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Schriro v. Summerlin
124 S. Ct. 2519 (2004)

I. Facts

On June 8, 1982, an Arizona jury convicted Warren Wesley Summerlin of the April 1981 first-degree murder and sexual assault of Brenna Bailey.[1] Pursuant to Arizona's capital sentencing statutes, the trial judge conducted a hearing to determine Summerlin's sentence.[2] Finding that Summerlin had a prior violent felony conviction and had committed "the offense in an especially heinous, cruel, or depraved manner," the judge sentenced him to death.[3] In 1983 the Supreme Court of Arizona affirmed the conviction and death sentence.[4]

During Summerlin's final federal habeas corpus appeal in the United States Court of Appeals for the Ninth Circuit, the United States Supreme Court decided *Apprendi v. New Jersey*[5] and *Ring v. Arizona*.[6] Relying on its determination in

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1. Schriro v. Summerlin, 124 S. Ct. 2519, 2521 (2004); *see* ARIZ. REV. STAT. ANN. § 13-1105 (West 1978) (defining the elements of first-degree murder and setting the punishment at death or life imprisonment); ARIZ. REV. STAT. ANN. §13-1406 (West 1978) (defining sexual assault); Charles Lane, *High Court to Clarify Judge-Only Sentencing*, WASH. POST, Apr. 19, 2004, at A4, *available at* 2004 WL 74480756 (giving the details of the procedural and factual history of Summerlin's cases). Bailey had gone to the Summerlin house on business and did not return. *Summerlin*, 124 S. Ct. at 2521. Later that evening, police received a telephone call from Summerlin's mother-in-law, who informed them that Summerlin had killed Bailey and wrapped her in a carpet. Summerlin v. Stewart, 341 F.3d 1082, 1084–85 (9th Cir. 2003). The mother-in-law based her information on her daughter's psychic abilities. *Id.* at 1085. The next day, police found Bailey's partially nude body wrapped in Summerlin's bedspread in the trunk of her car. *Id.*

2. *Summerlin*, 124 S. Ct. at 2521; *see* ARIZ. REV. STAT. ANN. § 13-703(B) (West 1978) (stating that "[w]hen a defendant is found guilty of . . . first degree murder . . . the judge who presided at the trial . . . shall conduct a separate sentencing hearing to determine the existence or nonexistence of [aggravating and mitigating circumstances] for the purpose of determining the sentence to be imposed").

3. *Summerlin*, 124 S. Ct. at 2521; *see* ARIZ. REV. STAT. ANN. § 13-703(F)(2) (defining as an aggravator a previous conviction for a felony "involving the use or threat of violence on another person"); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (stating as an aggravating circumstance that "[t]he defendant committed the offense in an especially heinous, cruel, or depraved manner").

4. *Summerlin*, 124 S. Ct. at 2521; *see* State v. Summerlin, 675 P.2d 686, 696 (Ariz. 1983) (affirming the convictions and death sentence).

5. 530 U.S. 466 (2000).

6. *Summerlin*, 124 S. Ct. at 2521–22; *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that a jury must find as an element of the crime any fact that can "increase[ ] the penalty . . . beyond the prescribed statutory maximum"); Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury" (quoting *Apprendi*, 530 U.S. at 494 n.19) (citation omitted)).

Apprendi 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,' " the Court in *Ring* declared Arizona's capital sentencing scheme unconstitutional.[7] Given the *Ring* ruling, the Ninth Circuit vacated Summerlin's death sentence.[8] Arguing that the Ninth Circuit erred in applying *Ring* retroactively to Summerlin's twenty-one-year-old death sentence, the State of Arizona sought certiorari in the United States Supreme Court.[9]

II. Holding

The United States Supreme Court reversed the Ninth Circuit's grant of sentencing relief, holding that *Ring* does not apply retroactively.[10] The Court stated that while new substantive rules of criminal law will normally be applied retroactively, *Ring* announced a new procedural rule and as such, was subject to the general rule of non-retroactivity set forth in *Teague v. Lane*.[11] The Court also made clear that *Ring* does not fit the *Teague* exception as a " 'watershed rule[ ] of criminal procedure.' "[12] The Court therefore reversed the Ninth Circuit's decision and remanded Summerlin's case for consideration of his other habeas claims.[13]

III. Analysis

The *Summerlin* Court began by outlining its current doctrine concerning the application of new Constitutional rules.[14] Under *Griffith v. Kentucky*,[15] a court must apply a newly announced rule to any case that is still pending on direct appeal at the time the new rule is announced.[16] For convictions that have

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7. *Summerlin*, 124 S. Ct. at 2522 (quoting *Apprendi*, 530 U.S. at 490).

