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Everything Old Is New Again: Justice Scalia's Activist Originalism in Schriro v. Summerlin

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EVERYTHING OLD IS NEW AGAIN: JUSTICE SCALIA'S ACTIVIST ORIGINALISM IN *SCHRIRO V. SUMMERLIN*

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

I. INTRODUCTION

In *Schriro v. Summerlin*,[1] the Supreme Court held by a five-to-four margin that the rules announced in *Ring v. Arizona*[2] and *Apprendi v. New Jersey*[3] will not apply retroactively on collateral review of cases finally decided prior to those decisions. Thus, although the Supreme Court has declared the sentencing scheme under which Warren Summerlin was sentenced to death unconstitutional, Summerlin's sentence will stand because he exhausted all of his direct appeals before the Court nullified the sentencing scheme.

This Note will argue that *Schriro* is indefensible: the decision is a jurisprudential failure that misconstrues the relevant precedent in the areas of the Sixth Amendment, habeas retroactivity, and the Eighth Amendment. Further, Justice Scalia's majority opinion privileges finality over justice and makes a virtue out of federal deference to unconstitutional state court decisions and laws. Finally, there is no compelling policy justification for the decision. Rather, as Justice Breyer noted in dissent, the retroactive application of *Ring* and *Apprendi* would only minimally disrupt state criminal justice systems. For all of these reasons, the Court should overrule itself and reject *Schriro* as soon as possible.

II. BACKGROUND

The Court confronted a seemingly straightforward question in *Schriro*: "whether *Ring v. Arizona* . . . applies retroactively to cases already final on direct review."[4] However, this apparent simplicity conceals the fact that

[1] 124 S. Ct. 2519 (2004).
[2] 536 U.S. 584 (2002).
[3] 530 U.S. 466 (2000).
[4] *Schriro*, 124 S. Ct. at 2521.

Schriro involved several intricate bodies of law and posed a difficult and multi-faceted jurisprudential problem. First, the current law on habeas retroactivity is a web of inconsistent—and at times, virtually incoherent—precedent and ambiguous statutory language.[5] Moreover, the Sixth Amendment rules announced in *Ring* and its parent case, *Apprendi*, present further analytical complications since the Court did not address how either decision impacts habeas adjudication. Because *Schriro* involved capital punishment, the Court's ruling also implicates such Eighth Amendment concerns as proportionality, fairness, and accuracy.[6] As *Schriro* demonstrates, Sixth and Eighth Amendment issues grow considerably more complex when they appear in conjunction.[7] Ultimately, though, the central issue presented by *Schriro* was the interaction between habeas retroactivity and the Sixth Amendment.

A. HABEAS RETROACTIVITY

While the Court's Sixth Amendment precedents are ambiguous, the governing law on retroactivity is even muddier. An amalgam of statutory enactments, judicial precedents, and constitutional text, habeas retroactivity is an exceptionally convoluted body of law.

1. Habeas History to 1867

The Constitution provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[8] Curiously, this negative reference in the Suspension Clause is the only allusion in the Constitution to the "Great Writ."[9] At common law during the period of the Constitution's framing, most petitioners sought habeas relief as a means of

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[5] *See, e.g.*, A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1 (2002); Ethan Isaac Jacobs, Note, *Is* Ring *Retroactive?*, 103 COLUM. L. REV. 1805 (2003).

[6] *See generally* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES (Hugo Adam Bedau ed., 1997) [hereinafter THE DEATH PENALTY].

[7] *See generally* David R. Dow, Teague *and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants*, 19 HASTINGS CONST. L.Q. 23 (1991); Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357 (1991); Sarah C. S. McLaren, Comment, *Was Death Different Then Than It Is Now? The Opportunity Presented to the Supreme Court by* Summerlin v. Stewart, 88 MINN. L. REV. 1731 (2004); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160 (1991).

[8] U.S. CONST. art. I, § 9, cl. 2.

[9] Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 862 (1994).

challenging pretrial imprisonment.[10] Following the framing, the first Congress limited the federal writ's scope to federal prisoners.[11]

In contrast to Congress's early reluctance to grant a broadly applicable right of habeas corpus for state prisoners, by the mid-nineteenth century the Supreme Court had established that the Constitution guaranteed some version of the federal habeas remedy in state courts.[12] During this period, Congress expanded federal habeas in response to specific conflicts between state and federal governments, and as such tensions intensified prior to the Civil War the writ increasingly became an instrument for enforcing national policies.[13] Still, throughout the antebellum period, the use of federal habeas by state prisoners remained limited in scope.[14]

2. *Habeas from the 1867 Act to the Warren Court*

The writ's narrow compass changed dramatically after the Civil War, when Congress for the first time made federal habeas relief generally available to state prisoners.[15] In 1868, the Supreme Court affirmed the constitutionality of this "expansive view"[16] toward the availability of the federal habeas writ, holding in *Ex parte McCardle* that the 1867 statute expanding habeas review "brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."[17] But even as the Court asserted the general availability of federal habeas relief to state prisoners, it also held that courts should actually grant the writ only where a state prisoner had been convicted by a trial court that did not possess jurisdiction.[18]

For nearly a century after *McCardle*, however, the Court gradually expanded the writ's application, stating that habeas should be available whenever a prisoner's conviction violated his constitutional rights, and habeas offered the only possibility for the vindication of those rights.[19] This growth in the scope of federal habeas review culminated in the Court's

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[10] *Id.* at 864.

[11] *Id.* at 865 (citing First Judiciary Act, ch. 20, § 14, 1 Stat. 73, 81-82 (1789)).

[12] *Id.* at 878; *see, e.g.*, *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

[13] Steiker, *supra* note 9, at 881-82.

[14] *Id.* at 878.

[15] *Id.* at 865 (citing Judiciary Act, ch. 28, § 1, 14 Stat. 385-86 (1867)).

[16] Goldstein, *supra* note 7, at 358.

[17] *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 325-26 (1868) (emphases omitted).

[18] Bryant, *supra* note 5, at 5 (quoting *Ex parte* Siebold, 100 U.S. 371, 375 (1879)).

[19] *Id.* at 5-6 (citing Waley v. Johnston, 316 U.S. 101, 105 (1942)).

landmark 1953 decision *Brown v. Allen*.[20] In *Brown*, the Court decisively announced that the balance of power in the habeas context, which had once clearly favored the state courts, now rested with reviewing federal courts.[21] Justice Frankfurter's majority opinion stated that federal courts owed no deference to state courts' holdings on questions of federal law, as "it is precisely these questions that the federal judge [must] decide."[22] In effect, *Brown* empowered federal district courts to police the state courts, ensuring that they faithfully applied Supreme Court precedent.[23]

The expansion of federal habeas took on added significance during the decade and a half that followed *Brown*, as the Warren Court announced a host of rules of criminal procedure.[24] This confluence of new constitutional rules and broader habeas authority contributed substantially to the dramatic increase in the caseload of the federal courts that began in the early 1960s and continues today.[25] The proliferation of new rules of criminal procedure also raised an important question: when could a prisoner invoke these rules in the habeas context?[26]

3. *Retroactivity Before* Teague

In a series of decisions issued throughout the 1960s,[27] the Court formulated a three-factor test for the analysis of habeas retroactivity. The Court summarized the test in *Stovall v. Denno*,[28] where the retroactivity analysis focused on "(a) the purpose to be served by the new standards, (b)

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[20] 344 U.S. 443 (1953); Bryant, *supra* note 5, at 6.

[21] Bryant, *supra* note 5, at 6-8.

[22] *Brown*, 344 U.S. at 506.

[23] Bryant, *supra* note 5, at 8.

[24] *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963) (state prisoner's failure to appeal conviction does not constitute waiver of right to federal habeas relief); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring states to provide counsel for indigent defendants); Mapp v. Ohio, 367 U.S. 643 (1961) (prohibiting the admission at trials of evidence obtained by unconstitutional searches).

[25] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 53-123 (1996).

[26] *See* Bryant, *supra* note 5, at 9.

[27] *See, e.g.*, Johnson v. New Jersey, 384 U.S. 719 (1966) (barring retroactive application of Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), which require that police provide pre-interrogation notifications of right to remain silent); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966) (prohibiting retroactive application of Griffin v. California, 380 U.S. 609 (1965), which held that adverse comment by judge or prosecutor on defendant's failure to testify violates Fifth Amendment right against self-incrimination); Linkletter v. Walker, 381 U.S. 618 (1965) (prohibiting the retroactive application of *Mapp*, 367 U.S. 643).

[28] 388 U.S. 293 (1967).

the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."[29] Moreover, because "the way in which these factors combine must inevitably vary with the dictate involved," and because each new rule presents a unique combination of the three factors in the *Stovall* test, "[t]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based."[30] Under the *Stovall* regime, federal courts hearing habeas claims possessed plenary authority in determining whether to apply a new constitutional rule retroactively.[31] With respect to new-rule retroactivity, then, habeas was all but indistinguishable from direct review. Thus, the expansion of habeas perfectly mirrored the Warren Court's contemporaneous promulgation of new rules.

4. Teague v. Lane

a. *Teague* background

The *Stovall* three-factor test had governed habeas retroactivity for roughly two decades when, in 1987, the Court broadened *Stovall*'s guarantee of habeas retroactivity.[32] Its decision in *Griffith v. Kentucky* explicitly stated that new constitutional rules would always apply retroactively to habeas claims if the conviction under appeal was not finally decided—i.e., the petitioner had not exhausted his direct appeals—at the time of the new rule's exposition.[33] Thus in *Griffith*, for the first time, the Court mandated retroactive application of new constitutional rules under certain circumstances. So two years later, when the Court announced its decision in *Teague v. Lane*,[34] the aggressiveness with which Justice O'Connor's plurality opinion sought to limit retroactivity marked a radical new direction in the Court's habeas jurisprudence.[35]

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[29] *Id.* at 297.

[30] *Id.* (quoting *Johnson*, 384 U.S. at 728).

[31] Dow, *supra* note 7, at 34 ("The Court used this test irrespective of whether the case was before the Court on direct appeal or collateral review, and it produced a series of somewhat ad hoc rulings.").

[32] Bryant, *supra* note 5, at 10.

[33] 479 U.S. 314, 322 (1987).

[34] 489 U.S. 288 (1989).

[35] One indication of *Teague*'s radicalism is the abundance of scholarship devoted to the elucidation of its holding. For a representative sample of much of this scholarship, *see* Bryant, *supra* note 5, at 9 n.39.

In *Teague*, the Justices confronted the following situation: an Illinois jury convicted the petitioner, an African-American man, of multiple counts of murder and armed robbery.[36] Teague's prosecutor had used all of his ten peremptory challenges to strike African-American prospective jurors, and Teague's counsel moved for a mistrial, arguing that the selection process violated Teague's right to be tried by a jury representative of his community.[37] The trial court denied the motion and the appellate court affirmed, rendering Teague's conviction final.[38]

Teague reprised his representative-jury argument in a petition for federal habeas relief.[39] Although the district court was sympathetic to the core of his claim, it ruled against him, finding itself bound by both Supreme Court and Seventh Circuit precedent.[40] On appeal, Teague again reiterated his earlier argument.[41] This time he met with success, as a panel held that the jury selection process had violated the fair-cross-section requirement, thus presenting a prima facie case of impermissible racial discrimination.[42] However, when the court of appeals reconsidered Teague's petition *en banc*, it overturned the panel's decision.[43] The circuit court postponed rehearing pending the Supreme Court's decision in *Batson v. Kentucky*.[44] *Batson*, in turn, overruled some of the precedent on which the district court had relied in rejecting Teague's initial petition.[45] Nevertheless, the circuit court once again denied Teague's fair-cross-section claim, stating that the fair-cross-section requirement should be limited to jury venire.[46] It also rejected his new *Batson* argument on the grounds that another intervening decision, *Allen v. Hardy*,[47] precluded the retroactive application of *Batson* on collateral review.[48]

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[36] *Teague*, 489 U.S. at 292-93.

[37] *Id.* at 293.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 294.

[42] *Id.*

[43] *Id.*; United States *ex rel.* Teague v. Lane, 779 F.2d 1332 (7th Cir. 1985).

[44] 476 U.S. 79 (1986).

[45] *Batson* established that a prosecutor's use of peremptory challenges to exclude potential jurors solely on the basis of their race violates the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 96.

[46] *Teague*, 489 U.S. at 294.

[47] 478 U.S. 255 (1986).

[48] *Teague*, 489 U.S. at 294 (citing Teague v. Lane, 820 F.2d 832, 834 n.4 (7th Cir. 1987)). Teague also argued that he had presented a valid Equal Protection claim under the law that governed his case at the time his conviction became final. *Id.* at 297-99.

