No. 22-982

In The Supreme Court of the United States

RYAN THORNELL,

Petitioner,

v.

DANNY LEE JONES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* EQUAL JUSTICE U.S.A. IN SUPPORT OF RESPONDENT

STEVEN J. ALAGNA
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
APPELLATE CLINIC
One Brookings Drive
MSC 1120-250-102
St. Louis, MO 63130
(314) 935-7238
salagna@wustl.edu

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Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Equal Justice USA (EJUSA) is a national organization that works to transform the justice system by promoting responses to violence that break cycles of trauma, working at the intersection of criminal justice, public health, and racial justice to elevate healing over retribution, meet the needs of survivors, advance racial equity, and build community safety. As part of its mission, EJUSA monitors and promotes community awareness about the death penalty and its impacts on community safety, healing, and accountability.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2002, this Court returned to an ancient and fundamental common-law rule that any facts required for the imposition of the death penalty must be found by the jury, not the judge. *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

Two years later, in *Schriro v. Summerlin*, the Court declined to apply *Ring* retroactively to cases on collateral review, presuming that it announced a procedural rule. 542 U.S. 348, 358 (2004). But in that decision, the Court overlooked the constitutionally substantive aspects wrapped up in *Ring* and, in the process, further blurred the Court's retroactivity jurisprudence. Respondent Danny Lee Jones's case

[1] Counsel for *amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6.

highlights why the Court should correct *Summerlin* and hold that *Ring* applies retroactively.

At the very least, in cases like this one that involve ineffective assistance of counsel layered on top of an already-unconstitutional pre-*Ring* sentencing regime, the Court should clarify that the proper barometer for prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), is whether correcting counsel's constitutionally deficient performance would have made a difference in a constitutional (post-*Ring*) sentencing proceeding. In other words, Mr. Jones can show prejudice if there is a reasonable probability that a single juror, rather than his sentencing judge, would have recommended a sentence other than death. To hold otherwise would penalize the most vulnerable defendants who were unlucky enough to be subjected to proceedings that violated their constitutional rights in multiple respects.

ARGUMENT

I. This Court Should Correct *Summerlin* Because Applying *Ring* Retroactively On Collateral Review Is Consistent With (And Will Help Clarify) This Court's Retroactivity Doctrine.

In *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021), this Court affirmed that new constitutional substantive rules are retroactively applicable on collateral review, but new constitutional procedural rules are not—even if they are "watershed" procedural rules. *Id.* at 1559–60. But the Court also acknowledged that the rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963), is not substantive, and yet

continues to apply retroactively. *Vannoy*, 141 S. Ct. at 1557.

Even throughout the changes in its retroactivity jurisprudence,[2] this Court has consistently recognized two categories of

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[2] Until 1965, new constitutional rules *always* applied retroactively. *Robinson v. Neil*, 409 U.S. 505, 507 (1973) ("[U]ntil [*Linkletter v. Walker*, 381 U.S. 618 (1965)], both the common law and our own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court."). Following *Linkletter*, however, this Court frequently found that administration-of-justice interests and related concerns outweighed the traditional equitable concerns driving the Great Writ. *See generally Lonchar v. Thomas*, 517 U.S. 314, 322–28 (1996). To Justice Rehnquist and the majority of the Court in the early 1970s, rules apply retroactively if they (1) go to the "very integrity" (i.e., accuracy) "of the factfinding process," *Robinson*, 409 U.S. at 508 (quoting *Linkletter*, 381 U.S. at 639), or (2) prohibit the imposition of unconstitutional punishments, *see, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (finding the death penalty unconstitutional in certain contexts). To Justice Harlan, rules apply retroactively if they uphold substantive due process, procedural due process, or fundamental fairness. *See Mackey v. United States*, 401 U.S. 667, 692–94 (1970) (Harlan, J., concurring); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151–53, 172 (1970) (explaining that rules related to factual innocence or lack of jurisdiction should be applied retroactively); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 456, 460 (1963) (explaining that rules that address the "full and fair opportunity to . . . litigate" or result in a lack of jurisdiction warrant retroactive application). Under *Teague v. Lane*, substantive rules and "watershed" procedural rules applied retroactively. 489 U.S. 288, 311 (1989) (plurality opinion). Most recently, in *Vannoy*, this Court affirmed the retroactive applicability of substantive rules but disavowed the existence of new "watershed" procedural rules. 141 S. Ct. at 1559–60.

constitutional rules that apply retroactively on collateral review. The first includes substantive rules, such as those creating new elements that limit authority to impose a particular punishment. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460 (2012). The second includes non-substantive rules that significantly enhance fundamental fairness, *see, e.g.*, *Gideon*, 372 U.S. at 342–45, especially when retroactive application would not overly burden the administration of justice. *Ring* checks both boxes.

