two courts' reasoning and to illustrate the significant and contentious elements of the *Schriro* opinion. It is also the goal of this Comment to sketch the contours of retroactivity law on collateral review and to come to conclusions on the state of the law in such a way that it extends beyond the immediate case presented to the Supreme Court. This Comment will show that there are aspects of retroactivity law that could be substantially affected by a court following the reasoning employed by the Ninth Circuit in its *Summerlin* decision. In many ways, the Ninth Circuit's opinion would have significantly lowered the bar for when a new constitutional criminal rule is applied retroactively on collateral review. Finally, this Comment discusses the precedential effects that the Supreme Court's *Schriro* opinion will have on future retroactivity litigation by specifically focusing on *Schriro*'s impact on the possible retroactive application of *Blakely v. Washington*,[15] a new rule of criminal procedure announced by the Supreme Court that could affect thousands of cases. Because *Ring* (the rule examined in *Schriro*) and *Blakely* both derive from applications of the Court's holding in *Apprendi v. New Jersey*,[16] the Court's *Schriro* analysis will likely be extremely influential on the inevitable litigation over whether *Blakely* applies retroactively.

Part I of this Comment reviews the background law regarding retroactive application of new constitutional rules dealing with criminal matters on collateral review. Part II discusses the background law of Summerlin's case, including an explanation of the Supreme Court's *Ring* decision as well as a general discussion of retroactivity law. Part III explains the Ninth Circuit's holding and reasoning in Summerlin's case, and Part IV discusses these elements of the Supreme Court's opinion. Finally, Part V dis-

[14] *Id*. at 2525.

[15] 124 S. Ct. 2531 (2004).

[16] 530 U.S. 466 (2000).

cusses the implications of these decisions on retroactivity law. First, it begins by discussing the impact on retroactivity law of the Supreme Court's clarified discussion of the distinction between substantive and procedural rules. Second, it discusses the effect of the Court's *Schriro* opinion on the second *Teague* exception, explaining how the Court maintained an extremely high hurdle for petitioners to clear in order to have new constitutional rules of criminal procedure apply retroactively to them. To conclude, this Comment discusses *Schriro's* impact on *Blakely*, in an effort to illustrate the likely effects *Schriro* will have on that important case as well as other cases in the future.

I

FACTUAL AND PROCEDURAL HISTORY

On April 29, 1981, Warren Wesley Summerlin brutally murdered Brenna Bailey, a delinquent-account investigator who came to Summerlin's house to speak with his wife about an overdue account.[17] As a result of his actions, Summerlin was convicted of both first-degree murder and sexual assault.[18] Pursuant to Arizona state law at the time, Summerlin received a sentencing hearing over which the trial judge presided to determine whether Summerlin would be sentenced to life imprisonment or death.[19] The judge sentenced Summerlin to death.[20]

Summerlin appealed his conviction and sentence.[21] One of the issues Summerlin raised on appeal was that Arizona's law of a judge, not a jury, sentencing him to death was unconstitutional.[22] However, the Arizona Supreme Court rejected that argument, along with the rest of his claims, and affirmed Summerlin's conviction and death sentence.[23]

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[17] Summerlin v. Stewart, 341 F.3d 1082, 1084-85 (9th Cir. 2003), *rev'd sub nom*. Schriro v. Summerlin, 124 S. Ct. 2519 (2004).

[18] *Summerlin*, 341 F.3d at 1088.

[19] *Id*. at 1088-89; *see also* ARIZ. REV. STAT. ANN. § 13-703 (West 1983) (amended 2002).

[20] *Summerlin*, 341 F.3d. at 1089. The sentencing hearing was extremely short. It began with the State submitting one exhibit and then asking the judge to consider the trial testimony. *Id*. Summerlin's attorney then called a doctor who had conducted a psychological evaluation on Summerlin, *id*. at 1085-86, but Summerlin told his attorney that he did not want the doctor to testify. *Id*. at 1089. The State concluded the sentencing hearing by calling two rebuttal psychiatric witnesses. *Id*.

[21] State v. Summerlin, 675 P.2d 686 (Ariz. 1983).

[22] *Id*. at 695.

[23] *Id*. at 696.

Summerlin next attempted to have his conviction overturned four different times in state court, all to no avail.[24] He then petitioned for a writ of habeas corpus in federal district court but was once again denied.[25] He appealed this judgment and a divided three-judge panel of the Ninth Circuit Court of Appeals reversed his conviction in part and remanded to the federal district court for an evidentiary hearing to determine whether Summerlin's sentencing judge was competent when he sentenced Summerlin to death.[26]

In the meantime, the United States Supreme Court granted certiorari in *State v. Ring*[27] to reexamine whether Arizona's capital sentencing scheme, which allowed judges to find the facts necessary to sentence persons to death, was constitutional.[28] This was an issue Summerlin had raised both at the state and federal levels, thus far with no success.[29] Accordingly, the Ninth Circuit withdrew its decision to remand the case to the district court for an evidentiary hearing and deferred submission of the case until the United States Supreme Court resolved *Ring*.[30] Undoubtedly to Summerlin's satisfaction, in *Ring v. Arizona*[31] the Supreme Court held that Arizona's capital sentencing procedure of having judges determine the aggravating factors necessary to impose a sentence of death violated the Sixth Amendment right to a trial by jury.[32]

Following *Ring*, Summerlin requested that the Arizona Supreme Court recall the mandate in his direct appeal to apply *Ring* to his case.[33] The Arizona Supreme Court denied Summerlin's motion to recall the mandate[34] and the Ninth Circuit voted to rehear Summerlin's case en banc.[35]

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[24] *Summerlin*, 341 F.3d at 1091.

[25] *Id*.

[26] Summerlin v. Stewart, 267 F.3d 926, 957 (9th Cir. 2001).

[27] 200 Ariz. 267 (2001), *rev'd*, 536 U.S. 584 (2002).

[28] *Summerlin*, 341 F.3d at 1091.

[29] *Id*.

[30] Summerlin v. Stewart, 281 F.3d 836, 837 (9th Cir. 2002).

[31] 536 U.S. 584 (2002).

[32] *Id*. at 609. *See also* U.S. CONST. amend. VI.

[33] *Summerlin*, 341 F.3d at 1091.

[34] *Id*.

[35] Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002).

II

BACKGROUND LAW

A. The Ring *Ruling and Related Authority*

Because the primary issue the Supreme Court decided in *Summerlin* was whether its holding in *Ring* applied retroactively, it is worth first discussing the *Ring* decision. In that case, Ring was convicted of felony murder.[36] As with the law under which Summerlin was sentenced, Ring was sentenced to death after a judge found aggravating factors that supported a death sentence.[37] Ring appealed his sentence, arguing "Arizona's capital sentencing scheme violate[d] the Sixth and Fourteenth Amendments to the U.S. Constitution because it entrust[ed] to a judge the finding of a fact raising the defendant's maximum penalty."[38]

The State of Arizona relied on *Walton v. Arizona*,[39] a United States Supreme Court opinion that upheld Arizona's capital sentencing scheme.[40] In *Walton*, the Court held that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'"[41] The Court noted the aggravating factors necessary to be found by a judge before imposition of a death sentence were not "elements of the offense," but were more like "sentencing considerations."[42]

Despite this obviously persuasive precedent, Ring relied on two recent Supreme Court cases that cast doubt on *Walton*'s validity.[43] In the first, *Jones v. United States*,[44] the Supreme Court held:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.[45]

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36 Ring v. Arizona, 536 U.S. 584, 591 (2002).
37 *Id.* at 592.
38 *Id*. at 595.
39 497 U.S. 639 (1990).
40 *Ring*, 536 U.S. at 595.
41 Walton v. Arizona, 497 U.S. 639, 648 (1990) (quoting Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per curiam)).
42 *Id*. at 648.
43 *Ring*, 536 U.S. at 595.
44 526 U.S. 227 (1999).
45 *Id*. at 243 n.6.

The second helpful opinion to Ring's case was *Apprendi v. New Jersey*.[46] In that case, Apprendi fired several shots into the home of an African-American family.[47] He pleaded guilty to possession of a firearm, a conviction that, standing on its own, carried a maximum sentence of ten years.[48] However, after the plea was entered the prosecutor filed a motion to enhance Apprendi's sentence based on a state hate-crime statute.[49] That statute allowed a sentencing judge to enhance a sentence beyond the statutory maximum when the judge found by a preponderance of evidence that the crime was committed with the purpose of intimidating a person or group because of race.[50] The judge in Apprendi's case found the crime was racially motivated and sentenced Apprendi to twelve years in prison, two years beyond the statutory maximum without the aggravating factor.[51]

The *Apprendi* Court held that this practice of allowing a sentencing judge to find the racial motivation aggravator, by only a preponderance of evidence, violated the Sixth Amendment right to a jury and the Fourteenth Amendment's right to due process of law.[52] The Court reasoned that the state "threatened Apprendi with certain pains if he unlawfully possessed a weapon and with *additional* pains if he selected his victims with a purpose to intimidate them because of their race."[53] The Court stated that determining whether a factor for a greater sentence was a "finding of fact," therefore subject to the Sixth Amendment right to a jury and the state's burden of proof beyond a reasonable doubt, or a mere "sentencing factor," properly determined by a sentencing judge, is a question "not of form, but of effect."[54]

Rather than overruling *Walton*, the *Apprendi* Court concluded that Apprendi's case was distinguishable.[55] The Court explained that when a capital sentencing judge was required to find aggra-

[46] 530 U.S. 466 (2000).
[47] *Id*. at 469.
[48] *Id*. at 470.
[49] *Id*.
[50] *Id*. at 468-69.
[51] *Id*. at 471.
[52] *Id*. at 477. The role of the Fourteenth Amendment in *Apprendi* was more than holding the Sixth Amendment against the State of Arizona. The Due Process Clause also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re* Winship, 397 U.S. 358, 364 (1970).
[53] *Apprendi*, 530 U.S. at 476 (emphasis added).
[54] *Id*. at 494, 482-83.
[55] *Id*. at 496-97.

vating factors to impose a death sentence, the jury had already decided the defendant was guilty of capital murder with a maximum penalty of death.[56] In that situation, the judge merely determines whether that maximum penalty should be imposed.[57] Justice O'Connor's dissent called this distinction "baffling."[58] Justice O'Connor quite persuasively noted "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment."[59]

In *Ring*, however, the Court held "*Walton* and *Apprendi* [were] irreconcilable," and overruled the former.[60] It overruled *Walton* "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' [and] the Sixth Amendment requires that they be found by a jury."[61] In other words, the Court held that a capital sentencing scheme violates the Sixth Amendment "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[62] The Court reasoned that "in effect," the finding of a death sentence under Arizona law required a finding of fact.[63] It noted that Arizona's *labeling* the required aggravating findings "sentencing factors" would not mean the Sixth Amendment does not apply.[64] Accepting such an argument would reduce *Apprendi* "to a 'meaningless and formalistic' rule of statutory drafting."[65]

B. Retroactivity and Teague v. Lane

When the Supreme Court issues a new constitutional rule, one might intuitively think the new rule would apply to every citizen of the United States. In fact, new judicial rulings generally apply

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[56] *Id*.
[57] *Id*.
[58] *Id*. at 538 (O'Connor, J., dissenting).
[59] *Id*.
[60] Ring v. Arizona, 536 U.S. 584, 609 (2002).
[61] *Id*. (quoting *Apprendi*, 530 U.S. at 494 n.19).
[62] 536 U.S. at 609.
[63] *Id*. at 604.
[64] *Id*.
[65] *Id*. (quoting *Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting)).

both prospectively and retroactively.[66] However, there are some situations where the Supreme Court will not apply judicial rulings retroactively.[67] In the landmark case *Teague v. Lane*,[68] the Supreme Court held that new constitutional rules of *criminal procedure* is one of those areas, at least with respect to cases that are considered final before the new rule is announced.[69] The Court held that for such rules there is a presumption against applying the rule retroactively, stating, "[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."[70] That is, a new rule of criminal procedure will not affect persons who have exhausted their direct appeals and are challenging their convictions or sentences on a collateral attack.

