No. 03-0526

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

REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

This Court granted certiorari to decide two questions: (1) whether the Ninth Circuit erred in holding that the new rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002), is substantive, and (2) whether the Ninth Circuit erred in holding that the rule, if procedural, falls within the watershed exception to the general rule of non-retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989).

Summerlin offers not two arguments, but four. His first two arguments attempt to avoid, rather than address, the two questions this Court accepted for review. Departing from the Ninth Circuit's reasoning, Summerlin first seeks to preserve the Ninth Circuit's judgment on the ground that this Court's decisions in *Walton v. Arizona*, 497 U.S. 639 (1990), and *Ring* concerned only a misinterpretation and correction of Arizona law. He then argues derivatively that *Ring* did not announce a new rule of constitutional law and therefore falls outside this Court's general rule against retroactive application. Summerlin's third and fourth arguments address the two questions on which this Court granted certiorari.

This Court should summarily reject Summerlin's first two arguments because, regardless whether *Walton* was based on a misinterpretation of Arizona law (it was not), *Walton* announced a Sixth Amendment rule applicable to every state that has a capital punishment statute. *Ring* similarly announced a Sixth Amendment rule applicable nationwide, and that ruling directly overruled *Walton*. Accordingly, Summerlin's first two arguments necessarily fail.[1]

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[1] This Court may also reject Summerlin's first argument (that *Ring* merely corrected a misinterpretation of Arizona law) as waived because he did not make it in opposing the petition for writ of certiorari, and he made the argument only tangentially below (Summerlin's Ninth Circuit Brief, filed 11/12/2002, at 7). *See Baldwin v. Reese*, 541 U.S. ___, 124 S. Ct. 1347, 1352 (2004) ("Under this court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.' ") (quoting

(Continued on following page)

Although addressing the issues accepted for review, Summerlin's third and fourth arguments are unpersuasive. The *Ring* rule is procedural because it did not reinterpret or redefine the scope of illegal conduct or circumstances that make a murder defendant eligible for a death sentence. The *Ring* rule does not qualify for retroactive application under *Teague* because it does not implicate the accuracy or fairness of capital sentencing proceedings. *Ring* did not change *what* is to be decided, but only *who* decides – a fair and impartial judge, or a fair and impartial jury.

Ring extended the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases. State and federal courts have uniformly declined to apply the *Apprendi* rule retroactively, and there is no reasoned basis for distinguishing *Apprendi* and *Ring* for purposes of the *Teague* retroactivity analysis. Because the *Apprendi*/*Ring* rule does not implicate the fundamental fairness or accuracy of sentencing proceedings, it lacks sufficient ameliorative value to justify the burdens that its retroactive application would impose on our state and federal court systems.

ARGUMENT

I. Regardless whether this Court based its decisions in *Walton*, *Apprendi*, or *Ring* on a misconception or misapplication of state law, those cases announce federal constitutional rules applicable beyond the confines of any one state.

To avoid *Teague*'s general prohibition against retroactive application of new constitutional rules, Summerlin has developed a novel argument that *Ring* is not a new constitutional rule, but rather a correction of a "misconception" in *Walton* that "in Arizona a prerequisite to a

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Caterpillar Inc. v. Lewis, 519 U.S. 61, 75 n.13 (1996)) (internal quotation marks omitted).

death sentence was a jury conviction for *capital* murder." (Resp't Br. at 21.) Summerlin posits that *Ring* did not overrule *Walton* for the purpose of resolving an irreconcilable conflict between the Sixth Amendment holding in that case and the reasoning of *Apprendi*, but rather to correct the Court's misinterpretation of Arizona substantive law in light of the Arizona Supreme Court's decision in *State v. Ring* (*Ring I*), 25 P.3d 1139 (Ariz. 2001).

Regardless whether this Court based its decision in *Walton* on a misinterpretation or misapplication of state law, *Walton* announced a Sixth Amendment rule applicable nationwide. Regardless whether *Ring* interpreted or reinterpreted state law, *Ring* similarly announced a Sixth Amendment rule applicable nationwide, and that ruling directly overruled *Walton*. *See Ring*, 536 U.S. at 589, 596, 609 (the reasoning of *Apprendi* is "irreconcilable" with the *holding* of *Walton*). The only relevant inquiry is whether *Ring* announced a new constitutional rule. It undeniably did.

