No. 03-526

IN THE
Supreme Court of the United States

DORA B. SCHRIRO,
Director, Arizona Department of Corrections,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that Arizona's enumerated aggravating circumstances operate as the functional equivalent of an element of the offense of capital murder and that the Sixth Amendment therefore requires that they be found by a jury. The United States Court of Appeals for the Ninth Circuit, stating that it was applying *Ring* retroactively, granted Respondent Warren Summerlin federal habeas corpus relief and vacated his death sentence.

The question presented is whether the principles underlying *Ring* may be applied in the federal habeas corpus proceeding of an Arizona prisoner under a sentence of death whose direct appeal became final prior to this Court's ruling in *Ring*.

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STATEMENT OF THE CASE

In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that, because the statutory aggravating factors that are prerequisites for imposition of the death penalty in Arizona operate as the functional equivalent of an element of the offense of capital murder, "the Sixth Amendment requires that they be found by a jury." *Id.* at 609. The question presented in this case is whether an Arizona death row prisoner, whose conviction and sentence became final on direct appeal in 1984, is entitled to relief from his unconstitutionally-imposed death sentence.

On July 12, 1982, Judge Philip Marquardt of the Maricopa County Superior Court sentenced Respondent Warren Wesley Summerlin to death for the first-degree murder of Brenna Bailey, a finance company investigator who had gone to Mr. Summerlin's home to speak to his wife about an overdue account. Petitioner's Appendix ("P.A.") at A-3; Joint Appendix ("J.A.") at 52. Judge Marquardt imposed the death sentence following a sentencing hearing in which he sat as the sole finder of fact on the existence of aggravating and mitigating circumstances.

Judge Marquardt's role as fact finder was mandated by the capital sentencing scheme that existed in Arizona from 1973 until this Court's decision in *Ring*. Prior to 1973, Arizona juries decided both guilt and sentence in first-degree murder cases. *See State v. Nielsen*, 495 P.2d 847, 850 (Ariz. 1972) ("A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, at the discretion of the jury trying the person charged therewith. . . .") (quoting former ARIZ. REV. STAT. § 13-453 (1956)). Arizona, however, substantially modified its capital sentencing scheme in 1973 in response to *Furman v. Georgia*, 408 U.S. 238 (1972). *See State*

v. Ring, 65 P.3d 915, 925 (Ariz. 2003). Specifically, the Arizona legislature enacted a new capital sentencing scheme requiring that the judge first make all findings of fact relevant to whether the defendant was eligible for a death sentence, and then determine whether death was the appropriate sentence. *See id.* (citing 1973 Ariz. Sess. Laws ch. 138, § 5). Under this scheme, a defendant convicted of first-degree murder was not eligible for a death sentence unless the judge found that the state had proven at least one statutory aggravating circumstance beyond a reasonable doubt. ARIZ. REV. STAT. § 13-703(B), (E) (West 2001). If the judge found one or more aggravating circumstances, *id*. § 13-703(F), and found no mitigating circumstances that were "sufficiently substantial to call for leniency," *id*. § 13-703(E), (G), he or she was required to sentence the defendant to death. *Id.* § 13-703(E).

As aggravating circumstances in Mr. Summerlin's case, Judge Marquardt found that Mr. Summerlin (1) had committed Brenna Bailey's murder in an especially heinous, cruel, or depraved manner; and (2) had a prior felony conviction involving the use or threatened use of violence on another person.[1] Judge Marquardt found no mitigating circumstances, and sentenced Mr. Summerlin to death.

On his direct appeal to the Arizona Supreme Court, Mr. Summerlin argued that Arizona's death penalty statute

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1. Mr. Summerlin's prior felony conviction was for aggravated assault. That conviction arose from an incident in which a vehicle veered off the road, jumped the curb and struck Mr. Summerlin's wife, who was hospitalized for her injuries. At the scene, Mr. Summerlin brandished a pocket knife at the vehicle's driver, an act which led to the filing of the aggravated assault charge. Mr. Summerlin was not convicted of this offense, however, until after the proceedings at issue in this case had commenced. P.A. at A-3.

violated the guarantees of the Sixth and Fourteenth Amendments to the United States Constitution because it denied him the right to have a jury determine the factual questions that led to the imposition of the death penalty. J.A. at 49-50. Inaccurately characterizing Mr. Summerlin's argument as a challenge to the constitutionality of a system that permitted the trial judge to "determine whether to impose the death penalty," the state supreme court rejected the argument by citing *Proffitt v. Florida*, 428 U.S. 242 (1976), and reaffirming the principle that jury *sentencing* is not constitutionally required. J.A. at 67-68.[2]

The Arizona Supreme Court affirmed Mr. Summerlin's convictions and sentences on November 21, 1983. Mr. Summerlin filed a timely motion for reconsideration, which the state supreme court denied on January 18, 1984. His convictions and sentences became final on April 17, 1984, when the time for seeking review by this Court lapsed.

Despite the Arizona Supreme Court's failure to recognize the nature and significance of his Sixth Amendment challenge to the Arizona death penalty statute, Mr. Summerlin continued to assert the claim. Describing the applicable constitutional principles in language strikingly similar to this Court's descriptions of those same principles fourteen years later in *Ring*, Mr. Summerlin argued in state post-conviction proceedings in

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2. *Proffitt* confirmed that Florida's death penalty scheme satisfied the requirements of the *Eighth* Amendment as construed in *Furman*. *Proffitt*, 428 U.S. at 251 ("On their face these procedures [used in Florida to administer the death penalty] appear to meet the constitutional deficiencies identified in *Furman*."). In contrast, Mr. Summerlin's argument to the Arizona Supreme Court expressly indicated his reliance on "the right to a trial by jury under the Sixth and Fourteenth Amendments to the United States Constitution." J.A. at 49.

1988 that Arizona's capital sentencing scheme created two "subclasses of first degree murder: capital murder and non-capital murder," and that "aggravating circumstances are elements of the crime" of capital murder. J.A. at 73-74. Quoting from *Patterson v. New York*, 432 U.S. 197, 215 (1977), Mr. Summerlin argued that "[t]he relevant question is not how the fact is labeled but whether it is an 'ingredient of an offense[,] . . . a fact which the state deems so important that it must be either proved or presumed. . . .'" J.A. at 74. The state courts summarily denied Mr. Summerlin's post-conviction challenge to the Arizona death penalty statute. P.A. at C-3 to C-4.

In *Walton v. Arizona*, 497 U.S. 639 (1990), this Court rejected another Arizona death row prisoner's Sixth Amendment challenge to Arizona's capital sentencing statute. Crucial to the ruling in *Walton* was this Court's belief that, in Arizona, aggravating circumstances were merely standards to guide the judge in choosing "between the alternative verdicts of death and life imprisonment," and thus were not the equivalent of an element of the offense of capital murder. *Id*. at 648 (quoting *Poland v. Arizona*, 476 U.S. 147, 156 (1986)); *see also Ring*, 536 U.S. at 598.

Despite *Walton*, Mr. Summerlin continued to assert his Sixth Amendment challenge to Arizona's capital sentencing scheme, raising the claim in his federal habeas corpus proceedings. J.A. at 78-81. Taking issue with this Court's description in *Walton* of the role of aggravating circumstances under Arizona law, he argued that "[t]he Arizona courts have held (by inference) that aggravating circumstances are elements of the crime [of capital murder] by requiring that they must be proved by competent evidence beyond a reasonable doubt." *Id*. at 79. Mr. Summerlin argued that the state's practice of referring to these critical facts as "aggravating circumstances"

did not change their "essential function," which was to distinguish the separate offenses of capital and non-capital first-degree murder. "Where the existence of certain facts is a specific characteristic of a more serious offense carrying a significantly increased punishment, it is, in effect, an element [of] the crime." *Id.* at 80. Citing *Walton*, however, the United States district court rejected Mr. Summerlin's claim. P.A. at C-23 to C-24.

