

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DORA B. SCHRIRO, DIRECTOR, :

4 ARIZONA DEPARTMENT OF :

5 CORRECTIONS, :

6 Petitioner :

7 v. : No. 03-526

8 WARREN WESLEY SUMMERLIN. :

9 - - - - -X

10 Washington, D.C.

11 Monday, April 19, 2004

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 11:10 a.m.

15 APPEARANCES:

16 JOHN P. TODD, ESQ., Assistant Attorney General, Phoenix,
17 Arizona; on behalf of the Petitioner.

18 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
19 General, Department of Justice, Washington, D.C.; on
20 behalf of the United States, as amicus curiae,
21 supporting the Petitioner.

22 KEN MURRAY, ESQ., Assistant Federal Public Defender,
23 Phoenix, Arizona; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 03-526, Dora B. Schriro v. Warren Wesley
5 Summerlin.

6 Mr. Todd.

7 ORAL ARGUMENT OF JOHN P. TODD

8 ON BEHALF OF THE PETITIONER

9 MR. TODD: Mr. Chief Justice, and may it please
10 the Court:

11 The rule this Court announced in Ring did not
12 change what is to be decided. It only changed who
13 decides. It did not make any conduct -- it did not
14 decriminalize any conduct, nor did it make any defendant
15 ineligible for the death penalty.

16 We agree with all the State and Federal
17 appellate courts that have looked to determine whether
18 Apprendi or Ring should apply retroactively and concluded
19 that the Apprendi/Ring rule is not the sort of ground-
20 breaking rule that overcomes this Court's Teague bar.

21 QUESTION: Mr. Todd, could we go back to what
22 you opened with, that you said this is just a -- and you
23 emphasized this throughout your brief -- it's only a who
24 decides, not what. But I thought that the notion in Ring
25 is that it adds elements to the offense that were not

1 there before. So now you have aggravating factors is an
2 element of the offense, and by so characterizing it, other
3 things happen. It has to be proved beyond a reasonable
4 doubt on the aggravating or the other aggravating factors.
5 You would have whatever you have to prove elements; that
6 is, you -- the confrontation clause would apply,
7 everything that goes with making it as part of the
8 substantive crime. Is that not so?

9 It's not just a question of, well, before it was
10 the judge and now it's the jury. Because it's part of the
11 substantive crime, other things go along with it too,
12 don't -- don't they?

13 MR. TODD: Justice Ginsburg, my understanding of
14 this Court's holding in Ring was that it applied the Sixth
15 Amendment jury guarantee as -- as this Court recalls,
16 Arizona already found, beyond a reasonable doubt, this --
17 these particular aggravators and that it applied it to --
18 for purposes of finding these -- these aggravators. It --
19 it didn't change the substantive reach of the statute.
20 Those --

21 QUESTION: Well, let me give you a concrete
22 example. The judge relied on the presentence report in --
23 in this case. If the -- if it had to be found by the
24 jury, if the aggravating factor had to be found by a jury
25 beyond a reasonable doubt, would that presentence report

1 have been admissible?

2 MR. TODD: Well, Your Honor, the judge in this
3 particular case did not rely on a presentence report to
4 find either of the aggravating circumstances that he
5 found. He relied on the trial testimony to find the --
6 that the crime was --

7 QUESTION: Well, just let's say that the judge
8 could consider, or would you concede that if the judge
9 could make this determination, that the judge could, and
10 judges routinely do, look at presentence reports?

11 MR. TODD: Not under Arizona law, Your Honor,
12 that the -- the aggravating circumstances that are -- that
13 are present in Arizona law are not the type that would be
14 -- you could rely on a presentence report to find because
15 Arizona law doesn't permit hearsay evidence to establish
16 the aggravator.

17 But the -- the key question -- I mean, the key
18 fact is that the underlying conduct, the -- has not
19 changed at all, that the aggravators are the same today as
20 they were before Ring. The -- it has the conduct -- the
21 reach of the statute hasn't changed. All we're talking
22 about is applying the Sixth Amendment guarantee to these
23 aggravators that the Arizona put into their sentencing
24 statute as a result from this Court's opinion in Furman.

25 QUESTION: Was it clear under prior law that the

1 aggravators had to be found by the judge beyond a
2 reasonable doubt?

3 MR. TODD: That's correct, Your Honor. Yes,
4 Justice Kennedy.

5 QUESTION: Was that in the statute or the
6 supreme court decision?

7 MR. TODD: Supreme court decision.

8 QUESTION: Thank you.

9 QUESTION: It's sort of like a mixed case on the
10 substantive procedural part. It's -- the argument that
11 it's substantive, which is -- imagine you have a statute
12 that says if you use a gun in connection with a drug sale,
13 it's a crime. All right? And then this Court says that
14 doesn't mean the drug in the -- the gun is in the attic.
15 you know, the gun is in the attic -- that doesn't count.
16 That's clearly substantive, isn't it?

17 MR. TODD: Yes, Justice Breyer.

18 QUESTION: All right. Now, suppose they have a
19 subpart (b) which said if the gun is in the attic, you get
20 more, but the gun in the attic will be found by the judge.
21 That's just as if those words, gun in the attic, weren't
22 there. So it's just like the first statute, and that's
23 Apprendi, you see. That's Apprendi.

24 And you say, well, if you got that second
25 statute that looked just like the first, this one does

1 too. I mean, that's the argument. And you say, well,
2 which way should we look at it. I'm not sure.

3 MR. TODD: Well, Your Honor, I -- I think that
4 the -- that this Court's discussion in Bousley or Bousley
5 -- as -- as you were indicating based on the Bailey
6 decision, sort of capsulizes where -- what -- what in
7 terms of retroactivity analysis, where substantive -- what
8 -- what a real substantive change is.

9 QUESTION: We -- didn't we make it quite clear
10 in Bousley that it was important that we were interpreting
11 a Federal law, which we had the authority to interpret,
12 rather than what's happened in this case where, as I
13 understand it, the Supreme Court of Arizona has said the
14 change brought by Ring was procedural.