Furthermore, Summerlin errs in asserting that *Walton* rests on this Court's misinterpretation of Arizona law. Prior to *Walton*, this Court understood that under Arizona law, a convicted first-degree murderer was "statutorily barred" from a death sentence unless a trial court found an aggravating circumstance. *See Arizona v. Rumsey*, 467 U.S. 203, 206 (1984) (holding that the trial judge's failure to find an aggravating circumstance at the original sentencing was an acquittal of the death penalty); *Poland v. Arizona*, 476 U.S. 147, 156 (1986) (noting that a judge must find "*some* aggravating circumstance before the death penalty may be imposed"); *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (decided the same day as *Walton* and noting that aggravating circumstances make a defendant "eligible" for the death penalty).

In *Walton*, the petitioner unsuccessfully argued that Arizona's aggravating circumstances were "elements of the offense" and, as such, had to be determined by a jury. 497 U.S. at 648. The *Walton* majority and the dissent disagreed whether aggravating circumstances should be treated as elements or sentencing factors. *Compare*

Walton, 497 U.S. at 647-49, *with* 497 U.S. at 709 (Stevens, J., dissenting). Neither the majority nor the dissent, however, misunderstood the fact that an Arizona court could not issue a death sentence on the basis of a first-degree murder verdict alone. *Walton* characterized the determination of aggravating circumstances as "prerequisite to imposition of [a death] sentence," and "the specific findings *authorizing* the imposition" of a death sentence. *Id.* at 647-48 (emphasis added). *See also id.* at 645 (noting that "a jury convicted Walton of *first degree murder*," and "[t]he trial judge *then* conducted the separate sentencing hearing required by [A.R.S.] § 13-703(B)") (emphasis added).

This Court's understanding of Arizona law mirrored that of the Arizona Supreme Court at the time. *See*, *e.g.*, *State v. Smith*, 665 P.2d 995, 1000 (Ariz. 1983) ("While the trial court made various findings of fact pursuant to [Arizona's capital sentencing] statute, including a finding that this homicide was committed for pecuniary gain, none of these findings were *elements* of the crime of which Smith stands convicted.") (emphasis added). Summerlin's argument that this Court misinterpreted Arizona law in *Walton* necessarily fails because the Arizona Supreme Court's interpretation was authoritative and identical.

In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Citing *Walton*, the majority distinguished state capital sentencing statutes that permitted judges to find specific aggravating circumstances before imposing a death sentence, based on the belief that under such statutes, "once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . " *Id.* at 497 (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2 (1998) (Scalia, J., dissenting)). The *Apprendi* dissenters rejected the distinction, arguing that absent the finding of the

aggravating circumstance, "the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." *Id.* at 538. In *Ring I*, 25 P.3d 1139 at ¶ 43, the Arizona Supreme Court provided a "further explication" of the "practical operation of Arizona's death penalty scheme" and agreed with the *Apprendi* dissent's description of Arizona's procedure.

Contrary to Summerlin's argument, the Arizona Supreme Court's explication in *Ring I* does not establish that this Court misunderstood Arizona's capital sentencing statute in deciding *Walton*. In *Ring I*, the Arizona Supreme Court explained that under Arizona law, "a defendant cannot be put to death solely on the basis of a jury's verdict, regardless of the jury's factual findings," and "the death sentence becomes possible only after the trial judge makes a factual finding that at least one aggravating factor is present." 25 P.3d 1139, ¶ 42. The Arizona Supreme Court's statement did not refute, or even address, any statement in *Walton*. Rather, it refuted the *Apprendi* majority's statement – which would otherwise have served to distinguish *Walton* – that juries in capital cases had "found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death." *Apprendi*, 530 U.S. at 497 (quoting *Almendarez-Torres*, 523 U.S. at 257 n.2 (Scalia, J., dissenting)).

Apprendi created a conflict between capital and non-capital jurisprudence, and this Court resolved that conflict by recognizing in *Ring* that, under *Apprendi*'s analysis, aggravating circumstances were the "functional equivalent" of elements of an offense for purposes of the Sixth Amendment jury trial guarantee. *Ring*, 536 U.S. at 589, 596. Consequently, the jury trial guarantee now applies to the finding of aggravating circumstances: not because this Court's understanding of Arizona's statutes has changed, but because its view of what constitutes an element for Sixth Amendment purposes has changed.