Accordingly, *Summerlin* got *Ring* wrong in two principal ways. First, it improperly characterized *Ring*'s substantive guarantee as merely allocating decision-making authority, when in fact it added a requirement that insured against the risk of imposing a constitutionally disproportionate death sentence. Second, it made short shrift of the concept of accuracy that is necessary to guarantee fundamental fairness. Properly understood, *Ring* ensures not only factual accuracy (whether the factfinder correctly construed the reality of what happened), but also a more normative accuracy (whether a death sentence adequately reflects community values) that only a jury can guarantee. As a result, *Summerlin* overlooked the essential role community values play in achieving fundamental fairness in capital cases like Mr. Jones's. And stare decisis offers no justification to adhere to *Summerlin*'s errors.

A. *Ring* Announced A Substantive Rule Because It Made Certain Factual Findings Constitutionally Necessary To Impose The Death Penalty On A Class Of Defendants.

An Arizona jury found Timothy Stuart Ring guilty of felony murder, but not premeditated murder. *Ring*, 536 U.S. at 591–92. Based on that jury determination, Ring was not eligible for capital punishment unless additional aggravating factors were present. *Id.* at 594. The state-court sentencing judge filled the gap himself when, untethered from any factual finding by the jury, he found that Ring was the killer. *Id.*

This Court held that the state court's approach violated Ring's Sixth Amendment right to have a jury, rather than a judge, find all facts necessary to sentence him to death. *Id.* at 609. The Court reasoned that "Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" such that they must be found by a jury. *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)).

Two terms later, *Summerlin* noted that if *Ring* had made finding "a certain fact essential to the death penalty," that rule "would be substantive," and therefore retroactive. 542 U.S. at 354. That is exactly what *Ring* did.

Summerlin ignored what *Ring* expressly stated: that Arizona's aggravating circumstances operated against the backdrop of Eighth Amendment

protections recognized by this Court. *See Ring*, 536 U.S. at 594 (describing Arizona's regime requiring certain aggravating circumstances before capital punishment became an eligible sentence and citing *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment prohibits imposing the death penalty on a felony-murder accomplice who "does not himself kill, attempt to kill, or intend that a killing take place")). In other words, Arizona's statutory aggravators necessary for a capital sentence mapped onto this Court's decisions explaining that the death penalty is an unconstitutionally disproportionate punishment for felony-murder defendants who did not participate in the killing (or act as a major participant in the felony with reckless indifference to human life). *See Ring*, 536 U.S. at 594 (first citing *Enmund*, 458 U.S. at 798; and then citing *Tison v. Arizona*, 481 U.S. 137, 158 (1987)). In fact, Justice Breyer concurred in *Ring* because he saw the Eighth Amendment, and not the Sixth, as mandating the jury's involvement in capital cases. *Id.* at 614 (Breyer, J., concurring).

Accordingly, when *Summerlin* suggested (parenthetically) that Arizona's aggravators operated only "as a matter of state law," 542 U.S. at 354, it failed to account for the whole picture. More accurately, Arizona's statutory aggravators tracked the Eighth Amendment's requirements such that the death penalty in the absence of such aggravators risked violating the Eighth Amendment's guarantee of proportional punishment. So *Summerlin*'s suggestion that *Ring* did anything other than make "a

certain fact essential to the death penalty," *id.*, is a misreading.

Properly understood, then, *Ring* is no different from *Miller v. Alabama*, 567 U.S. 460 (2012), whose rule this Court found to be substantive (and therefore retroactive) in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Miller* held that mandatory life without parole for juvenile offenders was disproportionate under the Eighth Amendment. 567 U.S. at 479. *Montgomery* then recognized that *Miller*'s rule was substantive because it prohibited a particular form of punishment for a class of persons (that is, children, who generally lack the culpability to justify such a harsh punishment). 136 S. Ct. at 734–35. And while *Miller*'s rule contains a procedural component—a proceeding by which the court must determine whether a particular juvenile defendant is a member of the protected class or whether certain circumstances aggravate a child's culpability sufficient to justify life without parole—that does not render *Miller*'s rule procedural. *Id.*; *accord Jones v. Mississippi*, 141 S. Ct. 1307, 1321 (2021).[3]

So too here. Arizona's sentencing regime operated against a backdrop that recognized that the aggravators required to impose the death penalty are the same mechanism that also checks against a risk

[3] *See also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) (holding that rules depriving the state of the power to "punish by death" a class of defendants is a substantive rule); *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("[T]he Constitution places [] substantive restriction[s] on the State's power to take the life of an insane prisoner.").

of imposing a capital sentence that is disproportionate (and therefore unconstitutional). *Ring*, 536 U.S. at 594; *cf. Miller*, 567 U.S. at 479 (holding that the juvenile-sentencing scheme at issue "poses too great a risk of disproportionate punishment").

