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Summerlin v. Stewart

341 F.3d 1082 (9th Cir. 2003)

I. Facts

In *Ring v. Arizona*,¹ the United States Supreme Court held that Arizona's capital punishment statute violated a defendant's Sixth Amendment right to a jury trial.² Prior to *Ring*, an Arizona trial judge could impose the death penalty during sentencing if the judge, without the benefit of a jury, found that one of the statutory aggravators existed.³ The Court ruled that the aggravating factors that trigger the imposition of the death penalty are elements of the offense and must be found beyond a reasonable doubt by a jury.⁴

Warren Wesley Summerlin ("Summerlin") was convicted and sentenced to death under the pre-*Ring* Arizona sentencing scheme.⁵ Summerlin's trial, however, was wrought with the following irregularities and unusual circumstances: Summerlin entered into and then refused to consent to a non-death plea agreement; the original public defender and the prosecutor entered into an intimate relationship that was never revealed to Summerlin; and the sentencing judge was addicted to marijuana at the time of the sentencing proceedings.⁶ At the sentencing phase, Summerlin's new counsel, George Klink ("Klink"), presented little mitigating evidence, apparently at Summerlin's request, and Summerlin's conviction for assault was used by Judge Marquardt as one of the aggravating factors triggering the imposition of the death penalty.⁷

1. 536 U.S. 584 (2002).

2. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that statutory aggravators triggering imposition of the death penalty are elements that must be proven to the jury beyond a reasonable doubt); see U.S. CONST. amend. VI (providing in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"). For a complete discussion and analysis of *Ring* see generally Janice L. Kopec, 15 CAP. DEF. J. 143 (2002) (analyzing *Ring v. Arizona*, 122 S. Ct. 2428 (2002) and *Allen v. United States*, 122 S. Ct. 2653 (2002)).

3. *Ring* 536 U.S. at 592-93; see ARIZ. REV. STAT. § 13-703(B) (1981) (requiring a separate sentencing hearing before the trial judge alone to determine the presence of statutory aggravators).

4. *Ring* 536 U.S. at 609.

5. *Summerlin v. Stewart*, 341 F.3d 1082, 1090 (9th Cir. 2003) [hereinafter *Summerlin IV*].

6. *Id.* at 1086-90.

7. *Id.* at 1089-90. Judge Marquardt found the following two aggravating circumstances: (1) Summerlin had a prior felony conviction—the road-rage assault conviction; and (2) the offense was committed "in an especially heinous, cruel, or depraved manner." *Id.* at 1090; see ARIZ. REV. STAT. § 13-703(f)(2), (6) (1981) (providing the definition of aggravating circumstances for imposition of the death penalty in Arizona). Summerlin argued that Judge Marquardt confused the facts of Summerlin's case with another case over which the judge presided due to his marijuana use. *Summerlin IV*, 341 F.3d at 1090.

Following several attempts to appeal at the state and federal levels, Summerlin filed a second amended petition for a writ of habeas corpus in the United States District Court for the District of Arizona.⁸ The district court denied Summerlin's amended petition and motion to vacate the judgment, but issued a certificate of appealability.⁹ Summerlin subsequently filed an appeal with the United States Court of Appeals for the Ninth Circuit.¹⁰ A three-judge panel of the Ninth Circuit affirmed in part and reversed in part.¹¹ While Summerlin's appeal was pending in the Ninth Circuit, the United States Supreme Court granted certiorari in *Ring v. Arizona*.¹² Because Summerlin raised the same Sixth Amendment claim in his initial habeas petition as the one at issue in *Ring*, the Ninth Circuit withdrew its initial decision and waited for the *Ring* decision.¹³ After the *Ring* decision was announced, the Ninth Circuit granted a stay to Summerlin so that he could request that the Supreme Court of Arizona reconsider his direct appeal in light of *Ring*.¹⁴ The Supreme Court of Arizona denied Summerlin's request and the Ninth Circuit voted to rehear Summerlin's appeal en banc.¹⁵