In his habeas petition to the Supreme Court, Teague presented two arguments implicating retroactivity concerns: 1) that the Court should retroactively apply *Batson*; and 2) that the reasoning behind the Court's fair-cross-section precedent mandated the establishment of a new rule extending the requirement to the petit jury.[49] Writing for a majority of the Court, Justice O'Connor dispensed with Teague's *Batson* claim on the grounds that *Allen v. Hardy* had explicitly and conclusively barred retroactive application of *Batson*.[50] Justice O'Connor also declined to announce the new, broader fair-cross-section rule requested by Teague.[51] Although a majority of the Court joined her in this result, only three of her fellow Justices concurred in the reasoning that supported it.[52] Nevertheless, over the past fifteen years, the new-rule dicta included in Justice O'Connor's plurality opinion have come to govern habeas retroactivity.[53]

The framework that Justice O'Connor promulgated in *Teague* greatly limited the circumstances under which new constitutional rules of criminal procedure would have retroactive application in the habeas context.[54] But before announcing this far-reaching change in retroactivity doctrine, Justice O'Connor provided a brief discussion of her theory's putative ancestry, which occupied a central place in her justification of the rule.[55] Here, Justice O'Connor positioned herself as the intellectual heir to the second Justice John Marshall Harlan, who had attempted, in several concurrences and dissents in the 1960s and 1970s, to frame a more systematic approach to habeas retroactivity.[56] For several reasons, Justice Harlan found the three-prong *Stovall* test a wholly unsatisfactory approach to habeas retroactivity. First, he believed that the test discouraged consistent application, because it allowed individual courts excessive discretion in determining new-rule retroactivity.[57] Justice Harlan also objected to the *Stovall* rule on the basis of federalism, because to the extent that it expanded federal courts' ability to overturn state court verdicts, it also undermined state courts' authority.[58] Moreover, Justice Harlan felt that the expansive scope of federal habeas caused diminished confidence in

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[49] *Id.* at 294, 298.

[50] *Id.* at 296.

[51] *Id.*

[52] *Id.* at 292.

[53] *See* Schriro v. Summerlin, 124 S. Ct. 2519, 2522 (2004).

[54] *Teague*, 489 U.S. at 309-13.

[55] *Id.* at 299-310.

[56] *See* Mackey v. United States, 401 U.S. 667, 681-95 (1971) (Harlan, J., concurring); Desist v. United States, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting).

[57] *Desist*, 394 U.S. at 263-65 (Harlan, J., dissenting).

[58] *Id.* at 261 (Harlan, J., dissenting).

convictions and sentences, which he saw as problematic from the perspectives of both the public at large and the convicted.[59] Justice Harlan therefore proposed his own retroactivity regime to remedy these perceived problems.

First, in his dissent in *Desist v. United States*, Justice Harlan argued that because the writ "seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted . . . all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas."[60] Two years later, Justice Harlan espoused a more detailed rule.[61] He proposed that new rules should not be retroactively applied to the habeas claims of petitioners whose convictions became final prior to the new rules' issuance, except under two circumstances.[62] Justice Harlan's regime allowed retroactive application 1) of "'substantive due process' rules that place . . . certain kinds of . . . conduct beyond the power of law-making authority to proscribe"[63]; and 2) "for claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.'"[64]

Like Justice Harlan, Justice O'Connor emphasized the finality of state court judgments and comity between state and federal courts.[65] These shared concerns led her to claim that she was adopting Justice Harlan's retroactivity framework for habeas review,[66] albeit with some modifications.

b. *Teague* test

According to Justice O'Connor, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[67] Justice O'Connor then described a retroactivity test that, like Justice Harlan's, included two exceptions to the general nonretroactivity presumption.[68] First, she reiterated Justice Harlan's first

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[59] *Mackey*, 401 U.S. at 690 (Harlan, J., concurring) (citing Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).

[60] *Desist*, 394 U.S. at 262 (Harlan, J., dissenting).

[61] *Mackey*, 401 U.S. at 692-94 (Harlan, J., concurring).

[62] *Id.* at 692 (Harlan, J., concurring).

[63] *Id.* (Harlan, J., concurring).

[64] *Id.* at 693 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[65] Teague v. Lane, 489 U.S. 288, 308 (1989).

[66] *Id.* at 310.

[67] *Id.* at 301.

[68] *See infra* notes 71-73 and accompanying text.

exception, allowing retroactive application of new "substantive" rules, but noted that it was not relevant to the facts of the case before her.[69] For the second exception, Justice O'Connor proposed a test that "combine[d] the accuracy element of *Desist* . . . with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial."[70] More specifically, the second prong of the *Teague* test gives retroactive effect only "to those new procedures without which the likelihood of an accurate conviction is *seriously* diminished."[71] *Teague* thus fundamentally altered the approach that it purported to adopt, de-emphasizing Justice Harlan's concern for basic fairness and stressing instead habeas retroactivity's administrative costs to state courts and its detriments to the constitutional principles of federalism.[72] Justice O'Connor explicitly disclaimed any opinion on the applicability of her rule to the capital sentencing context, although she did note her disagreement with Justice Stevens's suggestion, in his concurrence, "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.'"[73]

5. *Post*-Teague

Several months after deciding *Teague*, the Court affirmed Justice O'Connor's retroactivity formula and extended it to the capital sentencing context in *Penry v. Lynaugh*.[74] The Court had yet to explain, however, exactly what defined a rule as "new" for *Teague* purposes. In *Penry*, Justice O'Connor acknowledged the difficulty involved in determining whether a particular case announced a new rule.[75] Moreover, because the *Teague* test was itself so new, its impact on the retroactive availability of constitutional rules remained unclear: if courts defined the "new rule" category expansively, this would decrease the likelihood that Supreme Court decisions could be retroactively applied. Conversely, if either of *Teague*'s exceptions to the prohibition on "new rule" retroactivity was

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[69] *Teague*, 489 U.S. at 311. Justice O'Connor did not comment on the "substantive" rule exception's validity.

[70] *Id.* at 312.

[71] *Id.* at 313 (emphasis added).

[72] *Id.* at 309-10. At the risk of engaging in armchair psychology, this emphasis may reflect Justice O'Connor's own experience as a state judge and legislator. Perhaps coincidentally, the Arizona sentencing scheme at issue in *Ring* and *Schriro* became law while O'Connor was the Republican Leader of the Arizona State Senate.

[73] *Id.* at 314 n.2 (quoting *id.* at 321, n.3 (Stevens, J., concurring)).

[74] 492 U.S. 302 (1989).

[75] *Id.* at 314 (quoting *Teague*, 489 U.S. at 301).

construed broadly, this would necessarily expand the universe of constitutional rules that apply retroactively.

During the following term, the Court eliminated some of these ambiguities. In three decisions that dealt with habeas retroactivity in the capital sentencing context, the Supreme Court addressed several ambiguous aspects of *Teague*.[76] Specifically, the Court clarified the "new rule" category and refined its second exception to nonretroactivity. In *Butler v. McKellar*, the Court reiterated *Teague's* emphasis on the challenges posed to state courts by the retroactive application of federal decisions to state verdicts under collateral attack.[77] Thus, Chief Justice Rehnquist held that *Teague*'s "new rule" concept "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[78] In *Saffle v. Parks*, issued on the same day as *Butler*, Justice Kennedy made it clear that the Court was adopting *Teague*'s narrow "fairness and accuracy" reading of Justice Harlan's "implicit in the concept of ordered liberty" exception to the ban on habeas retroactivity.[79] Thus, these post-*Teague* rulings codified a dramatic reduction in the scope of habeas retroactivity. As one scholar has observed, "by expansively defining when a decision announces a new rule and by narrowly circumscribing the reach of the implicit in the concept of ordered liberty exception," *Butler, Saffle*, and *Sawyer v. Smith* guaranteed that the outcomes of future habeas petitions would be increasingly influenced by "fortuities in the timing and pace of litigation which are beyond the individual's control."[80]

The next watershed event in federal habeas law occurred in 1996, when Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).[81] AEDPA's drafters were chiefly concerned with procedural aspects of habeas corpus; the Act expedited the habeas process, limited the number of petitions prisoners could file, and imposed firm deadlines on filing.[82] However, AEDPA also substantively modified the scope of federal habeas jurisdiction.[83] In addition, although AEDPA did not specifically address retroactivity, it did promulgate a new standard for the grant of

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[76] *See* Butler v. McKellar, 494 U.S. 407 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Sawyer v. Smith, 497 U.S. 227 (1990).

[77] 494 U.S. at 413-14.

[78] *Id.* at 414.

[79] *Saffle*, 494 U.S. at 495.

[80] Goldstein, *supra* note 7, at 401-02.

[81] Pub. L. No. 104-132, 101-08, 110 Stat. 1214 (1996).

[82] *See* Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 386-97 (1996).

[83] These modifications are discussed in detail in *id.* at 398-411.

federal habeas to state prisoners. Under AEDPA, federal courts should grant the writ in such cases only under two conditions, where the state court proceedings:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence present in the State court proceeding.[84]

Observing that the first condition resembled the broad outlines of the *Teague* test, scholars and practitioners have questioned whether it simply "codifie[d] the *Teague* doctrine,"[85] or instead fundamentally altered Justice O'Connor's test. Certainly, AEDPA addressed the problem of habeas retroactivity in a wholly different manner than the Court had done in *Teague*. After AEDPA, in the words of Larry Yackle, "[t]he availability of federal habeas jurisdiction no longer turns on a strained attempt to decide whether a claim depends on 'new' law."[86] Instead, the new Section 2254(d) calls on the federal courts to directly confront challenged state court decisions and evaluate their correctness.[87] Such, at least, was the apparent mandate of AEDPA's text.[88]

However, prior to *Schriro*, the Court had yet to clarify the relationship between the statutory text and its own readings of the Constitution. In fact, because Section 2254(d)(1) emphasized that the relevant federal law in habeas adjudication was that "determined by the Supreme Court,"[89] AEDPA effectively left the question of how such law was "determined" to the Court itself. This ambiguity, in turn, begged the question of what defined a given constitutional rule as "new," insofar as it required the Court to decide whether and when the rule cited by a habeas petitioner had been "determined."

In 2000, the Court addressed these ambiguities without fully resolving them.[90] Once again, Justice O'Connor penned the controlling opinion. In her view, a state court decision was "contrary to" federal law—and thus open to collateral attack—either "if the state court arrives at a conclusion

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[84] 28 U.S.C. § 2254(d) (2000).

[85] Yackle, *supra* note 82, at 416.

[86] *Id.* at 418.

[87] *Id.* at 419.

[88] AEDPA also suggested, without stating outright, that federal habeas courts should review state court interpretations of federal law *de novo*. *See* Bryant, *supra* note 5, at 23-29.

[89] 28 U.S.C. § 2254(d)(1).

[90] Williams v. Taylor, 529 U.S. 362 (2000); Bryant, *supra* note 5, at 15.

opposite to that reached by [the Supreme] Court on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours."[91] By narrowly defining "contrary to" as "opposite," rather than construing it more broadly to "include a finding that the state-court 'decision' is simply 'erroneous' or wrong,"[92] Justice O'Connor once again appeared—without explicitly doing so—to restrict the circumstances under which federal courts should grant habeas relief in appeals from state court judgments. Justice O'Connor's discussion of the "unreasonable application" clause is similarly delphic: a state court's application of federal law is "unreasonable" if it 1) "unreasonably applies" the Supreme Court's governing rule to the facts presented, or 2) "either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."[93]

The Court was even less clear in defining what constituted "clearly established" federal law. On the one hand, Justice O'Connor noted that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law,'"[94] thus implicitly acknowledging that AEDPA might have enlarged the class of rules retroactively applicable in habeas proceedings.[95] However, Justice O'Connor's decision that AEDPA did not narrow the class of "old rules" left unexplained how AEDPA affected the "new rules" category; did it remain the same as under *Teague*, or did AEDPA narrow that category, consequently expanding the "old rules" category?[96] The only clear message was that AEDPA did not entirely supersede *Teague;* despite their seeming contradictions, the two continued to govern federal habeas law.

B. SIXTH AMENDMENT IN SENTENCING

The Sixth Amendment to the Constitution guarantees "a speedy and public trial, by an impartial jury" in "all criminal prosecutions."[97]

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[91] *Williams*, 529 U.S. at 405 (O'Connor, J.). Although Justice Stevens wrote for the Court for most of *Williams*, Justice O'Connor wrote for the Court with respect to the portions of her opinion quoted here. This is particularly confusing given Justice Stevens's dissatisfaction with this interpretation of "contrary to." *See infra* note 96 and accompanying text.

