No. 03-526

In the Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

WARREN WESLEY SUMMERLIN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The Court granted certiorari limited to the following questions:

1. Whether the rule announced by the Court in *Ring* v. *Arizona*, 536 U.S. 584, 589 (2002), is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague* v. *Lane*, 489 U.S. 288 (1989) (plurality opinion).

2. Whether *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings.

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INTEREST OF THE UNITED STATES

The issue in this case is whether the rule of *Ring* v. *Arizona*, 536 U.S. 584, 589 (2002), is retroactively applicable on collateral review of capital sentences. The specific new rule announced in *Ring*—that aggravating circumstances that make a defendant eligible for the death penalty must, under the Sixth Amendment, be found by a jury—has little direct effect on federal capital practice. At the time of *Ring*, the Federal Death Penalty Act already required that juries find those aggravating circumstances. See 18 U.S.C. 3593(b)-(c). The questions presented in this case, however, require the Court to consider more generally the standards governing the availability of new rules in collateral attacks on convictions and sentences. The United States thus has a substantial interest in this case.

STATEMENT

1. On the morning of April 29, 1981, Brenna Bailey, an account investigator for Finance America, left her office to visit respondent's home to speak with respondent's wife about an overdue account. She did not, however, return as scheduled, and her disappearance was reported to the police. Later that evening, police received a tip from a female caller, later identified as respondent's mother-in-law, who stated that respondent had murdered the missing woman from "Pacific Finance," rolled up her body in a carpet, and placed it in the trunk of a car. Pet. App. C2. Early the following morning, Bailey's car was found in a parking lot located approximately one mile from respondent's home. *Ibid.* A pair of panties, pantyhose, and shoes were located on the floor of the car's back seat. *Id.* at A4. Bailey's partially-nude body was found in the trunk, alongside a bloody bedspread. Her skull had been crushed. *Id.* at C2.

Police executed a warrant to search respondent's home, where they found numerous incriminating items. Respondent was arrested after he made incriminating statements and his wife identified the bloody bedspread found with Bailey's body as having come from their household. Respondent made additional incriminating statements at the police station. Pet. App. A4.

2. In 1982, following a jury trial in the Superior Court of Maricopa County, Arizona, respondent was found guilty of first degree murder and sexual assault. Pet. App. C3. State law required the trial judge, sitting alone, to determine the presence or absence, under the reasonable-doubt standard, of aggravating circumstances necessary to impose the death penalty and to weigh those circumstances against any mitigating circumstances calling for leniency. Ariz. Rev. Stat. Ann. § 13-703 (West 1978); *State* v. *Jordan*, 614 P.2d 825, 828 (Ariz.), cert. denied, 449 U.S. 986 (1980). The court found two aggravating circumstances that rendered respondent

eligible for a death sentence: (1) respondent had a prior felony conviction involving the use or threatened use of violence against another person; and (2) respondent committed the murder under especially cruel, heinous, or depraved circumstances by crushing Bailey's skull after raping her and by causing her mental terror. Pet. 3. After finding no mitigating circumstances calling for leniency, the court sentenced respondent to death for the murder and to 28 years of imprisonment for the assault. Pet. App. A13, C3.

3. The Arizona Supreme Court affirmed. *State* v. *Summerlin*, 675 P.2d 686 (1983). On direct appeal, petitioner argued, *inter alia*, that Arizona's death penalty statute violated the Sixth Amendment jury trial guarantee because it required the trial judge to determine the circumstances necessary for imposition of the death penalty. Relying on *Proffitt* v. *Florida*, 428 U.S. 242 (1976), the Arizona Supreme Court rejected that argument. *Summerlin*, 675 P.2d at 695.

4. In 1986, respondent filed a petition for federal habeas corpus relief in the United States District Court for the District of Arizona. The court stayed proceedings to allow petitioner to exhaust his claims in state court. Pet. App. C3. Over the next decade, respondent filed several petitions for postconviction relief in the Arizona courts, all of which were denied. After lifting the stay, the district court denied respondent's federal habeas petition. *Id.* at C4. The court rejected petitioner's argument that "the Sixth, Eight[h], and Fourteenth Amendments require a jury determination of [the] aggravating factors" supporting his death sentence, because "[t]he United States Supreme Court rejected this same argument in *Walton* v. *Arizona*, 497 U.S. 639, 647-649 (1990)." *Id.* at C23-C24 (citation omitted).

5. A divided panel of the Ninth Circuit affirmed in part, reversed in part, and remanded. *Summerlin* v. *Stewart*, 267 F.3d 926 (2001). The panel withdrew its opinion, however, after this Court granted the petition for a writ of certiorari in *Ring* v. *Arizona*, 534 U.S. 1103 (2002), to consider whether

Walton should be overruled. *Summerlin* v. *Stewart*, 281 F.3d 836 (9th Cir. 2002)

6. In *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002), this Court overruled *Walton* in part and held that the aggravating circumstances that make a defendant eligible for the death penalty under Arizona law "operate as 'the functional equivalent of an element of a greater offense,' " which, under the Sixth Amendment, must be found by a jury. Thereafter, the court of appeals granted respondent a stay to allow him to move the Arizona Supreme Court to recall the mandate in his direct appeal and consider *Ring*'s retroactive application to his conviction. Pet. App. A15. After the Arizona Supreme Court denied the motion, the Ninth Circuit voted to rehear respondent's case en banc. *Summerlin* v. *Stewart*, 310 F.3d 1221 (2002).

a. In an 8-3 decision, the en banc panel reversed the district court's order denying respondent habeas corpus relief with respect to his sentence. Pet. App. A1-A64. After rejecting respondent's claim that his lawyer rendered constitutionally ineffective assistance during the guilt phase of the trial, *id.* at A17-A22, the court concluded that *Ring* applies retroactively to cases on collateral review and requires that respondent's death sentence be vacated. *Id.* at A2. The majority held that the presumption under *Teague* v. *Lane*, 489 U.S. 288 (1989), against the retroactive application of new rules of constitutional procedure to cases on collateral review did not bar respondent's claim, because *Ring* was not a procedural rule. Pet. App. A28-A42. In that respect, the court distinguished the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), which it agreed was not retroactive. *Id.* at A40-A41. The court concluded that *Ring* worked a "restructuring of Arizona murder law" and a "redefinition of the separate crime of capital murder." *Id.* at A42. For that reason, the court concluded that the rule announced in *Ring* "is necessarily a 'substantive' rule" whose application on collat-

eral review is not barred by *Teague*. *Ibid.* (citing *Bousley* v. *United States*, 523 U.S. 614, 620 (1998)).

