NOTES

THE CLASH OF RING V. ARIZONA AND TEAGUE V. LANE:
AN ILLUSTRATION OF THE INAPPLICABILITY OF
MODERN HABEAS RETROACTIVITY JURISPRUDENCE IN
THE CAPITAL SENTENCING CONTEXT

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INTRODUCTION

In 2000 the Supreme Court held in Apprendi v. New Jersey that a jury, and not a judge, must make the factual determination authorizing an increase in the statutory maximum prison sentence.\(^1\) Two years later, in Ring v. Arizona, the Court clarified conflicting precedent and extended Apprendi to cover capital determinations.\(^2\) The Court struck down Arizona’s capital sentencing system as unconstitutional and held that when imposing a capital sentence, the jury must find the existence of aggravating factors beyond a reasonable doubt.\(^3\) Recently, in Summerlin v. Stewart, the Ninth Circuit interpreted the rule in

\(^{1}\) 530 U.S. 466, 490 (2000) (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

\(^{2}\) 536 U.S. 584, 589 (2002) (overruling Walton v. Arizona, 497 U.S. 639 (1990), and finding Arizona’s capital sentencing scheme unconstitutional because aggravating factors were determined by a judge rather than a jury).

\(^{3}\) Id. at 602 (holding findings of fact, no matter how they are labeled, must be established by a jury beyond a reasonable doubt).
Ring to apply retroactively to collateral death penalty appeals.\(^4\) In contrast, the Eleventh Circuit held that current retroactivity jurisprudence bars Ring from retroactive application.\(^5\) Amidst a flurry of decisions issued in the wake of Summerlin, the Supreme Court granted certiorari to “clarify the impact of its ruling last year that juries, not a judge, must decide if a convicted killer lives or dies.”\(^6\) Specifically, the Court addressed whether the rule announced in Ring must be applied retroactively to collateral attacks on final judgments, and ultimately determined that the rule does not apply retroactively.\(^7\)

This Note examines whether the Court’s current retroactivity analysis is optimal or even appropriate in the capital punishment context. Through exploration of the history of retroactivity jurisprudence and application of modern retroactivity analysis to the rule in Ring, this Note assesses the validity of the various distinctions inherent in the habeas retroactivity framework. Part I presents a brief history of the role of the jury in capital and non-capital sentencing jurisprudence, which culminates in the Supreme Court’s decision in Ring. Part II lays out the modern retroactivity framework and examines the history of retroactivity in the United States, exploring the justifications for the doctrine in place today. Part III focuses on how the lower courts, and ultimately the Supreme Court, endeavored to apply modern retroactivity analysis to the rule announced in Ring. Part IV demonstrates that the threshold questions required in a standard retroactivity analysis are ill-suited to the capital sentencing context, particularly as applied to the rule announced in Ring. Part IV shows that the justifications given for limiting full retroactive application of new rules in non-capital situations crumble when courts attempt to transpose the analysis to constitutional questions raised in the capital sentencing context. Finally, this note concludes that although valid in non-capital contexts, the Supreme Court’s retroactivity jurisprudence is misplaced in its application to the rule announced in Ring.

\(^4\) 341 F.3d 1082, 1108 (9th Cir. 2003) (construing the rule in Ring as a substantive rule, and therefore not barred by Teague v. Lane, 489 U.S. 288 (1989), from retroactive application - the applicability of Teague is discussed in Part IV).

\(^5\) Turner v. Crosby, 339 F.3d 1247, 1286 (11th Cir. 2003) (precluding the retroactive application of Ring to cases on collateral review because the new constitutional rule does not fall within either Teague exceptions discussed in Part IV).


\(^7\) Anne Gearan, Court to Clarify on Juries Imposing Death, CINCINNATI POST, Dec. 1, 2003, at A2.

\(^8\) Schriro v. Summerlin, 124 S. Ct. 2519, 2526-27 (2004) (“Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review.”).
I. BACKGROUND

A. The History Behind Ring v. Arizona

The Ring rule that a jury, and not a judge, must determine aggravating factors in a capital murder case emerged from a muddled and controversial Supreme Court capital sentencing jurisprudence. In 1972 the Supreme Court, in a succinct per curiam opinion, invalidated the death penalty as then applied by the states in Furman v. Georgia. Though the five Justices of the majority proffered disparate rationales for finding the death penalty unconstitutional as practiced, all agreed that grievous arbitrariness and capriciousness afflicted the existing administration of capital punishment in violation of the Eighth Amendment. Four years later, in response to the states’ attempts to conform their death penalty statutes to the Eighth Amendment protections and prohibitions announced in Furman, the Court again considered the constitutionality of several state capital punishment regimes. In one day, the Supreme Court announced five death penalty decisions that have been

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10 408 U.S. 238, 240 (1972) (per curiam) (finding that the Texas and Georgia capital punishment statutes, as applied, violated the Eighth Amendment prohibition against cruel and unusual punishment). Despite the fact that the Court considered the constitutionality of only the Georgia and Texas statutes, the fatal Eighth Amendment flaw of unguided jury discretion was present in all of the existing state capital sentencing statutes. See Lockett v. Ohio, 438 U.S. 586, 598-99 (1978) (noting that prior to Furman all states which authorized the death penalty “permitted the jury unguided and unrestrained discretion regarding the imposition of the death penalty”).

11 See Furman, 408 U.S. at 256-57 (Douglas, J., concurring) (finding discretionary death penalty statutes unconstitutional because “[t]hey are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments”); id. at 293 (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.”); id. at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”); id. at 311 (White, J., concurring) (arguing that the death penalty is so infrequently and arbitrarily imposed that it fails to serve its underlying justifications of deterrence); id. at 364 (Marshall, J., concurring) (“[C]apital punishment is imposed discriminatorily against certain identifiable classes of people . . . .”).

described by commentators as holding “that death penalty statutes were not per se unconstitutional; that any such statute must guard against arbitrariness by establishing standards to guide the sentencer’s discretion; and that such a statute must also permit the sentencer to consider mitigating circumstances as part of an individualized sentencing determination.”

While all of these holdings altered the existing capital sentencing regime, Proffitt v. Florida in particular would have lasting ramifications on the question of whether a judge or jury should determine the imposition of the death penalty. Unique among the 1976 cases and the statutes struck down in Furman, the statute at issue in Proffitt did not vest the sentencing determination in a jury. Instead, the legislature created a hybrid system, mandating that although the jury would issue a sentencing recommendation after a finding of guilt, the ultimate decision to impose the death penalty or life imprisonment had to be made by the judge. In upholding the Florida statute, the Court acknowledged the “important societal function” of jury sentencing in capital cases, but went on to assert that “it has never suggested that jury sentencing is constitutionally required.” The Court cemented its validation of Florida’s “jury override statute” by rejecting other constitutional challenges (approving the Texas death penalty statute because it avoids the concerns voiced in Furman by requiring the jury to “find the existence of a statutory aggravating circumstance before the death penalty may be imposed”); Proffitt v. Florida, 428 U.S. 242, 253 (1976) (rejecting a constitutional challenge to Florida’s capital sentencing procedures because the Legislature provided “specific and detailed guidance to assist [trial judges] in deciding whether to impose a death penalty or imprisonment for life” as well as a system for review of such decisions); Gregg v. Georgia, 428 U.S. 153, 206-07 (1976) (upholding Georgia’s death penalty statute on the grounds that the legislative guidelines channel the jury’s discretion and prevent arbitrary imposition of the death penalty).


Proffitt, 428 U.S. at 248-49 (observing that the jury’s opinion is only advisory, and that the trial judge makes the actual decision).

Id. at 252 (arguing that judicial sentencing would likely result in increased consistency in capital sentencing determinations because of the judge’s greater experience and familiarity with similar cases).

Statutes that require the jury to issue a sentencing recommendation but permit the sentencing judge to override that recommendation and make the final sentencing determination, like the statute at issue in Proffitt, are known in some circles as “jury override statutes.” See Katheryn K. Russell, The Constitutionality of Jury Override in Alabama Death Penalty Cases, 46 Ala. L. Rev. 5, 5-6 (1994) (discussing the existence of such statutes in Florida, Alabama, Indiana and Delaware). The Arizona statute in Ring did not provide for a provisional jury sentencing recommendation. See Ring v. Arizona, 536 U.S. 584, 592-93 (2002) (explaining that the Arizona capital sentencing statute endowed the judge with the power to determine aggravating circumstances and to determine whether to impose the death penalty).
to the statute in subsequent cases. In *Spaziano v. Florida*, the Court in no uncertain terms dismissed a challenge to Florida’s hybrid sentencing system:

In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.

Five years later, the Court reiterated the *Spaziano* holding, rejecting the argument that the Sixth Amendment requires the jury to specify the existence of aggravating factors before the court may impose a death sentence. Although forceful precedent seemingly foreclosed constitutional challenges to jury override statutes, the validity of a capital sentencing scheme that completely removed the sentencing determination from the hands of the jury and vested sole discretion in the judge remained undecided.