[92] *Id.* at 389 (Stevens, J.).

[93] *Id.* at 407 (O'Connor, J.).

[94] *Id.* at 412 (O'Connor, J.).

[95] Bryant, *supra* note 5, at 18.

[96] *Id.* at 19.

[97] U.S. CONST. amend. VI.

Nowhere, however, does the Constitution specifically address the role of juries in criminal proceedings. The *Schriro* decision presented a Sixth Amendment question because, pursuant to the Arizona law under which Summerlin was convicted and sentenced, a judge alone found the aggravating factors necessary to the imposition of Summerlin's death sentence.[98]

For most of the nation's history, the Sixth Amendment applied only to trials in federal courts, but in 1968, the Supreme Court ruled that the Amendment's jury trial guarantee was incorporated into the Fourteenth Amendment's promise of due process in state legal proceedings.[99] The exact contours of the jury guarantee, though, remained unclear. In 1990, the Court seemed to hold that it did not extend to the sentencing context, upholding the Arizona capital sentencing scheme under which Summerlin was originally sentenced to death.[100] Justice White, writing for the majority in *Walton v. Arizona*, observed that the Court had rejected numerous constitutional challenges to Florida's capital punishment scheme, which resembled Arizona's in its grant of sentencing authority to judges.[101] In such cases, Justice White noted, the Court had held that the Sixth Amendment does not command that a jury find those specific facts that permit the imposition of capital punishment.[102] Justice Stevens responded with a vigorous dissent, quoting extensively from White's own dissent in *Duncan v. Louisiana*,[103] and drawing heavily on historical sources. Stevens declared, "in 1791, when the Sixth Amendment became law . . . '*the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.*'"[104] Although various members of the Court dissented from other parts of Justice White's majority opinion, Justice Stevens was alone in his view that the Sixth Amendment commanded jury fact-finding in sentencing.

Nevertheless, just twelve years later, the Court struck down the sentencing scheme it had upheld in *Walton*.[105] The key change during the intervening period was the Court's landmark decision in *Apprendi v. New*

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[98] Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (2004).

[99] Duncan v. Louisiana, 391 U.S. 145 (1968).

[100] Walton v. Arizona, 497 U.S. 639 (1990).

[101] *Id.* at 647.

[102] *Id.* at 648 (citing Hildwin v. Florida, 490 U.S. 638, 640-41 (1989)).

[103] *Id.* at 711-13 (Stevens, J., dissenting); *Duncan*, 391 U.S. 145.

[104] *Walton*, 497 U.S. at 710-11 (Stevens, J., dissenting) (quoting Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L.REV. 1, 10-11 (1989)).

[105] Ring v. Arizona, 536 U.S. 584 (2002).

Jersey.[106] In *Apprendi*, the Court established that the Sixth Amendment requires a jury to find any fact that expands the range of available sentences.[107] According to Justice Stevens, *Apprendi*'s holding that the Sixth Amendment guaranteed defendants a right to have a jury find a sentence-enhancing aggravating factor was "foreshadowed"[108] by the Court's decision, one year earlier, in *Jones v. United States*.[109] There, the Court had held that the Fifth and Sixth Amendments require that "any fact (other than a 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."[110] But *Jones* was far from the only precedential support for *Apprendi*; Justice Stevens's opinion also included a lengthy discussion of the history of the jury requirement in sentencing.[111] This passage ends with Justice Stevens remarking on "the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[112]

Apprendi concluded by distinguishing between sentencing "factors" and "elements" of a crime.[113] According to *Apprendi*, "factors" do not enhance sentences beyond a statutorily specified range, and therefore may be found by a judge, whereas "elements" are necessary to the expansion of the range of available sentences and must be found by a jury.[114] *Apprendi* states that whether a given fact constitutes an element of a crime or a sentencing factor is a question "not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's verdict?"[115] If so, then that finding is an element, regardless of the label attached to it under a given statutory scheme. Justice Kennedy reiterated this formulation two years later in *Harris v. United States*, holding, "those facts setting the outer limits of a sentence, and of the

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[106] 530 U.S. 466 (2000).

[107] Stevens authored the majority opinion in *Apprendi*, thus effectively validating his *Walton* dissent. *See supra* notes 103-04 and accompanying text.

[108] *Apprendi*, 530 U.S. at 476.

[109] 526 U.S. 227 (1999).

[110] *Id.* at 243, n.6.

[111] *Apprendi*, 530 U.S. at 474-82.

[112] *Id.* at 482-83.

[113] *Id.* at 494.

[114] *Id.*

[115] *Id.*

judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis."[116]

On the same day it decided *Harris*, the Court announced in *Ring v. Arizona* that the Sixth Amendment requires that a jury find all facts necessary to the imposition of a death sentence.[117] In so doing, the Court explicitly overruled *Walton* "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."[118] *Apprendi* had evaded the question posed by *Walton*, stating that it stood for the proposition that the Sixth Amendment did not invalidate "state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death."[119] But this construction of the Arizona scheme was not strictly accurate, for under it a crime did not become a capital offense until the judge found the aggravating factors. The *Ring* Court recognized that *Walton* could not be reconciled with its recent Sixth Amendment jurisprudence.[120] Thus, since "Arizona's enumerated aggravating factors operate as 'the functional equivalent of a greater offense,'"[121] the Court invalidated the scheme under which Summerlin was convicted and sentenced to death.

III. FACTS AND PROCEDURAL HISTORY

In 1982, an Arizona jury convicted Warren Summerlin of first-degree murder and sexual assault.[122] Shortly thereafter, the court held an informal, non-adversarial hearing without a jury to decide Summerlin's sentence.[123] At the close of the proceeding, the judge found the presence of two aggravating factors and no mitigating factors and sentenced Summerlin to death.[124]

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[116] 536 U.S. 545, 567 (2002). This portion of Justice Kennedy's opinion was joined only by a plurality of the Court.

[117] 536 U.S. 584 (2002).

[118] *Id.* at 609.

[119] *Apprendi*, 530 U.S. at 498.

[120] *Ring*, 536 U.S. at 609.

[121] *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19).

[122] Summerlin v. Stewart, 341 F.3d 1082, 1088 (9th Cir. 2003).

[123] *Id.* at 1089.

[124] *Id.*

A. SUMMERLIN'S PERSONAL HISTORY

As the Ninth Circuit remarked, the narrative of Summerlin's case was "the raw material from which legal fiction is forged."[125] Summerlin's childhood was certainly the stuff of melodrama: his father was a convicted armed robber killed in a shootout, his mother an alcoholic who physically abused Summerlin and subjected him to electroshock therapy.[126] Summerlin suffered from dyslexia and failed to complete the seventh grade, and as a teenager he committed a number of petty crimes; he was later diagnosed as a paranoid schizophrenic.[127]

Prior to the murder at issue, however, Summerlin committed only one serious adult felony: he brandished a knife at the driver of a car that struck his wife, and was later convicted of aggravated assault.[128] Although this conviction occurred after Summerlin's murder trial had begun, the judge in the murder case cited it as a factor that contributed to his death sentence.[129]

B. THE MURDER

On April 29, 1981, an account investigator named Brenna Bailey visited Summerlin's home in order to speak with his wife about an overdue account.[130] Bailey never returned to her office, and her boyfriend reported her missing that evening.[131] That same night, an anonymous caller—later identified as Summerlin's mother-in-law—informed a hotline that Summerlin had murdered Bailey and wrapped her in a carpet; at trial she testified that she had obtained this information from her daughter (Summerlin's wife), who had learned it through extra-sensory perception.[132] The next day, police discovered Bailey's partially nude body wrapped in a bloody bedsheet in the trunk of Summerlin's car, her skull crushed.[133] When officers arrived to search Summerlin's house, he stated, "I didn't kill anybody," then inquired whether they were looking for "the girl that was at my house"; asked whom he meant, Summerlin described Bailey.[134] After

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[125] *Id.* at 1084.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 1084-85.
[133] *Id.* at 1085.
[134] *Id.*

his wife identified the bed-sheet as theirs, the police arrested Summerlin for Bailey's murder.[135]

C. TRIAL, SENTENCING, AND DIRECT APPEAL

Summerlin's arrest set in motion a byzantine sequence of pre-trial proceedings. The court appointed the public defender's office to represent Summerlin, but shortly after the appointment his counsel left the public defender's office and was replaced by another attorney whom the Ninth Circuit identified as "Roe."[136] Summerlin underwent a series of psychiatric and psychological examinations, which revealed him to be "functionally mentally retarded" and also found "indications of organic brain impairment, border-line personality disorder, and paranoid personality disorder." Nevertheless, under Arizona law, Summerlin was legally sane and fit to stand trial.[137] That the trial occurred at all was thus due in large part to the fact that, at the time, Arizona applied the "*M'Naghten* test" for determining mental competency to stand trial.[138]

Roe then entered into plea negations, obtaining an agreement that the Ninth Circuit later characterized as "extremely favorable."[139] Under its terms, Summerlin would plead guilty, without actually admitting his guilt, to second-degree murder, and receive a sentence of twenty-one years in prison, of which he was required to serve at least fourteen. [140] Summerlin would also plead guilty to aggravated assault based on his confrontation with the driver who had hit his wife, and admit that he had violated the terms of a probation arising from an earlier burglary.[141] This second plea would carry a maximum fifteen-year prison term, to run concurrently with his murder sentence.[142] However, the possibility remained that the court might reject the agreement after Summerlin entered the agreed-upon pleas, in which case Summerlin could either withdraw his pleas and stand trial, or allow the pleas to stand and face a possible sentence of up to thirty-eight-

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 1085-86.

[138] *Id.* at 1085. Under the *M'Naghten* test,

> an accused is not criminally responsible if, at the time of committing the act, he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.

BLACK'S LAW DICTIONARY 694 (6th ed. 1991).

[139] *Summerlin*, 341 F.3d at 1086.

[140] *Id.* This intricate procedure is known as an "*Alford*" plea. *Id.; see* North Carolina v. Alford, 400 U.S. 25 (1970).

[141] *Summerlin*, 341 F.3d at 1086.

[142] *Id.*

and-a-half years in prison.[143] Summerlin initially entered his pleas as arranged, but he then reversed course and, acting *pro se*, asked the court to withdraw his pleas and replace Roe with new counsel.[144] The judge denied the motions and informed Summerlin that he planned to reject the plea agreement.[145] On December 18, 1981, Roe attempted unsuccessfully to transfer the case to a new court, citing the judge's rejection of the plea agreement as evidence of bias.[146]

From this point on, the proceedings were fraught with irregularities. On the same night that Roe sought to challenge the court's impartiality, she commenced a romantic relationship with the prosecuting attorney, but she continued to represent Summerlin even after he withdrew from the plea agreement and decided to go to trial.[147] Several days later, after Summerlin once again requested new counsel, Roe withdrew from the case without informing Summerlin about her romantic conflict of interest, and the court appointed a private practitioner named George Klink to represent Summerlin.[148] In response to the romantic conflict of interest, the Arizona Attorney General assumed control of the case and promptly announced that any lesser plea agreement—such as the one Roe had negotiated—was unacceptable.[149] In addition, a new judge was assigned to conduct the murder trial.[150] Judge Marquardt, however, brought with him problems of his own: throughout Summerlin's trial and sentencing, Marquardt was a habitual user of marijuana, a fact later cited to explain some problematic behavior on his part.[151] In fact, Marquardt's drug problem was sufficiently serious to result, ultimately, in his disbarment.[152]

Meanwhile, Klink was providing Summerlin with substandard representation. Klink first tried to disqualify the judge (not Judge

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[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 1086-87.

[148] *Id.* at 1088.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 1089. For example, on the same day that Judge Marquardt sentenced Summerlin to death, he also imposed a death sentence on another capital defendant, James Clifford Fisher. But a court later overturned Fisher's sentence because it resulted, in part, from a plea agreement into which Judge Marquardt improperly entered as a party, and which Judge Marquardt allowed into evidence at Fisher's trial. Moreover, Summerlin later alleged that Judge Marquardt confused the facts of his case with those of Fisher's case, blaming this confusion on Judge Marquardt's drug-addled state. *Id.* at 1090-91.

[152] Judge Marquardt was sanctioned and then disbarred following a drug deal that went awry. *Id.* at 1089-90.