Alternatively, the majority held that insofar as the new rule announced by *Ring* is a procedural rule, it falls within *Teague*'s exception for "watershed rules" that "seriously enhance the accuracy of the proceeding" and "alter our understanding of bedrock procedural elements essential to the fairness of the proceeding." Pet. App. A44 (citing *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990)). The court stated that "there is little doubt that the rule announced in *Ring* will significantly improve the accuracy of capital trials in Arizona," *id.* at A54, because, in the court's view, penalty-phase presentations to judges may be "extremely truncated affairs," *id.* at A46; judges are exposed to "inadmissible evidence," *ibid.*; judges may confront a number of death penalty cases and are "less likely" than juries "to reflect the current conscience of the community and more likely to consider imposing a death penalty as just another criminal sentence," *id.* at A52; and "[j]udges who face election [like those in Arizona] are far more likely to impose the death penalty than * * * juries," *id.* at A52-A53. The court then asserted that *Ring* "establishes bedrock procedural requirements that affect the structure of every penalty-phase hearing in a capital case." *Id.* at A62. A "critical consideration," *id.* at A60, for the court was its view that errors under *Ring* are "structural" errors that are not subject to harmless-error review. See *id.* at A55-A60. The court concluded that its position that *Ring* is "bedrock" is consistent with the position that it had previously taken that *Apprendi* is not. See *id.* at A63.

b. Judge Rawlinson, joined by Judges O'Scannlain and Tallman, dissented. Pet. App. A69-A83. Judge Rawlinson explained that *Ring* did not announce a new "rule of substance." *Id.* at A71. If it had, she added, "*Apprendi* [also] would have been a substantive rather than a procedural ruling," because "the 'hate crime' aggravator in *Apprendi*

operated in the same manner as the death penalty factors in *Walton* to establish a 'greater offense.'" *Id.* at A72. Judge Rawlinson noted that *Ring* "affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt." *Id.* at A75. Instead, *Ring* merely "altered who decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings." *Ibid.* (quoting *State* v. *Towery*, 64 P.3d 828, 833 (Ariz. 2003)).

Judge Rawlinson also concluded that the rule adopted by the Court in *Ring* is not a watershed procedural rule subject to retroactive application under *Teague*. Pet. App. A77-A83. She disputed the majority's "facile conclusion that transfer of capital sentencing responsibility to a jury will enhance the accuracy of the process," *id.* at A80, citing studies suggesting that many jurors make up their minds about punishment before the penalty phase, often basing their decision on factors such as the quantum of proof of guilt, sympathy and pity, and race. *Id.* at A79-A80. Judge Rawlinson concluded that because "the jury is still out on the question of whether the decision in *Ring* enhances the accuracy of the capital sentencing process," the second *Teague* exception did not apply. *Id.* at A82.

Judge Rawlinson also disagreed with the majority's conclusion that *Ring* alters our understanding of bedrock procedural principles. Pet. App. A82-A83. She explained that, by expressly declining in *Ring* to reach the State's assertion that any Sixth Amendment error was harmless, this Court "strongly implied, if not outright held, that harmless error analysis is * * * applicable to any imposition of the death penalty by a judge rather than a jury." *Id.* at A73; see also *id.* at A82.

SUMMARY OF ARGUMENT

Under the analysis in *Teague* v. *Lane*, 489 U.S. 288 (1989), subject to narrow exceptions, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310 (plurality opinion); *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989) (adopting *Teague* plurality's approach to retroactivity). The rule that this Court announced in *Ring* v. *Arizona*, 536 U.S. 584 (2002), falls squarely within that principle and is not available to respondent on his collateral attack on his criminal conviction. Neither of the court of appeals' reasons for refusing to apply *Teague*'s bar on retroactive application of new rules—that *Ring* announced a "substantive" rule and that its rule is a "bedrock" principle of our system of justice—is correct.

I. The court of appeals mistakenly held that *Teague* does not apply, on the theory that the *Ring* rule is a substantive, not a procedural, rule under *Bousley* v. *United States*, 523 U.S. 614, 620 (1998). *Bousley* held that decisions of this Court narrowing the scope of federal criminal statutes are substantive, not procedural, rules that are not subject to *Teague*. Such decisions are retroactively applicable because they raise the risk that a defendant has been convicted for committing an act that the law in fact does not make criminal.

This Court's decision in *Ring*, like the decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), before it, does not present the risk that underlay the *Bousley* principle of retroactive application of substantive rules. The question of what facts must be proved in order to impose a particular punishment, as in *Bousley*, is a substantive one, but the question of who must be the decisionmaker on a particular fact, or how that decisionmaker should go about deciding the fact, presents a quintessentially procedural issue. Both *Apprendi* and *Ring* concern the latter question; both address

the question of "'who decides,' judge or jury," about the existence of certain facts. *Ring*, 536 U.S. at 605. Indeed, because federal courts do not have the authority to reach authoritative interpretations of the substance of state criminal prohibitions, federal court decisions in state criminal cases are *never* "substantive" decisions that defy *Teague* analysis entirely.

II. Under *Teague*, new rules of constitutional criminal procedure are not retroactively applicable to cases on collateral review unless they satisfy one of two narrow exceptions. First, a new rule is retroactively applicable if it places certain primary conduct beyond the reach of the State to prosecute or represents a categorical prohibition against imposition of a particular punishment. *Ring* does not satisfy that standard. Second, a new rule is retroactively applicable if it is a "watershed rule[] of criminal procedure" that is "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 311, 313. The court of appeals erred in holding that *Ring* announced such a rule.

A. The rule in *Ring* is not "central to an accurate determination of innocence or guilt," since it has long been recognized that accurate findings may be made by judge or jury. Instead, the rationale of *Ring* rests on the need under the Sixth Amendment for "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen." *Williams* v. *Florida*, 399 U.S. 78, 100 (1970). That rationale, although important, is not based on the relative accuracy of findings by a judge or jury. Moreover, contrary to the court of appeals' conclusion, the fact that this is a capital proceeding does not alter that result. This Court has long recognized that the ultimate sentencing decision in capital cases may be entrusted solely to the judge. Given that judges may be entrusted with that determination, and with accurately assessing the facts necessary to that determination, it follows *a fortiori* that judges are capable of making the more modest factual

determination under *Ring* of whether the defendant's crime was accompanied by a statutory aggravating factor.

