Retroactivity of New Rules of Constitutional Law: Why the Supreme Court Should Have Overturned Warren Summerlin's Unconstitutional Death Sentence

Sarah R. Green
RETROACTIVITY OF NEW RULES OF CONSTITUTIONAL LAW: WHY THE SUPREME COURT SHOULD HAVE OVERTURNED WARREN SUMMERLIN'S UNCONSTITUTIONAL DEATH SENTENCE

Sarah R. Greene*

"He who the sword of heaven will bear should be as holy as severe."1

INTRODUCTION

Warren Summerlin’s conviction for first-degree murder and sexual assault, and his resulting death sentence are, in the words of the United States Court of Appeals for the Ninth Circuit, “raw material from which legal fiction is forged.”2 Indeed, Summerlin suffered an inordinate number of bizarre misfortunes from the beginning of his journey through the criminal justice system.3 Court-ordered psychiatric evaluations revealed disturbing mental impairments, but still found Summerlin competent to stand trial and ostensibly legally sane.4 His first lawyer initially worked out a favorable plea agreement, from which Summerlin ultimately withdrew after

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* Sarah R. Greene is a JD candidate at the College of William & Mary School of Law. She graduated from the University of North Carolina at Chapel Hill with a bachelor of arts in English. She wishes to thank her parents for their unwavering support and Brendan H. Chandonnet for his invaluable guidance during the note-writing process.

1 Summerlin v. Stewart, 267 F.3d 926, 948 (9th Cir. 2001) (quoting WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 3, sc. 2) (discussing possible judicial impairment at Warren Summerlin’s trial due to use of marijuana), withdrawn, 281 F.3d 836 (9th Cir. 2002) (deferring submission pending the final disposition by the Supreme Court in State v. Ring, 25 P.3d 1139 (Ariz. 2001), rev’d, 536 U.S. 584 (2002)).


3 For a more detailed account of the facts surrounding Summerlin’s conviction and sentence see discussion infra Part II.A.

4 One doctor explained that Summerlin’s dyslexia and illiteracy made him “functionally mentally retarded”; that “Summerlin’s impulse control was extremely impaired due to an explosive-type personality disorder[;] and that he had an anti-social personality.” Summerlin, 267 F.3d at 942 (recounting the observations of Dr. Maier Tuchler). Another doctor suspected that Summerlin suffered from psychomotor epilepsy because Summerlin described “experiencing an intense perfume odor” when he committed the murder. Id. (recounting the observations of Dr. Leonardo Garcia-Bunuel). Still another doctor found “indications of organic brain impairment, borderline personality disorder, and paranoid personality disorder.” Id. (noting the observations of Dr. Donald Tatro).
the judge cautioned that he would not honor the sentencing recommendation.\textsuperscript{5} Unbeknownst to Summerlin, after the judge’s warning but before Summerlin withdrew his plea, his lawyer and the prosecutor who negotiated the plea agreement had a romantic encounter after a Christmas party.\textsuperscript{6} Following a brief jury trial, Judge Philip Marquardt alone was responsible for meting out Summerlin’s punishment.\textsuperscript{7} After a Friday penalty-phase hearing Judge Marquardt sentenced Summerlin to death the following Monday.\textsuperscript{8} Again, unbeknownst to Summerlin, the judge who decided his fate “behind closed doors over the weekend” suffered from a marijuana addiction.\textsuperscript{9} If only Summerlin had been sentenced twenty years later, constitutional law would have required that his fate rest in the hands of a group of jurors, rather than a single judge who may have been high.\textsuperscript{10}

On June 24, 2002, in the landmark decision of \textit{Ring v. Arizona}, the United States Supreme Court declared unconstitutional the Arizona capital sentencing scheme that allowed a judge, sitting alone, to determine the presence or absence of aggravating factors required for imposition of the death penalty.\textsuperscript{11} The petitioner, Timothy Ring, was convicted by a jury of “felony murder occurring in the course of armed robbery.”\textsuperscript{12} Pursuant to the Arizona statute then in effect,\textsuperscript{13} the trial judge held a separate sentencing hearing after the guilt phase of the trial: he found two aggravating factors, no mitigating circumstances sufficient to call for leniency, and accordingly sentenced Ring to death.\textsuperscript{14} Because the jury verdict alone would have conferred a maximum punishment of life imprisonment, the Supreme Court found that judge-only determination of aggravating factors violated the Sixth Amendment jury trial guarantee.\textsuperscript{15} Accordingly, the Supreme Court concluded that “[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”\textsuperscript{16}

\begin{thebibliography}{9}
\bibitem{Summerlin} \textit{Summerlin}, 341 F.3d at 1087.
\bibitem{Id} \textit{Id}. at 1086–87.
\bibitem{Id} \textit{Id}. at 1088–90.
\bibitem{Id} \textit{Id}. at 1090.
\bibitem{Id} \textit{Summerlin}, 267 F.3d at 953.
\bibitem{Id} \textit{Id}. at 591.
\bibitem{Id} \textit{Id}. at 594–95.
\bibitem{ARIZ. REV. STAT. ANN. §} 13–703(C) (West 2001).
\bibitem{Ring} \textit{Ring}, 536 U.S. at 597, 609.
\bibitem{Id} \textit{Id}. at 589.
\end{thebibliography}
Far from settling uncertainty in death penalty jurisprudence, the *Ring* opinion generated new problems for states that do not require juries to impose the death penalty. *Ring* invalidated not only Arizona's sentencing scheme, but similar procedures followed by Colorado, Idaho, Montana, and Nebraska.17 *Ring* also cast doubt on procedures followed in Alabama, Florida, Delaware, and Indiana where the death penalty is imposed pursuant to an advisory scheme, giving roles to both judges and juries.18 Most of these states changed their sentencing procedures in attempt to satisfy *Ring*,19 but there is still some debate as to exactly which sentencing schemes will satisfy *Ring*.20 For instance, under the advisory schemes still followed in Alabama and Florida, juries make factual findings and recommend sentences to the judge, who then makes the final sentencing determination.21 Do these statutes satisfy *Ring*?22


18 See id.

19 *The Death Penalty in 2002: Year End Report, 2002 Death Penalty Info. Ctr.* 3, http://www.deathpenaltyinfo.org/yrendrpt02.pdf (last visited Sept. 3, 2004) [hereinafter DEATH PENALTY INFO. CTR.]: Montana and Indiana changed their laws in anticipation of the Court’s ruling. Delaware, Colorado, Nevada, Nebraska[,] and Arizona revised their laws after the Court’s *Ring* decision. Idaho acknowledged the need for similar action on its statute. At least one federal case has been remanded to the lower courts in light of the *Ring* ruling, and federal prosecutors are altering their procedures in the hope of avoiding legislative change. So far, Florida and Alabama, which allow judges to override jury recommendations in capital cases, have resisted any changes to their laws.


21 Bryant, supra note 17.

22 See Forrester, supra note 20, at 1157, for a possible answer with respect to Alabama.
Another major question left unanswered by Ring, and the focus of this Note, is whether death row inmates, who have exhausted their direct appeals and were sentenced under schemes like the procedure invalidated by Ring, may obtain the benefit of Ring’s holding when seeking federal habeas corpus relief. In Summerlin v. Stewart, the United States Court of Appeals for the Ninth Circuit answered this question in Warren Summerlin’s favor, holding that federal habeas petitioners who were sentenced to death by judges sitting alone may obtain the benefit of the rule announced in Ring v. Arizona. In so holding, the Ninth Circuit directly contradicted the conclusion of the Eleventh Circuit in Turner v. Crosby and contradicted the Tenth Circuit’s reasoning in Cannon v. Mullin. In holding that a new constitutional rule may apply to sentences thought to be final, the Ninth Circuit called into question the constitutionality of eighty-nine death sentences in Arizona, fifteen in Idaho, and five in Montana.

Undoubtedly because of the circuit split created by the Summerlin decision, and the number of lives at stake, the Supreme Court granted certiorari to resolve two questions:

1. Did the Ninth Circuit err by holding that the new rule announced in Ring is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of Teague v. Lane . . .?
2. Did the Ninth Circuit err by holding that the new rule announced in Ring applies retroactively to case’s [sic] on collateral review under Teague’s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings?

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24 Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003) (declining to give a habeas petitioner the benefit of the new rule announced by Ring), cert. denied, 124 S. Ct. 2104 (2004).
25 Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) (denying retroactive application of Ring). A different retroactivity analysis applied to Cannon's habeas petition, and therefore the Tenth Circuit's holding was not necessarily irreconcilable with the Ninth Circuit's Summerlin holding. See discussion infra Part II.C.
27 Id.
29 See Petition for Writ of Certiorari at i, Summerlin (No. 03–526) (citations omitted); Summerlin, 341 F.3d 1082, cert. granted sub nom. Summerlin, 124 S. Ct. at 834 (granting certiorari “limited to Questions 1 and 2 presented by the petition”).
In an opinion authored by Justice Scalia and joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas, the Supreme Court held that Ring announced neither a substantive rule, nor a watershed rule of criminal procedure. Accordingly, Ring does not apply retroactively to cases that were final before its decision was announced.