In coming to its determination that constitutional rules of criminal procedure generally would not be applied retroactively, the Court noted in *Teague* that it "never has defined the scope of the writ [of habeas corpus] simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error,"[71] but rather has "recognized that interests of comity and finality must . . . be considered in determining the proper scope of habeas review."[72] Although many have noted that nonretroactivity leads to arbitrarily denying some defendants their constitutional rights because the judiciary-created errors were corrected too late,[73] the Court highlighted the frustrations of applying new constitutional rules of criminal procedure on collateral review: a lack of finality, which undermines the

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66 *See, e.g.*, 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, § 25.2, at 1034 n.1 (4th ed. 2001), which cites Landgraf v. USI Film Prods., 511 U.S. 244, 264 (1994) (noting general "rule that 'a court is to apply the law in effect at the time it renders its decision'") (quoting Bradley v. Richmond Sch. Bd., 416 U.S. 696, 711 (1994)).

67 *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 627 (1965).

68 489 U.S. 288 (1989) (plurality).

69 *Id*. at 310.

70 *Id*.

71 *Id*. at 308 (quoting Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986)) (plurality opinion).

72 489 U.S. at 308.

73 *See, e.g.*, Summerlin v. Stewart, 341 F.3d 1082, 1122 (Reinhardt, J., concurring) ("[E]xecuting people because their cases came too early—because their appeals ended before the Supreme Court belatedly came to the realization that it had made a grievous constitutional error . . . is surely arbitrariness that surpasses all bounds.").

entire criminal process.[74]

However, *Teague* stated two exceptions to the general presumption against retroactive application of new rules of criminal procedure: (1) if the rule "place[d] certain kinds of primary, private individual conduct beyond the criminal law-making authority to proscribe";[75] or (2) if the rule "require[d] the observance of those procedures that . . . are implicit in the concept of ordered liberty."[76] There are two elements to the Court's second exception to the rule of nonretroactivity for constitutional rules of criminal procedure.[77] First, the new rule must be a "watershed rule of criminal procedure" that "will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[78] Second, the new rule must "significantly improve the pre-existing factfinding procedures,"[79] in a way that "the likelihood of an accurate conviction [has been] seriously diminished."[80] The Court has noted this second exception is quite narrow and should be employed on an infrequent basis.[81] In fact, in *Beard v. Banks* the Supreme Court recently noted that "because any qualifying rule 'would be so central to an accurate determination of innocence or guilt . . .'

[74] *Teague*, 489 U.S. at 309, 310 ("Without finality, the criminal law is deprived of much of its deterrent effect.") ("[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.) (quoting Engle v. Isaac, 456 U.S. 107, 108 n.33).

[75] *Teague*, 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (Harlan, J., concurring in part and dissenting in part)).

[76] *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). Although *Teague* was a plurality opinion, the next year a majority of justices made clear that the opinion substantially limited the retroactive application of new constitutional rules of criminal procedure to these two narrow exceptions for cases that reached the habeas corpus stage before the new rule was announced. *See* Sawyer v. Smith, 497 U.S. 227, 241 (1990); Saffle v. Parks, 494 U.S. 484, 487-88 (1990); Butler v. McKellar, 494 U.S. 407, 409 (1990).

[77] *Teague*, 489 U.S. at 312.

[78] *Id*. at 311 (quoting *Mackey*, 401 U.S. at 693-94 (Harlan, J., concurring in part and dissenting in part)).

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

[80] *Teague*, 489 U.S. at 313.

[81] *See, e.g.*, Graham v. Collins, 506 U.S. 461, 478 (1993) (the second exception "clearly meant to apply only to a small core of rules"); *Sawyer*, 497 U.S. at 243 ("[I]t is 'unlikely that many such components of basis due process have yet to emerge.'") (quoting *Teague*); Spaziano v. Singletary, 36 F.3d 1028, 1043 (11th Cir. 1994) (stating a new rule under the second exception "must be so fundamentally important that its announcement is a 'groundbreaking occurrence'") (quoting Caspari v. Bohlen, 510 U.S. 383, 396 (1994)).

it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception."[82] Further, the Court noted that "[i]n providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon v. Wainwright* . . . (right to counsel), and only to this rule,"[83] which indicates a very narrow view of the second *Teague* exception.[84] Indeed, the same year *Teague* was announced, in *Penry v. Lynaugh*, the Court held the *Teague* nonretroactivity rule applied in capital cases.[85] Although *Teague* exceptions are supposed to be rare, this holding was surprising because it essentially approved death sentences to persons who were denied certain procedural rights while there was still an opportunity to remedy the wrong.

In *Bousley v. United States*, the Court clarified that this *Teague* analysis only applies to new *procedural* rules, not *substantive* ones.[86] Accordingly, a new constitutional rule will not be barred from applying retroactively by *Teague* if it is a new substantive rule.[87] Further, because new rules of substantive criminal law generally apply retroactively,[88] determining whether a new rule is substantive or procedural is critical. Although determining whether a new rule is procedural or substantive can be difficult,[89] in *Bousley* the Court provided some guidance. A decision of "substantive criminal law," the Court stated, is one that addresses the scope and application of a substantive federal criminal statute.[90] The Court did not speak as to what is a rule of procedure.

Of course, another issue that must be dealt with before a court

[82] 124 S. Ct. 2504, 2513-14 (2004) (quoting Graham v. Collins, 506 U.S. 461, 478 (1993) (quoting *Teague*, 489 U.S. at 313)). Interestingly, *Beard* was decided by the Supreme Court on the same day it decided Summerlin's case. *Compare Beard*, 124 S. Ct. at 2504 *with* Schriro v. Summerlin, 124 S. Ct. 2519 (2004).

[83] *Beard*, 124 S. Ct. at 2514 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

[84] *Beard*, 124 S. Ct. at 2514; Saffle v. Parks, 494 U.S. 484, 495 (1990); Teague v. Lane, 489 U.S. 288, 311-12 (1989) (plurality opinion); Solem v. Stumes, 465 U.S. 638, 653-54, 644 n.4 (1984) (Powell, J., concurring).

[85] Penry v. Lynaugh, 492 U.S. 302, 314 (1989).

[86] Bousley v. United States, 523 U.S. 614, 620 (1998).

[87] *Id*.

[88] *See, e.g.*, Coleman v. United States, 329 F.3d 77, 83 (2d Cir. 2003); Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001); Palmer v. Clarke, 293 F. Supp. 2d 1011, 1053 (D. Neb. 2003).

[89] *See, e.g.*, Robinson v. Neil, 409 U.S. 505, 509 (1973) ("[W]e would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other.").

[90] *Bousley*, 523 U.S. at 620.

evaluates whether a new rule of criminal procedure falls into one of the two *Teague* exceptions is whether the rule is in fact "new."[91] Determining whether a rule is new, as the Court noted in *Teague*, can also be difficult.[92] However, the *Teague* court stated that:

> In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . . To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.[93]

Although the Court has found it difficult to determine whether a rule is new, in cases where a new case extends an old rule,[94] the Court has been quite clear when a case overrules an older one: "[T]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision."[95]

In *O'Dell v. Netherland*,[96] the Supreme Court pulled all these issues together, laying out three elements a court must address under *Teague*: (1) the court must determine the date on which the defendant's conviction became final; (2) the court must determine whether "a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution";[97] and if not, then (3) whether the new rule falls into one of the two *Teague* exceptions discussed above.[98]

By the time the Ninth Circuit issued its opinion in *Summerlin*, the Eleventh Circuit Court of Appeals had already decided the

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91 Whether a rule is "new," for retroactivity purposes, is a matter of law and reviewed by federal courts de novo. *See, e.g.*, Am. Trucking Ass'n v. Smith, 496 U.S. 167, 177 (1990) (plurality opinion) ("The determination whether a constitutional decision of this Court is retroactive . . . is a matter of federal law.").

92 Teague v. Lane, 489 U.S. 288, 301 (1989).

93 *Id*. (citations omitted).

94 Saffle v. Park, 494 U.S. 484, 488 (1990). For a thorough discussion of the Court's difficulty in defining what constitutes a new rule, and its accordingly complex jurisprudence in this area, see 2 HERTZ & LIEBMAN, *supra* note 66, at 1064-1106.

95 Graham v. Collins, 506 U.S. 461, 467 (1993). *See also Saffle*, 494 U.S. at 488 (1990) ("The explicit overruling of an earlier holding no doubt creates a new rule.").

96 521 U.S. 151 (1997).

97 *Id*. at 156 (quoting Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (quoting *Saffle*, 494 U.S. at 488 (alterations in *Lambrix*)).

98 521 U.S. at 156. This approach was recently reaffirmed by the Supreme Court. *See* Beard v. Banks, 124 S. Ct. 2504, 2510 (2004).

exact issue of whether *Ring* applied retroactively under the *Teague* doctrine.[99] In *Turner*, the court first held that *Ring* announced a procedural rule, rather than a substantive one.[100] It reasoned that *Ring* was a procedural rule because it only affected "what fact-finding procedure must be employed in a capital sentencing hearing."[101] Further, *Ring* did not change the underlying conduct or the burden of proof necessary to impose a death sentence.[102] The court also argued *Ring's* holding was "procedural" because it was a mere extension of *Apprendi*, a ruling that numerous courts had already held was procedural.[103]

In *Turner*, the Eleventh Circuit also held that the rule from *Ring* did not fit either of the two exceptions stated in *Teague*.[104] The court noted that the first *Teague* exception clearly does not apply to the Supreme Court's *Ring* holding because it did not "decriminalize any class of conduct or prohibit a certain category of punishment."[105] Next, the court found that *Ring* was not a "watershed" rule that fit the second *Teague* exception because its purpose was not to improve the accuracy of the sentencing process.[106] It argued that the new rule merely shifted "fact-finding duties" from an impartial judge to an impartial jury.[107] The point of *Ring* was not a problem with judges' conducting sentencing,

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[99] Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003). The Ninth Circuit noted the Eleventh Circuit's opinion. *See* Summerlin v. Stewart, 341 F.3d 1082, 1096 n.4 (9th Cir. 2003). Another case that spoke directly to this issue was the Arizona Supreme Court's application of *Teague* to the *Ring* rule. State v. Towery, 64 P.3d 828 (Ariz. 2003). In that case, the Arizona Supreme Court held that *Teague* barred the United States Supreme Court's *Ring* holding from applying retroactively to the State's prisoners with death sentences. *Towery*, 64 P.3d at 830. The Ninth Circuit took note of the Arizona Supreme Court's decision, but heavily criticized it and eventually went the other way from the state court's holding. *Summerlin*, 341 F.3d at 1106-07. The Tenth Circuit Court of Appeals also held that *Ring* was not a substantive rule when the Ninth Circuit decided *Summerlin*. Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002). Finally, Nevada's Supreme Court also held that *Ring* did not apply retroactively under the *Teague* standard. Colwell v. State, 59 P.3d 463, 470-73 (Nev. 2002).

[100] *Turner*, 339 F.3d at 1284.

[101] *Id*.

[102] *Id.*

[103] *Id*. The Supreme Court, in *Apprendi*, stated that its holding was procedural and did not go to the substance of the offense. Apprendi v. New Jersey, 530 U.S. 466, 475 (2000).

[104] *Turner*, 339 F.3d at 1285.

[105] *Id*. (quoting McCoy v. United States, 266 F.3d 1245, 1256-57 (11th Cir. 2001) (internal quotations omitted)).

[106] *Turner*, 339 F.3d at 1286.

[107] *Id*.

but was an enlightened reading of the Sixth Amendment.[108]

III

THE NINTH CIRCUIT'S HOLDING AND RATIONALE IN *SUMMERLIN V. STEWART*

The Ninth Circuit had two alternative holdings for applying *Ring* retroactively.[109] First, it found that the *Ring* holding, although partially procedural for *Teague* purposes, was a ruling of substantive criminal law. Because *Ring* affected the substance of criminal law, the court held it was not subject to the Supreme Court's ruling in *Teague*.[110] Second, the Ninth Circuit held that even if *Ring* were seen as a procedural rule, it still fit the second exception stated in *Teague*: the holding was a watershed rule that improved the accuracy of the underlying proceeding.[111]

A. Ring *Announced a New Substantive Rule of Criminal Law*

In *Summerlin*, the Ninth Circuit first noted that *Ring* created at least a partially procedural rule.[112] The court observed that *Ring* really just changed who found the facts, from judge to jury.[113] However, it found that *Ring* went beyond that simple facial change of "who decides." The court also found that the rule at issue in *Ring,* despite being partially procedural, was a new substantive rule for *Teague* purposes.[114]

The Ninth Circuit used an intriguing argument to find that the Supreme Court established a new substantive rule in *Ring*. It observed that prior to *Ring,* the State claimed a jury was deciding, at the original criminal trial, whether the defendant was guilty of *capital* murder.[115] The State's theory, then, was that the judge was imposing a sentence on the jury's already-determined capital murder verdict. However, as *Ring* pointed out, this was not really the case. Rather, the jury decided whether the defendant was guilty of murder, as charged in the indictment, and then the judge determined whether aggravating factors, which were termed the "functional equivalent" of criminal elements by the

[108] *Id.*
[109] *Id*. at 1108.
[110] *Id*. at 1099-1108.
[111] *Id*. at 1108-21.
[112] *Id*. at 1101.
[113] *Id*.
[114] *Id*.
[115] *Id*. at 1101-02.