II. Holding

The Ninth Circuit upheld Summerlin's conviction, but reversed his sentence of death.¹⁶ The court ruled that Summerlin did not receive ineffective assistance of counsel during the guilt phase of the trial.¹⁷ However, the court held on substantive and procedural grounds that *Ring* applied retroactively to cases on federal habeas review filed prior to the enactment of the Antiterrorism and

8. *Summerlin IV*, 341 F.3d at 1091; see 28 U.S.C. § 2254 (1994) (outlining procedures for seeking writ of habeas corpus in federal court); *State v. Summerlin*, 675 P.2d 686, 696 (Ariz. 1983) (affirming Summerlin's conviction and sentence).

9. *Summerlin IV*, 341 F.3d at 1091; see FED. R. APP. P. 22(b)(1) (providing for the issuance of a certificate of appealability by a district judge before an appeal can be taken to the court of appeals).

10. *Summerlin IV*, 341 F.3d at 1091.

11. *Id.*; see *Summerlin v. Stewart*, 267 F.3d 926, 957 (9th Cir. 2001) [hereinafter *Summerlin I*] (affirming the district court in part, reversing in part, and remanding to the district court for an evidentiary hearing to determine Judge Marquardt's competence at the time of sentencing).

12. *Summerlin IV*, 341 F.3d at 1091; see *Ring v. Arizona*, 534 U.S. 1103, 1103 (2002) (mem.) (granting a writ of certiorari for *State v. Ring*, 25 P.3d 1139, 1139 (Ariz. 2001) (en banc)).

13. *Summerlin IV*, 341 F.3d at 1091; see *Summerlin v. Stewart*, 281 F.3d 836, 837 (9th Cir. 2002) [hereinafter *Summerlin II*] (withdrawing *Summerlin I* decision pending the outcome of *Ring*).

14. *Summerlin IV*, 341 F.3d at 1091.

15. *Id.* at 1091-92; *Summerlin v. Stewart*, 310 F.3d 1221, 1221 (9th Cir. 2002) (en banc) [hereinafter *Summerlin III*] (voting to rehear Summerlin's case).

16. *Summerlin IV*, 341 F.3d at 1121.

17. *Id.* at 1094.

Effective Death Penalty Act of 1996 ("AEDPA").¹⁸ The court, therefore, vacated Summerlin's death sentence and remanded the case to the district court.¹⁹

III. Analysis

Summerlin raised several claims on appeal to the Ninth Circuit.²⁰ The court determined that most of Summerlin's claims were related to the penalty phase of trial.²¹ Thus, the court proceeded with a determination of whether to apply *Ring* retroactively.²²

A. Retroactivity of *Ring*

The Ninth Circuit first discussed the applicable analysis for determining whether *Ring* was retroactive as applied to Summerlin.²³ The court noted that because Summerlin filed his initial federal habeas petition prior to the effective date of AEDPA, he was not subject to the strict retroactivity restrictions of 28 U.S.C. § 2244(b)(2)(A).²⁴ Instead, the court ruled that the retroactivity of *Ring* in

18. *Id.* at 1092, 1121; see 28 U.S.C. § 2244(b)(2)(A) (2000) (stating that a new rule of constitutional law is retroactive to cases on collateral review only if the Supreme Court explicitly stated that it is; part of AEDPA). In *Palmer v. Clarke*, the United States District Court for the District of Nebraska ruled that, in light of *Ring*, Nebraska's death penalty sentencing scheme was unconstitutional in that it allowed for the determination of aggravating circumstances by a three judge panel following a jury determination of guilt. *Palmer v. Clarke*, No. 4:00CV3020, 2003 WL 22327180, at *1, *33-37 (D. Neb. Oct. 9, 2003). Citing *Summerlin*, the *Palmer* court found that *Ring* was a new substantive rule and was retroactive to *Palmer's* case. *Id.* at *36-37. The court vacated *Palmer's* sentence of death and found "that his sentence should be commuted to life imprisonment." *Id.* at *48.