This question would not remain unanswered for long. In 1990 the Court addressed the validity of the Arizona death penalty statute and extended its sanction of Sixth Amendment constitutionality to a system that left the entire death penalty determination to the judge’s discretion. The Arizona statute prohibited a death sentence without the existence of certain aggravating factors, and required that the judge make those findings of fact. The petitioner argued that “the Arizona scheme would be constitutional only if a jury decides what aggravating and mitigating circumstances are present in a given case and the trial judge then imposes sentence based on those

18 See Hildwin v. Florida, 490 U.S. 638, 640-41 (1989) (per curiam) (rejecting a constitutional challenge on the grounds that an aggravating factor is merely a sentencing factor and not an element of the crime, therefore making it permissible for a judge to make this finding); *Spaziano v. Florida*, 468 U.S. 447, 466-67 (1984) (refusing to find constitutional infirmity in the Florida statute’s use of a judicial override procedure after a jury’s sentencing recommendation). For a more detailed analysis of the Supreme Court’s evolving view of the jury’s role in capital sentencing, see Stevenson, supra note 13, at 1096-1111 (discussing the evolution of Supreme Court jurisprudence concerning a jury’s role in the capital sentencing process).

19 *Spaziano*, 468 U.S. at 464.

20 *Hildwin*, 490 U.S. at 640-41 (maintaining that a sentencing factor is not an element of the offense).

21 See Stevenson, supra note 13, at 1101 (“Because the Florida death penalty statute provided for at least some jury involvement in capital sentencing in the form of an advisory recommendation to the sentencing judge, the *Proffitt, Spaziano*, and *Hildwin* decisions did not necessarily mean that a judge-only capital sentencing scheme was immune from constitutional challenge.”).

22 See Walton v. Arizona, 497 U.S. 639, 648-49 (1990) (finding the distinctions between the sentencing schemes of Arizona and Florida unpersuasive and applying the analysis articulated in the *Proffitt* line of cases).

23 See id. at 642-43.
findings."²⁴

Relying on its hybrid system precedent, the Court found the distinctions between the Florida and Arizona statutes irrelevant to its analysis.²⁵ Further, the Court rejected Walton’s suggestion that the aggravating factors were “elements of the offense,” stating that they instead serve as “standards to guide the making of [the] choice’ between the alternative verdicts of death and life imprisonment.”²⁶ The Court went on to conclude that the Arizona capital sentencing scheme, where the judge decides factual findings with regard to the existence of mitigating and aggravating circumstances, did not violate the Sixth Amendment.²⁷ The Court thus applied its Proffitt line of analysis unwervingly to the issue of the role of the jury in death penalty sentencing determinations.

Given the Court’s unwillingness to deviate from its assertion that the Sixth Amendment did not require jury involvement in capital sentencing, it is at least surprising that “the Court embarked on a radically different approach upon confronting similar issues in a non-capital context.”²⁸ The harbinger of the Supreme Court’s disparate treatment of non-capital sentencing procedures was Jones v. United States,²⁹ a case that turned on the construction of a federal carjacking statute. The statute created a baseline sentence for carjacking, and then instructed the court to issue increasingly severe sentences if the crime resulted in serious bodily injury or death.³⁰ The Supreme Court granted certiorari to resolve whether the statute “defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury

²⁴ Id. at 647.
²⁵ Id. at 648 (“A Florida trial court no more has the assistance of a jury’s findings of fact with respect to sentencing issues than does a trial judge in Arizona.”).
²⁶ Id. (quoting Poland v. Arizona, 476 U.S. 147, 156 (1986)).
²⁷ Id. at 649.
²⁸ Stevenson, supra note 13, at 1105.
²⁹ 526 U.S. 227, 229 (1999) (addressing whether a federal carjacking statute “defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict.”).
³⁰ At that time, the statute provided in relevant part:

Whoever, possessing a firearm . . . takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall – be fined under this title or imprisoned not more than 15 years, or both, if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and if death results, be fined under this title or imprisoned for any number of years up to life, or both.

verdict.”

Using the avoidance canon, the Court interpreted the statute to define three separate crimes, since grave constitutional questions would arise if the Court adopted the view that the statute was one unified crime. The Court’s concern was animated by the principle that, under the Sixth Amendment, “any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” Recognizing the inherent tension this created with the holding in Walton, the Court attempted to distinguish the two cases. Unlike the carjacking statute, the Court reasoned, the Arizona sentencing statute did not allow the judge to “[raise] the ceiling of the sentencing range available” through the finding of aggravating facts; such a finding instead operated as a “choice between a greater and lesser penalty.”

One year later in Apprendi v. New Jersey, the Supreme Court confirmed the reasoning of Jones and held that any factor that exposes a defendant to a greater punishment than that to which the jury’s finding of guilt would subject him must be found by a jury beyond a reasonable doubt. The Court then did

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31 Jones, 526 U.S. at 229.
32 The avoidance canon is a principle of construction employed by the courts to avoid constitutional issues when interpreting statutes. See United States ex rel. Att’y Gen. v. Del. & Hudson Co., 213 U.S. 366, 407 (1909) (“It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.”). The Court further explained 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. at 408.
33 See Jones, 526 U.S. at 240 (“As the Government would have us construe it, the statute would be open to constitutional doubt in light of a series of cases over the past quarter century, dealing with due process and the guarantee of trial by jury.”).
34 Id. at 243 n.6. See also id. at 252-53 (Stevens, J., concurring) (stating that it is unconstitutional “to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed” and that those facts must be found by proof beyond a reasonable doubt); id at 253 (Scalia, J., concurring) (echoing Stevens’ concurrence).
35 Id. at 251.
36 Id. Justice Kennedy in dissent openly criticized the logic of the majority’s distinction: If it is constitutionally impermissible to allow a judge’s finding to increase the maximum punishment for carjacking by 10 years, it is not clear why a judge’s finding may increase the maximum punishment for murder from imprisonment to death. In fact, Walton would appear to have been a better candidate for the Court’s new approach than is the instant case. Id. at 272 (Kennedy, J., dissenting).
37 See Apprendi v. New Jersey, 530 U.S. 466, 484-85 (2000) (holding that the same procedural safeguards allotted to each element of an offense must also extend to those factors which allow a punishment greater than what the defendant would have received on
away with the semantic distinction between “elements of the offense” and “sentencing factors” upon which the State had relied, recognizing that a “sentencing factor” within the New Jersey statute operated as “the functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict.” 38 The state’s characterization of the factor is thus irrelevant: the proper inquiry “is one not of form, but of effect.” 39 The Apprendi Court, like the majority in Jones, endeavored to square its ruling with the Walton Court’s sanction of a juryless capital sentencing statute. Rejecting the characterization of its capital sentencing jurisprudence as allowing a judge “to determine the existence of a factor which makes a crime a capital offense,” the Court asserted that those cases merely permit a judge to exercise discretion in imposing a death sentence after the jury has already “found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death.” 40 Justice O’Connor professed to be “baffle[ed]” by the majority’s characterization of Walton in her lengthy Apprendi dissent, calling the distinction “demonstrably untrue” and “unprincipled and inexplicable.” 41 Contrary to the majority’s claim, without the crucial factual determination made by the judge, an Arizona defendant convicted of first-degree murder could not receive a capital sentence. 42 In the aftermath of Apprendi, the lower courts shared O’Connor’s inability to grasp the distinction between Walton and Apprendi. 43 One court specifically remarked that the Supreme Court’s judgment “extends greater constitutional protections to noncapital, rather than capital, defendants.” 44 The struggle among the lower courts to meaningfully apply this conflicting precedent culminated in 2002, when the Court conceded that Walton could no longer remain good law. 45

the basis of the jury’s findings alone).

38 Id. at 494 n.19.
39 Id. at 494.
40 Id. at 497 (quoting Almendarez-Torres v. United States, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting) (emphasis omitted)).
41 Id. at 538-39 (O’Connor, dissenting) (“The distinction of Walton offered by the Court today is baffling, to say the least.”).
42 See id. at 538 (“Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty.”).
43 See, e.g., United States v. Promise, 255 F.3d 150, 159-60 (4th Cir. 2001) (leaving the resolution of the “perplexing” tension between Walton and Apprendi to the Supreme Court and conceding that until such resolution, the lower courts are bound to apply the law of both); Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001) (acknowledging that while “four dissenting Justices in Apprendi asserted that Apprendi effectively overruled Walton” and that “Apprendi may raise some doubt about Walton,” the lower courts may not “engage in anticipatory overruling”).
45 See Ring v. Arizona, 536 U.S. 584, 609 (2002) (overruling Walton “to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance
B. The Emergence of the Rule in Ring

The lower court proceedings in Ring starkly illustrate the tension created by Walton and Apprendi and showed the need for swift resolution by the nation’s highest court. In that case, Timothy Ring challenged the same statute at issue in Walton, arguing on the strength of Jones and Apprendi that the Arizona capital sentencing scheme violated “the Sixth and Fourteenth Amendments . . . because it entrusts to a judge the finding of a fact raising the defendant’s maximum penalty.” The Arizona Supreme Court initially observed that Apprendi and Jones created uncertainty regarding Walton’s continued viability, and then gave an account of the divergent characterizations of the Arizona law by the Apprendi majority and dissent. After analyzing the way in which the Arizona capital sentencing statute works in practice, the Arizona Supreme Court rejected the Apprendi majority’s interpretation and concluded that “the present case is precisely as described in Justice O’Connor’s dissent – Defendant’s death sentence required the judge’s factual findings.” Despite its approval of O’Connor’s analysis, the Arizona Supreme Court was bound by the Supremacy Clause, and reluctantly rejected Ring’s constitutional challenge on the grounds of Walton, which remained good law.

