Tossing Its Hat in the Ring: With Summerlin v. Stewart, the Ninth Circuit Exposes the Harmful Ambiguity Caused by Ring v. Arizona

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COMMENTS

TOSsing ITS HAT IN THE RING: WITH SUMMERLIN V. STEWART, THE NINTH CIRCUIT EXPOSES THE HARMFUL AMBIGUITY CAUSED BY RING V. ARIZONA

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In the realm of criminal punishment, "'death is different.'" Few issues conjure up such intense debate as the death penalty. Its implications stretch across social, political, moral, religious, and legal territory. While public opinion surveys purport to demonstrate high levels of support for the death penalty, critics argue for its abolishment based on the irreversibility of capital punishment, its allegedly unfair implementation, and its soaring costs. Additionally, moral arguments against the death penalty incite ardent debate from opponents, as the two sides attempt to balance efficacy arguments and empirical evidence against the opinion that capital punishment is simply immoral. 

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2. HARRY HENDERSON, CAPITAL PUNISHMENT 18-22 (rev. ed., 2000). Opponents suggest that the mere possibility for error in executing a prisoner is the most practical argument against capital punishment. Id. at 19. Other reasons include the more frequent imposition of the death penalty on underprivileged members of society, and the enormous monetary cost of capital sentencing, both of which indicate that eliminating the death penalty would create a more efficient and fair criminal sentencing structure. Id. at 20-22. Cf. Carol S. Steiker, Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty, 77 N.Y.U. L. REV. 1475, 1483 (2002) (acknowledging that public support for capital punishment has dropped in recent years, "from a high of 80% in favor in 1994 to a low of 65% in favor in 2001, the lowest level of support in nineteen years").

3. RAPHAEL GOLDMAN, CAPITAL PUNISHMENT 93-94 (Ann Chih Lin ed., 2002) (suggesting that moral arguments against the death penalty are rooted in intellectual opinions). Morality debates regarding the death penalty are "[u]nlike the deterrence debate . . . [because] this difference of opinion is purely intellectual in nature: people who feel that capital punishment is immoral will hold that opinion regardless of the efficacy of the death penalty at achieving societal goals." Id. at 93.
The finality of capital punishment makes new constitutional rulings in this area extremely significant. Constitutional modifications to death penalty jurisprudence oblige courts to grapple with the application of new rules, particularly when considering capital punishment cases on collateral review. However, a problem arises when the implications of these new rulings are unclear, as this makes retroactive application tedious and uncertain, and impacts the soundness of a court’s opinion at the possible expense of a defendant’s life. In general, new constitutional rulings that are construed as substantive apply retroactively, while decisions considered merely procedural do not. Retroactive application of a new rule is extremely significant because it directly affects the “rights and expectations of an accused.” Sorting through the complicated legal quagmire created by new constitutional rulings requires application of intricate, technical doctrines. When dealing with capital punishment, determining the retroactivity of new constitutional rulings is all the more significant because lives, not just rules, are at stake.

4. See Steiker, supra note 2, at 1475-77 (arguing that the Ring decision, along with Atkins v. Virginia, 536 U.S. 304 (2002), was an “unprecedented [shift] in the ‘modern era’ of the death penalty”). These two decisions significantly impacted death penalty jurisprudence by altering it both “doctrinally and atmospherically.” Id. at 1476-77.

5. See Summerlin, 341 F.3d at 1097 (indicating the novelty among American courts of applying “newly announced constitutional rule[s] . . . on collateral review”). The Summerlin court analyzed the evolution of courts’ consideration of the retroactivity of judicial determinations to begin its own retroactivity determination. Id. Under common law, the retroactivity dilemma “never arose because judges were believed to be discovering rules rather than declaring them.” Id. However, as the Supreme Court started recognizing state prisoners’ federal constitutional claims, discussions on retroactive application of new constitutional rules emerged. Id. Ultimately, “[t]he expanding scope of federal review, coupled with a significant increase in the filing of federal habeas petitions by state prisoners, provided the Supreme Court with the opportunity to review for the first time a number of alleged constitutional deprivations.” Id.

6. See Steiker, supra note 2, at 1481 (speculating that the Ring case will create numerous uncertainties regarding sentencing schemes and logical extensions of its holding).

7. See discussion infra Part I.B.

8. Gary Knapp, Annotation, Supreme Court’s Views as to Retroactive Effect of its Own Decisions Announcing New Rules as to Sentencing in Criminal Cases, 122 L. Ed. 2d 837, 841 (1997) (suggesting that proper determination of whether a new rule of criminal sentencing should be given retroactive application is vital to protecting the rights and expectations of the accused, as well as the state and federal criminal law systems).

9. See Adam Liptak, U.S. Court Overturns 100 Death Sentences; Judges, Not Juries, Had Set the Penalties, INT’L HERALD TRIB., Sept. 4, 2003, at 4 (stating that the decision to apply Ring retroactively hinged on “the application of complicated and technical doctrines about when newly announced constitutional principles must be applied retroactively”).

10. See Summerlin, 341 F.3d at 1123 (Reinhardt, J., concurring) (expressing an impassioned opinion regarding retroactive application of new rules to the death penalty). Judge Reinhardt questioned his colleagues’ purported belief that “it is perfectly proper for
On September 2, 2003, the Ninth Circuit Court of Appeals reevaluated *Ring v. Arizona*, a 2002 Supreme Court case, and delivered its opinion in *Summerlin v. Stewart*, which offered a novel approach to retroactive application of new constitutional rulings in “final” death penalty cases. By classifying *Ring* as a “substantive” rule of law, the Ninth Circuit invited controversy by directly conflicting with the Eleventh Circuit’s holding, in *Turner v. Crosby*, that *Ring* constituted a new procedural rule of law. Furthermore, the *Summerlin* court’s implicit overturning of more than 100 prisoners’ death sentences attracted the attention of the United States Supreme Court with its December 1, 2003 grant of certiorari and June 24, 2004 decision.

This Comment analyzes the Ninth Circuit’s decision in *Summerlin v. Stewart*, which provides an innovative interpretation of the Supreme Court’s 2002 case, *Ring v. Arizona*. First, this Comment introduces the general theory of retroactivity of new constitutional rulings and the key language and elements involved in the technical application of retroactivity. Next, this Comment addresses the statutory environment affecting petitions for writs of habeas corpus in death penalty cases, and describes the specific components of Arizona’s unconstitutional capital sentencing statute at issue in *Ring v. Arizona*. Further, this Comment

the state to execute individuals who were deprived of their constitutional right to have a jury make their death penalty decisions, if the judicial machinery had brought the direct appeal . . . to an end before the day on which the Supreme Court recognized its constitutional error.” *Id.*

13. 339 F.3d 1247 (11th Cir. 2003).
14. *Summerlin*, 341 F.3d at 1102; *Turner*, 339 F.3d at 1286 (holding that *Ring* does not apply retroactively on collateral review because it is a new procedural rule of law).
15. See *Schriro v. Summerlin*, 124 S. Ct. 833-34 (2003) (granting certiorari to questions one and two of the petition); *Schriro v. Summerlin*, 124 S. Ct. 2519, 2526 (2004) (deciding that *Ring*’s holding is properly classified as procedural). Legal analysts had suggested that the Court would grant Arizona’s petition for certiorari. *See* Charles Lane, *Death Row Inmates Get Legal Break; Federal Appeals Court Overturns Sentences in More Than 100 Cases*, WASH. POST, Sept. 3, 2003, at A01 (summarizing speculation from legal analysts that “[t]he large number of death sentences involved, and the fact that other federal appeals courts have reached contrary rulings, mean that the Supreme Court probably will agree to intervene”); *cf. Saved, Perhaps*, ECONOMIST, Sept. 6, 2003, at 29 (playing down the significance of the *Summerlin* ruling by stating that lawyers disagree on the impact of the decision). While “[s]ome argue that the 111 death-row prisoners in Arizona, Idaho and Montana who are directly affected would automatically have their sentences commuted to life . . . the Arizona attorney general’s office says that new sentencing hearings, with juries, would be set up.” *Id.; see also* Frank J. Murray, *Court Puts Death Sentences in Doubt; 9th Circuit Voids Judges’ Punishment*, WASH. TIMES, Sept. 3, 2003, at A10 (quoting Richard Dieter, executive director of the Death Penalty Information Center as saying, “I think the United States Supreme Court will have to resolve this before there will be any resentencings in any of these states.”).
examines the case precedent leading to *Ring v. Arizona* before reviewing *Ring* and the Court's holding that Arizona's capital sentencing scheme violated the Sixth Amendment right to a jury trial by allowing a judge to find aggravating factors needed to impose the death penalty. Then, this Comment identifies and analyzes the key cases, including *Summerlin v. Stewart* and *Turner v. Crosby*, in which the United States circuit courts have attempted to clarify and apply the Supreme Court's decision in *Ring*. Following this discussion, this Comment explains the implications of the Supreme Court's decision to overrule *Summerlin* in *Schriro v. Summerlin*, and ultimately clarify *Ring*. Finally, this Comment concludes that despite being overruled by the High Court, the Ninth Circuit's pioneering decision in *Summerlin* reached the proper result in light of the severity of its subject—the death penalty.

I. THE RETROACTIVITY DOCTRINE

The doctrine of retroactivity arises when courts seek to apply new rules to old cases.16 The doctrine strives to align the utility of the old rule with the purpose of the new rule, while factoring in the fundamental element of fairness.17 In evaluating the retroactive application of a new constitutional rule, courts consider certain principles, including "the purpose to be served by the new standards, the extent of the reliance by law enforcement authorities on the old standards [affected by the new rule], and the effect on the administrant of justice of a retroactive application of the new standards."18 In this way, when the Supreme Court deems a state's capital sentencing scheme unconstitutional, state legislatures often must quickly conform their old laws to the Court's new law.19

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16. See Christopher S. Strauss, Comment, Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners' Apprendi Claims on Collateral Review, 81 N.C. L. Rev. 1220, 1221 (2003) (stating that essentially, "[r]etroactivity asks 'what to do when the law changes?' When a judicial decision changes the law, the question of retroactivity boils down to how a rule announced in a given case should govern other [previous] cases.").
17. See Knapp, supra note 8, at 843-45.
19. See Eric J. Beane, Note, When It Comes to Capital Sentencing, You Be the Judge: Ring v. Arizona, 45 ARIZ. L. REV. 225, 230 (2003) (pointing out various states' attempts to make their own laws comply with the Court's ruling in *Ring*). After *Ring*, most of the states whose statutes fit into the unconstitutional statutory scheme "revised their laws quickly," and in Arizona, Attorney General Janet Napolitano advised the judges in her state to halt capital case sentencing until new laws could be written. Id. at 230. Arizona Governor Jane Hull even called a special session to rewrite the statute to conform with *Ring*. Id.; see also Adam Liptak, A Supreme Court Ruling Roils Death Penalty Cases, N.Y. TIMES, Sept. 16, 2002, at A14 (describing several state legislatures' quick response to *Ring*).
Considerable issues arise, however, when new constitutional rulings affect a final judgment for an inmate on death row. Generally, new rules of substantive criminal law are presumptively retroactive, making the classification of the rule as substantive extremely significant to the inmate seeking its application on collateral review. In contrast, inmates typically cannot use new constitutional rules of criminal procedure to argue their conviction on collateral review (although narrow exceptions may exist for the rule's retroactive application).

Because the Supreme Court often fails to specifically categorize its rulings as either procedural or substantive, lower courts struggle to classify the nature of the Court's decisions. Even if a lower court determines that a rule is procedural, the court still must consider the exceptions to the rule in determining whether to lift the retroactivity bar. The technical nature of classifying new constitutional rules forces courts to carefully analyze retroactivity, all the while recognizing that such a classification directly impacts an inmate's chance of escaping the death penalty.

by convening special sessions to fix their capital sentencing schemes and requiring juries to make the requisite factual determinations to apply the death penalty.