19. *Summerlin IV*, 341 F.3d at 1121-22.

20. *Id.* at 1092. Summerlin made the following claims: (1) he received ineffective assistance of counsel during the guilt phase of the trial; (2) Arizona's death penalty statute violated the Sixth Amendment; (3) he received ineffective assistance of counsel during the sentencing phase of the trial; (4) his counsel had a conflict of interest as a result of her relationship with the prosecutor; (5) his due process rights were violated due to the trial judge's marijuana addiction at the time of deliberation; and (6) the reversal of his sentence and conviction was necessary due to cumulative errors. *Id.* The preceding claims were subsumed within the larger issue of *Ring* retroactivity and will not be fully analyzed in this case note.

21. *Id.* The court applied the test from *Strickland v. Washington* for determining, and ultimately rejecting, Summerlin's ineffective assistance of counsel claim. *Summerlin IV*, 341 F.3d at 1094; see *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (creating two-pronged test for determining ineffective assistance of counsel). This issue will not be discussed further in this case note.

22. *Summerlin IV*, 341 F.3d at 1096.

23. *Id.* at 1096-99.

24. *Id.* at 1092; see 28 U.S.C. § 2244(b)(2)(A) (2000) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed 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, that was previously

Summerlin's case was governed by the Supreme Court's decision in *Teague v. Lane*.²⁵

The threshold question in a *Teague* retroactivity analysis is whether a new constitutional rule is substantive or procedural.²⁶ If the rule is substantive, then the *Teague* retroactivity bar does not apply because a *Teague* analysis is restricted to new procedural rules.²⁷ The Ninth Circuit found that the decision in *Ring* was both substantive and procedural.²⁸

The Ninth Circuit made the following findings regarding the "substantive rule" analysis: (1) new substantive rules of criminal law "are presumptively retroactive;"²⁹ (2) *Ring* was substantive because it redefined capital murder by making the statutory aggravators that triggered the imposition of the death penalty elements of the crime;³⁰ (3) *Ring* effectively added an element to the crime of capital murder that must be proven to a jury;³¹ and (4) the rule from *Ring* was substantive for *Teague* purposes and was thus not barred by *Teague*.³²

unavailable"; part of AEDPA). In its retroactivity analysis, the court first determined that although Summerlin's right to appeal was governed by the strictures of AEDPA, the merits of the petition itself were governed by pre-AEDPA law because his initial petition was filed before AEDPA went into effect. *Summerlin IV*, 341 F.3d at 1092; see *Slack v. McDaniel*, 529 U.S. 473, 482 (2000) (holding that "[u]nder AEDPA, an appellate case is commenced when the application for a [certificate of appealability] is filed"); *Lindh v. Murphy*, 521 U.S. 320, 326 (1997) (holding that AEDPA only applies to cases filed after the statute's enactment). Under AEDPA, a new rule of constitutional law is only retroactive to cases on collateral review if the Supreme Court has explicitly stated so. *Summerlin IV*, 341 F.3d at 1096 n.4. All of the courts of appeals to consider the issue have found that *Ring* is not retroactive to cases filed after the effective date of AEDPA. *Id.*; see, e.g., *Whitfield v. Bowersox*, 324 F.3d 1009, 1012 n.1 (8th Cir. 2003) (citing the Supreme Court's refusal to explicitly state that *Ring* was retroactive to cases on collateral review); *Moore v. Kinney*, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (en banc) (same); *Cannon v. Mullin*, 297 F.3d 989, 992-94 (10th Cir. 2002) (ruling that *Ring* was not retroactive to cases governed by AEDPA).

25. *Summerlin IV*, 341 F.3d at 1096 n.4; see *Teague v. Lane*, 489 U.S. 288, 310 (holding that new rules of criminal procedure are not retroactive to cases on collateral review unless they fall within "an exception to the general rule").

