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I. Facts

On November 28, 1994, three men robbed an armored van outside a Dillard's department store in Glendale, Arizona. The van's courier went into the store and when he returned, the van's driver, John Mogach, and the vehicle were gone. Maricopa County Sheriff's Deputies found the van later that day with its doors locked, its engine running, and Mogach dead from a single gunshot to the head. The van was missing $562,000 in cash and $271,000 in checks. With the help of wiretaps and cooperation from the local media, the police monitored three suspects, James Greenham, William Ferguson, and Timothy Ring. On February 16, 1995, the police executed a search warrant at Ring's house and discovered more than $271,000 in cash and a note splitting a total of $575,995 between "F," "Y," and "T."[1]

At trial, Ring testified that the cash was start-up capital from money he had made as an FBI informant and a bail bondsman. The trial judge instructed the jury on the charge of premeditated murder, and in the alternative, felony murder. The jury deadlocked on premeditated murder, but convicted Ring of felony murder. Under Arizona law, the judge was required to make additional findings of aggravating factors in order to sentence Ring to death.[2]

After Ring's trial, Greenham pleaded guilty; later, at Ring's sentencing hearing, Greenham testified that he, Ring, and Ferguson had planned the robbery several weeks prior to November 28, 1994. Greenham further testified that Ring was the leader, had shot Mogach with a silenced rifle, and had chastised his partners for forgetting to congratulate him on his shot. Greenham admitted he was changing his initial statement, which did not implicate Ring, and that his testimony was a reprisal against Ring.[3]

The trial judge entered a "Special Verdict" and sentenced Ring to death on October 29, 1997. The judge based his conclusion, that Ring had been the killer, on Greenham's testimony. The judge also found two aggravating factors–Ring

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1. Ring v. Arizona, 122 S. Ct. 2428, 2432-33 (2002).
2. *Id.* at 2433-34.
3. *Id.* at 2435.

had committed the offense in expectation of pecuniary gain and his comment expressing pride for killing Mogach indicated depravity of mind.[4]

Ring appealed his sentence to the Supreme Court of Arizona and argued that Arizona's capital sentencing structure violated his Sixth and Fourteenth Amendment rights because a judge, not a jury, made a finding of fact that increased the maximum penalty. The Supreme Court of Arizona found that the sentencing scheme did require the judge to make factual findings that increased the maximum penalty, but, relying on the United States Supreme Court's holding in *Walton v Arizona*,[5] it rejected Ring's constitutional challenge and reviewed the aggravating factors.[6] The court found that there was insufficient evidence to support the aggravating circumstance of depravity, but upheld the death sentence based on the aggravating factor of pecuniary gain. Ring petitioned the United States Supreme Court for a writ of certiorari and it was granted.[7]

When the United States Supreme Court handed down its opinion in *Ring*, it also remanded *Allen v United States*[8] to be considered in light of its opinion.[9] Billie Jerome Allen and Norris Holder entered the Lindell Bank & Trust in St. Louis, Missouri, on March 17, 1997, armed respectively with Chinese and Russian SKS semi-automatic rifles. The men fired sixteen shots inside the bank, eight of which hit and killed the bank's security guard. Allen and Holder robbed the bank and attempted a getaway. In order to destroy the getaway van, the men had soaked the vehicle in gasoline. One of the men, however, flicked a cigarette lighter, and the van caught on fire. Holder also caught on fire and was arrested almost immediately. Allen was arrested the following day and both were charged in federal court with "armed robbery by force or violence in which a killing occurs" ("Count I") and "carrying or using a firearm during a crime of violence and committing murder" ("Count II"). The two men were tried separately and found guilty of both counts. Holder was sentenced to death on both counts, and Allen received a sentence of life imprisonment for Count I and a sentence of death for Count II.[10]

Allen appealed and raised numerous constitutional challenges to the Federal Death Penalty Act of 1994 ("FDPA").[11] In one of these challenges, Allen claimed that his Fifth Amendment rights had been violated because his indictment did not allege the aggravating factors relied upon during his sentencing

4. *Id.*

5. 497 U.S. 639 (1990).

6. *Ring*, 122 S. Ct. at 2436; *see* Walton v. Arizona, 497 U.S. 639, 649 (1990) (holding that the additional facts weighed by an Arizona judge in capital sentencing were not elements of the offense, but sentencing considerations; therefore, the Sixth Amendment was not violated).

7. *Ring*, 122 S. Ct. at 2436.