II. *Ring* announced a new constitutional rule.

Summerlin contends that *Teague* "is altogether inapposite" because *Ring* did not announce a new rule of constitutional law. (Resp't Br. at 16.) The Ninth Circuit correctly rejected this contention, stating "Summerlin's argument fails because there is no doubt that *Ring* announced a new rule as that term is construed for *Teague* purposes." (Cert. Pet. App. A-43.) In fact, every other court to address this issue has concluded that *Ring* announced a new constitutional rule of criminal procedure. *See Turner v. Crosby*, 339 F.3d 1247, 1284 (11th Cir. 2003); *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003); *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002); *State v. Towery*, (Cert. Pet. App. B-19, ¶ 9); *Head v. Hill*, 587 S.E.2d 613, 619 (Ga. 2003); *State v. Lotter*, 664 N.W.2d 892, 904-05 (Neb. 2003); *Brown v. State*, 67 P.3d 917, 918 (Okla.Crim. App. 2003); *Bottoson v. Moore*, 833 So.2d 693, 711 (Fla. 2002) (Shaw, J., concurring).

Because *Ring* directly overruled controlling precedent, it necessarily established a new rule. *Graham v. Collins*, 506 U.S. 461, 467 (1993); *see also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (if a holding breaks new ground, was not dictated by precedent, or imposes new obligations on a government, it is a "new" rule for *Teague* purposes). Summerlin nevertheless contends that *Ring* did not announce a new rule because it merely applied a pre-existing rule to a new factual situation. He argues that *Walton* was an anomaly corrected by *Ring*, because by 1791, "'the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well-established.'" (Resp't Br. at 17.)

It is misleading to speak of "the jury's role" in finding facts that rendered a homicide defendant "eligible" for capital punishment in 1791. It superimposes an inapplicable post-*Furman*[2] concept – death eligibility based upon

[2] *Furman v. Georgia*, 408 U.S. 238 (1972).

objective, narrowing factors – onto a legal system that knew no such paradigm. In 1791, a murder conviction resulted in a death sentence as a matter of law, without discretion to impose a lesser sentence for any reason, much less upon consideration of objective "eligibility" determinations by the judge *or* the jury. *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion).

Summerlin also states that "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*." (Resp't Br. at 21.) "Capital murder" and "murder simpliciter" are not terms found in Arizona statutes. Rather, they are this Court's analytical shorthand for differentiating the defendant's status following the jury verdict in *Ring* (eligible to receive a life sentence, *i.e.*, murder simpliciter) from his status after the State proved an aggravating circumstance (eligible to receive a death sentence, *i.e.*, capital murder). Given the artificial construct of the terms "capital murder" and "murder simpliciter" as they are used in *Ring*, there is no significance to the fact that this Court has never permitted a judge to determine facts that differentiate them.

To the extent Summerlin is arguing that until *Furman* the Constitution prohibited a judge from sentencing a convicted murderer to death based on facts not heard by the jurors, he is wrong. *See Williams v. New York*, 337 U.S. 241, 242-43 (1949) (upholding capital sentence where, notwithstanding a jury recommendation of a life sentence, trial court imposed death based on trial evidence and "additional information obtained through the court's 'Probation Department and through other sources' ").

When Summerlin murdered Brenna Bailey in 1981, this Court did not recognize a constitutional requirement for jury sentencing in capital cases. To the contrary, this Court had previously upheld judicial sentencing in capital cases and had noted that judicial sentencing "should lead, if anything, to even greater consistency." *Proffitt v. Florida*, 428 U.S. 242, 252 (1976). The Arizona Supreme Court

relied on *Proffitt* in rejecting Summerlin's claim in his direct appeal. *State v. Summerlin*, 675 P.2d 686, 695 (Ariz. 1983). That reliance was not objectively unreasonable. *See O'Dell*, 521 U.S. at 156.

It was not surprising that the *Walton* Court, relying on a long line of post-*Furman* decisions in addition to *Proffitt*,[3] rejected the idea that aggravating circumstances must be proved to the jury as elements of first-degree murder before imposing a death sentence. *Walton*, 497 U.S. at 648. *Walton* was not an aberration resulting from a misinterpretation of Arizona law; it was a logical application of well-settled case law. *Ring*, in contrast, departed from that line of cases and directly overruled controlling precedent. Thus, *Ring* is a new constitutional rule.