26. *Summerlin IV*, 341 F.3d at 1099; see *Bousley v. United States*, 523 U.S. 614, 620-21 (1998) (explaining the importance of the distinction between substantive and procedural rules when analyzing a new constitutional rule under *Teague*).

27. *Summerlin IV*, 341 F.3d at 1099 (quoting *Santana-Madera v. United States*, 260 F.3d 133, 138 (2d Cir. 2001)).

28. *Id.* at 1101-02.

29. *Id.* at 1099 (quoting *Bousley*, 523 U.S. at 620).

30. *Id.* at 1102.

31. *Id.* at 1104-05. The Court noted that the inclusion of aggravating factors as elements was actually a restoration of Arizona capital sentencing law prior to *Walton v. Arizona*, 497 U.S. 639 (1990), which *Ring* overruled. See *Ring*, 536 U.S. at 603 (overruling *Walton* as irreconcilable with *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

32. *Summerlin IV*, 341 F.3d at 1108.

The Ninth Circuit then found that the *Ring* decision was also procedural because it changed the procedure by which a defendant was sentenced.³³ The court then applied the *Teague* three-part retroactivity test and found the following: (1) Summerlin's conviction became final in 1984 because Summerlin did not appeal the Supreme Court of Arizona's decision to deny him relief and the period to petition for a writ of certiorari had expired;³⁴ (2) because *Ring* overruled *Walton v Arizona*,³⁵ *Ring* was indisputably a new constitutional rule and was not existing precedent requiring application in 1984;³⁶ (3) Summerlin did not fall within the first *Teague* exception for those convicted of conduct that was decriminalized or among a class of individuals "immunized from specified forms of punishment;"³⁷ but (4) Summerlin did meet the second *Teague* exception.³⁸

The Ninth Circuit, in examining the second *Teague* exception, found that *Ring*'s requirement of fact-finding by a jury instead of a judge would render capital sentencing proceedings more accurate.³⁹ The court found the following: (1) the truncated Arizona sentencing proceedings presided over by a judge were inadequate in the capital context; (2) a jury is better suited for making the ethical decision to sentence a fellow citizen to death; (3) jurors sit for only one case and are not called upon to serve on capital trials on a routine basis; and (4) jurors are not under the political pressure of being re-elected to their position.⁴⁰ The court found that Summerlin's sentencing proceeding was typical of an Arizona case for

33. *Id.* at 1101.

34. *Id.* at 1108.

35. 497 U.S. 639 (1990).

36. *Summerlin IV*, 341 F.3d at 1108-09.

37. *Id.*

38. *Id.* at 1109, 1116, 1121. To satisfy the second *Teague* exception, "a new rule must: (1) seriously enhance the accuracy of the proceeding and (2) alter our understanding of bedrock procedural elements essential to the fairness of the proceeding." *Id.* at 1109 (citing *Sawyer v. Smith*, 497 U.S. 227, 242 (1990)).

39. *Summerlin IV*, 341 F.3d at 1110; see *Ring*, 536 U.S. at 607-08 ("In any event, the superiority of judicial factfinding in capital cases is far from evident. Unlike Arizona, the great majority of States responded to this Court's Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury."); *Teague*, 489 U.S. at 311-13 (stating that in order to meet the second exception, the rule in question first must seriously enhance the accuracy of the proceeding).