Ring's recognition that a jury must find the requisite aggravators tracks *Miller*'s "procedural requirement necessary to implement a substantive guarantee," which gives the defendant an opportunity to "show that he belongs to the protected class." *Montgomery*, 136 S. Ct. at 734–35; *see also Mackey*, 401 U.S. at 692 n.7 (Harlan, J., concurring) ("Some rules may have both procedural and substantive ramifications.").

In fact, *Jones v. Mississippi* recently clarified that *Miller* required only a regime where sentencing a child to life without parole was discretionary, plus a hearing to consider the child's youth and its attendant characteristics. 141 S. Ct. at 1316–18. As members of this Court have recognized, *Jones*'s conception of *Miller* makes it functionally equivalent to *Ring* such that there is no reason to continue to refuse its retroactive applicability. *Id.* at 1335–36. (Sotomayor, J., dissenting).

Were there any doubt about the Eighth Amendment overlay inextricably wrapped up in *Ring*, the Court need look no further than *Enmund*. There, social norms and jury determinations were central to *Enmund*'s conclusion that the death penalty was disproportionate for minimally culpable defendants who were mere accomplices to felony murder. 458 U.S.

at 794 (explaining the ways "sentencing decisions that juries have made" were "overwhelming" evidence of "[s]ociety's rejection of the death penalty for accomplice liability in felony murders").

Accordingly, *Summerlin*'s assertion that "the range of conduct punished by death in Arizona was the same before *Ring* as after," 542 U.S. at 354, misunderstands the transformative effect of requiring a jury to decide the question, rather than the judge. By assigning the issue to a jury, *Ring* changed the nature of the question, necessarily infusing it with community-based, normative value judgments that only a jury can render. *See infra* Section I.B.

Put another way, *Ring* removed Arizona's authority to impose the death penalty absent a jury's finding of the requisite aggravating circumstances. *See Blakely v. Washington*, 542 U.S. 296, 303–04 (2004). Rules that do that are substantive. *See Penry*, 492 U.S. at 330 (explaining that "a new rule placing a certain class of individuals beyond the State's power to punish by death" is substantive as "the Constitution itself deprives the State of the power to impose a certain penalty"); *accord Teague*, 489 U.S. at 307; *Mackey*, 401 U.S. at 692 (Harlan, J., concurring).

In contrast, strictly procedural rules regulate only "the *manner of determining* the defendant's culpability." *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (cleaned up). *Ring* is not like other jury-related rules that the Court has found to be procedural and not retroactive. Those rules do not limit judicial authority to punish based on the absence

of a necessary element and against the backdrop of the Eighth Amendment's proportionality principles. Rather, they regulate only how a jury functions. *See, e.g.*, *O'Dell v. Netherland*, 521 U.S. 151, 153 (1997) (holding non-retroactive the rule that the defendant may inform the jury of his ineligibility for parole if the prosecutor cites further dangerousness); *Sawyer v. Smith*, 497 U.S. 227, 229 (1990) (holding non-retroactive the rule forbidding suggesting to a capital jury that it is not responsible for a death sentence); *Beard v. Banks*, 542 U.S. 406, 408 (2004) (holding non-retroactive the constitutional criminal procedural rule that forbids instructing a jury to disregard non-unanimous mitigating factors); *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (holding non-retroactive the rule that jury verdicts be unanimous in state criminal trials).

At bottom, *Ring* held that a jury must find aggravators necessary to impose the death penalty—not only as a matter of state law, but against the backdrop of the Eighth Amendment. In effect, it "made a certain [category of] fact[s] essential to the death penalty," which amounts to a substantive rule. *Summerlin*, 542 U.S. at 354. And as *Enmund* shows, requiring that the question of aggravating circumstances be submitted to a jury does more than simply allocate decision-making authority; it transforms the question into one that must reflect social understandings of proportionality and culpability. *See* 458 U.S. at 794; *see also infra* Section I.B.

B. Even If *Ring* Had Not Announced A Substantive Rule, Its Retroactive Application Is Necessary To Ensure Fundamental Fairness And Would Not Hinder The Administration Of Justice.

