

**IN THE  
COURT OF APPEALS OF MARYLAND**

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**September Term 2002**

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**No. 117**

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STEVEN HOWARD OKEN,

*Appellant,*

vs.

STATE OF MARYLAND,

*Appellee.*

**On appeal from the Circuit Court for Baltimore County  
The Honorable John Grason Turnbull, II, Judge**

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**BRIEF AMICI CURIAE OF THE CRIMINAL JUSTICE LEGAL  
FOUNDATION, FREDERICK JOSEPH ROMANO AND FREDERICK  
ANTHONY ROMANO SUPPORTING AFFIRMANCE**

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KENT S. SCHEIDEGGER\*  
KYMBERLEE C. STAPLETON  
Criminal Justice Legal Foundation  
2131 L Street  
Sacramento, California 95816  
Telephone: (916) 446-0345  
Fax: (916) 446-1194  
E-mail: [cjlf@cjlf.org](mailto:cjlf@cjlf.org)

*Attorneys for Amicus Curiae  
Criminal Justice Legal Foundation*

\*Attorney of Record

**TABLE OF CONTENTS**

Table of authorities ..... ii  
Brief amici curiae ..... 1  
Summary of facts and case ..... 1  
Summary of argument ..... 2  
Argument ..... 3

**I**

The retroactivity of federal constitutional rules of criminal procedure on state postconviction review is governed by the standard of *Teague v. Lane* .... 3  
    A. The retroactivity revolution ..... 4  
    B. Retroactivity of Federal Rules in Maryland courts ..... 6  
    C. The cost of retroactivity ..... 11

**II**

Neither *Apprendi* nor *Ring* is retroactive under the *Teague* standard ..... 16

**III**

*Ring* applies only to the factual finding needed to make the defendant eligible for the death penalty, not to the discretionary “weighing” decision ..... 22  
Conclusion ..... 28  
Certificate of service ..... 29

## TABLE OF AUTHORITIES

### Cases

|  |            |
|--|------------|
| Agostini v. Felton, 521 U.S. 203, 138 L. Ed. 2d 391,<br>117 S. Ct. 1997 (1997) .....               | 26         |
| American Trucking Ass'n v. Smith, 496 U.S. 167, 110 L. Ed. 2d 148,<br>110 S. Ct. 2323 (1990) ..... | 9          |
| Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435,<br>120 S. Ct. 2348 (2000) .....           | 16, 17, 22 |
| Arizona v. Rumsey, 467 U.S. 203, 81 L. Ed. 2d 164,<br>104 S. Ct. 2305 (1984) .....                 | 26         |
| Atkins v. Virginia, 536 U.S. 304, 153 L.Ed.2d 335,<br>122 S.Ct. 2242 (2002) .....                  | 5, 23      |
| Blystone v. Pennsylvania, 494 U.S. 299, 108 L.Ed.2d 255,<br>110 S.Ct. 1079 (1990) .....            | 27         |
| Booth v. Maryland, 482 U.S. 496, 96 L. Ed. 2d 440,<br>107 S. Ct. 2529 (1987) .....                 | 14         |
| Borchardt v. State, 367 Md. 91, 786 A.2d 631 (2001) .....  | 19, 23, 27 |
| Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110<br>S. Ct. 1190 (1990) .....             | 14         |
| Brewer v. State, 444 N.W.2d 77 (Iowa 1989) .....   | 9          |
| Brown v. Mississippi, 297 U.S. 278, 80 L. Ed. 682,<br>56 S. Ct. 461 (1936) .....                   | 18         |
| Cannon v. Mullin, 297 F.3d 989 (10th Cir. 2002) .....  | 17, 18     |
| Caspari v. Bohlen, 510 U.S. 383, 127 L. Ed. 2d 236,<br>114 S. Ct. 948 (1994) .....                 | 3          |
| Clemons v. Mississippi, 494 U.S. 738, 108 L. Ed. 2d 725,<br>110 S. Ct. 1441 (1990) .....           | 25, 26     |
| Colwell v. State, 59 P.3d 463 (Nev. 2002) .....  | 11, 17     |
| Commonwealth v. Blystone, 555 Pa. 565, 725 A.2d 1197 (1999) .....                                  | 10, 27     |
| Commonwealth v. Bray, 407 Mass. 296, 553 N.E.2d 538 (1990) .....                                   | 10         |
| Commonwealth v. Sullivan, 425 Mass. 449, 681 N.E.2d 1184 (1997) .....                              | 10         |