8. 122 S. Ct. 2653 (2002).

9. Allen v. United States, 122 S. Ct. 2653 (2002) ("*Allen II*").

10. United States v. Allen, 247 F.3d 741, 755-57 (8th Cir. 2001) ("*Allen I*").

11. *Id.* at 757; *see* Federal Death Penalty Act of 1994, 18 U.S.C. § 3591 (2000) (outlining the process for sentencing a federal defendant to death).

phase. The United States Court of Appeals for the Eighth Circuit rejected this claim and affirmed Holder's and Allen's death sentences.[12] Both men appealed to the United States Supreme Court.[13]

II. Holding

The United States Supreme Court reversed Ring's death sentence, and held that *Apprendi v New Jersey*[14] and *Walton* are irreconcilable.[15] The Court held that Arizona's aggravating factors are elements of the offense, and that the Sixth Amendment requires that a jury determine the aggravator's existence.[16] Therefore, the Court overruled *Walton*, insofar as it allowed a judge to determine aggravating factors necessary for a sentence of death.[17] Shortly thereafter, the Court vacated the death sentences in *Allen*, and remanded the case for further consideration in light of *Ring*.[18]

III. Analysis

The Court determined that the maximum punishment Ring could have received based on the jury's verdict was life imprisonment.[19] The judge was then required to find at least one aggravating factor, beyond a reasonable doubt, before he or she could increase the penalty to a sentence of death.[20] In order to determine if this process violated Ring's Sixth Amendment right to trial by jury, the Court first looked at whether aggravating factors are elements of the offense.[21] The Court considered its decisions in *Apprendi* and *Jones v United States*[22] and found that in cases in which the enumerated aggravating factors function as elements of a greater offense and act to increase the maximum penalty, the Sixth Amendment requires that they be found beyond a reasonable doubt by a unanimous jury.[23] Prior to *Ring*, the Court's decision in *Walton* had

12. *Allen I*, 247 F.3d at 761.

13. *Allen II*, 122 S. Ct. at 2653.

14. 530 U.S. 466 (2000).

15. *Ring*, 122 S. Ct. at 2443; *see* Apprendi v. New Jersey, 530 U.S. 466, 476-85 (2000) (holding that the Sixth Amendment protects a defendant from receiving a punishment that exceeds the maximum penalty he would have received based on the facts found by the jury verdict alone).

16. *Ring*, 122 S. Ct. at 2443.

17. *Id.*

18. *Allen II*, 122 S. Ct. at 2654.

19. *Ring*, 122 S. Ct. at 2437.

20. *Id.*

21. *Id.* at 2437-42.

22. 526 U.S. 227 (1999).

23. *Ring*, 122 S. Ct. at 2438-40; *see, e.g., Apprendi*, 530 U.S. at 476 (stating that where procedural safeguards exist when charged with one act that carries a penalty, the same safeguards must exist for another act that also carries a penalty; labeling one act a "sentence enhancement" does not extinguish the right of procedural protection); Jones v. United States, 526 U.S. 227, 243 n.6, 252 (1999) (finding that a carjacking statute that listed three acts with three different penalties must be

excluded the application of *Apprendi* to death penalty cases because it held that Arizona's aggravating factors were not elements of capital murder—they were limitations on sentencing.[24] The Court in *Ring* overruled *Walton* and found that aggravating factors are not mere sentencing considerations; they are elements of the crime and must be determined by a jury.[25]

IV. Application

A. Federal Application

1. Prospective Effects on Federal Capital Indictments

The Court in *Jones* held that the Fifth Amendment Due Process Clause and the Sixth Amendment notice guarantee require that any fact which increases the maximum penalty beyond the statutory maximum must be charged in the indictment.[26] Because the statutory aggravators in the federal death penalty statute increase the maximum penalty that could be imposed without a finding of the statutory aggravators, federal indictments must charge the aggravators in a capital murder indictment.[27] If the indictment does not allege a statutory aggravator, it is insufficient.

2. Standard of Review for Insufficient Indictments on Direct Appeal

On direct appeal the indictment requirements presented in *Jones* and affirmed in *Ring* apply because a final judgment has not yet been reached. A defendant currently in the direct appeal process can argue that his sentence should be vacated if his indictment failed to allege a statutory aggravator. However, because the indictment was sufficient pre-*Ring*, many attorneys probably did not object to the indictment at trial. If an attorney did not object to the indictment at trial, the Court's high standard announced in *United States v. Cotton*[28] will apply on direct appeal.[29]

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treated as three distinct offenses and each offense "must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

24. *Ring*, 122 S. Ct. at 2438 (citing *Walton*, 497 U.S. at 649).