III. *Ring* did not announce a substantive rule.

Addressing the questions presented for review, Summerlin first argues that *Ring* announced a substantive rule. His argument fails because *Ring*, like *Apprendi*, did not alter the scope of criminal conduct or aggravating circumstances that make a defendant eligible for a death sentence. As the Seventh Circuit Court of Appeals succinctly stated in rejecting the corollary *Apprendi* retroactivity argument in *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002):

> Curtis and Sax contend that *Apprendi* is substantive rather than procedural. Yet *Apprendi* is about nothing but procedure – who decides a given question (judge versus jury) and under what standard (preponderance versus reasonable doubt). *Apprendi* does not alter which facts have what legal significance, let alone suggest that conspiring to distribute marijuana is no longer a

[3] *Spaziano v. Florida*, 468 U.S. 447 (1984); *Cabana v. Bullock*, 474 U.S. 376 (1986); *Poland*, 476 U.S. 147; *Hildwin v. Florida*, 490 U.S. 638 (1989) (*per curiam*); *Clemons v. Mississippi*, 494 U.S. 738 (1990).

> federal crime unless the jury finds that some particular quantity has been sold.

Ring extended the *Apprendi* rule to capital cases, and the same reasoning applies to the question of who decides (judge versus jury) whether aggravating circumstances have been established beyond a reasonable doubt. "*Apprendi* repeatedly instructs in that context that the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury." *Ring*, 536 U.S. at 604-05. *Ring* did not alter which facts have legal significance under Arizona's substantive first-degree murder statute, ARIZ. REV. STAT. ANN. § 13-1105, or Arizona's capital sentencing statute, ARIZ. REV. STAT. ANN. § 13-703. Before and after *Ring*, the State must prove the same facts, under the same standard of proof, in order to render a defendant eligible for a death sentence. All that has changed, as most appellate courts have acknowledged, is *who* finds those facts. (*See* Pet'r Br. at 31) (citing cases holding that *Ring* announced a new procedural rule). The rule is quintessentially procedural.

Summerlin notes that *Bousley v. United States*, 523 U.S. 614 (1998), does not "define the universe" of substantive rules. (*See* Resp't Br. at 25.) *Bousley* however, illustrates the difference between substantive and procedural rules. It demonstrates that a substantive rule interprets the meaning of a statute to alter the scope of unlawful conduct. *See id.* at 620 (substantive decisions hold that a statute "does not reach certain conduct," creating the risk that a defendant "stands convicted of an act that the law does not make criminal") (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Fiore v. White, 531 U.S. 225 (2001), and *Bunkley v. Florida*, 538 U.S. 835 (2003) (*per curiam*), fail to advance Summerlin's argument. Both *Fiore* and *Bunkley* involve a state court interpretation of the *scope of restricted conduct* under a state statute. Both cases establish that a state court interpretation that narrows the scope of a state statute so that certain conduct is not unlawful is a substantive change. Applying *Bousley*, *Fiore*, and *Bunkley* to

Ring leads to the conclusion that the *Ring* rule is procedural, rather than substantive, because *Ring* does not change what the State must prove for a defendant to be convicted of a crime or to be eligible for a death sentence. Summerlin never addresses, much less overcomes, this distinction.

Summerlin takes issue with Petitioner's argument linking retroactivity under *Apprendi* to retroactivity under *Ring*.[4] Petitioner's argument rests on this Court's statements in *Apprendi* and *Ring*, and enjoys the overwhelming weight of authority. (*See* Pet'r Br. at 15-16.) Summerlin's position rests on an unsupportable distinction between the question presented in *Apprendi* (which he concedes is procedural) and the rule announced therein (which he claims is substantive). (Resp't. Br. at 26-27.)

According to Summerlin, this Court answered the procedural question in *Apprendi* in a substantive way, by "determining what constitutes a crime" in the context of the relevant New Jersey statutes. (Resp't Br. at 26-27.) However, this Court did *not* "determine what constitutes a crime" under New Jersey law. No one disputed the interpretation, and therefore the scope of the New Jersey weapons statute or of the New Jersey enhancement statute. 530 U.S. at 468-69. Rather, this Court addressed whether the *Apprendi* defendant had a Sixth Amendment right to have a jury decide whether the State proved the facts that subjected the defendant to the greater penalty under the enhancement statute.