B. In any event, the rule in *Ring* was an application of *Apprendi*. The principle that a defendant has the right to a trial by jury on every essential element of the offense was established long before *Apprendi* or *Ring*. *Apprendi* was essentially a line-drawing decision that developed the standard for determining how to distinguish between facts that must be submitted to a jury and facts that may be decided by the judge. *Ring*, in turn, simply applied *Apprendi* to Arizona's capital sentencing procedure. *Ring* and *Apprendi* are accordingly refinements of long-settled legal principles. Although such refinements may be important, they do not alter our understanding of the "bedrock procedural elements" that are essential to a fair trial.

The court of appeals' primary support for its conclusion that *Ring* announced a "watershed" rule was its view that *Ring* error is "structural" because it is not subject to harmless-error review. The fact that an error is "structural" in that sense, however, does not mean that it is "watershed" under the second *Teague* exception. An error can be both significant and its effect difficult or impossible to determine without leading to the conclusion that the legal rule violated was of "bedrock" proportions. In any event, a *Ring* error, like an *Apprendi* error, is not "structural." Such an error consists merely in the failure to submit a single factual issue to the jury for determination. This Court's cases establish that a failure to submit a single element of an offense to a jury *is* subject to harmless-error review. *Neder* v. *United States*, 527 U.S. 1 (1999). Accordingly, the court of appeals' conclusion that *Ring* error is structural—along with its accompanying conclusion that such an error is "watershed" under *Teague*'s second exception—is mistaken.

ARGUMENT

I. *RING* DID NOT ANNOUNCE A SUBSTANTIVE RULE FOR PURPOSES OF *TEAGUE*'S RETROACTIVITY ANALYSIS

A. Substantive Rules That Are Applicable Retroactively Without Regard To *Teague* Are Those That Alter The Scope Of Criminal Liability

1. Under *Teague* v. *Lane*, 489 U.S. 288 (1989), "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.* at 310 (plurality opinion); *Penry* v. *Lynaugh*, 492 U.S. 302, 313-314 (1989) (adopting *Teague* plurality's approach to retroactivity). In *Bousley* v. *United States*, 523 U.S. 614 (1998), this Court held that "because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress." *Id.* at 620. Accordingly, non-procedural decisions under *Bousley* may be applied retroactively, notwithstanding *Teague*.

The issue in *Bousley* was whether *Bailey* v. *United States*, 516 U.S. 137 (1995), which had held that "use" of a firearm under 18 U.S.C. 924(c)(1) (1994), required active employment as opposed to mere possession, was retroactively applicable on collateral review. The Court reasoned that *Bailey*, by narrowing the meaning of the term "use," created "a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" 523 U.S. at 620 (quoting *Davis* v. *United States*, 417 U.S. 333, 346 (1974)). For that reason, the Court concluded that it would be "inconsistent with the doctrinal underpinnings of habeas review," *id.* at 621, to bar collateral relief based on a decision like *Bailey*—*i.e.*, a holding that "a substantive federal criminal statute does not reach certain conduct." *Id.* at 620.

2. The risk that a person's conviction of an offense rests on a finding that he has committed an act that does not constitute that offense is present when an authoritative decision has narrowed the *substantive* scope of criminal liability. *Bailey*, for example, narrowed the scope of liability because, after *Bailey*, a defendant's mere possession of a gun during and in relation to a drug trafficking offense was not a violation of the statute. In such an instance, the conclusion of the finder of fact and the original reviewing courts that the defendant's conduct was subject to the criminal prohibition enacted by the legislature is no longer trustworthy, because those entities were all acting under a mistaken view of the scope of criminal liability. Accordingly, the *Bousley* principle applies to permit retroactive application of decisions like *Bailey*, which narrowed the understanding of what conduct is punishable under the criminal law. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (narrowing scope of "willfulness" element of 31 U.S.C. 5322); *McNally* v. *United States*, 483 U.S. 350 (1987) (narrowing scope of "scheme or artifice to defraud" element of 18 U.S.C. 1341).

By contrast, the risk that a person's conviction of an offense rests on commission of an act that does not constitute that offense does not arise when a later decision merely clarifies *procedural* rights. In that instance, the later judicial decision has no effect on the criminality of the conduct that the defendant was found to have engaged in. Therefore, *Teague*—and not *Bousley*—continues to prohibit (subject to narrow exceptions) retroactive application of this Court's numerous procedural decisions, which do not alter the scope of criminal liability.

B. *Ring* Did Not Alter The Scope Of Criminal Liability For Any Crime

With respect to the specific rule at issue in this case, it is clear that *Ring*, like *Apprendi* before it, did not alter the substantive scope of criminal liability under applicable state

law. *Ring* is therefore a procedural rule subject to *Teague*. Both before and after *Ring*, a defendant who committed murder with at least one aggravating circumstance was subject to the possibility that he would be sentenced to death under Arizona law. Cf. *Dobbert* v. *Florida*, 432 U.S. 282 (1977) (post-offense death penalty statute providing for increased procedural protections may be applied to earlier committed offense). Like *Apprendi*, *Ring* merely answered the question of who—judge or jury—was to decide the factual question of whether such an aggravating circumstance was present. Because *Ring* did not alter the substantive law governing capital murder in Arizona, but merely placed a constitutional constraint on the identity of the decisionmaker for one element of that offense, *Ring*, like *Apprendi*, is a quintessentially procedural rule subject to *Teague* retroactivity principles.

1. Apprendi *is not a "substantive" rule under* Bousley, *and it is therefore subject to* Teague *retroactivity principles.* In *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The defendant in *Apprendi* had been convicted of unlawful possession of a firearm under a New Jersey statute that set a maximum punishment of imprisonment for ten years. A judge, however, had also found that the defendant was eligible under a "hate crime" law for an additional term of imprisonment of ten years because he had acted with a purpose to intimidate an individual because of race. This Court reasoned that the "hate crime" provision increased the statutory maximum sentence that could be imposed on the defendant based on a legislatively specified fact—the defendant's purpose to intimidate because of race. Accordingly, the Court ruled that the increased sentence could not be imposed unless the de-

fendant's purpose to intimidate was submitted to a jury and proved beyond a reasonable doubt.

a. Because the issue in *Apprendi* was "the adequacy of New Jersey's *procedure*," 530 U.S. at 475 (emphasis added), the *Apprendi* rule is not a substantive rule under *Teague*. *Apprendi* did not address whether or how severely a State could or did punish unlawful possession of a firearm accompanied by a purpose to intimidate because of race. Both before and after *Apprendi*, the State of New Jersey remained free to subject a defendant who so possessed a firearm to an enhanced sentence. *Apprendi* simply held that, if New Jersey wants to hinge enhanced statutory maximum penalties on a particular fact, it must do so in accordance with procedures that allow the defendant the opportunity to have the fact proved to a jury beyond a reasonable doubt.