This Note provides a more in-depth analysis of the issues the Supreme Court faced in resolving the retroactivity question than did the Schriro v. Summerlin opinion. This analysis shows that, notwithstanding the Supreme Court's holding to the contrary, the Ninth Circuit was correct in concluding that the rule announced by Ring should be applied retroactively to federal habeas petitioners. Part I summarizes the major decisions leading up to Summerlin, both within death penalty jurisprudence and retroactivity jurisprudence. Part II examines the reasoning behind the Ninth Circuit's Summerlin holding and provides a more detailed account of the facts surrounding Warren Summerlin's conviction and sentencing. Part II also explains the reasoning used by the Courts of Appeals for the Tenth and Eleventh Circuits to reach conclusions contrary to the Ninth Circuit's holding in Summerlin. Finally, Part III identifies additional arguments that support the Ninth Circuit's conclusion that Ring should be applied retroactively, but that were not incorporated in the Summerlin v. Stewart opinion.

That the Ninth Circuit followed existing precedent and sound logic in reaching its conclusion in Summerlin will be evident from the following discussion of death penalty and retroactivity jurisprudence, and the explication of the Ninth Circuit opinion. Furthermore, an examination of the circuit split precipitated by Summerlin will reveal that the Ninth Circuit's logic is the most persuasive among those circuits that weighed in on the Ring retroactivity question prior to the Supreme Court's decision; and indeed, its logic is even more persuasive than that of the Supreme Court's majority. Finally, after taking into account the concerns of fairness in the administration of the death penalty, especially given the singular circumstances of Summerlin's conviction and sentencing, it will be clear that the Supreme Court should have affirmed the Ninth Circuit's withdrawal of Summerlin's unconstitutional death sentence.

31 Id. at 2524–25.
I. BACKGROUND

A. History of Arizona Death Penalty Jurisprudence

Landmark decisions by the United States Supreme Court have forced the revision of Arizona's capital sentencing scheme several times over the past thirty years, beginning with the 1972 decision in *Furman v. Georgia*.

From 1919 until 1972, Arizona left the decision to impose a death sentence completely within the discretion of a jury. Because *Furman* held that death penalty statutes conferring complete discretion in sentencing on judges or juries were unconstitutional, Arizona revised its death penalty statute in 1973 to require sentencing by judges rather than juries in capital cases.

Arizona's death penalty faced its next major constitutional challenge in 1990. Following a jury's conviction of Jeffrey Walton for first-degree murder, the trial court held a separate sentencing hearing as required by Arizona statute. At the State's behest, the trial court found two aggravating circumstances: "(1) The murder was committed 'in an especially heinous, cruel or depraved manner,'" and "(2) the murder was committed for pecuniary gain." Walton presented mitigating testimony from "a psychiatrist who opined that Walton had a long history of substance abuse which impaired his judgment,... and that Walton may have been abused sexually as a child." The court sentenced Walton to death, "conclud[ing]...

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32 408 U.S. 238 (1972) (per curiam).
33 *Summerlin*, 341 F.3d at 1102 (recounting the history of Arizona's death penalty statute).
34 *Furman*, 408 U.S. at 253 (The Court criticized "a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned.... People live or die, dependent on the whim of one man or of 12."); Forrester, *supra* note 20, at 1157 ("*Furman* targeted jury discretion as the chief defect of modern capital sentencing, because of the opportunity it afforded for capricious imposition of the death penalty.").
37 *Id.* at 645 (citing ARIZ. REV. STAT. ANN. § 13–703(B) (West 1989)). After a defendant was found guilty of first-degree murder, the statute directed the court to hold a sentencing hearing, without a jury, to decide whether to impose a sentence of death or life imprisonment. The judge had to determine the existence of aggravating or mitigating circumstances enumerated in the statute. If the court found one or more of the aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency," it was directed to impose a death sentence. *Id.* at 643–44.
38 *Id.* at 645 (citing § 13–703(F)(6)).
39 *Id.* (citing § 13–703(F)(5)).
40 *Id.* (citing § 13–703(G)(1)).
that there were 'no mitigating circumstances sufficiently substantial to call for leniency.'

The Supreme Court rejected Walton's argument that his sentence violated the Sixth Amendment, and thus upheld the Arizona capital sentencing scheme. Reasoning that the aggravating factors that must be found prior to imposition of the death penalty were sentencing considerations, and not elements of a distinct offense of capital murder, the Court concluded that they did not have to be submitted to a jury and proven beyond a reasonable doubt. Only ten years after this decision, the Supreme Court cast serious doubt on the Walton rationale when it decided *Apprendi v. New Jersey*.

Although not a capital case, *Apprendi* directly contradicted the logic of Walton, thereby calling into question the constitutionality of Arizona's death penalty once again. *Apprendi* invalidated a New Jersey hate crime statute that allowed a judge to increase a sentence beyond the statutory maximum allowed by the jury's verdict if he found by a preponderance of the evidence that the defendant's purpose in committing the crime was to intimidate the victim based on a particular characteristic of the victim. Grounding its decision in the Due Process Clause and the Sixth Amendment jury trial guarantee, the *Apprendi* Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

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41 *Id.* (citing § 13-703).

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

43 *Id.* at 647. The United States Court of Appeals for the Ninth Circuit had recently reached the opposite conclusion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), finding that the aggravating factors required to impose the death penalty were elements of a distinct offense of capital murder. Accordingly, the Sixth Amendment required that the elements be submitted and proven to a jury beyond a reasonable doubt. When the Arizona Supreme Court upheld Walton's sentence, the United States Supreme Court granted certiorari to resolve the split. *Id.*

44 530 U.S. 466 (2000).

45 See infra note 47 and accompanying text.

46 *Apprendi*, 530 U.S. at 491. Charles Apprendi entered into a plea agreement pursuant to which the State reserved the right to request that the court impose an enhanced sentence as provided for in its hate crime statute. The judge accepted Apprendi's guilty pleas, and subsequently the prosecutor filed a motion for an enhanced sentence. After an evidentiary hearing on Apprendi's purpose, the judge imposed an enhanced sentence, finding by a preponderance of the evidence that Apprendi fired into the home of an African-American family with a purpose to intimidate. *Id.* at 470–71.

47 *Id.* at 490. The result in *Apprendi* was the natural extension of *Jones v. United States*, 526 U.S. 227 (1999), which examined a federal statute, to a state statute. In *Jones* the Supreme Court observed that "under 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
The *Apprendi* Court’s conclusion could not coexist with *Walton*, and accordingly, the Supreme Court revisited Arizona’s capital sentencing scheme in 2002. In *Ring v. Arizona*, the Supreme Court was confronted with facts and a constitutional challenge virtually identical to those presented by *Walton*, but in light of the *Apprendi* holding, the Supreme Court reached the opposite conclusion. The Court recognized that “*Apprendi*’s reasoning [was] irreconcilable with *Walton*’s holding,” and explicitly “overrule[d] *Walton* in relevant part.” Accordingly, the Court held that “[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”

**B. History of Retroactivity Jurisprudence**

When *Ring v. Arizona* held that juries must decide the presence or absence of aggravating factors and mitigating circumstances before imposition of the death penalty, the Supreme Court announced a “new constitutional rule of criminal procedure” within the meaning of *Teague v. Lane*. In addressing *Ring*’s Sixth Amendment claim, however, the Court left an important question unanswered: do the death row inmates who were sentenced under Arizona’s unconstitutional capital punishment scheme benefit from the new rule announced in *Ring*? Retroactivity jurisprudence clearly answers that question in the affirmative for those inmates who

indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Jones*, 526 U.S. at 243 n.6. The *Apprendi* Court adopted Justice Stevens’s observation that “it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.” *Apprendi*, 530 U.S. at 490 (citing *Jones*, 526 U.S. at 252–53 (Stevens, J., concurring)).

Justice O’Connor immediately recognized the conflict, observing in her *Apprendi* dissent that “[i]f the Court does not intend to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.” *Apprendi*, 530 U.S. at 538 (O’Connor, J., dissenting).


*Ring* was convicted of felony murder occurring in the course of armed robbery. As in *Walton*, the judge, sitting without a jury, sentenced *Ring* to death after finding two aggravating factors and no mitigating circumstances sufficient to call for leniency. *Ring* argued on appeal that his sentence violated the Sixth and Fourteenth Amendments. *Id.* at 594–95.

*Id.* at 589.

*Id.*

*Teague v. Lane*, 489 U.S. 288, 299 (1989) (plurality opinion). The Supreme Court announces a “new rule” for purposes of the *Teague* analysis 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.” *Id.* at 301 (citations omitted).
did not exhaust their direct appeals before the opinion was issued, but *Ring*’s impact on inmates seeking collateral relief is less clear.