15 MR. TODD: That's -- that's correct, Mr. Chief
16 Justice.

17 The -- this Court does not construe State
18 statutes. State courts do that, and it's our position
19 that in order to change the substance of a crime, this is
20 something either that the legislative body must do or that
21 the State court, in the case of a State --

22 QUESTION: Does it follow, if it is procedural,
23 that you necessarily prevail? If -- you -- you do agree
24 that he has been sentenced to death by an unconstitutional
25 procedure.

1 MR. TODD: This Court has said that it was, yes.

2 QUESTION: Yes, I mean, under our holdings.

3 And do you know any case in which we've held
4 that a death sentence can be carried out when it was
5 imposed pursuant to an unconstitutional procedure?

6 MR. TODD: I -- if I read your cases correct,
7 Justice Stevens, I believe that you have decided three
8 cases since Teague in which you have found that the --
9 there was a problem, unconstitutional problem, with a jury
10 sentencing procedure in a capital case and you have found
11 that those cases are Teague barred.

12 QUESTION: But the -- the -- what was barred was
13 considering whether or not there was a constitutional
14 violation. We didn't actually hold that where it was
15 acknowledged there was a constitutional violation, that
16 the death sentence could be carried out. Or am I wrong on
17 that?

18 MR. TODD: My recollection, Justice Stevens, is
19 that in each of those cases there had been a prior holding
20 by this Court finding some unconstitutional procedure and
21 that the case was in these three cases that procedure
22 existed, only they had -- they were on collateral review
23 and this Court found them Teague barred.

24 QUESTION: I see.

25 MR. TODD: In our opinion, the only way that Mr.

1 Summerlin can avoid this Court's Teague bar is if somehow
2 he can find that the Apprendi/Ring rule fits within the
3 exception for watershed changes in the rule. And as this
4 Court recalls, in order to do that, the Ring/Apprendi rule
5 must meet two tests. It must satisfy two tests. The
6 first test is it must enhance the accuracy. The second
7 test is it must alter this Court's understanding of some
8 bedrock principle.

9 Now, as to the -- the first test, we would
10 suggest that this Court's line of cases from 1968 answer
11 the first question in the negative. That is, that the
12 Sixth Amendment jury guarantee and cases arising out of
13 that are not to be applied retroactively. As you -- as
14 you recall in *Duncan v. Louisiana* in 1968, this Court for
15 the first time held that the Sixth Amendment jury
16 guarantee should be applied to the States. And in that
17 very case -- in that very case, this Court said that judge
18 trials are not inherently unfair. Then a month later in
19 *DeStefano v. Woods*, this Court decided and held that this
20 right, this very right to have a jury trial, would not be
21 applied retroactively. And then in a series of cases
22 after that, this Court -- that in cases where the -- the
23 right arose out of the jury guarantee -- this case -- the
24 Court did not apply those cases retroactively. At the
25 time when the military was -- had a right to a jury for a

1 civil offense that the person committed, this Court held
2 that that would not be applied retroactively.

3 QUESTION: May I interrupt you just once more?
4 Because I'm most interested in the capital cases. Am I
5 correct in remembering that after Furman, all of the death
6 sentences across the country were held invalid
7 retroactively?

8 MR. TODD: Well, Your Honor, the -- I can't
9 speak to -- to all the cases. In Arizona what -- what
10 happened was that the -- after Furman, that sentencing,
11 the jury verdict in all the death penalties were
12 unconstitutional. And the -- the Arizona Supreme Court
13 simply applied Arizona law and said the sentence was
14 excessive and, therefore -- because it was
15 unconstitutional, and therefore, imposed life sentence. I
16 don't -- I was unable to find any case that really briefed
17 or discussed the whole question of retroactivity or
18 whether you could --

19 QUESTION: Well, you wouldn't -- you wouldn't
20 contest that Furman was a watershed decision, would you?

21 MR. TODD: No, I would not.

22 QUESTION: So, I mean, the question is whether
23 this -- whether Ring is equivalent to Furman as far as
24 watershed decisions go I guess.

25 MR. TODD: Of course, Justice Scalia, our

1 position is that it is not. It's far from it.

2 But the -- all these cases that the cross
3 section -- right to have a cross section of the community
4 represented on a jury -- that was not applied
5 retroactively.

6 QUESTION: Let me just ask you why is Furman a
7 watershed decision? It just said the procedures were all
8 wrong. What -- what made that watershed and -- and this
9 not watershed?

10 MR. TODD: Because Furman affected all death
11 penalty cases nationwide.

12 QUESTION: Because it was applied retroactively.

13 MR. TODD: And -- and it --

14 (Laughter.)

15 MR. TODD: It -- and it was a complete --

16 QUESTION: And I suppose if this case is applied
17 retroactive, this might be a watershed decision.

18 (Laughter.)

19 QUESTION: Was Furman decided before Teague?

20 MR. TODD: Furman, Justice O'Connor, was decided
21 before Teague. And -- and also in Furman, there was a
22 major shift in this Court's thinking and understanding of
23 the meaning of the Eighth Amendment.

24 QUESTION: Yes, which -- an understanding which
25 -- which had existed in the country for a couple of

1 hundred years, whereas, as I understand Ring, it's based
2 on a reversal of -- of a relatively recent practice of
3 announcing in statutes sentencing factors as opposed to
4 elements of the crime. That -- that was a quite recent
5 practice and it seems to me quite reasonable to think that
6 Furman was a watershed and that -- that Ring and -- and
7 Apprendi, which preceded Ring, was not. It was just a
8 correction of a temporary wandering off from the -- from
9 the common law rule.

