CRIMINAL PROCEDURE — HABEAS CORPUS — NINTH CIRCUIT HOLDS THAT THE SUPREME COURT'S DECISION IN RING V. ARIZONA APPLIES RETROACTIVELY TO CASES ON HABEAS CORPUS REVIEW. — Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) (en banc).

In Ring v. Arizona, the Supreme Court held that the Sixth Amendment requires a jury, not a judge, to find the aggravating factors necessary to impose a capital sentence. Recently, in Summerlin v. Stewart, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit held that Ring announced a substantive rule that applies retroactively to cases on federal habeas review — a judgment that directly conflicts with the Eleventh Circuit’s decision in Turner v. Crosby. Although the Summerlin court reached the right result, it relied on tenuous distinctions between procedural and substantive law, as well as ambiguous studies about the differences between jury and judge fact-finding. Instead, the court should have based its decision solely on the Supreme Court’s continuous emphasis on the jury’s important role in expressing the moral judgment of the community in capital cases.

Summerlin involved a set of facts that can only be described as bizarre. On April 29, 1981, Brenna Bailey, an account investigator for

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1 122 S. Ct. 2428 (2002).
2 See id. at 2443. Ring rested on Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that “[o]ther than the fact of a prior conviction, any fact that increases the statutory penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Id. at 490. Ring directly overruled Walton v. Arizona, 497 U.S. 639 (1990), in which the Court held that a jury was not required to determine aggravating circumstances for a capital offense. See id. at 647. Ring may also render questionable the constitutionality of “hybrid” sentencing schemes, in which a jury serves an advisory role or a three-judge panel sentences a defendant to death when a jury is deadlocked. See, e.g., Benjamin F. Diamond, Note, The Sixth Amendment: Where Did the Jury Go? Florida’s Flawed Sentencing in Death Penalty Cases, 55 FLA. L. REV. 905, 906–08 (2003) (arguing that Florida’s “hybrid” sentencing scheme, in which the jury plays only an advisory role, is unconstitutional); cf. Recent Case, 117 HARV. L. REV. 1283, 1286 (2004) (arguing that there is little practical distinction between Alabama’s hybrid sentencing scheme and the Arizona scheme invalidated in Ring).
3 341 F.3d 1082 (9th Cir. 2003) (en banc).
5 339 F.3d 1247 (11th Cir. 2003) (holding that Ring set forth a new procedural rule that does not have retroactive effect). New substantive rules typically apply retroactively, whereas new procedural rules typically do not. See infra note 26.
6 Judge Thomas commented at the beginning of his opinion:

It is the raw material from which legal fiction is forged: A vicious murder, an anonymous psychic tip, a romantic encounter that jeopardized a plea agreement, an allegedly incompetent defense, and a death sentence imposed by a purportedly drug-addled judge.

But, as Mark Twain observed, “truth is often stranger than fiction because fiction has to make sense.”

Summerlin, 341 F.3d at 1084.
Finance America, disappeared after visiting Warren Summerlin’s home to discuss a delinquent account.\(^7\) Over the next two days, the police received an anonymous phone tip stating that Summerlin had murdered Bailey,\(^8\) and then found Bailey’s beaten and partially nude body in the trunk of her car, near Summerlin’s home.\(^9\) The police subsequently obtained a search warrant for the Summerlin residence, finding several pieces of incriminating evidence and later overhearing incriminating statements that Summerlin made to his wife at the police station.\(^10\) Summerlin was subsequently charged with first-degree murder and sexual assault.\(^11\)

During court proceedings, Summerlin’s public defender had a one-night “personal involvement . . . of a romantic nature” with the prosecutor for the case,\(^12\) and the Maricopa County Attorney and the Public Defender’s Office consequently removed themselves from the case.\(^13\) Summerlin was then convicted by a jury at trial\(^14\) and sentenced to death by Judge Phillip Marquardt based on two aggravating circumstances and the lack of any “sufficiently substantial” mitigating circumstances.\(^15\) Unbeknownst to any of the parties, Judge Marquardt was a heavy user of marijuana at the time.\(^16\)

The Arizona Supreme Court affirmed Summerlin’s conviction,\(^17\) and the federal district court in Arizona twice denied Summerlin’s petition for a writ of habeas corpus.\(^18\) Summerlin appealed the habeas denials to the Ninth Circuit, and a divided three-judge panel remanded to the district court to determine whether, in light of his drug use, Judge Marquardt was competent when he sentenced Summerlin.

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\(^7\) *Id.*

\(^8\) *Id.* at 1084–85. The anonymous caller was Summerlin’s mother-in-law, who later testified that her information was based on her daughter’s extrasensory perception. *Id.* at 1085.

\(^9\) *Id.* at 1085.