The Supreme Court’s preeminent opinion on retroactive application of new constitutional rules of criminal procedure, *Teague v. Lane*, provides a framework for this determination but does not provide a clear answer to the question left open by *Ring*. Justice O’Connor authored the opinion of a divided Supreme Court in *Teague v. Lane*, which came under fire in subsequent Supreme Court opinions beginning in the year it was decided. Even today “[t]he Justices continue to differ over the import and application of fundamental components of the doctrine.”

The *Teague* analysis had its genesis in Justice Harlan’s concurring opinion in *Mackey v. United States*, which the Supreme Court expressly adopted and expanded in *Teague*. Harlan distinguished cases on direct review from cases on collateral review, and concluded that new rules of constitutional law should always be applied on direct review. For cases on collateral review, however, “he concluded that it was better policy to apply the law prevailing at the time of the conviction rather than the new law prevailing at the time of the petition.” The “policy” implicated by retroactive application of new constitutional rules included several justifications for the presumption against retroactivity: that the purpose of habeas corpus to “ensure[] that constitutional standards are honored,” is fulfilled as long as “the constitutional standards that prevailed at the time the original proceedings took place” are applied; that “retroactive application of new rules frustrates the judicial need for comity and finality”; and that weighing “the relative costs and benefits of retroactivity generally shows that ‘costs imposed upon the State[s] . . . generally far outweigh the benefits.’”

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54 Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (“[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.”).

55 *Teague, 489 U.S. 288.*

56 *Id.* at 289. Parts IV and V of the *Teague* opinion adopt the modern approach to retroactivity of new constitutional rules to cases on collateral review. Only three other Justices joined Justice O’Connor in these Parts: Chief Justice Rehnquist, and Justices Scalia and Kennedy. *Id.*


59 *Teague, 489 U.S. at 310–13; Laffey, supra note 20, at 392–93.*


61 Laffey, *supra* note 20, at 393 (citations omitted).

62 *Beane, supra* note 20, at 233 (citing *Teague, 489 U.S.* at 306).

63 *Id.* (citing *Teague, 489 U.S.* at 308).

64 *Id.* (citing Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring) (alterations in original)).
Since the Supreme Court adopted Justice Harlan's *Mackey* rationale in *Teague v. Lane*, federal habeas petitions have been evaluated under the presumption that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." The Supreme Court delineated two exceptions to the presumption of non-retroactivity. The first exception applies where the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" The second exception allows for retroactive application of a new rule "if it requires the observance of 'those procedures . . . are implicit in the concept of ordered liberty.'"

A reading of *Teague* alone, however, would not necessarily dictate its application to Summerlin's petition. The Supreme Court declined to address application of the *Teague* framework to capital sentencing in the *Teague* opinion itself; however, it later held that the *Teague* rule of non-retroactivity, and its two exceptions, did apply to review of death sentences. Accordingly, the presumptive

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65 *Teague*, 489 U.S. at 310. Although *Teague* governs questions of retroactivity in the federal habeas context, note however, that "'[i]n state postconviction proceedings, this issue is generally governed by state law rules of retroactivity." Stevenson, *supra* note 20, at 1095 n.26. The scope of this Note is limited to the federal habeas context.


67 *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part) (quotations omitted). Harlan pointed to the recognition of the right to counsel at trial for serious crimes in *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of a rule that should be applied retroactively on collateral review. *Mackey*, 401 U.S. at 694 (Harlan, J., concurring in part and dissenting in part).

68 A footnote to a section of Justice O'Connor's opinion, in which Chief Justice Rehnquist and Justices Scalia and Kennedy joined, explicitly declined to "express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context." *Teague*, 489 U.S. at 314 n.2. However, the four Justices declined to adopt "Justice Stevens's suggestion that the finality concerns underlying Justice Harlan's approach to retroactivity are limited to 'making convictions final,' and are therefore 'wholly inapplicable to the capital sentencing context.'" *Id.* (citing *Teague*, 489 U.S. at 321 n.3 (Stevens, J., dissenting)).

69 Penry v. Lynaugh, 492 U.S. 302, 303 (1989) ("The *Teague* rule of nonretroactivity and its two exceptions are applicable in the capital sentencing context.")., overruled by *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry's* primary holding that execution of mentally retarded prisoners did not violate the Eighth Amendment, but leaving undisturbed the secondary holding that the *Teague* retroactivity analysis applies to capital sentences).
rule of non-retroactivity and its two exceptions were applied by both the Supreme Court and the Ninth Circuit in evaluating Summerlin’s habeas petition.

The foregoing history of death penalty and retroactivity jurisprudence is the legal backdrop against which the Ninth Circuit evaluated Summerlin’s habeas petition. While much of the Ninth Circuit opinion is devoted to arguments based on Ring v. Arizona and Teague v. Lane, the majority went into considerable detail in recounting the facts surrounding Summerlin’s conviction and sentencing. Accordingly, because the majority’s emphasis on the facts suggests they may have influenced its conclusion, the crucial ones are reproduced in the section that follows.

II. ANALYSIS

A. Facts Surrounding Summerlin’s Conviction and Sentencing

The Ninth Circuit described the facts surrounding Warren Summerlin’s conviction for the first-degree murder and sexual assault of Brenna Bailey as “raw material from which legal fiction is forged.” Summerlin’s first lawyer helped him to negotiate a favorable plea agreement under which he would plead guilty to the second-degree murder of Bailey, to aggravated assault in an unrelated road rage incident, and to violating his probation in another case charging burglary. In exchange, Summerlin would serve concurrent sentences, with the longest being twenty-one years for Bailey’s murder. After Summerlin entered his plea on December 15, 1981, Judge Derickson informed him that he did not intend to accept the stipulated sentence and that if Summerlin wanted his plea to stand, he would face up to thirty-eight-and-one-half years in prison. At the next hearing before Judge Derickson on December 22, 1981, Summerlin elected to withdraw from his plea agreement, which made him eligible for a first-degree murder conviction and a death sentence.

71 Summerlin, 341 F.3d at 1108–21.
72 Id. at 1084–92.
73 Id. at 1084.
74 Id. at 1086. The significance of this road rage incident is that it led to Summerlin’s conviction for aggravated assault, which later served as one of the two statutory aggravating factors that made him eligible for the death penalty. Id. at 1084–90. This conviction stemmed from Summerlin’s actions after “a car veered off the road, jumped the curb and struck Summerlin’s wife, who was hospitalized for her injuries. At the scene, Summerlin brandished a pocket knife at the errant driver, an act that occasioned the filing of the criminal assault charge.” Id. at 1084.
75 Id. at 1086.
76 Id. at 1087.
77 Summerlin, 341 F.3d at 1087.
Meanwhile, unbeknownst to Summerlin, his counsel developed a personal conflict of interest between the December 15 and December 22 hearings when she attended a Christmas party on the evening of December 18, 1981.\footnote{\textit{Id.} at 1086–88.}

She [Summerlin's counsel] and prosecutor Doe left the party together and had what she later described as a "personal involvement . . . of a romantic nature." As a result of that, as she later testified, she felt she "could no longer ethically represent Mr. Summerlin." Because of the circumstances, she believed "that it would be appropriate for another Public Defender to handle the case and take it to trial . . . ."\footnote{\textit{Id.} at 1086–87.}

Despite her misgivings, Summerlin's counsel never reported the conflict to Summerlin or to the court and she continued to represent him at the December 22 hearing.\footnote{\textit{Id.} at 1087.} Summerlin was eventually assigned new counsel, but only after he expressed dissatisfaction with his representation for reasons other than the undisclosed encounter between his lawyer and the prosecutor.\footnote{\textit{Id.} at 1087–88.}

Summerlin's murder trial was subsequently assigned to Judge Philip Marquardt who, it was later discovered, came with his own sort of conflict.\footnote{\textit{Id.} at 1089 (discussing Marquardt's marijuana use).} The trial itself lasted only four days, and the jury took only three hours to find Summerlin guilty of both first-degree murder and sexual assault.\footnote{\textit{Summerlin}, 341 F.3d at 1088.} The sentencing hearing was similarly perfunctory, requiring only twenty-six transcript pages.\footnote{\textit{Id.} at 1089.} In support of its aggravation argument, the State presented only one exhibit: the documents related to Summerlin's aggravated assault conviction for the road rage incident.\footnote{\textit{Id.}} In mitigation, the defense presented the written report of Dr. Tatro.\footnote{\textit{Id.}} Judge Marquardt said he would deliberate over the weekend and pronounce a sentence the following Monday.\footnote{\textit{Id.}}

When the sentencing hearing resumed, Judge Marquardt announced that he found "two aggravating circumstances and no sufficiently substantial mitigating circumstances."\footnote{\textit{Id.} at 1090.} In aggravation he found "that the defendant had a prior felony
conviction involving the use or threatened use of violence on another person," and that "Summerlin committed the offense in an especially heinous, cruel, or depraved manner." Accordingly, he sentenced Summerlin to death.