Marquardt) hearing Summerlin's assault trial, and when that failed, Klink sought a continuance because he was unprepared.[153] The court denied this motion, and the case went to trial, where Klink called only one witness—Summerlin's wife—and failed to obtain any psychiatric evaluations of Summerlin, whom the court convicted of aggravated assault.[154] Klink's defense of Summerlin during the subsequent murder trial was similarly slipshod. Once again, Mrs. Summerlin was the sole witness called on her husband's behalf.[155] Furthermore, although Klink's theory was that Summerlin lacked premeditation in committing the murder, Klink offered no evidentiary support for the theory; in fact, he neglected to present any psychiatric evidence at all.[156] After a four-day trial and less than four hours of deliberation, the jury convicted Summerlin of first-degree murder and sexual assault.[157]

During the month between Summerlin's conviction and his sentencing hearing, Klink never once met with Summerlin, and he also neglected to contact either of the psychiatrists who had initially examined Summerlin, although the State planned to call both as witnesses.[158] Klink's one planned witness was a doctor who would testify about emotional and physical abuse that Summerlin may have suffered as a child, but Klink prepared no evidence supporting the testimony.[159] At the hearing, Summerlin objected to Klink's decision to call the doctor, so no witnesses testified in support of Summerlin at the sentencing hearing.[160]

Following a period marked by Judge Marquardt's erratic behavior, the penalty phase began.[161] The proceedings were again irregular, but the result was clear: after finding two aggravating circumstances—Summerlin's felony conviction (for aggravated assault), and Summerlin's having murdered Bailey "in an especially heinous, cruel, or depraved manner"—and no mitigating circumstances, Judge Marquardt sentenced Summerlin to

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[153] *Id.* at 1088.

[154] *Id.* Judge Marquardt cited this conviction as one aggravating factor leading to Summerlin's death sentence. *See infra* note 162 and accompanying text.

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

[156] *Id.* This oversight was a particularly damning error in Summerlin's case, as his previously diagnosed psychiatric problems might have cast serious doubt on his capacity for premeditation.

[157] *Id.*

[158] *Id.* at 1088-89.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 1090.

death.[162] On appeal, the Arizona Supreme Court upheld Summerlin's conviction and sentence.[163]

D. HABEAS PETITIONS

Over the ensuing years, Summerlin repeatedly sought collateral review of his conviction and sentence, filing two federal and four state petitions for habeas corpus.[164] In 1997, after the denial of his second federal petition, Summerlin filed a motion to vacate his sentence pursuant to Federal Rule of Civil Procedure 59(e).[165] The federal district court denied this motion; however, the court authorized Summerlin to appeal its denial.[166] A three-judge panel from the Ninth Circuit partly affirmed and partly reversed the district court, then remanded the matter for an evidentiary hearing into Judge Marquardt's competence during Summerlin's sentencing.[167]

Meanwhile, the Supreme Court granted certiorari in *Ring v. Arizona*, which presented Sixth Amendment questions about Arizona's death penalty statute.[168] Because Summerlin had raised related issues in his habeas petitions, the Ninth Circuit deferred any evidentiary hearing pending the Supreme Court's decision in *Ring*.[169] After the Supreme Court invalidated Arizona's sentencing scheme in *Ring*,[170] Summerlin requested that the panel stay its proceedings so that he could petition the Arizona Supreme Court for the opportunity to re-try his appeal under the new *Ring* regime.[171] The circuit court entered the stay, but the Arizona court denied his petition.[172] The Ninth Circuit then heard Summerlin's case *en banc*.[173]

E. NINTH CIRCUIT

Before the Ninth Circuit, Summerlin contested the constitutionality of both his conviction and his sentence. With respect to the guilt phase of his trial, Summerlin argued that he had received ineffective assistance of

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[162] *Id.* at 1091 (quoting ARIZ. REV. STAT. § 13-703(F)(6) (2003)).
[163] *Id.*
[164] *Id.*
[165] *Id.*; FED. R. CIV. P. 59(e).
[166] *Summerlin*, 341 F.3d at 1091.
[167] *Id.*
[168] 534 U.S. 1103 (2002).
[169] *Id.*
[170] 536 U.S. 584, 609 (2002); *see supra* notes 117-21 and accompanying text.
[171] *Summerlin*, 341 F.3d at 1091.
[172] *Id.* at 1091-92.
[173] *Id.* at 1092.

counsel.[174] Summerlin also presented multiple arguments challenging the constitutionality of the penalty phase of his trial, but the court addressed only Summerlin's claim that the sentencing procedure infringed on his Sixth Amendment right to a jury trial.[175] Summerlin argued that because the Supreme Court had ruled, in *Ring*, that Arizona's sentencing scheme violated the Sixth Amendment by allowing a judge to find facts necessary to the imposition of the death penalty, his death sentence was constitutionally invalid.[176] Although the court found that Summerlin had not demonstrated ineffective assistance, it agreed, in a lengthy and extremely thorough opinion, with Summerlin's claim that *Ring* should apply retroactively in the habeas context, thus overturning Summerlin's death sentence.[177]

Applying *Teague*, the Ninth Circuit first determined that *Ring*'s rule was substantive, thus meeting *Teague*'s first prong for retroactivity.[178] After a detailed discussion of the history of capital punishment in Arizona, the majority concluded, "when *Ring* displaced *Walton*, the effect was to declare Arizona's understanding and treatment of the separate crime of capital murder, as Arizona defined it, unconstitutional."[179] In support of the idea that the availability of capital punishment brings about a substantive, categorical transformation of the crimes charged, the majority cited the Supreme Court's recent decision in *Sattazahn v. Pennsylvania*, where Justice Scalia held that "'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*."[180] The Ninth Circuit analogized *Ring* to *Sattazahn*, asserting that "*Ring* reintroduced 'capital murder' as a separate substantive offense under Arizona law, redefining, in the process, what the substantive elements of this 'separate offense' of capital murder are."[181] The court then considered, and quickly rejected, Summerlin's claim that *Ring* did not announce a new rule for *Teague* purposes.[182] The majority cited the principle, established in *Butler*, that habeas courts should evaluate the "reasonableness" of state court decisions in light of Supreme Court precedent.[183] Because the court

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[174] *Id.*

[175] *Id.* at 1092, 1121.

[176] *Id.* at 1092.

[177] *Id.* at 1121.

[178] *Id.* at 1101.

[179] *Id.* at 1105.

[180] *Id.* (quoting Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003)).

[181] *Id.* at 1106.

[182] *Id.* at 1109.

[183] *Id.* (citing Butler v. McKellar, 494 U.S. 407, 414 (1990)); *see supra* note 78 and accompanying text.

did not believe that a state court in 1984 "would have acted objectively unreasonably" in Summerlin, the majority held that *Ring*'s rule was new.[184]

Next, the Ninth Circuit addressed the question of whether *Ring* qualified for retroactive application under prong two of *Teague* as well as prong one.[185] With respect to the accuracy element of this second prong, the majority observed that the Supreme Court's Eighth Amendment precedent imposed higher standards of accuracy on courts in the capital sentencing context,[186] stating that in Summerlin's case, given Judge Marquardt's behavior, concerns about judicial accuracy in fact-finding were "not merely theoretical."[187] Further, accuracy in sentencing was not simply a factual matter but also a moral one:

> entrusting a jury with the authority to impose a capital verdict is an important procedural safeguard, because the jury members "are more attuned to the community's moral sensibility," "reflect more accurately the composition and experiences of the community as a whole," and act to "express the conscience of the community on the ultimate question of life or death."[188]

Moral judgment was especially salient in Summerlin's case, as his sentence was based in part on a finding that he had acted "in an especially heinous, cruel or depraved manner."[189] The court concluded that *Ring* "will significantly improve the accuracy of capital trials in Arizona."[190]

The court then held that *Ring* also satisfied the second element of *Teague*'s procedural exception to nonretroactivity, because it "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."[191] The majority asserted that Arizona's jury-free sentencing procedure constituted structural error because it impaired the efficacy of a trial's fact-finding function and cast ineradicable doubt on sentencing fairness.[192] After a discussion of recent Supreme Court precedent demonstrating the necessity of jury fact-finding,[193] the court noted that in the capital sentencing context, the Eighth Amendment added

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[184] *Id.* (quoting O'Dell v. Netherland, 521 U.S. 151, 156 (1997)).

[185] *Id.* at 1109-21; *see supra* Part II.A.4.b.

[186] *Summerlin*, 341 F.3d at 1110-15.

[187] *Id.* at 1115.

[188] *Id.* at 1113-14 (quoting Ring v. Arizona, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring)).

[189] *Id.* at 1091 (quoting ARIZ. REV. STAT. § 13-703(F)(6) (2003)); *see supra* text accompanying note 162.

[190] *Id.* at 1115.

[191] *Id.* at 1116.

[192] *Id.* (citing Rose v. Clark, 478 U.S. 570, 577-78 (1986)).

[193] *Id.* at 1116-18.

special weight to the Sixth Amendment's commands.[194] Finally, the majority addressed *Teague*'s requirement that a procedural rule must be "truly watershed" in nature in order to be retroactively applicable, concluding that insofar as *Ring*'s holding was procedural, it "define[d] structural safeguards implicit in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials," thus satisfying the remainder of *Teague*'s second prong.[195]

The court upheld Summerlin's conviction but overturned his death sentence on the grounds that *Ring* was retroactively applicable, thus invalidating Summerlin's sentence.[196] Arizona appealed *Ring*'s retroactive application, and the Supreme Court granted certiorari.[197] The sole issue before the Court was whether *Ring* should apply retroactively in the habeas context.[198]

IV. SUMMARY OF OPINIONS

A. MAJORITY

Justice Scalia wrote for the majority in *Schriro*.[199] Justice Scalia's opinion is notable for its brevity: the printed slip opinion covers a mere ten pages.[200] Moreover, Justice Scalia devoted nearly half of this space to the factual and procedural history of the case and a recitation of the basic law on habeas retroactivity.[201] Justice Scalia's terseness presents a particularly remarkable contrast to the Ninth Circuit opinion under review.[202] Before proceeding to his consideration of the Ninth Circuit's opinion, Justice

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[194] *Id.* at 1118-19.

[195] *Id.* at 1121.

[196] *Id.* In so doing, the Ninth Circuit created a circuit split, as two circuits had already classified *Ring* as purely procedural and declined to apply it retroactively. *See* Turner v. Crosby, 339 F.3d 1247 (11th Cir. 2003); Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002).

[197] 124 S. Ct. 833 (2003).

[198] Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (2004).

[199] Justice Scalia's majority opinion was joined by Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Thomas.

[200] Schriro v. Summerlin, No. 03-526, slip. op. at 1-10 (S. Ct. June 24, 2004). By contrast, the twenty-seven other majority and plurality opinions issued by the Court in June 2004 average eighteen pages in length.

[201] *Schriro*, 124 S. Ct. at 2521-23.

[202] Judge Thomas's decision for the Ninth Circuit covers sixty-nine pages, forty-eight of which are given over to legal analysis of the *Teague* issues on which the Supreme Court granted certiorari. Summerlin v. Stewart, No. 98-99002, slip. op. 12707, 12712-81 (9th Cir. Sept. 2, 2003).

Scalia noted, without further comment, that the circuit court had "agreed with the State that *Ring* announced a new rule."[203]

In addressing the Ninth Circuit's holding that *Ring*'s rule effected a substantive change in Arizona law, Justice Scalia first emphasized precedent that, in his view, demonstrated that "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes."[204] On the other hand, "rules that regulate only the *manner of determining* the defendant's culpability are procedural."[205] Seizing upon this distinction, Justice Scalia distinguished Summerlin's actual case, as he saw it, from Summerlin's argument: "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."[206] According to Justice Scalia, the former would be a procedural holding, and the latter a substantive one.