10 MR. TODD: We would agree, Justice Scalia.

11 QUESTION: You would agree that Apprendi just
12 corrected a -- a minor wandering law, not an old rule?

13 QUESTION: There's a question whether it
14 corrected anything.

15 MR. TODD: At -- at most -- at most, Apprendi
16 merely extended in an incremental degree an existing
17 proposition of this Court.

18 QUESTION: Apprendi purported, did it not, to be
19 setting forth established law? Did it not?

20 MR. TODD: I --

21 QUESTION: And -- right?

22 MR. TODD: Yes.

23 QUESTION: And did Furman?

24 MR. TODD: No. It was a -- a complete change is
25 my understanding.

1 QUESTION: There was no -- there was no Court
2 opinion in Furman, was there?

3 MR. TODD: No, there was no opinion by the full
4 Court where every -- all the members agreed or a majority
5 of the members agreed.

6 QUESTION: What will you do if -- I mean, I
7 absolutely accept your point, at least for argument, that
8 -- that if you go through the factors that favor calling
9 it a watershed rule, you've listed several that argue
10 strongly against calling it a watershed rule.

11 And I want your reaction to something on the
12 other side. And I have to say, though, I'm sure he -- he
13 will agree with these words. Justice Scalia will not
14 agree with the sentiment I'm quoting him for. But in Ring
15 he said -- he spoke about the repeated spectacle of a
16 man's going to his death because a judge found an
17 aggravating factor existed and added that we cannot
18 preserve our veneration for the protection of the jury in
19 criminal cases if we render ourselves callous to the need
20 for that protection by regularly imposing the death
21 penalty without it.

22 Now, what I'm using those words to call to mind
23 is that here we will have the spectacle of a person going
24 to his death when he was tried in violation of a rule that
25 the majority of the Court found to be a serious procedural

1 flaw. See, I'm not calling it absolutely overwhelming.
2 So I'm giving you that, but on the other side, I'm trying
3 to focus your attention on the spectacle of the man going
4 to his death, having been sentenced in violation of that
5 principle. What do you want to say about that?

6 MR. TODD: Your Honor, in our view Teague
7 answers that question, that if the Apprendi/Ring rule
8 would come within the Teague exception, then certainly in
9 fairness, it should be applied retroactively.

10 QUESTION: Justice Breyer is -- is arguing for a
11 -- a general capital sentencing exception to Teague. I
12 mean, you -- you could make that statement that he just
13 made in any capital case.

14 QUESTION: No, but -- but anyway --

15 (Laughter.)

16 QUESTION: -- the -- the -- Teague, of course,
17 encapsulates a long prior history with Justice Harlan
18 trying to formalize to a degree rules that will separate
19 the more important for the less important. Is that fair?

20 MR. TODD: Yes, absolutely, Your Honor. And our
21 position is that this case, because of -- it doesn't
22 increase the accuracy, the -- the Teague/Apprendi rule,
23 and it does not -- is not even a bedrock rule, not even a
24 bedrock rule, let alone a -- a change in this Court's
25 understanding of a bedrock rule.

1 QUESTION: Where as, is Teague itself a bedrock
2 rule? It was judge-made rule, isn't it? It's not in the
3 Constitution itself or any statute anywhere. It's a
4 judge-made rule.

5 MR. TODD: Teague --

6 QUESTION: And that should trump the
7 constitutional right at stake.

8 MR. TODD: Teague is a judge -- judge-made rule,
9 Your Honor, yes.

10 If I may reserve the remainder of my time.

11 QUESTION: Very well, Mr. Todd.

12 Mr. Feldman, we'll hear from you.

13 ORAL ARGUMENT OF JAMES A. FELDMAN

14 ON BEHALF OF THE UNITED STATES

15 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

16 MR. FELDMAN: Mr. Chief Justice, and may it
17 please the Court:

18 With respect to the bedrock principles -- that
19 is -- that is, the bedrock watershed rules that come
20 within the second Teague exception -- the Court has
21 articulated that exception not in terms of any rule that
22 carries out a principle of the Constitution, even an
23 important rule that carries out a principle of the
24 Constitution, or one of the amendments that have been
25 incorporated, but rather a bedrock rule.

1 And the examples that the Court has given, which
2 are things like the violation of the rule of Gideon
3 against Wainwright or a mob dominating a trial or the
4 knowing use of testimony that was -- of a -- of a
5 confession that was extracted by torture I think give
6 guidance as to what that sort of bedrock rule is. And
7 what it is, is those are elements that, if they exist in a
8 criminal trial, you can look at that trial and say this
9 was not -- could not have been a fair trial. In fact, the
10 trial conceivably could have come to the right result, but
11 it couldn't have been a fair trial if those elements were
12 not satisfied.

13 The rule in Ring and Apprendi does not come
14 within that class.

15 QUESTION: Mr. Feldman, what would you think the
16 result should be for someone whose capital conviction and
17 sentence became final after Apprendi but before Ring?

18 MR. FELDMAN: I -- I think that -- that was a
19 relatively brief period, but during that period, this
20 Court's decision in Walton had held that judges could
21 decide aggravating factors. And accordingly, the law at
22 that time was that and it would have to satisfy the Teague
23 second exception if it were to be applied. For the
24 reasons I've said, I don't think it does.

25 The Court --

1 QUESTION: Let me ask you something else. I
2 don't think you cited or relied on that DeStefano v. Woods
3 case. Why not?

4 MR. FELDMAN: We should have. The Court said in
5 -- in the -- in the Duncan case -- actually the quote is
6 we would not assert that every criminal trial or any
7 particular trial held before a judge alone is unfair or
8 that a defendant may never be as fairly treated by a judge
9 as he would be by a jury. That's a quote from Duncan.

10 In DeStefano, which was a pre-Teague case and I
11 suppose maybe that was the reason why it was overlooked,
12 but the Court relied on that particular reasoning in
13 holding that the Duncan rule, which was the whole Sixth
14 Amendment right, should not be retroactively applied.