In *Ring*, this Court resolved the corollary procedural question with the corollary procedural rule, declaring that a capital defendant has a Sixth Amendment right to have a jury determine whether the State proved facts underlying aggravating circumstances that subjected the

[4] Summerlin suggests that while *Apprendi* announced a new rule, *Ring* did not. (Resp't Br. at 19-21.) Summerlin's amicus curiae, Criminal Defense Lawyers ("CDL"), however, argues that both *Apprendi* and *Ring* are entitled to retroactive application. (CDL Br. at 5, 10, 18.)

defendant to the greater penalty (death). If *Apprendi* announced a procedural rule, the extension of that rule to capital cases in *Ring* is necessarily procedural as well. Adopting Summerlin's conclusion that the rule in *Ring*, and derivatively the rule in *Apprendi*, is substantive would be wrong and would unsettle a multitude of cases that have held otherwise.[5]

Summerlin's criticism of Petitioner's reliance on *United States v. Gaudin*, 515 U.S. 506 (1995), also fails. In *Gaudin*, this Court treated as procedural its holding that the trial court must submit the question of materiality to a jury. *Id.* at 521. Summerlin attempts to distinguish *Gaudin* from *Ring* because in *Gaudin*, the government conceded materiality to be an element of the offense, *id.* at 509, while in *Ring*, the State opposed the defendant's argument that aggravating circumstances were the functional equivalent of an element of the offense. *Ring*, 536 U.S. at 604. This distinction is insignificant. For purposes of the Sixth Amendment analysis, this Court in *Ring* treated aggravating circumstances as elements. *Id.* at 609.

Summerlin rejects *Dobbert v. Florida*, 432 U.S. 282 (1977), as irrelevant to the analysis of whether *Ring* announced a substantive change to Arizona's criminal code. (Pet'r. Br. at 16-17.) Summerlin asserts that the ex post facto prohibition at issue in *Dobbert* serves "a vastly different function than the judicially created doctrine of non-retroactivity." (Resp't Br. at 29.) Summerlin fails, however, to explain how those functions differ, much less

[5] Amicus CDL takes the position that this Court need not concern itself with the effects of such a decision because of other procedural obstacles that federal habeas corpus petitioners must surmount. (CDL Br. at 24.) Amicus fails to consider 18 U.S.C. § 2244(b)(2)(A), which enables habeas petitioners to surmount the retroactivity obstacle by bringing a successive petition whenever "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.*

why that difference renders this Court's pronouncements on the substantive/procedural distinction in ex post facto cases irrelevant to retroactivity cases.

Finally, Summerlin refuses to acknowledge the Arizona Supreme Court's authoritative holding in *Towery* that *Ring* "changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the State's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the State's burden to establish the factors beyond a reasonable doubt." (Cert. Pet. App. B-10, ¶ 13.) The *Towery* court considered whether "*Ring*[ ] refined the definition of an element of capital offenses, which is unquestionably a substantive decision," and concluded it did not. (*Id.* at B-9, ¶ 11.) The Arizona Supreme Court's unequivocal conclusion in *Towery* that *Ring* did *not* create a new offense of capital murder or change the definition of an element of a capital offense in Arizona is controlling. *See Martin v. Ohio*, 480 U.S. 228, 235 (1987) (the Ohio Supreme Court's holding that "unlawfulness" is not an element of the state's murder statute is an interpretation of state law that is binding on this Court).

Summerlin cites *no* case to this Court, other than the opinion below, holding that a substantive rule results whenever a court finds that a jury, rather than a judge, must determine whether a sentence-increasing fact exists. To the contrary, case law and logic support the conclusion that *Ring* announced a new procedural rule.

IV. The new rule announced in *Ring* does not significantly enhance accuracy in finding aggravating circumstances or alter bedrock principles essential to fairness.

To fall within *Teague*'s watershed exception to the general rule of non-retroactivity, a new constitutional rule of criminal procedure "must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural

elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (quotation marks and citations omitted).