Ring applies retroactively notwithstanding the end of *Teague*'s "watershed" exception in *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559–60 (2021). This is because the retroactive applicability of *Gideon v. Wainright*, 372 U.S. 335 (1963), has never depended on the watershed exception. *See Pickelsimer v. Wainwright*, 375 U.S. 2 (1963). Nor has this Court questioned *Gideon*'s continued retroactivity. While *Vannoy* concluded that "new procedural rules do not apply retroactively on federal collateral review," 141 S. Ct. at 1562, it did not purport to touch *Gideon* or this Court's other retroactivity precedent.

Because *Gideon* has survived *Teague* and *Vannoy*, it logically follows that this Court has either broadened the category of "substantive" rules or that there is another category of non-substantive rules that apply retroactively on collateral review. This Court's precedents support recognizing that this other category encompasses rules like *Gideon*'s that ensure fundamental fairness and would not disproportionately disrupt the administration of justice, consistent with the purposes of habeas doctrine. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("Fundamental fairness is the central concern of the writ of habeas corpus"); *Whorton v. Bockting*, 549 U.S. 406, 419 (2007) (explaining that *Gideon* has a "direct and profound" connection to the "accuracy of the factfinding process").

Ring fits this bill. Like *Gideon*, *Ring* ensures fundamental fairness by requiring that death eligibility be determined by juries. And, importantly, *Ring*'s retroactive application would not unduly impede the administration of justice.

1. Fundamental fairness requires that a death sentence reliably reflect normative community values.

The purpose of the retroactive application of new rules on collateral review has always been to ensure fundamental fairness.

> [I]t has been the law, presumably for at least as long as anyone currently in jail has been incarcerated, that procedures utilized to convict them must have been fundamentally fair, that is, in accordance with the command of the Fourteenth Amendment that no State shall . . . deprive any person of life, liberty, or property, without due process of law.

Mackey, 401 U.S. at 689 (Harlan, J., concurring) (cleaned up).

That is why Justice Harlan recommended (and this Court blessed the proposition) that constitutional procedural rules that are "implicit in the concept of ordered liberty" and are necessary to ensure proceedings are "fundamentally fair" should apply retroactively. *Id.* at 693 (Harlan, J., concurring); *see also Teague*, 489 U.S. at 292 ("[W]e adopt Justice Harlan's approach to retroactivity for cases on

collateral review."). And it explains *Gideon*'s consistently recognized retroactive application. *See Mackey*, 401 U.S. at 693–94 (Harlan, J., concurring) (explaining that *Gideon*'s rule is an example of changed "understanding[s] of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction," thus warranting retroactive application).

As this Court has recognized, *Gideon*'s rule preserves fundamental fairness because it ensures "the very integrity of the fact-finding process." *Johnson v. New Jersey*, 384 U.S. 719, 728 (1966); *accord Desist v. United States*, 394 U.S. 244, 250, 250 n.15 (1969) (naming *Gideon* among cases where new constitutional rules applied retroactively because of their centrality to the reliability of fact-finding); *accord Roberts v. Russell*, 392 U.S. 293, 294 (1968).

Capital cases like this one implicate special concerns at the heart of factfinding. *See Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) ("Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received.").

More specifically, fundamental fairness in capital cases requires that a death sentence reflect not only a correct determination of black and white adjudicative facts, but also of normative community judgments. *See Kansas v. Marsh*, 548 U.S. 163, 180 (2006) ("[A] jury's conclusion that [the existence of] aggravating evidence . . . is a *decision for death* and is indicative of the type of measured, normative process

in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant."); *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968) (finding a jury that excludes people opposed to the death penalty "cannot speak for the community"); *Summerlin*, 542 U.S. at 360 (Breyer, J., dissenting) ("[A] death sentence must reflect a community-based judgment that the sentence constitutes proper retribution.").

Only a jury can render such normative community judgments:

> Juries—comprised as they are of a fair cross section of the community—are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench.

Spaziano v. Florida, 468 U.S. 447, 486–87 (1984) (Stevens, J., concurring in part) (cleaned up), *overruled in part on other grounds*, *Hurst v. Florida*, 136 S. Ct. 616 (2016); *see also Witherspoon*, 391 U.S. at 519 (noting that it is imperative that a jury "express the conscience of the community on the ultimate question of life or death."); Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 L. & Contemp. Probs. 205 (1989).

As *Ring* acknowledged, 536 U.S. at 609, the framers recognized that this critical jury function is implicit in the concept of ordered liberty. *See Duncan*

v. Louisiana, 391 U.S. 145, 156 (1968) ("[T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge.").