Apprendi therefore announced a procedural, not a substantive, rule. Cf. *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999) (explaining that "[t]he constitutional safeguards that figure in our analysis concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment"). It follows under *Teague* that, unless the *Apprendi* rule falls within one of *Teague*'s exceptions, it may not be applied retroactively to cases on collateral review.

b. All of the federal courts of appeals that have considered the issue—including the Ninth Circuit—have held that the *Apprendi* rule is a procedural rule for purposes of *Teague* retroactivity analysis. As the Fifth Circuit explained in considering the application of *Apprendi* to federal drug offenses, *Apprendi* "did not change what the government must prove [to establish a drug offense under 21 U.S.C. 841(a)], only that the jury, rather than the judge must decide the question of drug quantity." *United States* v. *Brown*, 305

F.3d 304, 309 (5th Cir. 2002), cert. denied, 123 S. Ct. 1919 (2003).[1]

2. Ring, *as an application of* Apprendi, *is also subject to* Teague. *In Ring*, the Court applied the Sixth Amendment component of the procedural rule announced in *Apprendi* to Arizona's capital sentencing scheme, in which, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty." 536 U.S. at 588. The Court observed in *Ring* that, in *Walton* v. *Arizona*, 497 U.S. 639, 649 (1990), it had upheld "Arizona's sentencing scheme" as "compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as 'element[s] of the offense of capital murder.'" 536 U.S. at 588 (quoting *Walton*, 497 U.S. at 649). The Court noted, however, that under Arizona law as announced by the Arizona Supreme Court, "'[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists.'" 536 U.S. at

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[1] See *Curtis* v. *United States*, 294 F.3d 841, 843 (7th Cir.) ("*Apprendi* does not alter which facts have what legal significance, let alone suggest that conspiring to distribute [drugs] is no longer a federal crime unless the jury finds that some particular quantity has been sold."), cert. denied, 537 U.S. 976 (2002); see also, *e.g.*, *United States* v. *Swinton*, 333 F.3d 481, 488-489 (3d Cir.), cert. denied, 124 S. Ct. 458 (2003); *Sepulveda* v. *United States*, 330 F.3d 55, 62 (1st Cir. 2003); *Coleman* v. *United States*, 329 F.3d 77, 83-84 (2d Cir.), cert. denied, 124 S. Ct. 840 (2003); *Goode* v. *United States*, 305 F.3d 378 (6th Cir.), cert. denied, 537 U.S. 1096 (2002); *United States* v. *Mora*, 293 F.3d 1213, 1218-1219 (10th Cir.), cert. denied, 537 U.S. 961 (2002); *United States* v. *Sanchez-Cervantes*, 282 F.3d 664, 668 (9th Cir.), cert. denied, 537 U.S. 939 (2002); *McCoy* v. *United States*, 266 F.3d 1245, 1256 (11th Cir. 2001), cert. denied, 536 U.S. 906 (2002); *United States* v. *Moss*, 252 F.3d 993, 997-998 (8th Cir. 2001), cert. denied, 534 U.S. 1097 (2002); *United States* v. *Sanders*, 247 F.3d 139, 147 (4th Cir.), cert. denied, 534 U.S. 1032 (2001).

596 (quoting *State* v. *Ring*, 25 P.3d 1139, 1151 (Ariz. 2001)). Because the Arizona statute required the trial court to find facts necessary to increase the defendant's sentence from a term of imprisonment to the death penalty, the Court held that "*Walton*, in relevant part, cannot survive the reasoning of *Apprendi*." *Id.* at 603.

Ring thus simply applied the procedural rule announced in *Apprendi* to the particular circumstances of the Arizona sentencing scheme. Just as in *Apprendi* the Court did not alter whether or how severely the State could punish gun possession accompanied by the specified intent to intimidate, the Court in *Ring* did not alter whether or how severely the State of Arizona could punish murder accompanied by the specified aggravating circumstances. Both before and after *Ring*, the State of Arizona remained free to determine that individuals who commit murder accompanied by an aggravating circumstance may receive the death penalty. The Court in *Ring* simply held that, if Arizona wants to hinge eligibility for the death penalty on the presence of particular aggravating circumstances, it must permit the defendant the opportunity to have the question of whether those circumstances exist decided by the jury, rather than the judge. As the Court explained, "[c]apital defendants, no less than noncapital defendants, * * * are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589.

The Court itself described the question before it in *Ring* as "'who decides,' judge or jury." 536 U.S. at 605; see also *id.* at 597 ("The question presented is whether [an] aggravating factor may be found by the judge, as Arizona law specifies, or whether the Sixth Amendment's jury trial guarantee * * * requires that the aggravating factor determination be entrusted to the jury."). That is a procedural question, and the *Teague* bar on retroactive appli-

cation of new procedural rules accordingly applies to the rule announced in *Ring*.[2]

3. *The limits on federal courts' authority support the application of* Teague. Indeed, the fact that *Ring* is a procedural rule subject to *Teague* follows from the fact that it is a federal decision in a state criminal case. In *Bousley* itself, this Court described the decisions that apply retroactively notwithstanding *Teague* as decisions "in which this Court decides the meaning of a *criminal statute enacted by Congress*" or a decision that "a substantive *federal* criminal statute does not reach certain conduct." 523 U.S. at 620 (emphasis added). That limitation of the *Bousley* principle to cases narrowing the scope of federal criminal statutes is appropriate, because federal courts exercise distinctly different authority in federal and state criminal cases.

In federal criminal cases, federal courts have the authority to construe the substantive reach of federal criminal statutes. They occasionally reach decisions that narrow the scope of criminal liability under such statutes, as this Court did in *Bailey*. *Bousley* established that such decisions are "substantive" and not subject to *Teague* analysis.