Although Summerlin argues that the *Ring* rule fits within the watershed exception, he fails to address most of the analysis in Petitioner's opening brief or the reasoning in the supporting case law. Summerlin begins with the premise that the rule in *Ring* comes within *Teague*'s second exception because Justice O'Connor described (in dissent) the rule announced in *Apprendi* as a "watershed change." 530 U.S. at 524. Summerlin ignores, however, Justice O'Connor's express statement in her *Ring* dissent that habeas petitioners "will be barred from taking advantage of today's holding on federal collateral review." 536 U.S. at 621.

Summerlin next offers little more than a series of tangential observations by courts and commentators made in the context of addressing other constitutional issues. None of his arguments establishes that the new rule seriously enhances the accuracy of the proceeding or alters our understanding of bedrock procedural elements essential to the fairness of such proceedings.

A. Having a judge, rather than a jury, determine aggravating circumstances did not seriously diminish the accuracy of those findings.

A new rule meets the watershed criterion only if it is "so central" to an accurate determination that without it, the likelihood of obtaining an accurate result is "seriously diminished." *Teague*, 489 U.S. 288, 313 (1989) (plurality opinion). Summerlin asserts that jury fact-finding of aggravating circumstances improves the accuracy of capital murder trials. (Resp't Br. at 33). He does not, however, acknowledge that to satisfy the first part of *Teague*'s watershed exception, a new rule must *significantly* or *seriously* enhance accuracy. *See Graham v. Collins*, 506 U.S. 461, 478 (1993); *Sawyer v. Smith*, 497 U.S. 227, 242 (1990).

The *Ring* rule does not appreciably affect accuracy. That stands to reason, because this Court adopted the rule to fulfill a Sixth Amendment requirement, rather than to correct a defect in the fact-finding process. *See Turner v. Crosby*, 339 F.3d 1247, 1286 (11th Cir. 2003) ("*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."). The jury trial right acts as a shield against an overzealous prosecutor and a compliant judge, not as a vehicle for ensuring accuracy in fact finding. *See Duncan v. Louisiana*, 391 U.S. 145, 156, 158 (1968). The primary purpose of the Sixth Amendment right is thus to "prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who . . . are less likely to function or appear as but another arm of the Government that has proceeded against him." *Baldwin v. New York*, 399 U.S. 66, 72 (1970); *see also Williams v. Florida*, 399 U.S. 78, 100 (1970) (jury's purpose is "to prevent oppression by the Government").

In *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), this Court expressly declined to retroactively apply the newly-incorporated Sixth Amendment jury trial guarantee set forth in *Duncan*. Summerlin argues, however, that this Court's retroactivity test changed after *DeStefano*, and he speculates that the *DeStefano* court might have applied *Duncan* retroactively had it applied the *Teague* test. That speculation is ill-founded because accuracy was a central retroactivity concern prior to *Teague*. *See Roberts v. Russell*, 392 U.S. 293, 294 (1968) (*per curiam*) (citing cases holding that new rules apply retroactively to correct "serious flaws" in the fact-finding process). Under this Court's pre-*Teague* jurisprudence, when a new rule raised serious questions about the accuracy of the proceeding, it was given full retroactive effect. *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977); *Williams v. United States*, 401 U.S. 646, 653 (1971) (plurality opinion). Summerlin's argument ignores the analytical overlap between the pre- and post-*Teague* retroactivity tests, and it ignores

the fact that this Court has consistently declined to give retroactive effect to newly-announced constitutional rules of criminal procedure based on the jury trial guarantee. *See*, *e.g.*, *Gosa v. Mayden*, 413 U.S. 665, 676 (1972) (plurality opinion); *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975) (*per curiam*); *Allen v. Hardy*, 478 U.S. 255, 257-59 (1986) (*per curiam*).

Summerlin and his amici do not address this long, unbroken line of controlling authority, but instead focus on one pre-*Teague* case as authority for *Ring* to be applied retroactively: *Brown v. Louisiana*, 447 U.S. 323 (1980). (Resp't Br. at 40-41; CDL Br. at 3-4, 23; SCHR Br. at 15.) Their reliance on *Brown* is misplaced because *Brown* is part of this line of authority in which this Court has declined to apply retroactively the Sixth Amendment jury trial guarantee. In *Burch v. Louisiana*, 441 U.S. 130 (1979), this Court held that conviction of a nonpetty criminal offense by a non-unanimous six-person jury violated the Sixth and Fourteenth Amendments. In *Brown*, this Court applied *Burch* to a case that was pending on *direct appeal* when *Burch* was decided. *See Brown*, 447 U.S. at 337 (Justice Powell, with whom Justice Stevens joined, concurring in the judgment). *Brown* does not stand for the proposition that an incremental change to Sixth Amendment jury trial rights warrants retroactive application to cases on *collateral* review.