Recognizing that the Arizona Supreme Court’s opinion provided an opportunity for resolution of the widespread confusion among lower courts, the Supreme Court granted Timothy Ring’s petition for a writ of certiorari. After summarizing the mechanics of the Arizona statute and the various opinions in Walton, Jones and Apprendi, the Court began by acknowledging that the “Arizona court’s construction of the State’s own law is authoritative” and necessary for imposition of the death penalty”). Although the Court’s holding would resolve the divergence in its capital and non-capital sentencing jurisprudence, conflict among the lower courts would again rear its ugly head in determining whether the protections announced in Ring apply retroactively to collateral attacks on final judgments. See infra Section IV.

46 Ring, 536 U.S. at 595.


48 Id. at 1151.

49 See id. at 1152 (concluding that Walton is still controlling authority, thereby rendering the Arizona death penalty statute constitutional).

50 Ring, 536 U.S. at 596 (granting certiorari “to allay uncertainty in the lower courts caused by the manifest tension between Walton and the reasoning of Apprendi”). Ring’s challenge was a narrow one. He argued that “the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.” Id. at 597 n.4. Importantly, he did not “argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty.” Id. By framing his claim so narrowly, Ring ensured that the resolution of the case would fall squarely within the world of Apprendi.
conceding that, in the face of that construction, Walton “cannot survive the reasoning of Apprendi.”\textsuperscript{51} The Court rejected several justifications proffered by the State as evidence of the statute’s validity, echoing Apprendi’s admonition that “the relevant inquiry is one not of form, but of effect.”\textsuperscript{52} Using support gleaned from both the majority and dissenting opinions in Apprendi, the Ring Court quickly refuted the state’s remaining arguments\textsuperscript{53} and overruled Walton “to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty.”\textsuperscript{54} The Court further explained that its Sixth Amendment jurisprudence could no longer house both Walton and Apprendi: “The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant’s sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both.”\textsuperscript{55}

In a single opinion, the Supreme Court’s capital and non-capital sentencing jurisprudence converged. It became clear that the Sixth Amendment would no longer tolerate the disparate treatment of criminal defendants who faced the most severe punishments. As the states scrambled to reform their capital sentencing schemes to conform to the Ring Court’s pronouncement,\textsuperscript{56} the

\textsuperscript{51} Id. at 603.

\textsuperscript{52} Id. at 604 (quoting Apprendi, 530 U.S. at 494). Under this inquiry, the Court concluded that the Arizona statute for first-degree murder “authorizes a maximum penalty of death only in a formal sense.” The State had argued that Ring’s punishment fell within the statute’s authorized range of punishment because the Arizona law specifies only two available punishments for a conviction of first-degree murder: life imprisonment or death. See id. at 603-04; see also Ariz. Rev. Stat. Ann. § 13-1105(c) (West 2001) (imposing either life imprisonment or the death penalty as punishment for first degree murder). Not persuaded by the State’s distinction, the Court found that the statute “explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty.” Ring, 536 U.S. at 604.

\textsuperscript{53} Arizona argued in turn that the aggravating circumstances were merely “sentencing factors;” that the judge-only sentencing scheme is sanctioned by Furman’s litany of Eighth Amendment constraints; and that the use of a judge is a better guard against the arbitrary and capricious imposition of capital punishment. See id. at 605-608 (rejecting Arizona’s contention that aggravating circumstances are sentencing factors, that the Eighth Amendment places constraints on capital sentencing, and that judicial authority in death sentencing determinations is a constitutional protection against arbitrary imposition of the death penalty). For a detailed summary of the State’s arguments and the Court’s responses, see Cantarero, supra note 9, at 331-36’.

\textsuperscript{54} Ring, 536 U.S. at 609.

\textsuperscript{55} Id.

\textsuperscript{56} Although thirty-eight states had capital sentencing schemes at the time Ring was decided, only eight states left the capital sentencing determination to the judge. See 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, 382-83 (2003) (remarking that these eight states would be directly affected by Ring). Like Arizona, Idaho, Montana, and Nebraska all
courts anticipated an influx of capital punishment appellate litigation.\footnote{57} The volume of that litigation would depend, in large part, on whether the rule announced in \textit{Ring} would apply retroactively to collateral attacks on final judgments, a subject the Supreme Court did not address in \textit{Ring}.\footnote{58} Although the \textit{Ring} Court disposed of much uncertainty in the lower courts regarding the Sixth Amendment right to a jury trial, it failed to clarify the extent to which this new rule would apply to defendants already sentenced under an unconstitutional statute. The reaction of the lower courts, and the ultimate resolution of the retroactivity issue, will occupy the remainder of this Note.

\section*{II. \textit{TEAGUE} AND ITS PREDECESSORS: THE HISTORICAL DEVELOPMENT OF MODERN RETROACTIVITY JURISPRUDENCE}

Before examining the conflicting lower court holdings regarding \textit{Ring}’s retroactive application and the Supreme Court’s ultimate resolution of the issue, it is important to understand the standard that governs the retroactive application of new rules in the habeas context. Unlike the treatment given to cases on direct review, newly declared constitutional rules do not automatically apply retroactively to cases in which the defendant has received a final judgment and exhausted all direct appeals.\footnote{59} Historically, when a court announced a new rule of law, that rule received full retroactive application because “[t]he judge rather than being the creator of the law was but its discoverer.”\footnote{60} This presumption of full retroactivity shifted in the 1960s when

\footnote{57} Justice O’Connor, along with Chief Justice Rehnquist, dissented in \textit{Ring}, bemoaning the potential increase that they believed the decision would wreak on lower court’s workload. \textit{See Ring}, 536 U.S. at 620 (O’Connor, J., dissenting) (anticipating serious effects in the aftermath of \textit{Ring} on the grounds that \textit{Apprendi} “threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary”).

\footnote{58} See infra Part IV.

\footnote{59} See Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (“[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . .”); United States v. Johnson, 457 U.S. 537, 556 n.16 (1982) (noting that whether a new rule is a clear break from the past does not necessarily indicate whether a new rule results in actual inequality to similarly situated defendants).

\footnote{60} Linkletter v. Walker, 381 U.S. 618, 623 (1965) (citing John Shipman Gray, The Nature and Sources of the Law 222 (1st ed. 1909)).
the Supreme Court, in the wake of a series of decisions extending constitutional protection in the criminal field, became concerned with the disruptive consequences of applying each new rule retroactively; lower courts could no longer comfortably rely on good-faith application of existing law to prevent an influx of appellate litigation.61

The Supreme Court’s attempts to curb the impact of retroactive application and to create a doctrine of habeas retroactivity first arose in Linkletter v. Walker.62 The Court began by examining the history of retroactivity and remarking that “[a]t common law there was no authority for the proposition that judicial decisions made law only for the future.”63 Despite its concession that “heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule,” the Court articulated its belief that “the Constitution neither prohibits nor requires retrospective effect.”64 Instead, citing the interests of justice, the Court adopted a balancing test: to determine retrospective application of new rules, a court must evaluate “the purpose of the [new] rule; the reliance placed upon the [former] doctrine; and the effect on the administration of justice.”65 The Court then applied its balancing test and found that the relevant rule did not warrant retrospective application to collateral attacks on final judgments, and denied relief to Petitioner Linkletter.66

61 See Mackey v. United States, 401 U.S. 667, 676 (1971) (Harlan, J., concurring) (describing the Court’s creation of its “retroactivity” doctrine as “the product of the Court’s disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field”). For an argument that the net benefits of retroactive application outweigh any reliance problems that emerge when the Court announces new rules, see generally Bradley Scott Shannon, The Retroactive and Prospective Application of Judicial Decisions, 26 HARV. J.L. & PUB. POL’Y 811 (2003) (concluding that “a firm rule of retroactive application of judicial decisions in all civil and criminal cases on direct review is superior to both prospective and mixed methodologies . . . .”).

62 381 U.S. at 627-29 (holding that cases on direct review will receive the benefit of changes in the law but that the effect of the new rule on collateral attacks must be determined by a three-part balancing test). Linkletter argued that he should receive the benefit of the extension of the Fourth Amendment to state courts, as in Mapp v. Ohio, 367 U.S. 642 (1961). The Linkletter Court addressed the question of whether such an extension “operates retrospectively upon cases finally decided in the period prior to Mapp.” 381 U.S. at 619-20. A case is final if “the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed” prior to the announcement of a new rule. Id. at 622 n.5.

63 Linkletter, 381 U.S. at 622 (“I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years.”) (citing Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

64 Id. at 628-29.

65 Id. at 636.

66 See id. at 639-40 (“[T]hough the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it.”). In a bitter dissent,
A series of cases following *Linkletter* created “many incompatible rules and inconsistent principles”\(^67\) to govern *Linkletter*’s notion that new constitutional criminal rules do not require retroactive application,\(^68\) prompting Justice Harlan to call for an examination and reworking of the retroactivity doctrine.\(^69\) In a concurring opinion in *Mackey v. United States*,\(^70\) Justice Harlan refined the preliminary criticisms he expressed in *Desist v. United States*\(^71\) and proposed

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\(^68\) See, e.g., *Fuller v. Alaska*, 393 U.S. 80, 81 (1968) (restricting application of a new rule to only those cases where tainted evidence had not yet been introduced into evidence at trial); *Stovall v. Denno*, 388 U.S. 293, 296 (1967) (requiring retroactive application only to the petitioner in the case in which the new rule was announced, and otherwise applying the rule prospectively to future conduct); *Johnson v. New Jersey*, 384 U.S. 719, 732 (1966) (applying *Linkletter*’s test to cases on direct appeal, and holding that the new constitutional protections effect only cases in which the commencement of trial followed the date of decision of the new rules); *Tehan v. United States*, ex rel. *Scott*, 382 U.S. 406, 409 n.3, 419 (1966) (requiring retroactive effect of a new rule to all cases pending on direct review, but denying any other retroactive application of the new rule).