20. See Summerlin v. Stewart, 341 F.3d 1082, 1122 (9th Cir. 2003) (Reinhardt, J., concurring), cert. granted sub nom. Schriro v. Summerlin, 124 S. Ct. 833 (2003) (articulating a concern with the insurmountable arbitrariness of "executing people because their cases came too early—because their appeals ended before the Supreme Court belatedly came to the realization that it had made a grievous constitutional error in its interpretation of death penalty law").

21. See Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001); see also United States v. Mandanici, 205 F.3d 519, 525 (2d Cir. 2000) (maintaining that "a new rule of substantive criminal law is presumptively retroactive because a defendant may have been 'punished for conduct that simply is not illegal'" (quoting Bilzerian v. United States, 127 F.3d 237, 242 (2d Cir. 1997))).

22. See Lambrix v. Singletary, 520 U.S. 518, 527 (1997) ("[I]n general, 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.'") (quoting Teague v. Lane, 489 U.S. 288, 310 (1989)); see also Summerlin, 341 F.3d at 1109-10 (articulating the two narrow exceptions for retroactive application of new procedural rules).

23. See Summerlin, 341 F.3d at 1096-97 (pointing out that the Supreme Court did not decide in Ring whether the new law applied to petitioners who raised the "challenge in collateral post-conviction proceedings rather than on direct appeal," therefore leaving lower courts to grapple with the inquiry).

24. See Turner v. Crosby, 339 F.3d 1247, 1284-86 (11th Cir. 2003) (demonstrating one court's steps in evaluating the retroactivity of Ring). First, the Eleventh Circuit termed Ring procedural. Id. at 1284. Then, the court evaluated Ring under the two exceptions to the retroactivity bar in Teague and determined that Ring did not fall within these loopholes. Id. at 1285. Therefore, the new constitutional rule did not apply to Turner's case on collateral review, and the court affirmed the denial of his petition for writ of habeas corpus. Id. at 1286.

25. See Liptak, supra note 9.
A. The Threshold Issue: Distinguishing Between Procedure and Substance

The Supreme Court established its modern approach to the retroactivity of new procedural constitutional rules in *Teague v. Lane*. In *Teague*, the Court developed a clearer framework for determining the retroactive application of new procedural rules. Frank Teague, the petitioner, sought on appeal to benefit from a Supreme Court opinion issued after his final conviction. The Court set forth a new framework for retroactivity, and, based on these guidelines, found that the petitioner could not apply the new constitutional rule to his final conviction. The Court held that new constitutional rules of criminal procedure are not

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26. 489 U.S. 288 (1989); see also RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 769 (2d ed. 2001) (claiming that *Teague* "substantially altered the nature of that 'final say' given to the federal habeas courts") (quoting LAFAVE & ISRAEL, CRIMINAL PROCEDURE § 28.6(a) (2d ed. 1999)).

27. *Teague*, 489 U.S. at 301 (stating that the Court believes its “approach to retroactivity for cases on collateral review requires modification.”); see also Casey Laffey, Note, *The Death Penalty and the Sixth Amendment: How Will the System Look After Ring v. Arizona?*, 77 ST. JOHN’S L. REV. 371, 393 (2003) (suggesting that the Court’s concerns about inconsistent application of retroactivity led it to develop “a clear procedure for determining when laws should be applied retroactively.”).

28. *Teague*, 489 U.S. at 294. Teague was “convicted by an all-white . . . jury of three counts of attempted murder, two counts of armed robbery, and one count of aggravated battery.” *Id.* at 292-93. During jury selection, the prosecutor used all ten peremptory challenges to exclude every black individual from the jury pool by claiming that he was seeking a balance of men and women. *Id.* at 293. Various appellate proceedings ensued, during which the Supreme Court issued a new ruling in *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that the defendant first must make a prima facie case of discrimination before the burden shifts back to the prosecution to offer a race-neutral explanation. *Id.* at 294-95. Teague argued that he should be permitted to use this rule on direct appeal, but the Court denied his argument and refused to retroactively apply the *Batson* rule to Teague’s case. *Id.* at 294-96.

29. *Id.* at 316. The dissenting Justices argued that their colleagues improperly established these new federal habeas guidelines. *Id.* at 326 (Brennan, J., dissenting). The dissenters claimed that the majority ignored stare decisis and thirty-five years of the Court's “delineating the broad scope of habeas relief.” *Id.* For Justice Brennan, the Court went too far in *Teague*:

Out of an exaggerated concern for treating similarly situated habeas petitioners the same, the plurality would for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional challenges; where those challenges have merit, it would bar the vindication of personal constitutional rights and deny society a check against further violations until the same claim is presented on direct review. In my view, the plurality's 'blind adherence to the principle of treating like cases alike' amounts to ‘letting the tail wag the dog’ when it stymies the resolution of substantial and unheralded constitutional questions.

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retroactive unless they fall into one of two exceptions. Essentially, an exception applies if its absence would make it more difficult to assure an accurate conviction or if it would alter the fairness of the criminal proceeding. Therefore, the threshold question after Teague focuses on whether the new constitutional rule is substantive or procedural. A finding that a rule is procedural requires a Teague exception analysis, while the “retroactivity bar” does not apply to new substantive rules.

B. The Technicalities of a Retroactive Determination

Courts grapple with the technical nature of the terms and rules inherent in the retroactivity doctrine when determining whether a new constitutional rule applies retroactively. A host of issues confront courts’ analysis of retroactive rules, such as whether a Supreme Court decision announces a new rule at all. In general, a Supreme Court judgment announces a new rule when it “breaks new ground or imposes a new obligation on the States or the Federal Government.” In other words, “a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” Effectively, Ring constituted a new rule because it forced states with

30. Id. Under Teague, two exceptions to the general ban on retroactivity of new constitutional rulings exist. Id. at 310-11. First, a new procedural rule should be applied retroactively if it places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.” Id. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)). Second, a new constitutional, procedural rule should be retroactively applied when it fundamentally alters the concepts of ordered liberty. Id.; see also Annotation, En Banc Ninth Circuit Says Ring Rule on Capital Sentencing Applies Retroactively, 72 U.S.L.W. 1118-19 (Sept. 9, 2003) (summarizing the Teague exceptions) [hereinafter Ring Rule].

31. Teague, 489 U.S. at 300 (stating that to ensure “evenhanded justice,” retroactivity should be considered a “threshold question”).

32. See Summerlin v. Stewart, 341 F.3d 1082, 1099 (9th Cir. 2003), cert. granted sub nom. Schriro v. Summerlin, 124 S. Ct. 833 (2003) (laying out the court’s first analytical step, “consider[ing] the threshold Teague question, namely whether Ring announced a substantive rule or a procedural rule’’); see also McCoy v. United States, 266 F.3d 1245, 1256 (11th Cir. 2001).

33. Summerlin, 341 F.3d at 1099; see also supra note 21.

34. See Liptak, supra note 9 (stating that the Summerlin decision to apply Ring retroactively hinged on “the application of complicated and technical doctrines about when newly announced constitutional principles must be applied retroactively”).

35. See Teague, 489 U.S. at 301 (demonstrating that even the Supreme Court admits that it is “often difficult to determine when a case announces a new rule, and [they] do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes”); cf. Beane, supra note 19, at 231 (suggesting that a lower court’s proper analysis of the federal retroactivity doctrine should start with determining whether the Court in fact announced a new rule).

36. Teague, 489 U.S. at 301.

37. Id.
certain death penalty schemes, like Arizona's, to rewrite its statutes.\footnote{38} However, once a lower court establishes that the Supreme Court has announced a new rule, the detailed classification of that rule as procedural or substantive remains; such a consideration directly impacts the rule's retroactive applicability to cases on collateral review.\footnote{39}

Unfortunately for the courts, the distinction between substantive and procedural rules is not necessarily easy to discern.\footnote{40} Although the Supreme Court has acknowledged the complexity of making this determination, it has not established guidelines to aid lower courts in classifying decisions as substantive or procedural.\footnote{41} In fact, with \textit{Ring v. Arizona}, the Supreme Court seemingly made it more difficult for courts to classify rules because the Court failed to distinguish its own rule as substantive or procedural.\footnote{42}

Generally, a new rule must affect the process of a criminal trial to be procedural.\footnote{43} A procedural rule inserts itself into the function of a trial and alters the operation of the court proceeding.\footnote{44} In contrast, substantive rules "reach beyond issues of procedural function and

\footnote{38. See Laffey, supra note 27, at 394-95 (declaring that \textit{Ring} clearly announced a new rule because it imposed a novel obligation on the states by overruling certain capital sentencing statutes).}

\footnote{39. See \textit{Teague}, 489 U.S. at 306-11 (adopting Justice Harlan's position that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"). The general bar on retroactivity exists, in part, because retroactivity does not advance any deterrent purposes; rather, as some argue, it "frustrates the judicial need for comity and finality," and overall, the costs on the states outweigh the benefits. Beane, \textit{supra} note 19, at 233.}

\footnote{40. \textit{Summerlin v. Stewart}, 341 F.3d 1082, 1099-00 (9th Cir. 2003), cert. granted sub \textit{nom.} Schriro v. Summerlin, 124 S. Ct. 833 (2003).}

\footnote{41. See \textit{id.} (recognizing that the Supreme Court has acknowledged the difficulty in distinguishing between substantive and procedural decisions). The Supreme Court somewhat justified this uncertainty by stating that "[w]e would not suggest that the distinction that we draw is an ironclad one that will invariably result in the easy classification of cases in one category or the other." \textit{Id.} at 1100 (quoting Robinson v. Neil, 409 U.S. 505, 509 (1973)).}

\footnote{42. \textit{Ring v. Arizona}, 536 U.S. 584 (2002). Nowhere in its opinion does the Supreme Court classify its new constitutional rule. \textit{See id.; see also Steiker, supra note 2, at 1478-79 (reiterating that the "Ring Court was silent on the issue of the retroactivity of its holding").}

\footnote{43. \textit{Summerlin}, 341 F.3d at 1100 ("[T]he Supreme Court has understood decisions of 'criminal procedure' to be those decisions that implicate how the criminal trial process functions.")}.}

\footnote{44. \textit{Id.} A procedural law is one that "prescrib[es] the steps for having a right or duty judicially enforced," while a substantive law "creates, defines, and regulates the rights, duties, and powers of parties." \textit{Black's Law Dictionary} 1221, 1443 (7th ed. 1999); see \textit{also} Turner v. Crosby, 339 F.3d 1247, 1284 (11th Cir. 2003). The \textit{Turner} court designated \textit{Ring} a procedural rule because it "altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure." \textit{Id.}}
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address the meaning, scope, and application of substantive criminal statutes." A substantive rule of law affects the breadth and function of a criminal statute, rather than its mere operation. A rule that redefines a law or adds a new requisite element to the law also may be classified as substantive. In short, "a new rule is one of 'procedure' if it impacts the operation of the criminal trial process, and a new rule is one of 'substance' if it alters the scope or modifies the applicability of a substantive criminal statute." Differentiating between a procedural rule and a substantive rule may prove tedious, yet it is the threshold question when considering whether the rule applies retroactively. A new substantive rule of law is the key to unlock certain retroactive application of that law on collateral review of a final death sentence.