And that is why this Court has recognized for decades that when the jury disagrees with the judge, the jury serves "the very purposes for which they were created." *Duncan*, 391 U.S. at 157; *see also Ring*, 536 U.S. at 612 (2002) (Scalia, J., concurring) ("[T]he repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed . . . [undermines] our veneration for the protection of the jury in criminal cases." (cleaned up)).

Unfortunately, such disagreements are not rare. *See, e.g.*, Stephen Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1, 67 (1980) (noting that judge and jury disagreed 60% of the time in cases where the death penalty is imposed); Harry Kalven, Jr. & Hans Zeisel, *The American Jury and the Death Penalty*, 33 U. Chi. L. Rev. 769, 770–71 (1966) (noting similar disagreement 20% of the time).

Accordingly, capital sentences cannot reliably reflect necessary, normative, community-based judgments unless they come from a jury.

2. *Ring* ensures fundamental fairness by requiring death sentences to reflect normative community values.

Ring's rule—requiring a jury determination of death eligibility—ensures that death sentences reliably reflect such values-based community

judgments. In fact, the Arizona capital-sentencing regime at issue in *Ring* and *Summerlin* perfectly illustrates the necessity of these kinds of normative determinations. *See, e.g.*, *Summerlin*, 542 U.S. at 361–62 (Breyer, J., dissenting) (explaining that Arizona's aggravating circumstances, such as "especially heinous, cruel, or depraved" conduct, are fundamentally normative judgments). And here, Mr. Jones's death sentence was based in part on the judge's (not the jury's) finding of that particular aggravator. J.A. 2–3.

Indeed, consistent with juries being uniquely positioned to make the kind of normative decisions inherent in capital cases, Arizona death sentences dropped by nearly half after *Ring*.[4]

This significant change confirms that *Ring* announced a rule that ensures fundamental fairness. *See Summerlin*, 542 U.S. at 361, 362–66 (Breyer J., dissenting) (explaining that "[a] jury is better equipped than a judge to identify and to apply those standards [that incorporate values] accurately[,]" and thus "the risk [that the death penalty was improperly imposed] is one that the law need not and should not tolerate"); *see also Enmund*, 458 U.S. at 794 (recognizing that juries' sentencing decisions provided "overwhelming" evidence of "[s]ociety's rejection of the

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[4] Arizona imposed the death sentence an average of 4.2 times per year in the years following *Ring* (2003–2022), compared to an average of 7.45 times per year in the years preceding *Ring* (1973–2002). *See Death Sentences in the United States Since 1973*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/facts-and-research/sentencing-data/death-sentences-in-the-united-states-from-1977-by-state-and-by-year.

death penalty for accomplice liability in felony murders").

Ring's rule therefore ensures fundamental fairness the same way *Gideon*'s does. So *Summerlin* got it wrong when it suggested that Arizona's aggravator for "heinous, cruel, or depraved" conduct was not dependent on "*community standards*." 542 U.S. at 357. Even if that had correctly described how the aggravator functioned when a judge decided it, *Ring*'s requirement that the jury decide such a question transformed it into one that *necessarily* reflects community standards.

Similarly, *Summerlin* suggested that "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Id.* at 356. Of course, the framers' and this Court's repeated recognitions of the jury's centrality—to say nothing of the empirics of judges and juries disagreeing (especially on capital sentences)—provide serious reasons to question *Summerlin*'s ambivalence. But where *Summerlin* really went wrong was in giving short shrift to the more normative role a jury plays in capital cases. Unlike in other criminal cases, disagreement over even one aggravating circumstance may be the difference between life and death.

3. Applying *Ring*'s rule retroactively would not hinder the administration of justice.

Of course, most new constitutional rules are "obviously important," *see Vannoy*, 141 S. Ct. at 1573 (Gorsuch, J., concurring), but are nonetheless improper candidates for retroactive application because they impede the administration of justice, *id.*

at 1554–55 (majority opinion). The retroactive application of many new constitutional rules would be overly disruptive and costly. *See id.* at 1554. ("[C]onducting scores of retrials years after the crimes occurred would require significant state resources."); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 148 (1970) ("Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community.").

But *Ring* is different. Not only does it ensure fundamental fairness, as explained above, *see supra* Section I.B, but its retroactive application would not unduly impede the administration of justice, finality concerns, or federalism interests.

First, applying Ring retroactively would leave defendants' convictions untouched and would vacate only their sentences. So there would be no need to retry questions of guilt.