25. *Id.* at 2443.

26. *Jones*, 526 U.S. at 243 n.6.

27. *See* 18 U.S.C. § 3593(e) (explaining that the jury "shall consider whether all [sic] the aggravating factor or factors found to exist sufficiently outweigh all [sic] the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death"); *see also* 18 U.S.C. § 3593(c) (stating that the "burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt"). *See generally* 18 U.S.C. § 3592(c)(1-16) (listing the statutory aggravators that the jury shall consider).

28. 122 S. Ct. 1781 (2002).

29. United States v. Cotton, 122 S. Ct. 1781, 1783 (2002). The Court in *Cotton* indicated that a sentence that has been illegally enhanced should be objected to at trial. *Id.* The Court held that

The defendant in *Cotton* was charged with and found guilty of drug offenses that involved selling a "detectable quantity of cocaine."[30] Yet, the judge sentenced Cotton under a statutory section that required a finding of at least fifty grams of cocaine.[31] The initial statute carried a maximum penalty of twenty years; the second statute carried a maximum penalty of life.[32] Cotton was sentenced to thirty years.[33] The language of *Cotton* indicated that had his attorney objected at trial, the omission from the indictment of a fact that increased the maximum sentence would have justified vacating the enhanced sentence.[34] The applicable lesson in light of *Ring* is that prosecutors must allege which aggravating factors they intend to prove in the indictment and defendants must have the right to plead to these factors. If the Government omits factors supporting an enhanced maximum sentence, objection to the indictment must be made at trial.

If the objection to the indictment is not made at trial, *Cotton* established a difficult test. The Court in *Cotton* explained that if an objection is not made, an appellate court may only vacate an illegally enhanced sentence if the trial court committed plain error which affected substantial rights of the defendant.[35] Even if the appellate panel finds plain error, it has discretion to determine whether the error seriously "affect[s] the fairness, integrity, or public reputation of judicial proceedings."[36] The Court in *Cotton* determined that the error in that case did not have a serious effect on the fairness, integrity, or reputation of the proceedings; Cotton's sentence therefore, was affirmed.[37] The fact that the Court remanded *Allen* for reconsideration, presumably because Allen's indictment did not include the aggravating factors that led to his sentence, indicates that capital indictment challenges should fare better than Cotton's challenge.[38] The Court's decision to remand *Allen* does not, however, nullify the standard explained in *Cotton*; therefore, it is necessary to distinguish the *Cotton* challenge from capital indictment challenges.

Ring is factually distinguishable from *Cotton*. In *Cotton*, the judge determined a fact that involved a measurable amount— whether or not there was evidence

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if the error is not objected to at trial, the error must threaten the fairness and reputation of judicial proceedings for the sentence to be vacated. *Id.* at 1785-86.

30. *Id.* at 1783.

31. *Id.*

32. *Id.*

33. *Id.* at 1784.

34. *Id.* at 1783. The Court stated that it was addressing "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence, *even though the defendant did not object in the trial court.*" *Id.* (emphasis added). This language implies that if the defendant had objected at trial, the court of appeals' vacation of the enhanced sentence would have been justified.

35. *Cotton*, 122 S. Ct. at 1785.

36. *Id.*

37. *Id.* at 1786. The United States Supreme Court reinstated Cotton's original sentence. *Id.*

38. *Allen II*, 122 S. Ct. at 2653; *see Allen I*, 247 F.3d at 762.

of fifty grams of cocaine.[39] The Court emphasized that this fact was largely uncontroverted.[40] In light of these conditions, the judge's determination did not seriously affect the proceedings. In a challenge regarding an omission of aggravating factors, a court may be more likely to find a serious effect on the proceedings. To begin with, the defendant in *Cotton* was on notice, from the time of the flawed indictment, that he would face charges centering around the sale and distribution of cocaine.[41] During his trial, Cotton had the opportunity to defend against testimony and evidence that indicated the amount of cocaine in question.[42] The judge then made a factual determination— whether the defendant possessed less than fifty grams of cocaine or more.[43] If, for example, the Government decides to prove the aggravating circumstance of committing the offense in a heinous, cruel, or depraved manner, and that element is omitted from the indictment, the defendant suffers a greater loss. He is not put on notice from the time of the indictment how his actions are going to be categorized. Without this notice, his defense cannot be complete. In this instance the error is not a judge making a decision based upon grams and dollars, but a jury making a subjective decision on how best to categorize a defendant's actions. This distinction should support attempts to demonstrate that omitting aggravating factors from capital indictments seriously affects judicial fairness, integrity, and public reputation.