\(^11\) Summerlin v. Stewart, 267 F.3d 926, 929 (9th Cir. 2001). Prior to trial, two court-appointed psychiatrists found Summerlin both competent to stand trial and sane under Arizona law. See *Summerlin*, 341 F.3d at 1085. However, another psychiatrist determined that Summerlin was “deeply emotionally and mentally disturbed, . . . and unable, because of his problems, to exercise normal restraint and control . . . .” *Id.* at 1085–86 (internal quotation marks omitted).

\(^12\) *Summerlin*, 341 F.3d at 1086–87 (omission in original).

\(^13\) *Id.* at 1087–88. The Arizona Attorney General’s Office then assumed prosecution and declined to offer Summerlin a lesser plea. See *id.* at 1088.

\(^14\) *Id.* at 1088.

\(^15\) *Id.* at 1090. The aggravating circumstances, drawn from a statutory list, were a prior felony conviction and the heinous manner in which the murder was committed. See *id.* Judge Marquardt did not find any mitigating circumstances, even though Summerlin had been abused as a child, was “functionally retarded,” and was diagnosed as a paranoid schizophrenic. See *id.* at 1084, 1090.

\(^16\) *Id.* at 1089–90.


\(^18\) See *Summerlin*, 341 F.3d at 1091.
to death. Before the trial court held an evidentiary hearing on this issue, however, the Ninth Circuit vacated its earlier decision due to the Supreme Court’s grant of certiorari in \textit{Ring}. After \textit{Ring} was decided, the court reheard the case en banc.

Writing for the court in an 8–3 decision, Judge Thomas ruled that \textit{Ring} applied retroactively to invalidate Summerlin’s capital sentence. After dismissing Summerlin’s claim that he had received inadequate assistance of counsel, Judge Thomas applied the Supreme Court’s decision in \textit{Teague v. Lane}, which limits the cases in which a new constitutional procedural rule established by the Court is to apply retroactively. Judge Thomas first noted that the court should apply the retroactivity analysis specified in \textit{Teague} rather than the one outlined in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) because Summerlin had filed his habeas petition before AEDPA had gone into effect. Judge Thomas then explained that the \textit{Teague} bar on retroactivity did not apply in the present case because, as applied to Arizona’s capital murder law, \textit{Ring} was “a ‘substantive’ decision, even if its form was partially procedural.” He noted that

\begin{itemize}
\item \textbf{19} See id. Judge Marquardt claimed that he was not under the influence of drugs while presiding in the courtroom. See Adam Liptak, \textit{Judge’s Drug Use at Issue in 2 Death Sentences}, N.Y. Times, May 16, 2002, at A1.
\item \textbf{20} See \textit{Summerlin}, 341 F.3d at 1091.
\item \textbf{21} Id. at 1091–92.
\item \textbf{22} Judge Thomas was joined by Chief Judge Schroeder and Judges Pregerson, Reinhardt, Hawkins, McKeown, Wardlaw, and Fisher.
\item \textbf{23} See \textit{Summerlin}, 341 F.3d at 1121.
\item \textbf{24} See id. at 1092–96.
\item \textbf{25} 489 U.S. 288 (1989) (plurality opinion).
\item \textbf{26} See id. at 310–14. The limitations on retroactivity announced in \textit{Teague} (also known as the \textit{Teague} bar) apply only on collateral review to new rules created by the Supreme Court that are procedural, not substantive, in nature. See \textit{Summerlin}, 341 F.3d at 1099. Once a rule is determined to be procedural, the court “must ascertain the date on which the defendant’s conviction and sentence became final for \textit{Teague} purposes” and determine whether, at that time, the rule would have been new or whether it was required by existing precedent. \textit{Id.} (quoting \textit{Caspari v. Bohlen}, 510 U.S. 383, 390 (1994)) (internal quotation marks omitted). The court then must decide whether one of two exceptions to \textit{Teague} applies: The first exception is for a rule that “decriminalize[s] a class of conduct” or immunizes certain classes of people from punishment. \textit{Id.} at 1109 (quoting \textit{Graham v. Collins}, 506 U.S. 461, 477 (1993) (quoting \textit{Saffle v. Parks}, 494 U.S. 484, 495 (1990))). The second exception is for a “watershed rule of criminal procedure,” \textit{id.} at 1099 (quoting \textit{Teague}, 489 U.S. at 311) (internal quotation marks omitted), that “(1) seriously enhance[s] the accuracy of the proceeding and (2) alter[s] our understanding of bedrock procedural elements essential to the fairness of the proceeding,” \textit{id.} at 1109 (citing \textit{Sawyer v. Smith}, 497 U.S. 227, 242 (1990)).
\item \textbf{27} 28 U.S.C. § 2244(b) (2000). AEDPA precludes a defendant from presenting “[a new] claim on a second or successive habeas corpus application . . . unless the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.” \textit{Id.} (emphasis added).
\item \textbf{28} See \textit{Summerlin}, 341 F.3d at 1092.
\item \textbf{29} \textit{Id.} at 1102.
\end{itemize}
"Ring [restored] an earlier Arizona legal paradigm in which murder and capital murder [were] separate substantive offenses with different essential elements and different forms of potential punishment." Judge Thomas acknowledged that the Ninth Circuit had previously characterized the rule that the Supreme Court set forth in *Apprendi v. New Jersey* — a case similar to and relied upon by *Ring* — as procedural. He concluded, however, that a strict analogy between the two cases was inapposite because, unlike in *Ring*, the *Apprendi* Court expressly declared that "[t]he substantive basis for [the law in question was] not at issue."