And there are currently fewer than 50 death-row inmates who were sentenced under a regime that violates *Ring*.[5] Each state could make its own decision

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[5] *See Death Row*, Ariz. Dep't of Corr. Rehab. & Reentry, https://corrections.az.gov/death-row; *Death Row*, Idaho Dep't of Corr., https://www.idoc.idaho.gov/content/prisons/death-row#:~:text=We%20currently%20have%20eight%20residents%20under%20the%20sentence%20of%20death%20in%20Idaho; *The Inmates on Nebraska's Death Row and Their Crimes*, Omaha World Herald (June 25, 2021), https://omaha.com/the-inmates-on-nebraska-s-death-row-and-their-crimes/collection_097542fd-fde7-501f-bed4-755fa540637f.html#1; Samual Stebbins, *This is How Many People are on Death Row in Montana*, The Ctr. Square (Nov. 22, 2022), https://www.thecentersquare.com/montana/this-

about how to handle its handful of affected defendants, but there are options that minimize any expenditure of resources. *Cf. Montgomery*, 136 S. Ct. at 736 (holding that *Miller*'s retroactivity "does not require States to relitigate sentences, let alone convictions," as states could simply commute life-without-parole sentences to permit parole eligibility).

Second, *Ring*'s retroactive application does not significantly undermine states' finality interests. Of course, traditional finality interests in preserving state-court resources are "wholly inapplicable to the capital sentencing context." *Teague*, 489 U.S. at 321 n.3 (Stevens, J., concurring in part). That is because—as this case illustrates—capital cases produce *more* litigation, often lasting decades.

Here, Mr. Jones's death sentence was affirmed almost three decades ago. *State v. Jones*, 917 P.2d 200, 222 (Ariz. 1996). And his case is not an exception: In 2023, executed prisoners spent an average of 23 years on death row, with six prisoners spending more than 30 years on death row before being executed. Death Penalty Info. Ctr., *The Death Penalty in 2023: Year End Report* (2023), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2023-year-end-report; *see also* James N.G. Cauthen & Barry Latzer, *Why So Long? Explaining Processing Time in Capital Appeals*, 29 Just. Sys. J. 298, 298–99 (2008). In contrast, appeals

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is-how-many-people-are-on-death-row-in-montana/article_5e51e442-39b8-5d42-b2c2-6b1bfcea256b.html.

in life-without-parole cases are typically resolved in less than two years. *The Truth About Life Without Parole: Condemned to Die in Prison,* ACLU N. Cal. (Sep. 25, 2013), https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison#:~:text=The%20facts%20prove%20that%20life,of%20people%20sentenced%20to%20death. This very case may have ended decades ago had Mr. Jones been sentenced to life without parole. Such protracted litigation undermines finality interests in promoting rehabilitation. *See Sanders v. United States*, 373 U.S. 1, 24–25 (1963) (Harlan. J., dissenting) ("Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused . . . on whether the prisoner can be restored to a useful place in the community.").

And of course, death sentences carry a different kind of finality: Death cannot be reversed. *See Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) ("[Death] may have been unconstitutionally inflicted yet the finality of death precludes relief." (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968))).

Third, *Ring*'s retroactive application does not threaten federalism. To the contrary, it is continuous, collateral, federal-court challenges to state convictions that undermine federalism. *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 453–62 (1963).

Summerlin missed the mark on these points, too. *Summerlin* brushed off the reality that applying *Ring* retroactively would affect only a small—now much smaller—subclass of defendants, suggesting that such considerations "are irrelevant under *Teague*." 542 U.S. at 358 n.6. Yet in the same breath, *Summerlin* relied on *DeStefano v. Woods*, 392 U.S. 631, 633–34 (1968) (holding that the right to a jury for serious crimes was not retroactively applicable). *Summerlin*, 542 U.S. at 356–57. *DeStefano*, of course, was pre-*Teague*, and itself turned on concerns that retroactively applying the jury-trial right would significantly hamper "law enforcement and the administration of justice . . . because the denial of [a] jury trial has occurred in a very great number of cases in those States not until now accepting the Sixth Amendment guarantee." *DeStefano*, 392 U.S. at 634; *see also Summerlin*, 542 U.S. at 365 (Breyer, J., dissenting) ("Retroactivity [in *DeStefano*], unlike here, would have thrown the prison doors open wide").

Unlike in *DeStefano*, *Ring*'s more limited scope minimizes the impact its retroactive application would have on the administration of justice for the reasons explained above. *Summerlin*, 542 U.S. at 366 (Breyer, J., dissenting) ("[T]he *DeStefano* court would have come out differently had it been considering *Ring*'s rule."). And any impact on such concerns has only shrunk even more in the 20 years since *Summerlin* was incorrectly decided.