Federal courts have entirely different authority in reviewing state criminal laws. This Court (like other federal courts) lacks the authority to make substantive changes to state law or to reject an authoritative interpretation of a state criminal statute. See *Ring*, 536 U.S. at 603 ("This

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[2] The courts of appeals for the Tenth and Eleventh Circuits and the highest courts of several States have all concluded that *Ring* announced a procedural rule, rather than a substantive rule, for purposes of *Teague*. *Turner* v. *Crosby*, 339 F.3d 1247, 1283-1284 (11th Cir 2003); *Cannon* v. *Mullin*, 297 F.3d 989, 993 (10th Cir. 2002); *State* v. *Lotter*, 664 N.W. 2d 892, 908 (Neb. 2003); *Head* v. *Hill*, 587 S.E.2d 613, 619 (Ga. 2003); *State* v. *Towery*, 64 P.3d 828 (Ariz.), cert. dismissed, 124 S. Ct. 44 (2003); *Colwell* v. *State*, 59 P.3d 463, 470-473 (Nev. 2002), cert. denied, 124 S. Ct. 462 (2003); see also *State* v. *Whitfield*, 107 S.W.3d 253, 268-270 (Mo. 2003) (suggesting that *Ring* announced a procedural rule, but declining to adopt *Teague* framework and electing to apply *Ring* retroactively).

Court * * * repeatedly has held that state courts are the ultimate expositors of state law.") (quoting *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975)). Federal courts may of course invalidate state criminal laws where those laws run afoul of the Constitution. But state criminal laws ordinarily are found to violate the Constitution because they violate one of the procedural requirements of the Constitution—for example, the procedural right to a jury trial embodied in the Sixth Amendment (as made applicable to the States through the Fourteenth Amendment) that is at issue in this case. Decisions holding state criminal laws invalid accordingly are procedural and not substantive, and their retroactivity is governed by *Teague*.

There are some constitutional limitations applicable to state criminal cases that govern the nature of conduct that may be made criminal or that may be subject to certain punishment, such as those in the First Amendment, *e.g.*, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), or the Eighth Amendment, *e.g.*, *Enmund* v. *Florida*, 458 U.S. 782 (1982). Those limitations were not at issue in *Ring*. But when those limitations are applied in state criminal cases, the result is still not a "substantive" decision under *Bousley*. Instead, the result is a decision placing "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Teague*, 489 U.S. at 311 or "address[ing] a substantive categorical guarante[e] accorded by the Constitution, such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense," *Saffle* v. *Parks*, 494 U.S. 484, 494 (1990) (citation and internal quotation marks omitted). The retroactivity of such decisions is determined under the first *Teague* exception. Accordingly, the category of "substantive" decisions not subject to *Teague* at all is limited to federal court decisions narrowing the scope of federal criminal statutes. *Ring* involved a state criminal statute,

and its retroactivity accordingly must be analyzed under *Teague*.

C. The Court Of Appeals' Bases For Finding *Ring* To Be Substantive Are Unsound

The court of appeals conceded that "[i]n one sense, *Ring*—like *Apprendi*—announced a procedural rule: *Ring* mandated that a jury, rather than a judge, must find aggravating circumstances in a capital case." Pet. App. A31. The court noted that "*Ring*'s holding thus addressed, at least in part, the procedure by which any capital trial must be conducted." *Ibid.* Thus far, the court of appeals was correct. The court went on, however, to hold that *Ring* nevertheless announced a substantive rule. None of the court's reasons for reaching that further conclusion is sound.

1. The court of appeals believed that *Ring* was "[m]ore than a procedural holding" because it "effected a redefinition of Arizona capital murder law, restoring, as a matter of substantive law, an earlier Arizona legal paradigm in which murder and capital murder are separate substantive offenses with different essential elements and different forms of potential punishment." Pet. App. A32.[3] That is mistaken. This Court did not—and, indeed, had no authority to—"redefin[e] Arizona capital murder law" in *Ring*. The Court in *Ring* instead held unconstitutional the assignment, under Arizona's then-current capital murder sentencing scheme, of the task of determining whether an aggravating circumstance was present to the judge, rather than the jury. After *Ring*, Arizona remained free to impose the death penalty on the same substantive basis as before—*i.e.*, where, as a necessary pre-

[3] See also Pet. App. A37 ("[W]hen *Ring* overruled *Walton*, * * * it necessarily altered both the substance of the offense of capital murder in Arizona and the substance of Arizona murder law more generally."); *id.* at A40 (*Ring* "restructured Arizona law and it redefined, as a substantive matter, how that law operates.").

condition, the murder was accompanied by an aggravating circumstance.

2. The court of appeals also believed that *Ring* announced a substantive rule because *Ring* involved a "determination of the meaning of a criminal statute" and it "address[ed] the criminal significance of certain facts." Pet. App. A40 (internal quotation marks omitted). Procedural rights, in criminal law as elsewhere, may frequently turn on the nature or provisions of the substantive law at issue in a case, and the adjudication of procedural rights accordingly may depend on a construction of the civil or criminal statute. See, *e.g.*, *Blanton* v. *City of North Las Vegas*, 489 U.S. 538, 542-543 (1989) (right to jury trial only for "serious" offenses); *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 60 (1999) (procedural due process rights depend on existence of property interest). Thus, this Court in *Ring* and in *Apprendi* had to determine the meaning of the criminal statutes at issue, in order to determine which facts "increase[d] the penalty * * * beyond the prescribed statutory maximum" and therefore had to be submitted to the jury. *Apprendi*, 530 U.S. at 490. That has nothing to do, however, with whether those decisions were substantive. The only reason that the Court construed the scope of the state statutes in either case was in order to determine a procedural question—which facts could be decided by the judge or, instead, had to be submitted to the jury.