C. Petitions for Writs of Habeas Corpus and the Boundaries that Attempt to Curb Them

Another factor federal courts consider when determining the retroactivity of new constitutional rules is the inherent finality of exhausted appeals. Individuals who file a petition for a writ of habeas corpus seek review of their "final" case and contend that despite their conviction, their imprisonment violates the Constitution. While each state employs its own procedure for collateral review, the process

45. *Summerlin*, 341 F.3d at 1100 ("noting that a Supreme Court holding is 'substantive' for *Teague* purposes when it impacts the scope and application of a 'substantive federal statute.'") (quoting *Teague* v. *Lane*, 489 U.S. 288, 310 (1989)).
46. *Id.*
47. *Id.* at 1101-02. For example, the *Summerlin* court classified the new *Ring* rule as substantive because it redefined Arizona capital murder law. *Id.* at 1102.
48. *Id.* at 1100.
49. See *id.* at 1099.
50. See Liptak, *supra* note 9 (illustrating the dramatic result of classifying a new constitutional rule as substantive). Because the Ninth Circuit designated *Ring* as substantive, *Ring* applies retroactively to more than 100 prisoners in three states and entitles each affected prisoner, "at a minimum, to a new sentencing proceeding, unless the U.S. Supreme Court reverses that appeals court's decision." *Id.*
51. See *Strauss*, *supra* note 16, at 1264-65 (suggesting that an "interest in finality is always present, even on direct appeal"). To preserve the interest in finality, courts restrict either the availability of collateral review or the types of claims that courts can hear. *Id.; see also* United States v. *Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002) (observing that "[t]he rule against retroactive application of new laws supports important interests of finality that pertain to both the federal system and the state system").
52. See Larry W. *Yackle*, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus, in BEYOND REPAIR? AMERICA'S DEATH PENALTY* 62-64 (Stephen P. *Garvey* ed., 2003) (explaining that defendants who claim violation of their rights cannot appeal directly to a federal district court, but can petition the court for a writ of habeas corpus under the theory that they are being imprisoned in violation of their constitutional rights).
typically commences with the filing of a petition in a state court. After
thereafter, various state appellate courts review the petition. Before
making a federal habeas claim, however, the petitioner first must exhaust
state remedies.

Additionally, institutional limits curb a petitioner's ability to file for
writs of habeas corpus, and the Supreme Court and Congress ensure that
significant boundaries prevent frivolous claims that unduly tax the
federal court system. Moreover, Congress enacted the Antiterrorism
and Effective Death Penalty Act of 1996 (AEDPA) to limit federal
courts' ability to hear petitions for habeas relief. The AEDPA

collateral review process).
54. Id. at 219-20 (stating that a petition remains "pending" until it "has achieved final
resolution through the State's post-conviction procedures").
55. Id. at 220 (clarifying that, statutorily, a "federal petitioner has not exhausted
those remedies as long as he maintains 'the right under the law of the State to raise' in that
State, 'by any available procedure, the question presented'").
56. See Yackle, supra note 52, at 68 (identifying some Court restraints on writs of
habeas corpus, including: a limit on the types of claims prisoners may bring; a limit on
federal courts' authority to hear a claim that was rejected by a state court; and specific
procedural steps the Court and Congress require a petitioner to take before making a
constitutional claim in federal court).
amends numerous existing acts to prevent and punish acts of terrorism, as well as revises
proceedings of habeas corpus appeals for federal review of state criminal convictions
(particularly focusing on death penalty cases). See generally id. For example, section 101
amends subsection (d) to 28 U.S.C. § 2244 by affixing explicit constraints on the one-year
"period of limitation" in which "a person in custody pursuant to the judgment of a state
court" can apply for a writ of habeas corpus. § 101, 110 Stat. at 1217. The extensive
AEDPA has several purposes:

One focus of the AEDPA was to restrict habeas corpus relief available in the
federal courts. In addition to restricting such relief by mandating further federal
court deference to state court adjudications, imposing a one-year period of
limitation on filings, and establishing for the first time special procedures for
death penalty cases in qualified jurisdictions, the AEDPA dramatically changed
both the procedural and substantive law governing second and successive . . .
applications. As to procedures, the AEDPA assigned the circuit courts a unique
"gatekeeping" function under which they must grant authorization before a
petitioner can even file a successive application in a district court. As to the
substantive law, most significantly the AEDPA: limited to only two the diverse
reasons constituting "cause" excusing a petitioner's failure to bring a claim in a
prior application; heightened the degree of prejudice that a petitioner must
establish to obtain relief based on a claim relying on newly discovered evidence;
and eliminated the miscarriage of justice exception for petitioners who fail to
demonstrate both cause for failing to raise a claim in a prior petition and
prejudice from the failure to address the claim.

Randal S. Jeffrey, Successive Habeas Corpus Petitions and Section 2255 Motions After the
Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and
significantly narrowed the situations in which a prisoner can successively petition for a writ of habeas corpus, by requiring that the claim be based on a new rule of constitutional law made retroactively applicable on collateral review, or that the claim be based on newly discovered evidence. For habeas petitions filed before the statute’s effective date in 1996, pre-AEDPA law and case precedent governs, providing courts with a more flexible standard to determine whether to “entertain” the claim.

D. Aggravating Factors: An Illustration of the Courts’ Debate

The courts’ struggle to classify rules manifests itself in the Supreme Court’s treatment of aggravating factors under Arizona’s death penalty sentencing scheme in Ring v. Arizona. Prior to Ring, Arizona required

Substantive Issues, 84 MARQ. L. REV. 43, 43-45 (2000); see also Benjamin R. Orye III, Note, The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purpose of 28 U.S.C. § 2255(1), 44 WM. & MARY L. REV. 441, 453-55 (2002) (reviewing some of the legislative history of the AEDPA). First, habeas reform intended to “restore the public confidence in the judicial system.” Id. at 453. Second, Congress recognized the burden on the federal courts from “frivolous, unnecessary petitions” and the AEDPA aimed to quash some of those proceedings. Id. Third, Congress acknowledged the significance of “finality” in death penalty cases by establishing a “reasonable filing deadline.” Id. at 454. But cf. GOLDMAN, supra note 3, at 25 (identifying some critics’ arguments that the AEDPA is virtually ineffective and that it does not go far enough in “restricting the authority of federal appellate courts to defy state court decisions by prolonging the appeals process”).

58. See Jeffrey, supra note 57, at 125-26. Prior to the enactment of the AEDPA, new claims could be raised in habeas petitions “if the petitioner could demonstrate either (1) cause for failing to raise the claim previously and prejudice from failing to consider the claim or (2) that a miscarriage of justice would result from the failure to consider the claim.” Id. at 125. The AEDPA replaced these flexible standards by authorizing only two circumstances in which claims could be presented in successive applications:

[T]he claim must be based on either (1) a rule of constitutional law, which the Supreme Court has made retroactively applicable on collateral review, and which was previously unavailable; or (2) newly discovered evidence, which at least in the § 2254 context, supports a claim of a constitutional error, and if proven, would demonstrate by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty beyond a reasonable doubt.

Id. at 126.

59. See Summerlin v. Stewart, 341 F.3d 1082, 1096 n.4 (9th Cir. 2003), cert. granted sub nom. Schriro v. Summerlin, 124 S. Ct. 833 (2003) (noting that “[b]ecause the Supreme Court has not addressed whether Ring should be applied retroactively, the analysis of the retroactively [sic] of Ring under AEPDA [sic] and Teague is necessarily distinct”); id. at 1092 (indicating that because Summerlin filed his petition before the AEDPA’s effective date, pre-AEDPA law governed the petition); Turner v. Crosby, 339 F.3d 1247, 1273 (11th Cir. 2003) (establishing that because Turner filed his petition prior to the effective date of the AEDPA, his petition was governed by pre-AEDPA law); see also Jeffrey, supra note 57, at 126.

60. See discussion supra Part I.B.
judges, not juries, to determine the presence of aggravating circumstances required to impose the death penalty. Although the Sixth Amendment provides the right to a jury trial, this guarantee did not extend to the determination of such aggravating factors until Ring. Depending on the circuit, Ring’s designation of the jury, and not the judge, as arbiter of aggravating factors was either procedural or substantive. Procedural arguments contended that altering the death-sentence statutory scheme only varied the fact-finding procedure, while substantive proponents maintained that the modification redefined Arizona capital murder law. The fallout from Ring illuminated the complexity of the retroactivity doctrine, and courts’ divergence over Ring’s application demonstrates that retroactive application requires intricate and careful consideration.

II. THE BUILDING BLOCKS OF RING V. ARIZONA: CASE PRECEDENT AND COURT CONFUSION

After Teague, lower courts recognized the need to classify new constitutional rules as substantive or procedural, but found difficulty in drawing the distinction. The body of case law emerging from the Supreme Court confused lower courts, as they attempted to reconcile the Court’s seemingly contradictory holdings. In particular, the Court’s

61. ARIZ. REV. STAT. ANN. § 13-703(F)(1)-(10) (West 2001); see also Ring v. Arizona, 536 U.S. 584, 593 (2002).

62. See Laffey, supra note 27, at 371; see also Thomas Aumann, Note, Death by Peers: The Extension of the Sixth Amendment to Capital Sentencing in Ring v. Arizona, 34 LOY. U. CHI. L.J. 845, 848-50 (2003) (assessing that although the Sixth Amendment requires that a jury must find all elements of a defendant’s crime beyond a reasonable doubt, “the Court has struggled to define precisely what constitutes an essential element.”). Furthermore, sentencing factors had been exempt from a jury determination beyond a reasonable doubt and, therefore, “[l]egislatures often attempt[ed] to label a determinative fact as a sentencing factor to avoid having it treated as an element of the crime.” Id. at 850.

63. Cf. Aumann, supra note 62, at 852-54 (depicting the origin of the role of the jury in American death penalty decisions, which may influence the way a court would consider the Ring decision).

64. Compare Turner v. Crosby, 339 F.3d 1247, 1284 (11th Cir. 2003) (arguing that Ring is procedural because it dictates what fact-finding method must be used to apply the death penalty), with Summerlin, 341 F.3d at 1102 (stating that Ring is substantive because it redefined Arizona capital murder law and established different elements for different forms of punishment).

65. See Strauss, supra note 16, at 1242 (arguing that one of the major difficulties with the retroactivity doctrine is “the necessity of classifying a new rule as either procedural or substantive”).

66. See Laffey, supra note 27, at 372 (suggesting that a reason the Supreme Court eventually agreed to hear Ring was for the opportunity to resolve its incompatible holdings in Walton and Apprendi).
holdings in three cases, Walton v. Arizona,67 Jones v. United States,68 and Apprendi v. New Jersey69 puzzled lower courts and virtually forced the Supreme Court to make a definitive ruling to rectify this uncertainty.70

In Walton v. Arizona, the Supreme Court considered a challenge to Arizona’s capital sentencing statute.71 After a first-degree murder conviction, petitioner Jeffrey Walton underwent a separate sentencing proceeding solely conducted by the trial judge, as required under Arizona law.72 During the sentencing phase, the judge determined the existence of two aggravating circumstances and sentenced Walton to death.73

On appeal to the Supreme Court, Walton argued that “every finding of fact underlying the sentencing decision must be made by a jury, not by a judge,” and therefore, Arizona’s death penalty scheme was unconstitutional.74 After a brief review of case precedent, the Court succinctly denounced Walton’s argument, holding that the Sixth Amendment does not require a jury to determine the aggravating factors necessary to invoke the death penalty.75 Over the next decade, several