3. *Standard of Review for Insufficient Indictments on Collateral Review*

a. *Applying* Teague v. Lane

Before *Ring* can be asserted retroactively on collateral review, a federal court must analyze its applicability under *Teague v Lane*.[44] For the purposes of retroactive application of a rule of constitutional criminal procedure, the Court in *Teague* defined a "new rule" as a rule that "breaks new ground or imposes a new obligation on the States or Federal Government" and is not the result of a precedent existing at the time the defendant's conviction became final.[45] *Ring* imposed a new obligation on the State and Federal Governments and the decision was not based on existing precedent. Even if *Ring* is viewed as an extension of *Apprendi*,

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39. *Cotton*, 122 S. Ct. at 1786.

40. *Id.*

41. *Id.* at 1783.

42. *Id.* at 1786 n.3.

43. *Id.* at 1784.

44. Teague v. Lane, 489 U.S. 288, 311 (1989) (holding that new criminal procedure rules, that are not based on prior precedent, do not apply to defendants who have received final judgments, unless the rule falls within two narrow exceptions); *see* Horn v. Banks, 122 S. Ct. 2147, 2150 (2002) (affirming that a threshold question in every habeas case is whether the court must apply the *Teague* rule to the defendant's claim); Janice L. Kopec, Case Note, 15 CAP. DEF. J. 133 (2002) (analyzing Horn v. Banks, 122 S. Ct. 2147 (2002)).

45. *Teague*, 489 U.S. at 301.

it would not qualify as a result of an existing precedent because *Apprendi*, in reliance on *Walton*, specifically excluded capital proceedings from the *Apprendi* rule.[46] As a new constitutional rule of criminal procedure, *Ring* is not applicable on collateral review unless it falls into one of two exceptions.

The first exception outlined in *Teague* applies to new rules that place a class of conduct beyond the State's power to proscribe.[47] The Court has held that this exception does not apply only to rules prohibiting the punishment of certain conduct; the exception also applies to rules "prohibiting a certain category of punishment for a class of defendants because of their status or offense."[48] Because *Ring* has altered the elements of capital murder, it has altered the offense. This alteration results in two different offenses— capital murder in which the aggravators are proved to a jury beyond a reasonable doubt, which can result in a sentence of death, and capital murder in which the aggravators are not proved to a jury beyond a reasonable doubt, which can only result in life imprisonment. The latter offense creates a class of defendants against whom a certain category of punishment, death, is now prohibited. Because the state is prohibited from imposing death on a group of defendants because of the altered nature of the offense, *Ring* should fall into *Teague*'s first exception.

Teague's second exception is "reserved for watershed rules of criminal procedure" which "'alter our understanding of the *bedrock procedural elements*.'"[49] The Court does not, however, define the term "bedrock procedural element." In formulating a *Teague* argument, attorneys should not ignore the fact that the Court has been loathe to grant retroactivity under this second exception.[50]

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46. *Walton*, 497 U.S. at 649.

47. *Teague*, 489 U.S. at 311 (stating that the first exception applies to rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," (quoting Mackey v. United States, 401 U.S. 667, 692 (1971))).

48. Saffle v. Parks, 494 U.S. 484, 494 (1990) (citing Penry v. Lynaugh, 492 U.S. 302, 330 (1989) (expanding the first exception of *Teague* to cover new rules that prohibit a certain class of punishment for a group of defendants because of their status or offense)). The Court relied on Justice Harlan's words from *Mackey*, "There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." *Penry*, 492 U.S. at 330 (quoting *Mackey*, 401 U.S. at 693).

49. *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 693).