8. *Id.*; *see Summerlin*, 341 F.3d at 1121 (reversing Summerlin's death sentence). For a complete discussion and analysis of the Ninth Circuit's decision in *Summerlin*, see generally Terrence T. Egland, Case Note, 16 CAP. DEF J. 319 (2003) (analyzing Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003)).

9. *Summerlin*, 124 S. Ct. at 2522. The State also argued that the trial judge's finding of a prior felony conviction exempted Summerlin's case from *Apprendi* and was sufficient to justify the death sentence. *Id.* at 2522 n.3. The Supreme Court denied certiorari on this claim. *Id.*

10. *Id.* at 2526.

11. *Id.* at 2522–23; *see* Teague v. Lane, 489 U.S. 288, 311 (1989) (defining the rule for retroactive application of new Constitutional rules).

12. *Summerlin*, 124 S. Ct. at 2524–26 (quoting Saffle v. Parks, 494 U.S. 494, 495 (1990) (internal quotations omitted)).

13. *Id.* at 2526.

14. *Id.* at 2522–23.

15. 479 U.S. 314 (1987).

16. *Summerlin*, 124 S. Ct. at 2522; *see* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding

become final following direct appeal in state court, the Court stated that under *Teague* only new rules of substantive criminal law could normally be applied retroactively.[17] The Court made clear that substantive rules are rules that either: (1) "narrow the scope of a criminal statute by interpreting its terms"; (2) remove a class of persons from the State's legal reach; or (3) "place particular conduct . . . beyond the State's power to punish."[18] The Court stated that these types of rules must be applied retroactively because of the risk of punishing a person for an act that is no longer a crime.[19] The reason for such retroactive application is to prevent the conviction and punishment of the innocent.[20]

The Court then explained the *Teague* rule that new procedural rules must not be applied retroactively.[21] To do so would undermine the legal system because such rules "merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise."[22] Classifying this possibility as a "more speculative connection to innocence," the Court explained that only in rare cases would a procedural rule need to have a retroactive effect.[23] The procedural exception to the *Teague* non-retroactivity rule, the Court stated, would have to be a " 'watershed rule[ ] of criminal procedure.' "[24] This type of rule " 'implicat[es] the fundamental fairness and accuracy of the criminal proceeding.' "[25] According to the Court, even if the new procedural rule is "fundamental," it should not be applied retroactively unless it " '*seriously* diminishe[s]' " the accuracy of the outcome.[26] The Court went on to distinguish a procedural rule from a substantive rule by defining a procedural rule as one "that regulate[s] only the *manner of determining* the defendant's culpability," in contrast to one that changes the nature of the culpable act itself.[27]

The State of Arizona argued in its petition for certiorari that the Ninth Circuit should not have applied *Ring* retroactively to vacate Summerlin's death

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"that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final").

17. *Summerlin*, 124 S. Ct. at 2522.

18. *Id.*; *see* Bousley v. United States, 523 U.S. 614, 620–21 (1998) (discussing the substantive nature of a new rule that reinterprets a statute and thus changes the criminality of particular conduct); *Saffle*, 494 U.S. at 494–95 (discussing the type of new rule that eliminates classes of people or conduct from within the State's power of punishment).

19. *Summerlin*, 124 S. Ct. at 2522–23.

20. *Id.*

21. *Id.* at 2523.

22. *Id.*

23. *Id.*

24. *Id.* (quoting *Saffle*, 494 U.S. at 495 (internal quotations omitted)).