69. 530 U.S. 466 (2000).
70. Apprendi, 530 U.S. at 497; Jones, 526 U.S. at 251-52; Walton, 497 U.S. at 649; see also Laffey, supra note 27, at 375 (demonstrating lower courts’ confusion with the conflicting rulings). The Fourth Circuit found the Court’s holdings “perplexing,” while the Ninth Circuit determined that Apprendi called into question the Court’s holding in Walton. Id. The circuits’ confusion demonstrated that the Supreme Court “needed to clarify the constitutionality of judicial determination of so-called capital sentencing factors and overrule either Walton or Apprendi.” Id. at 376.
71. See Walton, 497 U.S. at 647-52.
72. Id. at 645.
73. Id. The Court found two aggravating factors: “(1) The murder was committed ‘in an especially heinous, cruel or depraved manner,’ and (2) the murder was committed for pecuniary gain.” Id. (citations omitted). The Court considered mitigating factors, including Walton’s age (he was twenty years of age at sentencing) and his capacity to appreciate the wrongfulness of his conduct, but these factors were insufficient “to call for leniency.” Id.
74. Id. at 647. Walton contended that constitutional implementation of the Arizona statute required the jury to determine the existence of aggravating or mitigating factors, and then the trial judge would impose a sentence based on those findings. Id. In immediate foreclosure of this argument, the Supreme Court stated that, “‘[a]ny argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.”’ Id. (quoting Clemons v. Mississippi, 494 U.S. 728, 745 (1990)).
75. Id. at 648-49. In reaching its conclusion, the Court found that aggravating circumstances are not necessarily “‘elements of the offense.’” Id. at 648. Rather, aggravating circumstances are guidelines that aid in choosing between a death sentence and life in prison. Id.; see also Beane, supra note 19, at 226 (interpreting the Walton Court’s rationale to suggest that “[I]f the judge’s sentencing considerations neither require
Supreme Court opinions diluted the strength of Walton's holding, but it remained binding law until the Court expressly overruled it in 2002, with Ring v. Arizona.\(^6\)

In 1999, the Supreme Court considered Jones v. United States to evaluate the constitutionality of a federal carjacking sentencing statute.\(^7\) After an indictment on two counts of carjacking with a firearm, petitioner Nathaniel Jones was arraigned and informed by the magistrate judge that he faced a maximum sentence of fifteen years.\(^8\) A jury convicted Jones on both counts, and the district court later sentenced him to twenty-five years of imprisonment based on a presentencing investigation indicating that one of the victims had suffered bodily injury.\(^9\) Jones objected, claiming that the government neglected to prove serious bodily injury to the jury.\(^10\) The Court of Appeals for the Ninth Circuit found that the trial court had the discretion to determine bodily harm and to sentence Jones to twenty-five years in prison.\(^11\)

nor preclude a death penalty verdict . . . the defendant is in no sense convicted or acquitted by the finding of those circumstances" and the defendant’s Sixth Amendment rights are not violated). But see id. at 708-14 (Stevens, J., dissenting) (disagreeing with his colleagues and determining that the Sixth Amendment does in fact entitle a defendant to a jury finding of facts required to impose the death penalty because of the historical significance of the jury).

76. Ring v. Arizona, 536 U.S. 584, 609 (2002). Prior to Ring, several Supreme Court decisions weakened the Walton decision. See, e.g., Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) (further complicating Walton’s meaning by holding that New Jersey’s statutory system allowing a judge to make findings that enhance a defendant’s sentence, is “an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system”); Jones v. United States, 526 U.S. 227, 248 (1999) (confusing the Walton decision by finding that a Sixth Amendment issue is raised when a jury is prevented from deciding facts that determine a sentencing range); Beane, supra note 19, at 227 (explaining that despite new case law tending to overrule Walton, the apparent legal contradictions remained); see also John M. Challis, Note, I’m Sorry Your Honor, You Will Not Decide My Fate Today: The Role of Judges in the Imposition of the Death Penalty: A Note on Ring v. Arizona, 22 ST. LOUIS U. PUB. L. REV 521, 537 (2003) (observing that the Court’s jurisprudence prior to Ring virtually required the Court to remedy the confusion and “answer the question of the applicability of Walton after Jones and Apprendi” because these decisions, “read in concert with each other, made absolutely no sense”).

77. Jones, 526 U.S. at 229. The Court considered whether the federal carjacking statute, 18 U.S.C. § 2119, defined three distinct offenses or a single crime with three possible maximum penalties dependent on additional factors. Id.

78. Id. at 230-31.

79. Id. at 231. One of the victims suffered a perforated eardrum and permanent hearing loss after being struck by a gun during the commission of the crime. Id. Under 18 U.S.C. § 2119(2), serous bodily injury occurring as a result of the crime allows a defendant to be sentenced for twenty-five years. Id. at 230.

80. Id. at 231.

81. Id. at 231-32. The Court of Appeals for the Ninth Circuit agreed with the district court’s structural interpretation of § 2119(2). Id. The Ninth Circuit found that Congress
The Supreme Court reversed the lower court, finding that "the fairest reading of [the carjacking statute] treats the fact of serious bodily harm as an element, not a mere enhancement." The Court found that removing the jury's control over facts that determine a statutory sentencing range raises a Sixth Amendment issue. Furthermore, the Court held that the federal carjacking statute consisted of three separate elements, each of which needed proof beyond a reasonable doubt as determined by the jury. Though it did not specify whether this decision should apply retroactively, the Court's line of reasoning paved the way for further rulings on statutory schemes that increase penalties without jury deliberation.

Ten years after Walton, the Supreme Court created confusion among lower courts with a seemingly contradictory holding in Apprendi v. New Jersey. In Apprendi, the Court invalidated a state statute that allowed a judge to impose a sentence for a first-degree crime despite a defendant's second-degree conviction by a jury. The Court found that because the

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82. Id. at 239. The Court "recognize[d] the possibility of the other view," but avoided the issue by adopting the theory that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Id. (quoting United States ex rel. Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

83. Id. at 248. The Court found that under the circumstances in Jones, "there is reason to suppose that . . . the relative diminution of the jury's significance would merit Sixth Amendment concern." Id. The Court also was concerned "that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled." Id.

84. Id. at 252; see also Aumann, supra note 62, at 871 (depicting the Court's rationale as a "maximum punishment test"). A sentence enhancer should be considered an element of the crime when it raises the maximum punishment available for the crime and as a separate element when it must receive jury deliberation beyond a reasonable doubt. Id.

85. See supra note 66.

86. See 530 U.S. 466 (2000); Laffey, supra note 27, at 375. The author argues that: Subsequent courts have struggled with Walton's continued applicability in light of Apprendi. The Fourth Circuit has called it "perplexing" that a jury is required for factual findings of drug quantities while they are not essential for determining the presence or absence of aggravating factors justifying imposition of a capital sentence. In addition, the Ninth Circuit stated that although "Apprendi may raise some doubt about Walton," the lower courts are still required to apply Walton to capital cases until the Supreme Court expressly overrules it.

87. Apprendi, 530 U.S. at 491; see also Laffey, supra note 27, at 374 (summarizing Apprendi's procedural history). Defendant Apprendi "pleaded guilty to two counts . . . of second-degree possession of a firearm for an unlawful purpose . . . and one count of the third-degree offense unlawful possession of an antipersonnel bomb." Apprendi, 530 U.S. at 469-70. Under New Jersey state law, a second-degree offense entails a five to ten year
severity of the criminal system requires a jury to find "all facts necessary to constitute a statutory offense," it was unconstitutional for a defendant to face punishment beyond statutory guidelines.\textsuperscript{88} Considering the history of the right to a jury trial, the Court found the statute unconstitutional because it "remov[ed] 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."\textsuperscript{89} The majority attempted to align \textit{Apprendi} with \textit{Walton}, but some Justices found this reasoning perplexing.\textsuperscript{90} Furthermore, the \textit{Apprendi} Court left the issue of whether its rule was procedural or substantive open to the interpretation of the lower courts.\textsuperscript{91} Because the Supreme Court essentially extended its sentence, and a third-degree offense provides a three to five year sentence. \textit{Id.} at 470. Upon the state's motion for an extended term, based on Apprendi's alleged racial motivations in the offense, the trial judge applied the hate-crime enhancement and sentenced Apprendi to a twelve-year term of imprisonment. \textit{Id.} at 471. On appeal, the Supreme Court found this sentence unconstitutional because the procedure "is an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." \textit{Id.} at 497.

\textsuperscript{88} \textit{Id.} at 483-84; see also Andrew M. Levine, \textit{The Confounding Boundaries of \textquotedblleft Apprendi-land\textquotedblright: Statutory Minimums and the Federal Sentencing Guidelines}, 29 AM. J. CRIM. L. 377, 414 (2001) (offering a formulation of the \textit{Apprendi} rule: "that when the finding of any fact (other than a prior conviction) has the effect, in real terms, of increasing the maximum punishment or minimum punishment beyond an otherwise applicable range, it must be submitted to a jury and proved beyond a reasonable doubt").

\textsuperscript{89} \textit{Apprendi}, 530 U.S. at 482-83 (addressing the "historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties").

\textsuperscript{90} \textit{Id.} at 496-97. The Court argued that:

Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge.

\textit{Id.} (quoting Almendaraz-Torres v. United States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)); cf. \textit{Id.} at 540-41 (O'Connor, J., dissenting) (indicating her discontent with the majority's reasoning). According to Justice O'Connor, \textit{Apprendi} "will surely be remembered as a watershed change in constitutional law." \textit{Id.} at 524. In Justice O'Connor's view, the majority attempted to distinguish \textit{Apprendi} from \textit{Walton} by claiming that in Arizona, "the jury makes all of the findings necessary to expose the defendant to a death sentence." \textit{Id.} at 538. Justice O'Connor found her colleagues' explanation "baffling," and "demonstrably untrue," and slammed the majority for a seeming reliance on "irrelevant historical evidence," which neglects the Court's own case precedent and offers "unprincipled and inexplicable distinctions." \textit{Id.} at 538-39.

\textsuperscript{91} \textit{Id.} at 475. Perhaps the Court did not classify its decision because, "[t]he substantive basis for New Jersey's enhancement is thus not an issue; the adequacy of New
Apprendi ruling to the capital sentencing scheme at issue in Ring, Apprendi’s classification is relevant to lower courts’ interpretation of Ring.92

III. THE RING DECISION

In Ring v. Arizona, the Supreme Court issued an opinion causing lower courts to speculate about its retroactivity.93 Petitioner Thomas Jersey’s procedure is.” Id. But see McCoy v. United States, 266 F.3d 1245, 1272 (11th Cir. 2001) (Barkett, J., concurring) (offering an interpretation of the Supreme Court’s statement). In the context of its decision, that statement suggests that “[t]he Court was simply saying . . . that the constitutionality of the ‘substantive basis’ of the penalty enhancement—racial bias—was not before the [C]ourt.” Id.; see also Summerlin v. Stewart, 341 F.3d 1082, 1101 (9th Cir. 2003), cert. granted sub nom. Schriro v. Summerlin, 124 S. Ct. 833 (2003) (concluding that Apprendi was in fact procedural); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir. 2002) (opining that although Apprendi is “doubtless an extremely important decision,” it is merely a decision that shifts the fact-finding duties and is therefore procedural). But see McCoy, 266 F.3d at 1272 (Barkett, J., concurring) (observing that Apprendi creates a new substantive law). Although Judge Barkett concurred with the court’s result, he found that the majority “mis[se]d the mark entirely” on the classification of Apprendi. Id. at 1271-72; cf. United States v. Clark, 260 F.3d 382, 385 (5th Cir. 2001) (Parker, J., dissenting) (admitting that cases, such as Apprendi, are not always easily classified as substantive or procedural). Depending on the interpretation of Apprendi:

If the new rule gleaned from [it] is the holding that every element of a crime must be submitted to the jury, then it is a procedural rule which should be analyzed under Teague standards. If, on the other hand, Apprendi is read as refining the definition of an element of a federal offense, it is a substantive decision.

Id.; cf. Strauss, supra note 16, at 1243-45 (describing the difficulty with classifying Apprendi because it can be considered “an old procedural rule that has, in operation, created a new element of a substantive criminal offense”).