Although Summerlin argues that jury determination of aggravating circumstances is "more accurate," case law is to the contrary. "Although the function of the jury is to find facts, that body is not necessarily *or even probably* better at the job than the conscientious judge." *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971) (White, J. concurring) (emphasis added). "[O]ne cannot say that in our legal system the jury is a necessary component of accurate factfinding." *Id.* at 543 (plurality opinion); *see also Towery*, (Cert. Pet. App. B-12, ¶ 19) ("We have no reason to believe that impartial juries will reach more accurate conclusions regarding the presence of aggravating circumstances than did an impartial judge."); *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2003) ("[T]he likelihood of an accurate sentence was

not seriously diminished simply because a three-judge panel, rather than a jury, found the aggravating circumstances that supported Colwell's death sentence.").

With the exception of *Ballew v. Georgia*, 435 U.S. 223 (1978), all of the cases Summerlin discusses address only the jury's efficacy in shielding defendants from an oppressive government or overly zealous prosecutor, a function unrelated to fact-finding *accuracy*. Summerlin attempts, in a footnote, to distinguish between the jury's sentencing function as the "conscience of the community," which he concedes is irrelevant to accuracy, and the jury's ability to "apply the common sense of the community to the facts," which he claims increases accuracy of factfinding. (Resp't. Br. at 37, n.9). But the case he cites to draw the distinction, *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), concerns the fair cross-section requirement, and says nothing about the fact-finding process, or how jury involvement enhances accuracy. Moreover, this Court declined to apply *Taylor* retroactively. *Daniel*, 420 U.S. at 32 (citing *DeStefano*).

Summerlin's quotes from a portion of the *Ballew* opinion are from two Justices only. (Resp't Br. at 34.) The narrow holding in *Ballew* is that the Sixth Amendment jury trial guarantee requires a jury of at least six people. *Ballew* did not address whether juries were more accurate fact-finders than judges. Furthermore, although the statements Summerlin quotes from *Ballew* may be relevant to the accuracy question, they do not carry the *Ring* rule over the "seriously enhances accuracy" threshold.

Summerlin also advances the notion that juries are more accurate fact finders than judges because jurors are not exposed to inadmissible evidence. (Resp't. Br. at 36.) However, at the time of Summerlin's trial and sentencing, the admissibility evidence of aggravating circumstances was governed – as it is today – by the rules of evidence at criminal trials. *See* former ARIZ. REV. STAT. ANN. § 13-703(C) (1973). This Court presumes that judges follow the law and disregard inadmissible evidence. *Walton*, 497 U.S. at 653.

To the extent that a judge's bias, like a juror's bias, corrupts the fact-finding process, the law provides procedures for removing a biased or otherwise incompetent judge, and for reversing convictions and/or sentences in cases where such judges have presided. *See*, *e.g.*, *Liteky v. United States*, 510 U.S. 540, 544 (1994); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). Thus, this Court should disregard Summerlin's irrelevant references to trial Judge Philip Marquardt's alleged marijuana use during his sentencing proceedings.[6]

Summerlin offers his unsupported observation that jury fact finding is more accurate because a jury's "unanimous decision more closely reflects public opinion regarding the gravity of the defendant's failure to 'conform' to 'societal standards.'" (Resp't Br. at 36.) However, the Constitution does not require unanimity by a 12-person jury. *Apodaca v. Oregon*, 406 U.S. 404, 412 (1972). Moreover, public opinion is unrelated to factual accuracy.

Summerlin also offers amicus Welsh White's observation that "historically," juries "bring the application of capital punishment for homicide more nearly in line with community perceptions relating to just deserts." (Resp't Br. at 37.) Summerlin fails to recognize the distinction between jury *sentencing*, a process in which community perceptions might arguably apply, and jury determination of aggravating circumstances, which is indistinguishable from any other proof of facts in criminal trials.[7] Summerlin

[6] Summerlin's pending habeas proceeding includes a separate claim relating to Judge Marquardt's alleged drug impairment. (Cert. Pet. App. A-16.) Contrary to the Ninth Circuit's implication in the opinion below, the State did not concede that Judge Marquardt used marijuana while deliberating. In state post-conviction proceedings, a different superior court judge, as well as the Arizona Supreme Court, rejected Summerlin's claim that Judge Marquardt's drug problems affected the conviction or sentence. Notably, Summerlin does not argue that Judge Marquardt's findings relating to the two aggravating circumstances underlying his death sentence were inaccurate.