Ring Court,[116] were present before the judge had statutory authority to impose a death sentence. The way the Ninth Circuit saw it, the *Ring* Court created an entirely new substantive structure of murder law in Arizona—murder at the trial level and *capital* murder at the sentencing level, for which one would receive the death penalty.[117] The court called this reordering of murder law a change from one offense (capital murder), pre-*Ring*, to a two-offense structure, post-*Ring*.[118]

To better understand how the Ninth Circuit saw a substantive change in law after *Ring*, it is helpful to consider what the Supreme Court said in *Ring*. There the Court reasoned that Arizona could not have judges finding the aggravating factors necessary to impose a death sentence, because those were factual findings subject to the Sixth Amendment and Fourteenth Amendment guarantee to a jury finding facts beyond a reasonable doubt.[119] Accordingly, if a jury is necessary at the sentencing level, there is no difference between the trial for innocence and guilt (termed simple "murder" by the Ninth Circuit) and the trial for death or life imprisonment (termed "capital murder" by the Ninth Circuit). Elements must be found at each stage. If elements must be found at the sentencing stage, and not mere sentencing factors, then the Supreme Court, theoretically speaking, created a new substantive law. Put into its shortest form, capital murder is the highest kind of "murder" in Arizona.

To support this perception of the holding in *Ring*, the Ninth Circuit examined the history of capital sentencing in Arizona.[120] The court noted that from 1919 to 1972, Arizona left capital sentencing in the complete discretion of the jury.[121] However, in the wake of *Furman v. Georgia*,[122] finding complete discretion of judge or jury unconstitutional, Arizona's substantive capital sentencing structure was eliminated.[123] After 1973, Arizona judges determined whether a defendant would be sentenced to death,[124] with various changes to its structure mandated by Supreme Court

116 Ring v. Arizona, 536 U.S. 584, 609 (2002) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

117 Summerlin v. Stewart, 341 F.3d 1082, 1104-05 (9th Cir. 2003).

118 *Id*. at 1105.

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

120 *Summerlin*, 341 F.3d at 1102-05.

121 *Id*. at 1102.

122 408 U.S. 238 (1972) (per curiam).

123 *Summerlin*, 341 F.3d at 1103 (citing *In re* Tarr, 109 Ariz. 264 (1973)).

124 *Summerlin*, 341 F.3d at 1102-03.

decisions.[125] The court of appeals then discussed its opinion in *Adamson v. Ricketts*,[126] where it held the Arizona capital sentencing structure's aggravating factors were elements of the distinct offense of *capital* murder.[127] However, the Ninth Circuit's opinion in *Adamson* was overruled by the Supreme Court's decision in *Walton*.[128] According to the court's reasoning, once *Ring* overruled *Walton*, the Ninth Circuit's interpretation that the aggravating factors were elements of the distinct crime of capital murder was restored.[129]

In noting that *Ring* was both a procedural and substantive decision, the Ninth Circuit found that all states must comply with the minimum procedural requirements outlined in *Ring*.[130] However, the court went on to state, as described above, that *Ring* was a substantive decision that should be applied retroactively.[131]

Because *Ring* merely extended the reasoning from *Apprendi*, and because the Ninth Circuit, and all other circuits, had found *Apprendi* was a procedural rule not applying retroactively,[132] the court distinguished *Ring* and *Apprendi* on the substantive/procedural distinction.[133] It reasoned that in *Apprendi* the Supreme Court directly stated New Jersey's substantive criminal law was not at issue,[134] but in *Ring* the substantive law was at issue.[135] By the Ninth Circuit's reasoning, the Supreme Court rendered a "wholesale invalidation of Arizona's capital sentencing

125 *See, e.g.,* Alford v. Eyman, 408 U.S. 939 (1972); Lockett v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978).

126 865 F.2d 1011 (9th Cir. 1988) (en banc).

127 *Summerlin*, 341 F.3d at 1104.

128 *Id*.

129 *Id*. at 1104-05.

130 *Id*. at 1106.

131 *Id*.

132 *See, e.g.*, United States v. Buckland, 289 F.3d 558, 564 (9th Cir. 2003) (en banc) (holding that *Apprendi* was not a substantive determination, but applying the rule retroactively nevertheless, because the care arose on direct review); Goode v. United States, 305 F.3d 378, 382-85 (6th Cir. 2002); United States v. Sanchez-Cervantes, 282 F.3d 664, 670 (9th Cir. 2002) (holding *Apprendi* did not apply retroactively under a *Teague* analysis for a case on collateral review); McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001); United States v. Moss, 252 F.3d 993, 999-1000 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 149-51 (4th Cir. 2001).

133 *Summerlin*, 341 F.3d at 1101-02, 1102 n.9.

134 *Id*. at 1101 (citing Apprendi v. New Jersey, 530 U.S. 466, 475 (2000)).

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

scheme."[136] The court relied on its reasoning that in capital cases the circumstances are unique in that the two crimes of capital murder and plain murder were split apart from the old (and unconstitutional) structure of just *one* class of murder, and that in creating such a new dichotomized structure in *Ring*, the Supreme Court had struck down the entire substantive law of murder in Arizona.[137]

B. Teague *Analysis*

Applying the three-step *Teague* analysis described above, the Ninth Circuit first observed that Summerlin's conviction was final when the Arizona Supreme Court denied "rehearing of its opinion affirming his conviction and death sentence in 1984."[138] The court next determined that *Ring* announced a new rule that was not available to the Arizona courts before Summerlin exhausted all of his direct appeals.[139]

The court went on to determine whether either of the *Teague* exceptions applied to the *Ring* holding.[140] The Ninth Circuit first held that "[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 [*Teague*] exception is inapplicable' to the instant ruling."[141] However, the court also held that the *Ring* holding, if seen as a new procedural rule, fit the second *Teague* exception, thereby providing an alternative reason for applying the new constitutional rule retroactively.[142]

The court had several grounds for finding that *Ring* enhanced the accuracy of the proceeding.[143] First, the court found that the new rule, on its face, improved the accuracy of the sentencing proceeding.[144] The court, citing *Sawyer v. Smith*,[145] noted that all capital sentencing procedures are aimed at improving the reliability and accuracy of the proceeding at issue.[146]

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136 *Id*.

137 *Id*.

138 *Id*. at 1108 (citing State v. Summerlin, 675 P.2d 686 (Ariz. 1984)).

139 *Summerlin*, 341 F.3d at 1109.

140 *Id*.

141 *Id*. (quoting Graham v. Collins, 506 U.S. 461, 477 (1993) (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).

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

143 *Id*. at 1110-16.

144 *Id*. at 1110.

145 497 U.S. 227, 243 (1990).

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

Second, the court found that "fact-finding by a jury, rather than by a judge, is more likely to heighten the accuracy of capital sentencing proceedings."[147] It observed that sentencing proceedings with juries tend to resemble trial-like settings, with "orderly presentation of evidence and argument."[148] The court noted penalty-phases presented to judges resembled mere ordinary sentencing proceedings.[149] It also argued that this resulted in a significant amount of inadmissible evidence being used to decide a defendant's fate.[150] The court believed that these problems with the sentencing proceedings presented to judges led to less accurate determinations than would an orderly presentation to a jury.[151]

Third, the court argued that a large part of capital sentencing is the moral decision of deciding when a person should be sentenced to death.[152] It noted that a jury is better equipped to express the moral decision of whether to sentence a capital defendant to death because jurors are people from the community of the defendant.[153] Also, because judges regularly sentence criminal defendants and may even regularly confront death penalty cases, the judge may be "hardened," or at least far "less likely to reflect the current conscience of the community."[154] Finally, the court of appeals noted that judges are affected by political pressures from having to run for office, suggesting that judges facing political pressure are more likely to impose the death penalty.[155]

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147 *Id*.

148 *Id*.

149 *Id*. at 1110-11.

150 *Id*. at 1111-12.

151 *Id*. at 1113.

152 *Id.*

153 *Id*.

154 *Id*. at 1114.

155 *Id*. (citing John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 470-75 (1999)); Stephen B. Bright et al., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases*, 31 COLUM. HUM. RTS. L. REV. 123 *passim* (1999); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793-94 (1995); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 62 (2002); *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 270-73 (1994); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1039-44 (1999).

The Ninth Circuit also found that *Ring* announced a new watershed rule.[156] It first found the *Ring* ruling "fundamentally altered the procedural structure of capital sentencing applicable to all states."[157] This restructuring of capital sentencing was so fundamental, according to the court, that it was a structural change in capital sentencing procedure that led to a finding that *Ring* was a watershed rule.[158] Providing support for the finding that *Ring* announced a "structural" change in capital sentencing was the fact that *Ring* error is not capable of harmless-error review.[159] The court pointed out that because "the wrong entity found Summerlin to be guilty of a capital crime . . . there was no jury verdict within the meaning of the Sixth Amendment and no constitutionally cognizable finding to review."[160] Put another way, the court could only speculate as to what the effect of the error in Summerlin's sentencing proceeding was because Summerlin was provided the wrong fact-finder and the court would have to guess what a "hypothetical jury" would have done.[161] The court concluded by stating that "*Ring* error is one 'affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'"[162]

To complete its watershed analysis, the court of appeals examined whether *Ring* was "truly watershed," and so fundamental that it announced a right "implicit in the concept of ordered liberty."[163] The Ninth Circuit found *Ring* was such a ruling.[164] It first noted *Ring*'s impact was far greater than the impact of the "*Mills/McKoy*" rule which was found to be a "watershed rule" by other circuits.[165] The *Mills/McKoy* rule holds that a state may not limit mitigating evidence from the jury's consideration of a capital sentence, even if the jury is not unninanimous in finding

156 *Summerlin*, 341 F.3d at 1116-21.

157 *Id*. at 1116.

158 *Id*.

159 *Id*. at 1116-17.

160 *Id*. at 1117.

161 *Id*. (citing Sullivan v. Louisiana, 508 U.S. 275, 280 (1993)); Bollenbach v. United States, 326 U.S. 607, 614 (1946).

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

163 *Summerlin*, 341 F.3d at 1119 (citations omitted).

164 *Id*. at 1121.

165 *Id*. at 1120. Ironically, after the Ninth Circuit issued its *Summerlin* opinion, the Supreme Court held that the new *Mills* rule does not apply retroactively, specifically noting that *Mills*/*McKoy* did not announce a new watershed rule. Beard v. Banks, 124 S. Ct. 2504, 2508 (2004).

the mitigating evidence.[166] Comparing the *Ring* rule to the *Mills/McKoy* rule, the Ninth Circuit observed that "*Ring* does not merely announce a supplemental procedural safeguard."[167] The court also noted that *Ring* rendered the constitutionality of one-fourth of capital punishment states' sentencing procedures invalid, and affected every single capital sentencing scheme in the country.[168] Accordingly, *Ring* "altered the fundamental bedrock principles applicable to capital murder trials."[169]

The Ninth Circuit also had to distinguish *Ring* from *Apprendi* because in *United States v. Sanchez-Cervantes*, the Ninth Circuit held *Apprendi* did not apply retroactively under a *Teague* analysis.[170] Clearly, holding *Apprendi* not to apply retroactively was related to whether the court should hold that *Ring* applies retroactively, because the Supreme Court had stated *Ring* was merely an extension of *Apprendi*. The court distinguished *Apprendi* from *Ring*, for retroactivity purposes, in at least five ways: (1) *Apprendi* was not a decision of substantive law, in that it did not declare the statute unconstitutional; (2) *Apprendi* errors are not structural and are subject to harmless-error review; (3) *Apprendi* did not improve the accuracy of the sentencing proceeding and it was not sweeping because it would apply only in a limited number of cases; (4) capital cases are structurally different than non-capital cases because the sentencing proceeding of a capital case with a jury resembles a trial; and (5) the Eighth Amendment of the Constitution imposes a heightened analysis on capital trials that was not present in the analysis of *Apprendi*.[171]

IV

THE SUPREME COURT'S HOLDING AND RATIONALE

The Supreme Court overturned the Ninth Circuit's decision that *Ring* applied retroactively.[172] The Court addressed the two

166 McKoy v. North Carolina, 494 U.S. 433, 435 (1990); Mills v. Maryland, 486 U.S. 367, 384 (1988).

167 *Summerlin*, 341 F.3d at 1120.