25. *Summerlin*, 124 S. Ct. at 2523 (quoting *Saffle*, 494 U.S. at 495).

26. *Id.* (quoting *Teague*, 489 U.S. at 313).

27. *Id.*

sentence because *Ring* created a new procedural rule.[28] Summerlin responded by arguing that *Ring* was substantive because it recharacterized the aggravating factors as elements of the crime that raised the maximum allowable penalty to death.[29] The Ninth Circuit agreed with this interpretation and concluded "that *Ring* 'reposition[ed] Arizona's aggravating factors as elements of the separate offense of capital murder.' "[30] By identifying aggravating circumstances as essential elements of a newly defined crime of death-eligible murder, Summerlin argued, *Ring* changed the substance of Arizona's death penalty law.[31] Both Summerlin and the Ninth Circuit further contended that *Ring* changed "our understanding of Arizona law," thus making the rule substantive.[32]

The Supreme Court rejected this interpretation and upheld the State's claim that *Ring* announced a new procedural rule.[33] Acknowledging that a rule that "modifies the elements of an offense is normally substantive rather than procedural," the Court nonetheless found that *Ring* did not actually change any elements of Arizona's capital murder stature.[34] The Court stated that a defendant in Arizona could be sentenced to death for the same conduct both before and after *Ring*.[35] The Court's ruling in *Ring* merely "altered the range of permissible *methods* for determining whether a defendant's conduct is punishable by death."[36] The Court also rejected Summerlin's second claim about the substantive nature of the change, and pointed out that although "our understanding of state law changed, . . . the actual content of state law did not."[37] The Court made clear that it viewed the rule in *Ring* as merely procedural.[38]

Summerlin also argued that if the Court found *Ring* to be procedural, then it at least should consider it a "watershed" rule and uphold the Ninth Circuit's retroactive application of it to his sentence.[39] He claimed that the prior law allowing the judge to find aggravating factors undermined the " 'fundamental fairness and accuracy of the criminal proceeding,' " because "juries are more accurate factfinders."[40] A jury, according to Summerlin, will produce a more accurate conviction and sentence than a single judge because of the truth-seeking

28. *Id.* at 2522.
29. *Id.* at 2524.
30. *Id.* (quoting *Summerlin*, 341 F.3d at 1105).
31. *Summerlin*, 124 S. Ct. at 2524.
32. *Id.* at 2524 n.5.
33. *Id.* at 2523.
34. *Id.* at 2524.
35. *Id.* at 2523.
36. *Id.* (emphasis added).
37. *Summerlin*, 124 S. Ct. at 2524 n.5.
38. *Id.* at 2523.
39. *Id.* at 2524.
40. *Id.* (quoting *Saffle*, 494 U.S. at 495).

power of group deliberation, "the jury's protection from exposure to inadmissible evidence," and the fact that the jury more acutely represents the community and its responsibility to punish only the worst of the worst with death.[41] The differences in accuracy and fairness between a judicial fact-finding and one done by a jury in a capital sentencing proceeding, Summerlin claimed, are precisely the kinds of differences for which the Court made the exception to the *Teague* non-retroactivity rule.[42]

The Supreme Court rejected the proposition that *Ring* presented a "watershed" rule.[43] The Court did not answer the question of whether juries are more accurate than judges, but instead focused on the question of "whether judicial factfinding so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach."[44] The Court decided that the evidence on the consistency of judicial, as opposed to jury, fact-finding was "too equivocal" to conclude that "judicial factfinding *seriously* diminishes accuracy."[45] The Court further found that its decision in *DeStefano v. Woods*[46] not to apply the *Duncan v. Louisiana*[47] jury trial rule retro-actively supported its choice not to allow a retroactive application of *Ring*.[48] The Court consequently held that because *Ring* was a procedural rule that did not come under the "watershed" exception of *Teague*, the Ninth Circuit erred in reversing Summerlin's death sentence.[49]

Dissenting, Justice Breyer (joined by Justices Stevens, Souter, and Ginsburg) critiqued the majority's classification of *Ring* as an unexceptional procedural rule.[50] Conceding that *Ring* is a procedural, rather than a substantive, rule, the dissent nonetheless found the rule to be of such importance as to qualify under the "watershed" exception to *Teague*.[51] The dissent argued that "a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution," and insisted that a jury necessarily better represents " 'the

41. *Id.*

42. *Id.*

43. *Summerlin*, 124 S. Ct. at 2525.