92. See Laffey, supra note 27, at 380 (indicating that Ring applied Apprendi’s holding to capital and non-capital findings). Compare Levine, supra note 88, at 382-83 (arguing for a broad application for Apprendi because it “supports a bright-line rule: Any fact (other than a prior conviction) that has the effect, in real terms, of increasing the maximum or minimum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt”), with Apprendi, 530 U.S. at 524 (2000) (O’Connor, J., dissenting) (setting forth that the Court has long realized that not every fact relating to the defendant’s punishment must be proved beyond a reasonable doubt). Instead, the Court has:

[D]eclined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an offense element.

Id. (O’Connor, J., dissenting).

93. Ring v. Arizona, 536 U.S. 584, 609 (2002); see also Ring Rule, supra note 30, at 1119 (indicating that the Ring Court did not determine whether their rule was substantive or procedural, or “whether it is to be applied retroactively on collateral review,” thereby
Ring was convicted of felony murder during the course of an armed robbery. At the time of Ring’s sentencing, Arizona’s death penalty statute required findings beyond felony murder for imposition of the death penalty. During sentencing, the judge found two aggravating circumstances: one, that Ring committed the offense to obtain money; and two, that the crime was committed in a particularly heinous way; he therefore, sentenced Ring to death. On appeal, the Arizona Supreme Court relied on Walton to find the State’s capital sentencing scheme constitutional. Eventually, the Supreme Court granted Ring’s petition for a writ of certiorari to remedy the tension between its decisions in Walton and Apprendi.

In Ring, the Court found Arizona’s death penalty system, where judges determined death penalty prerequisites, unconstitutional. The Court implicitly leaving the issue open for interpretation by the lower courts); Aumann, supra note 62, at 896 (explaining that Ring effected a “logistical nightmare regarding sentences imposed under a judicial determination of aggravating factors”). Ring voided five states’ death sentencing schemes, created lower court confusion about its precise holding, and “fuel[ed] a growing national debate over the continued imposition of the death penalty.” Id. at 896-99; Challis, supra note 76, at 536-37 (demonstrating Ring’s impact by pointing out that there has been a remarkable number of state statutes affected by Ring).

Ring, 536 U.S. at 591. Ring’s actions began on November 28, 1994, when a Wells Fargo armored vehicle made a routine stop at an Arizona department store. Id. at 589. When the Wells Fargo courier returned to his vehicle after picking up the money in the store, he found the van and its driver missing. Id. Later in the day, local police authorities found the Wells Fargo van locked, with its engine running, in a church parking lot. Id. Inside the vehicle was the driver who had died from a single gunshot to the head. Id. Over $562,000 in cash and $271,000 in checks were missing from the van. Id. Based on an informant’s tip, police investigated Ring’s involvement, and at trial, the jury deadlocked on the charge of premeditated-murder but convicted Ring of felony-murder in the course of armed robbery. Id. at 589, 591.

Id. at 592. Ring was convicted of felony murder, not premeditated murder; therefore, he could only receive the death penalty if he was the victim’s killer or if he was a major participant in the robbery and exhibited a “reckless disregard or indifference for human life.” Id. at 594. The judge used testimony from Ring’s sentencing to determine that Ring was the victim’s killer and a major participant in the armed robbery. Id.

Id. at 594-95. The judge found that Ring committed the offense in expectation of receiving something of pecuniary value, by murdering the victim in order to steal the cash from the armored car. Id. In determining that Ring committed the offense in a particularly cruel or heinous way, the judge relied on Ring’s apparent “pride in his marksmanship.” Id. at 595; see also id. at n.1 (listing aggravating factors required to impose a death sentence under Arizona law).

Ring, 536 U.S. at 596 (referring to the Supremacy Clause as the basis for the Arizona Supreme Court’s reliance on Walton).

Id. at 596-97.

Id. at 609. The precise question before the Court was “whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment’s jury trial guarantee, made applicable to the States by the Fourteenth Amendment, requires that the aggravating factor determination be entrusted to the jury.” Id. at 597. Ultimately, the Court ruled that it was unconstitutional for a “sentencing judge,
determined its Sixth Amendment jurisprudence requires a jury, not a judge, to ascertain the aggravating factors that would make a defendant eligible for the death penalty.\textsuperscript{100} In addition, the Court clarified its own precedent by extending its rationale in \textit{Apprendi} and then applying it to Arizona’s capital sentencing scheme.\textsuperscript{101} Aggravating factors are subject to constitutional requirements and “must be found by the jury beyond a reasonable doubt.”\textsuperscript{102} Although Arizona argued, in part, that requiring judges to find aggravating factors could protect against the “arbitrary imposition of the death penalty,”\textsuperscript{103} the Court responded that the Sixth Amendment is not rooted in the “relative rationality, fairness, or efficiency of potential factfinders.”\textsuperscript{104} The majority of states with capital punishment require a jury to determine aggravating factors in capital cases, which indicates that “the superiority of judicial factfinding in capital cases is far from evident.”\textsuperscript{105} While recognizing the importance of stare decisis, the Court acknowledged that case precedent is not immovable and expressly overruled \textit{Walton}.\textsuperscript{106} With \textit{Ring}, the Court issued a “widely controversial and monumental decision” by deeming it unconstitutional for statutes to assign a judge as the sole arbiter of aggravating factors needed to impose the death penalty.\textsuperscript{107}

The Court’s decision rendering Arizona’s death penalty statute unconstitutional resolved the tension between \textit{Apprendi} and \textit{Walton}, but established the groundwork for new conflicts.\textsuperscript{108} In \textit{Ring}, the Court left several significant questions unanswered, “including how the new rule affects defendants at various stages in the cases against them; whether the decision requires actions in states where juries render advisory verdicts; what new laws are required to fix the problem the court sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.” \textit{Id.} at 609.

100. \textit{Ring}, 536 U.S. at 609 (finding Arizona’s judge-based system of aggravating factor determination unconstitutional).

101. \textit{Id.}; see also \textit{Ring Rule}, supra note 30, at 1119 (suggesting that the \textit{Ring} court relied on its own rule in \textit{Apprendi} and applied this logic to death penalty sentencing).

102. \textit{Ring}, 536 U.S. at 612 (Scalia, J., concurring).

103. \textit{Id.} at 607 (citations omitted).

104. \textit{Id.}

105. \textit{Id.} at 607-08. The Court points to the fact that “[o]f the 38 States with capital punishment, 29 generally commit sentencing decisions to juries.” \textit{Id.} at 608 n.6.

106. \textit{Id.} at 608-09.

107. Laffey, supra note 27, at 399 (commenting that \textit{Ring} will “buy everyone on death row in these . . . states another 7.5 years of life. That’s the average length of time it takes to go from imposition of the death sentence to execution.”).

108. \textit{See supra} text accompanying note 98 (emphasizing the need for the Court’s resolution of \textit{Apprendi} and \textit{Walton}’s incompatible holdings); \textit{see also infra} text accompanying note 109 (illustrating \textit{Ring}’s controversial consequences) (quoting Liptak, \textit{supra} note 19).
identified; and what happens in cases like the one in Arizona. In addition, *Ring* ignited another significant debate concerning the retroactive application of its rule to prisoners on death row who have already received a final verdict. Nowhere in the *Ring* opinion did the Court indicate whether this rule was procedural or substantive, a designation that determines the retroactive applicability of its decision, thereby forcing lower courts to interpret the ruling.

IV. READING *RING*: CIRCUITS ATTEMPT TO INTERPRET THE CASE

After *Ring*, various federal circuits attempted to interpret the Supreme Court’s decision. The Tenth and Eleventh Circuits designated *Ring* as a procedural rule, a decision that prevents application of the *Ring* rule on collateral review. Conversely, the Ninth Circuit classified *Ring* as a substantive rule, thereby permitting its use on collateral review. These circuits were at odds with their conflicting applications of *Ring*. An examination of the Tenth Circuit’s holding in *Cannon v. Mullin*, the Eleventh Circuit’s opinion in *Turner v. Crosby*, and the Ninth Circuit’s alternative decision in *Summerlin v. Stewart* exemplifies this split among the circuits.

A. The Procedural Designation of *Ring*

In July 2002, the Court of Appeals for the Tenth Circuit issued its decision in *Cannon v. Mullin* and determined that *Ring*, like its predecessor *Apprendi*, set forth a new rule of criminal procedure. In *Cannon*, petitioner Randall Cannon was convicted of murder and arson, and the judge sentenced him to death. After appealing, Cannon sought...

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109. Liptak, supra note 19. In addition, *Ring* effectively invalidated five states’ death-penalty sentencing statutes, including Arizona, Colorado, Idaho, Montana, and Nebraska. *Id.* Furthermore, the decision called into question four other states’ statutes, including Alabama, Delaware, Florida, and Indiana, because those states require juries to offer “advisory verdicts” but assign the ultimate decision to sentence the defendant to death to the judges. *Id.*

110. Murray, supra note 15 (stating that the *Ring* ruling “pointedly did not specify whether that procedure would be retroactively required”).

111. *Ring Rule*, supra note 30 (indicating that the *Ring* court did not determine whether its rule was substantive or procedural or “whether it is to be applied retroactively on collateral review,” leaving it open for the lower courts to make their own interpretation of the law).


114. See infra text accompanying notes 115, 121, 127.

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

116. *Id.* at 991.
a second petition for habeas corpus relief and an emergency application for a stay of execution, claiming that Oklahoma’s death penalty scheme was unconstitutional under *Ring* because the jury did not find the factual determinations required to impose the death penalty. Cannon put forth a two-fold argument, contending first that *Ring* announced a new rule of substantive criminal law and second, that *Ring* applied retroactively “through the combination of *Teague, Ring*, and cases preceding *Ring* in the *Apprendi* line.” The Tenth Circuit rejected the arguments, ruling that Cannon failed to make a prima facie showing that the Supreme Court intended *Ring* to apply retroactively to cases on collateral review. The Tenth Circuit’s ruling denied Cannon’s habeas petition and his emergency request for a stay, and implicitly set the tone for the Eleventh Circuit’s parallel ruling in *Turner v. Crosby*.

One year later, the Eleventh Circuit Court of Appeals heard *Turner*, and similarly held that *Ring* announced a new rule of criminal procedure, thereby concluding it did not apply retroactively. A jury found William Turner guilty on two counts of first-degree murder, and the judge sentenced Turner to death based on his findings of aggravating circumstances. Turner appealed, arguing in part, that his sentence was irreconcilable with *Ring*. Without reaching the merits of his claim, the Eleventh Circuit determined that as an extension of *Apprendi*, *Ring* is a procedural rule.

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117. Id. at 990-92.
118. Id. at 992.
119. Id. at 994 (dismissing Cannon’s claims because *Ring* is an “extension of *Apprendi* to the death penalty context,” and the Tenth Circuit previously determined that *Apprendi* was procedural in United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); therefore, *Ring* is a procedural rule as well).
120. Id. at 994-95. After denying Cannon’s petition and his request for a stay, the court verbalized the apparent finality of its ruling by stating that it is “not appealable and cannot be the subject of a petition for rehearing or a writ of certiorari. Thus only the Supreme Court, exercising its original jurisdiction, can make the decision necessary to provide Cannon the relief he seeks.” Id. at 995.
121. Turner v. Crosby, 339 F.3d 1247, 1283 (11th Cir. 2003); see also Arizona v. Towery, 64 P.3d 828, 833 (Ariz. 2003) (declaring that *Ring* is a procedural rule). In Towery, the Arizona Supreme Court refused to apply *Ring* retroactively to four petitioners convicted of first-degree murder and sentenced to death. Id. at 930. The court reasoned that *Ring* “changed neither the underlying conduct that the state must prove to establish that a defendant’s crime warrants death nor the state’s burden of proof.” Id. at 833. Rather, *Ring* merely modified the fact-finding procedures, not who determines aggravating circumstances, therefore announcing a procedural rule. Id.
122. *Turner*, 339 F.3d at 1261-69. The manner in which the murders were committed was particularly gruesome, as Turner stabbed his wife twenty-two times and stabbed and slashed the other victim fifty-one times, in front of witnesses. Id. at 1267-68. The judge found numerous aggravating factors, including a prior capital felony conviction, the fact that the felony was especially heinous, atrocious or cruel, and that it was committed in a cold and calculated way. Id.
123. Id. at 1273.
procedural rule. It followed that as a procedural rule, Ring could not be applied retroactively unless it fit into Teague’s narrow exceptions, which the court determined did not apply. Ultimately, the Eleventh Circuit found that Turner could not apply Ring to his case on collateral review, and denied his writ of habeas corpus.