In sum, *Ring* is exceptional because it not only ensures fundamental fairness by requiring that death sentences reliably reflect normative ideas of community justice, but it also presents minimal disruptions to finality and other administration-of-

justice concerns. This Court should therefore correct *Summerlin* and apply *Ring* retroactively.

C. Overruling *Summerlin* Does Not Offend Principles Of Stare Decisis.

For the same reasons outlined above, reliance interests weigh in favor of overruling *Summerlin*. In determining reliance, this Court traditionally evaluates any interests of those who have relied on the precedent, any strain on judicial resources, and the risk of any societal costs associated with guilty offenders being set free. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

Correcting *Summerlin* would affect only the few death-row inmates sentenced under the unconstitutional regimes *Ring* corrected over 20 years ago. This number is far smaller than it was in 2002, amounting to (by our count) 46 total individuals as of 2023. And for each state's handful of affected defendants, no new guilt-phase trial would be necessary, as *Ring* leaves convictions untouched. *See supra* Section I.B.3. This minimal effect on a few states' court systems does not justify strict adherence to precedent.

And as explained above, the badly fractured, 5-4 decision in *Summerlin* was wrong for a myriad of reasons, including its failure to account for the Eighth Amendment backdrop over which the requisite aggravators ensure that a death sentence is not unconstitutionally disproportionate, its ignorance of the ways requiring a jury to find such aggravators

transformed the question into one that would reliably reflect normative community judgments, and its contradictory reliance on *Teague* to discount considerations favoring retroactivity while simultaneously relying on a pre-*Teague* case that turned on those very considerations.

In the end, *Summerlin* also overlooked that death is different. *Furman*, 408 U.S. at 287 (Brennan, J., concurring) ("Death is today an unusually severe punishment, unusual in . . . its finality, and in its enormity."). This Court has consistently reiterated that death requires extra safeguards due to its unique finality and severity concerns. *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) ("In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (cleaned up)); *accord Glossip v. Gross*, 576 U.S. 863, 909 (2015) (Breyer, J., dissenting). As such, applying *Ring* retroactively is consistent with this Court's principle that death requires heightened constitutional care, which *Summerlin* (and its reliance on *DeStefano*) failed to account for.

Summerlin also continues to undermine the law's commitment to uniformity and equal justice, threatening public confidence in the law. *See, e.g.*, *Mackey*, 401 U.S. at 689 (Harlan, J., concurring) (explaining that the legal system must "assure a uniformity of ultimate treatment among prisoners");

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) ("[L]ike cases should generally be treated alike."). Treatment is not uniform when access to fundamental fairness turns solely on the fortuity of timing. *Summerlin*, 542 U.S. at 364 (Breyer, J., dissenting). Outside of the capital context, this disparate treatment may be explained by a need for finality. But finality hits different in capital proceedings. *See supra* Section I.B.3. "[A] death sentence is different in that" it does not seem "final" until it is undergone by a prisoner. *Summerlin*, 542 U.S. at 363.

This lack of uniform treatment undermines public confidence in the law. The ordinary citizen does not understand the difference between those on death row with final judgments and those with direct appeals still pending. *See Summerlin*, 542 U.S. at 363 (Breyer, J., dissenting) ("[O]ne individual going to his death, the other saved, all through the accident of timing."). And of course, any arcane differences between "substantive" and "procedural" rules are even less likely to inspire confidence—especially when considering a rule as wrapped up in fundamental fairness as *Ring*'s is. Stare decisis, therefore, offers no reason to hang onto *Summerlin*'s faults.

II. Mr. Jones Establishes *Strickland* Prejudice By Showing A Reasonable Probability Of A Different Outcome In A Constitutional (Not A Pre-*Ring*) Proceeding.

At the very least, this Court should clarify that *Strickland*'s prejudice inquiry is whether there is a

reasonable likelihood of a different outcome in a *constitutional* sentencing proceeding—not in the pre-*Ring* unconstitutional regime in which a judge finds the aggravators required for capital punishment, in violation of the Sixth Amendment. This is true regardless whether *Ring* is retroactively applicable.

Here, Mr. Jones's sentencing was doubly unconstitutional. First, as explained above, his sentencing violated *Ring* because a judge, and not a jury, found the aggravators necessary to impose the death penalty. Second, as the Court of Appeals held below, his sentencing was unconstitutional for the additional reason that his counsel's failure to investigate and present mitigating evidence deprived him of effective assistance of counsel. *See Williams v. Taylor*, 529 U.S. 362 (2000).