15 The rule in Apprendi and Ring doesn't apply to
16 the whole Sixth Amendment right. It was long accepted
17 before Apprendi and Ring that any element that the
18 legislature identifies as an element of the offense has to
19 be proven to the jury. The question in these cases was
20 things that the legislature had -- was at the margins,
21 things that the legislature had set forth not as an
22 element of the offense, but as a sentencing factor that
23 only goes to sentencing. And what those cases did is
24 divide up the -- the universe of things that just go to
25 sentencing and say some of them have to be submitted to

1 the jury and others don't.

2 Those kinds of line-drawing decisions are not
3 the kinds of things that are -- that you can look at the
4 submission of that particular fact to a judge rather than
5 a jury and say this proceeding couldn't have been a fair
6 one. In fact, judges make -- the Court has recognized
7 that judges make similar types of decisions both
8 procedurally in terms of the admission of evidence, in
9 terms of the application of the Fourth Amendment, and even
10 substantively, in fact, even in the capital context, in
11 deciding the presence of mitigating factors, in deciding
12 facts that may be of -- of crucial importance in weighing
13 the weight of mitigating against aggravating factors. All
14 of those things judges may permissibly do and may do so
15 fairly.

16 Given that those things can be decided by a
17 judge fairly, I don't think that it can be said that the
18 rule in Apprendi and in Ring reaches that level of bedrock
19 importance, that it just is -- is -- necessarily the whole
20 proceeding was unfair because this element was --

21 QUESTION: Can we go back to the -- the first
22 and how you characterize this? I would imagine you list
23 elements of an offense. Well, the elements of an offense
24 -- that has a substantive feel. Who decides has a
25 procedural feel. It seems to me you could give this a

1 substantive characterization if you're saying recite the
2 elements of -- of an offense. That sounds very
3 substantive. What does it take to -- to compose this
4 crime. And then -- well, and then you say it -- well,
5 it's just who decides. That's a procedural question. You
6 can characterize this fairly either way I think.

7 MR. FELDMAN: I -- I don't think so. I think
8 for the -- for purposes of Teague, the best definition of
9 substantive offense -- of what is substantive is what
10 substantive is what -- what has been made criminal and --
11 and perhaps what facts -- on what facts turns a particular
12 punishment. The definition of those facts is a
13 substantive point. And the reason for that is that in
14 Bousley, what the Court said was a -- a longstanding
15 concern of Federal habeas is that someone is going to
16 stand convicted of an offense based on conduct that the
17 law does not make criminal or does not subject to the
18 punishment that he's going to get.

19 Now, when a court comes to a new understanding
20 of an element of -- of what the meaning, the substantive
21 meaning, of an element of an offense, what conduct is or
22 isn't criminal or can or cannot be subject to a particular
23 punishment, there is a risk that -- that the defendant,
24 who was tried under a different standard, does stand
25 convicted of committing an act that the law didn't make

1 criminal. And that's why substantive rules don't come
2 within Teague.

3 But where -- what happened here is not at all
4 times, both before and after Ring, the -- in Arizona the
5 list of aggravating circumstances was the same. They
6 meant exactly the same thing. And that risk that the
7 Court talked about in Bousley of standing convicted of an
8 act based on a finding that you committed an act that in
9 fact is not criminal or couldn't be subject to the death
10 penalty, that risk was not raised by this decision in
11 Ring.

12 QUESTION: Mr. Feldman, do you think that the
13 outcome of this case necessarily determines whether
14 Apprendi is retroactive or not?

15 MR. FELDMAN: I -- I would think they stand or
16 fall together because the Court in Ring --

17 QUESTION: Do you think if we hold this is bad,
18 we must follow the same rule in Apprendi?

19 MR. FELDMAN: Well, I'd prefer not to be
20 categorical about that. I -- I mean, if the Court reached
21 that conclusion, I'd want to see what the reasoning was
22 that the Court used and see whether there are distinctions
23 or aren't distinctions at that point.

24 But the Court --

25 QUESTION: But if we -- if we said, for example,

1 that this is -- this is retroactive because we, in effect,
2 have said that the sentencing factor is -- is like an
3 element so that we are, in fact, for purposes of -- of
4 serving the jury right, recharacterizing or redefining the
5 -- the crime, then that would cover Apprendi as well as
6 this case, wouldn't it?

7 MR. FELDMAN: It -- it may well. It may well.

8 But I don't think the Court should reach that
9 result for the reasons I just said, which is as a matter
10 of substance and procedure, I think you can -- if the
11 question is, is this an element or is it a sentencing
12 factor, but in both cases it's something that the
13 legislature intended to set aside as this is something
14 that's going to trigger a particular penalty, in this case
15 the eligibility for the death penalty, either way I don't
16 think that's a substantive decision.

17 If the question is, as it was in Bousley or in
18 the -- the Bailey case, well, is mere possession of a gun
19 a criminal act or do you have -- or is something else, is
20 it something narrower than that, it has to be active use
21 of the gun, that is a substantive decision because there
22 are defendants who might have been found to have just
23 possessed the gun and -- and therefore not to be guilty of
24 any crime at all. And that does tie into a core purpose
25 of habeas as -- as the Court articulated in the Bousley

1 case.

2 The Court has said in -- said in Tyler -- to
3 return to the -- the bedrock, the second Teague exception,
4 the Court said in Tyler and -- v. Cain, that not all rules
5 relating to due process, not even all new rules relating
6 to the fundamental requirements of due process, will
7 satisfy the second Teague exception. That exception is a
8 narrow one because States have very vital interests in the
9 finality of criminal convictions and in coming to closure
10 after there's been a criminal conviction based on a good
11 faith interpretation and reasonable interpretation of
12 existing law, that not having to constantly reopen
13 criminal convictions as the law naturally develops, as it
14 does with respect to the jury trial right or any of the
15 other rights that have been incorporated.