Though Summerlin and his counsel were not aware of it at the time, Judge Marquardt had a problem with marijuana addiction when he sentenced Summerlin to death. After Marquardt was charged with a second marijuana-related offense in 1991, he "stepped down from the bench and was ordered disbarred in Arizona and by the United States Supreme Court." Marquardt subsequently admitted to using marijuana regularly in the years in which he sentenced both Summerlin and another death row inmate challenging his sentence. When asked about one death sentence that he gave, Marquardt admitted that he did not remember the man, "but he said he had no doubt that the death penalty was warranted. 'These guys have sentenced themselves,'" he remarked.

Although the missteps of Summerlin’s first counsel and Judge Marquardt are reprehensible, considerations of fairness alone are not sufficient to surmount the hurdles to retroactive application of a new rule. No doubt influenced by Summerlin’s misfortunes, the Ninth Circuit cleared these hurdles by following the complicated retroactivity jurisprudence crafted by the Supreme Court. In concluding that Ring is either a substantive rule that is presumptively retroactive, or, in the alternative, that it falls within a Teague exception that allows for its retroactive application, the Ninth Circuit reached a result that is both just and grounded in constitutional law. These arguments are explained in the following section.

90 Id. (citing § 13-703(F)(6)).
91 Id. at 1089.
92 Id. at 1090 n.1.
94 Id.
95 The Summerlin majority explicitly linked their concerns with Marquardt’s behavior to a key portion of the Teague retroactivity analysis that required examining whether changes mandated by Ring seriously enhanced the accuracy of capital sentencing proceedings: [T]he extremity of [Marquardt’s] actions highlights the potential risk of accuracy loss when a capital decision is reposed in a single decision-maker who may be habituated to the process, or who may not treat capital sentencing in accordance with the heightened requirements that the Eighth Amendment imposes. Obviously, in Summerlin’s case, the concern is not merely theoretical.

Summerlin, 341 F.3d at 1114–15. See infra notes 131–36 and accompanying text for an explanation of how Ring’s jury requirement enhances accuracy in sentencing proceedings.
B. Reasoning of the Ninth Circuit Summerlin Opinion

The Ninth Circuit *Summerlin* majority took a two-pronged approach in concluding that *Ring* should apply retroactively to Summerlin's habeas petition. In the first instance, the court of appeals posited that the rule announced in *Ring* was not subject to a *Teague* analysis because the new rule was one of substance rather than procedure.96 The classification of *Ring*’s rule as substantive dictates its retroactive application because “[u]nlike strictly procedural rules, ‘new rules of substantive criminal law are presumptively retroactive.’”97 In the alternative, the Ninth Circuit evaluated the procedural aspects of the new rule within the *Teague* framework and held that retroactive application was mandated because it fell within the second *Teague* exception to the presumption against non-retroactivity.98

1. The *Teague* Presumption Against Non-Retroactivity Did Not Apply Because *Ring* Announced a New Substantive Rule.

The Ninth Circuit began the first prong of its retroactivity analysis by observing that “[t]he threshold question in a *Teague* analysis is whether the rule the petitioner

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96 *Summerlin*, 341 F.3d at 1108.

97 *Id.* at 1099 (citing Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001)).

98 The Supreme Court condensed the Ninth Circuit’s analysis from three steps to two. The Ninth Circuit’s analysis consisted of (1) a threshold inquiry of whether a *Teague* analysis applied to the new rule; (2) determining that if a *Teague* analysis did apply to the procedural aspects of the new rule, the new rule did not fit within the first *Teague* exception; (3) but that *Ring* did fall within the second *Teague* exception to the presumptive non-retroactivity of procedural rules. The Supreme Court combined the threshold determination of whether *Ring* announced a new procedural rule with its evaluation of what the Ninth Circuit considered the first *Teague* exception, see *Schriro v. Summerlin*, 124 S. Ct. 2519, 2523–24 (2004), which, the Ninth Circuit reasoned, applies where “certain primary conduct has been decriminalized or [where] certain classes of individuals are immunized from specified forms of punishment by the newly announced rule,” 341 F.3d at 1109 (citing *Saffle v. Parks*, 494 U.S. 484 (1990)). The Supreme Court began its analysis with the premise that “[n]ew substantive rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms,” 124 S. Ct. at 2522 (citing *Bousley v. United States*, 523 U.S. 614, 620–21 (1998)), “as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State’s power to punish,” *id.* (citing *Saffle v. Parks*, 494 U.S. 484, 494–95 (1990); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion)). Perhaps in an attempt to prevent confusion, the Supreme Court appended a footnote explaining that although it “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.” *Id.* at n.4 (citations omitted). The Supreme Court’s truncated analysis probably deserved a more thorough explanation than the footnote provided, given that the Ninth Circuit concluded that *Ring* was a substantive rule not subject to the *Teague* bar, 341 F.3d at 1099–1108, while simultaneously rejecting the notion that it fell within the first *Teague* exception, *id.* at 1109. Obviously, under the Ninth Circuit’s reasoning, these inquiries were distinct.
seeks to apply is a substantive rule or a procedural rule, because 'Teague by its terms only applies [sic] to procedural rules.'\textsuperscript{99} The significance of this distinction is that 'the Teague retroactivity bar does not apply if the rule Ring announced is substantive, rather than procedural, in nature.'\textsuperscript{100} The Ninth Circuit interpreted the substantive-procedural distinction in the Teague context as follows: "a new rule is one of 'procedure' if it impacts the operation of the criminal trial process, and a new rule is one of 'substance' if it alters the scope or modifies the applicability of a substantive criminal statute.'\textsuperscript{101}

While both the Supreme Court and the Ninth Circuit invoked Bousley v. United States\textsuperscript{102} to determine whether Ring announced a new substantive rule, they reached opposite conclusions. The Supreme Court cited Bousley for the proposition that a rule is substantive if it "alters the range of conduct or the class of persons that the law punishes . . . . In contrast, rules that regulate only the manner of determining the defendant's culpability are procedural."\textsuperscript{103} The Court recognized that "[a] decision that modifies the elements of an offense is normally substantive rather than procedural,"\textsuperscript{104} but rejected Summerlin's argument that Ring "modified the elements of the offense for which he was convicted."\textsuperscript{105} In concluding that Ring was a procedural decision, the Court made the following distinction between substantive and procedural holdings:

This Court's holding that, because Arizona has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as this Court's making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.\textsuperscript{106}

Conversely, in response to the Teague threshold question, the Ninth Circuit reasoned that "Ring is, as to Arizona, a 'substantive' decision, even if its form is partially procedural."\textsuperscript{107} This conclusion is buttressed by the Supreme Court's logic in Bousley v. United States,\textsuperscript{108} and subsequent interpretations of the rule it

\textsuperscript{99} Summervin, 341 F.3d at 1099 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).
\textsuperscript{100} Id. Moreover, "[u]nlike strictly procedural rules, 'new rules of substantive criminal law are presumptively retroactive.'" Id. (citing Santana-Madera, 260 F.3d at 138).
\textsuperscript{101} Id. at 1100 (citing Bousley, 523 U.S. at 620).
\textsuperscript{102} 523 U.S. 614 (1998).
\textsuperscript{104} Id. at 2524.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Summervin, 341 F.3d at 1102.
announced in *Richardson v. United States*. In *Bousley*, the Supreme Court "reject[ed] the government's *Teague*-based non-retroactivity argument because the case called for a construction of a federal statute. *Teague*, Chief Justice Rehnquist explained, 'is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.' Using the same logic, the Ninth Circuit declined to apply the *Teague* analysis to the rule announced in *Richardson*, observing that its requirement of "jury unanimity on individual violations alleged as part of a continuing criminal enterprise, is substantive, not procedural, under *Teague*." Similarly, the court observed, *Ring* "decide[d] the meaning of a criminal statute," and it did so in a manner that both redefined the separate substantive offense of 'capital murder' in Arizona and reinserted the distinction between murder and capital murder into Arizona's substantive criminal law structure." Furthermore, "[w]hen a decision affects the substantive elements of an offense, or how an offense is defined, it is necessarily a decision of substantive law." Accordingly, the Ninth Circuit concluded that "the rule announced by the Supreme Court in *Ring*, with its restructuring of Arizona murder law and its redefinition of the separate crime of capital murder, is necessarily a substantive rule."