168 *Id*. (citing Ring v. Arizona, 536 U.S. 584, 621 (2002) (O'Connor, J., dissenting)); Brief for Amici Curiae Alabama, Colorado, Delaware, Florida, Idaho, Indiana, Mississippi, Montana, Nebraska, Nevada, New York District Attorney's Ass'n, Pennsylvania, South Carolina, Utah, Virginia In Support of Respondent to the Supreme Court in *Ring* at 4 n.2 (No. 01-488), *available at* 2002 WL 481140.

169 *Summerlin*, 341 F.3d at 1120.

170 282 F.3d 664, 670 (9th Cir. 2002).

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

172 Schriro v. Summerlin, 124 S. Ct. 2519, 2527 (2004).

primary holdings found by the Ninth Circuit, disagreeing with both of them.[173] First, the Court ruled that *Ring* did not announce a new substantive rule, because it merely altered the procedure for determining whether a person is subject to a death sentence.[174] Second, the Court found that *Ring* did not fit the second *Teague* exception, because judicial fact-finding does not seriously diminish the accuracy of an underlying proceeding.[175] Justice Breyer, joined by three other Justices,[176] filed a dissenting opinion arguing that there were three reasons the accuracy in Summerlin's sentencing proceeding was seriously diminished in light of the Court's *Ring* holding.

A. Ring *Is Not a New Rule of Criminal Procedure*

The Court began by making a somewhat significant clarification to retroactivity law. It initially explained that new substantive rules apply retroactively, citing *Bousley*, "as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish," which is the first *Teague* exception.[177] The Court went on to note that the *Bousley* rule is not separate from this first *Teague* exception.[178] Specifically, the Court stated, "[w]e have sometimes referred to rules of this latter type as falling under an exception to *Teague*'s bar on retroactive application of procedural rules . . . they are more accurately characterized as substantive rules not subject to the bar."[179] Accordingly, the Court made anomalous the Ninth Circuit's holding that *Ring* was a substantive rule under *Bousley* which did not fit the first *Teague* exception.

The Court then analyzed whether *Ring* announced a new substantive rule of criminal law.[180] It explained that in making the substantive/procedural distinction, a "rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes," but is procedural if it "regulate[s]

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[173] *Id.* at 2526-27.
[174] *Id*. at 2523.
[175] *Id*. at 2526.
[176] Justices Stevens, Souter, and Ginsburg. *See id*. at 2527.
[177] *Id*. at 2522.
[178] *Id*. at 2522-23, 2523 n.4.
[179] *Id*. at 2522 n.4 (citation omitted).
[180] *Id*. at 2523-24.

only the *manner of determining* the defendant's culpability."[181] Applying this method of distinguishing the two, it found that *Ring* did not "alter the range of conduct Arizona law subjected to the death penalty."[182] In fact, the Court noted that because *Ring* was decided entirely upon Sixth Amendment jury-trial grounds, something that seems procedural on its face, it could have "nothing to do with the range of conduct a State may criminalize."[183] The opinion also noted that rules allocating decision-making authority are "prototypical procedural rules."[184]

The Court also rejected Summerlin and the Ninth Circuit's argument that *Ring* restructured the elements of Arizona's aggravated murder structure to create a new offense of "capital murder."[185] It began by explaining that a decision which modifies the elements of an offense usually announces a substantive rule.[186] However, the Court explained that modification of elements refers to the altering of "the range of conduct the statute [in question] punishes."[187] In the case of *Ring*, there was no altering of the range of conduct that was punishable after the opinion.[188] The Court in *Ring* did not hold that certain elements were necessary for Arizona to sentence a person to death. Rather, *Ring merely held that* Arizona must have juries decide the elements that Arizona chose, because those elements were "factual" elements.[189] In other words, *Ring* found that certain sentencing elements, as labeled by the Arizona state legislature, were the functional equivalent of criminal elements. *Ring* merely relabeled Arizona's sentencing aggravators by looking at substance over form. However, at the end of the day, this relabeling did not affect the conduct which is captured as criminal. Rather, it was a relabeling that affected who decides, as prescribed by the Sixth Amendment.[190]

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181 *Id*. at 2523.

182 *Id*.

183 *Id*.

184 *Id*.

185 *Id*. at 2524.

186 *Id*.

187 *Id*.

188 *Id*.

189 *Id*.

190 The Court also criticized the Ninth Circuit's holding for federalism reasons. It noted, as discussed in note 99, *supra,* that the Arizona Supreme Court did *not* find that *Ring* reordered Arizona's capital murder structure in *State v. Towery*, 64 P.3d 828, 832-33 (Ariz. 2003). *Schriro*, 124 S. Ct. at 2524.

B. Ring *Is Not a Watershed Rule of Criminal Procedure*

Because the Supreme Court rejected the Ninth Circuit's finding that *Ring* announced a new substantive rule, it still had to determine whether *Ring* fell under the watershed exception to *Teague*.[191] In making this determination, the Court did not speak to whether *Ring* was a fundamental decision, "implicit in the concept of ordered liberty."[192] Instead, it focused entirely on whether a judicial determination of the aggravating factors under Arizona's pre-*Ring* statute "seriously diminished [the] accuracy" of Summerlin's sentencing proceeding.[193] Despite the Ninth Circuit's list of reasons why juries are more accurate factfinders than judges, the majority held that it did not.[194] The Court stated that rather than looking to see whether juries are better factfinders than judges, the Court must determine "whether judicial factfinding so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach."[195]

Applying this standard, the Court found that evidence supporting the questionability of judicial factfinding was too equivocal to support a conclusion that the accuracy of Summerlin's sentencing proceeding was seriously diminished.[196] Essentially, it found that because there was no clear answer to whether judicial factfinding is more or less accurate than that of juries, it could not be said that the accuracy of Summerlin's conviction was *seriously* diminished.[197] The Court pointed out that "for every argument why juries are more accurate factfinders, there is another why they are less accurate."[198] Upon finding this issue to be inconclusive and controversial, the Court stated, "[w]hen so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that

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191 *Schriro*, 124 S. Ct. at 2524.

192 *Id*. at 2527 (Breyer, J., dissenting) (quoting Teague v. Lane, 489 U.S. 288, 311-13 (1989)).

193 *Schriro*, 124 S. Ct. at 2525-26.

194 *Id*. at 2524-25.

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

196 *Schriro*, 124 S. Ct. at 2525.

197 *Id*.

198 *Id.* The Court noted that although the Ninth Circuit majority listed reasons why juries are more accurate, the dissent in the Ninth Circuit's *Summerlin* opinion had advanced several arguments why juries are *less* accurate than judges. *Id*.

judicial factfinding *seriously* diminishes accuracy."[199]

The Court found precedential support for its finding that judicial factfinding was not seriously inaccurate in the pre-*Teague* decision of *DeStefano v. Woods*.[200] In *DeStefano* the Supreme Court was presented with the issue of whether *Duncan v. Louisiana*,[201] where the Court held that "the States cannot deny a request for jury trial in serious criminal cases,"[202] applied retroactively.[203] The *DeStefano* court gave three different reasons for holding that *Duncan* did not apply retroactively,[204] one of which was important to the *Schriro* court.[205] In finding that the purpose of the *Duncan* rule would not be served by retroactive application, *DeStefano* stated, "'[w]e would not assert, however, that every criminal trial . . . held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'"[206] In *Schriro*, the Court believed that this was a finding by the *DeStefano C*ourt that an *entire* criminal trial without a jury was not impermissibly inaccurate.[207] Accordingly, a judge finding only sentencing aggravators could not be any more inaccurate.

The *Schriro* majority also addressed two significant points from the dissent.[208] First, in response to the dissent's claim that juries are more accurate because they are more adept at deciding factors that call for the weighing of community standards, the majority strictly read Arizona's sentencing aggravators, noting that nowhere did Arizona's death sentence statute require them to be "*determined by community standards*."[209] Second, in response to the dissent's arguments on the theme that death sentences should be viewed differently when it comes to retroactivity, the Court used formalistic reasoning, stating that this was not an application of *Teague*, but of a different sort of balancing

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[199] *Id*.

[200] *Id*. at 2525 (citing DeStefano v. Woods, 392 U.S. 631 (1968)(per curiam)).

[201] 391 U.S. 145 (1968).

[202] *DeStefano*, 392 U.S. at 632.

[203] *Id*. at 633.

[204] *Id*. at 633-34.

[205] Schriro v. Summerlin, 124 S. Ct. 2519, 2525-26 (2004).

[206] *DeStefano*, 392 U.S. at 633-34 (quoting Duncan v. Louisiana, 391 U.S. 145, 158 (1968)).

[207] *Schriro*, 124 S. Ct. at 2526.

[208] *Id*.

[209] *Id*.

test that is nowhere found in Court precedent.[210]

C. Justice Breyer's Dissent

Justice Breyer's dissent, joined by three other justices, began with the assumption that *Ring* announced a rule that meets the "implicit in the concept of ordered liberty" piece of the *Teague* exception, reasoning that the majority did not deny this piece of the test and citing a number of cases that indicated the jury trial right is a "fundamental guarantee."[211] Accordingly, like the majority, the dissent focused entirely on whether *Ring* significantly undermined the accuracy of the underlying proceeding.[212] The dissent provided three primary reasons why having a judge as the factfinder in a death-sentence proceeding seriously undermines the accuracy of the proceeding.[213]

First, it noted that the necessary aggravators for a death sentence are full of highly subjective, value-laden terms, which clearly imply that they should be evaluated according to "community standards," which can only be provided by a jury.[214] Justice Breyer specifically pointed out one of Arizona's aggravators, which required a finding that the crime "was committed in an 'especially heinous, cruel, or depraved manner.'"[215]

Second, Justice Breyer examined the policies underlying the *Teague* rule of non-retroactivity and balanced these competing interests to find that *Ring* should be applied retroactively.[216] He began by noting two objectives of habeas corpus law, specifically, protecting the innocent and uniformity among all persons.[217] He argued that these considerations are more pointed in the death penalty context because Eighth Amendment jurisprudence requires greater scrutiny because of the severity and irrevocability of the punishment.[218] On the uniformity issue, the dissent noted the arbitrariness of a person being put to death under a procedure acknowledged as unconstitutional and how, in the death penalty context, that is unique because *none* of the "sentence"

[210] *Id*. The Court noted that even if it were willing to reconsider *Teague*, it would not be willing to adopt such a balancing formulation.
[211] *Id*. at 2527 (Breyer, J., dissenting).
[212] *Id*.
[213] *Id*. at 2528.
[214] *Id*.
[215] *Id*. (quoting ARIZ. REV. STAT. ANN. § 13-703(F)(6) (West Supp. 2003)).
[216] *Schriro*, 124 S. Ct. at 2528.
[217] *Id*. at 2528.
[218] *Id*. at 2528-29.

has been carried out by the time the Court catches its constitutional mistake.[219] The dissent also discussed the policy interests usually cited for *not* applying new rules of criminal procedure retroactively and how these interests were not particularly weighty in regards to *Ring*.[220] The dissent noted that one interest in non-retroactivity is conservation of state resources, but argued this was not weighty in this case because *Ring* only affected approximately 110 individual cases.[221] Further, finality, a policy often cited for non-retroactivity, is not as important in the capital context as in usual criminal cases because the death sentence process goes on for many years anyway, and finality should be discounted due to the nature of the sentence.[222]

Third, the dissent argued that the majority's reliance on *DeStefano* was not persuasive because *DeStefano* was a pre-*Teague* case and the majority singled out only one of the three factors that *DeStefano* relied on in coming to its conclusion.[223] The dissent noted that the other two factors discussed in *DeStefano* for non-retroactivity of the *Duncan* rule were quite persuasive, while the one factor seized by the *Schriro* Court was not as persuasive standing on its own.[224] Further, the dissent distinguished *DeStefano* by noting *Ring* is quite different than the *Duncan* rule: it applies to a small subclass of defendants; the relative harm was greater to defendants deprived of *Ring*; administration of justice is not as difficult with *Ring*; and there were hardly any reliance interests damaged by *Ring*.[225]

V

IMPLICATIONS

A. The Supreme Court's Substantive/Procedural Distinction

The *Schriro* Court's clarification of the substantive/procedural distinction is a positive movement in the law of habeas retroactivity for a number of reasons: it provides much need clarity in the field; it is appropriate in light of Supreme Court precedent; it follows the policies underlying the *Teague* rule; and it will pro-

219 *Id*.
220 *Id*. at 2529-30.
221 *Id*. at 2530.
222 *Id*.
223 *Id*.
224 *Id* at 2530-31.
225 *Id*. at 2531.

vide far greater certainty for future retroactivity cases. The Court clarified that there are not two separate procedural *Teague* exceptions and a separate substantive *Bousley* rule that can lead to retroactive application of new rules of criminal law.[226] Rather, there is a rule of retroactivity for new substantive rules and a rule of non-retroactivity for new procedural rules of criminal law, unless the new rule fits the *one* "watershed" exception.[227] This explanation clarified a developing problem. Namely, there appeared to be little difference between the first *Teague* exception and what the Ninth Circuit termed the "substantive" exception to the non-retroactivity bar. Nevertheless, courts began analyzing *Teague* issues under such a framework.[228] The result was ambiguity, uncertainty, and bizarre results, such as the Ninth Circuit's highly tenuous finding that *Ring* announced a substantive rule.[229] A rule like *Ring*, about "who decides" in a sentencing proceeding, appears to be the classic example of a procedural rule, as the *Schriro* majority pointed out.[230] For the Ninth Circuit to find to the contrary illustrates the pre-*Schriro* framework in this area of *Teague* jurisprudence was lacking. Of course, prior to *Schriro* there was relatively little written on the distinction of substance and procedure in the habeas context,[231] and as the Ninth Circuit illustrated, the door was wide open for any federal court to overturn a state's conviction if it so desired. The Supreme Court's *Schriro* opinion began to fill that gap.