[7] Even if the "conscience of the community" were relevant to the accuracy prong of the *Teague* analysis, and even if *Ring* implicated

(Continued on following page)

has not established that having a fair and impartial jury, rather than a fair and impartial judge, determine aggravating circumstances significantly or seriously improves accuracy in the sentencing process.

B. The *Ring* decision did not alter bedrock principles of procedure.

The second part of the *Teague* watershed exception applies to new rules that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," and implement procedures "implicit in the concept of ordered liberty." *Sawyer*, 497 U.S. at 242. In rejecting the argument that the rule announced in *Ring* implicates the watershed exception, the Arizona Supreme Court noted that "[o]ne can easily envision a system of 'ordered liberty' in which certain elements of a crime can or must be proved to a judge, not to the jury." *Towery*, (Cert. Pet. App. B-13, at ¶ 21) (quoting *United States v. Shunk*, 113 F.3d 31, 37 (5th Cir. 1997) (holding that *Gaudin* does not apply retroactively)). Summerlin offers little to refute Petitioner's argument that the *Apprendi*/*Ring* rule did not alter our understanding of bedrock procedural elements necessary to ensure a fair proceeding.

"The principle announced in *Teague* serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the

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anything more than judicial finding of aggravating circumstances, jury sentencing may not provide the type of buffer between the prosecution and the accused that Summerlin presumes. In Arizona, for example, following a recent change to jury sentencing in capital cases, the percentage of cases in which the death penalty has been imposed has dramatically increased. *See* Jim Walsh, *Jurors Dish Out Death in Arizona. Sentencing Rate Up Since Judges Lost Say*, ARIZONA REPUBLIC, Nov. 12, 2003, at A1; Robert Greenberger, *Death-Penalty Law Backfires*, WALL STREET JOURNAL, Aug. 6, 2003, at A4.

finality of state convictions valid when entered." *Sawyer*, 497 U.S. at 234. The new rule at issue in *Sawyer* was "designed as an enhancement of the accuracy of capital sentencing," but it was an incremental change and thus not an "absolute prerequisite to fundamental fairness," so this Court declined to apply it retroactively. *Id.* at 244 (quoting *Teague*, 489 U.S. at 314). The rule in *Apprendi* and *Ring*, like the rule in *Sawyer*, incrementally advanced a constitutional principle, extending the Sixth Amendment jury trial guarantee by applying it to facts that functioned as elements by increasing the maximum sentencing range. This Court should similarly decline to retroactively apply the *Apprendi*/*Ring* rule.

Summerlin attempts to analogize the rule in *Ring* to that announced in *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). *Gideon* introduced a fundamental and sweeping change by recognizing, for the first time, the constitutional right to counsel, a change acknowledged to fit within what is now termed the *Teague* watershed exception. Incremental extensions of the *Gideon* rule, however, have not been applied retroactively. For example, in *Adams v. Illinois*, 405 U.S. 278 (1972), the petitioner unsuccessfully argued for retroactive application of the rule announced in *Coleman v. Alabama*, 399 U.S. 1 (1968), where this Court incrementally extended the *Gideon* right to counsel to the preliminary hearing stage of criminal proceedings. Summerlin must overcome not only the fact that this Court declined to apply the seminal Sixth Amendment case – *Duncan* – retroactively, but also that *Apprendi*/*Ring* is at most an incremental extension of *Duncan*.

Teague strikes the necessary balance between the need for finality in the criminal justice system and a defendant's interest in applying new procedural rules retroactively. Because the *Ring* rule has no appreciable effect on accuracy and does not alter our understanding of

any bedrock procedural principle, it should not apply retroactively to cases on collateral review.

CONCLUSION

Petitioner respectfully asks this Court to (1) hold that the rule announced in *Ring* does not apply to cases on collateral review, and (2) reverse the Ninth Circuit's decision insofar as it vacates Summerlin's death sentence.

Respectfully submitted,

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