Responding to the idea that *Ring* qualified for the procedural rule exception to *Teague's* nonretroactivity presumption, Justice Scalia disputed the Ninth Circuit's assertion that *Ring*'s jury guarantee significantly enhanced fact-finding accuracy.[207] He argued that "[t]he evidence is simply too equivocal to support that conclusion," since "for every argument why juries are more accurate fact-finders, there is another why they are less accurate."[208] After citing several scholarly and judicial sources, Justice Scalia concluded, "[w]hen so many presumably reasonable minds continue to disagree over whether juries are better fact-finders *at all*, we cannot confidently say that judicial fact-finding *seriously* diminishes accuracy."[209] Justice Scalia also disputed the relevance of "moral accuracy," observing, "the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved *as determined by community standards.*"[210] Similarly, he called the "death is different" argument against applying *Teague* in capital cases "not an application of *Teague*, but a rejection of it."[211] As precedential support for his stance that *Ring* does not qualify for

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[203] *Schriro*, 124 S. Ct. at 2523.
[204] *Id.*
[205] *Id.* (citing Bousley v. United States, 523 U.S. 614, 620 (1998)).
[206] *Id.* at 2524.
[207] *Id.* at 2525.
[208] *Id.*
[209] *Id.*
[210] *Id.* at 2526.
[211] *Id.*

retroactive effect, Justice Scalia relied largely on *DeStefano v. Woods*.[212] There, the Court declined to retroactively apply its ruling in *Duncan v. Louisiana* extending the jury trial guarantee to the states because such application failed the three-factor *Stovall* test.[213]

Justice Scalia closed with a policy-based argument dominated by finality and federalism:

> [Though t]he right to jury trial is fundamental to our system of criminal procedure . . . it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart.[214]

The Court thus overturned the Ninth Circuit's retroactive application of *Ring* and reinstated Summerlin's death sentence.[215]

B. DISSENT

Justice Breyer dissented from the *Schriro* majority opinion.[216] He started by emphasizing the importance of juries' moral accuracy, but conceded that when he had adopted this perspective in his *Ring* concurrence, he did so alone.[217] Justice Breyer then enumerated three arguments against the *Schriro* majority's result.[218]

First, he recast his "moral accuracy" argument in terms of "community-based value judgments."[219] Justice Breyer observed that three of the four states that would be affected by the retroactive application of *Ring* applied a sentencing aggravator like the one at issue in *Schriro*, requiring fact-finders to determine whether a defendant acted in a "heinous, cruel, or depraved manner."[220] He then stated that such terms "require reference to community-based standards," which juries are clearly "better equipped" than judges to define and apply.[221]

Next, Justice Breyer argued that the primary aim behind Justice Harlan's pre-*Teague* opinions was to ensure that the Court "balance

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[212] 392 U.S. 631 (1968) (per curiam); *Schriro*, 124 S. Ct. at 2525-26.

[213] *DeStefano*, 392 U.S. at 633-35 (per curiam).

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

[215] *Id.*

[216] Justice Breyer's dissent was joined by Justices Ginsburg, Souter, and Stevens.

[217] *Id.* at 2527 (Breyer, J., dissenting).

[218] *Id.* at 2528-31 (Breyer, J., dissenting).

[219] *Id.* at 2528 (Breyer, J., dissenting).

[220] *Id.* (Breyer, J., dissenting) (quoting ARIZ. REV. STAT. § 13-703(F)(6) (2003)).

[221] *Id.* (Breyer, J., dissenting).

competing considerations."[222] On the one hand, the "basic objectives" of the writ of habeas corpus favored granting *Ring* retroactive effect, as did the criminal justice system's general focus on justice and equity.[223] On the other hand, Justice Breyer acknowledged *Teague's* emphasis on federalism, finality, and the limited resources available in the criminal justice system.[224] As Justice Breyer noted, however, *Ring*'s retroactive application would affect only 110 prisoners nationally, and in the capital sentencing context, finality concerns weigh on the side of the defendant, not of the courts.[225]

Third, Justice Breyer disputed the relevance of *DeStefano v. Woods*, on which Justice Scalia relied.[226] He noted that *DeStefano* predated *Teague*, which cast doubt on its authority.[227] Justice Breyer then concluded by arguing that even on its own terms, *DeStefano* did not bar the retroactive application of *Ring*, because two of the three factors cited in *DeStefano* were consequentialist in nature and expressed the Court's reluctance to substantially disrupt state criminal justice systems.[228] But because *Ring*'s retroactive application would have extremely limited effects, Justice Breyer asserted that neither factor applied in *Schriro*.[229]

V. ANALYSIS

The Supreme Court was wrong to overrule the Ninth Circuit's decision to apply *Ring* retroactively. The Court should have acknowledged the watershed nature of *Ring*, vacated Summerlin's death sentence, and remanded this case for sentencing in accordance with *Ring*. The flaws in Justice Scalia's opinion stem from a variety of sources, chief among them his misinterpretation of Supreme Court precedent and his fixation on extra-constitutional policy preferences like finality and comity.[230]

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[222] *Id.* (Breyer, J., dissenting).

[223] *Id.* at 2528-29 (Breyer, J., dissenting). According to Breyer, these "basic objectives" of habeas corpus are "protecting the innocent against erroneous conviction or punishment and assuring fundamentally fair procedures." *Id.* at 2528 (Breyer, J., dissenting).

[224] *Id.* at 2529-30 (Breyer, J., dissenting).

[225] *Id.* at 2530 (Breyer, J., dissenting).

[226] Id. at 2530-31; *see supra* Part IV.A.

[227] *Schriro*, 124 S. Ct. at 2530 (Breyer, J., dissenting).

[228] *Id.* at 2530-31 (Breyer, J., dissenting). Specifically, Breyer cited *DeStefano*'s emphasis on "the effect on the administration of justice of a retroactive application" and "the extent of the reliance by law enforcement authorities on the old standards." *Id.* at 2530 (Breyer, J., dissenting) (quoting DeStefano v. Woods, 392 U.S. 631, 633 (1968) (per curiam)).

[229] 124 S. Ct. at 2531 (Breyer, J., dissenting).

[230] Finality and comity are not expressly mentioned in the Constitution. Of course, comity may be implied in the Constitution's federalist structure, and John Hart Ely argued that the Fifth Amendment's prohibition of double jeopardy, among other purposes,

A central weakness of Justice Scalia's opinion is its reliance on *Teague*. First, even within the *Teague* retroactivity framework, *Schriro* reaches the wrong result in overturning the Ninth Circuit's retroactive application of *Ring*. Justice Scalia's use of *Teague* is particularly distressing because AEDPA continues to provide the Court with the opportunity to revisit—and elucidate—its retroactivity framework by expressly reconciling *Teague* and AEDPA. Unfortunately, Justice Scalia has apparently declined the invitation. Although, in *Schriro,* Justice Scalia purported to uphold existing retroactivity law, that law itself is an incoherent jumble of statute, precedent, and policy; there is virtually nothing to uphold. But rather than effecting a much-needed clarification of habeas retroactivity law, Justice Scalia instead took advantage of its indeterminacy by espousing a regime that furthered his own extra-constitutional policy goals. That these goals trumped constitutional theory is evident in *Schriro*'s abandonment of Justice Scalia's "originalist" approach. Unfortunately (and paradoxically), despite the activist, goal-oriented approach that underlies the *Schriro* decision, that holding's consequences are likely to be deleterious from the perspectives of both jurisprudential logic and public policy.

A. DOES *TEAGUE* GOVERN?

The first question that *Schriro* raises is whether Justice Scalia employed the proper analytical framework in deciding the case. Put another way, was *Teague*'s retroactivity regime the appropriate lens through which Summerlin's claims should have been viewed? For two basic reasons, the answer to this question must be "no." First, because *Schriro* involved capital punishment, Justice Scalia should have paid greater attention to Eighth Amendment concerns. A proper consideration of the Eighth Amendment would have led to a different result in *Schriro*. In addition, since the passage of AEDPA in 1996, the Court has yet to fully confront the ways in which Congress modified *Teague* retroactivity. *Schriro* presented the Court with a perfect opportunity to resolve the ambiguities created by AEDPA, which, at least in part, superseded *Teague*'s retroactivity framework.

"guarantee[s] a sense of repose, an assurance that at some definable point the defendant can assume the ordeal is over." JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 96 (1980). But regardless of the credibility of these theories, their non-explicit nature would seem to render them strange bases on which Justice Scalia, the arch-textualist, would rest an opinion. *See supra* note 214 and accompanying text.

1. Is Death Different?

In *Penry v. Lynaugh*, the Court extended the applicability of *Teague*'s retroactivity rules to the capital sentencing context.[231] But *Penry* and its progeny[232] are fatally flawed insofar as they fail to reconcile the law of habeas corpus with the commands of the Eighth Amendment, instead simply extending *Teague*'s nonretroactivity presumption to the capital punishment context despite the constitutionally recognized uniqueness of the death penalty. Unfortunately, *Schriro* perpetuated this mistake.[233] A long line of Supreme Court precedent demonstrates that because "the death penalty is qualitatively different from any other punishment," death-sentencing procedures must meet a much higher bar of fairness and accuracy in order to be constitutionally valid.[234] Summerlin emphasized this history in his discussion of his case's Eighth Amendment ramifications.[235] In fact, Summerlin's Eighth Amendment argument receives ample support both from the Court's own precedent and from scholarship investigating the death penalty from legal and non-legal perspectives.[236]

Nevertheless, in *Schriro*, Justice Scalia called the "death is different" idea "not an application of *Teague*, but a rejection of it, in favor of a broader endeavor to 'balance competing considerations.'"[237] Of course, this statement correctly describes Summerlin's (and Justice Breyer's) position.[238] It also, if followed to its logical conclusion, should lead to a re-evaluation of either *Teague*'s application to the capital sentencing context, or the "death is different" idea itself. Either way, *Schriro* would have entailed a major transformation of the Court's governing law, whether in

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[231] 492 U.S. 302 (1989); *see supra* Part II.A.5.

[232] *See supra* Part II.A.5.

[233] *Schriro* thus continued the Rehnquist Court's tendency to treat capital punishment more like other punishments than previous courts have done by stressing the importance of efficiency and removing procedural safeguards that reflected the Court's view of the death penalty's singular nature. *See* Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677 (2000). *But see* Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1484 (2002) ("The Court's decisions in *Atkins* and *Ring* do not merely reflect [the] trend in public attitudes toward skepticism about the administration of capital punishment; to some degree, of course, the Court's decisions reinforce this skepticism.").

[234] Metzner, *supra* note 7, at 160 (quoting Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part)).

[235] Brief for Respondent at 37-38, *Schriro* (No. 03-0526).

[236] *See* THE DEATH PENALTY, *supra* note 6.

[237] *Schriro*, 124 S. Ct. at 2526 (quoting *Schriro*, 124 S. Ct. at 2528 (Breyer, J., dissenting)).

[238] *See supra* notes 222-25 and accompanying text.

the Eighth Amendment or habeas retroactivity field, for as Justice Scalia apparently recognized, *Teague* (and especially *Penry*) and "death is different" are fundamentally in tension with one another. Instead, Justice Scalia simply described the conflict and then proceeded to apply *Teague*, as if merely to depict a legal problem were to resolve it. Although such a cursory approach may be appropriate to *Teague*, it is worthy of neither Justice Scalia nor "death is different," which boasts a judicial heritage of great distinction.[239]

Only by waving away the Eighth Amendment issues that Summerlin's case presented could Justice Scalia collapse *Ring*'s death-specific rule into *Apprendi*'s broader one, rendering the two indistinguishable for *Teague* purposes. This faulty equation of the two then allowed Justice Scalia to deny the watershed nature of *Ring*, and also to reject the Ninth Circuit's argument that the availability of capital punishment rendered *Ring*'s rule substantive.[240] Justice Scalia thus either misread or ignored—or perhaps both—the Court's Eighth Amendment decisions regarding the uniquely high accuracy requirements present in capital cases. Had he not made this fundamental mistake, Justice Scalia would have recognized that *Ring*'s rule expresses a "bedrock" principle of American criminal justice.

2. *Did AEDPA Narrow* Teague*?*

As noted earlier, the Court has yet to satisfactorily resolve how AEDPA affected the application of *Teague*.[241] Although, in *Williams v. Taylor* and subsequent cases, the Court attempted to incorporate *Teague*'s conception of habeas retroactivity into AEDPA, it did not address the key question: how exactly did AEDPA redefine what constitutes a "new rule" for retroactivity purposes?[242] Several scholars have observed that the plain language of AEDPA seems to define the "new rule" category in a more limited fashion than the *Teague* line of cases has done.[243] Specifically, these writers point to the text of 28 U.S.C. § 2254(d), which codified the relevant portion of AEDPA. This provision authorizes courts to grant the

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[239] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002); Harmelin v. Michigan, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment . . . ."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("[D]eath as a punishment is unique in its severity and irrevocability").

[240] *See infra* Part V.B.1.

[241] *See supra* text accompanying notes 89-96.

[242] Bryant, *supra* note 5, at 41.