While Mr. Summerlin's appeal from the district court's denial of his habeas corpus petition was pending in the United States Court of Appeals for the Ninth Circuit, the Arizona Supreme Court issued a decision which provided "further explication" of "the practical operation of Arizona's death penalty scheme." *State v. Ring* ("*Ring I*"), 25 P.3d 1139, 1150 (Ariz. 2001). The state court was prompted to clarify its capital sentencing statute because of its own uncertainty over the statute's constitutionality in light of *Jones v. United States*, 526 U.S. 227 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See Ring I*, 25 P.3d at 1150 ("While the state is correct in noting that neither *Jones* nor *Apprendi* overruled *Walton*, we must acknowledge that both cases raise some question about the continued viability of *Walton*."). Particularly troubling to the state supreme court was this Court's description of Arizona's capital sentencing scheme in its majority opinion in *Apprendi*. *Apprendi* characterized Arizona's capital sentencing statute as one "requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." 530 U.S. at 496. The Arizona Supreme Court corrected this inaccurate description of Arizona law, holding that, "[i]n Arizona, a defendant *cannot* be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." *Ring I*, 25 P.3d at 1151 (emphasis added). Rather, a "death sentence becomes possible only after

the trial judge makes a factual finding that at least one aggravating factor is present." *Id.* Although the Arizona Supreme Court concluded that this Court was in error with regard to its understanding of Arizona law, it was nevertheless bound by the Supremacy Clause to conclude that *Walton* was "controlling authority" and to reject the Sixth Amendment argument presented to it in *Ring I. Id.* at 1152.

This Court then granted certiorari in *Ring* "to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*." *Ring*, 536 U.S. at 596. Relying on the Arizona Supreme Court's explanation of its capital sentencing statute in *Ring I*, and "[r]ecognizing that the Arizona court's construction of the State's own law is authoritative," this Court held that *Walton* could not "survive the reasoning of *Apprendi*," and it therefore overruled *Walton* in relevant part. *Id.* at 595-96, 603, 609. Specifically, the Court held that "because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Id.* at 609 (citation omitted).

In response to this Court's ruling in *Ring*, the Ninth Circuit Court of Appeals ordered that Mr. Summerlin's appeal be heard *en banc* to resolve, among other things, the question of *Ring*'s retroactive application.[3] *See* J.A. at 9. In its opinion of September

3. A three-judge panel of the court of appeals had earlier reversed in part the district court's denial of Mr. Summerlin's petition for writ of habeas corpus. *See* J.A. at 8. The court had held that Mr. Summerlin was entitled to an evidentiary hearing on his claim that he was deprived of due process by Judge Marquardt's drug-related impairment. Specifically, the court concluded that the uncontroverted evidence of Judge Marquardt's addiction to marijuana, his two marijuana-related convictions, and the fact that he "determined by himself over a weekend (Cont'd)

2, 2003, the court of appeals held that *Ring* applies retroactively to federal habeas corpus proceedings. Specifically, it held that the rule announced in *Ring* was one of substantive criminal law, and was therefore exempt from the retroactivity analysis applied to new rules of constitutional criminal procedure pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *See* P.A. at A-32. Alternatively, the court of appeals held that, even if the rule announced in *Ring* were subjected to a *Teague* analysis, it would nevertheless be retroactive because it falls within *Teague*'s second exception for new rules of constitutional procedure that seriously enhance the accuracy of a criminal proceeding and alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. P.A. at A-44 to A-63.

Petitioner filed a timely petition for writ of certiorari with this Court, and the Court granted the petition on December 1, 2003. *Schriro v. Summerlin*, 540 U.S. __, 124 S. Ct. 833 (2003).

SUMMARY OF ARGUMENT

In *Teague*, this Court held that, except in limited circumstances, "intervening changes in constitutional interpretation" will not apply retroactively to cases on federal

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(Cont'd)
that Summerlin should be executed," and thus might have made his sentencing decision while under the influence of drugs, necessitated a hearing on Mr. Summerlin's claim. *Summerlin v. Stewart*, 267 F.3d 926, 948-56 (9th Cir. 2001), *withdrawn by Summerlin v. Stewart*, 281 F.3d 836 (9th Cir. 2002).

Relying on *Walton*, the court had rejected Mr. Summerlin's Sixth Amendment challenge to Arizona's capital sentencing scheme. On February 11, 2002, however, it withdrew its decision in light of this Court's grant of certiorari in *Ring*. *Summerlin*, 281 F.3d at 837.

habeas corpus review. 489 U.S. at 306, 310 (quoting *Mackey v. United States*, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part)). Petitioner maintains that Mr. Summerlin and other similarly situated death row prisoners can not benefit from this Court's decision in *Ring* because the ruling in that case can not pass through the gateway of *Teague*. Brief for Petitioner on the Merits ("Pet'r. Br.") at 6-10. Not only is Petitioner's conclusion incorrect, but the entire premise of her argument is mistaken. This is not a *Teague* case. In fact, "this case presents no issue of retroactivity." *Fiore v. White*, 531 U.S. 225, 228 (2001); *see also Bunkley v. Florida*, 538 U.S. 835 (2003). *Teague* does not apply unless a habeas petitioner seeks the retroactive benefit of a change in a rule of *federal constitutional law*. *Ring* involved only this Court's correction of its misunderstanding in *Walton* regarding the nature and operation of Arizona's capital sentencing scheme. The Court abandoned *Walton* in *Ring* solely because its understanding of state law, not federal law, had changed. Accordingly, *Ring* initiated no new "federal constitutional interpretation" to apply retroactively.

But even if a *Teague* analysis were appropriate under these circumstances, it would not prevent applying *Ring* in the present case. *Teague* bars the application, on collateral review, only of *new* rules of federal constitutional law. *Ring* did not announce any new rule of federal constitutional law. *Ring* invoked the basic and immutable Sixth Amendment principle that a jury must find every element of an offense beyond a reasonable doubt, and it applied this long-recognized principle to its new understanding of the state law premise—clarified by the Arizona Supreme Court in *Ring I*—that Arizona's statutory aggravating circumstances are elements of the offense of capital murder. To apply an old constitutional doctrine to a newly understood state-law predicate is no different than applying an old

constitutional rule to a new set of facts—neither application creates a "new rule" for *Teague* purposes.

Moreover, even if *Ring* could be described as announcing a *new* rule of federal constitutional law, that rule would be substantive, not procedural. *Teague* does not bar the retroactive application of a rule of substantive criminal law. Petitioner argues that *Ring* announced a procedural change in the law, requiring juries rather than judges to now serve as the fact finders of aggravating circumstances in capital cases. Petitioner maintains that, because *Ring* merely altered *who* must determine whether aggravating circumstances exist in a capital case, it announced a procedural rule. Pet'r. Br. at 7. This argument, however, ignores the essential nature of the Court's *holding* and *reasoning* in *Ring* and focuses instead on one *result* of the Court's ruling. The Court held in *Ring* that, *"[b]ecause* Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment *requires* that they be found by a jury." 536 U.S. at 609 (emphasis added; citation omitted). To the extent that this holding could be considered a "new" rule, it would be one of substantive criminal law. Specifically, it would be a rule requiring that, when states use "aggravating circumstances" as the dividing line between capital and non-capital murder, they cause the aggravating circumstances to function as an element of the greater offense of capital murder. This rule concerns the *substance* of the criminal law, and not merely the procedures for its enforcement. *See id.* at 606 ("In various settings, we have interpreted the Constitution to require the addition of an element or elements to *the definition of a criminal offense* in order to narrow its scope.") (emphasis added).

Of course, it follows that, *because* aggravating circumstances function as an element of the offense of capital

murder in Arizona, the Sixth Amendment requires that they be proven to a jury beyond a reasonable doubt. This "procedural" *result*, however, is simply a consequence of the substantive *rule* of *Ring*. Because the true "rule" of *Ring* is one of substantive constitutional law, it is exempt from *Teague*'s presumption of non-retroactivity.

Finally, even if this Court were to conclude that *Ring* announced a new rule of federal constitutional procedure, Mr. Summerlin would be entitled to the retroactive application of that rule under *Teague*. Specifically, as the court of appeals found in this case, to the extent that *Ring* announces a procedural rule, that rule falls within *Teague*'s second exception for new rules of constitutional procedure that seriously enhance the accuracy of a criminal proceeding and alter our understanding of the bedrock procedural elements essential to the fairness of the proceeding. *See* P.A. at A-44 to A-63.

This Court has long acknowledged that the Constitution, like the English common law before it, recognizes juries as more accurate fact finders. The "accuracy" of jury fact-finding is heightened in capital cases because the unanimous verdict of a jury drawn from a cross-section of the community more accurately reflects the community's judgment regarding which homicide defendants should be eligible for the death penalty. Historically, juries have played this crucial role in homicide cases.