3. Finally, the efforts of the court of appeals to distinguish *Apprendi*, which the court accepted as announcing a procedural rule, from *Ring*, which the court viewed as announcing a "substantive" rule not subject to *Teague*, were mistaken. As the court of appeals noted, this Court in *Apprendi* had stated that "[t]he substantive basis for New Jersey's enhancement [was] not at issue." Pet. App. A40 (quoting 530 U.S. at 475). The same point, however, was true in *Ring*. This Court in *Ring* did not suggest that there was any legal defect in Arizona's aggravating circumstances,

or that Arizona could not hinge eligibility for the death penalty on the presence of at least one of those circumstances. The only point at issue in *Ring* was precisely the same point at issue in *Apprendi*—whether the defendant was entitled to have the "substantive basis" for the increased punishment submitted to the jury, rather than decided by the judge. The court of appeals conceded that this Court's decision in *Apprendi* was "procedural." This Court's decision in *Ring* was "procedural" for precisely the same reasons.[4]

II. RING DOES NOT FALL WITHIN TEAGUE'S NARROW EXCEPTION FOR "WATERSHED" RULES OF CRIMINAL PROCEDURE

Under the *Teague* framework, new constitutional rules of criminal procedure are not retroactively applicable to proceedings on collateral review. That is because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague*, 489 U.S. at 309. Nonetheless, if a new rule satisfies one of two exceptions, society's interest in finality can legitimately be subordinated to the defendant's interest in relitigating his claim. The first exception permits retroactive application of new rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 311 (quoting *Mackey* v. *United States*, 401 U.S. 667, 692 (1971)). The court of appeals correctly concluded that

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[4] The court of appeals also erred in attempting to distinguish *Ring* from the procedural rule announced in *Apprendi* on the ground that, "[u]nlike the result in *Ring*, *Apprendi* did not cause the relevant statute to be declared unconstitutional." Pet. App. A63. Just as *Ring* invalidated Arizona's death penalty procedures, *Apprendi* invalidated the procedures used in New Jersey to impose the hate crime enhancement—procedures that the New Jersey Supreme Court had authoritatively interpreted to allow the trial judge alone to sentence the defendant above the otherwise applicable statutory maximum verdict. See *Apprendi*, 530 U.S. at 473.

Ring does not fall within that exception. Pet. App. A44. The second exception allows retroactive application of "watershed rules of criminal procedure" that implicate the fundamental fairness and accuracy of the criminal proceeding. *Teague*, 489 U.S. at 311-313. The court of appeals erred in holding (Pet. App. A44-A63) that the rule announced in *Ring* falls within that exception.

This Court has made clear that "[t]o fall within [the second *Teague*] exception, a new rule must meet two requirements: [i]nfringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,' and the rule must 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Tyler* v. *Cain*, 533 U.S. 656, 665 (2001) (quoting *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990), and *Teague*, 489 U.S. at 311). There has been no sufficient showing that the rule in *Ring* satisfies the first, "accuracy" element. Nor is the rule in *Ring*, applying the Sixth Amendment's jury trial right to a particular circumstance, one of "a small core of rules," *Graham* v. *Collins*, 506 U.S. 461, 478 (1993), that mark a "groundbreaking occurrence," *Caspari* v. *Bohlen*, 510 U.S. 383, 396 (1994), in our understanding of what constitutes a fair trial. Accordingly, the rule in *Ring* does not fall within the second *Teague* exception.

A. Infringement Of The Rule In *Ring* Does Not Seriously Diminish The Likelihood Of Obtaining An Accurate Determination

1. Ring *was not based on the rationale that jury findings are more accurate than findings by a court.* The court of appeals concluded that the rule in *Ring* "enhances the accuracy of the determination of capital murder in Arizona." Pet. App. A45. Although the rule in *Ring* was based on the Sixth Amendment, the Court made clear in *Ring* itself that the "Sixth Amendment jury trial right * * * does not turn on the relative rationality, fairness, or efficiency of potential

factfinders." 536 U.S. at 607. The right to jury trial is instead based on the interest in having "the interposition between the accused and his accuser of the commonsense judgment of a group of laymen," *Williams* v. *Florida*, 399 U.S. 78, 100 (1970), thereby "guard[ing] against a spirit of oppression and tyranny on the part of rulers," *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 541 & n.2 (4th ed. 1873)). As a general matter, therefore, the jury-trial right is not based on a particular view on whether juries or judges are more likely to determine facts accurately.

Indeed, it has long been accepted that judges are able to make accurate factual determinations in criminal cases, both in deciding non-jury questions, see, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690 (1996) (probable cause and reasonable suspicion under Fourth Amendment); *Bourjaily* v. *United States*, 483 U.S. 171, 176 (1987) (existence and scope of conspiracy under Federal Rule of Evidence 801(d)(2)); *Nix* v. *Williams*, 467 U.S. 431, 444-445 n.5 (1984) (inevitable discovery rule), and in conducting bench trials, see *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968). A determination of the presence of an aggravating factor is in itself no different from a determination of the presence of any other fact in the case. There is no reason why a judge cannot be an accurate decisionmaker on any such fact.

2. *Courts may make accurate factual findings in capital cases, as in other cases.* The fact that the aggravating factor in this case was essential to imposition of a capital sentence does not alter that conclusion. To the contrary, even with respect to the ultimate question whether to sentence a defendant to death, this Court has made clear that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence," without any participation by the jury. *Harris* v. *Alabama*, 513 U.S. 504, 515 (1995); see *McCleskey* v. *Kemp*, 481 U.S. 279, 303-304 n.25 (1987); *Spaziano* v. *Flor-*

ida, 468 U.S. 447, 457-465 (1984). If a judge may make a sufficiently accurate determination on that ultimate question and on the subsidiary facts on which it may turn, it follows *a fortiori* that a judge may reach an accurate determination of the existence of a particular fact in a capital case, such as the presence of an aggravating circumstance.

The court of appeals observed that factual presentations to a judge "are capable of being extremely truncated affairs with heavy reliance on presentence reports and sentencing memoranda" and the court may "receive an inordinate amount of inadmissible evidence." Pet. App. A46. Those observations, however, have nothing to do with whether *Ring* enhances the accuracy of capital sentencing proceedings. *Ring* did not impose requirements on the structure and length of capital sentencing hearings or set standards for the admissibility of evidence in such proceedings, and the rationale and applicability of *Ring* had nothing to do with the desirability of any such limitations.

The court of appeals also believed 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." Pet. App. A50. As noted above, however, this Court has held, in decisions not called into question by *Ring*, that the Constitution permits the ultimate decision about punishment in a capital case to be made by the court, without participation by the jury. That ultimate decision is far more a product of "moral decisions" than the factual question whether an aggravating circumstance was present. The court of appeals' conclusion that judges cannot render sufficiently accurate capital sentencing decisions is mistaken.