50. *See* United States v. Sanders, 247 F.3d 139, 148 (4th Cir. 2001) (denying a *Teague* exception to *Jones* and *Apprendi* and stating that there have been eleven new or proposed rules that the United States Supreme Court has refused to exempt under *Teague* (citing United States v. Mandanici, 205 F.3d 519, 529-31 (2d Cir. 2000))). *See generally* Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997); Gray v. Netherland, 518 U.S. 152, 170 (1996); Goeke v. Branch, 514 U.S. 115, 120-21 (1995); Caspari v. Bohlen, 510 U.S. 383, 396 (1994); Gilmore v. Taylor, 508 U.S. 333, 346-56 (1993) (O'Connor, J., concurring); Graham v. Collins, 506 U.S. 461, 478 (1993); Butler v. McKellar, 494 U.S. 407, 416 (1990). The United States Supreme Court cites *Gideon v Wainwright*, which held that in all criminal prosecutions the Sixth Amendment requires that the accused have assistance of counsel and that the states must appoint counsel if he or she is indigent, as an example of a watershed principle. O'Dell v. Netherland, 521 U.S. 151, 167 (1997) (explaining that *Gideon v Wainwright* contained a watershed rule of criminal procedure that would be excepted under *Teague*

Nevertheless, *Ring* can be distinguished from other cases that the Court analyzed under *Teague*'s second exception.

In *Sawyer v Smith*,[51] a capital defendant attempted to convince the Court that *Teague*'s second exception applied to *Caldwell v Mississippi*.[52] The Court in *Caldwell* decided that when an instruction diminished a jury's sense of responsibility, the defendant's Eighth Amendment rights had been violated.[53] The prosecutor in *Sawyer* told the jury in his closing argument that it should not feel responsible for executing the defendant should it choose to sentence him to death; nevertheless, the Court held that the *Teague* exception did not apply.[54] The Court stated that an enhancement of the accuracy of capital sentencing buttressed fundamental fairness, but it is not an "absolute pre-requisite to fundamental fairness," and therefore, the *Caldwell* rule was not a bedrock principle.[55] *Ring* can be distinguished from *Sawyer* because *Ring* alters who is to be the final decision-maker in capital sentencing. Unlike Ring, Sawyer was not denied the appropriate decision-maker.[56] The division of decision-making is a basic notion of criminal jurisprudence arising directly from the Sixth Amendment; therefore, *Ring* does not simply enhance fundamental fairness, it augments a fundamental principle.

In *O'Dell v Netherland*[57] the Court considered whether *Simmons v South Carolina*[58] met *Teague*'s second exception.[59] The Court in *O'Dell* held that the *Simmons* instruction only provided a narrow right of rebuttal to a limited class of capital cases; therefore, it did not alter the Court's understanding of bedrock procedural elements.[60] *Ring* is distinguishable from *O'Dell* because it does not just provide for a mere rebuttal, but for a fundamental alteration in the elements of a capital crime; it does not apply to a limited class of cases, but to all capital

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(citing Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963))).

51. 497 U.S. 227 (1990).

52. Sawyer v. Smith, 497 U.S. 227, 232 (1990) (holding that the rule expressed in *Caldwell v Mississippi* does not constitute an exception under *Teague*); *see* Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985) (holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe . . . that the responsibility for determining the appropriateness of the defendant's death rests elsewhere").

53. *Caldwell*, 472 U.S. at 320-21.

54. *Sawyer*, 497 U.S. at 231, 244-45.

55. *Id.* at 244 (quoting *Teague*, 489 U.S. at 314).

56. Sawyer was convicted and sentenced to death by a Louisiana jury. *Id.* at 230.

57. 521 U.S. 151 (1997).

58. 512 U.S. 154 (1994).

59. O'Dell v. Netherland, 521 U.S. 151, 157-58 (1997) (holding that *Simmons* was a new rule and did not fall into the *Teague* exceptions); *see* Simmons v. South Carolina, 512 U.S. 154, 154 (1994) (holding that where the defendant is parole ineligible and future dangerousness has been introduced, due process requires that the defendant be allowed to bring his parole ineligibility to the attention of the jury).

60. *O'Dell*, 521 U.S. at 167 (O'Connor, J., concurring). *O'Dell* cautions in its dissent that since *Teague* was decided, the Court has never found that a rule fell under its exception. *Id.* at 171 (Stevens, J., dissenting).

cases. Furthermore, *O'Dell*, like *Sawyer*, did not contain a shift in the division of decision-making power from judge to jury.