Ring similarly implicates bedrock procedural elements essential to the fairness of capital trials. If, as Petitioner maintains, *Ring* announced a new rule of criminal procedure, that rule most certainly derives from the understanding that the most basic Sixth Amendment principles require that a unanimous jury, not a single judge, convict a defendant of capital murder.

ARGUMENT

I. In *Ring*, this Court overruled *Walton* because its understanding of Arizona law, not federal law, had changed. Such a "change" in the law does not implicate *Teague*.

A. In *Walton*, the Court held that Arizona's capital sentencing scheme did not offend the Sixth Amendment. 497 U.S. at 647-49. In *Apprendi*, the Court explained that its holding in *Walton* rested upon its understanding that Arizona's death penalty sentencing procedure was one "requiring judges, after a jury verdict holding a defendant guilty of a *capital* crime, to find specific aggravating factors before imposing a sentence of death." 530 U.S. at 496 (emphasis added). More specifically, the Court expressed its understanding that Arizona's death penalty statutes did not "permit[] a judge to determine the existence of a factor which makes a crime a capital offense." *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)). Thus, according to the Court, its reasoning in *Walton* did not conflict with its other Sixth Amendment jurisprudence. Rather, *Walton* merely applied well established Sixth Amendment principles to the specific factual scenario presented by the Arizona death penalty statutes. *Apprendi*, 530 U.S. at 496 (rejecting "the argument that the principles guiding [*Apprendi*] render invalid state capital sentencing schemes requiring judges, *after a jury verdict holding a defendant guilty of a capital crime*, to find specific aggravating factors before imposing a sentence of death") (emphasis added).

Faced with statements from this Court inaccurately describing Arizona law, the Arizona Supreme Court, in *Ring I*, provided "further explication" of "the practical operation of Arizona's death penalty scheme." 25 P.3d at 1150. The state

court explained that, "[i]n Arizona, a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings." *Id.* at 1151. Rather, the Arizona capital sentencing statute invalidated by *Ring* permitted a judge to impose a sentence of death only after a sentencing hearing "at which the judge alone act[ed] as the finder of the necessary statutory factual *elements*." *Id.* (emphasis added).

In its subsequent decision in *Ring*, this Court, "[r]ecognizing that the Arizona court's construction of the State's own law is authoritative," overruled *Walton* "to the extent that it allow[ed] a sentencing judge, without a jury, to find an aggravating circumstance necessary for imposition of the death penalty."[4]

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4. *Ring* did not overrule the entirety of the Court's Sixth Amendment analysis in *Walton*. *Walton* states that the petitioner's argument in that case was that Arizona's capital sentencing scheme "would be constitutional only if a jury decides what aggravating *and mitigating* circumstances are present in a given case." 497 U.S. at 647 (emphasis added). As Justice Scalia noted in his concurring opinion in *Ring*,

> In *Walton*, to tell the truth, the Sixth Amendment claim was not put with the clarity it obtained in *Almendarez-Torres* and *Apprendi*. There what the appellant argued had to be found by the jury was not all facts essential to imposition of the death penalty, but rather "*every* finding of fact underlying the sentencing decision," including not only the aggravating factors without which the penalty could not be imposed, but also the *mitigating* factors that might induce a sentencer to give a lesser punishment.

536 U.S. at 611 (citation omitted). Thus, *Walton* merely held that the Sixth Amendment does not require that the jury make "*every* finding of fact underlying the sentencing decision." *Id.* (emphasis added). This holding is consistent with the Court's Sixth Amendment jurisprudence—both before and after *Ring*.

Ring, 536 U.S. at 603, 609. The Court acknowledged that the factual premise underlying its decision in *Walton*—that a jury conviction of first-degree murder in Arizona automatically made the defendant eligible for a sentence of death—was incorrect. *Id.* at 603. Once the Arizona Supreme Court identified this error in the factual underpinnings of *Walton*, this Court, consistent with its Sixth Amendment jurisprudence, declared Arizona's death penalty statute unconstitutional.

This Court's decision in *Ring* did not announce a rule of federal constitutional law. To the extent that the Court held in *Ring* that *Walton* was wrongly decided, the error concerned only the Court's understanding of Arizona state law. Even if the Sixth Amendment issue presented in *Walton* had been identical to the issue presented in *Ring* (and a careful reading of *Walton* reveals that it was not), the Court still would have rejected Walton's Sixth Amendment argument in that case because the Court mistakenly believed that an Arizona jury could convict a defendant of *capital* murder. The Court reached a contrary result in *Ring* because its understanding of Arizona law, not federal constitutional law, had changed.

B. Thus, in *Ring* the Court was called upon to reconcile a recent clarification of the elemental components of a state's substantive law with established constitutional principles. The Court has held that situations like this do not implicate *Teague*, because they do not involve the retroactive application of new rules of constitutional criminal procedure. Specifically, in *Fiore v. White*, this Court explained that, when a state's highest court interprets a state criminal statute to require proof of a particular element, and that interpretation does not create new law, but merely clarifies what the law was at the time of a defendant's conviction, "no issue of retroactivity" exists. 531 U.S. at 228.

Fiore involved a Pennsylvania criminal statute that the Pennsylvania Supreme Court interpreted for the first time after Fiore's conviction became final. *See id*. at 226; *see also Commonwealth v. Scarpone*, 634 A.2d 1109 (Pa. 1993). Under the Pennsylvania Supreme Court's interpretation of the criminal statute, Fiore could not have been guilty of the crime for which he was convicted. *See Fiore*, 531 U.S. at 227-28. This Court originally granted certiorari in *Fiore* to consider "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Id.* at 226. However, because the Court was uncertain whether the Pennsylvania Supreme Court's decision represented a change in state law, it certified a question to the Pennsylvania Supreme Court. *Id.* at 228. The certified question asked whether the state court's interpretation of the statute in *Scarpone* "'state[d] the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final.'" *Id.* The Pennsylvania Supreme Court responded that its ruling "'merely clarified the plain language of the statute,'" and was "'the proper statement of the law at the date Fiore's conviction became final.'" *Id.* (citations omitted).

After receiving the Pennsylvania Supreme Court's confirmation that its interpretation of its state statute reflected the meaning of the statute at the time of the defendant's conviction, this Court concluded that the case "present[ed] no issue of retroactivity." *Id*. The Court then addressed the merits of Fiore's constitutional challenge to his conviction, and concluded that the conviction violated the Due Process Clause of the Fourteenth Amendment because, under the law as interpreted by the Pennsylvania Supreme Court, the state had convicted Fiore of a criminal offense without proving all of the elements of that offense beyond a reasonable doubt. *Id.* at 228-29.

Fiore closely parallels this case. In *Ring I*, the Arizona Supreme Court held that, under Arizona law, aggravating circumstances are "necessary statutory factual elements" of capital murder. 25 P.3d at 1151. Pursuant to clearly established Arizona law, the Arizona Supreme Court's interpretation of its state's death penalty statutes reflected the meaning of those statutes from the date of their enactment in 1973. *See, e.g.*, *Galloway v. Vanderpool*, 69 P.3d 23, 27 (Ariz. 2003) ("Once published, our interpretation becomes part of the statute."); *Local 266, Int'l Bhd. of Elec. Workers v. Salt River Project Agric. Improvement and Power Dist.*, 275 P.2d 393, 402 (Ariz. 1955) (noting that "unreversed statutory construction is to be held part of the statute as if originally so written"). Thus, it is undisputed that, at the time of Mr. Summerlin's conviction, aggravating circumstances were "necessary statutory factual elements" of capital murder. As in *Fiore*, applying this authoritative construction of Arizona law to Mr. Summerlin involves "no issue of retroactivity."

Indeed, a careful examination of the "retroactivity" issue here reveals that the decision Mr. Summerlin seeks to apply to his case is not this Court's *Ring* decision, but rather the Arizona Supreme Court's ruling in *Ring I*. In that case, the Arizona Supreme Court recognized that its capital sentencing scheme appeared to be unconstitutional under this Court's Sixth Amendment jurisprudence, but concluded that under the Supremacy Clause, it was nevertheless bound by the anomaly of *Walton* to reject Ring's Sixth Amendment claim. *Ring I*, 25 P.3d at 1151. This Court's subsequent decision in *Ring* merely removed the obstacle presented by *Walton*, acknowledging that the earlier decision was premised on a faulty understanding of Arizona law. This Court's decision in *Ring*, however, is not the *sine qua non* of the relief Mr. Summerlin seeks. The Court could have as easily addressed the post-*Ring I*

vitality of *Walton* in a case brought by a petitioner on collateral relief, like Mr. Summerlin, as in one brought by a petitioner still on direct review, like Timothy Ring. In such a situation, Mr. Summerlin would have been in the same position as the petitioner in *Fiore*: a federal habeas petitioner seeking relief under an intervening state supreme court decision defining the meaning of a state criminal statute. The mere happenstance that Mr. Ring's case preceded Mr. Summerlin's case has given rise to the illusion of retroactivity when in fact it is not present. Had Mr. Summerlin's case been the first to reach this Court, *Fiore* would have negated any retroactivity concerns, as it should now. *Accord Dixon v. Miller*, 293 F.3d 74, 79 (2d Cir. 2002) (holding, under *Fiore*, that federal habeas petitioner's reliance on a recent New York state court decision presented "no issue of retroactivity").