\(^69\) See *Desist*, 394 U.S. at 258 (Harlan, J., dissenting) (“I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. ‘Retroactivity’ must be rethought.”).

\(^70\) 401 U.S. 667, 701-02 (1971) (Harlan, J., concurring) (admonishing the Court for treating direct and collateral review as “one piece” and giving the wit of habeas corpus “almost boundless sweep”).

\(^71\) 394 U.S. at 258-69 (Harlan, J., dissenting) (urging that a new rule must at least be applied to all cases which “are still subject to direct review” by the Supreme Court, and listing various considerations which courts should use to decide whether to apply new rules retroactively in habeas corpus petitions). Justice Harlan approved of the conclusion in *Linkletter* that cases on direct review must receive the benefit of new rules of constitutional law. See *id.* at 258 (“[A]ll new rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to review by this Court at the time the ‘new’ decision is handed down.”). Justice Harlan further offered some observations as to how retroactivity should operate in the habeas context. *Id.* at 260 (offering “some of the considerations which appear . . . to lay bare the complexities of the retroactivity problem on habeas”). He asserted that “‘new’ constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas.” *Id.* at 262. Harlan also emphasized the importance of determining whether a decision announces a new rule or merely applies a well-established principle to a new set of facts. See *id.* at 263-64 (suggesting that in the former situation, the new rule should be applied retroactively to all habeas cases).
an alternative to Linkletter’s three-part balancing test. According to Harlan, “[t]he relevant frame of reference . . . is not the purpose of the new rule whose benefit the petitioner seeks, but instead the purposes for which the writ of habeas corpus is made available.” Mindful of the competing interests of finality and correcting constitutional error, Justice Harlan concluded that the purposes of habeas review are satisfied by applying the law in effect at the time that a conviction becomes final, rather than adjudicating habeas petitions “on the basis of intervening changes in constitutional interpretation.” Justice Harlan confined the reach of the habeas retroactivity bar in two significant, if abstract, ways. First, he proposed that courts apply rules that prohibit the state from punishing “certain kinds of primary, private individual conduct” retroactively to collateral attacks on final judgments. Second, “the writ ought always to lie for claims of nonobservance of those procedures that . . . ‘are implicit in the concept of ordered liberty.’” Justice Harlan’s lengthy concurrence would ultimately shape the future of the Supreme Court’s habeas retroactivity jurisprudence.

The Supreme Court supplied a modern habeas retroactivity framework in 1988 in Teague v. Lane. Prompted by increasing concerns that application of the prevailing retroactivity analysis lacked consistency in its application, the Court adopted Justice Harlan’s view of retroactivity that “[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” The Supreme Court, like Justice Harlan, grounded the rationale behind this presumptive bar in balancing the underlying factors that shape the habeas doctrine.

The Court found considerations of finality particularly persuasive in the context of the criminal justice system, stating that “[w]ithout finality, the

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72 See Mackey, 401 U.S. at 691-95 (Harlan, J., concurring) (asserting that retroactive application in the habeas context should extend to rules prohibiting the state from punishing private, individual conduct and to claims which allege the violation of procedures implicit in the concept of ordered liberty).

73 Id. at 682.

74 Id. at 688-89. Justice Harlan applied a policy balancing test to criticize the unsettled case law of the court with respect to retroactivity. Id.

75 Id. at 692-93 (“There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.”).

76 Id. at 693 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (explaining how changes in social and judicial understanding of bedrock principles can require a re-examination of a final conviction).

77 489 U.S. 288, 300 (1988) (clarifying the existing retroactivity regime and holding that whether or not a new rule applies retroactively should be determined at the time of the decision which produced the new rule). Clearly, the Court has not followed this “rule” in all cases. The Court remained silent in Ring as to whether the rule it announced would mandate retroactive application.

78 Id. at 310. The Court found this conclusion dictated by a cost-benefit analysis. Id.
criminal law is deprived of much of its deterrent effect.” Further, the likelihood of imposing high costs on the States, and of frustrating lower courts that faithfully apply existing law only to have decisions uprooted by the discovery of new constitutional mandates in a habeas proceeding, persuaded the Court to deny retroactive application to new procedural rules. In engaging in this cost-benefit analysis, however, the Court did not forget that the principal function of habeas corpus review is “to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.”

The Court adopted two narrow exceptions to the presumptive bar against retroactive application of new procedural rules which mirrored the language of Justice Harlan’s earlier concurrence. First, “a new 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.’” Second, new rules may require retroactive application if they constitute “watershed rules of criminal procedure.” These exceptions, the Court asserted, serve to safeguard the accuracy of convictions and ensure that only rules which “implicate the fundamental fairness of the trial” will be applied retroactively. Although these exceptions are seemingly narrow, the Court did not foreclose the possibility that a new rule of criminal procedure would receive retroactive treatment for collateral attacks on final judgments.

79 Id. at 309 (noting that the policy in favor of finality is weaker, but clearly not non-existent, when life and liberty are at risk in the criminal context).
80 See id. at 309-10.
81 Id. at 312 (quoting Desist v. United States, 394 U.S. 244, 262 (1969)).
82 Id. at 312 (“We believe it desirable to combine the accuracy element of the Desist version of the second exception with the Mackey requirement that the procedure at issue must implicate the fundamental fairness of the trial.”).
83 Id. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).
84 Id. (altering and then adopting the standard Justice Harlan proposed in Mackey by combining it with his earlier statements in Desist on procedures which would increase the likelihood of an accurate conviction). Justice Stevens noted in his concurrence in Teague that “[t]he plurality wrongly resuscitates Justice Harlan’s early view.” Id. at 321 (Stevens, J., concurring). Stevens further remarked that “a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings.” Id.
85 Id. at 312.
86 The case the Court considered in Teague was not a capital case, and the plurality opinion specifically noted that it expressed no views as to how the retroactivity framework it adopted would be applied in the capital sentencing context. See id. at 314 n.2 (disagreeing with the notion that finality concerns are not applicable in the capital sentencing context). In 1989, subsequent to the decision in Teague, the Court confirmed the analysis it set out in its plurality opinion in Teague and extended the framework to the capital sentencing context. See Penry v. Lynaugh, 492 U.S. 302, 313 (1989) (reciting the Teague court’s belief...
Court did, however, severely curtail the ability of a habeas petitioner to receive the benefit of new constitutional rules of criminal procedure through retroactive application.

The presumptive Teague bar against full retroactive effect “by its terms applies only to procedural rules.”87 New rules of substantive criminal law, on the other hand, are applied retroactively.88 Therefore, the threshold inquiry a court must resolve prior to performing a Teague analysis is whether the rule announced is substantive or procedural.89 The substance-procedure distinction is difficult to articulate, and plagues legal scholars and courts in both the criminal and civil context.90 In simple terms, a substantive rule is one which “alters the scope or modifies the applicability of a substantive criminal statute” while a procedural rule “impacts the operation of the criminal trial process.”91

Once a court determines that the rule announced is procedural, the court conducts the Teague inquiry in three steps.92 First, a court must determine the

that “a criminal judgment necessarily includes the sentence imposed” and that finality concerns are equally compelling when collateral attacks on capital sentencing are at issue).

87 Bousley v. United States, 523 U.S. 614, 620 (1998) (asserting that the Teague doctrine is inapplicable when the Supreme Court “decides the meaning of a criminal statute enacted by Congress”).

88 Id.

89 Courts vary in their treatment of the substance-procedure inquiry. Some adopt the view that it is a threshold inquiry. Under this view, the Teague framework is inapplicable if the new rule is substantive rather than procedural. See United States v. Barajas-Diaz, 313 F.3d 1242, 1245 (10th Cir. 2002) (refusing to apply a Teague analysis to the new rule of substantive law announced in Richardson v. United States, 526 U.S. 813 (1999)). Other courts confront the substance-procedure inquiry when addressing the first of Teague’s two exceptions, which provides that a rule may apply retroactively if it denies the State the power to punish an entire category of primary conduct. See, e.g., McIntyre v. Trickey, 938 F.3d 899, 903-04 (8th Cir. 1991) (applying Teague’s first exception to a conviction that would constitute a violation of double jeopardy). The former view is more persuasive because the Teague court expressly states that a new procedural rule may apply retroactively if it fits within one of the two exceptions provided. Teague, 489 U.S. at 310 (“Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.”). From this language, it appears that the Court has made the substance-procedure determination prior to reaching the two exceptions.