44. *Id.* (quoting *Teague*, 489 U.S. at 312–13 (internal quotations omitted)).

45. *Id.*

46. 392 U.S. 631 (1968).

47. 391 U.S. 145 (1968).

48. *Summerlin*, 124 S. Ct. at 2525–26; *see* DeStefano v. Woods, 392 U.S. 631, 633–34 (1968) (stating that the Court " 'would not assert . . . that every criminal trial . . . held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury' " (quoting Duncan v. Louisiana, 391 U.S. 145, 158 (1968)); *Duncan*, 391 U.S. at 149 (holding that a defendant's right to a jury trial in state criminal cases is the same as it would be in federal criminal cases under the Sixth Amendment).

49. *Summerlin*, 124 S. Ct. at 2526.

50. *Id.*

51. *Id.*

conscience of the community' " than does a judge acting alone.[52] It noted Justice Stevens's conclusion in his concurrence in *Spaziano v. Florida*[53] that "the right to have jury sentencing in the capital context is both a fundamental aspect of constitutional liberty and also significantly more likely to produce an accurate assessment of whether death is the appropriate punishment."[54]

The dissent made three arguments in favor of applying *Ring* retroactively.[55] First, it pointed out that the death sentence is an expression of "community-based value judgments."[56] It argued that a jury is essential to the determination of death because the jury must use its "community-based standards, standards that incorporate values," to define the aggravating terms—"especially heinous," "cruel," and "depraved"—that make a defendant death-eligible.[57] The dissent next noted that "*Teague*'s retroactivity principles reflect the Court's effort to balance competing considerations."[58] Applying *Ring* retroactively would further the purpose of the writ of habeas corpus to "protect[ ] the innocent against erroneous conviction or punishment," a consideration especially important when the punishment is as final and irrevocable as death.[59] Finally, the dissent argued that a retroactive application of *Ring* would ensure that prisoners sentenced to death have uniform constitutional sentencing procedures.[60]

It is worth noting that in its discussion of the accuracy of the judicial fact-finder, the *Summerlin* majority paid no heed to the actual fact-finder in Summerlin's case. According to the Ninth Circuit's opinion, Judge Philip Marquardt, who sentenced Summerlin to death, "was a heavy user of marijuana at the time" of the sentencing.[61] Indeed, Marquardt was later convicted in Texas in 1988 for misdemeanor possession of marijuana, and in 1991, he attempted to place the blame for an intercepted purchase of marijuana on his daughter's boyfriend.[62] The Supreme Court of Arizona eventually suspended Marquardt for

52. *Id.* at 2527–29 (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)); *see* California v. Ramos, 463 U.S. 992, 998–99 (1983) (stating that the "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" than that given to other punishments).

53. 468 U.S. 447 (1984).

54. *Summerlin*, 124 S. Ct. at 2527 (citing Spaziano v. Florida, 468 U.S. 447, 486–87 (1984) (Stevens, J., concurring)).

55. *Id.* at 2528.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 2528–29.

60. *Summerlin*, 124 S. Ct. at 2529.

61. *Summerlin*, 341 F.3d at 1089.

62. *Id.* at 1089 n.1.

his marijuana use, and the United States Supreme Court disbarred him in 1992.[63] Although the Ninth Circuit stated that it could not be sure of the extent of Marquardt's drug-use during Summerlin's trial and sentencing, it nonetheless found that "[t]here [were] instances during pre-trial hearings and at trial when Judge Marquardt exhibited confusion over facts that had just been presented[;] . . . [h]e also made some quite perplexing, if not unintelligible, statements at various times during the trial."[64] One might argue that a drug-addicted judge who appeared confused and unintelligible during trial should raise some serious doubts as to the accuracy of the outcome and "produce [such] an 'impermissibly large risk' of injustice" that the Court should be willing to consider *Ring* to be a "watershed" rule.[65]