B. The Substantive Classification of Ring

Just a few short months after the Turner decision, the Ninth Circuit broke from its fellow circuits and delivered a completely contrary ruling. In reviewing Summerlin v. Stewart, the Ninth Circuit Court of Appeals faced a horrific murder case riddled with counsel error, a functionally retarded plaintiff, and a marijuana-addicted judge. Summerlin’s procedural history included various court proceedings, inappropriate attorney relations, and numerous changes in counsel and judges. Warren Summerlin’s trial resulted in a jury conviction of first-degree murder and sexual assault. He was sentenced to death based on the judge’s finding of two aggravating circumstances: a prior felony

124. Id. at 1280.
125. Id. at 1284-85. Ring neither identified “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority,” nor did infringement of Ring’s rule make a fair trial proceeding less likely. Id. at 1285.
126. Id. at 1286.
127. Summerlin v. Stewart, 341 F.3d 1082, 1121 (9th Cir. 2003), cert. granted sub nom. Schriro v. Summerlin, 124 S. Ct. 833 (2003). In the past, the Ninth Circuit has faced criticism for its decisions. See Arthur D. Hellman, Getting it Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals, 34 U.C. DAVIS L. REV. 425, 426 (2000) (criticizing the Ninth Circuit based on the Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals which stated that “the Ninth Circuit today generates a disproportionate number of panel decisions that are wrong, and the existing en banc process fails to provide the necessary corrective”). Senator Orrin Hatch, chairman of the Senate Judiciary Committee, has asserted that the Court of Appeals for the Ninth Circuit has “judges who are out of control, who are activist judges ignoring the law itself.” Id. at 431-32. See also infra text accompanying note 200 (identifying another criticism of a decision of the Court of Appeals for the Ninth Circuit).
128. Summerlin, 341 F.3d at 1084.
129. Id. Summerlin first pled guilty to second-degree murder and aggravated assault without admitting guilt. Id. at 1086. However, several days later, Summerlin withdrew this plea and filed a motion to fire his public defender. Id. Meanwhile, Summerlin’s Public Defender, “Jane Roe,” developed a romantic relationship with Summerlin’s prosecutor. Id. at 1086-87. Because of ethical implications and conflicts of interests, both counsels were eventually replaced and a new judge was assigned. Id. at 1088. Summerlin’s final public defender, George Klink, purportedly provided ineffective assistance of counsel because he failed to investigate Summerlin’s “organic brain disfunction.” Id. at 1093. This Comment will not examine Summerlin’s claims on appeal of ineffective counsel.
130. Id. at 1088.
conviction and the heinous manner in which he committed the act. Later, during federal habeas proceedings, Summerlin’s sentencing judge, Philip Marquardt, was disbarred when it became known that he “was a heavy user of marijuana.”

Summerlin exhausted his state remedies by moving to vacate the judgment, amending habeas petitions and filing a motion to stay the proceeding. Ultimately, the Court of Appeals for the Ninth Circuit voted to rehear Summerlin’s case en banc.

Among Summerlin’s numerous arguments on appeal was the contention that the Arizona death penalty statute was unconstitutional because it permitted a judge, not a jury, to determine the elements necessary for a capital sentence. The Ninth Circuit began by finding that Arizona’s death penalty scheme was unconstitutional in light of *Ring v. Arizona* because it “permits a judge rather than a jury to determine the elements necessary for a death sentence.” The court then faced the pivotal question of whether *Ring’s* “newly announced constitutional rule” could be applied retroactively—a decision that would determine the status of Summerlin’s death penalty sentence.

In undertaking an analysis of *Ring*, the Ninth Circuit considered “whether others who received the same constitutionally infirm sentence . . . are eligible for the same relief or whether they should remain subject to execution.” First, the court considered the threshold *Teague* question of whether *Ring* amounts to a substantive or procedural rule. Because newly announced substantive constitutional rules are presumptively retroactive, this classification would permit Summerlin to

131. *Id.* at 1090. Brenna Bailey, a delinquent account investigator for Finance America, went to Summerlin’s home to speak with his wife about an overdue account. *Id.* at 1084. Ms. Bailey never returned to work, and later that day the police received an anonymous phone call suggesting she had been murdered by Summerlin. *Id.* at 1084-85. The next day, the police found Ms. Bailey’s body “wrapped in a bloody bedsheet . . . Her skull was crushed, and she was partially nude.” *Id.* at 1085. Although he was found competent to stand trial, court-appointed psychiatrists deemed Summerlin “functionally mentally retarded” and “deeply emotionally and mentally disturbed.” *Id.* at 1085-86.

132. *Id.* at 1089, 1090 n.1. Although the amount of drugs that Judge Marquardt used during the trial is unknown, the record supports the contention that Judge Marquardt “was either having difficulty concentrating or experiencing short-term memory loss.” *Id.* at 1090.

133. *Id.* at 1091.

134. *Id.* at 1092.

135. *Id.*

136. *Id.* at 1096.

137. *Id.* at 1097.

138. *Id.*

139. *Id.* at 1099.
use the *Ring* rule on collateral review. Following an extensive analysis, the Ninth Circuit found that "*Ring* is, as to Arizona, a 'substantive' decision."

The *Summerlin* court went further, however, and provided an independent basis for *Ring*'s retroactivity. To ensure *Ring*’s applicability to *Summerlin*, the court determined that even if construed as a procedural decision, "a full *Teague* analysis of the unique procedural aspects of *Ring* provides an independent basis upon which to apply *Ring* retroactively to cases on collateral review." The court found that *Ring* did not fit into *Teague*’s first exception because it did not decriminalize conduct or prevent capital punishment from applying to certain groups of individuals. However, *Ring* fulfilled *Teague*’s second requirement because the new law: "(1) seriously enhance[d] the accuracy of the proceeding and (2) alter[ed] our understanding of bedrock procedural elements essential to the fairness of the proceeding." Because *Ring* satisfied an exception to the retroactivity bar set forth in *Teague*, it “must be given retroactive effect on habeas review.” Therefore, on both substantive and procedural grounds, the *Summerlin* court reversed.

140. *Id.* (reviewing that “[u]nlike strictly procedural rules, ‘new rules of substantive criminal law are presumptively retroactive’”) (quoting Santana-Madera v. United States, 260 F.3d 133, 138 (2d Cir. 2001); see also discussion supra Part I.

141. *Summerlin*, 341 F.3d at 1102 (basing their classification of the *Ring* rule on “[a] careful analysis of the structure and history of the relevant Arizona statutes, coupled with a close examination of the underlying rationale of *Ring* and the Supreme Court’s related jurisprudence”).

142. *Id.* at 1108 (offering an independent source for retroactive application of *Ring*).

143. *Id.*

144. *Id.* at 1109.

145. *Id.* First, the court found that “there is little doubt” that the *Ring* rule would significantly improve the accuracy of Arizona capital trials because juries would not become acclimated to imposing the death penalty. *Id.* at 1115. Nor do juries get elected, making them “less apt to be influenced by external considerations when making their decisions.” *Id.* Second, *Ring* “fundamentally altered the procedural structure of capital sentencing applicable to all states.” *Id.* at 1116. Because *Ring* established a “bedrock” principle—that the determination of aggravated circumstances requires jury deliberation—it functions as a “watershed rule” that alters courts’ understanding of “procedural elements essential to the fairness of the proceeding.” *Id.* Contra Arizona v. Towery, 64 P.3d 828, 833 (Ariz. 2003) (doubting that the sentencing scheme in place before *Ring* “seriously diminished the likelihood of a fair sentencing hearing”). The *Towery* court viewed *Ring*’s outcome as a mere allocation of “the fact-finding duty from an impartial judge to an impartial jury.” *Id.*

146. *Summerlin*, 341 F.3d at 1121 (summarizing the essence of the court’s holding that *Ring* “defines structural safeguards implicitly in our concept of ordered liberty that are necessary to protect the fundamental fairness of capital murder trials”).
Summerlin's death sentence, holding that Ring must be applied retroactively.147

V. DIFFERENT PERSPECTIVES: THE LOGIC BEHIND INTERPRETING A LAW AS PROCEDURAL OR SUBSTANTIVE

An examination of the circuits' analytic approaches in classifying Ring illustrates the merits and downsfalls of each method of interpretation. A great deal depends on a rule's classification because it effectively governs whether a prisoner on death row can use a new constitutional rule and possibly avoid execution by the state.148 When the Supreme Court makes a new constitutional rule, it often restores a party's constitutional rights; this is particularly true in the area of capital sentencing.149 These issues factor into the lower courts' complex debate between preventing an overburdened appellate system and preserving prisoners' constitutional rights.150 The careful approach undertaken by courts in determining the procedural or substantive nature of a new rule demonstrates the significance of the issue.

147. Id. at 1108. But see Arizona v. Sansing, 77 P.3d 30, 33 n.2 (Ariz. 2003) (asserting that the Arizona Supreme Court is not bound by the Ninth Circuit's determination of constitutional requirements). In 1998, John Edward Sansing was sentenced to death based on two judge-determined aggravating circumstances. Id. at 32. After Ring, the U.S. Supreme Court vacated the Sansing judgment and remanded it to the Arizona Supreme Court. Id. In considering whether Sansing was sentenced by a constitutionally infirm procedure, the Arizona court explicitly discounted the Ninth Circuit's logic in Summerlin. Id. at 33 n.2. The court affirmed Sansing's death sentence by assuming the mindset of a jury and decided "beyond a reasonable doubt that any reasonable jury would have concluded that the mitigating evidence was not sufficiently substantial to call for leniency." Id. at 39.


149. See Summerlin, 341 F.3d at 1125 (Reinhardt, J., concurring) (arguing that "if our society truly honors its constitutional values, it will not tolerate the execution by the state of individuals whose capital sentences were imposed in violation of their constitutional rights").

150. Compare Teague v. Lane, 489 U.S. 288, 310 (1989) (pointing out that applying new constitutional rules on collateral review "may be more intrusive than the enjoining of criminal prosecutions . . . for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards") with Summerlin, 341 F.3d at 1125 (Reinhardt, J., concurring) (opining that society cannot tolerate the state's execution of an individual whose capital sentence violates his constitutional rights); see also United States v. Smith, 250 F.3d 1073, 1074 (7th Cir. 2001) (Wood, J., dissenting) (recognizing that "annual filing statistics from [the Seventh Circuit] and our sister circuits attest [that] habeas corpus petitions and the rules of procedural default consume enormous resources for the court"); Towery, 64 P.3d at 835 (avoiding retroactive application of Ring because it "would greatly disrupt the administration of justice. . . . Conducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice.").
A. The Procedural Analysis

A court’s analysis of a procedural rule often begins with whether it changes the actual court proceedings. For example, the Eleventh Circuit designated Ring as a procedural rule because it “dictates what fact-finding procedure must be employed in a capital sentencing hearing.” The Turner court found that the Supreme Court’s decision requiring juries, not judges, to find aggravating factors failed to change the conduct needed to prove a crime or to alter the substantive elements of the proceeding, such as the government’s burden. Under this procedural view, Ring altered who decided the existence of aggravating circumstances, a function which merely modifies the fact-finding procedure.