90 Although the substance-procedure dichotomy is crucial in the habeas retroactivity context, law students probably first encountered this tricky issue when they grappled with it while studying choice of law in Civil Procedure. In federal cases grounded in diversity jurisdiction, federal courts may use federal procedural law, but are bound to apply state substantive law. See generally Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

91 Summerlin v. Stewart, 341 F.3d 1082, 1100 (9th Cir. 2003).

92 See, e.g., O’Dell v. Netherland, 521 U.S. 151, 156 (1997) (“The Teague inquiry is conducted in three steps.”); Summerlin, 341 F.3d at 1108-10 (determining Summerlin’s conviction finality date, surveying the legal landscape at that time, and applying the Teague exceptions).
date on which a petitioner’s conviction became final.\textsuperscript{93} Second, if the conviction became final prior to the rule, a preliminary question facing any court applying \textit{Teague} is whether the rule that emerged from a case is “new.”\textsuperscript{94} The framework the Court announced is relevant only when the rule announced is a “new” rule.\textsuperscript{95} Although it is admittedly difficult to determine what constitutes a new rule, the Supreme Court did issue some general guidelines: a rule is “new” for retroactivity purposes if “it breaks new ground or imposes a new obligation on the States or the Federal Government” or “if the result was not \textit{dictated} by precedent existing at the time the defendant’s conviction became final.”\textsuperscript{96} A rule which “breaks new ground” emerges, for example, when the Supreme Court overrules its own precedent, although this rarely occurs.\textsuperscript{97} The more common, though arguably more elusive, new rules are those which were not dictated by then-existing precedent.\textsuperscript{98} The Court has clarified this to mean that a rule is new for \textit{Teague} purposes unless “a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court.”\textsuperscript{99}

Finally, after resolving the issue of “newness,” the court must decide whether the new procedural rule falls within the narrow boundaries of \textit{Teague}’s two exceptions. To qualify for the first exception to \textit{Teague}’s directive of non-retroactivity, a rule must either deprive the State of the power to punish a certain category of primary conduct or prohibit “a certain category of punishment for a class of defendants because of their status or offense.”\textsuperscript{100} The second, and more confining, of \textit{Teague}’s exceptions provides that an otherwise barred rule shall be applied retroactively if it concerns procedures that are fundamental to the fairness and accuracy of a criminal proceeding.\textsuperscript{101}

\textsuperscript{93} See \textit{O’Dell}, 521 U.S. at 156; see also Joshua Dressler, \textit{Understanding Criminal Procedure} § 4.01(D)(2)(b)(i) (3d ed. 2002) (describing the order a court follows when performing a \textit{Teague} inquiry).
\textsuperscript{94} \textit{O’Dell}, 521 U.S. at 156. (laying out the second step of the \textit{Teague} test).
\textsuperscript{95} \textit{Teague v. Lane}, 489 U.S. 288, 310 (1989).
\textsuperscript{96} Id. at 301.
\textsuperscript{97} See Dressler, supra note 93, § 4.01(D)(2)(b)(ii) (explaining the \textit{Teague} standards for determining when a rule is “new” for retroactivity purposes). Although it is rare for the Supreme Court to overrule itself, the Court did so when it decided \textit{Ring}.
\textsuperscript{98} Id.
\textsuperscript{99} \textit{O’Dell}, 521 U.S. at 156 (clarifying the test for \textit{Teague} newness).
\textsuperscript{100} \textit{Penry v. Lynaugh}, 492 U.S. 302, 330 (1989) (expounding on the meaning of the first \textit{Teague} exception by analogizing classification of categories of offenders to putting certain types of conduct beyond the State’s purview). An example of this kind of exception would be a new rule which prohibits the execution of mentally retarded persons; courts would apply this rule retroactively to cases on collateral review. For additional examples of rules which fit under \textit{Teague}’s first exception, see Dressler, supra note 93, § 4.01(D)(2)(b)(i).
\textsuperscript{101} \textit{Teague}, 489 U.S. at 311-14 (deriving the second \textit{Teague} exception from Justice Harlan’s framework and explaining how it would apply in a range of cases). The \textit{Teague}
This is not to say that any procedure that might increase the accuracy of a conviction or the fairness of a proceeding should have retroactive effect. Rather, the exception encompasses only those procedures that are “implicit in the concept of ordered liberty.” Should a rule qualify for either exception, that new rule would apply retroactively to cases on collateral review. If a new procedural rule cannot meet the standards required by either of Teague’s exceptions, it cannot be applied retroactively.

Teague and its progeny have attempted to create a retroactivity jurisprudence that is manageable and applicable to a variety of rules and cases. In theory, the lines between new and old and between substance and procedure, while difficult to draw, do exist. Similarly, the difference between a “watershed” rule of criminal procedure and a procedure that merely marginally increases fairness or accuracy seems clear. In practice, however, the framework is unwieldy and inconsistent in its application. The distinctions the Court so carefully crafted blur together. Nowhere is this haziness more evident than in the capital sentencing context. The lower court cases that have addressed the issue of Ring’s retroactivity illustrate how the current retroactivity doctrine, derived from Teague, is ill-equipped to deal with the complex and unique questions that lower courts face when the difference between life and death hinges on a calendar date.

III. Ring Retroactivity Analysis in the Lower Courts

Despite the Teague Court’s admonition that retroactive application of a new rule should be addressed when the rule is announced, the Supreme Court in Ring failed to issue any direction to the lower courts as to how they should
handle the inevitable habeas challenges that would result from the Court’s holding. Guided only by the Supreme Court’s amorphous habeas retroactivity jurisprudence, the lower courts struggled to locate the Ring rule within Teague’s framework. Not surprisingly, lower courts that have addressed the issue of Ring’s retroactive effect have reached divergent conclusions.\textsuperscript{103} The conflicting holdings and analyses of the Ninth and Eleventh Circuits illustrate how two courts, both applying the same habeas retroactivity jurisprudence to the same rule, can reach irreconcilable conclusions regarding the question of Ring’s retroactivity.

In Turner v. Crosby, decided in July of 2003, the Eleventh Circuit considered whether Ring should apply retroactively to benefit a petitioner sentenced in 1985 under Florida’s hybrid capital sentencing scheme.\textsuperscript{104} Notwithstanding its holding that Turner’s Ring claim was procedurally barred,\textsuperscript{105} the court argued in the alternative that the Teague doctrine precludes retroactive application of the rule in Ring.\textsuperscript{106} After remarking that Ring’s retroactivity under the Teague framework was a matter of first impression in the Eleventh Circuit, the court stated that both the Arizona and Nevada Supreme Courts rejected the possibility of Ring’s retroactive application to collateral attacks on final judgments.\textsuperscript{107} Further, the court asserted that it had previously held that Apprendi, the case from which Ring derived, announced a new procedural rule and would not apply retroactively.\textsuperscript{108}

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\textsuperscript{103} See, e.g., Summerlin v. Stewart, 341 F.3d 1082, 1099-1121 (9th Cir. 2003) (holding that Ring announced a substantive rule and should be applied retroactively, and, in the alternative, fits within the second Teague exception for “watershed” rules of criminal procedure); Turner v. Crosby, 339 F.3d 1247, 1286 (11th Cir. 2003) (rejecting petitioner’s contention that the rule in Ring should be applied retroactively on the grounds that it is a new rule of criminal procedure which fails to meet either of Teague’s stated exceptions); see also Palmer v. Clarke, 293 F. Supp. 2d 1011, 1057 (D. Neb. 2003) (concluding that “Ring is all about substance” and must therefore be applied retroactively).

\textsuperscript{104} Turner, 339 F.3d at 1279-86 (deciding, without reaching the underlying merits of Turner’s claim, that the Florida hybrid system is irreconcilable with Ring; that Turner’s Ring claim is procedurally barred; and that, in the alternative, Teague prevents Ring’s retroactive application). Florida’s capital sentencing structure permitted a jury to issue a sentencing recommendation to the judge, but left the final determination of the actual sentence to the judge alone. See supra notes 12-20 and accompanying text.

\textsuperscript{105} Turner, 339 F.3d at 1280-82 (asserting that Turner’s failure to raise a Sixth Amendment claim in his state court proceedings challenging the constitutionality of Florida’s capital sentencing structure effectively prevented him from raising such a claim at a later collateral proceeding).

\textsuperscript{106} Id. at 1282 (“Ring does not apply retroactively to Turner’s § 2254 petition in any event.”).

\textsuperscript{107} Id. at 1283 (citing State v. Towery, 64 P.3d 828 (Ariz. 2003) (describing the state’s “more lenient” applications of Teague) and Colwell v. State, 59 P.3d 463 (Nev. 2002)).

\textsuperscript{108} See id. at 1283 (recounting and accepting the reasons for classifying the Apprendi holding as procedural) (citing McCoy v. United States, 266 F.3d 1245, 1258 (11th Cir. 2001)).
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Employing the Teague analysis, the court first approached the substance-procedure dichotomy. The court concluded that Ring “altered only who decides whether any aggravating circumstances exist and, thus, altered only the fact-finding procedure.” In support of its supposition that Ring announced only a procedural rule, the court found persuasive the conclusions of other jurisdictions “that because Apprendi was a procedural rule, it axiomatically follows that Ring is also a procedural rule.” Moreover, despite its characterization of Ring as an extension of Apprendi, the court found that Ring announced a new rule for Teague purposes because it explicitly overruled Walton. After determining that Ring announced a new rule of criminal procedure and was thus presumptively barred from retroactive application, the court turned to Teague’s two narrow exceptions. Dismissing the applicability of Teague’s first exception, the court focused on whether Ring merited retroactive application through the second exception as a “watershed” rule of criminal procedure. Influenced by its prior conclusion that Apprendi failed to meet Teague’s second exception, the court stated that “Ring is based on the Sixth Amendment right to a jury trial and not on a perceived, much less documented, need to enhance accuracy or fairness of the fact-finding in a capital sentencing context. Ring simply does not fall within the ambit of the second Teague exception.”