B. *Ring* Did Not Announce A "Bedrock" Or "Watershed" Rule

Even aside from whether the pre-*Ring* procedure in Arizona "seriously diminish[ed] the likelihood of obtaining an accurate conviction," *Ring* did not "alter our understanding

of the *bedrock procedural elements* essential to" a fair trial. See *Tyler*, 533 U.S. at 665 (citations and internal quotation marks omitted). The Court has identified the rule of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), as the best example of such a rule. See *Saffle*, 494 U.S. at 495; see also *Mackey*, 401 U.S. at 694 (Harlan, J., concurring). Before *Gideon*, it was thought that an indigent defendant charged with a felony offense could in some cases receive a fair trial without the opportunity for assistance of appointed counsel. In *Gideon*, the Court repudiated that notion when it recognized that, absent a waiver of counsel, a felony trial conducted without a defense lawyer was an inherently unfair vehicle for adjudicating the defendant's guilt or innocence. In that way, *Gideon* altered our understanding of the universe of procedures that are indispensable to a fair trial; it added the right to appointed counsel to that core set of rules that define an American criminal trial.

Beyond *Gideon*, the Court has noted that rules within the second *Teague* exception "are best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313 (plurality opinion; citation and internal quotation marks omitted). The exception "is clearly meant to apply only to a small core of rules" that have the "primacy and centrality" of those examples. *Graham*, 506 U.S. at 478. Because the "premise" of the second *Teague* exception is "that such procedures would be so central to an accurate determination of innocence or guilt," the Court has concluded that it is "unlikely that many such components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. The rules in *Apprendi* and in *Ring*, which involve applications of the long-settled general principle that a defendant is entitled to

have the essential elements of his offense submitted to a jury, do not fit within the exception.

1. Apprendi *and* Ring *were refinements of pre-existing principles.* *Apprendi* announced the rule that any fact that increases the penalty for a crime beyond the prescribed statutory maximum (other than the fact of a prior conviction) must be submitted to the jury and proved beyond a reasonable doubt. 530 U.S. at 490. Before *Apprendi*, the Court had made clear that the Due Process Clause of the Fifth Amendment and jury trial guarantee of the Sixth Amendment required a jury finding on all essential elements of an offense. See, *e.g.*, *Sullivan* v. *Lousiana*, 508 U.S. 275, 277-278 (1993) (citing cases); *United States* v. *Gaudin*, 515 U.S. at 510. Indeed, the fundamental importance of the jury trial right in criminal cases was well established. See *Duncan* v. *Louisiana*, 391 U.S. at 148-154. *Apprendi*'s contribution was not to announce a new "watershed" rule, but to clarify precisely which facts that enhance punishment must be submitted to the jury and which facts need not be—an issue that had previously been the subject of finely graduated distinctions. Compare *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), with *Patterson* v. *New York*, 432 U.S. 197 (1977). Such line-drawing decisions may be of substantial importance, but they are not the kind of "groundbreaking" decisions, *Caspari* v. *Bohlen*, 510 U.S. at 396, comparable to *Gideon* v. *Wainwright*, that "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 242 (quoting *Teague*, 489 U.S. at 311).

It follows *a fortiori* that *Ring* did not announce a new bedrock rule. *Ring* did not alter the substantive standard announced in *Apprendi* for determining which facts must be submitted to the jury, but simply applied the *Apprendi* rule to Arizona's capital sentencing statute. The rule applied in *Ring* was that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a

fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." 536 U.S. at 602. In announcing that rule, the Court cited *Apprendi*, and the Court's statement of the rule is a paraphrase of the rule announced in *Apprendi*. See 530 U.S. at 490 ("Other 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."). Cases such as *Ring*, which apply general legal principles to particular circumstances, are not "watershed rules" that come within *Teague*'s second exception.[5]

2. *The court of appeals erred in concluding that* Ring *errors are retroactively applicable because they are "structural."* The court of appeals drew support for its conclusion that *Ring* stated a "watershed" rule from its view that a *Ring* error is a "structural" error that requires reversal on direct review without any consideration of whether the error was harmless in the particular case. Pet. App. A55-A60. In the court's view, "structural error indisputably arises" in cases of *Ring* error, *id.* at A58, and that fact is a "critical consideration in determining whether the second *Teague* exception has been satisfied." *Id.* at A60.

a. The fact that an error is "structural" and not subject to harmless error review does not establish that it satisfies the second *Teague* exception. To the contrary, "[c]lassifying an error as structural does not necessarily alter our under-

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[5] Likewise, neither *Apprendi* nor *Ring* made a fundamental change by requiring "that guilt of a criminal charge be established by proof beyond a reasonable doubt"; that principle "dates at least from our early years as a Nation." *In re Winship*, 397 U.S. 358, 361 (1970). *Apprendi* involved an *application* of that bedrock principle to penalty-enhancing facts; the rule it articulated is not one of watershed proportions precisely because it applied that principle and did not announce it. Neither *Ring* nor this case directly implicates the *Winship* rule, because under Arizona law before *Ring*, the judge made the determination of the existence of aggravating factors using the reasonable doubt standard. See *State* v. *Jordan*, 614 P.2d 825, 828 (Ariz. 1980), cert. denied, 449 U.S. 986 (1980).

standing of the[] bedrock procedural elements" under the *Teague* exception, "[n]or can it be said that all new rules relating to due process (or even the 'fundamental requirements of due process') alter such understanding." *Tyler*, 533 U.S. at 666-667 n.7 (citation omitted). An error qualifies as "structural" when it is impossible to determine the effect of the error on the jury's verdict, see *Arizona* v. *Fulminante*, 499 U.S. 279, 309-310 (1991) , and the error "infect[s] the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 630 (1993). Even if *Ring* error were "structural" in that sense, however, it would not establish that *Ring* was a "watershed" decision. A decision holding that a given element must be entrusted to the jury does not have the "primacy and centrality" of the *Gideon* rule, and it would not "necessarily alter our understanding of the bedrock procedural elements essential to" a fair trial under *Teague*.

b. In any event, the court of appeals erred in classifying *Ring* error as "structural." This Court has made clear that "most constitutional errors can be harmless," *Neder* v. *United States*, 527 U.S. 1, 8 (1999), and has "found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases,'" such as those involving a complete denial of counsel, a biased trial judge, or racial discrimination in jury selection. *Ibid.* (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997)). In *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), the Court held that a defective reasonable doubt instruction is "structural," because that instruction "'vitiates *all* the jury's findings' and produces 'consequences that are necessarily unquantifiable and indeterminate.'" *Neder*, 527 U.S. at 11 (quoting *Sullivan*, 508 U.S. at 281-282). In *Neder*, however, the Court held that a failure to submit an element of the offense to the jury was not a structural error. The Court held that "where a reviewing court concludes beyond a reasonable doubt that [an] omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have

been the same absent the error, [an] erroneous instruction [omitting the element] is properly found to be harmless." 527 U.S. at 17.