Other circuits also have concluded that Apprendi constituted a procedural decision. This significant conclusion inevitably factors into these circuits’ subsequent evaluations of Ring, because Ring should take on its predecessor’s characterization as a procedural rule if it is an extension of Apprendi. In Apprendi, the Supreme Court separated the substantive basis of enhancing a sentence based on racial bias from the adequacy of the procedure and determined that the substantive basis for New Jersey’s enhancement statute was not at issue. Using this precedent, the Tenth Circuit deemed Apprendi procedural because it clarified who determines a sentencing enhancement. Conceding that the Apprendi rule could increase the accuracy of convictions, the rule is “simply [one that] ‘shifts the fact-finding duties from an impartial judge to a jury.’”

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151. See Turner v. Crosby, 339 F.3d 1247, 1284 (11th Cir. 2002) (starting the court’s explanation of Ring as a rule of criminal procedure).
152. Id.
153. Id. In applying Ring to Florida’s capital sentencing scheme, the Eleventh Circuit found that, “Ring changed neither the underlying conduct the state must prove to establish a defendant’s crime warrants death nor the state’s burden of proof. Ring affected neither the facts necessary to establish Florida’s aggravating factors nor that State’s burden to establish those factors beyond a reasonable doubt.” Id.
154. Id.
155. See Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002); McCoy v. United States, 266 F.3d 1245, 1256 (11th Cir. 2001); see also Summerlin, 341 F.3d at 1128-29 (Rawlinson, J., dissenting) (reviewing the Ninth Circuit’s sister circuits’ contrary Ring analyses).
156. See Cannon, 297 F.3d at 994 (indicating that Ring obviously extends Apprendi to the realm of capital punishment).
158. See id.; see also United States v. Mora, 293 F.3d 1213, 1219 (10th Cir. 2002).
159. Mora, 295 F.3d at 1219 (quoting United States v. Sanders, 247 F.3d 139, 148 (4th Cir. 2001)).
B. Summerlin’s Substantive Analysis

In making a substantive classification, the Ninth Circuit in *Summerlin v. Stewart* relied on Supreme Court precedent as well as its own cases.\textsuperscript{161} The court’s analysis started with *Bousley v. United States*,\textsuperscript{161} where the Supreme Court rejected the government’s non-retroactivity argument because the case called for the interpretation of a federal statute.\textsuperscript{162} In addition, the Ninth Circuit recounted its recent decision in *United States v. Montalvo*,\textsuperscript{163} where it determined that the Supreme Court’s decision in *Richardson v. United States*,\textsuperscript{164} “requiring jury unanimity on individual violations alleged as part of a continuing criminal enterprise, [was] a substantive, not procedural, [decision].”\textsuperscript{165} The Ninth Circuit reinforced the *Richardson* substantive finding by citing the decisions of its fellow circuits.\textsuperscript{166} Under the *Summerlin* view, a Supreme Court interpretation of the meaning of a death penalty statute has substantive implications and should therefore apply retroactively.\textsuperscript{167}

In designating *Ring* as substantive, the Ninth Circuit considered how the Supreme Court’s decision redefined the Arizona capital murder statute.\textsuperscript{168} *Ring* restructured the capital sentencing scheme by making aggravating factors separate elements; this “necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally.”\textsuperscript{169} Demonstrating the redefinition of Arizona law as a result of *Ring*, the Arizona Supreme

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160. *Summerlin*, 341 F.3d at 1100 (depicting the Ninth Circuit’s use of the Supreme Court’s “substantive-procedural logic” in its own rulings).
162. *Summerlin*, 341 F.3d at 1100 (quoting *Bousley*, 523 U.S. at 620 (1998)); see also *Bousley*, 523 U.S. at 620-21 (recognizing that “under our federal system it is only Congress, and not the courts, which can make conduct criminal”).
163. 331 F.3d 1052 (9th Cir. 2003).
165. *Summerlin*, 341 F.3d at 1100; see also *Montalvo*, 331 F.3d at 1056 (interpreting *Richardson*, 526 U.S. at 815, as a substantive determination). In *Richardson*, the petitioner was charged with a series of violations, including organizing a street gang and distributing narcotics. 526 U.S. at 816. The Supreme Court reviewed the trial judge’s determination that the jury had to unanimously agree that the defendant committed at least three drug offenses, but did not have to agree about the particular offenses. Id. The Seventh Circuit upheld the trial judge’s instruction, but the Supreme Court reversed, finding that “unanimity in respect to each individual violation is necessary.” *Id.*
166. *Summerlin*, 341 F.3d at 1100 n.6.
167. *Id.* at 1106, 1120-21.
168. *Id.* at 1102 (stating that *Ring* effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment”).
169. *Id.* at 1105.
Court vacated death sentences in cases pending on direct appeal, and the Arizona legislature changed the law to provide for jury sentencing in capital cases.\textsuperscript{170} Essentially, \textit{Ring} established 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.”\textsuperscript{171} Therefore, the alteration of the substantive elements of Arizona’s capital sentencing scheme required retroactive application because, “if our society truly honors its constitutional values, it will not tolerate the execution by the state of individuals whose capital sentences were imposed in violation of their constitutional rights.”\textsuperscript{172}

Several \textit{Summerlin} judges joined in a dissenting opinion, finding the decision incompatible “with Supreme Court precedent, [the Ninth Circuit’s] prior rulings, or the law of our sister circuits.”\textsuperscript{173} The \textit{Summerlin} dissent attacked the majority’s classification of the \textit{Ring} rule as substantive.\textsuperscript{174} The dissenters did not agree that “merely saying that creation of a separate substantive criminal offense renders a rule one of substance rather than procedure.”\textsuperscript{175} Under the dissenters’ view, \textit{Ring} changed “who” determines capital sentences, not “what” they are sentencing, and a change in determination is “quintessentially procedural.”\textsuperscript{176} The dissenters sided with other circuits’ views of \textit{Ring}, arguing that it should not be applied retroactively.\textsuperscript{177}

Ultimately, \textit{Summerlin} demonstrated that substantive criminal law decisions “reach beyond issues of procedural function and address the meaning, scope, and application of substantive criminal statutes.”\textsuperscript{178} The \textit{Summerlin} court declared that “[w]hen a decision in classifying a new constitutional rule affects the substantive elements of an offense, or how

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\item[170.] \textit{Id.}
\item[171.] \textit{Id.} at 1106.
\item[172.] \textit{Id.} at 1125 (Reinhardt, J., concurring) (adding that “[i]t should not take a constitutional scholar to comprehend” such a point).
\item[173.] \textit{Id.} at 1132 (Rawlinson, J., dissenting).
\item[174.] \textit{Id.} at 1126 (Rawlinson, J., dissenting) (suggesting that the “first point of the syllogism tarnishes the initial appeal of the majority’s logic”).
\item[175.] \textit{Id.} (Rawlinson, J., dissenting).
\item[176.] \textit{Id.} at 1128 (Rawlinson, J., dissenting) (adopting the “who”/ “what” distinction from State v. Towery, 64 P.3d 828, 833 (Ariz. 2003)).
\item[177.] \textit{Id.} at 1028-29 (Rawlinson, J., dissenting) (citing the Tenth Circuit’s conclusion in \textit{Cannon} that \textit{Ring} is procedural and the Eleventh Circuit’s decision in \textit{Turner} that because \textit{Apprendi} is a procedural rule, \textit{Ring} is as well). The dissent supported adherence to \textit{Apprendi}, thereby “declar[ing] the nonretroactivity of \textit{Ring}, and affirm[ing] the district court’s denial of \textit{Summerlin}’s habeas petition.” \textit{Id.} at 1132 (Rawlinson, J., dissenting).
\item[178.] \textit{Id.} at 1100; see also \textit{id.} at 1101 (citing an example of a substantive rule as one that “analyz[ed] what constitutes ‘elements’ as opposed to brute facts or ‘means’” (quoting United States v. Montalvo, 331 F.3d 1052, 1056 (9th Cir. 2003))).
\end{enumerate}
an offense is defined, it is necessarily a decision of substantive law.” To that end, the Ninth Circuit recognized that a new constitutional rule redistributing the aggravating factor determination to the jury is necessarily a substantive rule of law.

C. Ambiguity Between the Two: The Hybrid Theory

Unfortunately, the definitive line between substantive and procedural classifications is not always clear. As the *Summerlin* court pointed out, “[i]n the habeas context in particular . . . there are those cases that do ‘not fall neatly under either the substantive or procedural doctrinal category.’” In such circumstances, “‘the best approach is to recognize that [the case at issue] is neither entirely substantive nor procedural,’ . . . *Ring* is such a decision.”

For example, elements of the *Ring* decision could be construed as both procedural and substantive. The Ninth Circuit conceded that in a limited sense, *Ring* announced a procedural rule because it addressed the procedure by which the trial must be conducted. In the broader context of Arizona criminal law, however, the decision in *Ring* went beyond answering a procedural question—it made Arizona’s capital murder statute unconstitutional. Under the *Summerlin* court’s approach, the overarching result of the *Ring* decision affected the core substance of Arizona’s capital sentencing scheme. This overwhelming change seemingly mandated a substantive classification and, therefore, a retroactive application in order to prevent arbitrary application of the law.

179. *Id.* at 1106.
180. *See id.* at 1105-06.
181. *Id.* at 1099-100.
182. *Id.* at 1101 (quoting United Stated v. Woods, 986 F.2d 669, 677 (3d Cir. 1993)).
183. *Id.* (quoting *Woods*, 986 F.2d at 677).
184. *Id.* at 1101-02.
185. *Id.* at 1101 (stating that *Ring* “mandated that a jury, rather than a judge, must find aggravating circumstances in a capital case”).
186. *Id.* at 1101-02.
187. *See Summerlin*, 341 F.3d at 1102 (demonstrating how *Ring* altered the essential substance of Arizona’s capital sentencing scheme); *see also* Lane, *supra* note 15 (interpreting the Ninth Circuit’s logic as finding “that the *Ring* ruling had so transformed the constitutional framework governing the imposition of death sentences that it would be unconstitutional to execute someone who had been sentenced under a pre-*Ring* system”).
188. *Summerlin*, 341 F.3d at 1122-25 (Reinhardt, J., concurring). Judge Reinhardt fully supported the court’s determination that *Ring* is a substantive rule. *Id.* at 1122-23. Furthermore, he insisted that it must be applied retroactively to prevent an arbitrary or irrational imposition of the death penalty. *Id.* at 1124-25. To make his point, Judge Reinhardt posed the rhetorical question, “[i]s it possible that prisoners will now be executed by the state solely because of the happenstance that the Supreme Court
Apprendi also illustrates the possible ambiguity in determining whether a new constitutional rule should be classified as procedural or substantive.\textsuperscript{189} Simply determining that elements of a crime must be proved to a jury beyond a reasonable doubt is procedure; yet in the realm of enhanced sentencing, Apprendi could have effected a “substantive construction of a federal criminal law.”\textsuperscript{190} This ambiguity breeds debate, as evidenced in the majority and dissent of the Summerlin court.\textsuperscript{191} Because of this uncertainty, courts were in need of guidance and clarification from the Supreme Court.