16 Applying that standard, the -- the decision in
17 Ring and the decision in -- in Apprendi also, shouldn't be
18 applied -- don't come within the Teague second exception
19 because it cannot be said in those circumstances that the
20 -- that the trial, in violation of those rules, was
21 necessarily -- couldn't have been a fair trial.

22 If there are no questions from the Court --

23 QUESTION: Thank you, Mr. Feldman.

24 Mr. Murray, we'll hear from you.

25 ORAL ARGUMENT OF KEN MURRAY

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ON BEHALF OF THE RESPONDENT

MR. MURRAY: Mr. Chief Justice, and may it please the Court:

I'd like to first go right to the heart of the issue of the questions that were between Justice Breyer and Justice Scalia and point out that we are not, in fact, asking for an exception in death penalty cases of Teague, but we are asking the Court to look at the specific issues involved in capital cases and how the Teague exception that -- that implicates accuracy and fairness is applied in those contexts.

And this Court has done that before in *Stringer v. Black*, the only case that we are aware of where you were looking at jury instructions to see whether they're old and new. The -- the criteria and the specific unique aspects of the death penalty and the aggravating circumstances that you were looking at, such as the heinous, cruel, and depraved one that's in this case, were of a particular importance in determining whether the issue was new or old.

QUESTION: Did the court of appeals rely on the fact that there was a -- this was a death case as part of its reasoning?

MR. MURRAY: It did in many respects, Your Honor.

1 QUESTION: You mean it said in so many words?

2 MR. MURRAY: Well, it -- it pointed out the fact
3 of the necessity of having evidence presented in a manner
4 that would go to accuracy in a capital case, especially
5 one was -- you know, if somebody was looking at the death
6 penalty, and there was a concurrence that specifically
7 went into the fact that this was a capital case.

8 It's important to note if -- if we're going to
9 the first in the Teague exception that implicates accuracy
10 and -- and fairness, it's important to note that at the
11 heart of the Sixth Amendment, we have the right to have
12 all the facts necessary for a sentencing decision to be
13 made by a jury. And it's even more essential in capital
14 cases. In death penalty cases, juries really do make a
15 difference.

16 QUESTION: Well, isn't -- isn't that because a
17 lot of the sentencing -- a lot of the aggravating factors
18 the sentencing pivots are -- are not only factual but
19 normative? I mean, heinous, atrocious, and cruel is -- is
20 the -- is a perfect example of it. It's -- it's a how --
21 how bad is it kind of determination.

22 This isn't so much a matter of accuracy as it is
23 a -- a matter of -- of moral weighing, and does that fall
24 within prong one of -- of the Teague exception?

25 MR. MURRAY: Prong one of the second exception?

1 QUESTION: Yes.

2 MR. MURRAY: Yes, Your Honor, to the extent that
3 -- I mean, I understand what you're saying, but to the
4 extent that this is going to categorical accuracy.

5 QUESTION: But it sounds more like judgment than
6 accuracy is what I'm getting at.

7 MR. MURRAY: It is -- and is -- and that's why
8 the accuracy I -- we believe has to be categorical. If I
9 could put it this way. There's -- there's a imaginary
10 line of -- about who can get closest to being correct in
11 the term of accuracy that really hasn't been defined by
12 the Court in this context, but in everyday uses accuracy
13 is -- is sort of getting it right. But that's not what
14 really works out here in these capital cases because we
15 have this normative or subjective type aggravating
16 circumstances.

17 We're talking about can we say for sure that
18 jurors versus the judge -- the individual judge would
19 always get these issues the same. And if they would not,
20 if they would not categorically be accurate in that
21 respect, then we have a problem because the -- the jurors
22 are supposed to be representing the community's common
23 sense.

24 QUESTION: Well, that's -- that's -- everything
25 you say is -- is true so far, but I don't know that that

1 gets you to satisfy the accuracy prong. Judges and juries
2 may -- I -- I don't know how it would really work out, but
3 they -- they may make different normative judgments,
4 different moral judgments in -- in applying a factor like
5 this. But I don't think it falls within the -- the
6 category of accuracy.

7 MR. MURRAY: Well -- well, Your Honor, we're --
8 our position is that it's accuracy only in, as I said, a
9 categorical context because you can't ever determine who
10 is absolutely right or wrong. It's not like adding
11 numbers. But you can say that after the Court's decision
12 in Ballew and other cases looking at group deliberation
13 and unanimity requirements and the proper presentation of
14 evidence to the jury, that their role as the community's
15 voice for what their sense of -- of the moral outrage, of
16 what their sense -- in determining the eligibility,
17 because that's what we're looking at here with the
18 aggravators in Arizona, is going to be more accurate over
19 the long run than a single judge.

20 QUESTION: Mr. Murray, I -- I have sort of the
21 same problem that Justice O'Connor did. I find it hard to
22 contemplate how we could have held in DeStefano that
23 Duncan v. Louisiana, which for the first time applied the
24 jury trial guarantee of the Federal Constitution to the
25 States -- I mean, the entire trial didn't have to be

1 before a jury until we decided Duncan. And in DeStefano,
2 we said that decision doesn't have to be retroactive, that
3 the cases decided before Duncan will stand even though the
4 judge decided the entire criminal case, not just the --
5 the one element we're talking about here.

6 How -- how can you possibly reconcile that with
7 what you're asking us to do here? This seems relatively
8 minor compared to the quite more massive change in
9 accuracy, if you believe it, which -- which Duncan
10 produced.

11 MR. MURRAY: Well, specifically, Your Honor, we
12 have two responses to that.

13 First, there are other cases from this Court's
14 precedent where the DeStefano's refusal to find
15 retroactivity for Duncan was set aside and not followed.
16 For example, after Ballew, then you had Brown and the
17 Burch decisions, and they -- they specifically refused to
18 find -- follow DeStefano, and in fact, this Court said,
19 rejects the argument in Brown v. Louisiana that
20 DeStefano's refusal to apply Duncan retroactively
21 controlled and because of a constitutional rule directed
22 toward ensuring that the proper functioning of the jury in
23 those cases in which it has been provided can be given
24 retroactive effect. That is in note 13 in -- in Brown.