Tyler v Cain[61] relied on a case somewhat similar to *Ring*, but it too was denied a *Teague* exception.[62] Tyler relied on *Cage v Louisiana*[63] to argue that his right "to have the jury make the determination of guilt beyond a reasonable doubt" had been violated.[64] Tyler employed this argument to advance the theory that such a violation undermines the reliability of the trial outcome; the Court evidently did not consider this a bedrock principle, although it never explained its decision.[65] *Cage* provides that if a jury interprets its instruction not to require proof beyond a reasonable doubt, the instruction is flawed because the jury did not make a true determination of guilt.[66] Rather than determine if this rule is a bedrock procedural element, the Court focused on the fact that it could have offered retroactive application on collateral review and chose not to do so.[67] *Tyler* informs *Ring* because the Court never made a statement on the merits of the argument, which implies that a rule involving a jury's determination of guilt beyond a reasonable doubt has not yet been excluded from *Teague*'s second exception. This decision makes possible the argument that *Ring* alters a defendant's right to a jury determination of fact by increasing the elements that must be decided by a jury. The right to a jury in a criminal proceeding is protected under the Sixth Amendment in such a way that *Ring* should be perceived as a bedrock procedural holding.

b. Applying AEDPA

If *Ring* is granted an exception under *Teague*, courts on collateral review must consider its application under the AEDPA standard of review.[68] AEDPA specifies that the appropriate standard of review in a habeas proceeding is whether the lower court's decision was an unreasonable application of, or contrary to, established federal law.[69] If *Ring* becomes a retroactive rule of

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61. 533 U.S. 656 (2001).

62. Tyler v. Cain, 533 U.S. 656, 659, 665-66 (2001) (holding that the rule in question was not made retroactive to cases on collateral review).

63. 498 U.S. 39 (1990).

64. *Tyler*, 533 U.S. at 665; *see* Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam) (holding that if there is a likelihood that the jury interpreted its instruction not to require proof beyond a reasonable doubt, the instruction is unconstitutional).

65. *Tyler*, 533 U.S. at 666.

66. *Cage*, 498 U.S. at 41.

67. *Tyler*, 533 U.S. at 666.

68. *See* 28 U.S.C. § 2254(d)(1) (2000) (stating that a writ of habeas corpus pursuant to any claim heard by a state court shall be denied "unless the adjudication of the claim–(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" part of the Anti-Terrorism and Effective Death Penalty Act of 1996).

69. *Id.*

constitutional criminal procedure, its holdings must be treated as established federal law and *Ring* claims may be heard in habeas proceedings.[70] An AEDPA review of *Ring*'s application can arise in two circumstances. If a capital defendant completed his direct appeals and received a final judgment prior to *Ring*, a habeas court must consider if the last state court's decision was a reasonable application of *Ring*. In most circumstances, the reviewing court could not have reasonably applied *Ring* because it issued its decision before *Ring* was handed down. It is likely that an AEDPA review would result in a remand for reconsideration in light of *Ring*. However, if a defendant is in habeas court and his direct appeals did not conclude before *Ring* was handed down, the AEDPA standard would assume a different role. The habeas court must consider how the last court applied *Ring* and if that application was reasonable or if it was contrary to the holdings of the case.

B. Application in Virginia

Ring affects directly the sentencing structure of Arizona, Colorado, Idaho, Montana, and Nebraska; these states leave both the penalty fact-finding and the ultimate sentencing decision entirely with the judge.[71] Alabama, Delaware, Florida, and Indiana have a hybrid system in which the judge makes the final sentencing decision based on a jury's advisory verdict.[72] *Ring*'s insistence that every element must be determined by a jury places all eight of these systems in jeopardy. *Ring*'s application in Virginia is less direct, though not less significant.

1. Redefining Aggravators as Elements

The Court in *Ring* rejected the notion that aggravating factors are sentencing enhancers.[73] Rather, it labeled the aggravators "elements" of the offense because they ultimately increase the maximum penalty.[74] The aggravating factors must be found beyond a reasonable doubt by a unanimous jury.[75] Like the Arizona statute at issue in *Ring*, if, in Virginia, an aggravator is not found, the maximum

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70. *See* 28 U.S.C. § 2254(e)(2)(A)(i) (stating that the habeas court will not conduct an evidentiary hearing on a claim unless the claim is based upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable").

71. *Ring*, 122 S. Ct. at 2442; (citing COLO. REV. STAT. § 16-11-103 (2001); IDAHO CODE § 19-2515 (Michie Supp. 2002); MONT. CODE ANN. § 46-18-301 (2001); NEB. REV. STAT. § 29-2520 (1995)).