VI. THE SUPREME COURT’S FAULTY REMEDY OF THE CIRCUIT SPLIT

The Ninth Circuit’s interpretation of Ring in Summerlin provided a novel approach to the Supreme Court’s 2002 ruling.\textsuperscript{192} It was uncertain, however, whether this novel approach would stand in light of its conflict with other circuits.\textsuperscript{193} On December 1, 2003, the United States Supreme Court granted certiorari to consider the controversial issues in Summerlin v. Stewart, and ultimately, to resolve Ring’s uncertainty.\textsuperscript{194} On

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\item recognized the correctness of their constitutional arguments too late – on a wholly arbitrary date, rather than when it should have?" \textit{Id.} at 1124.
\item Strauss, \textit{supra} note 16, at 1244-45.
\item \textit{Summerlin}, 341 F.3d at 1102-02 n.9 (stating the majority’s claim that the dissent “overstates Ring’s affinity to Apprendi and mischaracterizes the first step of our ‘syllogism’”).
\item \textit{See Ring Rule, supra} note 30, at 1118 (describing the Ninth Circuit’s decision as conflicting with and “in tension with decisions of other circuits”).
\item \textit{See} Lane, \textit{supra} note 15 (suggesting that “[t]he large number of death sentences involved [resulting from the \textit{Summerlin} decision], and the fact that other federal appeals courts have reached contrary rulings, mean that the Supreme Court probably will agree to intervene”).
\item \textit{Schriro v. Summerlin}, 124 S. Ct. 833 (2003). The petition for writ of certiorari, presented by petitioner Dora B. Schriro, the recently appointed Director of the Arizona Department of Corrections and successor in office for Terry Stewart, asks: one,
\begin{itemize}
\item Did the Ninth Circuit err by holding that the new rule announced in Ring is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of \textit{Teague v. Lane}...? [and two.] Did the Ninth Circuit err by holding that the new rule announced in Ring applies retroactively to cases on collateral review under \textit{Teague’s} exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings?
\end{itemize}
\end{itemize}
June 24, 2004, the Court finally ruled on the matter in Schriro v. Summerlin. The Court definitively stated that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review"; subsequently, this closed the debate on the retroactive applicability of Ring.

Ruling that Ring constitutes a new procedural rule, and therefore, does not apply retroactively to final cases on direct review, the Court finally addressed Summerlin's controversial application of Ring and resolved the discord among the lower courts. This resolution was particularly vital, as it was the Supreme Court's failure to classify its own rule that caused the confusion among the circuits. Moreover, while the main (explaining the Ninth Circuit's approach in Summerlin and the Court's subsequent grant of certiorari). The Ninth Circuit has received criticism for its controversial rulings, and the Supreme Court has reversed a number of its decisions. See Hellman, supra note 127, at 426; see also John Athens, Jr., Comment, The Ninth Circuit Errs Again: The Quiet Title Act as a Bar to Judicial Review, 19 ALASKA L. REV. 433, 433 (2002) (stating that "[t]he Ninth Circuit Court of Appeals has received criticism for its relatively high rate of questionable decisions"). In fact, critics insist it "has an appallingly high reversal rate by the Supreme Court,' and there has even been criticism within the Ninth Circuit itself." Athens, supra, at 433-34. In recent years, however, the Ninth Circuit's record has improved at the Court, "falling more in line with its sister circuits, [b]ut the nation's largest circuit is increasingly dominating the high court's calendar." Wise, supra (recognizing that at the time of Summerlin's grant of certiorari, twenty of the fifty-eight certiorari grants from the federal appeals courts stemmed from the Ninth Circuit, which comprises more than a third of the docket). Regardless of the Ninth Circuit's reputation or the reasons underlying the Supreme Court's grant of certiorari, the Court's decision to clarify Ring acknowledged the gravity of the issue: that the procedural or substantive classification is not a mere technicality but rather a literal life or death determination. See Summerlin v. Stewart, 341 F.3d 1082, 1124-25 (9th Cir. 2003), cert. granted sub nom. Schriro v. Summerlin, 124 S. Ct. 833 (2003) (Reinhardt, J., concurring). Judge Reinhardt reinforced the solemnity of the procedural/substantive designation by rhetorically asking:

Will we add to all of the other arbitrariness infecting our administration of the death penalty the pure fortuity of when the Supreme Court recognized its own critical error with respect to the meaning of the Constitution? . . . A state's decision to take the life of a human being, if it can be justified at all, must rest on a far less arbitrary foundation.

Id.; see also Wise, supra (explaining the Ninth Circuit's decision regarding whether to deem Ring a substantive change and highlighting Judge Reinhardt's concurrence which "point[s] out that the seemingly arcane question was actually a matter of life or death.") 195. 124 S. Ct. 2519 (2004).

196. Id. at 2526.

197. Schriro, 124 S. Ct. at 2526; See Jason Hoppin, 9th Circuit Overturns Death Sentences; Appeals Court Applies Ring Decision Retroactively, but Split with Other Circuits may Attract High Court Review, LEGAL TIMES, Sept. 8, 2003, at 14 (pointing to the different legal conclusions reached by different state courts and other courts as a key reason why the Supreme Court would probably review the case).

198. See Summerlin, 341 F.3d at 1096-97 (revealing the Ninth Circuit's obligation to determine whether the Supreme Court's decision to vacate Ring's capital murder conviction applies retroactively because the Court failed to categorize its decision itself);
question in Schriro concerned the retroactive application of Ring, the Court also attempted to clarify some of the uncertainty surrounding the classification of rules as procedural or substantive.  

The holding in Schriro, however, was quite surprising. The Court's treatment of the right to trial by jury in Ring suggested that the Court would uphold Summerlin and apply the rule retroactively. In Ring, the Court considered the "superiority of judicial factfinding" with extreme skepticism and impliedly supported the freedom inherent in the jury system. The only way to uphold these values and guard against arbitrary imposition of the death penalty was to apply Ring retroactively.  

Additionally, the flawed rationale of Turner v. Crosby and Cannon v. Mullin weighed against the categorization of Ring as procedural. In Turner, the Eleventh Circuit improperly concluded that Ring was a procedural rule, finding that "it dictates what fact-finding procedure must be employed in a capital sentencing hearing." This justification overlooked Ring's substantial alteration of the "fact-finding procedure," from judge to jury. Cannon's logic was equally vulnerable, as the Turner v. Crosby, 339 F.3d 1247, 1283-85 (11th Cir. 2003) (depicting the Eleventh Circuit's evaluation of Ring as a procedural rule; because the Supreme Court avoided characterizing its own rule, the Eleventh Circuit was left to analyze the retroactivity of Ring); Cannon v. Mullin, 297 F.3d 989, 992 (10th Cir. 2002) (illustrating the petitioner's attempts to categorize the Ring rule). The Court seemingly invited the circuit confusion by failing to determine Ring's retroactive applicability sooner. In the death penalty context, however, this ambiguity remains repugnant because prisoners' lives are at stake. See Linda Greenhouse, Supreme Court Roundup, N.Y. TIMES, Dec. 2, 2003, at A22 (pointing out that more than 100 inmates in five states could be entitled to new sentencing hearings—an extension of their sentence—if the Court decides to apply Ring retroactively).  

199. See Schriro, 124 S. Ct. at 2521 (stating the Court's purpose as determining whether Ring "applies retroactively to cases already final on direct review").  

200. Ring v. Arizona, 536 U.S. 584, 609 (2002) (stressing the fact that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years [as decided in Apprendi], but not the factfinding necessary to put him to death").  

201. Id. at 607 (reminding the courts that although entrusting a judge to determine the prerequisites for a death sentence may be efficient, "[t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.") (quoting Apprendi v. New Jersey, 530 U.S. 466, 475 (2000) (Scalia, J., concurring)).  


203. Turner, 339 F.3d at 1284.  

204. Cf. Adam Liptak, Judges' Rulings Imposing Death are Overturned, N.Y. TIMES, Sept. 3, 2003 at A1. Because juries in capital cases tend to be more lenient, a defendant facing the death penalty is more likely to receive a life sentence. Id. Furthermore, "[o]nly
Tenth Circuit foreclosed any discussion that \textit{Ring} was substantive, despite the obvious differences between a sentence enhancement based on firearm possession and a death sentence.\footnote{See Murray, supra note 15 (citing law professor and Visiting Judge Charles F. Baird's prediction that the Supreme Court will adopt the \textit{Summerlin} court's logic). Judge Baird believes that "'if we're going to have capital punishment, this Supreme Court is going to provide very strict judicial scrutiny of how that punishment is imposed and that it should be done by a jury and not by judge.'" \textit{Id.}} Such inconsistent and incomplete holdings indicated that the Supreme Court would uphold, and should uphold, \textit{Summerlin} by declaring the \textit{Ring} rule substantive.\footnote{See Summerlin \textit{v.} Stewart, 341 F.3d 1082, 1124 (9th Cir. 2003) (Reinhardt, J., concurring), \textit{cert. granted sub nom.} Schriro \textit{v.} Summerlin, 124 S. Ct. 833 (2003). Judge Reinhardt put forward the dilemma of inmates sentenced under constitutionally infirm schemes as: May the state execute the "Jeffrey Alan Waltons" who are now on death row—the prisoners who previously correctly argued (or were incorrectly deterred from arguing) that their executions would be unconstitutional, the prisoners whose causes were erroneously turned down by the Supreme Court—the prisoners who were right about the Constitution when the Supreme Court was wrong? \textit{Id.}}

Rather than doing this, however, the Court instead adopted a rule that will leave prisoners on death row because they were sentenced under constitutionally infirm guidelines.\footnote{See Summerlin \textit{v.} Stewart, 341 F.3d 1082, 1124 (9th Cir. 2003) (Reinhardt, J., concurring), \textit{cert. granted sub nom.} Schriro \textit{v.} Summerlin, 124 S. Ct. 833 (2003). Judge Reinhardt put forward the dilemma of inmates sentenced under constitutionally infirm schemes as: May the state execute the "Jeffrey Alan Waltons" who are now on death row—the prisoners who previously correctly argued (or were incorrectly deterred from arguing) that their executions would be unconstitutional, the prisoners whose causes were erroneously turned down by the Supreme Court—the prisoners who were right about the Constitution when the Supreme Court was wrong? \textit{Id.}} Unfortunately, for these prisoners, the Supreme Court declined to follow the \textit{Summerlin} court's correct method of retroactive application.\footnote{See Murray, supra note 15 (citing law professor and Visiting Judge Charles F. Baird's prediction that the Supreme Court will adopt the \textit{Summerlin} court's logic). Judge Baird believes that "'if we're going to have capital punishment, this Supreme Court is going to provide very strict judicial scrutiny of how that punishment is imposed and that it should be done by a jury and not by judge.'" \textit{Id.}} The Ninth Circuit's approach to \textit{Ring}'s rule was the proper one because it ensured that a defendant's death sentence was based on a jury's findings of factors \textit{beyond a reasonable doubt}. The Supreme Court should have followed this logic, and deemed \textit{Ring} a substantive, retroactive rule of law.\footnote{See \textit{Greenhouse}, supra note 198 (explaining that a ruling that \textit{Ring} applies retroactively would wholly alter the lives of more than one hundred inmates in five states sentenced to death).}

\section*{VII. CONCLUSION}

The conflict among the circuits regarding the proper interpretation of \textit{Ring} indicates that the efficacy of the criminal system was at stake. Had the Supreme Court used its \textit{Ring}-logic in deciding \textit{Walton} twelve years ago, twenty-two people on death row would not have been executed.\footnote{See \textit{Beane}, supra note 19, at 234 (quoting from Timothy Ring, the human element for this entire debate, which underscores the significance of jury determination of aggravating factors: that now, "[t]he prosecutor would have . . . to convince 12 people instead of just one friendly judge.").}
Such inherent unfairness undermines the criminal justice system, demonstrating that the Supreme Court should have recognized that juror determination of aggravating factors required retroactive application. The \textit{Summerlin} court properly determined \textit{Ring}'s rule as substantive, and the Supreme Court failed to recognize the soundness of that approach. It is unfortunate, and perhaps unwise, for the Supreme Court to have veered from such logic when it could have prevented more executions based on constitutionally infirm sentences.\footnote{211 See \textit{Schriro v. Summerlin}, 124 S. Ct. 2519, 2530 (Breyer, J., dissenting) (commenting that a decision to make \textit{Ring} retroactive only would have affected about 110 people sentenced to death—a “small number” when compared with the 1.2 million prisoners in state jails.).}