Shortly after the Eleventh Circuit’s decision in Turner, the Ninth Circuit confronted the issue of Ring’s retroactivity in Summerlin v. Stewart and reached conclusions fundamentally at odds with the Turner ruling. After an initial discussion of the Supreme Court’s habeas retroactivity jurisprudence, Judge Thomas, writing for the en banc panel, turned to Teague’s preliminary

109 Id. at 1284.
110 Id. (citing Cannon v. Mullin, 297 F.3d 989, 994 (10th Cir. 2002) and Towery, 64 P.3d at 832-33).
111 See Turner, 339 F.3d at 1284-85 (“[P]rior to the outcome in Ring, courts had been upholding judge-imposed death sentences in Walton and its progeny.”).
112 See id. at 1285 (concluding that Ring does not trigger the first exception because it fails to remove primary private conduct from the authority of the State).
113 See id. (stating that “Ring, like Apprendi, ‘is not sufficiently fundamental to fall within Teague’s second exception’”) (quoting McCoy, 266 F.3d at 1257).
114 Id. at 1286 (rejecting the fundamentality of the Ring rule). The Court focused its “second exception” analysis on whether the new rule improved the accuracy of the sentencing procedure or significantly impacted the “fundamental fairness” of the proceeding. Id. at 1285-86 (ruling that the “[p]re-Ring sentencing procedure does not diminish the likelihood of a fair sentencing hearing”).
115 See Summerlin v. Stewart, 341 F.3d 1082, 1099-1121 (9th Cir. 2003) (finding that Ring announced a substantive rule which applies retroactively to final decisions because it redefined the requisite elements for capital murder under the Arizona statute). See generally Terrence T. Egland, Case Note, Cases of Interest: Summerlin v. Stewart, 16 CAP. DEF. J. 319 (2003); Ninth Circuit Holds That the Supreme Court’s Decision in Ring v. Arizona Applies Retroactively to Cases on Habeas Corpus Review, 117 HARV. L. REV. 1291 (2004).
The court recognized that while the distinction is crucial in the habeas context, substance and procedure are not mutually exclusive. By mandating that a jury, and not a judge, must determine the existence of any aggravating factors in a capital case, the court reasoned, Ring certainly addressed the requirements of capital trial procedures. More importantly, in the context of Arizona criminal law, Ring’s holding arguably had significant substantive impact. Ring, by finding that Arizona’s aggravating factors, in operation, are functionally equivalent to an element of a greater offense, “reintroduced ‘capital murder’ as a separate substantive offense under Arizona law, redefining, in the process, what the substantive elements of this ‘separate offense’ of capital murder are.” In this manner, the court reasoned, Ring “decided the meaning of a criminal statute” and therefore Teague does not bar its retroactive application to collateral attacks on constitutionally infirm death sentences decided under the Arizona capital sentencing statute.

After characterizing the holding in Ring as substantive and, therefore, presumptively retroactive, the court nonetheless provided a complete Teague analysis of the procedural elements of the Ring Court’s holding. The court first found that a state court in 1984, at the time of Summerlin’s sentencing, would have been bound by the Proffitt line of cases, which held that the Constitution did not require jury sentencing in the capital context.

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116 See Summerlin, 341 F.3d at 1099-1108 (explaining Ring’s substantive effect and comprehensively criticizing any claim that it is procedural).

117 See id. at 1101 (admitting that occasionally, in the habeas context, “there are those cases that do ‘not fall neatly under either the substantive or procedural doctrinal category’”) (quoting United States v. Wood, 986 F.2d 669, 677 (3d Cir. 1993)).

118 See id. at 1101 (reasoning that the allocation of responsibility between judge and jury is certainly procedural).

119 See id. at 1101-02 (stating that Ring effectively required a change in the Arizona murder statute). The Summerlin court, unlike the Turner court, sought to distinguish Ring from Apprendi. The Summerlin court claimed that “the substantive basis for Arizona’s capital sentencing statute was precisely at issue in Ring.” Id. at 1101. In contrast, the Supreme Court in Apprendi expressly remarked that “the substantive basis for New Jersey’s enhancement is not at issue.” Id. (quoting Apprendi, 530 U.S. at 475). The retroactivity of Apprendi, and whether its holding announced a procedural or substantive rule, has not yet been resolved by the Supreme Court.

120 Id. at 1106 (explaining why Ring is at least in part substantive).

121 Id. (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

122 Id. at 1106. Cf. id. at 1126 (Rawlinson, J., dissenting) (“[M]erely saying that creation of a separate substantive criminal offense renders a rule one of substance rather than procedure does not make it so.”).

123 See id. at 1108-1122.

124 See id. at 1108-09 (agreeing with the Arizona Supreme Court’s earlier finding that Proffitt, at the time of Summerlin’s sentencing, foreclosed Summerlin’s challenge to the constitutionality of Arizona’s sentencing scheme).
Therefore, “there is no doubt that Ring announced a new rule as that term is construed for Teague purposes.” 125 Proceeding to the third and final stage of the Teague analysis, the Ninth Circuit, just like the Eleventh Circuit before it, swiftly determined that the first exception was inapplicable to Ring. 126 Although its analysis of Ring as a new rule of criminal procedure followed the Turner court’s reasoning thus far, the two courts diverged sharply in their treatment of Teague’s second exception.

Summerlin bifurcated the second exception analysis. First, the court considered the likelihood that the rule announced in Ring would increase the accuracy of sentencing proceedings. 127 Acknowledging the special Eighth Amendment limitations on capital sentencing procedures, 128 the court concluded that “fact-finding by a jury, rather than by a judge, is more likely to heighten the accuracy of capital sentencing proceedings in Arizona.” 129 Next, the court held that the rule in Ring satisfies the second prong of Teague’s second exception because it constitutes a “watershed rule” that alters our understanding of the Sixth Amendment right to a jury trial. 130 Ring “affects

125 Id. at 1109 (asserting that Ring constituted a new rule in part because Supreme Court, in deciding Ring, indisputably overruled its prior decision in Walton).

126 Id. (“Because Ring did not ‘decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons,’ the first exception is inapplicable to the instant ruling.”) (quoting Graham v. Collins, 506 U.S. 461, 477 (1993) (citations omitted)).

127 Id. at 1109-10 (“To fall within the second Teague exception, a new rule must: (1) seriously enhance the accuracy of the proceeding and (2) alter our understanding of bedrock procedural elements essential to the fairness of the proceeding.”) (citing Sawyer v. Smith, 497 U.S. 227, 242 (1990)). According to the Summerlin court, a new rule must satisfy both elements of the second Teague exception inquiry.

128 Summerlin, 341 F.3d at 1110 (stating that “the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a non-capital case”) (quoting Gilmore v. Taylor, 508 U.S. 333, 342 (1993)).

129 Id. (arguing that such an increase in accuracy triggers the second Teague exception). The Court asserted that “[s]ubjecting penalty-phase presentations of evidence to the rigors and restrictions of a jury trial necessarily will improve the quality of presentation and diminish the risk of an erroneous verdict.” Id. at 1113. The bizarre nature of Summerlin’s trial proceedings supports the Court’s conclusion. Summerlin’s sentence was determined “by a drug-impaired judge, habituated to treating penalty-phase trials the same as non-capital sentencing, who relied upon inadmissible evidence in making the factual findings that sentenced Summerlin to death.” Id. at 1115-16. The Court conceded that no sentencing system is perfect, but insisted that the use of a jury in capital sentencing reduces the risk of error by placing the determination in the hands of twelve individuals rather than at the whim of a judge. Id. at 1116 (adding this consideration to the moral judging and fact finding capabilities of the jury in concluding jury determinations would generally be more accurate).

130 See id. at 1116 (“Ring established the bedrock principle that, under the Sixth Amendment, a jury verdict is required on the finding of aggravating circumstances necessary to the imposition of the death penalty.”).
the structure of every capital trial and has rendered unconstitutional every substantive statute in conflict with its dictates.”

By altering our understanding of the Sixth Amendment right to a jury trial, the rule in *Ring* “redefined the structural safeguards implicit in our concept of ordered liberty.” Finally, the court respectfully disagreed with the Eleventh Circuit’s conclusions and held that the retroactive application of *Apprendi* does not govern the court’s analysis of *Ring*.

In June of 2004, the Supreme Court resolved the circuit split and reversed the Ninth Circuit’s holding that *Ring* required retroactive application. The Court, in an opinion authored by Justice Scalia, first reiterated the basic rules of retroactivity: Unlike new substantive rules, he reasoned, new rules that are merely procedural generally do not merit retroactive application. Unlike the Ninth Circuit, the Court concluded that *Ring* was unequivocally a rule of procedure. Rather than “alter[ing] the range of conduct or the class of persons that the law punishes,” *Ring* merely “allocate[d] decisionmaking authority.”

Such allocation, the Court argued, placed *Ring* squarely within the class of “prototypical procedural rules.”

Dismissing the Ninth Circuit’s claim that *Ring* modified the structure of Arizona’s capital murder statute by making aggravating factors elements of the offense, the Court stated:

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

After characterizing the *Ring* rule as procedural, the Court quickly disposed

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131 *Id.* at 1119 (terming *Ring* “a sharp reversal of course”). The Court analogized *Ring*’s effect on capital murder cases to that of *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), which applied retroactively to collateral attacks on final judgments. *Id.* at 1120 (making the implicit argument that a shift in who makes a given decision is as significant as the level of discretion given the decision-maker).

132 *Id.* at 1121.