72. *Id.* (citing ALA. CODE §§ 13A-5-46, 13A-5-47 (1994); DEL. CODE ANN., tit. 11 § 4209 (2001); FLA. STAT. ANN. § 921.141 (West 2001); IND. CODE ANN. § 35-50-2-9 (Michie Supp. 2001)).

73. *Id.*

74. *Id.* (explaining that a factor "used to describe an increase beyond the maximum authorized statutory sentence . . . is the functional equivalent of an element of a greater offense" (quoting *Apprendi*, 530 U. S. at 494 n.19)).

75. *Id.* at 2443; *Apprendi*, 530 U.S. at 490.

punishment for capital murder is life imprisonment;[76] therefore, the aggravators can increase the maximum sentence and must be considered elements of the offense. As elements of the offense, an aggravator in Virginia must now be found beyond a reasonable doubt by a unanimous jury.

Virginia Code Section 19.2-264.4(C) already states that the death penalty cannot be imposed unless the Commonwealth proves one of two aggravating factors—future dangerousness or vileness—beyond a reasonable doubt.[77] Vileness is broken into different sub-elements which include torture, depravity of mind, or aggravated battery of the victim.[78] Because a finding of vileness in Virginia requires a finding of one of the enumerated sub-elements, the sub-element is an element of the aggravating factor. In application, this means that the Commonwealth must submit which element and sub-element(s) it is alleging, the jury must find the element—and in the case of vileness, the sub-element(s)—beyond a reasonable doubt, and its finding must be unanimous. Ensuring this procedural protection could require polling the jury to determine that if a defendant is sentenced to death based on vileness, every member of the jury found the same sub-element.

2. *Effects on Capital Murder Indictments in the States*

Attorneys can argue that the Virginia capital murder indictments must allege future dangerousness or vileness and the vileness sub-elements. The Court in *Jones* noted that the Due Process Clause of the Fifth Amendment requires that elements that increase the maximum penalty for a crime be charged in an indictment.[79] The Fifth Amendment right to indictment by grand jury does not apply to the states.[80] However, the Sixth Amendment notice requirement does apply to the states;[81] because *Ring* redefines aggravators as elements, states are required

76. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (stating that "the penalty of death shall not be imposed" unless the Commonwealth proves at least one of the statutory aggravators).

77. *See id.* (stating that the Commonwealth must prove beyond a reasonable doubt that the defendant "would constitute a continuing serious threat to society," or that the defendant's offense was "outrageously or wantonly vile").

78. *See id.* (stating that an offense is wantonly vile "in that it involved torture, depravity of mind or aggravated battery to the victim").

79. *Jones*, 526 U.S. at 243 n.6. *See generally Allen II*, 122 S. Ct. at 2653.

80. Hurtado v. California, 110 U.S. 516, 534-35 (1884) (holding that the Fifth Amendment right to indictment by grand jury does not apply to the states).

81. Cole v. Arkansas, 333 U.S. 196, 201 (1948) (stating that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal").

to give notice of the elements to the defendant. Virginia satisfies its Sixth Amendment notice requirement through a statutory right to an indictment.[82]

Virginia case law has held that an indictment must include all of the essential elements of the charged offense; if any of the elements are omitted, the indictment is fatally defective.[83] The indictment must provide the defendant with adequate notice of the nature and character of the offense charged in order to enable him to prepare a defense.[84] The nature and character of vileness is substantially different from the nature and character of future dangerousness; therefore, notice of a specific aggravator is necessary to prepare an adequate capital defense. Furthermore, if the sentencing aggravators are omitted from the indictment, not all of the essential elements are charged and the indictment is fatally flawed. If the Commonwealth fails to allege the aggravators in the indictment and later tries to amend the indictment to include them, that amendment is prohibited by Virginia case and statutory law.[85] Because *Ring* redefines Virginia's aggravators as essential elements of capital murder and Virginia courts have held that essential elements must be charged in the indictment, future dangerousness or vileness and a vileness sub-element must be alleged in the indictment.[86]

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82. *See* VA. CODE ANN. § 19.2-217 (Michie 2000) (stating that "no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction"); *see also* VA. CODE ANN. § 19.2-216 (Michie 2000) (defining an indictment as "a written accusation of crime, prepared by the attorney for the Commonwealth and returned "a true bill" upon the oath or affirmation of a legally impanelled grand jury"); VA. CODE ANN. § 19.2-215.8 (Michie 2000) (stating that a "true bill" of indictment must be returned with a majority of the grand jurors agreeing to its findings).