Error under *Apprendi* or *Ring* is essentially the same as the error in *Neder* and differs from the error in *Sullivan*. While the error in *Sullivan* infected *all* of the jury's findings, the errors in *Neder*, *Apprendi*, and *Ring* involved the mistaken submission of a *single* fact that should have been decided by the jury to a judge instead.[6] An appellate court may review an *Apprendi* or *Ring* error for harmlessness in the same way as a court would review the error in *Neder*: "a court, in typical appellate court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the" penalty-enhancing fact found by the court beyond a reasonable doubt at sentencing. 527 U.S. at 19.[7]

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[6] Relying on *Neder*, the courts of appeals—including the Ninth Circuit itself—have uniformly and correctly rejected the argument that *Apprendi* errors are "structural" and have applied harmless-error analysis to *Apprendi* claims. See, *e.g.*, *Coleman*, 329 F.3d at 89-90; *United States* v. *Mackins*, 315 F.3d 399, 408-409 (4th Cir.), cert. denied, 123 S. Ct. 2099 (2003); *United States* v. *Matthews*, 312 F.3d 652, 665 (5th Cir. 2002), cert. denied, 123 S. Ct. 1604 (2003); *United States* v. *Stewart*, 306 F.3d 295, 321 (6th Cir. 2002), cert. denied, 537 U.S. 1138 (2003); *Sanchez-Cervantes*, 282 F.3d at 670; *United States* v. *Clinton*, 256 F.3d 311, 315-316 (5th Cir.), cert. denied, 534 U.S. 1008 (2001); *United States* v. *Candelario*, 240 F.3d 1300, 1307 (11th Cir.), cert. denied, 533 U.S. 922 (2001); *United States* v. *Terry*, 240 F.3d 65, 74-75 (1st Cir.), cert. denied, 532 U.S. 1023 (2001); *United States* v. *White*, 240 F.3d 127, 133-134 (2d Cir. 2001), cert. denied, 124 S. Ct. 157 (2003); *United States* v. *Anderson*, 236 F.3d 427, 429 (8th Cir. 2001), cert. denied, 534 U.S. 956 (2001); *United States* v. *Nance*, 236 F.3d 820, 823-825 (7th Cir. 2000), cert. denied, 534 U.S. 832 (2001).

[7] On remand from this Court's decision in *Ring*, the Arizona Supreme Court held that error under *Ring* is susceptible to harmless-error review. *State* v. *Ring*, 65 P.3d 915, 936 (Ariz. 2003). The court then had no difficulty applying that analysis in concluding that the failure to submit the aggravator at issue in *Ring* to the jury was not harmless and the sentence thus had to be reversed. *State* v. *Ring*, 76 P.3d 421, 423 (Ariz. 2003).

The court of appeals' failure to follow *Neder* resulted from its misapprehension of the nature of the error in this case. The court of appeals stated that "[h]ere, as in *Sullivan*, there was no jury verdict within the meaning of the Sixth Amendment" and the court characterized the error in this case as "[a] complete deprivation of the right to a jury." Pet. App. A56. See *id.* at A59 n.20 ("There is a vast difference between not submitting the element of materiality to the jury for decision [in *Neder*] and having no jury decision at all [in this case].") In the instant case, however, all of the elements necessary to support respondent's guilt of a crime subject to the death penalty were found by a jury beyond a reasonable doubt, with the single exception of the presence of an aggravating circumstance. Accordingly, there was no "complete deprivation of the right to a jury" in this case, and harmless-error review is applicable under the rule of *Neder*.[8]

3. *The court of appeals' other rationales are mistaken.* Beyond its attempt to draw support from its mistaken holding that harmless-error review is inapplicable to *Ring* errors, the court of appeals offered little additional basis for its conclusion that *Ring* error falls within the *Teague* exception for "watershed" rules. See Pet. App. A61-A63. The court repeatedly stated that the *Ring* rule "affects the structure of every capital trial," *id.* at A60; see *id.* at A62, but the court itself conceded that only a limited number of States had enacted schemes that entrusted aggravating-circumstance

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[8] The other decisions relied on by the court of appeals (Pet. App. A57-A58) in support of its conclusion that error under *Ring* is structural error are inapposite. Both *Nguyen* v. *United States*, 123 S. Ct. 2130 (2003) (rendering of appellate judgments by panels that included non-Article III judges), and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (delegation of Article III authority to non-Article III judges), involved improperly constituted courts. Neither case involved the issue in *Neder*, *Apprendi*, or this case, which concerns the review of incomplete jury findings in proceedings before a properly constituted court.

determinations to the judge and were therefore subject to *Ring*. See *ibid.* Although the *Ring* rule does implicate the "fundamental right" to a jury trial under the Sixth Amendment, see *id.* at A62, the same can be said of *every* decision of this Court defining the content of that right and applying it to particular circumstances. If the fact that a decision of this Court interprets and applies a "fundamental right" were sufficient to make that decision "bedrock" or "watershed" under the second *Teague* exception, then the exception would swallow the rule, and this Court's frequent refusals to hold that the exception applies would be mistaken.[9] This Court has consistently rejected that kind of broad construction of the second *Teague* exception, and it should do so again in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[9] See *O'Dell* v. *Netherland*, 521 U.S. 151, 167 (1997); *Lambrix* v. *Singletary*, 520 U.S. 518, 539-540 (1997); *Gray* v. *Netherland*, 518 U.S. 152, 170 (1996); *Goeke* v. *Branch*, 514 U.S. 115, 120-121 (1995) (per curiam); *Caspari* v. *Bohlen*, 510 U.S. at 396; *Gilmore* v. *Taylor*, 508 U.S. 333, 345-346 (1993); *Graham* v. *Collins*, 506 U.S. at 478; *Sawyer* v. *Smith*, 497 U.S. at 241-245; *Saffle* v. *Parks*, 494 U.S. at 495; *Butler* v. *McKellar*, 494 U.S. 407, 416 (1990); *Teague* v. *Lane*, 489 U.S. at 314-315 (plurality opinion).