Judge Thomas then reasoned that even if *Ring* created a procedural rather than a substantive rule, it fell within the second exception to *Teague*’s retroactivity bar because it "fundamentally altered the procedural structure of capital sentencing applicable to all states" and would "significantly improve the accuracy of capital trials in Arizona." Furthermore, he asserted that the *Ring* rule was not subject to harmless error analysis because it corrects a structural error that "affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself." Finally, Judge Thomas reasoned that analogizing between *Apprendi* and *Ring* in the procedural context was improper for two reasons. First, unlike *Ring* errors, *Apprendi* errors are subject to harmless error analysis. Second,
unlike Ring, Apprendi was not a "watershed" rule because it did not "greatly enhance[] the accuracy of sentencing proceedings" and applied "only in a limited number of cases."38

In a concurring opinion, Judge Reinhardt reminded the court that "death is different"39 from other forms of punishment. He asked, "May the state execute [those prisoners] who are now on death row ... who were right about the Constitution when the Supreme Court was wrong?"40 Judge Reinhardt concluded that "if our society truly honors its constitutional values, it will not tolerate the execution by the state of individuals whose capital sentences were imposed in violation of their constitutional rights."41

Judge Rawlinson dissented.42 Asserting that Ring announced a procedural rather than a substantive rule, she contended that "merely saying that creation of a separate substantive criminal offense [of capital murder] renders a rule one of substance rather than procedure does not make it so."43 She further asserted that the aggravating factors in Apprendi and Ring operated similarly; thus, like Apprendi, Ring was not a "watershed rule of procedural law" and must be subject to harmless error analysis.44 Judge Rawlinson then supported her assertion that Ring should not fall under the second Teague exception by citing numerous studies indicating that juries may be less accurate than judges when imposing the death penalty.45

Summerlin rests on a strained characterization of Ring as creating a substantive rather than a procedural rule46 and relies heavily on in-

38 Id. at 1122 (quoting United States v. Sanchez-Cervantes, 282 F.3d 664, 669 (9th Cir. 2002)). Judge Thomas also noted that Ring is procedurally different from Apprendi because capital cases are structurally different from noncapital cases, and "the Eighth Amendment constraints applicable to capital trials demand a heightened analysis inapplicable to the usual Apprendi situation." Id.

39 Id. at 1123 (Reinhardt, J., concurring) (quoting Ring v. Arizona, 122 S. Ct. 2428, 2441 (2002)) (internal quotation marks omitted).

40 Id. at 1124.

41 Id. at 1125.

42 Judge Rawlinson was joined by Judges O'Scannlain and Tallman.

43 Summerlin, 341 F.3d at 1126 (Rawlinson, J., dissenting).

44 See id. at 1126-27; id. at 1127 ("The Supreme Court in Ring strongly implied, if not outright held, that harmless error analysis is equally applicable to any imposition of the death penalty by a judge rather than a jury.").

45 See id. at 1129-31 (citing, for example, William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 CORNELL L. REV. 1476, 1477 (1998), which observes that jurors often make punishment decisions before hearing the evidence or arguments and before receiving the judge's instructions; and Stephen P. Garvey, The Emotional Economy of Capital Sentencing, 75 N.Y.U. L. REV. 25, 48 (2000), which states that juries, like judges, may have access to inadmissible evidence, such as victim impact statements, during penalty deliberations).

46 As the dissent noted, Ring appeared to be a direct application of Apprendi to Arizona's death penalty statute, and the Ninth Circuit had already ruled that Apprendi was a procedural rule, not a substantive one. See id. at 1126-27 (citing United States v. Sanchez-Cervantes, 282
conclusive studies about the accuracy of jury factfinding in sentencing proceedings. Instead of relying on whether judge or jury factfinding is more accurate from a results-oriented perspective, the court should have primarily focused on how juries more accurately reflect the moral voice of the community in capital sentencing proceedings. This type of "procedural accuracy" enables Ring to apply retroactively by placing it within the second exception to Teague and honors the Supreme Court's continued insistence that a capital sentence should reflect the collective moral judgment of the community.