The prejudice inquiry under *Strickland v. Washington* "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. 668, 687 (1984). Counsel's deficient performance prejudiced the defendant if "the decision reached would reasonably likely have been different absent the errors." *Id.* at 696. In other words, *Strickland* requires a counterfactual analysis about the impact of deficient performance on the sentencing proceeding to make sure that the deficient performance actually undermined fundamental fairness.

In cases like this one, a defendant proves *Strickland* prejudice by showing a reasonable probability that the mitigating evidence would prompt

"at least one juror would have struck a different balance" and recommended a sentence other than death. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Requiring Mr. Jones to prove a reasonable probability of a different result from his *sentencing judge*, rather than from *Wiggins*'s single juror, would undermine the purpose of *Strickland*'s prejudice test. To measure the constitutional implications of counsel's deficient performance (the independent variable), the Court must necessarily isolate it by controlling for the constitutional implications of other aspects of the proceedings. Setting this counterfactual scenario in an already-unconstitutional (pre-*Ring*) proceeding impairs the ability to test for the *Strickland* error's constitutional effect.

And it would be downright unfair. Both *Ring* and *Strickland* guarantee Sixth Amendment rights at the heart of fundamental fairness. *Ring*, 536 U.S. at 609; *Strickland*, 466 U.S. at 697–98. So apart from failing to test for what *Strickland*'s prejudice requirement targets, it would also, in effect, inequitably impose a higher prejudice standard on a defendant because (and not despite) his sentencing was already fundamentally unfair for another reason. *Strickland* recognized that ineffective assistance of counsel "asserts the absence of *one of* the crucial assurances that the result of the proceeding is reliable," such that "the appropriate standard of prejudice should be somewhat lower." 466 U.S. at 694 (emphasis added). When, as here, at least *two* distinct constitutional errors undermine a proceeding's

reliability, it hardly makes sense to make the bar for showing prejudice *higher*.

Post-*Ring* developments confirm that *Wiggins*'s single-juror standard is appropriate here. For one thing, only "[t]hirty-eight days after *Ring*," the Arizona legislature amended its capital-sentencing statute, *McGill v. Shinn*, 16 F.4th 666, 700 (9th Cir. 2021), so that it "passed constitutional muster," *id.* at 709 (Smith, J., concurring). Since then, Arizona has required that a jury must find any requisite aggravators, and "shall determine unanimously whether death is the appropriate sentence." Ariz. Rev. Stat. § 13-752(H).

Under such regimes, this Court has recognized that *Wiggins*'s single-juror formulation is the correct test for *Strickland* prejudice. *See, e.g.*, *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020) (per curiam) (citing *Wiggins*'s "one juror" test); *see also Matthews v. Workman*, 577 F.3d 1175, 1190 (10th Cir. 2009) (Gorsuch, J.) ("In a death penalty case, the relevant prejudice inquiry is whether there is a reasonable probability that one juror would have chosen a sentence other than death." (citing *Wiggins*, 539 U.S. at 537)).

And in fact, lower courts appear to be applying *Wiggins*'s single-juror test for *Strickland* prejudice even when the defendant was sentenced under the pre-*Ring* regime, *see, e.g.*, *Correll v. Ryan*, 539 F.3d 938, 951–54 (9th Cir. 2008) (citing and applying *Wiggins*'s "one juror" formulation and granting habeas relief), *cert. denied*, 555 U.S. 1098 (2009), or

concluding that the result would be the same in any event, as the en banc Ninth Circuit did on remand after *Summerlin*, *see Summerlin v. Schriro*, 427 F.3d 623, 643 (9th Cir. 2005) (en banc) (citing *Wiggins*'s "one juror" test and noting "for the purposes of resolving this issue, we evaluate prejudice in the context of judge-sentencing," and "the result is the same.").

Ultimately, defendants like Mr. Jones who were subjected to multiple layers of constitutional errors should not be penalized with a higher threshold for proving *Strickland* prejudice. Two wrongs do not make a right.

CONCLUSION

For the foregoing reasons, the Court should correct *Summerlin* and recognize that *Ring* must apply retroactively on collateral review. And here, the Court should affirm the judgment below.

Respectfully submitted,

STEVEN J. ALAGNA
Counsel of Record
WASHINGTON UNIVERSITY
SCHOOL OF LAW
APPELLATE CLINIC
One Brookings Drive
MSC 1120-250-102
St. Louis, MO 63130
(314) 935-7238
salagna@wustl.edu

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