II. *Ring* did not announce a "new" rule of federal constitutional law. Accordingly, *Teague* does not bar its retroactive application.

A. This case is unlike any of the Court's decisions applying its retroactivity doctrine in that it involves the overruling of a prior decision by this Court solely because of the belated discovery that the state-law premise of the earlier decision was incorrect. What changed from *Walton* to *Ring* was not federal constitutional law, but this Court's understanding of Arizona law, so the *Teague* principle—which concerns changes in federal law—is altogether inapposite.

Nonetheless, the *Teague* doctrine does recognize a principle that is analogous to the present case. The *Teague* cases hold that when a decision of this Court does not announce a *new rule* of constitutional law, but merely applies a pre-existing rule to a new factual situation, the *Teague* bar against collateral

retroactivity is not implicated. *E.g.*, *Teague*, 489 U.S. at 307 (discussing *Yates v. Aiken*, 484 U.S. 211, 216-17 (1988)). That is akin to what happened in *Ring* because, under long-standing principles of federalism, state-law rules that are predicates for federal constitutional decision-making have the same status as facts. This Court accepts them as *given*, on the basis of an authoritative state-court pronouncement of them, and proceeds to apply federal constitutional rules to them in a way that produces differing results depending upon relevant differences in the underlying state-law rules. *Cf. NAACP v. Button*, 371 U.S. 415, 432 (1963); *City of Chicago v. Morales*, 527 U.S. 41, 61 (1999) (acknowledging this Court's "duty to defer to a state court's construction of the scope of a local enactment"). When this happens—as it happened in *Ring*—the Court is no more making a *new federal constitutional rule* than it is when it applies a preexisting federal constitutional rule to a new set of facts, as in *Stringer v. Black*, 503 U.S. 222 (1992).

The Sixth Amendment principle applied in *Ring* is not one of recent vintage. Quoting from Justice Stevens' dissent in *Walton*, the Court acknowledged in *Ring* that, if the Sixth Amendment question presented in that case had been posed in 1791, "'the answer would have been clear' for '[b]y that time, *. . . the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established.*'" 536 U.S. at 599 (quoting *Walton*, 497 U.S. at 710 (Stevens, J., dissenting)). "'Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned.'" *Id.* Indeed, the jury's fact-finding power is historically and inextricably intertwined with offense elements

in homicide prosecutions, because it was the jury's ability to interpose that power between the executioner and the defendant that spawned the development of what came to be known as homicide "elements." *See* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800 28-64 (1985).

B. Despite the Court's clear references to the historical underpinnings of its ruling in *Ring*, Petitioner nevertheless insists that *Ring* "announced" a "new rule." Pet'r. Br. at i. She provides no explanation for how this is so, however, other than to state that "*Ring* extended to the capital sentencing context this Court's holding in [*Apprendi*] that any alleged fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."[5] *Id.* at 4.

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5. The entirety of Petitioner's argument is premised on the *assumption* that *Ring* announced a new rule. Likewise, with one exception, the briefs submitted by *amici curiae* in support of Petitioner fail to address whether *Ring* announced a "new" rule, and instead merely assume that it did. The one exception is the brief of the United States government, which describes *Ring* and *Apprendi* not as new rules, but as "refinements of pre-existing principles." Brief of the United States as Amicus Curiae at 25.

According to the United States, "[b]efore *Apprendi*, the Court had made clear that the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment required a jury finding on all essential elements of an offense. Indeed, the fundamental importance of the jury trial right in criminal cases was well established." *Id*. at 25 (citations omitted). Similarly, on another occasion, the United States acknowledged that the rule applied by this Court in *Apprendi* arises from a "long line of consistent judicial decisions." *Harris v. United States*, 2002 WL 521354, *18 (Oral Argument) (March 25, 2002) (Deputy Solicitor General Michael R. Dreeben arguing on behalf of respondent United States). The United States similarly acknowledged in *Harris* that

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Petitioner wrongly equates *Ring* with *Apprendi* for retroactivity purposes, for even if *Apprendi* can be said to have announced a new rule of constitutional interpretation, it does not necessarily follow that *Ring* did so as well. To be sure, the essential constitutional principle applied in *Apprendi* and *Ring* was identical: the Sixth Amendment right to have a jury convict the defendant of every element of the offense beyond a reasonable doubt. *Apprendi* and *Ring*, however, implicated this constitutional principle in significantly different ways.

Apprendi involved New Jersey's "hate crime" statute, a sentence enhancement statute of general application. *See* 530 U.S. at 468-69; *see also* N.J. STAT. ANN. § 2C:44-3(e) (West 1999). A hate crime statute like New Jersey's is a relatively novel form of legislation that permits enhanced sentences for defendants who, in committing their crimes, are motivated by hatred for certain protected classes of persons. In *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993), this Court held that this nascent type of "penalty enhancement" does not offend the First Amendment's guarantee of freedom of expression; and in *Apprendi*, the Court emphasized that, "although the constitutionality of basing an enhanced sentence on racial bias was argued in the New Jersey courts," the "substantive basis" for such an enhancement was not an issue on which the Court had granted certiorari. 530 U.S. at 475. Rather, the issue before the Court in *Apprendi* was whether the Due Process Clause of the Fourteenth Amendment required that the factual determination of hate-based motivation be made by a jury on the basis of proof beyond a reasonable doubt. *Id.* at 468.

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"[t]he history in *Apprendi* . . . showed that it has been the rule down the centuries into the common law that the judge cannot give a higher sentence than based on the facts that the jury has determined." *Harris*, Tr. of Oral Arg., 2002 WL 521354, *11.

Thus, in *Apprendi*, the Court was called upon to apply its established due process and Sixth Amendment jurisprudence in a wholly unique and distinctly modern arena: hate crime sentence enhancements. The constitutional principles that guided the Court's analysis in *Apprendi*, however, were not at all modern, but rather "extend[ed] down centuries into the common law." *Id.* at 477. At least since *In re Winship*, 397 U.S. 358 (1970), it has been "clear beyond peradventure that . . . due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484 (quoting *Almendarez-Torres*, 523 U.S. at 251 (Scalia, J., dissenting)).

Accordingly, in *Apprendi*, the Court applied long-standing due process requirements to the novel situation presented by the modern innovation of penalty enhancements for hate-motivated crimes. *Apprendi* broke no new ground, however, in acknowledging the well established Sixth Amendment principle that a jury must find those facts that determine the maximum sentence the defendant can receive. As Justice Scalia observed, this is what the Sixth Amendment "has been assumed to guarantee throughout our history." *Id.* at 499 (Scalia, J., concurring); *accord id.* at 500 ("Sentence enhancements may be new creatures, but the question that they create for courts is not.") (Thomas, J., concurring); *see also Jones*, 526 U.S. at 251 n.11 ("[O]ur decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century."). To the extent that *Apprendi* announced a new rule, it was simply that modern sentence enhancement provisions—even ones like New Jersey's hate crime statute that apply to a variety of underlying crimes—are to be treated as elements of a

greater substantive offense whenever they expose the defendant to a greater punishment than that authorized by the jury's guilty verdict.