The Supreme Court's explanation of the difference between procedural and substantive rules is simple and clear. If a new rule of constitutional criminal law "alters the range of conduct or the class of persons that the law punishes," then it is substantive and applies retroactively.[232] The focus is on whether the new rule affects the number of people or the amount of conduct subject to the criminal statute under which the petitioner was con-

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[226] *See infra* Part V.A.

[227] *Schriro*, 124 S. Ct. at 2522-23, 2523 n.4.

[228] *See, e.g.*, Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003); Coleman v. United States, 329 F.3d 77, 83 (2d Cir. 2003); Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001).

[229] Judge Rawlinson's dissenting opinion in *Summerlin* noted "the majority opinion wanders afield" in its holding that *Ring* announced a substantive decision. *Summerlin*, 341 F.3d at 1125.

[230] Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004).

[231] Ethan Isaac Jacobs, Note, *Is Ring Retroactive?*, 103 COLUM. L. REV. 1805, 1828 (2003).

[232] *Schriro*, 124 S. Ct. at 2523.

victed. In contrast, a new rule is procedural if it regulates the "manner of determining the [criminal] defendant's culpability."[233] The critical piece for determining whether a rule is procedural, rather than substantive, appears to be whether it addresses the "manner of determining" culpability.[234] This standard does not leave room for courts to examine other factors, like the Ninth Circuit's tracing Arizona's death penalty statute throughout the twentieth century, to come to the conclusion that *Ring*, a rule about who is the fact-finder, is a substantive rule of criminal law. The *Schriro* Court's relatively simple and dichotomous standard for determining whether a new rule is procedural or not should cut off confusion when the Supreme Court issues future rules of constitutional criminal law.

Further, *Schriro's* holding regarding the substantive/procedural distinction appears to be in accord with the spirit of Supreme Court precedent on this issue. The analysis begins by closely looking at *Bousley v. United States*,[235] a case relied upon by the Ninth Circuit in *Summerlin* and the Supreme Court in *Schriro*.[236] In *Bousley*, the Supreme Court held 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."[237] The focus of *Bousley* was whether the Supreme Court's decision in *Bailey v. United States*[238] applied retroactively on collateral review.[239] *Bailey* held that use of a firearm under a firearms statute[240] required active employment as opposed to mere possession of the firearm.[241] In *Bousley*, the Court held the *Bailey* rule was not barred by *Teague* because the narrowing of the term "use" created "a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'"[242] The opinion ob-

233 *Id*. (emphasis omitted).

234 *Id*. This appeared to be an important piece to the Court, as the Court emphasized this phrase in text of its opinion.

235 523 U.S. 614 (1998).

236 *See* Summerlin v. Stewart, 341 F.3d 1082, 1099 (9th Cir. 2003); *Schriro*, 124 S. Ct. at 2523. In fact, the Supreme Court cited *Bousley* when giving its definition of "substantive" and "procedural" rules. *Schriro*, 124 S. Ct. at 2523.

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

238 516 U.S. 137 (1995).

239 *Bousley*, 523 U.S. at 618.

240 18 U.S.C. § 924(c)(1) (1994).

241 *Bailey*, 516 U.S. at 144.

242 *Bousley*, 523 U.S. at 620 (quoting Davis v. United States, 417 U.S. 333, 346 (1974)).

served it would be "inconsistent with the doctrinal underpinnings of habeas review"[243] to bar collateral relief based on new rules like *Bailey*, where the Court interpreted the relevant statute to not reach certain conduct as criminal.[244]

Bousley established that a substantive decision is one that provides that *Teague* will not block the retroactive application of a new rule that alters the scope of a criminal statute. The concern in *Bousley* was that a new rule had been established significantly limiting the amount of conduct that was "criminal" under a federal statute. The Court's *Schriro* definition of "substantive" looks directly at that concern—whether the new rule limits the *conduct* punishable as criminal. *Bousley* was never intended to apply to a rule like *Ring* because the only shift that was made was "who decides."[245] Accordingly, the *Schriro* Court's formulation of the substantive/procedural distinction appears to be more in line with this precedent than the Ninth Circuit's opinion.

The *Schriro* Court's substantive/procedural distinction is also in line with the underlying doctrinal principles of the *Teague* rule. Beginning in the mid-1960s, Justice Harlan began writing a number of dissenting and concurring opinions which later became the foundation for the Court's non-retroactivity rule in *Teague*.[246] In explaining the first exception, Justice Harlan stated that "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[247] Justice Harlan went on further to give as an example "[n]ew 'substantive due process' rules" that "free[ ] individuals from punishment for conduct that is constitutionally protected."[248] This understanding of the first *Teague* exception illustrates that the determination of whether the new constitutional

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[243] *Bousley*, 523 U.S. at 621.

[244] *Id*. at 620.

[245] In fact, after the Supreme Court issued its opinion in *Ring*, the Arizona legislature amended the State's capital sentencing statute. *See* Act of Apr. 27, 2001, ch. 260, § 1, 2001 Ariz. Sess. Laws 1334, 1334 (codified as amended at ARIZ. REV. STAT. § 13-703.01 (2003)). It did not change the terms of the aggravating factors necessary to impose a sentence of death; rather, it only changed the factfinder from judge to jury. *Id*.

[246] *See* United States v. Johnson, 457 U.S. 537, 546-47 nn.9-10 (1982) (citing opinions); Mackey v. United States, 401 U.S. 667, 675 (1971) (Harlan, J., concurring in part and dissenting in part); Desist v. United States, 394 U.S. 244, 256-57 (1969) (Harlan, J., dissenting). For an account of the historical development of non-retroactivity, see 2 HERTZ & LIEBMAN, *supra* note 66, § 25.2, at 1034-45.

[247] *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part).

[248] *Id*. at 692-93.

rule is substantive or procedural should focus on whether, in the end, the rule limits conduct that may be punished as criminal. Hertz and Liebman agree with this reading, stating, "[i]n general, the first exception may be interpreted as distinguishing new rules of substantive criminal law, which always apply retroactively, from new rules of criminal procedure, which generally do not apply retroactively in cases that were final as of the time the new rule was announced."[249] In other words, merging the *Bousley* ruling with the first *Teague* exception fits the underlying policy and intent of the original *Teague* rule.

Aside from the Court's precedent, rejecting the Ninth Circuit's reasoning that *Ring* was a substantive rule averted the possibility of not being able to find a logical end to what is *not* substantive. Particularly, the Ninth Circuit's distinction of *Ring* from *Apprendi* were unavailing, despite the fact that the Ninth Circuit had held *Apprendi* does not apply retroactively.[250] The Ninth Circuit's explanation that *Ring* established "capital murder" and plain "murder" in Arizona could just as easily have applied to *Apprendi*. One could say *Apprendi* reorganized the elements of assault plus the aggravator into two distinct crimes: assault and hate-motivated assault. The former was punishable by a maximum of ten years in New Jersey, the latter punishable by up to twenty. Accordingly, the reasoning used by the Ninth Circuit to hold that *Ring* announced a substantive rule could apply to countless situations and is the crux of the problem with the court's reasoning—it gutted the *Teague* rule. It removed whatever cases a court wants to exempt from the bar of retroactivity. A conception of the substantive/procedural distinction without a clear ending point is problematic in this area because such distinctions have never been easy.[251] The Ninth Circuit's "non-existent" distinctions from *Apprendi*, as well as its overall characterization of substantive versus procedural, provided future courts with little guidance or potential consistency. Not surprisingly, the Supreme Court immediately corrected these problems by its formulation of the substantive/procedural distinction.

The Supreme Court's policy interests in *Teague*'s retroactivity

[249] 2 HERTZ & LIEBMAN, *supra* note 66, §25.7, at 1119.

[250] *See supra* Parts III.B, IV.A.

[251] D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 189-90 (1982).

holding are also advanced by the *Schriro* Court's substantive/procedural distinction. The Court has offered roughly three explanations for its rule of non-retroactivity of new rules of criminal procedure: (1) applying new rules retroactively does not advance the deterrent purpose of habeas corpus law, specifically meaning habeas corpus usually is a way to get state courts to abide by the United States Constitution; (2) retroactivity of new constitutional rules frustrates judicial concern over comity and finality; and (3) in evaluating the relative costs and benefits of retroactivity, the costs imposed upon the states far outweigh the benefits.[252] These policies are furthered by defining a substantive rule, for *Teague* purposes, as only one that readjusts the conduct punishable as criminal. Such a rule limits the number of new rules being applied retroactively, advances comity and finality, and does not impose such a great cost on the states.[253] It also creates far more clarity as to what constitutes a substantive versus a procedural rule. For example, no court other than the Ninth Circuit seriously questioned whether *Ring* was procedural or substantive because on its face the decision was procedural. Allowing courts to read into a ruling, probing around for a comprehensive history of the development of a criminal statute, will result in far less finality of criminal judgments. Courts could begin splitting over what is and is not a new substantive rule, as was the case under *Ring* after the Ninth Circuit's *Summerlin* decision.

In sum, the distinction between procedural and substantive rules under *Teague* greatly needed to be clarified, and was by *Schriro*. This was an area with little guidance and a significant probability for conflicting interpretations. The Court's answer came in a form that fits its precedent as well as the overall policies underlying the *Teague* rule.

B. The Teague *"Watershed" Analysis*

As discussed above, the Supreme Court concluded the *Ring*

252 Eric J. Beane, Note, *When It Comes to Capital Sentencing, You Be the Judge:* Ring v. Arizona, 45 ARIZ. L. REV. 225, 233 (2003).

253 Additionally, retroactive application of new substantive rules that affect only the scope of conduct punishable avoids the significant costs to the states of re-prosecuting individuals because, theoretically, the individual did not commit a crime. Such is not the case with new procedural rules being applied retroactively—the state will likely incur significant costs re-prosecuting the potentially thousands of affected prisoners.

rule did not fit the procedural *Teague* exception, basing its entire discussion on the fact that judicial factfinding in death-sentence hearings did not *significantly* decrease the accuracy of the underlying sentence. However, the Ninth Circuit's decision not only found that such judicial decision-making significantly decreased the accuracy of the underlying conviction, but also that the *Ring* rule was a watershed one, which must be applied retroactively. This Part will begin by explaining why such a holding by the Ninth Circuit had the effect of significantly lowering the bar for retroactivity law, and will conclude with a discussion of how the Supreme Court's opinion, at the least, maintained the pre-*Summerlin* bar for retroactivity.