[243] *See, e.g.*, *id.* at 41-44; Yackle, *supra* note 82, at 414-21.

writ where the challenged proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[244] A strict reading of this language suggests that Congress intended to narrow the field of circumstances under which *Teague*'s retroactivity bar would apply, for it requires courts to grant the writ even where the proceedings at issue were simply "unreasonable." This formulation borrows *Butler*'s presumption that the writ should not overturn "reasonable" state court decisions, but it does not take up Chief Justice Rehnquist's corollary, which precluded reviewing courts from determining a challenged verdict's "reasonableness" in light of later decisions.[245]

Curiously, though, Justice Scalia's *Schriro* opinion does not mention either AEDPA or the federal habeas statute in which it was codified.[246] This omission would be bizarre coming from any member of the Court. But it is particularly noteworthy that Justice Scalia would adopt such a precedent-based common law perspective on retroactivity, because he has written extensively on the inappropriateness of this analytical model for constitutional adjudication.[247]

B. MISREADING *TEAGUE*

Even if the *Schriro* majority was correct in choosing to apply the *Teague* retroactivity test to Summerlin's *Ring*-based petition without considering the impact of AEDPA, it reached the wrong result because it misapplied *Teague* and its progeny.

1. Ring *as "Substantive" Rule*

In classifying *Ring*'s rule as procedural, Justice Scalia effectively evaded the Court's precedent regarding the element/factor distinction. This omission was essential to Justice Scalia's result, because if he had conceded that *Ring* redefined the Arizona scheme's "aggravating factors" as "elements," then he would have been compelled to agree with the Ninth Circuit's decision that *Ring* was substantive. According to Justice Scalia, *Ring* established that, "*because* Arizona's statutory aggravating factors restricted . . . the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were

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[244] 28 U.S.C. § 2254(d)(1) (2000).

[245] *See supra* notes 77-78 and accompanying text.

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

[247] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997).

subject to the procedural requirements the Constitution attaches to trial of elements."[248] The last clause of this description clearly casts the "elements" determination as a procedural question, but this classification is in direct conflict with the Court's precedent on the matter. Similarly, Justice Scalia's emphasis on *Ring*'s statement that the statutory aggravators were "effectively" elements of the crime of capital murder downplayed the substantive nature of *Ring*'s holding. This approach then allowed Justice Scalia to conclude that, because *Ring* did not touch the question of whether the aggravators listed in the Arizona statute could legitimately serve as grounds for capital punishment, *Ring*'s rule was not substantive.[249] The Solicitor General argued in a similar vein that *Ring* was not substantive because "[a]fter *Ring*, Arizona remained free to impose the death penalty on the same substantive basis as before—*i.e.*, where, as a necessary precondition, the murder was accompanied by an aggravating circumstance."[250] Thus, the government suggested that a rule is substantive only if it bars a state from punishing specific behavior.

But surely this understanding of "substantive" rules is false. As the Ninth Circuit stated in *Summerlin*, *Ring* transformed Arizona's sentencing aggravators into elements by distinguishing two discrete substantive crimes of murder: capital and non-capital murder, as determined by the presence (or absence) of those aggravators.[251] Then, because Arizona's scheme failed to provide the requisite procedural safeguards to a criminal defendant (i.e., the right to jury fact-finding in sentencing), the Court in *Ring* commanded Arizona to reconfigure its capital sentencing scheme.[252] And according to *Apprendi*, the question of whether an aggravator is an element of a crime or a sentencing factor "is one not of form, but of effect"; an aggravator will be an element provided that its "finding expose[s] the defendant to a greater punishment than that authorized by the jury's verdict."[253] As applied to Summerlin's case, this means that throughout the guilt phase of the trial Klink effectively defended Summerlin against the charge of "murder simpliciter," because no facts found at the trial could render Summerlin eligible for capital punishment. But after Summerlin's conviction the court sentenced him for capital murder, a charge upon which

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[248] *Schriro*, 124 S. Ct. at 2524.

[249] *Id.*

[250] Brief for the United States as Amicus Curiae Supporting Petitioner at 18-19, *Schriro* (No. 03-0526).

[251] Summerlin v. Stewart, 341 F.3d 1082, 1105 (9th Cir. 2003).

[252] Ring v. Arizona, 536 U.S. 584, 609 (2002).

[253] Apprendi v. New Jersey, 530 U.S. 466, 494 (2000).

he did not receive a jury trial.[254] The distinction between the crimes, however, only became apparent with *Ring*, which had the effect of barring Arizona from punishing Summerlin's criminal conduct, as determined by a jury at his trial, with death.[255] As such, *Ring* effected a substantive shift in Arizona's criminal law, a point the Ninth Circuit articulated with help from a quotation borrowed from Justice Scalia.[256]

Moreover, although it is true, as Justice Scalia wrote, that subsequent to *Ring* the Arizona Supreme Court concluded that *Ring*'s rule did not effect a substantive change in Arizona criminal law,[257] this fact is not at all relevant. To be sure, both the Arizona State Department of Corrections and the Solicitor General made this argument; according to Arizona, "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."[258] But while Arizona was correct to note that state court interpretations of state law are binding, but the question of whether *Ring*'s rule was substantive or procedural does not turn on state statutory interpretation. Rather, it requires an evaluation, based on federal constitutional law, of *Ring*'s effect on criminal procedure. In fact, the logical outcome of the state's argument is that federal courts can never effect substantive changes in state law; as the Solicitor General put it, "because federal courts do not have the authority to reach authoritative interpretations of the substance of state criminal prohibitions, federal court decisions in state criminal cases are *never* 'substantive' decisions that defy *Teague* analysis entirely."[259] But this argument goes too far—for example, surely *Lawrence v. Texas*[260] effected a substantive change in the criminal laws of Texas and all other states that criminalized homosexual intercourse—and the Court was wise to reject it.

2. Ring *Enhanced Fact-finding Accuracy and Was "Implicit in Concept of Ordered Liberty"*

Whatever the merits of the argument that *Ring* announced a "substantive" rule for retroactivity purposes, the Ninth Circuit was surely

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[254] *Summerlin*, 341 F.3d at 1089-90.

[255] *Ring*, 536 U.S. at 603-09.

[256] *See supra* note 180 and accompanying text.

[257] *Schriro*, 124 S. Ct. at 2524 (citing State v. Towery, 64 P.3d 828, 832-33 (Ariz. 2003)).

[258] Brief for Petitioner at 19, *Schriro* (No. 03-0526) (quoting Johnson v. Fankell, 520 U.S. 911, 916 (1997)).

[259] Brief for the United States at 8, *Schriro* (No. 03-0526).

[260] 539 U.S. 558 (2003).

correct in holding that *Ring* satisfied the procedural prong of *Teague*'s exception to the nonretroactivity presumption. In order to qualify for retroactive application under this prong, a decision must announce "new procedures without which the likelihood of an accurate conviction is seriously diminished."[261]

Justice Scalia's primary argument against finding that *Ring* satisfied the enhanced-accuracy requirement was empirical in nature. Although he conceded that juries *may* be more accurate fact-finders than judges, Justice Scalia observed that the evidence on this issue is far from dispositive.[262] After noting several scholarly studies that dispute the efficacy of jury decision-making, Justice Scalia wrote, "[w]hen so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy."[263] This argument seems reasonable on its face, but it confronts at least two serious difficulties.

First, although it may be true, in the abstract, that judges are equally good, or perhaps even better, fact-finders than are juries, Summerlin's own experience clearly demonstrated the dangers inherent in a blanket preference for judges as fact-finders. In fact, as Summerlin's brief observed, English and American courts historically required juries at criminal trials in order to shield defendants from the danger of "eccentric judges," and "[t]he specter of the 'eccentric' judge was no abstraction for Mr. Summerlin."[264]

The government-restricting function of juries is of course closely related to a concern with accuracy, albeit not a narrow, fact-based kind of accuracy. In his brief to the Court, Summerlin argued for a less factual understanding of the term:

> Accuracy . . . denotes more than the mere absence of error. It also signifies conformity to the truth or to a standard or model. In this sense, a jury in a criminal case renders a more "accurate" verdict than a judge because its unanimous decision more closely reflects public opinion regarding the gravity of the defendant's failure to "conform" to societal "standards."[265]

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[261] Teague v. Lane, 489 U.S. 288, 313 (1989).

[262] *Schriro*, 124 S. Ct. at 2524-25.

[263] *Id.* at 2525.

[264] Brief for Respondent at 34-35, *Schriro* (No. 03-0526) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). Indeed, this issue highlights one of the essential problems with Justice Scalia's approach in *Schriro*, which is entirely focused on abstract questions about constitutional rules, and seems completely divorced from the facts of Summerlin's case.

[265] *Id.* at 36 (citing WEBSTER'S NEW COLLEGIATE DICTIONARY 8 (1981)).

This argument illustrates the second basic problem with *Schriro's* approach to accuracy, which is its unduly constricted view of that concept. Justice Scalia seemed to consider accuracy solely in terms of objective facts. But while this view of fact-finding accuracy may be perfectly adequate with respect to the guilt-determination phase of trials, it does not seem particularly appropriate in sentencing. The Ninth Circuit emphasized that the aggravating factor at issue in Summerlin's habeas petition—whether he acted "in an especially heinous, cruel, or depraved manner"—may not be found with the kind of empirical accuracy that Justice Scalia cited. Although Justice Scalia addressed this argument, he did so in a perfunctory fashion, stating, "the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved *as determined by community standards.*"[266] This simply begs the question, though, of how else "heinous, cruel or depraved" can be defined; the terms possess no fixed, objective meanings, and their definitions will necessarily vary across communities. As Justice Breyer observed in his dissent, juries are surely better equipped than judges to make the moral judgments that such terms require.[267]

The inadequacy of Justice Scalia's conception of accuracy is further demonstrated by the very authority that he cited to bolster it. As legal support for his position that *Ring* did not qualify for retroactive effect, Justice Scalia relied heavily on *DeStefano v. Woods*,[268] in which the Court declined to retroactively apply its ruling in *Duncan v. Louisiana* extending the jury trial guarantee to the states.[269] The precedential value of *DeStefano* is itself dubious. For one thing, the case predates *Teague* by more than two decades. Justice Scalia was therefore on questionable grounds in citing its approach to retroactivity in the course of applying *Teague*, which presumably superseded *DeStefano*. Moreover, as Summerlin noted, in *Brown v. Louisiana*[270] the Court retroactively applied a Sixth Amendment rule because "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based."[271] But more important for the purposes of evaluting Justice Scalia's *Teague* test "accuracy" argument is the view of Justice Harlan. In the very opinion in which he first described the basic contours of

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

[267] *Id.* at 2528 (Breyer, J., dissenting).

[268] *Id.* at 2525-26; 392 U.S. 631 (1968) (per curiam).

[269] 391 U.S. 145 (1968).

[270] 447 U.S. 323 (1980).

[271] Brief for Respondent at 40, *Schriro* (No. 03-0526) (quoting *Brown*, 447 U.S. at 334 n.13).

what later became the *Teague* test, Justice Harlan wrote that *DeStefano* violated the "principle that new rules affecting 'the very integrity of the fact-finding process' are to be retroactively applied."[272] Thus, the purported progenitor of the *Teague* test rejected *DeStefano* and viewed accuracy in the more liberal, moral light urged by Summerlin and rejected by Justice Scalia.

Equally unconvincing is Justice Scalia's implicit assumption that *Ring* fails to satisfy Justice Harlan's original second requirement for procedural rule retroactivity because it did not declare a "watershed" rule of criminal procedure. It is interesting that Justice Scalia failed to even discuss whether *Ring*'s rule was of "watershed" significance.[273] As Arizona observed in its brief to the Court, the one judge-made rule that is widely agreed to qualify for this exception to *Teague* nonretroactivity is the requirement, announced in *Gideon v. Wainwright*,[274] that courts must appoint counsel for indigent defendants.[275] According to Arizona's brief, *Gideon* merits classification as a "watershed rule" because "*Gideon* dramatically changed the landscape of American criminal procedure by requiring states to provide counsel in all criminal trials involving serious offenses."[276]

This argument, however, leads nowhere; one could just as easily assert that *Ring v. Arizona* and *Apprendi v. New Jersey* changed the legal landscape by requiring states to prove all facts necessary for the imposition of a given sentence to a jury. Indeed, as Summerlin argued, in terms of historical practice and constitutional grounding "*Ring's* pedigree is as impressive as *Gideon*'s."[277] Justice Stevens provided substantial support for exactly this point in *Apprendi*, where he noted "the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[278] Thus, the historical anomaly in Summerlin's case

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[272] *Id.* at 41 (quoting Desist v. United States, 394 U.S. 244, 257 (1969) (Harlan, J., dissenting)).

[273] *Schriro*, 124 S. Ct. at 2519-26.

[274] 372 U.S. 335 (1963).

[275] Brief for Petitioner at 21-22 (No. 03-0526) (citing O'Dell v. Netherland, 521 U.S. 151, 170 (1997); Saffle v. Parks, 494 U.S. 484, 495 (1990); Teague v. Lane, 489 U.S. 288, 311-12 (1989)).