This "new" aspect of *Apprendi*, however, is irrelevant to the issue presented in *Ring*, for as this Court has noted, by 1791 it "was unquestioned" that the jury was responsible for making the factual determinations that were necessary to subject a homicide defendant to capital punishment. *Ring*, 536 U.S. at 599. Consistent with this historic respect for the role of the jury in capital cases, this Court has never held that, absent the consent of the accused, the Constitution permits a judge, rather than a jury, to find the facts that differentiate capital murder from murder *simpliciter*. To the extent that *Walton* suggested that this constitutional imperative somehow did not apply to capital sentencing schemes enacted after *Furman*, the Court explained in both *Apprendi* and *Ring* that the holding in *Walton* was premised on the Court's misconception that in Arizona a prerequisite to a death sentence was a jury conviction for *capital* murder. *Ring* simply corrected the factual error the Court made in *Walton*, and withdrew the constitutional imprimatur that *Walton* mistakenly conferred on Arizona's death penalty scheme.[6]

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6. For similar reasons, Petitioner cannot rely on pronouncements from this Court that the "explicit overruling of an earlier holding no doubt creates a new rule" for *Teague* purposes. *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *see also Butler v. McKellar*, 494 U.S. 407, 412 (1990) ("A new decision that explicitly overrules an earlier holding obviously 'breaks new ground' or 'imposes a new obligation.'"). As is explained in Sections I.A and II.A, *ante*, the Court partially overruled *Walton* solely because of that decision's mischaracterization of Arizona state law. The Court in *Ring* was essentially correcting a factual error in *Walton*: its description of the state law predicate underlying its Sixth Amendment analysis. Nothing in *Ring* indicates that the Court was abandoning the (Cont'd)

Moreover, Mr. Summerlin's convictions were final not only before *Ring*, but before *Walton* as well. Thus, in rejecting the Sixth Amendment argument Mr. Summerlin advanced in his direct appeal, the Arizona Supreme Court could not have relied upon *Walton*. In determining the "newness" of a federal constitutional rule for *Teague* purposes, the Court looks to the law prevailing at the time the defendant's conviction became final. *E.g.*, *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). As the preceding discussion demonstrates, long before Mr. Summerlin's conviction became final in 1984, Sixth Amendment jurisprudence required that a jury find the facts that make a homicide defendant eligible for the death penalty. *Accord Adamson v. Ricketts*, 865 F.2d 1011, 1027 (9th Cir. 1988) (holding that Arizona's aggravating circumstances function as elements of the crime of capital murder requiring a jury determination). *Ring* did not announce a new rule of constitutional interpretation.

III. If *Ring* announced a new rule of constitutional interpretation, the rule is substantive, not procedural, and does not implicate *Teague*.

A. If this Court were to conclude that *Ring* did announce a new rule of federal constitutional law, the "rule" would be that, when a state relies on aggravating factors as the line of demarcation between those first-degree murders for which a

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legal principles it applied in *Walton*. Moreover, the petitioner in *Walton* argued that Arizona's capital sentencing scheme "would be constitutional only if a jury decides what aggravating *and mitigating* circumstances are present in a given case." 497 U.S. at 647 (emphasis added). *Walton* merely held that the Sixth Amendment does not require that the jury make *"every* finding of fact underlying the sentencing decision." *Id.* (emphasis added). The Court did not hold otherwise in *Ring*.

sentence of death is permissible and those for which it is not, the aggravating factors function as elements of the greater offense of capital murder. *Ring*, 536 U.S. at 609 ("Because Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury.") (internal quotations and citations omitted). Stated differently, the rule of *Ring* would be that, "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111 (2003) (opinion of Scalia, J.). Thus, the decisive issue in *Ring* was whether, and under what circumstances, aggravating factors are an element of the offense of capital murder—an issue that is plainly substantive in nature. *Accord Apprendi*, 530 U.S. at 499 (Thomas, J., concurring) ("This case turns on the seemingly simple question of what constitutes a 'crime.'"); *Jones*, 526 U.S. at 229 ("This case turns on whether the federal carjacking statute . . . define[s] three distinct offenses or a single crime with a choice of three maximum penalties.").[7]

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7. Every Justice of this Court, regardless of his or her opinion about the constitutional soundness of *Apprendi* and *Ring*, has acknowledged the substantive underpinnings of those two decisions. *See Sattazahn*, 537 U.S. at 111 (Scalia, J., joined by Rehnquist, C.J., & Thomas, J.) (noting that *Apprendi* "clarified what constitutes an 'element' of an offense for purposes of the Sixth Amendment's jury-trial guarantee," and that *Ring* "recognized the import of *Apprendi* in the context of capital-sentencing proceedings"); *id.* at 126 n.6 (Ginsburg, J., dissenting, joined by Stevens, Souter & Breyer, JJ.) (citing *Ring* for the proposition that "capital sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of separate *offenses*, not mere sentencing proceedings"); *see also Harris v. United States*, 536 U.S. 545, 567 (2002) (Kennedy, J., joined by Rehnquist, C.J., O'Connor

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"The substantive criminal law is to a large extent concerned with the definitions of various crimes." 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.2(a) (2d ed. 2003). Likewise, the "rule" of *Ring* lies in its interpretation of the elements of a crime and its conclusion that aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of the greater offense of capital murder. Another "basic premise" of substantive criminal law "is that a person who has engaged in criminal conduct may only be subjected to the legally prescribed punishment." *Id.* § 1.2(b). This basic substantive law premise is also critical to the "rule" of *Ring*, which identified for Sixth Amendment purposes the criminal offense for which death is the "legally prescribed punishment" in Arizona. Thus, if the Court announced a "new" rule of federal constitutional law in *Ring*, *Teague* would not bar the retroactive application of that rule because *Teague*'s rule of non-retroactivity applies only to new rules of constitutional criminal *procedure*.

B. Petitioner maintains, however, that *Ring* announced a rule that is exclusively procedural, and therefore subject to

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& Scalia, JJ.) ("Read together, *McMillan* [*v. Pennsylvania*, 477 U.S. 79 (1986),] and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for purposes of the constitutional analysis."); *id.* at 575 (Thomas, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.) ("'[I]f the legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact . . . the fact is also an element.'") (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)); *Apprendi*, 530 U.S. at 527 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Kennedy & Breyer, JJ.) (observing that *Apprendi* "concern[ed] the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element").

Teague's presumption of non-retroactivity. She advances four arguments in support of this claim. Upon examination, each of these arguments proves illusory.

Petitioner first argues that *Ring* is procedural because it "does not fit within this Court's definition of a substantive change for retroactivity purposes." Pet'r. Br. at 10. Other than *Bousley v. United States*, 523 U.S. 614 (1998), however, she cites no authority to indicate where this Court has ever "defined" a "substantive change for retroactivity purposes." Instead, relying exclusively on *Bousley*, Petitioner maintains that a new rule is "substantive" only if it interprets the meaning of a *federal* criminal statute, and then only if it mandates "that conduct that formerly resulted in criminal liability may no longer be illegal." *Id.* at 10-11. Petitioner's "definition" of a substantive rule merely restates the facts of *Bousley*. Although *Bousley* presents an *example* of a new substantive rule exempt from *Teague*'s presumption of non-retroactivity, it does not purport to define the universe of such rules.

To the extent that *Ring* announced any new rule, it would be that aggravating factors that render a homicide defendant eligible for the death penalty are elements of the offense of capital murder. As the Court acknowledged in *Ring*, some or all of Arizona's aggravating factors may exist solely because of the restrictions imposed by the Court's Eighth Amendment jurisprudence. 536 U.S. at 606 ("[I]n the area of capital punishment, unlike any other area, we have imposed special constraints on a legislature's ability to determine what facts shall lead to what punishment—we have restricted the legislature's ability to define crimes.") (quoting *Apprendi*, 530 U.S. at 522-23 (Thomas, J., concurring)). Nevertheless, if the Arizona legislature responded to the Court's Eighth Amendment cases by "adding the *element [the Court] held*

constitutionally required, surely the Sixth Amendment guarantee would apply to that element." *Id.* at 607 (emphasis added). *Ring* thus clarified what the Court's previous case law had failed to make plain: although aggravating factors may be mandated by the *Eighth* Amendment, they nevertheless function as an element under the *Sixth* Amendment. This holding is unmistakably substantive in nature and, as such, is exempt from *Teague*.

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Petitioner's second argument is premised on her belief that "*Ring* announced . . . the same procedural rule that *Apprendi* announced, but applied to capital cases." Pet'r. Br. at 13. From this premise, Petitioner argues that, because this Court "expressly characterized its ruling in *Apprendi* as a procedural decision," *Ring* necessarily announced a procedural rule as well. *Id.* at 14-15. The "express characterization" to which Petitioner refers is this Court's statement in *Apprendi* that "[t]he substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is." Pet'r. Br. at 14 (quoting *Apprendi*, 530 U.S. at 475). This statement, however, does not support the proposition for which Petitioner cites it. Rather, it refers to the fact that the Court in *Apprendi* had not granted certiorari to address the First Amendment constitutionality of basing an enhanced sentence on racial bias, an issue it had examined several Terms earlier in *Wisconsin v. Mitchell*, 508 U.S. 476. *See Apprendi*, 530 U.S. at 475.