In reaching the conclusion that *Ring* announced a substantive rule for *Teague* purposes, the Ninth Circuit was careful to distinguish *Apprendi v. New Jersey*. Reconciling *Ring*’s application in *Summerlin* with *Apprendi* is important because *Ring* has been interpreted to be an extension of *Apprendi* to the capital sentencing context; accordingly, it has been argued, any application of *Ring* should necessarily conform to the logic of *Apprendi*. The significance for the *Teague*

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110 *Summerlin*, 341 F.3d at 1100 (citing *Bousley*, 523 U.S. at 620).
111 *Id.* (citing United States v. Montalvo, 331 F.3d 1052 (9th Cir. 2003)). Furthermore, the *Summerlin* majority observed that “[a]ll of [its] sister circuits that have considered the question agree with this categorization.” *Id.* (citing United States v. Barajas-Diaz, 313 F.3d 1242, 1245 (10th Cir. 2002); Ross v. United States, 289 F.3d 677, 681 (11th Cir. 2002), cert. denied, 537 U.S. 1113 (2003); Santana-Madera v. United States, 260 F.3d 123, 138–39 (2d Cir. 2001); United States v. Lopez, 248 F.3d 427, 431–32 (5th Cir.), cert. denied, 534 U.S. 898 (2001); Lamier v. United States, 220 F.3d 833, 838 (7th Cir. 2000); Murr v. United States, 200 F.3d 895, 905–06 (6th Cir. 2000)).
112 *Summerlin*, 341 F.3d at 1106 (citing *Bousley*, 523 U.S. at 620).
113 *Id.* (citing United States v. Dashney, 52 F.3d 298, 299 (10th Cir. 1995)).
114 *Id.* at 1108 (quotation omitted).
115 530 U.S. 466 (2000).
116 See *Summerlin*, 341 F.3d at 1125 (Rawlinson, J., dissenting). See also Stevenson, supra note 20, at 1109 ("Justice Ginsburg’s opinion for the Court in *Ring* is framed as simply a straightforward application of the rule of *Apprendi* to the Arizona death penalty statute.").
117 *Summerlin*, 341 F.3d at 1125 (Rawlinson, J., dissenting). This premise forms the basis of the dissent's argument against interpreting *Ring* as establishing a new substantive rule: "[i]n my view, the majority opinion wanders afield in the first instance by holding that *Ring*
analysis is that the *Apprendi* majority was clear that its decision was one of procedure, not substance:118 "[t]he substantive basis for New Jersey’s enhancement is thus not at issue; the adequacy of New Jersey’s procedure is."119 The Ninth Circuit distinguished *Ring* from *Apprendi* by observing that, in contrast to *Apprendi*, "the substantive basis for Arizona’s capital sentencing scheme was precisely at issue in *Ring.*"120

2. The New Rule Announced by *Ring* Falls Within an Exception to the *Teague* Presumption Against Non-Retroactivity.

While primarily arguing that the *Teague* analysis did not apply to Summerlin’s petition because *Ring* announced a substantive rule as opposed to one of criminal procedure, the Ninth Circuit also performed a *Teague* analysis of the procedural aspects of *Ring.*121 The court concluded that *Teague* "provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review."122 After the substantive-procedural threshold inquiry, the *Teague* analysis required determining the date on which Summerlin’s conviction became final, which was in 1984.123 Next, to determine whether *Ring* announced a “new rule” within the meaning of *Teague*, the court “survey[ed] the legal landscape’ as it existed in 1984 to determine whether the result in *Ring* was dictated by then existing precedent.”124 Finding that the result was not dictated, the Ninth Circuit observed that there was “no doubt that

contains a new substantive rule despite the teaching of *Apprendi v. New Jersey*, upon which the Supreme Court expressly relied in deciding *Ring.*” *Id.* (citation omitted).

118 At least the *Summerlin* majority interpreted *Apprendi* as clearly announcing a procedural rule, as opposed to one of substance. Other commentators, however, have concluded that, as applied, *Apprendi* may have the effect of a new rule of substantive criminal law, thus making it even more clear that a *Teague* analysis is not required to decide its retroactive effect. See infra Part III.

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

120 *Summerlin*, 341 F.3d at 1101. The *Summerlin* majority squarely addressed Judge Rawlinson’s dissent, remarking that "the very focus of the Supreme Court’s analysis in the two cases proves *Ring* and *Apprendi* distinct: *Apprendi* expressly refused to reach ‘[t]he substantive basis’ of law at issue in that case; *Ring*, conversely, did reach the relevant substantive basis." *Id.* at 1102 n.9 (citation omitted).

121 *Id.* at 1108–21. The *Summerlin* majority acknowledged that “*Ring*’s rule is partially procedural under *Teague*.” *Id.* at 1107. Because *Teague* only applies to new rules of criminal procedure, *id.* at 1099, this concession was necessary to perform a *Teague* analysis; however, the majority maintained its objection to the notion that “*Ring*’s rule is entirely procedural,” *id.* at 1107.

122 *Id.* at 1108.

123 *Id.* (Summerlin’s conviction was final when “the Arizona Supreme Court denied rehearing of its opinion affirming his conviction and death sentence . . . and Summerlin did not file a petition for writ of certiorari with the Supreme Court.”).

124 *Id.*
Ring announced a new rule as that term is construed for Teague purposes. Because Ring announced a new, partially procedural rule after Summerlin’s conviction was final, the Teague presumption against retroactivity applied.

After determining that Teague’s presumption applied, the court evaluated whether the rule announced by Ring fell into either of its exceptions. The first exception, which applies where the new rule “places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,’” did not apply to Summerlin’s petition. The second exception, however, allowed for retroactive application of a new rule “if it requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty,’” and arguably describes the effect of Ring with respect to Summerlin and other similarly-situated federal habeas petitioners. To fall within this exception, “a new rule must: (1) seriously enhance the accuracy of the proceeding and (2) alter our understanding of bedrock procedural elements essential to the fairness of the proceeding.”

With respect to the first of these two requirements, the Ninth Circuit pointed to several characteristics of the invalidated Arizona capital sentencing scheme that indicate enhanced accuracy of capital sentencing proceedings in the wake of changes mandated by Ring. First, it observed that the “[r]eformation of capital sentencing procedures has been presumed to meet the first requirement that the new rule substantially enhance the accuracy of the legal proceeding at issue.”

Second, the majority observed that the absence of procedural protections afforded during a jury trial compromised the accuracy of judges’ fact-finding during the sentencing phase of capital trials. Third, Ring’s requirement that juries determine the

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125 Id. at 1109.
126 Summerlin, 341 F.3d at 1108–09.
128 The Ninth Circuit uses two sentences to dismiss the notion that Ring fell within the first Teague exception; the Supreme Court, on the other hand, devoted nearly two pages to explaining why Ring did not fall within the first Teague exception, though it did so as part of its inquiry into whether Teague applied at all. See supra note 99.
129 Id. (quoting Mackey, 401 U.S. at 693) (quotations omitted).
130 Summerlin, 341 F.3d at 1109.
131 Id. at 1110 (citing Sawyer v. Smith, 497 U.S. 227, 243 (1990)).
132 The Ninth Circuit attributed the compromised accuracy to several practices generally followed by Arizona judges when contemplating death sentences under the invalidated scheme. In contrast with the guilt phase of trial, “penalty-phase presentations to Arizona judges [were] capable of being extremely truncated affairs with heavy reliance on presentence reports and sentencing memoranda, and with formal court proceedings frequently limited to a brief argument by counsel.” Id. Additionally, “because penalty-phase presentations to judges tend to resemble non-capital sentencing proceedings, the sentencing judge receives an inordinate amount of inadmissible evidence, which he or she is expected to ignore.” Id.
presence of aggravating circumstances corrected the defect under Arizona’s invalidated sentencing scheme that deprived capital defendants of the “accuracy-enhancing role of a jury . . . to make the important moral decisions inherent in rendering a capital verdict.”\textsuperscript{133} Fourth, the Ninth Circuit observed that “unlike judges, juries do not stand for election in Arizona and therefore are less apt to be influenced by external considerations when making their decisions.”\textsuperscript{134} All of these considerations, coupled with the “heightened attention that the Eighth Amendment obligates [the court] to afford capital cases,”\textsuperscript{135} led the Ninth Circuit to the following conclusion:

If the allegations concerning Judge Marquardt are true, Summerlin’s fate was determined by a drug-impaired judge, habituated to treating penalty-phase trials the same as non-

\textsuperscript{133} Id. Judge Marquardt’s determination that Warren Summerlin committed murder “in an especially heinous, cruel or depraved manner,” id. at 1114 (citing ARIZ. REV. STAT. § 13 703(F)(6)), was the sort of assessment that “directly measure[s] a defendant’s moral guilt and overall culpability — traditionally the jury’s domain of decision,” id. at 1114 (quoting Adamson v. Ricketts, 865 F.2d 1011, 1027 (9th Cir. 1988)). The Ninth Circuit expressed concern that a judge’s ability to make such assessments “may be influenced by the possible acclimation of the judge to the capital sentencing process.” Id. at 1114. Their concern particularly resonates given the peculiar facts surrounding Summerlin’s conviction:

A reasonable inference from the habituation brought about by imposing capital punishment under near rote conditions is that a judge may be less likely to reflect the current conscience of the community and more likely to consider imposing a death penalty as just another criminal sentence. Indeed, when questioned about another capital case in which his judgment was being assailed because he purportedly slept through portions of the short penalty-phase hearing, Judge Marquardt answered that he was unable to recall the case, but “said he had no doubt that the death penalty was warranted.” . . . “These guys have sentenced themselves,” he is reported to have said.