25 QUESTION: But -- but those cases do not involve

1 the precise issue that you're bringing before us here.
2 The precise issue in Duncan was the difference between
3 having the judge decide and having the jury decide.
4 That's the very thing that's at issue here. Those other
5 cases you mentioned did not involve that very thing.

6 MR. MURRAY: Yes, Your Honor. In Duncan, they
7 had dealt with the issue of whether there is a right to
8 jury trial in the States.

9 We also have other cases from this Court's
10 precedents such as In re Winship, which was going to the
11 burden of proof to prove every element being held
12 retroactive.

13 We have Mullaney being held retroactive and
14 Hankerson which talks about whether the States can make
15 sort of end runs around by labeling issues as sentencing
16 factors --

17 QUESTION: The point is that they didn't involve
18 precisely what is involved here. The difference between
19 having the judge decide the case and having the jury
20 decide the case. Our only precedent dealing precisely
21 with that issue says that the decision is not retroactive.

22 MR. MURRAY: That's correct, Your Honor, but
23 also you can remember that that case was decided pre-
24 Teague when the balancing process that the Court used
25 included a consideration and -- and have given great

1 weight to the consideration of the overall effect of the
2 administration of justice.

3 And I'd also point out --

4 QUESTION: Teague -- but Teague does that too,
5 does it not? Gives great weight to the overall effect in
6 the administration of justice in a different way perhaps.

7 MR. MURRAY: Teague has done that essentially to
8 the extent that the Court is going to consider that by the
9 definition of a standard that is set in Teague. But it
10 has withdrawn it as a balancing factor that's specifically
11 taken into consideration and can be given as much weight
12 as it has previously.

13 I'd also point out that Teague as -- as a result
14 of Justice Harlan's writings in Desist and Mackey and he
15 himself had said that the failure to hold Duncan
16 retroactive in DeStefano was -- probably eroded the
17 principle that new rules affecting the very integrity of
18 fact-finding processes are to be retroactively applied.
19 So --

20 QUESTION: That was a separate opinion, was it
21 not?

22 MR. MURRAY: It was, Your Honor.

23 If I can then, I'd like to move on to the
24 substantive and procedural question that has been raised,
25 and that is something that has caused a lot of confusion.

1 But it is not our position that Ring -- the rule in Ring
2 itself is purely substantive because every substantive
3 ruling will generate and will have flow from it a
4 procedural consequence constitutionally. So Ring is both
5 procedural and substantive. But it had to be substantive
6 first because what the Court said in Ring was these
7 aggravating circumstances in Arizona where they are used
8 for the purpose of determining eligibility as opposed to
9 the purpose of imposition of the death penalty or
10 selection under the Eighth Amendment due -- Eighth
11 Amendment jurisprudence -- these factors are necessary to
12 establish eligibility for the death penalty. Thus, it
13 follows that the conviction for murder or first degree
14 murder which the jury can make in -- under Arizona law,
15 plus the finding of the aggravating factor is what
16 actually makes an individual guilty of a capital offense
17 in Arizona.

18 QUESTION: I agree. I think you can see it as
19 substantive or you can see it as procedural.

20 But I wonder, because you've read all these
21 cases now, is that -- is -- do you -- do you think that
22 the Teague categories -- how fixed are they meant to be?
23 What I'm thinking of in particular is the remark that
24 actually the Chief Justice made about it did reflect
25 something to do with administration of justice.

1 So suppose that you had a case in which it looks
2 as if it falls on the substantive side of the line, but
3 really to let everyone out of prison is going to -- is
4 going to just devastate the justice system. Is there
5 room, given Teague, for some flexibility there? In other
6 words, are the factors absolutely written in stone? Is
7 there any indication they're flexible to read in the light
8 of Teague's purposes? What's your reaction to that?

9 MR. MURRAY: Well, our position, Your Honor, is
10 that there is room for flexibility and -- and it is
11 essential if you're going -- if the Court is going to be
12 looking at these cases and trying to determine how the
13 result of their decisions will affect everybody else who
14 are in similar positions, because the goal of Teague is to
15 ensure that people in similar circumstances receives equal
16 treatment. And in looking at the specific circumstances,
17 I think that it is flexible.

18 QUESTION: Mr. Murray, we have many opinions
19 which -- which comment upon the fact that the -- the line
20 between substance and procedure is an extremely variable
21 one and that they really are just -- just two opposites in
22 various fields, and -- and where the line is depends upon
23 the purpose for which you're calling it substantive or
24 calling it procedural.

25 Now, Mr. Feldman gave us what he -- what his

1 assessment of -- of what our Teague rule means by -- by
2 substantive and that is if you have changed the -- the
3 punishment or if you have changed the status of whether an
4 act could be performed without being criminally punished,
5 that is a substantive change.

6 Now, if you believe that that's what substance
7 versus procedure means here, this is clearly not
8 substantive. Right?

9 MR. MURRAY: If that's the limitation --

10 QUESTION: If -- if that's what it means.

11 Now, if -- if you don't agree with his
12 description of -- of what the dichotomy is, what is your
13 understanding of -- of what constitutes something that is
14 substantive under -- under Teague?

15 MR. MURRAY: Our understanding, Your Honor, is
16 that the position that the Assistant SG gave is included
17 in a broader, more universal definition of what
18 substantive is and that is at the core of a substantive
19 ruling is defining what the elements of an offense are,
20 back to the status quo of finding what is a crime, what is
21 the crime of capital murder --

22 QUESTION: Even though the additional 5 years or
23 10 years for -- for an act that was innocent was being
24 imposed under the rubric of a sentencing factor rather
25 than under the rubric of element.