Moreover, the Court in *Apprendi* did not characterize its *decision* as procedural, as Petitioner claims; it described the *question presented* in that case as procedural. *Id*. Answers to procedural questions may lie in substantive law principles. Because the procedural guarantees of the Fifth and Sixth Amendments apply only in the context of "a capital, or otherwise infamous crime," U.S. CONST. amend. V, or a "criminal case," *id.*, or a "criminal prosecution," *id*. amend. VI, the procedural

question posed in *Apprendi* was answered by determining "what constitutes a crime" in the context of the relevant New Jersey statutes. 530 U.S. at 499 (Thomas, J., concurring). Similarly, *Ring* answered the procedural question posed in that case by looking to substantive criminal law: "*Because* Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U.S. at 609 (emphasis added; citation omitted); *see generally* Ethan Isaac Jacobs, Note, *Is Ring Retroactive*?, 103 COLUM. L. REV. 1805 (2003) (concluding that *Ring* announced a new rule of substantive law and that its retroactive application to cases on collateral review is required by habeas retroactivity doctrine and the values underlying the writ).

Petitioner also suggests that *United States v. Gaudin*, 515 U.S. 506 (1995), is analogous to *Ring*. *Gaudin* held that the element of materiality in prosecutions for making material false statements in a matter within the jurisdiction of a federal agency must be submitted to a jury and found beyond a reasonable doubt. *See id.* at 522-23; *see also* 18 U.S.C. § 1001. Petitioner relies on *Gaudin* for its self-description as a "case of a procedural rule," which did "not serve as a guide to lawful behavior." *Gaudin*, 515 U.S. at 521. *Gaudin*, however, differs from *Ring* in a critical aspect. In *Gaudin*, the Court was not called upon to decide *whether* materiality was an element of the crime at issue. The government conceded that it was. *Id.* at 509. Accordingly, the sole issue in *Gaudin* was whether the Constitution permitted an element of an offense to be found by a judge, rather than a jury. This issue, of course, is one of procedure, not substance. In contrast, the issue in *Ring* was whether aggravating factors were elements. This issue is one of substance, not procedure, because discerning elements of crimes is a primary function of substantive criminal law.

Any doubt about this distinction between *Gaudin* and *Ring* is dispelled by the concurring opinion in *Gaudin*. There, the Chief Justice, joined by Justices O'Connor and Breyer, emphasized that *Gaudin* was easily decided because the government had conceded the most difficult question: whether materiality was an element of the offense. 515 U.S. at 524. The Chief Justice observed that, "[a]s with many aspects of statutory construction, determination of what elements constitute a crime is often subject to dispute," and he stressed that "[n]othing in the Court's decision stands as a barrier to legislatures that wish to define—or that have defined—the elements of their criminal laws in such a way as to remove issues such as materiality from the jury's consideration." *Id.* at 525. More specifically, the Chief Justice emphasized that a state legislature could, for example, reallocate burdens of proof by converting elements into sentencing factors for consideration by the sentencing court. *Id. Ring* rejected this aspect of the *Gaudin* concurrence, at least as it applied to capital sentencing procedures. In doing so, *Ring* addressed the substantive law issue that was not presented in *Gaudin*: what are the elements of a crime.

For her third argument that *Ring* is exclusively procedural, Petitioner turns to the Court's ex post facto jurisprudence. She maintains that the Court's cases in this area "parallel" its retroactivity cases because of their emphasis on substance versus procedure, and she discusses at length *Dobbert v. Florida*, 432 U.S. 282 (1977), an ex post facto case that, according to Petitioner, illustrates the procedural nature of the Sixth Amendment ruling in *Ring*. Pet'r. Br. at 16-17. The crux of Petitioner's argument is that, "[i]f the sentencing change at issue in *Dobbert* was procedural, the change announced in *Ring* can only be procedural." *Id.* at 17.

Petitioner's argument is misguided. Last Term, the Court once again observed that "the meaning of 'substance' and 'procedure' in a particular context is 'largely determined by the purposes for which the dichotomy is drawn.'" *Jinks v. Richland County, S.C.*, 538 U.S. 456, __, 123 S. Ct. 1667, 1672 (2003) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988)). For this reason, the Court is reluctant to apply definitions of "substance" and "procedure" outside the subject matter for which the definitions were created. *See id.* The constitutional prohibitions against ex post facto laws, *see* U.S. CONST. art I, § 9, cl. 3, *and* art. I, § 10, serve a vastly different function than the judicially created doctrine of non-retroactivity. Accordingly, the Court has never employed the "substance versus procedure" distinction of its ex post facto case law as a guide for determining the *Teague* retroactivity of one of its decisions. Petitioner's discussion of *Dobbert* is therefore irrelevant to the issue presently before the Court.

Moreover, even if the ex post facto definitions of "substance" and "procedure" were relevant to the retroactivity issue in this case, *Dobbert* would *support* the conclusion that *Ring* was a decision of substantive criminal law. The petitioner in *Dobbert* argued that changes in Florida's capital sentencing procedures violated the Ex Post Facto Clause. As *Dobbert* makes plain, those sentencing procedures could be invoked by Florida only "[u]pon conviction or adjudication of guilt of a defendant of a *capital* felony." 432 U.S. at 289 n.5 (emphasis added); *accord id.* at 290 ("After a defendant is found guilty of a *capital* felony, a separate sentencing hearing is held before the trial judge and the trial jury.") (emphasis added). In concluding that the changes to the Florida sentencing statute were "clearly procedural," and thus not violative of the Ex Post Facto Clause, the Court emphasized: "The new statute simply altered the methods employed in determining whether the death penalty

was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id*. at 293-94. The issue in *Ring* was markedly different. There the Court held that "for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of 'murder' is a distinct, lesser included offense of 'murder plus one or more aggravating circumstances.'" *Sattazahn*, 537 U.S. at 111 (opinion of Scalia, J.). The quantum of punishment constitutionally permissible for these distinct crimes is undeniably different. *Dobbert* concerned the procedure for imposing punishment for capital murder; *Ring* concerned the definition of capital murder itself. The former may be procedural, but the latter is undoubtedly substantive.

Finally, Petitioner argues that the "rule" of *Ring* cannot be substantive because the Arizona Supreme Court has "correctly and authoritatively concluded that *Ring* did not substantively change Arizona's first-degree murder statute or its aggravating circumstances." Pet'r. Br. at 18; *see State v. Towery*, 64 P.3d 828 (Ariz. 2003) (holding *Ring* not retroactive for purposes of state post-conviction proceedings). Petitioner maintains that the Arizona Supreme Court conclusively "rejected the proposition that *Ring* altered the substance of Arizona law," and that the federal courts are not free to disagree with the state supreme court on this issue. Pet'r. Br. at 19. This argument misapprehends both the ruling in *Ring* and the nature of this Court's retroactivity analysis. More fundamentally, it confuses the Arizona Supreme Court's conclusive authority to interpret Arizona statutes with its more limited authority to interpret the meaning and effect of this Court's constitutional rulings.

Clearly, an interpretation of a state statute by the state's highest court is binding on a federal court. This Court recognized this principle in *Ring* when it deferred to the Arizona Supreme

Court's interpretation of the state's capital sentencing statute in *Ring I. See* 536 U.S. at 603. In *Towery*, however, the Arizona Supreme Court was not interpreting a state statute; it was interpreting *Ring*, a constitutional decision of this Court. Accordingly, its discussion of *Ring*'s effect on Arizona law is not an "authoritative holding." Pet'r. Br. at 20. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 462 n.6 (1981) ("[A] state court's decision invalidating state legislation on federal constitutional grounds may be reversed by this Court if the state court misinterpreted the relevant constitutional standard."). *Towery* is not binding on this or any other federal court.

Moreover, *Towery*'s perfunctory analysis of *Ring* is not compelling. For example, *Towery* concludes that *Ring Towery* must have announced a "new rule" because it overruled *Walton*. *Towery*, 64 P.3d at 832. This reasoning is flawed, as is shown above in Section II.