83. Hagood v. Commonwealth, 162 S.E. 10, 12 (Va. Ct. App. 1932) (stating that it "is of course necessary for an indictment to set forth all of the essential elements of the crime, and, if any of them are omitted, it is fatally defective").

84. Grier v. Commonwealth, 546 S.E.2d 743, 746 (Va. 2001) (stating that an indictment should include "'notice of the nature and character of the accusations against'" an accused (quoting Sims v. Commonwealth, 507 S.E.2d 648, 652 (Va. Ct. App. 1998))).

85. Powell v. Commonwealth, 552 S.E.2d 344, 356-57 (Va. 2001) (holding that the defendant's conviction for capital murder under an amended indictment could not stand (citing VA. CODE ANN. § 19.2-231 (Michie 2000))). The Commonwealth in *Powell* attempted to amend the capital murder indictment from a charge of capital murder in the commission of a robbery to a charge of capital murder in the commission of a robbery and/or a rape. *Id.* at 356. Section 19.2-231 provides that an amendment to the indictment is permitted unless it changes the nature or character of the offense charged. § 19.2-231. The court held that the amendment to the indictment did change the nature and character of the offense charged. *Powell*, 552 S.E.2d at 357. Because *Ring* makes the aggravators elements of the offense which must be proved beyond a reasonable doubt, the aggravators are analogous to the gradations of the crime of capital murder which *Powell* held cannot be amended.

86. In cases in which the indictment fails to allege future dangerousness or vileness, and guilt has been determined, the defense can make a motion to prevent the Commonwealth from seeking death. *See* Janice L. Kopec, Case Note, 15 CAP. DEF. J. 197 (2002) (analyzing Hartman v. Lee, 283 F.3d 190 (4th Cir. 2002)).

3. Lack of Effect on Mandatory Minimum Cases

Ring does not affect cases in which the judge makes a determination that increases the mandatory *minimum* sentence.[87] The Court held in *Harris v United States*,[88] that facts that increase the mandatory minimum are not to be treated categorically as elements of the offense.[89] In a penalty statute with mandatory minimums, sentencing factors are treated as limitations on the judge's authorized choices.[90] On the surface, the facts in *Harris* indicate that the judge made a determination of fact that resulted in a higher penalty for the defendant.[91] Harris was indicted for distribution of marijuana and for carrying a firearm in relation to drug trafficking.[92] The firearm statute provided a maximum of ten years and a mandatory minimum sentence of five years imprisonment for possession of a firearm.[93] The statute also provided a mandatory minimum sentence of seven years if the firearm was "brandished."[94] The judge determined that Harris had brandished the weapon and sentenced him to a term of seven years imprisonment.[95] Even though the judge's determination increased Harris's penalty, it did not increase the penalty above the statutory maximum; therefore, *Apprendi* did not apply.[96] Defense attorneys should be aware of when they can advance demands for the procedural rights granted in *Ring*— in cases with a statutory maximum penalty— and when they cannot— in cases with only a mandatory minimum penalty.

V. Conclusion

On a federal level, *Ring* has direct consequences on capital indictments. Aggravating factors and their elements must be alleged by the grand jury in the indictment. The Court's remand of *Allen* indicates that indictments that do not allege every element used in sentencing will be treated as plain error. Whether or not this plain error will amount to vacating all illegally enhanced capital sentences has yet to be determined. Furthermore, the general question of whether *Ring*'s holding will be retroactive cannot be answered until an argument

87. *Ring*, 122 S. Ct. at 2441 n.5 (citing Harris v. United States, 122 S. Ct. 2406 (2002)).

88. 122 S. Ct. 2406 (2002).

89. Harris v. United States, 122 S. Ct. 2406, 2413 (2002) (holding that "brandishing" a firearm was not an element of the crime, but a sentencing factor, and that a judge can determine a sentencing factor that affects the mandatory minimum penalty without violating constitutional rights).

90. *Id.* at 2409.

91. United States v. Harris, 243 F.3d 806, 807-08 (4th Cir. 2001).

92. *Id.* at 807.

93. *Id.* at 808.

94. *Id.* at 807-08.

95. *Id.* at 807.

96. *Harris*, 122 S. Ct. at 2409.

for a *Teague* exception has been put forward and decided. For Virginia capital defenders, the crucial effect of *Ring* is that the aggravators are elements and must be charged in the indictment, and a jury must find every element and sub-element in the sentencing phase unanimously.

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