Language used by the Supreme Court in prior retroactivity opinions defining and describing the procedural *Teague* exception illustrates its narrowness. The new rule must be "implicit in the concept of ordered liberty,"[254] and it must be a "procedure[ ] without which the likelihood of an accurate conviction [or sentence] is seriously diminished."[255] The Court has further required that there be an issue of fundamental fairness.[256] Only then is the new rule a watershed one.[257]

Not only has the Court used language describing this exception as narrow, but in practice it is a very narrow exception as well, "encompassing only a handful of rulings, at least outside the [Eighth] Amendment area."[258] Further, the Court recently noted that it has never held a rule to apply retroactively under this exception.[259] Illustrating the narrowness of this exception,

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[254] Teague v. Lane, 489 U.S. 288, 307 (1989) (plurality) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)); *accord* Bousley v. United States, 523 U.S. 614, 620 (1998); O'Dell v. Netherland, 521 U.S. 151, 157 (1997) (characterizing second exception as "apply[ing] only to a small core of rules"); Lambrix v. Singletary, 520 U.S. 518, 527 (1997) (describing both *Teague* exceptions as "narrow"); Goeke v. Branch, 514 U.S. 115, 120 (1995) (per curiam).

[255] *Teague*, 489 U.S. at 312-13; *see also Bousley*, 523 U.S. at 620; *Goeke*, 514 U.S. at 120; Withrow v. Williams, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and dissenting in part); Penry v. Lynaugh, 492 U.S. 302, 314 (1989).

[256] *See, e.g.*, *Teague*, 489 U.S. at 320-21 (Stevens, J., concurring).

[257] *See, e.g.*, *O'Dell*, 521 U.S. at 167; *Lambrix*, 520 U.S. at 539-40; *Goeke*, 514 U.S. at 120; Caspari v. Bohlen, 510 U.S. 383, 396-97 (1994); Gilmore v. Taylor, 508 U.S. 333, 344-45 (1993); Graham v. Collins, 506 U.S. 461, 477-78 (1993); Saffle v. Parks, 494 U.S. 484, 495 (1990).

[258] 2 HERTZ & LIEBMAN, *supra* note 66, § 25.7, at 1121. For an excellent listing of the Supreme Court's decisions illustrating how narrow this exception has been applied, as well as lower court's decisions, see *id*. at 1121-24, n.27.

[259] Beard v. Banks, 124 S. Ct. 2504, 2514 (2004).

the Supreme Court in *O'Dell* determined that *Simmons v. South Carolina*,[260] which held that a capital defendant could present evidence of ineligibility of parole to rebut the state's argument of future dangerousness, did not fit the second *Teague* exception.[261] The Court reasoned that the *Simmons* rule was not "on par" with the Court's decision from *Gideon v. Wainwright*,[262] as the petitioner had argued, and that the "narrow right of rebuttal that *Simmons* affords to defendants in a limited class of capital cases" was not a watershed rule, as envisioned by *Teague*.[263] Despite the *fact* that O'Dell was a capital case, the Court dismissed the petitioner's argument with little reasoning. Another example of how narrow the Court has interpreted this exception is in *Goeke v. Branch*.[264] In that case the Court held that "[b]ecause due process does not require a State to provide appellate process at all, a former fugitive's right to appeal [denied here under a state rule forbidding prisoners who escape following conviction to appeal] cannot be said to be so central to an accurate determination of innocence or guilt as to fall within this [second] exception to the *Teague* bar."[265]

There have also been a number of cases the Court has held do not apply retroactively that might have been thought to qualify under the second *Teague* exception. An example is *Sawyer v. Smith*,[266] where the Court held as non-retroactive the rule from *Caldwell v. Mississippi*,[267] which states that it is constitutionally impermissible for a prosecutor to diminish responsibility of jurors in their capital-sentencing duties.[268] The Court reasoned that this rule was not within the second *Teague* exception because it is not an "absolute prerequisite to fundamental fairness," although the Court did note the *Caldwell* rule was "directed toward the enhancement of reliability and accuracy."[269]

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[260] 512 U.S. 154 (1994).
[261] *O'Dell*, 521 U.S. at 167.
[262] 372 U.S. 335 (1963).
[263] *O'Dell*, 521 U.S. at 167.
[264] 514 U.S. 115 (1995).
[265] *Id*. at 120 (citations and internal quotations omitted).
[266] 497 U.S. 227 (1990).
[267] 472 U.S. 320, 328-29 (1985).
[268] *Sawyer*, 497 U.S. at 244.
[269] *Id*. (quoting Teague v. Lane, 489 U.S. 288, 314 (1989)). For a listing of other examples that the Court surprisingly did not apply retroactively, see 2 HERTZ & LIEBMAN, *supra* note 66, § 25.7, at 1122 n.27 (citing examples such as Butler v. McKellar, 494 U.S. 407 (1990), Allen v. Hardy, 478 U.S. 255 (1986), and Solem v. Stumes, 465 U.S. 638 (1984)).

With the fact that the second *Teague* exception applies to only a "small core of rules"[270] in mind, it is evident that the bar for overcoming the presumption of non-retroactivity is extremely high. The Ninth Circuit's holding that *Ring* is one of those rare cases that fits the exception lowered that bar. The finding that a jury conducting capital sentencing increases the accuracy of the underlying sentence, relative to the judge's finding, essentially devolved the "improves accuracy" element of the second exception into a policy decision. After *Ring*, none of the evidence presented will be any different. As mentioned above, none of the aggravating or mitigating factors have been required to be any different.[271] The difference between whether a judge or jury is more accurate can only be decided normatively. Further, every argument presented by the *Summerlin* court that a jury is more accurate than a judge can be countered. Accordingly, it is not surprising that the Ninth Circuit majority and dissent split over this issue.[272] For example, the court argued judge-based sentencing phases are too short; the counter is that judges are more efficient and cut to the heart of the issues.[273] The court argued the jury better reflects the community; the counter is that the judge is more experienced and does not allow defendants with more emotional appeal to be treated differently than the more or less culpable defendant who has lesser counsel or a less emotional case.[274] The point is not that the *Summerlin* majority was wrong in its normative belief that the jury is more accurate. The concern is that the only way to find the jury is more accurate than a judge is a normative policy belief about the role of the decision-maker. Accordingly, the *Summerlin* majority's finding on this issue turned the question of whether the new rule improves the "accuracy of the proceeding" into a policy question, depending on one's belief about the nature of judge versus jury decision-making. Allowing this aspect of the second *Teague* exception to turn on a policy determination certainly lowers the bar for retroactivity.

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[270] Graham v. Collins, 506 U.S. 461, 478 (1993).

[271] In response to the Supreme Court's opinion, the Arizona legislature did not change the substance of its death penalty statute. Rather, it merely changed who decides the necessary aggravating and mitigating factors. See ARIZ. REV. STAT. ANN. §§ 13-703, 13-703.01(S)(1) (West Supp. 2003).

[272] *See* Summerlin v. Stewart, 341 F.3d 1082, 1110-16, 1129-31 (9th Cir. 2003).

[273] *See supra* Part IV.B.

[274] *See id*.

In addition, the Ninth Circuit's finding that *Ring* was a watershed rule appeared to lower the retroactivity bar. On first glance, it may be appealing to believe a new rule affecting prisoners with death sentences is always a watershed rule. However, in cases such as *Simmons* and *Caldwell*, that has not been the case. Rather, even in capital cases the rule must be truly watershed. In *Summerlin*, the court argued that *Ring* is watershed because it is sweeping, in that it affects every capital trial in the country.[275] But as the *Summerlin* majority noted, *Ring* affected less than one-fourth of the states' capital sentencing structures.[276] The Ninth Circuit also argued that *Ring* was sweeping because it affected every state that desires to sentence defendants to death, by establishing minimal structural requirements.[277] The problem with that claim is that every new constitutional rule is creating some kind of minimal requirement that in some way will affect all states. The Ninth Circuit's reasoning for why *Ring* is "sweeping" does not provide any limits for any other new rule of criminal procedure, thereby lowering the bar for when a rule is retroactively applied.

In short, it is difficult to see how *Ring*, a case that essentially stated "who decides" in capital sentencing, is a watershed ruling on par with decisions like *Gideon*. It does not affect every criminal trial throughout the country and it only changed the procedure in less than half of the states that use capital sentencing. Also, judges are traditionally not seen as so suspect that their sentencing decisions render the quality of the sentence untrustworthy. Given the cases that the Supreme Court has held do not apply retroactively, holding that *Ring* is a watershed ruling would have significantly lowered the bar for retroactivity on collateral review.

Despite these reasons for not finding *Ring* to be watershed, the Supreme Court, as noted above, held only that the *Ring* rule did not seriously diminish the accuracy of Summerlin's death sentence. It did not directly discuss the issue of whether *Ring* is a "fundamental" rule that is "implicit in the concept of ordered liberty."[278] But the Court's focused discussion on the "accuracy"

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[275] *Summerlin*, 341 F.3d at 1119.

[276] *Id*. at 1120.

[277] *Id*.

[278] The dissent argued that the majority's silence on the "implicit in the concept of ordered liberty" issue is an affirmation that *Ring* is such a rule. Schriro v. Summerlin, 124 S. Ct. 2519, 2527 (2004) (Breyer, J., dissenting) (stating "[t]he majority does

issue under *Teague*'s procedural exception appears to have maintained the limited nature of this exception. Perhaps most obviously, it reaffirmed the "seriously" language of the "accuracy" element of the "watershed" exception to *Teague*. Upon close reading of the *Summerlin* majority's opinion, it seems that the Ninth Circuit used the language that the finding must be that the new rule "seriously" decreases the accuracy of the underlying sentence.[279] However, when the Ninth Circuit majority analyzed the issue, the requirement of not only finding diminished accuracy under *Ring*, but *seriously* diminished accuracy, is nowhere to be found.[280] As a consequence of this omission, the Ninth Circuit was able to find that *Ring* enhanced accuracy merely by citing a few controversial empirical studies favorable to its conclusion.[281]

Although the Supreme Court's *Schriro* opinion apparently only cited back to language that has been part of the *Teague* analysis since the beginning,[282] it maintained the extreme narrowness of the *Teague* procedural exception by increasing the significance of a new rule to be one that really puts into doubt the habeas petitioner's conviction or sentence. Despite the fact that *Schriro* did not add substance to what *exactly* is a rule that seriously decreases the accuracy of the conviction, it put a halt to courts using policy preferences to decide whether something is more accurate or not and hence eligible for retroactive application. Accordingly, this holding in *Schriro* will at least preserve

not deny that *Ring* meets the first criterion, that its holding is 'implicit in the concept of ordered liberty'"). Supporting the dissent's contention is a string citation of a number of cases noting that the right to a jury trial is a "fundamental right," with a majority of the cited opinions being authored by the *Schriro* majority's writer, Justice Scalia. *Id*. Potentially providing further support for such an assertion was the majority opinion's last paragraph, stating "*[t]he right to jury trial is fundamental to our system of criminal procedure*, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them." *Id*. at 2526 (emphasis added). Nevertheless, because the majority spoke neither here nor there to the issue, it is not clear whether a majority of the Supreme Court would have found *Ring* announced a rule "implicit in the concept of ordered liberty."

279 *Summerlin*, 341 F.3d at 1109.

280 *Id*. at 1109-16.

281 *Id*. These studies are controversial because the dissenting opinion in *Summerlin* was able to cite the same number of studies which came to the opposite conclusion of those cited by the *Summerlin* majority. *Id*. at 1129-31 (Rawlinson, J., dissenting).

282 The phrase "seriously diminished," regarding the accuracy of the underlying conviction in light of the new rule, appeared in *Teague* itself. Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality).

this *Teague* exception for those truly watershed rules which throw significant doubt into prisoners' convictions and sentences.

Also significant is the Court's rejection of a balancing approach for new rules of criminal procedure.[283] Not only did the Court implicitly reaffirm the entire *Teague* structure, thereby further entrenching it in American criminal law, it rejected an approach that is attractive in cases like Summerlin's. As noted above, Summerlin pushed for the rule the Court had explicitly rejected but eventually embraced. But as a consequence of the Court getting the issue wrong in *Walton*, Summerlin was sentenced to death by a drug-addled judge who may have confused Summerlin's case with somebody else's. A balancing test, achieved by looking at the policies implicit in the writ of habeas corpus and non-retroactivity, at least on its face, could possibly work justice in a highly questionable case like Summerlin's. On the other hand, such an approach would provide tremendous amounts of uncertainty, and issues of retroactivity of criminal rules of procedure can potentially affect unthinkable numbers of convictions. Nevertheless, the Court's statement that it would reject a balancing approach indicates that future retroactivity questions *must* be addressed within the *Teague* framework.