Towery also rejects the possibility that *Ring* was a ruling of substantive, rather than procedural, law. 64 P.3d at 832-33. Like Petitioner, however, *Towery* reaches this conclusion by taking *Apprendi*'s references to "substance" and "procedure" out of context. *See supra* Section III.B. The state court also refused to recognize the substantive law underpinnings of *Ring*, erroneously concluding that *Ring* could not be substantive because it did not "change" or "alter" either the underlying conduct the state was required to prove to obtain a death sentence or the requisite burden of proof. *Towery*, 64 P.3d at 833. Rather, according to the state court, *Ring* only altered only "who decides," and could therefore only be a procedural decision.

Towery's oversimplification of *Ring* strips this Court's opinion of its reasoning, and focuses solely on the *result* of the

Court's ruling. *Ring* held that, *because* aggravating circumstances in Arizona are the key factor for deciding death eligibility among homicide defendants, they function as elements of the greater offense of capital murder, and *because* aggravating circumstances function as elements under these circumstances, the Constitution requires, as it always has, that the jury determine whether they exist in any particular case. To the extent that *Ring* announced any *new* constitutional principle, it was that aggravating factors that make a homicide defendant eligible for a death sentence are elements of the offense of capital murder. The procedural result in *Ring* flowed directly and inexorably from this substantive ruling. The Arizona Supreme Court erred in *Towery* in identifying these procedural consequences as the *cause*, rather than the *result*, of this Court's ruling in *Ring*. If *Ring* announced a new rule, it is a rule of substantive criminal law, grounded in the federal Constitution, and its retroactive application is not precluded by *Teague*.

IV. If *Ring* announced a new rule of constitutional criminal procedure, it applies retroactively under *Teague*'s exception for rules that implicate the fundamental fairness and accuracy of criminal proceedings.

A. Even if Petitioner is correct that *Ring* represents an unprecedented shift in the Court's interpretation of the Constitution's procedural mandates, Mr. Summerlin would still be entitled to relief, because the "new rule" of *Ring* would constitute a watershed change in constitutional procedure that would fall under *Teague*'s second exception. Dissenting in *Apprendi*, Justice O'Connor predicted that what she described as the Court's new "increase in the maximum penalty" rule would "surely be remembered as a watershed change in constitutional law." 530 U.S. at 524, 525 (further noting that the "extraordinary rule" the Court "announce[d]" in *Apprendi*

had never, in the history of the Bill of Rights, been applied as a constitutional requirement). Such "watershed" procedural changes are not subject to *Teague*'s rule of non-retroactivity if they "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (quoting *Graham v. Collins*, 506 U.S. 461, 478 (1993)). More specifically, *Teague* does not prohibit retroactive application of new procedural rules that (1) improve the accuracy of the trial, and (2) alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). As the court of appeals correctly concluded in this case, to the extent that *Ring* announced a new rule of constitutional procedural law, the rule satisfies these two requirements.

B. Jury fact-finding of aggravating factors improves the accuracy of capital murder trials. As the Court observed in *Ring*, "the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established" in English common law. 536 U.S. at 599. Juries had assumed this important role in the English system of justice because they were "the best investigators of truth and the surest guardians of public justice." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379-80 (Cooley 4th ed. 1899). As a corollary, Blackstone warned that, when a "single magistrate" is given responsibility for "settling and adjusting a question of fact," "partiality and injustice have ample field to range in." *Id*. Consistent with this history, this Court has long recognized that juries are more accurate fact finders than judges. *See Sparf v. United States*, 156 U.S. 51, 65 (1895) (*quoting Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794)) ("'it is presumed that juries are best judges of facts'").

The heightened reliability of jury fact-finding derives from several sources. First among these is the crucial role of group deliberation. In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court unanimously held that the Sixth and Fourteenth Amendments prohibit states from impaneling fewer than six jurors in serious criminal cases. The Court concluded that allowing jury size to fall below six would "lead[] to inaccurate factfinding and incorrect application of the common sense of the community to the facts." *Id.* at 232. Citing empirical research, the Court observed that, "[a]s juries decrease in size, . . . they are less likely to have members who remember each of the important pieces of evidence or argument," and are also less likely to counteract the biases of individual jurors. *Id.* at 233. The Court emphasized that, "[b]ecause juries frequently face complex problems laden with value choices, the benefits of [group deliberation] are important and should be retained." *Id.* Nowhere are the benefits of group deliberation more important, or the problems faced more laden with value choices, than in determining facts that will make a defendant eligible for a death sentence. If a five-person jury is presumptively inaccurate in serious criminal cases, a "jury of one" is, *a fortiori*, inaccurate in a capital case.

The group deliberation and unanimous verdict of twelve jurors further enhances the accuracy of trials by shielding defendants from "the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The Framers had a "healthy suspicion" of judges, who necessarily operate as an arm of the government, and they therefore left "the function of determining criminal guilt *to themselves*, sitting as jurors." *Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., concurring in part and dissenting in part). Simply put, "absent voluntary waiver of the jury right, *the Constitution does not trust judges to make determinations of criminal guilt*." *Id.*

The specter of the "eccentric" judge was no abstraction for Mr. Summerlin. Judge Philip Marquardt, who sentenced both Mr. Summerlin and another man to death on the same day, had an extensive history of substance abuse problems, which culminated in his criminal conviction, removal from the bench, and disbarment. *See* P.A. at A-11 to A-13; *see also supra* note 3. Judge Marquardt's particular eccentricities notwithstanding, Mr. Summerlin's case also illustrates the concern that judges, by virtue of their position, grow inured to meting out the severest of punishments and do not approach the death-eligibility decision with the same gravity that a jury would. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (noting that juries serve as a check against "overconditioned" judges). Here again, the facts of Mr. Summerlin's case show that these essential Sixth Amendment concerns are no mere abstraction or historical anomaly. When questioned about yet another defendant he had sentenced to death while on the bench, Judge Marquardt was unable to recall the man's case, remarking only that "[t]hese guys have sentenced themselves." P.A. at A-52.

Mr. Summerlin's case thus demonstrates that relying on a single judge as the fact finder in a capital case presents an acute danger that personal eccentricities, individual biases, and inevitable acclimation to the capital sentencing process will diminish the accuracy of the capital murder proceeding. *See also* BLACKSTONE, *supra*, at 379 (observing that, when the administration of justice is "entirely entrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decision, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity"); *accord Ring*, 536 U.S. at 612 (Scalia, J., concurring) ("[T]he right of trial by jury is in perilous decline. That decline

is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed.").

The jury system fosters more accurate fact-finding for other reasons, as well. For example, as the court of appeals discussed in its opinion below, subjecting the state's evidence regarding aggravating circumstances to the crucible of a formal trial improves the accuracy of the verdict by eliminating the fact finder's exposure to inadmissible evidence (a common occurrence in the pre-*Ring* era of judicial fact-finding) and by improving the quality of the presentation of evidence for this critical aspect of the capital murder trial.[8] *See* P.A. at A-45 to A-50.

Accuracy, however, denotes more than the mere absence of error. It also signifies conformity to the truth or to a standard or model. WEBSTER'S NEW COLLEGIATE DICTIONARY 8 (1981). In this sense, a jury in a criminal case renders a more "accurate" verdict than a judge because its unanimous decision more closely reflects public opinion regarding the gravity of the defendant's failure to "conform" to societal "standards." Thus, in holding in *Ballew* that the Constitution prohibits states from impaneling fewer than six jurors in a serious criminal case, the Court noted concerns both of "inaccurate factfinding" *and* "incorrect

8. The state's formal presentation of aggravating circumstance evidence in this case was extremely abbreviated. *See* J.A. at 40-42. In lieu of admissible evidence regarding aggravating circumstances, Judge Marquardt received a presentence report prepared by a probation officer. The report contained numerous sentencing recommendations from the victim's family and friends, as well as from law enforcement officers and members of the community. P.A. at A-48. The report also contained the probation officer's personal opinion concerning the heinous nature of the crime. *Id*. at A-49 to A-50.

application of the common sense of the community to the facts" resulting from a jury of only five members. 435 U.S. at 232. Not only is the "common sense of the community" aspect of accuracy relevant to *Teague*'s second exception, it has enhanced significance in the context of a capital murder trial.[9] *See, e.g.*, *Mackey*, 401 U.S. at 695 (Harlan, J., concurring in part and dissenting in part) ("[A] particular rule may be more or less crucial to the fairness of a case depending on its own factual setting.").