133 *Id.*: The Court noted several differences between *Apprendi* and *Ring* to support its conclusion that *Apprendi*’s retroactivity analysis does not apply to *Ring*: *Apprendi* announced a procedural rule; *Apprendi* errors are not structural; *Apprendi* failed to significantly increase accuracy; *Apprendi* affected only non-capital cases; and the Eighth Amendment does not require a heightened analysis in *Apprendi* situations as it does in the capital context. *See id.*


135 *See id.* at 2523 (“New rules of procedure… generally do not apply retroactively. They… merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.”).

136 *Id.* (finding no change in the range of conduct punishable by death post-*Ring*).

137 *See id.* (citing *Gas Perini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996)).

138 *Id.* at 2524 (emphasis in original).
of Summerlin’s remaining argument that Ring fell within the Teague exception reserved for “watershed” rules of criminal procedure. The issue, the Court clarified, is not whether juries or judges are the better fact-finders, but “whether judicial factfinding so ‘seriously diminish[s]’ accuracy that there is an ‘impermissibly large risk’ of punishing conduct the law does not reach.”

Acknowledging disagreement among scholars and judges over whether juries are in fact superior fact-finders, the majority declared that “we cannot confidently say that judicial factfinding seriously diminishes accuracy” and cited earlier precedent to bolster its conclusion that if “a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.” Accordingly, the Court surmised, the procedural rule announced in Ring did not merit an exception to the Teague bar against retroactive application to collateral attacks on final judgments.

Despite the Supreme Court’s resolution of the question of Ring’s retroactivity under Teague, the current retroactivity framework remains

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139 Id. at 2524-25.
140 Id. at 2525 (quoting Teague v. Lane, 489 U.S. 288, 312-13 (1988)).
141 See id. (citing conflicting opinions of scholars and judges concerning judicial fact-finding and the “mixed reception that the right to jury trial has been given in other countries” for the proposition that judicial fact-finding does not “produce an ‘impermissibly large risk’ of injustice”).
142 Id.
143 See DeStefano v. Woods, 392 U.S. 631 (1968) (refusing retroactive application of a new rule that extended the Sixth Amendment jury trial right to the states and declining to hold that every trial held before a judge rather than a jury is unfair).
144 Schriro, 124 S. Ct. at 2525-26.
145 In a dissent joined by Justices Stevens, Souter, and Ginsburg, Justice Breyer attacked the majority’s conclusion that Teague’s concern with accuracy does not require the retroactive application of Ring. See id. at 2527-28 (Breyer, J., dissenting). Characterizing the Teague exception’s applicability as a question of whether the Ring rule is “central to an accurate determination” that death is a legally appropriate punishment,” Justice Breyer argued that the factfinder in a death penalty case must make “death-related, community-based value judgments.” Id. Because a death sentence must reflect the conscience of the community, Breyer reasoned, “a jury is better equipped than a judge to identify and apply those standards accurately.” Id. at 2528. In addition, Justice Breyer asserted that the very purpose behind retroactivity jurisprudence suggests that retroactive application of Ring is appropriate. Citing Teague as “an effort to balance competing considerations,” Justice Breyer concluded that concerns of uniformity and fair procedures take on special importance in death penalty cases and outweigh the general interest in finality and preservation of resources. See id. at 2528-30. The majority addressed and dismissed the dissent’s concerns in a cursory manner: “Much of this analysis is not an application of Teague, but a rejection of it, in favor of a broader endeavor to “balance competing considerations. . . . Even were we inclined to revisit Teague in this fashion, we would not agree with the dissent’s conclusions.” Id. at 2526. The majority specifically recognized an opportunity to reassess Teague’s applicability to capital sentencing and declined to do so.
unwieldy and ill-suited to questions of capital sentencing. The earlier analysis of the Ninth and Eleventh Circuits aptly demonstrates the problems inherent in the Teague framework. Presumably, both circuits faithfully applied the Teague analysis – as they understood it – to the rule announced in Ring. What, then, explains the contrary results reached by the Ninth and Eleventh circuits? The question of Ring’s retroactivity is an issue on which reasonable jurists can differ. An analysis of the Turner and Summerlin opinions suggests that the courts struggled to fit the Ring rule within the scope of the existing retroactivity framework. It is difficult, when viewing the circuit courts’ analyses, to determine which interpretation of Ring, viewed through the lens of current retroactivity jurisprudence, is correct. A careful exploration of the justifications behind the circuit courts’ conclusions suggests that Teague is not the appropriate framework with which to analyze the question of Ring’s retroactivity.

IV. Teague’s Fundamental Flaws in its Application to Ring

Some might suggest that the judges’ personal views on the death penalty colored their application of the Teague framework. Judges undoubtedly approach capital sentencing issues differently; in some cases reflecting societal disdain for convicted murderers, while in others showing hesitancy and restraint based on the finality and severity of the punishment. It is more likely, however, that the disparate conclusions reached by the circuit courts derive from Teague’s failure to articulate meaningful and easily applicable distinctions. The ambiguities inherent in current habeas retroactivity jurisprudence were highlighted when applied to the rule in Ring v. Arizona. Standardless application of the Teague framework to rules such as Ring results in the very arbitrariness and capriciousness the Supreme Court proscribed in Furman v. Georgia. The Supreme Court’s current habeas retroactivity jurisprudence fails in its application to rules that are, like Ring’s, both old and new, and that touch on both substance and procedure. Such a perfect storm of conflicting categories embodied in a single rule creates an opening for judges to use their personal opinions to bridge the gaps in the law; without a clear legal framework, there is little else for a judge to rely on in making a retroactivity determination.

The resolution of Teague’s threshold question of substance versus procedure in Ring illustrates how the determination of whether a habeas petitioner lives or dies depends on how a court chooses to frame the Ring Court’s holding. As the Ninth Circuit demonstrated, in the context of Arizona’s capital sentencing statute, Ring did not merely assign a procedural function to a jury rather than to

146 See United States v. Battle, 291 F. Supp. 2d 1367, 1373 (N.D. Ga. 2003) (“In the event of a split of authority between circuits, an issue is classified as debatable among reasonable jurists.”).

147 408 U.S. 238, 274 (1972) (articulating basic premise that an arbitrary punishment violates common law and Constitutional protections for criminal defendants).
Instead, the ruling arguably redefined the underlying substantive offense. The blurred line between substance and procedure is readily apparent in the Ninth Circuit’s Summerlin analysis. In other Ring-affected states with subtle differences in their capital sentencing regimes, the validity of the Ninth Circuit’s contention in Summerlin that Ring redefines the elements of a crime may be dubious. Furthermore, in contrast to the Ninth Circuit’s extensive examination of the statute at issue, the Eleventh Circuit in Turner relied heavily on its prior characterization of Apprendi to determine that Ring announced a procedural rule. The Supreme Court, however, has never expressly affirmed the Eleventh Circuit’s holding that the Apprendi rule was not substantive and therefore should not be applied retroactively.

Regardless of how the Supreme Court resolved the issue of Ring’s retroactivity under a Teague analysis, the illusory distinctions remain. Similarly, the rule in Ring, though “new” because it overruled a prior Supreme Court decision, could arguably be characterized as dictated by precedent existing at the time of Ring’s conviction. As Judge Harlan acknowledged, the determination “whether a particular decision has really announced a ‘new’ rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law” is complex and elusive. The Teague court, after stating that a rule is “new” for retroactivity purposes if it “breaks new ground or imposes a new obligation on the States,” further defined newness to include rules “not dictated by precedent existing at the time the defendant’s conviction became final.”

If the requirements of “breaking new ground” and “not dictated by existing precedent” must be read in conjunction to define “newness,” then it is not at all clear that Ring announced a new rule. If Ring is best characterized as an application of the rule in Apprendi to capital cases, then the Apprendi/Jones line of cases could be seen as existing precedent. Moreover, the right to a

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148 See supra notes 119-126 and accompanying text.

149 See Summerlin, 341 F.3d at 1101-02 (asserting that “the best approach is to recognize that [the case at issue] is neither entirely substantive nor procedural”) (quoting United States v. Woods, 986 F.2d 669, 678 (3d Cir. 1993)).

150 Compare id. at 1101-1108 with Turner v. Crosby, 339 F.3d 1247, 1285 (11th Cir. 2003).

151 Although one could argue that the Supreme Court’s denial of retroactivity to the Ring rule similarly denies retroactive application to Apprendi, the majority did not make that express argument in their opinion.

152 See Desist, 394 U.S. at 263 (Harlan, J., dissenting).

153 See Teague, 489 U.S at 301-““.

154 See Laffey, supra note 56 at 395 (“Some scholars would argue that the holding was not a new rule but rather an application of the rule stated in Apprendi, which is that any fact upon which the legislature conditions an increase in sentencing upon must be found by a jury beyond a reasonable doubt.”). Laffey relies on a suggestion of Justice Powell’s that the precedent must be “settled” to conclude that the Apprendi rule did not constitute “settled”
jury determination of aggravating factors derives from the Sixth Amendment. If one looks to the language of the earlier non-capital sentencing jurisprudence, this right is also inherent in due process. Following this understanding of the “newness” requirements, it is at least arguable that the Ring Court, rather than announcing a new rule, merely “applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.”

As the Supreme Court emphasized in its non-capital sentencing jurisprudence, the Sixth Amendment has always implicitly granted the right to have a jury determine the factors that impact sentencing. In that sense, therefore, it can be argued that the rule in Ring is not a “new” rule for Teague purposes. The flaw in this argument, however, is that virtually any new constitutional rule the Court announces could be characterized as “pre-existing” and therefore, not “new.” Nonetheless, it seems particularly unfair to characterize the rule in Ring as “new” simply because the Court recognized and embraced a Sixth Amendment protection for non-capital cases long before it finally acknowledged the identical right in capital sentencing. 