[276] *Id.*

[277] Brief for Respondent at 42, *Schriro* (No. 03-0526) (citing Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994)).

[278] Apprendi v. New Jersey, 530 U.S. 466, 482-83 (2000); *see also* White, *supra* note 104.

was not *Ring*'s requirement of jury fact-finding, but rather Arizona's sentencing scheme, which did not require it.[279]

In addition to the historical arguments it made in favor of considering *Ring* a "bedrock" rule, the Ninth Circuit presented a significant consequentialist justification for this classification. According to the Ninth Circuit, Arizona's failure to provide a jury during the sentencing phase constituted a structural error, which meant that the trial had lacked an element essential to fairness.[280] The Solicitor General argued in response that the *Ring* rule was not "structural," but rather should be evaluated under "harmless error" standard.[281] In *Schriro*, the Solicitor General asserted, "all of the elements necessary to support respondent's guilt of a crime subject to the death penalty were found by a jury beyond a reasonable doubt, with the single exception of the presence of an aggravating circumstance."[282]

The disingenuousness of this argument is obvious, its emphasis on the "single exception" irrelevant. The number of errors present in a trial has no bearing on whether or not they were structural. The extreme, but logical, conclusion of this argument would be to term "harmless error" a situation in which a jury found all of the relevant facts in a trial with the single exception of guilt, which was determined by the judge. More importantly, it seems ludicrous to argue that the finding of a sentencing aggravator in a capital case could ever be "harmless"; that finding quite literally represents the difference between life and death for the defendant.[283]

Ultimately, the case for the bedrock nature of *Ring*'s rule was made most clearly, albeit indirectly, by Justice Scalia himself. In *Blakely v. Washington*,[284] issued on the same day as *Schriro*, Justice Scalia termed the right to a jury's determination of essential sentencing factors "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[285] Like *Schriro*, *Blakely* addressed the jury's role in sentencing, and not in determining guilt.[286] It seems clear, then, that the Court's affirmation of this right in *Ring* should constitute a "watershed"

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[279] On the recent development of "determinate sentencing" schemes, see FRANK E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 112-15 (2001).

[280] Summerlin v. Stewart, 341 F.3d 1082, 1116-19 (9th Cir. 2003).

[281] Brief for the United States at 29, *Schriro* (No. 03-0526) (citing Neder v. United States, 527 U.S. 1, 8 (1999)).

[282] Id.

[283] Moreover, *Neder*, on which the United States relied, pre-dates *Apprendi*, so its authority is questionable at best.

[284] 124 S. Ct. 2531 (2004).

[285] Id. at 2358-59.

[286] Id. at 2536.

rule in criminal procedure, thus qualifying for retroactive application under *Teague*. The Court's decision not to classify *Ring* this way owes more to the defects in the *Teague* line of cases and the ambiguity of the "watershed" exception itself than to Summerlin's case.[287]

3. Ring *as a "New Rule"*

An even more compelling argument against Justice Scalia's application of *Teague* is one that the Ninth Circuit inexplicably rejected: that *Ring* did not announce a new rule at all, but merely clarified the meaning of the Sixth Amendment jury trial guarantee.[288] According to *Teague*, a rule is new "when it breaks new ground or imposes a new obligation on the States or the Federal Government."[289] Under this definition, it is difficult to see how the *Ring* rule could be considered a new one, for the obligation that it imposes ostensibly derives from the Sixth Amendment itself. Indeed, the Solicitor General's *amicus* brief argued, "*Apprendi*'s contribution was not to announce a new 'watershed' rule, but to clarify precisely which facts that enhance punishment must be submitted to the jury and which facts need not be."[290] Even more tellingly, in disputing the substantive nature of the *Ring* rule the Solicitor General asserted that

> The principle that a defendant has the right to a trial by jury on every essential element of the offense was established long before *Apprendi* or *Ring*. *Apprendi* was essentially a line-drawing decision that developed the standard for determining how to distinguish between facts that must be submitted to a jury and facts that may be decided by the judge. *Ring*, in turn, simply applied *Apprendi* to Arizona's capital sentencing procedure. *Ring* and *Apprendi* are accordingly refinements of long-settled legal principles. Although such refinements may be important, they do not alter our understanding of the 'bedrock procedural elements' that are essential to a fair trial.[291]

The Solicitor General's statement seems a reasonable description of *Ring* and *Apprendi*, and it comports with the history of the Court's Sixth

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[287] In fact, in the fifteen years since Teague was decided, the Supreme Court has yet to identify a single case (with the historical exception of Gideon v. Wainwright) that qualifies as a Teague "watershed." Tonya G. Newman, Comment, Summerlin v. Stewart *and* Ring *Retroactivity*, 79 CHI.-KENT L. REV. 755, 767 (2004). Even this concession is trivial, as it has not, to my knowledge, been applied in a single case, which is not surprising, considering that Gideon was decided roughly a quarter-century before Teague.

[288] Summerlin v. Stewart, 341 F.3d 1082, 1109 (9th Cir. 2003).

[289] Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion).

[290] Brief for the United States at 25, *Schriro* (No. 03-0526). This passage appears in the brief's section arguing against the retroactive application of *Ring* under the second, procedural exception to *Teague*'s nonretroactivity presumption. *Id.*

[291] *Id.* at 9.

Amendment jurisprudence. Nevertheless, as Summerlin observed, Arizona simply assumed that *Ring*'s rule was new, without actually demonstrating why this was so.[292] In fact, this was true of all of the briefs from Arizona's *amici* except the Solicitor General's.[293] Summerlin, however, argued that *Ring*'s rule was not new at all, citing both the Solicitor General's *amicus* brief and Justice Stevens' *Walton* dissent, with its substantial discussion of the history of the jury guarantee in capital sentencing.[294]

Still, there remains one primary hurdle confronting a proponent of the theory that *Ring* and *Apprendi* did not announce a new rule: *Ring*'s overruling of *Walton v. Arizona* suggests that *Ring* declared a new constitutional principle.[295] In its reply brief, Arizona made this point, stating that just as *Walton* announced a new constitutional rule, *Ring* announced a Sixth Amendment rule that directly contradicted *Walton*'s.[296] But this formulation, confident though it sounds, raises a key question: what, exactly, was the *Walton* rule that the Court rejected in *Ring*?

As Summerlin's brief noted, in *Ring* "[t]he Court acknowledged that the factual premise underlying its decision in *Walton*—that a jury conviction of first-degree murder in Arizona automatically made the defendant eligible for a sentence of death—was incorrect."[297] In effect, the presumptive "*Walton* rule" (that Arizona's sentencing scheme was constitutionally permissible) never existed, because *Walton* erroneously approved a scheme that did not exist. This mistake was perpetuated when the Court explicitly declined to overrule *Walton* in *Apprendi*.[298] Thus, Summerlin observed that the Arizona Supreme Court later "refuted the *Apprendi* majority's statement . . . that juries in capital cases had 'found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death.'"[299] Contrary to Arizona's assertion—unchallenged by the Ninth Circuit, and unexamined by Justice Scalia—that *Ring* announced a new rule, the stronger case rests with the side asserting that *Ring* merely restored a proper understanding of the Sixth Amendment's jury trial guarantee.

Near the conclusion of his *Schriro* opinion, Justice Scalia wrote that, despite the significance of the Sixth Amendment's jury trial guarantee, "it

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[292] Brief for Respondent at 18 n.5, *Schriro*, (No. 03-0526).

[293] *Id.*

[294] *Id.* at 17-18.

[295] Ring v. Arizona, 536 U.S. 584, 603 (2002).

[296] Brief for Respondent at 3, *Schriro* (No. 03-0526).

[297] *Id.* at 13 (citing *Ring*, 536 U.S. at 603).

[298] Apprendi v. New Jersey, 530 U.S. 466, 496-97 (2000).

[299] Reply Brief for Petitioner at 5 (No. 03-0526) (quoting *Apprendi*, 530 U.S. at 497).

does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it *at the time*,"[300] the Court should allow him to benefit from a subsequently announced constitutional rule. The key phrase in this passage is "at the time." With these words, Justice Scalia at once acknowledged that the Court's pre-*Ring* understanding of the Sixth Amendment was no longer operative, and also displayed a complete disregard for the originalist approach to Constitutional interpretation of which he has long been the fiercest and most articulate proponent.[301]

Central to the originalist project is the quasi-Platonist idea that there exists one true, unchanging interpretation of the Constitutional text. Justice Scalia clearly enunciated his originalist approach to the jury trial right in his concurring opinion in *Apprendi*. There, he argued that Justice Breyer's policy-based dissent

> proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury,' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.[302]

But just four years later, in *Schriro*, Justice Scalia alluded to evolving constitutional norms and essentially adopted a "living" constitutional perspective, a viewpoint for which he has in the past reserved some of his harshest broadsides.[303] If there is, as Justice Scalia has traditionally insisted, just one true "original" understanding of the Constitution, and if reaching that understanding is the ultimate goal of constitutional adjudication, then it is unclear why any weight should be accorded to prior decisions (e.g., *Walton*) that the Court later determines were inconsistent with this proper understanding of the Constitution. Indeed, if the rule announced in *Ring* expresses the original meaning of the Constitution—and since Justice Scalia joined *Ring*, this is presumably his belief—then it is difficult to see how that rule can be considered "new" in any meaningful sense. It is particularly ironic that Justice Scalia reached the dubious result that *Ring* announced a new rule in the course of applying the *Teague* test, which is itself devoid of constitutional support. That the *Teague* test was formulated by Justice O'Connor, the Court's consummate pragmatist (and

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[300] Schriro v. Summerlin, 124 S. Ct. 2519, 2526 (2004) (emphasis added).

[301] *See, e.g.*, SCALIA, *supra* note 247, at 37-41.

[302] *Apprendi*, 530 U.S. at 499 (Scalia, J., concurring) (quoting U.S. CONST. amend. VI) (alteration in original).

[303] *See* SCALIA, *supra* note 247, at 41-47.

former legislator), is not at all surprising; that it has been unquestioningly adopted by Justice Scalia, the consistent promoter, in both scholarship and jurisprudence, of a rigorous and principled theory of constitutionalism, is inexplicable.

Furthermore, the perpetuation of *Teague*'s broad conception of what constitutes a "new" rule threatens to narrow the availability of meaningful habeas relief almost to extinction. Whereas Justice Harlan thought that the concept of "new rules" should be narrowly construed in order to allow retroactive application in the habeas context of most Supreme Court holdings, *Teague* and its progeny have effected a remarkable expansion of the "new rule" field.[304] This unfortunate result is a consequence of the theory of habeas corpus that Justice O'Connor first articulated in *Teague*.[305] In her view, the costs that federal grants of habeas impose on state courts are an essential consideration in defining the writ's scope.[306] But while Justice Harlan, too, considered this to be a relevant concern of habeas adjudication, he did not elevate it to the central position that it occupies in Justice O'Connor's conception. Instead, he listed federalism as one relevant consideration among many.[307] This view is surely the correct one, because as *Black's Law Dictionary* states, historically, "[t]he primary function of the writ is to release from unlawful imprisonment."[308] In *Teague*, however, Justice O'Connor transformed a writ that is chiefly concerned with the vindication of individual rights into a device for ensuring the proper state-federal balance of power. Such renovations are characteristic of the Rehnquist Court's approach to individual constitutional rights in the capital sentencing context.[309]

C. SHOULD *TEAGUE* GOVERN?

Finally, *Schriro* demonstrates several of the reasons why the Court should retire *Teague* as the primary authority in the area of habeas retroactivity. First, the *Teague* test derives from dicta in a plurality opinion signed by only four justices, so its precedential value is open to question. In addition, although *Teague* purports to announce a clear retroactivity framework, it relies on terms that are inherently vague, and does little or

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[304] *See* Goldstein, *supra* note 7, at 401-10.

[305] *See supra* note 287.

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

[307] Mackey v. United States, 401 U.S. 667, 689 (1971) (Harlan, J., concurring).

[308] BLACK'S LAW DICTIONARY 491 (abr. 6th ed. 1991).

[309] *See* Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313 (1999) (arguing that the Court's recent death penalty jurisprudence over-emphasizes process at the expense of rights).

nothing to clarify them. Lastly, there exist no compelling policy arguments for prohibiting *Ring*'s retroactive application, and a number of reasons in favor of it.