As the history of homicide law demonstrates, "[b]y finding facts so as to mitigate the harshness of the medieval law of homicide, the jury was able to bring the application of capital punishment for homicide more nearly in line with community perceptions relating to just deserts." Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989). Modern juries perform a similar role when they find aggravating circumstances. For example, in the death-eligibility stage of capital cases, juries are routinely asked to determine whether a particular murder was committed in a

9. In applying "the common sense of the community to the facts" in its role as fact finder, a jury is *not* performing the same function as when, acting in the role of *sentencer*, it applies the "conscience of the community" in making its decision between death or life imprisonment. In the latter situation, the jury performs an Eighth Amendment function; in the former, it performs a Sixth Amendment function. *Compare Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (discussing the "strong interest in having the jury express the conscience of the community on the ultimate question of life or death") (citation and internal quotation marks omitted), *with Taylor v. Louisiana*, 419 U.S. at 527, 528 (stating that "selection of jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial" because juries act as "instruments of public justice") (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

cruel, heinous or depraved manner. *See, e.g.*, ARIZ. REV. STAT. § 13-703(F)(6). Such determinations are "laden with value choices," *Ballew*, 435 U.S. at 233, which demonstrates why adherence to the jury-trial mandate is imperative in capital cases. Similarly, capital-case juries are frequently asked to determine whether a homicide defendant was motivated by an expectation of pecuniary gain. An accurate finding on this issue "requires subjective and complex inquiries into the defendant's state of mind before, during, and after the crime." *Adamson*, 865 F.2d at 1026. These types of determinations entail qualitative judgments, the accuracy of which is enhanced by "application of the common sense of the community." *Ballew*, 435 U.S. at 232; *accord Neder*, 527 U.S. at 36 n.2 (Scalia, J., concurring in part and dissenting in part) ("The jury has the right to apply its own logic (or illogic) to its decision to convict or acquit.").

Petitioner nevertheless maintains that any concerns about the "accuracy" of Judge Marquardt's findings in Mr. Summerlin's case are dispelled by the Arizona Supreme Court's subsequent affirmance of those findings. Pet'r. Br. at 24. This argument reflects a profound misunderstanding of the purpose of the jury-trial guarantee. *See, e.g.*, *Neder*, 527 U.S. at 33 (Scalia, J., dissenting) (noting the anomaly of permitting "the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) [to be] a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury.)"). *Bollenbach v. United States*, 326 U.S. 607 (1946), is instructive on this point. There, the Court emphasized that, in addressing a violation of a defendant's jury-trial right, "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials . . . ." *Id.* at 614. "In view of the place of importance that

trial by jury has in our Bill of Rights, . . . the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record," cannot substitute "for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Id.* at 615.

In determining whether a homicide defendant should be included among the very few who may constitutionally be condemned to die for their crimes, an "accurate" verdict can result only from the deliberative process and unanimous verdict of a jury. This jury must be drawn from a cross section of the community so that it is capable of accurately expressing the collective common sense of that community. The procedural ramifications of *Ring* advance these vital principles.

C. *Ring* similarly implicates "bedrock procedural elements essential to the fairness of the proceeding." *Sawyer*, 497 U.S. at 242. "The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan*, 391 U.S. at 156. Thus, the Sixth Amendment reflects "[t]he deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement." *Id*. Moreover, as the Court emphasized in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the "most important element" of the Sixth Amendment is "the right to have a jury, rather than a judge, reach the requisite finding of guilty." *Id.* at 277 (citing *Sparf*, 156 U.S. at 105-06). Certainly then, if, as Petitioner maintains, *Ring* announced a new rule of constitutional procedure requiring that juries, rather than judges, find the facts that make a first-degree homicide defendant eligible for the death penalty, this shift in constitutional interpretation must derive from the "fundamental decision"

made by the Framers to establish this country's system of justice on the principle of trial by jury.

The Framers had a profound "reluctance to entrust plenary powers over the life . . . of the citizen to one judge." *Duncan*, 391 U.S. at 156. Yet, before *Ring*, that is precisely what Arizona law allowed. By prohibiting Arizona's unconstitutional practice of permitting a single judge to convict a defendant of capital murder, *Ring* signified a return to bedrock principles upon which the country's criminal justice system was built.

Relying upon *DeStefano v. Woods*, 392 U.S. 631 (1968), Petitioner nevertheless maintains that *Ring* cannot satisfy the fundamental fairness requirement of *Teague*'s second exception. In *DeStefano*, the Court declined to apply retroactively its decision in *Duncan v. Louisiana*, in which the Court held that the Sixth Amendment's jury-trial guarantee applies to the states through the Fourteenth Amendment. Petitioner maintains that, "[i]f application of the Sixth Amendment itself is not retroactive, it would be anomalous to hold that an incremental extension of the jury-trial guarantee is retroactive." Pet'r. Br. at 8-9. The Court, however, expressly rejected this very argument when it retroactively applied *Burch v. Louisiana*, 441 U.S. 130 (1979), which held that conviction by a nonunanimous six-person jury violated the Sixth and Fourteenth Amendments. *See Brown v. Louisiana*, 447 U.S. 323 (1980). *Brown* emphasized that "the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based." 447 U.S. at 334 n.13 (quoting *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966)). Rather, the Court "must determine retroactivity in each case by looking to the peculiar traits of the specific rule in question." *Id*. (internal quotations omitted). Thus, the Court's decision not to grant a new trial in every state case in which a defendant was convicted of a serious

offense without a jury does not control its decision whether to grant new sentencing hearings to the capital defendants affected by *Ring*.

Moreover, in *Teague*, the Court adopted the retroactivity analysis espoused by Justice Harlan in his opinions in *Mackey* and *Desist*. *See Teague*, 489 U.S. at 305-10. In *DeStefano*, by contrast, the Court resolved the retroactivity issue by means of the test outlined in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), which required the Court to consider the purpose of the new rule, the extent of reliance by law enforcement authorities on the old rule, and the effect retroactive application of the new rule would have on the administration of justice. *DeStefano*, 392 U.S. at 633. The *Teague* test is significantly different, especially in that the "effect on the administration of justice" is not a factor in the retroactivity determination. *Teague*, 489 U.S. at 302.

More importantly, in his dissenting opinion in *Desist*, Justice Harlan identified *DeStefano* as a decision in which the Court had "eroded" the principle that new rules affecting "'the very integrity of the fact-finding process'" are to be retroactively applied. *Desist v. United States*, 394 U.S. 244, 257 (1969) (Harlan, J., dissenting) (quoting *Linkletter v. Walker*, 381 U.S. 618, 639 (1965)). Thus, it is far from clear that *Duncan*'s retroactivity would have been resolved in the same fashion under the test developed by Justice Harlan and adopted by this Court in *Teague*.

D. If Petitioner is correct, and *Ring* announced a new rule of constitutional criminal procedure, then that rule merits inclusion with *Gideon v. Wainwright*, 372 U.S. 335 (1963), in the exclusive group of decisions that alter our understanding of the bedrock procedural elements essential to a fair trial.

Certainly, *Ring*'s pedigree is as impressive as *Gideon*'s. "The right to trial by jury in criminal cases was the only guarantee common to the 12 state constitutions that predated the Constitutional Convention, and it has appeared in every State to enter the Union thereafter." *Neder*, 527 U.S. at 31 (Scalia, J., dissenting) (citing Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870, 875 n.44 (1994)). "By comparison, the right to counsel . . . is a Johnny-come-lately: Defense counsel did not become a regular fixture of the criminal trial until the mid-1800's." *Id*. (citing W. BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS 226 (1955)).

The history of this very case confirms the bedrock nature of the right Mr. Summerlin asserts. Over twenty years ago, Mr. Summerlin argued to the Arizona Supreme Court that his Sixth Amendment rights were violated when a judge, rather than a jury, found the facts upon which his death-eligibility was predicated. J.A. at 49-50. He continued to assert that right throughout his state and federal post-conviction proceedings. His Sixth Amendment claim was not premised on any novel theory. Rather, it rested on the "bedrock" Sixth Amendment guarantee of trial by jury. In 2002, in its decision in *Ring*, this Court clearly articulated the precise constitutional principle that Mr. Summerlin had been diligently asserting since his conviction. To permit Mr. Summerlin to be executed following an unquestionably unconstitutional sentencing proceeding because he seeks a "retroactive" application of this most basic Sixth Amendment guarantee could not possibly be consistent with the goals underlying the Great Writ.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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