Ultimately, to argue that Ring does not derive from existing precedent punishes capital defendants for the Court’s own failure to extend to them the same protections that the Sixth Amendment has long provided to non-capital defendants.

The final stage in the Teague analysis, the applicability of its two narrow exceptions, presents significant problems of its own. One problem courts encounter in determining whether a new rule affecting capital sentencing fits Teague’s “watershed rule of criminal procedure” exception is that much of the language and many of the justifications in Teague are couched in terms of guilt or innocence. This focus, an admitted departure from Justice Harlan’s suggested standard of “implicit in the concept of ordered liberty,” may have been appropriate in light of the nature of the Teague petitioner’s claim that his conviction was tainted by the fact that he was not tried by a “jury that was representative of the community.” Guilt and innocence have no relevance when determining retroactivity in the capital sentencing context because habeas petitioners under Ring question the validity of their death sentence, not the validity of their convictions. As Justice Stevens asserted, “factual

precedent at the time Ring was decided, and therefore “that Ring announced a new rule for retroactivity purposes. See id. at 395 (“The holding of Ring that a defendant’s Sixth Amendment right to a jury trial extends to the determination of aggravating circumstances in capital cases was not existing precedent.”).

155 See supra notes 37-40 and accompanying text.
156 Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (analyzing the historical and theoretical underpinnings of contemporary retroactivity jurisprudence).
157 See, e.g., Teague v. Lane, 489 U.S. 288, 313 (1989) (“Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.”).
158 Id. at 293’.
innocence is too capricious a factor by which to determine if a procedural change is sufficiently ‘bedrock’ or ‘watershed’ to justify application of the fundamental fairness exception.” 159 Moreover, if the language of guilt and innocence is relevant to the retroactivity inquiry in capital sentencing cases, then courts have incorrectly applied the innocence standard within the Teague framework. Rather than inquiring as to whether the petitioner would be innocent of a crime under a new rule, courts must determine whether a particular petitioner instead deserves the death penalty under that rule.

The distinctions the Court so carefully crafted present definitional problems even beyond the capital sentencing context. 160 The difficulties arising from these ambiguities, however, are all the more apparent when courts attempt to apply Ring-like rules retroactively, precisely because the Supreme Court extended the non-capital sentencing Teague framework to capital sentencing with no alteration. 161 Though the Teague Court carefully noted that “[b]ecause petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context,” 162 in the following year the Court sanctioned the extension of the Teague framework to capital sentencing in Penry v. Lynaugh. 163 Incredibly, the Court made this crucial determination without the benefit of briefing or oral argument. 164 Instead, the Court, in a succinct sentence, stated “[i]n our view, the finality concerns underlying Justice Harlan’s approach to retroactivity are applicable in the capital sentencing context, as are the two exceptions to his general rule of nonretroactivity” and proceeded immediately thereafter to apply the Teague framework to the case at hand. 165

The Court, however, failed to address why the policy considerations in Teague with respect to non-capital sentencing remained valid in the capital

159 Id. at 321-22 (Stevens, J., concurring) (criticizing the plurality’s re-characterization of Justice Harlan’s second exception). When the Supreme Court addressed the applicability of Teague’s “watershed” exception to the rule in Ring, it focused solely on the accuracy of the judge versus the jury as the pivotal inquiry. See supra notes 137-144 and accompanying text.

160 See David R. Dow, Teague and Death: The Impact of Current Retroactivity Doctrine on Capital Defendants, 19 HASTINGS CONST. L.Q. 23, 37 (1991) (identifying definitional problems in both “the determination of whether the newly articulated constitutional principle is a ‘new’ rule” and “the amorphous notion of ‘implicit in the concept of ordered liberty’”).

161 See supra note 86.

162 Teague, 489 U.S. at 314 n.2 (disagreeing with the notion that finality concerns are not applicable in the capital sentencing context).

163 492 U.S. 302, 313 (1989) (reciting the Teague Court’s belief that “a criminal judgment necessarily includes the sentence imposed” and that finality concerns are equally compelling when collateral attacks on capital sentencing are at issue).

164 Id. at 342 (Brennan, J., dissenting).

165 Id. at 314.
sentencing context. The Teague Court, by adopting Justice Harlan’s focus on the purposes of habeas corpus, emphasized the importance of finality in its justification for limiting the applicability of retroactivity in collateral proceedings.\textsuperscript{166} As Justice Stevens pointed out, such an interest “is wholly inapplicable to the capital sentencing context.”\textsuperscript{167} In the alternative, if the Court believed that finality concerns still had merit in the capital context, a thorough discussion of finality in the capital sentencing context would have proven valuable. Instead, “[t]here is not the least hint that the Court has even considered whether different rules might be called for in capital cases, let alone any sign of reasoning justifying the extension.”\textsuperscript{168} Given the fact that a person’s life hangs in the balance, the Court should not have omitted a measured and considered discussion of the differences between capital and non-capital sentencing. Without such discussion, and in light of the struggle evident in the lower courts, it is possible to conclude that the justifications given for limiting full retroactive application of new rules in non-capital situations break down when courts attempt to transpose the analysis to constitutional questions in capital sentencing.

As this Note demonstrates, the retroactivity framework drafted by the Teague Court is ill-fitting in its application to Ring, and in the capital sentencing context more generally. What options exist outside the current retroactivity jurisprudence? The Supreme Court decided not to make the rule in Ring fully retroactive. Had a contrary result been reached, the consequences would not be as damaging or far-reaching as Justice O’Connor suggested in her dissent in Ring, nor would it have the docket-clogging effect on the courts that she’ predicted.\textsuperscript{169} The retroactive application of the rule in Ring would not require a new guilt phase of a trial because the rule concerns only the sentencing phase of the trial. Each state affected by Ring could choose to either give petitioners a new sentencing hearing – subject to harmless error review on habeas petitions – or to commute all of the unconstitutional death sentences to life sentences. Given the finite, though not insubstantial, number of states and death row inmates affected by the ruling in Ring,\textsuperscript{170} these options seem both appropriate and manageable.

\begin{footnotesize}
\textsuperscript{166} Teague, 489 U.S. at 308’.
\textsuperscript{167} Id. at 322 n.3 (Stevens, J., concurring) (citing Mackey v. United States, 401 U.S. 667, 690-691 (1971) (Harlan, J., concurring)) (noting that in Justice Harlan’s discussions on finality, he points out that no one is benefited by a tentative jail sentence, thus indicating that Harlan only had considered non-capital cases).
\textsuperscript{168} Penry, 492 U.S. at 342 (Brennan, J., dissenting) (blasting the plurality’s compounding of their error in Teague by making an independently incorrect decision to extend it to capital cases).
\textsuperscript{169} See supra note 61 and accompanying text.
\textsuperscript{170} See Schriro v. Summerlin, 124 S. Ct. 2519, 2530 (2004) (Breyer, J., dissenting) (“Retroactivity here, for example, would not required inordinate expenditure of state resources. A decision making Ring retroactive would affect approximately 110 individuals on death row.”).
\end{footnotesize}
In the long run, however, this approach may not be ideal or even possible when determining the retroactivity of future capital sentencing rules. A better solution does exist: the Supreme Court should have recognized the failings of its current retroactivity doctrine and modified the Teague framework for new rules concerning capital sentencing procedures. The Teague framework, though flawed, is not entirely unworkable. After briefing and oral argument, the Supreme Court could and should have attempted to refine the distinctions and justifications inherent in the Teague framework to better comport with the special problems and demands of capital sentencing.

CONCLUSION

Given the imprecise nature of the various distinctions in the Teague framework, it is not difficult for a court, grappling with a rule like that in Ring, to manipulate those distinctions to arrive at a result that suits its political or ideological leanings. Similarly, it is nearly impossible for a court, earnestly attempting to apply the retroactivity doctrine, to give meaningful content to either of Teague’s exceptions. When the lives of death row inmates, sentenced under an unconstitutional capital sentencing statute, hang in the balance, clearer standards should apply. The Teague framework was not crafted for the capital sentencing context, and courts have failed to meaningfully adapt that analysis to the special circumstances that exist when the death penalty is at issue.

The Supreme Court, aware of the unique concerns that surround capital punishment, the absolute finality of its imposition, and its unequivocal message of moral condemnation, has repeatedly stated that the Eighth Amendment prohibits the arbitrary and capricious imposition of the death penalty. The unpredictable lower court applications of the Teague framework to the rule in Ring, granting a reprieve from the death penalty to some while refusing the same relief to others similarly situated, surely results in the exact inconsistent application of the death penalty that the Constitution prohibits. Although the Supreme Court ultimately resolved the issue of Ring’s retroactivity, new rules that emerge, similar to that in Ring, will be subject to the same lower court confusion. The Supreme Court decision did little to allay the underlying problem highlighted by the circuit split: lower courts do not have a uniform understanding of how to apply Teague in the capital sentencing context. The Teague framework is an inappropriate lens through which to examine the question of Ring’s retroactivity. Nor is a presumptive rule of full retroactive application appropriate in all capital sentencing contexts. The Supreme Court must refine the Teague framework to provide, at a minimum, more concrete distinctions and more definitive guidance to lower courts struggling with the difficult choice between life and death.