\textsuperscript{134} Id. at 1115.

\textsuperscript{135} Id. at 1116.
capital sentencing, who relied upon inadmissible evidence in making the factual findings that sentenced Summerlin to death. Although no system is perfect, relying on a jury to administer capital punishment unquestionably reduces the risk of error by reposing trust in twelve individuals who must agree as to the presence of aggravating factors beyond a reasonable doubt, whose continued job security is not threatened by their decision, and whose consideration is based solely on admissible evidence subject to the rigors of cross-examination.

...[T]he inevitable conclusion must be that a requirement of capital findings made by a jury will improve the accuracy of Arizona capital murder trials.\textsuperscript{136}

The court next turned to the second requirement that the rule announced in Ring "must be a 'watershed rule' that alters our understanding of bedrock procedural elements essential to the fairness of the proceeding."\textsuperscript{137} The majority identified "the bedrock procedural element at issue [in Ring, as] the provision of the Sixth Amendment right to a jury trial."\textsuperscript{138} More specifically, "Ring established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravated circumstances necessary to the imposition of the death penalty."\textsuperscript{139} However, to fall within the "small core" of "groundbreaking" rules described by the Supreme Court,\textsuperscript{140} "[t]he newly announced rule must enhance accuracy, improve fairness, and dictate 'observance of those procedures that... are implicit in the concept of ordered liberty.'"\textsuperscript{141}

The Ninth Circuit identified several characteristics of the Ring decision that militate in favor of including it in the "watershed rule" category.\textsuperscript{142} First, Ring corrected a structural error — the absence of a jury — that prevented the imposition of capital punishment from ever being "fundamentally fair."\textsuperscript{143} Second, because there is no jury finding of the aggravating factors required for imposition of

\textsuperscript{136} Summerlin, 341 F.3d at 1115–16.
\textsuperscript{137} Id. at 1116 (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)).
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 1119 (citing, e.g., O'Dell v. Netherland, 521 U.S. 151, 167 (1997); Caspari v. Bohlen, 510 U.S. 383, 396 (1994); Graham v. Collins, 506 U.S. 461, 478 (1993)).
\textsuperscript{141} Summerlin, 341 F.3d at 1119 (quoting Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion)).
\textsuperscript{142} Id. at 1116 (citing Sawyer, 497 U.S. at 242).
\textsuperscript{143} Id. (quoting Rose v. Clark, 478 U.S. 570, 577–78 (1986) (citation omitted from original) ("If structural error is present, 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'"))).
capital punishment in pre-Ring cases, a Ring error is not subject to harmless-error analysis.\textsuperscript{144} Third, the majority analogized Ring to the Mills/McKoy rule that "struck down state procedures that limited any given juror's consideration of mitigating circumstances in capital sentencing to such evidence that the entire jury had found relevant."\textsuperscript{145} Both the Fourth and Sixth Circuit Courts of Appeals declared the Mills/McKoy rule to be a "‘watershed rule’ that warrants retroactive application" under Teague.\textsuperscript{146} In addition, the court pointed to the broad impact of Ring, observing that "the rule in Ring is central to the conduct of every capital murder trial," as an indication of Ring's "watershed" significance.\textsuperscript{147}

Satisfied that the rule announced by Ring both "seriously enhance[d] the accuracy"\textsuperscript{148} of capital sentencing proceedings, and "alter[ed] our understanding of bedrock procedural elements essential to the fairness of the proceeding[s],"\textsuperscript{149} the Ninth Circuit held that Ring satisfied the criteria of the second Teague exception.\textsuperscript{150} The court summarized its Teague analysis with the following observations: "Thus, the rule announced in Ring defines structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials. Ring satisfies the criteria of Teague and must be given retroactive effect on habeas review."\textsuperscript{151} Because this conclusion was not in accord with those reached by other courts, the section that follows describes the resulting circuit split.

\hspace{1cm} \textbf{C. The Circuit Split: Comparison of Reasoning in Turner v. Crosby and Cannon v. Mullin to Summerlin v. Stewart}

In granting certiorari in the Summerlin case, the Supreme Court sought to clear the confusion created by the Ninth Circuit's decision to retroactively apply the new constitutional rule announced by Ring. While acknowledging that it was the first United States circuit court of appeals to reach such a result, the Ninth Circuit was

\hspace{1cm} \textsuperscript{144} Id. at 1116–19.
\hspace{1cm} \textsuperscript{145} Id. at 1120 n.21 (citing McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988)).
\hspace{1cm} \textsuperscript{146} Id. The Ninth Circuit also compared Ring to Furman v. Georgia, 408 U.S. 238 (1972), the landmark Supreme Court case "which declared that death penalty statutes vesting complete discretion in the judge or in the jury, like Arizona's, were unconstitutional." Id. at 1119. Furman, the majority noted, "was given full retroactive effect for the purposes of federal habeas review." Id. at 1119–20 (citing Moore v. Illinois, 408 U.S. 786 (1972)). Teague v. Lane, 489 U.S. 288 (1989), however, had not been decided when retroactive application of Furman was at issue, and therefore its retroactive application was governed by a different standard.
\hspace{1cm} \textsuperscript{147} Summerlin, 341 F.3d at 1120.
\hspace{1cm} \textsuperscript{148} Id. at 1109.
\hspace{1cm} \textsuperscript{149} Id.
\hspace{1cm} \textsuperscript{150} Id. at 1121.
\hspace{1cm} \textsuperscript{151} Id.
careful to distinguish the most notable of the seemingly contradictory circuit court opinions: the Eleventh Circuit opinion in *Turner v. Crosby* and the Tenth Circuit opinion in *Cannon v. Mullin*.\(^{152}\)

The Eleventh Circuit recently concluded that *Ring* did not apply retroactively to the petitioner in *Turner v. Crosby*.\(^{153}\) Pursuant to Florida's advisory capital sentencing scheme, William Thaddeus Turner was sentenced to death by a judge after the same jury that decided his guilt recommended the death penalty.\(^{154}\) The judge had discretion to accept or reject the jury's recommendation, and in Turner's case he adopted the recommended death sentence.\(^{155}\) Although the sentencing procedure invalidated by *Ring* did not involve the jury in even an advisory capacity, "Turner argue[d] that *Ring* and Florida's capital sentencing procedure are irreconcilable and that his judge-imposed death sentence violates his right to a jury trial under the Sixth Amendment."\(^{156}\) While primarily holding that Turner was procedurally barred from raising the *Ring* claim for the first time in his federal habeas petition and thus declining to reach the merits of the claim, the Eleventh Circuit also concluded that *Ring* did not apply retroactively to Turner.\(^{157}\)

In declining to retroactively apply *Ring* to Turner's habeas petition, the Eleventh Circuit first observed that two state supreme courts, Arizona and Nevada, had already rejected *Teague*-based arguments for retroactive application of *Ring* on collateral review.\(^{158}\) Second, because the Eleventh Circuit had already concluded that *Apprendi* established a new rule of criminal procedure that did not fit within a *Teague* exception, it reasoned here that "because *Apprendi* was a procedural rule, it axiomatically follows that *Ring* is also a procedural rule."\(^{159}\) Like the Ninth Circuit, the Eleventh Circuit concluded that the rule announced by *Ring* did not fall within the first *Teague* exception for rules that "decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants."\(^{160}\) But unlike the Ninth Circuit, the Eleventh Circuit also "conclude[d] that *Ring*, like *Apprendi*, 'is not sufficiently fundamental to fall within *Teague*’s second exception."\(^{161}\)

\(^{152}\) *Id.* at 1096, 1101.


\(^{154}\) *Id.* at 1265.

\(^{155}\) *Id.* at 1267.

\(^{156}\) *Id.* at 1280.

\(^{157}\) *Id.*

\(^{158}\) *Id.* at 1283 n.29 (citing *State v. Towery*, 64 P.3d 828 (Ariz. 2003); *Colwell v. State*, 59 P.3d 463 (Nev. 2002)).


\(^{160}\) *Id.* at 1285 (quoting the observations made by the court on *Apprendi* in *McCoy v. United States*, 266 F.3d 1245, 1256–57 (11th Cir. 2001)).