1 MR. MURRAY: Well, anytime that you -- yes, but
2 anytime that you change the definition, it's a substantive
3 -- substantive change --

4 QUESTION: Well, it -- it is substantive for the
5 purpose of whether it's in a criminal procedure book as an
6 element or as a -- as a sentencing factor, but it's not
7 substantive for the purpose of whether an individual knew
8 that if he did this, he was going to get 5 more years.
9 It's not substantive in that sense. And I thought that
10 that's what Teague was talking about.

11 MR. MURRAY: Well, Your Honor, that -- that
12 sounds of the first exception to Teague, and our position
13 is that -- is not the entire universe of what substantive
14 is about because in this case, although in Arizona the
15 individuals were charged with -- setting aside for the
16 moment the indictment issue, they were charged and given
17 notice, at least pretrial, of the aggravating
18 circumstances for which they -- the State was trying to
19 impose the death penalty. So that is known.

20 But the -- the question is would -- did they
21 know that the -- the jury -- that they have a right to
22 have a jury verdict. Did they know that the jury was not
23 going to be determining essentially what was the offense
24 of capital murder? And that is where it becomes a
25 substantive situation because in Arizona they do not,

1 based on the jury's finding, convict the individual being
2 charged in a capital case of capital murder. It wasn't
3 until Ring came down, that they finally admitted that in
4 Arizona from -- from the other side, but that's the
5 essence of the substantive.

6 QUESTION: There was a question that was asked
7 to Mr. Wood and that was about do Apprendi and Ring go
8 together, and I'd like your answer to that. If we agree
9 with you that this is substantive, wouldn't it follow that
10 Apprendi also would be retroactive?

11 MR. MURRAY: The short answer, Your Honor, is
12 maybe or -- or not necessarily. It would depend on the --

13 (Laughter.)

14 MR. MURRAY: -- the reason --

15 QUESTION: What -- what -- could you give me a
16 reason why they shouldn't go together?

17 MR. MURRAY: If -- if you rule -- we've
18 presented basically four arguments. If you accept the
19 argument that there was a misunderstanding of State law,
20 not Federal or that it was an old rule, which we haven't
21 discussed yet, we don't think that Apprendi and Ring would
22 be hooked together.

23 If it's the substantive versus procedural issue
24 that this Court relies upon, our position -- it would be
25 very difficult to distinguish Apprendi from Ring. If --

1 if we're going to buy our -- our definition of
2 substantive, then they will both probably be the same.

3 If we get to the second exception of Teague, the
4 one that implicates the fairness and accuracy, our
5 position is that you wouldn't necessarily have to overturn
6 or make Apprendi retroactive if you're depending on the
7 specific and unique aspects of capital cases that we've
8 been discussing so far.

9 QUESTION: On your -- your not a new rule, I
10 found that hard to follow in light of Walton. I mean,
11 Walton was the law until Ring said it was -- overruled it
12 pro tonto.

13 MR. MURRAY: Yes, Your Honor.

14 QUESTION: So how could it not be -- given that
15 Walton was the instruction, how could Ring be anything but
16 new?

17 MR. MURRAY: Well, Ring went back, so to speak,
18 to the old law. First off, let me just point out in
19 answering the question that Mr. Summerlin's case was pre-
20 Walton. His case became final 6 years before this Court's
21 decision in Walton.

22 What happened in Walton then was this Court made
23 the decision, based on the aspect -- the issue of whether
24 there is a Sixth Amendment right to juries' involvement in
25 sentencing in capital cases. Walton, until Ring, was in

1 essence a -- a blip in the history upon which the State
2 jumped on to deny relief in these cases.

3 In Ring, the Court recognized that there is a
4 difference between the Sixth Amendment right or lack of
5 that --

6 QUESTION: Why do you say Walton was a blip in
7 -- in the history? Are you talking about from the time
8 Arizona reimposed capital punishment after Furman?

9 MR. MURRAY: Yes, Your Honor, and even before
10 that. For hundreds of years, juries have been having the
11 responsibility to determine the facts that are necessary
12 for individuals to be eligible for the death penalty.

13 QUESTION: But surely, I mean, Arizona had
14 adopted that system before Walton or Walton wouldn't have
15 had occasion to pass on it.

16 MR. MURRAY: Arizona never adopted the -- the
17 system wherein the juries would be involved in sentencing.
18 They adopted the system where the jury convicted only of
19 the first degree murder and never performed the
20 eligibility determination, although that's what the
21 statute required.

22 QUESTION: And -- and it was that system that
23 came to us in Walton, was it not?

24 MR. MURRAY: It was that system, Your Honor.

25 QUESTION: So saying that Walton -- when you say

1 blip, I got the impression you thought it originated
2 something. It didn't. It just passed on the existing
3 system in Arizona.

4 MR. MURRAY: It passed on the existing system in
5 Arizona but for the wrong reason. But for a
6 misunderstanding of how the system in Arizona worked, this
7 Court -- had this Court been presented with, for example,
8 the information the Arizona Supreme Court gave in Ring I
9 when they explained that in the Arizona system the
10 aggravating circumstances do serve the eligibility purpose
11 that they are an essential statutory factual element, then
12 had you had that before Walton, had you had that
13 information, Walton would have resulted in a different
14 opinion is our position because you would have known then
15 what you acknowledged in Ring, that we're not talking
16 about jury sentencing in capital cases. We're talking
17 about making determination of eligibility for the death
18 penalty itself with these aggravating circumstances.

19 And I would point out this is heinous, cruel,
20 and depraved aggravating circumstance. It isn't one --
21 and this goes back a little bit to accuracy, but it isn't
22 one that everybody necessarily agrees on because the
23 prosecutor himself, the initial prosecutor in this case,
24 did not, as the court in the Ninth Circuit points out,
25 believe that there was enough evidence to support the

1 heinous, cruel, and depraved circumstance -- aggravating
2 circumstance. But that --

3 QUESTION: Why -- why should that be a factor
4 that we take into consideration? I mean, surely there
5 could be a difference between prosecutors and the fact
6 that somebody in the DA's office thought there wasn't
7 evidence -- enough evidence to go ahead, shouldn't be
8 crucial in deciding whether the finding was correct made
9 by the court or by the jury.