C. Schriro*'s Effect on Determinate Sentencing*

During the same term the Supreme Court handed down its ruling in *Schriro*, the Court issued another significant ruling of criminal procedure spawned from *Apprendi*.[284] In *Blakely v. Washington*,[285] the Court threw determinate sentencing structures at both the state and federal level into doubt. Because the *Blakely* holding will affect hundreds of thousands of prisoners throughout the country,[286] the stakes are extremely high in the retroactivity litigation of this recent decision. This section will briefly describe the *Blakely* opinion and will then discuss the effects of *Schriro* on the impending retroactivity controversy over whether *Blakely* applies retroactively.

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[283] *See supra* Part V.B.

[284] In fact, the Court decided both *Blakely v. Washington* and *Schriro* on exactly the same day. *Compare* Blakely v. Washington, 124 S. Ct. 2531 (2004), *with* Schriro v. Summerlin, 124 S. Ct. 2519 (2004).

[285] 124 S. Ct. at 2531.

[286] One article noted that *Blakely* affects "as many as 270,000 federal cases alone." Benjamin Wittes, *Suspended Sentencing*, THE ATLANTIC MONTHLY, Oct. 2004, at 50.

In *Blakely*, the Court held that judges could not upwardly depart from presumed sentencing ranges under a determinate sentencing scheme.[287] The facts of *Blakely* make clear the court's holding. In *Blakely*, the defendant kidnapped his wife, put her in a box in the back of his pickup truck and carried her across three western states.[288] The defendant pleaded guilty to second-degree kidnapping, which carried a maximum sentence of ten years under Washington State law.[289] However, under the state's sentencing guidelines, the defendant was eligible for a presumptive sentence of forty-nine to fifty-three months.[290] Finding one of the state's aggravating factors, the trial judge instead imposed a ninety-month sentence.[291]

The Court found that this upward departure violated the defendant's Sixth and Fourteenth Amendment rights.[292] The majority opinion began by noting that its decision would require an application of its *Apprendi* decision.[293] Rejecting the state's argument that the maximum sentence a judge may impose for purposes of the Sixth Amendment is the absolute maximum sentence allowed under state statute, including upward departures, the Court explained that "for *Apprendi* purposes . . . the maximum sentence a judge may impose" is limited solely to "the facts reflected in the jury verdict or admitted by the defendant."[294] Accordingly, the maximum sentence a judge may impose is not the maximum sentence allowed under state law, but the maximum sentence allowed without requiring the judge to find additional facts not included in the underlying crime.[295] Applying this reasoning to the facts of the case, the Court found the judge imposed an unconstitutional sentence because he relied on factual findings not admitted in the defendant's guilty plea, and hence found facts beyond what was required.[296] The Court further noted that under Washington state law, had the judge *not* considered facts beyond the guilty plea, his upwardly-departed

287 *Blakely*, 124 S. Ct. at 2537-38.
288 *Id*. at 2534.
289 *Id*. at 2534-35.
290 *Id*. at 2535.
291 *Id*.
292 *Id*. at 2538.
293 *Id*. at 2536.
294 *Id*. at 2537 (emphasis omitted).
295 *Id*. at 2537-38.
296 *Id*.

sentence would have been reversed.[297]

The Court's *Schriro* opinion will likely have a great impact on the retroactivity analysis of *Blakely*, specifically on the point of whether *Blakely* will fit either of the two *Teague* exceptions.[298] The retroactivity issues for *Blakely* should be quite similar to

[297] *Id*. at 2538.

[298] Of course, this entire discussion of whether *Blakely* fits either of the two *Teague* exceptions to the bar on retroactive application of new rules of criminal procedure assumes that the Court will find *Blakely* to be a "new" rule. The Court has announced that a rule is new if it was not "*dictated* by then existing precedent" and "was apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. 518, 528 (1997). Whether or not *Blakely* is a new rule is an issue because as the Court noted in *Blakely*, it was merely applying the rule announced in *Apprendi* and was not announcing an entirely new line of legal doctrine. *Blakely*, 124 S. Ct. at 2536. Because of this, it could be argued that *Blakely* did not announce a new legal rule and that petitioners challenging their sentences on collateral review should not have to show that *Blakely* fits one of the two narrow *Teague* exceptions. Instead, they need only show that their convictions were final after the Court announced *Apprendi*.

However, two factors counter strongly against such an argument. First, the Court has reasoned that a strong dissent is relevant evidence indicating that reasonable jurists could have differed as to whether prior law compelled the new rule. Beard v. Banks, 124 S. Ct. 2504, 2512-13 (2004). In *Blakely* there was a large four-justice group of dissenters. *See Blakely*, 124 S. Ct. at 2543. Although Justice O'Connor's dissent criticized part of the reasoning in *Apprendi*, it noted that *Apprendi* did not command the outcome in *Blakely*. *Id*. at 2547-48 (interpreting *Apprendi's* "statutory maximum" as the maximum allowed under the statute rather than the maximum presumed sentence). Accordingly, the *Blakely* dissent based its reasoning on an interpretation of *Apprendi* that was contrary to that of the majority, rather than only suggesting that *Apprendi* be overturned. Second, whether lower courts split over whether to apply the then-existing precedent in a manner consistent with the new rule was held to be a critical issue by the Court in *Butler v. McKellar*, 494 U.S. 407, 415 (1990). As Justice O'Connor noted in her *Blakely* dissent, "only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme." *Blakely*, 124 S. Ct. at 2547 n.1 (citing sixteen federal and state opinions that found *Apprendi* did not strike down guidelines schemes). Every single federal circuit court considering this issue rejected that *Apprendi* applied to determinate sentencing schemes the way that *Blakely* applied. *See* United States v. Toliver, 351 F.3d 423 (9th Cir. 2003); United States v. Heltn, 349 F.3d 295 (6th Cir. 2003); United States v. Johnson, 335 F.3d 589 (7th Cir. 2003) (per curiam); United States v. Goodine, 326 F.3d 26 (1st Cir. 2003); United States v. Piggie, 316 F.3d 789 (8th Cir. 2003); United States v. Luciano, 311 F.3d 146 (2nd Cir. 2002); United States v. Randle, 304 F.3d 373 (5th Cir. 2002); United States v. Mendez-Zamora, 296 F.3d 1013 (10th Cir. 2002); United States v. DeSumma, 272 F.3d 176 (3rd Cir. 2001); United States v. Sanchez, 269 F.3d 1250 (11th Cir. 2001); United States v. Fields, 251 F.3d 1041 (D.C. Cir. 2001)); United States v. Kinter, 235 F.3d 192 (4th Cir. 2000). Such a weight of opinions contrary to *Blakely* provides significant evidence that *Apprendi* did not dictate such a result and that the issue was open for reasonable jurists to disagree. Not surprisingly, two courts considering this issue have found that *Blakely* is a "new" rule. *Morris v. United States*, 333 F. Supp. 2d 759 (C.D. Ill. 2004); *Lilly v. United States*, 342 F. Supp. 2d 532 (W.D. Va. 2004).

those of the *Ring* holding, which were analyzed in *Schriro*, because both new Supreme Court rules come from the Court's general holding in *Apprendi* and have to do with the Sixth Amendment guarantee of a jury trial in sentencing proceedings. Critical distinctions exist, however, which require a complete analysis of what exactly will be the impact of the Court's holding in *Schriro* to the impending retroactivity analysis of *Blakely*.

Regarding the first exception, whether *Blakely* is a substantive ruling, *Schriro* appears to have ruled out any possibility that *Blakely* announced a new substantive rule of criminal law. In order to make an argument that *Blakely* announced a new rule, a similar argument to the one announced by the Ninth Circuit and overruled by the Supreme Court in *Schriro* would have to be presented.[299] With the Court's clear pronouncement that the substantive versus procedural distinction will focus on whether the new rule regulates the "manner of determining the [criminal] defendant's culpability,"[300] and because *Blakely* does not appear to "alter[ ] the range of conduct or the class of persons that the law punishes,"[301] it will likely not be found to be a new substantive ruling under the first *Teague* exception.[302]

Schriro could also significantly impact a retroactivity analysis of the second *Teague* exception to the retroactivity bar for new rules of criminal procedure. With the Court re-emphasizing that a new rule must seriously diminish the accuracy of the underlying conviction, greater emphasis will likely be placed on this "accuracy" issue. Interestingly, regarding this issue, there appears to be a critical distinction between *Blakely* and *Schriro*, opening the

299 Specifically, the argument would be that, because the aggravating factors necessary for an upward departure must be found by a jury and are the functional equivalent of criminal elements, *Blakely* reordered the structure of the underlying crime into two separate crimes. In Blakely's case, it was assault for the first crime and "aggravated" assault, leading to a higher than presumed sentence as the second crime. As noted above, that is *exactly* the argument that was rejected by the Court in *Schriro*. *See supra* Part V.A.

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

301 *Id*. at 2523.

302 Not surprisingly, a number of district courts have already held as much, specifically relying on *Schriro*'s new formulation for determining whether a new rule is procedural or substantive, to find that *Blakely* is not a new substantive rule. Lilly, 342 F. Supp. 2d at 537; Rosario-Dominguez v. United States, 2004 U.S. Dist. LEXIS 15995, *26 n.3 (S.D.N.Y. Aug. 16, 2004); United States v. Stoltz, 325 F. Supp. 2d 982, 987 (D. Minn. 2004); United States v. Lowe, 2004 U.S. Dist. LEXIS 15455, *7-8 (W.D. Ill. Aug. 5, 2004); Morris v. United States, 333 F. Supp. 2d 759, 771 n.8 (C.D. Ill. 2004).

possibility that the Court could find the accuracy of old upwardly-departed sentences seriously diminished, leading to the possible holding that *Blakely* must be applied retroactively. Specifically, in *Schriro*, the burden of proof necessary to find the aggravating factors to impose a death sentence was the same both before and after the Court's decision in *Ring*. However, after *Blakely* the burden of proof will likely be higher for sentences imposed before the Court's decision. In *Schriro*, the burden was on the state to prove the aggravating factors to a judge beyond a reasonable doubt,[303] which is the same standard of proof necessary for a criminal element that must be found by a jury under the Sixth Amendment.[304] Accordingly, the only difference between a person sentenced to death pre-*Ring* and post-*Ring* was the fact-finder. This is not the case under *Blakely*. In Oregon, for example, the rule for imposing an upward departure before *Blakely* was that the judge must find "substantial and compelling reasons to upwardly depart, based on a list of aggravating factors to consider.[305] Post-*Blakely*, because the Court treats sentencing factors subject to the Sixth Amendment like elements, and therefore subject to the beyond a reasonable doubt standard,[306] for an upward departure to be imposed a jury would have to find the same enumerated factors beyond a reasonable doubt.[307]

Although on its face the accuracy issue regarding retroactivity of *Blakely* appears to be quite similar to *Ring*, there is a potentially critical distinction. Quite unlike Ring, pre-*Blakely* criminal defendants may have been subject to a lower burden of proof than defendants after *Blakely*, which could logically lead to a finding that the accuracy of the old sentences is seriously diminished. However, merely having the burden of proof elevated from something like a "preponderance of the evidence" standard to "beyond a reasonable doubt" may not be enough for the Court to find the accuracy of the underlying conviction is *seriously* diminished. *Blakely* is extremely similar to *Ring* in that the large change from the rule is a different factfinder (judge to

303 Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (citing ARIZ. REV. STAT. ANN. § 13-703 (West 1978), as amended by Act of May 1, 1979, Ariz. Sess. Laws ch. 144).

304 *See In re* Winship, 397 U.S. 358, 361-64 (1970).

305 OR. ADMIN. R. 213-008-0001, 213-008-0002 (2003).

306 Blakely v. Washington, 124 S. Ct. 2531, 2536-38 (2004); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

307 *Blakely*, 124 S. Ct. at 2536-38.

jury). The Court's holding in *Schriro* that the effect on accuracy from such a change in factfinder is too equivocal to find that the accuracy is seriously diminished may undercut any argument that judges are less accurate factfinders than juries and will, therefore, force the argument to focus almost entirely on the adjusted burden issue. Further, the Court's focusing in *Schriro* on the fact that for retroactive application there must be a finding of a *serious* diminishing of accuracy means a slight shift in the burdens may not be enough.[308] This illustrates an issue that was not entirely addressed by the Court in *Schriro*—how much of a loss of accuracy must there be before the accuracy of the underlying proceeding is seriously diminished? *Schriro* did not truly address this issue because it focused on the fact that the evidence is equivocal about whether judges or juries are more accurate factfinders.[309] Unfortunately, the facts in *Schriro* did not present a situation where the accuracy of the underlying conviction had unequivocally been lessened, so the Court had no occasion to illustrate what it meant by *seriously* diminished accuracy.