40. *Summerlin IV*, 341 F.3d at 1110-15. Hearsay testimony, inadmissible victim impact statements, sentencing recommendations from the victim's family, and a lack of evidentiary standards in presentence reports were all common features of Arizona's sentencing proceedings. *Id.* at 1111-12. The court noted that judges in Arizona also often received letters from the victims' families with recommendations for sentencing. *Id.* at 1112. The court cited Judge Marquardt as an example of a judge possibly presiding over too many capital cases, and the court concluded that the frequency of imposing the sentence could lead a judge to consider it "just another criminal sentence." *Id.* at 1114.

the time.⁴¹ The court concluded that conducting the sentencing phase of a capital trial before a jury, subject to evidentiary rules and procedures, would enhance the accuracy of such proceedings.⁴²

The Ninth Circuit continued its examination under the second *Teague* exception and found that the bedrock principle at issue in *Ring* was the Sixth Amendment right to a jury trial because it "fundamentally altered the procedural structure of capital sentencing applicable to all states."⁴³ The court also found that the denial of the constitutional right to a jury was a structural error that affected the mechanics of the trial process.⁴⁴ The court held that because there was no jury verdict to review and the error was structural, cases such as *Summerlin*'s cannot be reviewed for harmless error.⁴⁵ Harmless-error review necessarily implies that there was a constitutionally valid verdict to review.⁴⁶ Because *Summerlin*'s death sentence was not delivered by an entity constitutionally authorized to deliver such a verdict, the error necessarily affected the trial process.⁴⁷

IV. Application in Virginia

The Ninth Circuit provided valuable guidance for conducting a *Teague* analysis of *Ring*. The threshold question of whether a rule is substantive or procedural, the three-part test for retroactivity of a procedural rule, and the two exceptions for satisfying the third element of the test are all analyzed and applied with precision and clarity.⁴⁸ The retroactivity of *Ring*, however, has very little impact in Virginia. The basic holding of *Ring* is that aggravators must be found by a jury. This has been the case in Virginia since the post-*Furman* death scheme was created.⁴⁹

41. *Id.* at 1112.

42. *Id.* at 1115. The court, in particular, cited the inadmissible evidence the judge received in a presentence report and compared it to the "extremely abbreviated" formal submissions by the parties. *Id.* at 1111-13.

43. *Id.* at 1116. The court specifically found that *Ring* established the bedrock principle of requiring a jury to find the aggravating circumstances necessary to impose the death penalty. *Id.*; see *Ring*, 536 U.S. at 589 (holding that a jury, not a judge, must find death sentence aggravators).

44. *Summerlin IV*, 341 F.3d at 1116.

45. *Id.* at 1116-17 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 277-81 (1993)).

46. *Id.*; see *Sullivan*, 508 U.S. at 279-80 (finding that when the basis on which the jury made its decision is compromised, the resulting conviction cannot be reviewed for harmless-error).

47. *Summerlin IV*, 341 F.3d at 1117.

48. *Id.* at 1099.

49. See VA. CODE ANN. § 19.2-264.2 (Michie 2000) (requiring aggravating factors necessary for imposition of the death penalty to be found by the finder of fact); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (finding then-existing death penalty statutes unconstitutional under the Eighth and Fourteenth Amendments).

The only Virginia case to which the retroactive application of *Ring* might apply is one in which the defendant pleaded guilty. Assume an indictment alleging only the basic elements of a Virginia Code section 18.2-31 offense, but not alleging aggravators.⁵⁰ Assume further that the defendant waived his right to jury trial, for example, on "the offense charged in the indictment." Because the defendant did not waive his *Ring*-created jury trial right on the aggravators, retroactive application of *Ring* would require reversal of that defendant's death sentence.

V. Conclusion

Whether a new constitutional rule is retroactive is dependent on the substantive or procedural nature of the rule. Substantive rules are presumptively retroactive, whereas procedural rules are retroactive only if they satisfy the Supreme Court's test in *Teague*. *Ring*, found to be a substantive rule by the Ninth Circuit, is presumptively retroactive to cases where the trial judge found that aggravating factors existed and warranted the imposition of the death penalty. The *Summerlin* court further found that even if the rule was only procedural in nature, the rule in *Ring* satisfied the three-part test in *Teague*.

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50. See VA. CODE ANN. § 18.2-31 (Michie Supp. 2003) (defining capital murder).