10 MR. MURRAY: It just, Your Honor, goes to the
11 fact that if two people on the government's side of the
12 case are disagreeing on it, then it just shows the
13 absolute need and the -- the essential character of the
14 jury's role in determining the community's sense of
15 whether such an aggravating factor did exist in this case.

16 Now, if I can just continue on the old versus
17 the new then, what happened then was that given the
18 understanding of the -- how the Arizona court worked, this
19 Court went back to -- to the basics of determining that
20 every element of an offense, in this case capital murder,
21 must be proved beyond a reasonable doubt and the State is
22 not able to rely upon mere labels or, you know, drafting
23 of the sentence -- of the statutes to give a different
24 determination to what those aggravating circumstances are.

25 And so this is really back consistent with

1 Mullaney and -- and Patterson and McMillan, although
2 McMillan wasn't out at the time Mr. Summerlin's case
3 became final. That was 2 years later. But that series of
4 cases.

5 When we say it's -- it's old, it's as if Walton
6 was a -- in essence, a new rule and Ring was a new rule
7 that corrected Walton. And so we're back for Mr.
8 Summerlin where he's raised this issue for 20 years since
9 1983, over 20 years, and -- and has sought to have the
10 jury verdict on the capital offense to make -- and their
11 determination of whether he was eligible for the death
12 penalty. And he has not been given that.

13 QUESTION: Do you agree, by the way, with Mr.
14 Wood that the judge -- whatever his name was -- that he
15 didn't use the presentence report because that would be
16 considered hearsay under Arizona law?

17 MR. MURRAY: I do, Your Honor. There was a
18 significant amount of inadmissible or irrelevant evidence
19 that went to the judge, Judge Marquardt, who was a judge
20 that had his own problems in this case, but that went to
21 him that would not have been reviewed or heard by the
22 jury.

23 In addition, the --

24 QUESTION: But Mr. Wood said he couldn't
25 consider it because it was hearsay. Is it --

1 MR. MURRAY: Well --

2 QUESTION: But the judge -- no more than the
3 jury, the judge could not have considered that in
4 determining whether there was an aggravating factor.

5 MR. MURRAY: I understand, and I agree that
6 there are rules that -- and there are rules and
7 presumptions that say that the court is not going to
8 consider irrelevant or inadmissible evidence. The problem
9 we have is that evidence is there. The judges are human.
10 They have human frailties as this case shows, and in the
11 long run, that is precisely why the Framers of the
12 Constitution chose to have the juries to stand as
13 protectant bulwarks between the accused and the government
14 officials who are, you know, seeking to have the death
15 penalty imposed on the individual.

16 QUESTION: Who don't have human frailties.
17 Right? Juries -- juries without human frailties.

18 MR. MURRAY: We all -- the juries, the judges,
19 every one of us have human frailties, Justice Scalia.

20 QUESTION: There -- there were a number of
21 issues that you raised in this case that -- that they
22 didn't get to below. Is that right? Because of the court
23 of appeals' decision on the Ring retroactivity.

24 MR. MURRAY: Yes, Your Honor. There are all but
25 -- they did rule on the ineffectiveness at the trial phase

1 itself --

2 QUESTION: And they rejected the --

3 MR. MURRAY: -- as a preliminary matter, but the
4 remainder of the rules -- of the ineffectiveness issues
5 and the judge issues remain open. And I -- I would assume
6 that if we did not prevail on this, that we'd be back in
7 the Ninth Circuit for a ruling on that.

8 If there are no further questions, I believe
9 I've covered the issues, Your Honor.

10 QUESTION: Thank you, Mr. Murray.

11 Mr. Todd, you have 2 minutes remaining.

12 REBUTTAL ARGUMENT OF JOHN P. TODD

13 ON BEHALF OF THE PETITIONER

14 MR. TODD: If I may, I would like to respond to
15 Justice Breyer's question concerning flexibility of
16 Teague. And I -- I would suggest that if this Court had a
17 rule that so increased accuracy, a new rule, and so was --
18 changed this Court's understanding of some truly bedrock
19 principle, then this Court would not care how many cases
20 it affected because it was so important, so critical and
21 that you would apply it retroactively.

22 Conversely, if a rule doesn't reach that, then
23 you don't apply it retroactively under Teague is -- is our
24 understanding. The --

25 QUESTION: What -- what rules would fit that so

1 important? And the -- the briefs cite Gideon. Is there
2 anything else?

3 MR. TODD: I think Gideon is the -- the ideal,
4 perfect example.

5 QUESTION: Yes, but are there other examples?

6 MR. TODD: I cannot think of one off the top of
7 my head, Your Honor. These surely are not.

8 In -- in terms of your concern with whether
9 there's any substance component to the Teague -- excuse me
10 -- to the Ring or Apprendi opinions, it seems to me this
11 Court's opinion in Bousley where you're explaining what
12 truly is a substantive change and you cite to the first
13 Teague exception in the Bousley case, that sort of
14 explains that -- what you're really concerned with,
15 particularly on habeas, is that we don't have somebody who
16 shouldn't be convicted, shouldn't be punished in the
17 system. And so if it falls within like the first Teague
18 exception or if you've change the law, your -- your
19 understanding of the law like in Bailey, or the other two
20 cases that are cited in the yellow brief, Fiore v. White
21 and Bunkley v. Florida, where the State court interpreted
22 State law and determined that in their construction of the
23 law, they changed the scope of that statute --

24 QUESTION: Thank you, Mr. Todd.

25 MR. TODD: You're welcome.

1 CHIEF JUSTICE REHNQUIST: The case is submitted.
2 (Whereupon, at 12:04 p.m., the case in the
3 above-entitled matter was submitted.)
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