Whether *Ring* fits the more general piece of the second *Teague* exception, the requirement that the new rule of criminal procedure be "implicit in the concept of ordered liberty"[310] was not specifically addressed by *Schriro*.[311] However, Justice Breyer's dissent claims that the majority's silence on this point indicates an implicit finding that the Court's new rule from *Ring* is "implicit in the concept of ordered liberty."[312] If this assertion is true, it is possible that the Court could also find *Blakely* is "implicit in the concept of ordered liberty." As noted above, both *Ring* and *Blakely* derive from the same holding in *Apprendi*, which is a protection of individuals' right to a have a jury deter-

[308] Recently, in *Woodroffe v. Lambert*, 2004 U.S. Dist. LEXIS 19457, *40-42 (D. Or. Sept. 23, 2004), a district court in Oregon embraced this argument. In that case, the court held that although the petitioner's enhanced sentence under pre-*Apprendi* rules was imposed under a lower standard of proof than after *Apprendi*, the accuracy of the conviction or the enhanced sentence was still not *seriously* diminished. In *Woodroffe*, the court examined whether *Schriro* cast doubt on the Ninth Circuit's determination in *United States v. Sanchez-Cervantes*, 282 F.3d 664 (9th Cir. 2002) (holding that *Apprendi* did not fit the second *Teague* exception). Nevertheless, the court's discussion of changing burdens of proof for a *Teague* analysis should apply to *Blakely*.

[309] Schriro v. Summerlin, 124 S. Ct. 2519, 2525 (2004).

[310] Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality).

[311] *Schriro*, 124 S. Ct. 2519, 2527 (2004) (Breyer, J., dissenting).

[312] *Id*.

mine truly factual issues in a criminal proceeding.[313] This basic principle appears to be indistinguishable in *Ring* and *Blakely*. If a majority of the *Schriro* Court believed that *Ring* dealt with a right that is "implicit in the concept of ordered liberty," and it found that the accuracy of the underlying proceeding was seriously diminished, as described above, then it is possible the Court could find that *Blakely* applies retroactively under the second *Teague* exception.

There are at least four reasons why such a finding is unlikely.[314] First, it is a large assumption that because *Schriro* did not address the issue of whether *Ring* announced a rule that is "implicit in the concept of ordered liberty," the Court did not dispute the issue.[315] Justice Breyer's dissent supports this assertion by citing to a number of opinions that either directly or indirectly state that the Sixth Amendment jury trial guarantee is a fundamental right.[316] But other opinions casually noting that the Sixth Amendment jury trial right is fundamental do not necessarily equate the rule to being "implicit in the concept of ordered liberty" for *Teague* retroactivity purposes. As discussed above, for the Court to find that a new rule of criminal procedure applies retroactively, it must be watershed and comparable in importance to *Gideon v. Wainwright*.[317] Therefore, "implicit in the

313 *See* Blakely v. Washington, 124 S. Ct. 2531, 2536-37 (2004).

314 In fact, a number of courts have already held that *Blakely* does not apply retroactively. *See, e.g.*, United States v. Swinton, 333 F.3d 481, 485 (3d Cir. 2003); Sepulveda v. United States, 330 F.3d 55, 61 (1st Cir. 2003); Coleman v. United States, 329 F.3d 77, 90 (2d Cir. 2003); United States v. Brown, 305 F.3d 304, 310 (5th Cir. 2002); Goode v. United States, 305 F.3d 378, 382 (6th Cir. 2002); Curtis v. United States, 294 F.3d 841, 844 (7th Cir. 2002); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir. 2002); McCoy v. United States, 266 F.3d 1245, 1256-57 (11th Cir. 2001); United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 151 (4th Cir. 2001); Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000); *In re* Smith, 285 F.3d 6, 9 (D.C. Cir. 2002).

315 The following discussion points out the logical reasons to believe Justice Breyer made a large assumption. When it comes to counting Supreme Court justices, it may not be such a "large" assumption. It is true, of course, that four other justices signed off on Justice Breyer's dissenting opinion, implying that at least four justices believe that the Sixth Amendment guarantee underlying *Ring* and *Blakely* is a fundamental one, implicit in the concept of ordered liberty. This means that only one justice from the *Schriro* majority must believe that the new rule from *Blakely* is implicit in the concept of ordered liberty.

316 *Schriro*, 124 S. Ct. at 2527 (citing Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Scalia, J., concurring)); *Blakely*, 124 S. Ct. at 2536; Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring)); Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality); Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968)).

317 *See supra* note 83 and accompanying text.

concept of ordered liberty" in the habeas corpus retroactivity context does not mean that a right is generally fundamental. Rather, it seems that the new rule must be extremely rare and special in some way.[318] This perspective on the type of rule the Court would apply retroactively seems to be substantiated by the Court's discussion in *Beard v. Banks* of the rarity of rules it will find apply retroactively, where the Court noted it has not yet found a rule that fits the second *Teague* exception.[319]

Second, and similar to the first problem, *Blakely* did not announce a rule that is entirely unprecedented and new to criminal procedural jurisprudence.[320] In *Blakely* the Court noted that it was merely applying its holding from *Apprendi* to the context of a determinate sentencing scheme.[321] The Court was quite clear that it was not announcing a previously unheard-of legal doctrine. Instead, *Blakely* was another logical, albeit surprising, extension of the principle announced in *Apprendi*. Although the Court has never announced that an extension (or new application) of a previously established legal rule cannot be one that is "implicit in the concept of ordered liberty" which rises to the level of watershed, it is difficult to conceive of the Court describing the second *Teague* exception as only applying to a "small core of rules"[322] but then finding that an extension of a previously announced concept is such a rule. In other words, because *Blakely* is a mere variant of *Apprendi*, it seems unlikely that it could be found to be a watershed ruling of criminal procedure.

Third, *Blakely* will likely be subject to harmless-error analysis, a critical consideration in whether a new rule is one "implicit in the concept of ordered liberty." The Ninth Circuit recently explained how Sixth Amendment jury rights being subject to harmless-error analysis is weighty evidence that such rules do not fit the second *Teague* exception:

> Our decisions that subjected *Apprendi* claims to harmless error analysis or plain error review lend additional support to

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318 *See, e.g.*, Beard v. Banks, 124 S. Ct. 2504, 2513-14 (2004); O'Dell v. Netherland, 521 U.S. 151, 157 (1997); Graham v. Collins, 506 U.S. 461, 478 (1993); Saffle v. Parks, 494 U.S. 484, 495 (1990).

319 *Beard*, 124 S. Ct. at 2513-14. Note that the Court's formulation of the second *Teague* exception in *Beard* seems to be an especially arduous characterization of the second *Teague* exception.

320 For the double meaning of "new" that arises in the *Teague* context see *supra* note 298.

321 Blakely v. Washington, 124 S. Ct. 2531, 2536-37 (2004).

322 *O'Dell*, 521 U.S. at 157.

> our determination that *Apprendi* is not a bedrock procedural rule. In these cases, we did not consider *Apprendi* errors to be structural. A structural error is one that necessarily renders a trial fundamentally unfair and therefore invalidates the conviction. We only review for plain error or assess whether an error is harmless when the error is not structural; in those circumstances, the court must determine whether any substantial rights were prejudiced by the error. By applying harmless error analysis or plain error review to *Apprendi* claims, we have necessarily held that *Apprendi* errors do not render a trial fundamentally unfair.[323]

As noted above, *Blakely* is a derivative of *Apprendi*, and it appears that a *Blakely* claim will be subject to harmless-error review because it is not a structural error that renders the entire trial or sentencing fundamentally unfair. In fact, one Ninth Circuit panel recently conducted harmless-error review of a *Blakely* error, implying that *Blakely*, like *Apprendi*, is subject to such review, providing significant evidence that *Blakely* is not a watershed rule.[324]

Fourth, there are pragmatic reasons to believe the Court will avoid finding that *Blakely* fits the second *Teague* exception. One commentator reported that *Blakely* would affect up to 270,000 federal cases.[325] In addition, if the Court holds that *Blakely* applies retroactively, federal habeas corpus statutory law allows both state and federal prisoners to file successive petitions.[326] This means that prisoners who have already challenged their convictions and sentences in federal court and lost will be allowed to bring an entirely new case to have their unconstitutional

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[323] United States v. Sanchez-Cervantes, 282 F.3d 664, 670-71 (2002).

[324] *See* United States v. Ameline, 376 F.3d 967, 972 (9th Cir. 2004) (holding *Blakely* error requires reversal and resentencing under either plain-error or harmless-error standard). In *Tyler v. Cain*, 533 U.S. 656, 666 (2002), the Supreme Court explained that not even all structural-error rules fit into *Teague*'s procedural exception. This implies that the second *Teague* exception is even narrower than the category of structural-error rules. *See also* United States v. Sanders, 247 F.3d 139, 150 (4th Cir. 2001) (noting that the fact the claim is subject to harmless and plain error indicates it is not a watershed change in criminal procedure and emphasizing that "finding something to be a structural error would seem to be a necessary predicate for a new rule to apply retroactively under *Teague*").

[325] Wittes, *supra* note 286.

[326] *See* 28 U.S.C. § 2244(b)(2)(a) (2000), which states

> 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 unavailable.

sentences overturned. Such a scenario would mean that sentences imposed as far back as the early 1980s, when the federal and state governments began implementing determinate sentencing structures,[327] would be subject to review. This could lead to a massive flood of convicted criminals being let out in one large wave. Because of the potential political and economic effects associated with a finding, it seems unlikely the Court would issue such a decision.

CONCLUSION

The entire case of Warren Wesley Summerlin was unfortunate, beginning with the crime itself and concluding with the Supreme Court's overturning itself on an issue Summerlin had argued fifteen years earlier. The issue presented to the Court, however, was not a factual or policy issue about whether Mr. Summerlin deserved his death sentence. Rather, the issue presented in this case was purely a legal one. More particularly, it was about what the Supreme Court did in *Ring v. Arizona*.[328]

In determining whether *Ring* applied retroactively, the Ninth Circuit applied the well-accepted *Teague* test. This *Teague* test has placed a very high hurdle in front of federal habeas corpus petitioners to have a new rule of constitutional criminal procedure applied retroactively. Surprisingly, in applying the *Teague* test the Ninth Circuit held that *Ring* was a new substantive ruling, thus applying retroactively. Alternatively, the court held that if the new rule announced in *Ring* is seen as procedural, then it was a new watershed rule that improved the accuracy of the underlying proceeding. In so holding, the Ninth Circuit added to confusion regarding when a new rule is substantive, and it significantly lowered the bar for when a procedural rule is applied retroactively.

From a legal standpoint, the Supreme Court fortunately granted certoriari and overturned the Ninth Circuit. In so doing, the Court cleaned up the framework for *Teague* issues and provided significant clarification on the distinction between substantive and procedural rules of criminal law. The Court's distinction is clear, workable, and perhaps most importantly, follows the spirit and underlying policy rationales for the *Teague* doctrine of

[327] *See* Apprendi v. New Jersey, 530 U.S. 466, 549-50 (2000) (O'Connor, J., dissenting).

[328] 536 U.S. 584 (2002).

retroactivity. The Court also provided clarification for the procedural exception to the *Teague* bar of retroactivity. It held that new rules must not only diminish the accuracy of the underlying proceeding, but new rules must *seriously* do so to be applied retroactively. This holding not only stayed within the bounds of already-existing *Teague* jurisprudence, but also maintained the narrowness of the *Teague* procedural exception. Accordingly, the *Schriro* Court took great strides towards protecting finalized convictions. Its opinion also reserves the finding of watershed rules for the extremely rare cases that are truly "groundbreaking."[329]

This holding will prove important as federal courts will now have to deal with whether to apply *Blakely*, the Supreme Court's most recent new rule of criminal procedure, retroactively. *Schriro* will make it very difficult to find that the rule from *Blakely* announced a new substantive rule. However, *Blakely* will provide interesting accuracy issues that will likely force the Court to further define what constitutes a serious diminishing of the accuracy of the underlying proceeding. If it is found that the rule from *Blakely* seriously diminished the accuracy of prior sentences, the Court will also have to deal with the difficult issue of whether *Blakely* is "implicit in the concept of ordered liberty." Although the possibility is definitely there for the Court to announce such a holding, several legal and pragmatic factors make that an unlikely result. Whatever the result, future retroactivity cases will address *Blakely*, will be heavily influenced by *Schriro*—and will further define the factors discussed in the Court's opinion.

[329] *See* O'Dell v. Netherland, 521 U.S. 151, 167 (1997).