The Summerlin majority and dissent debate whether juries or judges are more "accurate" factfinders from a results-oriented perspective. Therefore, for the Summerlin court, the relevant inquiry is which factfinder is more likely to find the truth regarding the guilt of a capital defendant. However, this discussion misconstrues the meaning of "accuracy" as applied in Ring. First, both judges and juries suffer from certain biases that can distort the adjudication process, and it is unclear which type of factfinder more accurately punishes capital defendants in accordance with an objective notion of guilt. More important, the Ring Court indicated that the purpose of the new rule was not to increase this type of accuracy in the sentencing process. The Court noted:

The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice ... [but] [t]he founders of the American Republic were not prepared to leave [criminal justice] to the State . . . . [The jury-trial guarantee] has never been efficient; but it has always been free."
Accordingly, the *Ring* decision was motivated simply by the text of the Sixth Amendment rather than by an empirical judgment that juries reach the "right" result more often than judges.

Instead of focusing primarily on the accuracy of adjudicatory results, the Ninth Circuit should have concentrated solely on how *Ring* enhances “procedural” accuracy: juries more accurately reflect the morals of the community, which is an especially important consideration in the capital punishment context. This argument finds support in Supreme Court precedent, which has often indicated that capital defendants should receive heightened procedural and substantive protections and that a death sentence should reflect the collective voice of the community. Juries are particularly well-suited to serve these goals. Jury members ideally represent a fair cross section of the community in which the crime occurred. Juries are also subject to unanimity or supermajority requirements, which help to ensure that the community, in its collective moral judgment, unambiguously condemns a convicted defendant’s actions.

The Supreme Court has recognized on many occasions that juries more accurately represent community morality than do judges. In particular, the Court has stated that “in a capital sentencing proceeding, the Government has a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.” Justice Stevens has also observed:

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50. The majority did briefly observe that “[a] second primary accuracy-enhancing role of a jury in capital cases is to make the important moral decisions inherent in rendering a capital verdict.” *Summerlin*, 341 F.3d at 1113. Rather than being a secondary point, however, this line of reasoning should have been the majority’s primary argument for why *Ring* falls within the second exception to *Teague*. In addition, focusing on how “death is different” provides a principled way to distinguish the court’s holding in *Summerlin* from its holding in *Sanchez-Cervantes*. See supra note 48. While the procedural accuracy concerns at issue in *Apprendi* were not serious enough to overcome the *Teague* bar, the procedural accuracy concerns at issue in *Ring* involved death and were thus weighty enough to pass the *Teague* test.


52. See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (noting the importance of “maintain[ing] a link between contemporary community values and the penal system” in the capital punishment context). Despite the Supreme Court’s desire to create additional protections in the death penalty context, the Court has declined to hold that retroactive application of new constitutional procedural rules affecting capital punishment is per se constitutionally required. See, e.g., *O’Dell v. Netherland*, 521 U.S. 151, 153 (1997); *Saffle v. Parks*, 494 U.S. 484, 486 (1990).


54. From this perspective, one might view a jury unanimity requirement as protecting the community’s right to pass judgment on those accused of the most heinous of crimes.

The belief that juries more accurately reflect the conscience of the community than can a single judge is the central reason that the jury right has been recognized at the guilt stage in our jurisprudence. This same belief firmly supports the use of juries in capital sentencing, in order to address the Eighth Amendment’s concern that capital punishment be administered consistently with community values.  

It may strike one as fundamentally unfair that a defendant can be sentenced to death in violation of his constitutional rights without the Constitution mandating the nullification of the sentence. This impulse forms a powerful undercurrent in the *Summerlin* opinion, particularly in Judge Reinhardt’s concurrence. Rather than focusing on whether jury- or judge-based sentencing is more “accurate” from a results-oriented perspective, the court should have acknowledged this undercurrent by asserting only that jury factfinding more accurately reflects community morals — a consideration that is especially important in the death penalty context.  

Such a conception of “procedural accuracy” would honor the Supreme Court’s earlier jurisprudence emphasizing the importance of community judgment in capital cases. If courts truly believe that “death is different” from other forms of punishment, they should recognize that the retroactive application of *Ring* ensures that the collective voice of the community bears on the ultimate government sanction: the imposition of death.

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57 Despite the force of this argument, the majority may still have to fight an uphill battle: the Supreme Court has yet to find a rule that qualifies under the second exception to the *Teague* bar. See United States v. Sanchez-Cervantes, 282 F.3d 664, 669 n.23 (9th Cir. 2002) (citing United States v. Sanders, 247 F.3d 139, 148 (4th Cir. 2001)).