\(^{161}\) *Id.* (quoting *McCoy*, 266 F.3d at 1257).
Although the Ninth Circuit explicitly disagreed with the Eleventh Circuit's holding in *Turner*, it did not perform a detailed critique of Turner's rationale.\(^{162}\) The Ninth Circuit did, however, point out one important difference in the approaches taken by the two courts: the Eleventh Circuit failed to address the possibility that *Ring* may have announced a new substantive rule, which would thereby make the *Teague* analysis moot.\(^{163}\) In contrast, characterizing the new rule in *Ring* as substantive was the Ninth Circuit's primary rationale for allowing its retroactive application.\(^{164}\)

In accord with the Eleventh Circuit, the Tenth Circuit held in *Cannon v. Mullin* that *Ring* did not apply retroactively to federal habeas petitioners.\(^{165}\) *Cannon*, however, involved an application for permission to file a second habeas petition and was accordingly decided based on the more restrictive Antiterrorism and Effective Death Penalty Act (AEDPA) retroactivity rule,\(^{166}\) not the *Teague* analysis that governed *Summerlin*.\(^{167}\) Because different retroactivity rules applied in *Cannon* and *Summerlin*, the Ninth Circuit holding in *Summerlin* did not directly contradict the Tenth Circuit holding in *Cannon*; indeed, the Tenth Circuit never reached the question of whether the new rule announced in *Ring* would be retroactively available under a *Teague* analysis.\(^{168}\) Accordingly, the Ninth Circuit expressly

\[^{162}\] *Summerlin*, 341 F.3d at 1101 n.8.

\[^{163}\] *Id.* at 1102.

\[^{164}\] *Id.* at 1099–1102. In response to “the threshold *Teague* question, namely whether *Ring* announced a substantive rule or a procedural rule,” *id.* at 1099, the *Summerlin* majority determined that “*Ring* is, as to Arizona, a ‘substantive’ decision,” *id.* at 1102.

\[^{165}\] 297 F.3d 989 (10th Cir. 2002).

\[^{166}\] Enacted in 1996, “AEDPA greatly restricts the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications.” *Tyler v. Cain*, 533 U.S. 656, 661 (2001) (declining to allow successive habeas petition seeking the benefit of a new rule that was not made retroactive by the Supreme Court). See generally Hertz & Liebman, supra note 57, at § 3.2 (providing an overview of AEDPA). AEDPA requires dismissal of a successive habeas petition if it includes a claim that was not presented in a prior petition 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.” 28 U.S.C. § 2244(b)(2)(A). The AEDPA retroactivity rule is more likely than the *Teague* rule to bar retroactive application of new constitutional rules because “the requirement [in 28 U.S.C. § 2244(b)(2)(A)] is satisfied only if [the Supreme Court] has held that the new rule is retroactively applicable to cases on collateral review.” *Tyler*, 533 U.S. at 662.

\[^{167}\] *Summerlin*, 341 F.3d at 1092. The court explained that “[b]ecause [Summerlin’s] appeal was filed after the effective date of [AEDPA], the right to appeal in this case is governed by AEDPA rules. However, because the petition for habeas corpus was filed before AEDPA’s effective date, pre-AEDPA law governs the petition itself.” *Id.* (citations omitted).

\[^{168}\] Because the question of retroactive application of *Ring* was decided under the AEDPA standard requiring a Supreme Court holding to make a new rule of constitutional law retroactive, the Tenth Circuit observed that “the mere fact a new rule might fall within the general parameters of overarching retroactivity principles established by the Supreme Court
distinguished the Tenth Circuit's reasoning in Cannon:

The question of whether a rule has retroactive application under AEDPA is a different inquiry from the question of whether Teague precludes retroactive application of a rule. Most importantly, AEDPA precludes retroactive application of a new rule of constitutional law unless "made retroactive to cases on collateral review by the Supreme Court." Because the Supreme Court has not addressed whether Ring should be applied retroactively, the analysis of the retroactively [sic] of Ring under AEDPA and Teague is necessarily distinct. . . . [I]n analyzing whether Ring should be applied retroactively in a case governed by AEDPA, "[a]bsent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive." 169

Thus, even though the Ninth Circuit's conclusion that Ring should be applied retroactively diverged from the results of both the Tenth and Eleventh Circuit cases, the only true circuit split that the Supreme Court had to resolve was the differing applications of the Teague retroactivity analysis by the Ninth and Eleventh Circuits. 170 As Part III explains, there were persuasive arguments for the Supreme Court to affirm the Ninth Circuit's holding under either of the alternative justifications provided in Summerlin v. Stewart.

III. BEYOND THE REASONING OF SUMMERLIN V. STEWART: ADDITIONAL ARGUMENTS FOR RETROACTIVE APPLICATION OF RING

As described above in Part II.B, the Ninth Circuit provided two sound justifications for concluding that Warren Summerlin's habeas petition should be decided in his favor because of the new constitutional rule announced by Ring: (1) that the new rule announced in Ring is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of Teague v. Lane; and (2) even if evaluated pursuant to Teague v. Lane, Ring applies retroactively to cases on collateral review under Teague's exception for watershed rules of criminal procedure that alter

(i.e., Teague) is not sufficient." Cannon v. Mullin, 297 F.3d 989, 993 (10th Cir. 2002) (citing Tyler, 533 U.S. at 663).


170 Id. (Although other circuits have addressed retroactive application of Ring under AEDPA, "only the Eleventh Circuit has addressed the retroactivity of Ring under a Teague analysis.").
bedrock procedural principles and seriously enhance the accuracy of the proceedings. These alternative arguments for the result in *Summerlin v. Stewart* are the exact issues on which the Supreme Court granted certiorari. Because of the cogent rationale presented in the Ninth Circuit opinion and for the additional reasons that follow, the Supreme Court should have affirmed the Ninth Circuit on both lines of reasoning.

With respect to the primary holding, the Ninth Circuit is not alone in interpreting *Ring* as announcing "a new rule of substantive criminal law," and thereby exempt from *Teague* analysis. Other commentators have identified an argument for finding that *Ring* announced a new substantive rule that was implicitly rejected by the Ninth Circuit: that as an extension of *Apprendi*, *Ring* announced a substantive rule, not despite the absence of a substantive rule in *Apprendi*, but because *Apprendi* was also a substantive decision. Indeed, some commentators have observed that "[t]he basis for classifying *Apprendi* as a substantive rule is more compelling in the wake of the Court’s recent *Ring* decision."

Support in the *Ring* decision for the proposition that *Apprendi* announced a substantive rule of criminal law lies in the logic of the opinion itself. First, *Ring* characterized *Apprendi* as recognizing that when the Sixth Amendment right to a jury trial attaches to the proceedings against a defendant, he has the right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"; and furthermore, that this "right attached, not only to *Apprendi*’s weapons offense but also to the ‘hate crime’ aggravating

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171 *Id.* at 1109.
172 Stevenson, *supra* note 20, at 1095 n.26 (citing McCoy v. United States, 266 F.3d 1245, 1271–72 (11th Cir. 2001) (Barkett, J., concurring in result) ("As long as a petitioner’s claim relies on *Apprendi*’s effect on substantive law, ... the claim is not analyzed under *Teague,* because new substantive rules are retroactive on collateral review."), *cert. denied*, 536 U.S. 906 (2002)).
173 *Summerlin*, 341 F.3d at 1102 n.9. The Ninth Circuit conceded that *Apprendi* did not create a substantive rule when it distinguished *Ring* from *Apprendi*:

[T]he very focus of the Supreme Court’s analysis in the two cases proves *Ring and Apprendi* distinct: *Apprendi* expressly refused to reach "[t]he substantive basis" of law at issue in that case; *Ring*, conversely, did reach the relevant substantive basis. ... [C]onsideration of the "substantive basis" of the law was wholly absent from the Supreme Court’s analysis and decision in *Apprendi*.

*Id.* (citations omitted).
174 Stevenson, *supra* note 20, at 1095 n.26 (2003) (citing United States v. Clark, 260 F.3d 382, 388 (5th Cir. 2001) (Parker, J., dissenting) ("Because ... *Apprendi* announces a new substantive rule, *Teague*’s prohibition against retroactivity does not apply and *Apprendi* must be applied retroactively.").
176 *Ring*, 536 U.S. at 602 (quoting *Apprendi*, 530 U.S. at 477).
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Circumstance.” Ring observed that the Apprendi Court emphasized its inquiry as “one not of form, but of effect,” thus recognizing that Arizona’s classification of the hate crime aggravator as a sentencing factor did not make it anything less than an element of an aggravated crime that had to be submitted to a jury and proven beyond a reasonable doubt. Additionally, the Ring Court pointed out, Arizona’s attempt to craft a sentencing scheme that would satisfy the Supreme Court’s Eighth Amendment jurisprudence, is in no way exempt from the mandates of the Sixth Amendment. To illustrate, the Ring Court made the following observation:

In various settings, we have interpreted the Constitution to require the addition of an element or elements to the definition of a criminal offense in order to narrow its scope. . . . If a legislature responded to one of these decisions by adding the element we held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. We see no reason to differentiate capital crimes from all others in this regard.