1. Is Teague *Binding?*

In his brief, Summerlin cited *Ballew v. Georgia*[310] for the proposition that fact-finding accuracy has always been an important justification for requiring juries in criminal trials.[311] However, as Arizona observed in its reply, "Summerlin's quotes from a portion of the *Ballew* opinion are from two Justices only."[312] Of course, this argument points up the dubious precedential value of *Teague* itself. Although most of the Court signed onto the result in *Teague*, Justice O'Connor was unable to persuade a majority to support her adaptation of Justice Harlan's retroactivity framework. Moreover, *Teague* itself misread the Justice Harlan theories that it allegedly advanced.[313] Admittedly, the Court's repeated reliance on *Teague* has invested it with some degree of authority. But the fact that the test possesses no true weight from a *stare decisis* perspective should make it that much easier for the Court ultimately to reject it.

2. Is Teague *Internally Coherent?*

The central problem with the *Teague* test is one that plagues many such multi-factor balancing tests: it pretends to generally applicable objectivity, but the vagueness of its terms precludes consistent application. The indeterminacy of this test is self-evident: its three factors are nebulous and not susceptible to objective measurement; there is no clear formula for weighing the factors; and a reviewing court may apply the test to virtually any constitutional claim. Thus, every aspect of the test suffers from acute ambiguity, particularly its "new rules" category and the substantive/procedural bifurcation of such rules.[314] As noted above, *Teague* and its progeny fail to define "new rules" in a way that enables consistent application.[315] Further, *Teague* relied heavily on a binary categorization—opposing "substantive" versus "procedural" rules—that is notoriously slippery,[316] and *Teague* itself did nothing to resolve the terminological

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[310] 435 U.S. 223 (1978).

[311] Brief for Respondent at 34 (No. 03-0526).

[312] Reply Brief for Petitioner at 16 (No. 03-0526).

[313] *See* Bryant, *supra* note 5.

[314] *See supra* Part II.A.4.b.

[315] *See supra* notes 94-96 and accompanying text.

[316] *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 465-66 (1965); *see also* Gillian T. DiFilippo, Comment, *Tossing Its Hat in the Ring: With* Summerlin v. Stewart, *the Ninth*

vagueness. The actual permeability of *Teague*'s ostensibly rigid substantive/procedural split is particularly clear in the Ninth Circuit's *Summerlin* decision, which classified *Ring* as both substantive and procedural.[317] Similarly, the explanatory power of the "watershed" concept is dubious, as illustrated by Justice O'Connor's reference (via Justice Harlan) to the equally ambiguous term "bedrock" in her definition of the "watershed" decision category.[318] Such impressionistic terms do not lend themselves to uniform application.

Even more troubling are the logical consequences of a literal application of *Teague*'s test. Strictly interpreted, *Teague*'s test commands that, even where a habeas plaintiff succeeds in convincing the Court to announce a new rule, if that rule does not qualify for either of *Teague*'s retroactivity requirements, then that plaintiff would be unable to benefit from the rule. Imagine, for example, that Timothy Ring had convinced the Court to invalidate Arizona's capital sentencing scheme in a federal habeas corpus petition based on *Apprendi*, rather than on direct appeal. Imagine next that the Court decided, as it did in *Schriro*, that *Ring*'s rule did not warrant retroactive application. Such a sequence would mean that, because the new rule took effect after Ring's conviction became final, Ring's sentence would stand. This result is plainly ridiculous, but *Teague* commands it.

3. Is Teague *Even Necessary?*

The fundamental flaw at the core of the *Teague* and its progeny is that they seek to solve a non-existent problem. Retroactivity was never a vexing issue until the Court decided, *sua sponte*, that it needed to formulate rules governing its operation.[319] Indeed, as one of the great students of the common law tradition wrote, "[j]udicial decisions have had retrospective operation for near a thousand years."[320] Moreover, *Teague* actually

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Circuit Exposes the Harmful Ambiguity Caused by Ring v. Arizona, 53 CATH. U. L. REV. 1091, 1121 (2003-04) (noting that "the Supreme Court's failure to classify its own rule [in *Ring*] . . . caused the confusion" regarding its retroactivity).

[317] *See supra* Part II.E.

[318] Teague v. Lane, 489 U.S. 288, 311 (1989) (quoting Mackey v. United States, 401 U.S. 667, 693-94 (1971) (Harlan, J., concurring)).

[319] Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 427 (1994) ("Before 1965, the Supreme Court assumed all of its decisions should apply retroactively.").

[320] Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). A default presumption of retroactivity seems particularly natural in the habeas context. Incarceration is an ongoing process that imposes costs on both the prisoner and the state. Thus, it is in both parties' interests not to maintain incarcerations once their legal

exacerbates the problem that it purports to alleviate. Although in *Teague* Justice O'Connor expressed great concern for the authority of state courts, and claimed that the *Teague* test would lessen tension between federal and state judiciaries, the test's vagueness winds up producing more uncertainty—and thus more extensive federal judicial review—than obtained before *Teague*. Such perverse results often flow from complex, multi-pronged balancing tests like *Teague*'s, a fact that may explain, at least in part, the durability of most of the Warren Court's expansive rules of criminal procedure: aside from their (often-contested) substantive merits, the Warren Court's rules were actually more efficient, and more protective of federalism, than the purportedly states-rights-based rules that they replaced.[321] Similarly, *Teague*, although ostensibly designed in order to further federalist concerns, may actually impair federalism and reduce efficiency by increasing uncertainty.

4. Teague *Conflicts with Sound Public Policy*

Finally, the *Teague* test—both generally and as applied in *Schriro*—is a failure from the perspective of public policy. In overturning Summerlin's death sentence, the Ninth Circuit persuasively argued that, on purely public policy grounds, *Ring* should be retroactive.[322] Judge Reinhardt's concurrence is particularly eloquent in its description of the salutary real-world consequences of applying *Ring* retroactively.[323] As Judge Reinhardt argued, this result would further the interests of justice and fairness.[324] Specifically, such a holding would ensure that coincidences in the timing of arrests and convictions do not determine the ultimate dispositions of habeas

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foundations have disappeared. Although a habeas petitioner should bear the burden of demonstrating that his imprisonment lacks a legal basis, a showing of the relevant law's current unconstitutionality should suffice.

[321] The late Professor Ely observed that this federalism-based argument for clear rules was one important justification for the Court's decision in *Gideon v. Wainwright*, because "the previously prevailing 'special circumstances rule [for court-appointed counsel],' though requiring counsel on fewer occasions, in fact had repeatedly resulted in messy and friction-generating factual inquiries into every case." ELY, *supra* note 230, at 125. Professor Ely was particularly well-situated to attest to the role this argument played in *Gideon*, having invented it himself as a summer associate at Arnold, Fortas and Porter. ANTHONY LEWIS, GIDEON'S TRUMPET 124 (1964). Likewise, Justice Scalia has previously expressed a strong preference for bright-line rules, as opposed to discretionary standards, in judicial opinion-writing. *See* Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[322] Summerlin v. Stewart, 341 F.3d 1082, 1120-21 (9th Cir. 2003).

[323] *Id.* at 1124 (Reinhardt, J., concurring).

[324] *Id.* at 1122 (Reinhardt, J., concurring). Moreover, *Ring*'s retroactive application would have a minimal impact on state courts, for as Justice Breyer noted, it would affect only about 110 death-row inmates nationally. Schriro v. Summerlin, 124 S. Ct. 2519, 2530 (Breyer, J., dissenting).

petitions.[325] Given the vagaries of individual states' criminal justice systems, a defendant who committed a crime at time T1 could see his conviction become final after one who committed the same crime at a later T2. But, applying the rule promulgated in *Schriro*, if the Supreme Court issued a decision regarding the Sixth Amendment during the period between the final dispositions of the two defendants' appeals, the later criminal (but earlier convict) could benefit from the new law, while his peer could not. Is this equity, in any real sense?

Finally, Justice Scalia's opinion raises several fundamental jurisprudential questions. Why should the Court decline to correct the consequences of its mistakes? As Judge Reinhardt noted, the Court should be applauded for rectifying its erroneous decision in *Walton*.[326] Unfortunately, by declining to apply *Ring* retroactively, the Court effectively punished Summerlin for its own blunders. And why, in the interest of "comity," should the Court defer to constitutionally flawed state laws? This seems like the *reductio ad absurdum* of doctrinaire federalism. It also raises the question: "may the state now deliberately execute persons knowing that their death sentences were arrived at in a manner that violated their constitutional rights?"[327] In *Schriro*, Justice Scalia answered this question with a resounding "yes."[328]

VI. CONCLUSION

For all of the above reasons, *Schriro v. Summerlin*, while less celebrated than other decisions from the Court's 2003 term, is potentially as consequential as any of its more prominent companions. Unfortunately, these consequences will almost surely be negative. *Schriro* constitutes a striking abdication of judicial responsibility, and its sloppy reasoning and misuse of precedent compare quite unfavorably to the thorough, reasoned Ninth Circuit opinion it overturned. Its feebleness also presents a stark contrast to *Blakely v. Washington*, a principled decision written by Justice Scalia in which precedent, constitutional text, and internal logic prevailed over the potentially disruptive results that provoked Justice O'Connor's

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[325] *Summerlin*, 341 F.3d at 1124-25 (Reinhardt, J., concurring).

[326] *Id.* at 1122 (Reinhardt, J., concurring).

[327] *Id.* at 1124 (Reinhardt, J., concurring).

[328] It is possible that Summerlin could suffer the consequences of Justice Scalia's decision yet again, as *Schriro* would likely preclude a habeas petition based on *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* barred the execution of the mentally retarded, but like *Ring*, it was decided in 2002. *Id.* at 321. Conversely, an ineffective assistance of counsel claim based on *Strickland v. Washington*, 466 U.S. 668 (1984) could succeed. Thus, Summerlin may ultimately benefit from the sheer volume of irregularities in his case.

dissent.[329] Even more important than the qualitative divergence between these decisions is their substantive conflict: courts have already cited *Schriro* in limiting *Blakely*'s scope.[330] Perhaps this is no accident; Justice Scalia may have decided *Schriro* as he did in order to win one of the Court's "conservatives" to his side in *Blakely*.[331] Even if true, this would hardly excuse *Schriro*.

Ultimately, it is odd that the Court decided *Schriro* at all, let alone as broadly it did. As always, the Justices could have denied certiorari. Or they could have ruled narrowly on the facts of Summerlin's case, denying his petition because *Ring* allows judges to find the facts of prior convictions, as happened with Summerlin. Instead, the Court unnecessarily issued a blanket rule limiting *Ring*, *Apprendi*, and untold future decisions. The Court thus deprived not only Summerlin, but also future habeas petitioners, of basic protections afforded them by the Constitution. *Schriro* is a jurisprudential travesty and a public policy failure, and the Court should abandon it at the first opportunity.

Marc E. Johnson

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[329] 124 S. Ct. 2531, 2548-50 (2004) (O'Connor, J., dissenting).

[330] *See, e.g.*, United States v. Price, 400 F.3d 844, 845-46 (10th Cir. 2005); Morris v. United States, 333 F. Supp. 2d 759, 769 (C.D. Ill. 2004); United States v. Traeger, 325 F. Supp. 2d 860, 864 (N.D. Ill. 2004). Likewise, every circuit to address the issue has relied on *Schriro* in declining to give retroactive effect to the Court's recent extension of *Blakely* in *United States v. Booker*, 125 S. Ct. 738 (2005). Douglas Berman, Sentencing Law and Policy, Apr. 9, 2005, at http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/retroactivity_c.html (last visited April 15, 2005); *see, e.g.*, Guzman v. United States, No. 03-2446, 2005 U.S. App. LEXIS 5700, at *6-11 (2d Cir. Apr. 8, 2005) ("[*Schriro*'s] reasoning applies [to *Booker*] *a fortiori*."); Humphress v. United States, 398 F.3d 855, 863 (6th Cir. 2005) ("*Schriro*'s reasoning applies with equal force to *Booker*."); McReynolds v. United States, 397 F.3d 479, 480 (7th Cir. 2005) ("Although the Supreme Court did not address the retroactivity question in *Booker*, its decision in *Schriro v. Summerlin* . . . is all but conclusive on this point.").

[331] Justice Breyer's opposition to *Blakely* was all but assured by his involvement in crafting the Federal Sentencing Guidelines, whose constitutionality *Blakely* cast into doubt. Justice Thomas was the only member of the Court to join Justice Scalia in both opinions, and it does not seem too far-fetched to imagine that he was induced to join *Blakely* by the knowledge that *Schriro* would limit its impact. For more on such "realist" interpretations of *Schriro*, see Professor Douglas Berman's comments at Sentencing Law and Policy, July 14, 2004, *at* http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/thoughts_and_ho (last visited April 2, 2005).