The circumstances of Summerlin's own history also call into question the accuracy of his death sentence. Had a jury heard evidence of Summerlin's history and mental condition, it might have decided that he was not culpable enough to put to death. The Ninth Circuit opinion spelled out in great detail the circumstances of Summerlin's life that might have persuaded a jury to impose life instead of death:

> There is no doubt that Warren Summerlin is an extremely troubled man. He has organic brain dysfunction, was described by a psychiatrist as "functionally retarded," and has explosive personality disorder with impaired impulse control. His father was a convicted armed robber who was killed in a shootout. As a youth, his alcoholic mother beat him frequently and punished him by locking him in a room with ammonia fumes. At his mother's behest, he received electroshock treatments to control his explosive temper. He dropped out of school in the seventh grade due to dyslexia and committed numerous petty juvenile offenses. In 1975, he was diagnosed as a paranoid schizophrenic and treated with the anti-psychotic medication Thorazine.[66]

A group of individuals, reflective of the diversity of the community on whose behalf they must impose sentence, might have given these arguably horrific circumstances the kind of consideration that the potentially "drug-addled" judge did not, perhaps even concluding that Summerlin's brain dysfunction and mental health warranted a finding under Arizona Revised Statute section 13-703(G)(1) that Summerlin's "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired."[67] The Supreme Court may have been too quick to ignore these circumstances in

63. *Id.*; *see* In re Disbarment of Marquardt, 503 U.S. 902, 902 (1992) (disbarring the judge).

64. *Summerlin*, 341 F.3d at 1090 n.2.

65. *Summerlin*, 124 S. Ct. at 2525 (quoting *Teague*, 489 U.S. at 312–13 (internal quotations omitted)).

66. *Summerlin*, 341 F.3d at 1084.

67. ARIZ. REV. STAT. ANN. § 13-703(G)(1) (West 1978).

its finding that the fundamental fairness of Arizona sentencing proceedings was not "seriously diminished" by the total absence of jury participation.[68]

IV. *Application in Virginia*

Summerlin's application in Virginia cases is limited. *Ring* did not affect Virginia's capital murder and sentencing statutes because the statutes already provide for a jury's finding beyond a reasonable doubt the aggravating factors that make a defendant eligible for the death penalty.[69] *Summerlin* should, at least, serve as a reminder to Virginia practitioners that the aggravating elements of vileness and future dangerous are indeed elements of capital murder that the jury must find beyond a reasonable doubt before it can choose to recommend a death sentence, and that a defendant must know of the elements before trial so that he or she may be prepared to defend against them.

V. *Conclusion*

Summerlin implicates the habeas corpus appeals of 110 people on death row in Arizona, Colorado, Idaho, and Nebraska.[70] The Court's fears about unending litigation and deferment of finality seem unjustified in such a defined group of cases. By limiting *Ring* to those cases not yet affirmed on direct appeal, the Supreme Court has sanctioned the imposition of death in those cases under unconstitutional procedures. If the death sentence is indeed a different kind of punishment—a reflection of the community's desire to make a statement about the worst of the worst—then it is ironic that the Court did not find it essential to require that aggravating factors be found, and thus each death sentence be imposed, by the representatives of the community, the jury. One should consider that Summerlin raised his *Ring* claim long before the Supreme Court decided *Ring*. *Ring* overruled *Walton v. Arizona*[71] while Summerlin's case was still pending, holding that aggravating factors were essential elements of the crime of capital murder and needed to be found by a jury beyond a reasonable doubt.[72]

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68. *Summerlin*, 124 S. Ct. at 2525.

69. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (providing that a trier of fact cannot impose a death sentence "unless [it] shall . . . find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman").

70. *Summerlin*, 124 S. Ct. at 2528, 2530.

71. 497 U.S. 639 (1990).

72. *Ring*, 536 U.S. at 609 (overruling Walton v. Arizona, 497 U.S. 639, 649 (1990)); *see Walton*, 497 U.S. at 649 (rejecting Walton's argument that Arizona's capital sentencing scheme was unconstitutional).