The “various settings” cited by the Supreme Court are all instances where it mandated changes to substantive criminal law; therefore, the obvious inference is that the changes Arizona was required to make in the wake of Apprendi, while remaining within the confines of Eighth Amendment jurisprudence, resulted in changes to substantive criminal law. Thus, as an extension of Apprendi, Ring must have also effected a change in substantive criminal law.

There is also support for the Ninth Circuit’s alternative holding — that Ring should be retroactively applied as an exception to Teague — beyond the reasoning in the Summerlin v. Stewart opinion. Admittedly, “[t]he second [Teague] exception is narrow, probably encompassing only a handful of rulings, at least outside the 8th Amendment area, that have been rendered since Earl Warren left the

177 Id. at 602.
178 Id. (quoting Apprendi, 530 U.S. at 494).
179 Id.
180 Id. at 606 (citing Apprendi, 530 U.S. at 539 (O’Connor, J., dissenting)).
181 Ring, 536 U.S. at 606–07 (citations omitted).
183 E.g., Apprendi, 530 U.S. at 524 (O’Connor, J., dissenting) (characterizing majority’s ruling as a “watershed change in constitutional law”); Stevenson, supra note 20, at 1095 n.26 (citing Ring, 536 U.S. 610 (Scalia, J., concurring) (emphasizing “fundamental” nature of “the jury trial guarantee of the Sixth Amendment . . . that all facts essential to imposition of the level of punishment that the defendant receives . . . must be found by the jury beyond a reasonable doubt”)).
Indeed, in one dissent, Justice Stevens observed that "[s]ince Teague was decided, this Court has never found a rule so essential to the fairness of a proceeding that it would fall under this exception."^85

Although it would have broken new ground in retroactivity jurisprudence for the Supreme Court to mandate retroactive application of a new rule because it fell within the second Teague exception, there have been several influential dissents and lower court opinions that advocated lifting the Teague bar because a new rule fell within its second exception. Two such opinions were identified by the Ninth Circuit.\(^{186}\) In addition, the persuasive dissent in O'Dell v. Netherland, authored by Justice Stevens and joined by three other Justices,\(^{187}\) counseled in favor of recognizing that the Simmons rule fell within the second Teague exception.\(^{188}\)

Although Teague v. Lane focused on the accuracy of a guilt-innocence determination, we have long recognized that sentencing procedures, as well as trials, must satisfy the dictates of the Due Process Clause and that the unique character of the death penalty mandates special scrutiny of those procedures in capital cases. An unfair procedure that seriously diminishes the likelihood of an accurate determination that a convicted defendant should receive the death penalty rather than life without parole . . . is plainly encompassed by Teague's exception.\(^{189}\)

The Stevens dissent concluded by remarking that the Simmons rule was "of such importance to the accuracy and fairness of a capital sentencing proceeding that it should be applied consistently to all prisoners whose death sentences were imposed in violation of the rule, whether they were sentenced before Simmons was decided or after."\(^{190}\) The Ninth Circuit's alternative holding is consistent with Justice Stevens's conclusion; and if three Justices agreed with his logic in 1997, it certainly would not have been an illogical extension of retroactivity law for the Supreme Court to recognize in 2004 that Ring falls within Teague's second exception.

\(^{184}\) Hertz & Liebman, supra note 57, at § 25.7, at 1121 (citations omitted).
\(^{186}\) See supra notes 145–46 and accompanying text.
\(^{187}\) O'Dell, 521 U.S. at 168–78 (Stevens, J., dissenting).
\(^{188}\) Id. at 170–73 (Stevens, J., dissenting). The new constitutional rule of criminal procedure announced by Simmons v. South Carolina, 512 U.S. 154 (1994), was that a defendant facing the death penalty has the right to rebut a prosecutor's argument of future dangerousness by pointing out that if sentenced to imprisonment he would not be eligible for parole. Id.
\(^{189}\) Id. at 171 n.3 (citations omitted).
\(^{190}\) Id. at 173 (Stevens, J., dissenting).
Perhaps the most persuasive argument for affirming the Ninth Circuit rationale, beautifully articulated by Judge Reinhardt, is also the most simple. In his Summerlin concurrence, Judge Reinhardt did not attempt to “improve on the legal arguments” offered by the majority opinion, but instead wrote separately “only to emphasize that a contrary result would be unthinkable in a society that considers itself both decent and rational.” While the lengthy explication of retroactivity jurisprudence is a necessary part of the Summerlin opinion, Reinhardt boiled down the question in Summerlin to chilling simplicity:

[M]ay the state now deliberately execute persons knowing that their death sentences were arrived at in a manner that violated their constitutional rights? Is it possible that prisoners will now be executed by the state solely because of the happenstance that the Supreme Court recognized the correctness of their constitutional arguments too late — on a wholly arbitrary date, rather than when it should have? Will we add to all of the other arbitrariness infecting our administration of the death penalty the pure fortuity of when the Supreme Court recognized its own critical error with respect to the meaning of the Constitution? Can we justify executing those whose legal efforts had reached a certain point in our imperfect legal process on the day the Supreme Court changed its mind, while invalidating the death sentences of those whose cases were waiting slightly further down the line?

Judge Reinhardt observed that “[i]t should not take a constitutional scholar to comprehend [the] point” that states should not be permitted to execute prisoners who were unconstitutionally sentenced simply because of the arbitrary date on which their appeals were finalized. But given that there are valid constitutional arguments for affirming both of the Ninth Circuit’s alternative Summerlin holdings, Reinhardt’s observations should have resolved any doubts in favor of affirming the Ninth Circuit. Because his concerns particularly resonate in light of the facts surrounding Summerlin’s conviction and sentencing, the Supreme Court should have taken this opportunity to extend the benefit of Ring to all federal habeas petitioners.

\[191\] Summerlin, 341 F.3d at 1122 (Reinhardt, J., concurring).
\[192\] Id.
\[193\] Id. at 1124–25.
\[194\] Id. at 1125.
\[195\] Supra Part II.B.
IV. CONCLUSION

When the United States Supreme Court issued its seminal decision in *Ring v. Arizona* requiring that juries determine the presence or absence of aggravating and mitigating factors that lead to imposition of the death penalty, it vindicated the Sixth Amendment rights of capital defendants who were unconstitutionally sentenced without jury findings on those factors.\(^{196}\) Unfortunately for Warren Summerlin and eighty-eight other death row inmates, the Supreme Court limited its vindication of the jury trial right to those inmates whose sentences were not yet final when it decided *Ring*. As the foregoing analysis shows, the Supreme Court could have used the logical framework provided by the United States Court of Appeals for the Ninth Circuit to arrive at a just result while remaining within the confines of evolving retroactivity jurisprudence by affirming either of *Summerlin v. Stewart*’s alternative holdings.

The Supreme Court should have affirmed the Ninth Circuit’s primary holding that the new rule announced in *Ring* is substantive, and therefore exempt from *Teague v. Lane*’s presumption against retroactivity.\(^{197}\) While there are substantive and procedural components to the *Ring* decision, precedent supports classifying *Ring* as substantive for purposes of retroactivity analysis.\(^{198}\) In the alternative, the Supreme Court should have affirmed the Ninth Circuit’s secondary holding that *Ring* applies retroactively to cases on collateral review under *Teague*’s exception for “watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings.”\(^{199}\) The Ninth Circuit cogently reasoned that the rule announced in *Ring* satisfied the *Teague* requirements that it “(1) seriously enhance the accuracy of the proceeding and (2) alter our understanding of bedrock procedural elements essential to the fairness of the proceeding.”\(^{200}\) Under either rationale, the Supreme Court should have concluded that the Ninth Circuit correctly applied retroactivity jurisprudence when it applied *Ring* to Summerlin’s habeas petition.

Finally, in weighing its decision, the Supreme Court should have placed more emphasis on the bizarre circumstances of Warren Summerlin’s conviction and sentence, which inspired the Ninth Circuit to quote Mark Twain: “truth is often stranger than fiction because fiction has to make sense.”\(^{201}\) Indeed, allowing a potentially drug-impaired judge to impose a death sentence without the input of a


\(^{197}\) *See supra* Part II.B.1.

\(^{198}\) *See supra* Part II.B.1.

\(^{199}\) Petition for Writ of Certiorari at i, *Summerlin* (No. 03-526) (citations omitted). *See supra* Part II.B.2.

\(^{200}\) *Summerlin*, 341 F.3d at 1109.

\(^{201}\) *Id.* at 1084.
jury does not seem fair or sensible. Because the Supreme Court recognized that the procedure by which Warren Summerlin was sentenced to death is unconstitutional, carrying out his execution without at least affording him a new sentencing hearing will add a final, unbelievable twist to the story of Warren Summerlin's journey through the legal system. The Ninth Circuit's opinion provided sound legal reasoning for curing the injustice perpetrated upon him: it was incumbent upon the nine Justices to affirm the Ninth Circuit and allow Warren Summerlin and other habeas petitioners the Sixth Amendment right to a jury that they were previously wrongfully denied. The result the Supreme Court reached instead simply does not make sense.