|   |       |
|---|-------|
| Cowell v. Leapley, 458 N.W.2d 514 (S.D. 1990) . . . . .   | 11    |
| Curtis v. United States, 294 F.3d 841 (7th Cir. 2002) . . . . .                                 | 17    |
| Daniels v. State, 561 N.E.2d 487 (Ind. 1990) . . . . .  | 9     |
| Desist v. United States, 394 U.S. 244, 22 L. Ed. 2d 248,<br>89 S. Ct. 1030 (1969) . . . . .     | 4     |
| Duncan v. Walker, 533 U.S. 167, 150 L.Ed.2d 251,<br>121 S.Ct. 2120 (2001) . . . . .             | 4     |
| Flamer v. State, 585 A.2d 736 (Del. 1990) . . . . .   | 9     |
| Gafford v. State, 127 Idaho 472, 903 P.2d 61 (1995) . . . . .                                   | 9     |
| Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799,<br>83 S. Ct. 792 (1963) . . . . .          | 5, 21 |
| Grandison v. State, 341 Md. 175, 670 A.2d 398 (1995) . . . . .                                  | 15    |
| Griffith v. Kentucky, 479 U.S. 314, 93 L. Ed. 2d 649,<br>107 S. Ct. 708 (1987) . . . . .        | 5, 15 |
| Hankerson v. North Carolina, 432 U.S. 233, 53 L. Ed. 2d 306,<br>97 S. Ct. 2339 (1977) . . . . . | 5     |
| Harris v. United States, 536 U.S. 545, 153 L.Ed.2d 524,<br>122 S.Ct. 2406 (2002) . . . . .      | 23    |
| Horn v. Banks, 536 U.S. 266, 153 L.Ed.2d 301,<br>122 S.Ct. 2147 (2002) . . . . .                | 3     |
| Hunt v. State, 312 Md. 494, 540 A.2d 1125 (1988) . . . . .                                      | 15    |
| In re Pierre, 118 Wash.2d 321, 823 P.2d 492 (1992) . . . . .                                    | 10    |
| Jones v. United States, 527 U.S. 373, 144 L. Ed. 2d 370,<br>119 S. Ct. 2090 (1999) . . . . .    | 24    |
| Larkin v. Commissioner of Correction, 45 Conn. App. 809,<br>699 A.2d 207 (1997) . . . . .       | 9     |
| Lawrence v. Texas, U.S. Supreme Court No. 02-102 . . . . .                                      | 5     |
| Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601,<br>85 S. Ct. 1731 (1965) . . . . .        | 5     |
| Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973,<br>98 S. Ct. 2954 (1978) . . . . .             | 27    |

|   |        |
|---|--------|
| Lowenfield v. Phelps, 484 U.S. 231, 98 L. Ed. 2d 568,<br>108 S. Ct. 546 (1988) .....    | 27     |
| Luke v. Battle, 275 Ga. 370, 565 S.E.2d 816 (2002) .....                                | 9      |
| Mackey v. United States, 401 U.S. 667, 28 L. Ed. 2d 404,<br>91 S. Ct. 1160 (1971) ..... | 4, 5   |
| McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001) .....                            | 17     |
| Mills v. Maryland, 486 U.S. 367, 100 L. Ed. 2d 384,<br>108 S. Ct. 1860 (1988) .....     | 7, 14  |
| Mills v. State, 310 Md. 33, 527 A.2d 3 (1987) .....                                     | 14     |
| Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791,<br>55 S. Ct. 340 (1935) .....           | 18     |
| Morgan v. Illinois, 504 U.S. 719, 119 L. Ed. 2d 492,<br>112 S. Ct. 2222 (1992) .....    | 13     |
| Mueller v. Murray, 252 Va. 356, 478 S.E.2d 542 (1996) .....                             | 10     |
| Murray v. Carrier, 477 U.S. 478, 91 L. Ed. 2d 397,<br>106 S. Ct. 2639 (1986) .....      | 12, 22 |
| Oken v. Corcoran, 220 F.3d 259 (4th Cir. 2000) .....                                    | 2      |
| Oken v. Nuth, 64 F. Supp. 2d 488 (D. Md. 1999) .....                                    | 2      |
| Oken v. State, 327 Md. 628, 612 A. 2d 258 (1992) .....                                  | 2      |
| Oken v. State, 343 Md. 256, 681 A. 2d 30 (1996) .....                                   | 1, 2   |
| Oken v. State, 367 Md. 191, 786 A.2d 691 (2001) .....                                   | 2, 19  |
| Oken v. State, 367 Md. 618, 790 A.2d 612 (2002) .....                                   | 15     |
| O'Dell v. Netherland, 521 U.S. 151, 138 L. Ed. 2d 351,<br>117 S. Ct. 1969 (1997) .....  | 20     |
| Pailin v. Vose, 603 A.2d 738 (R.I. 1992) .....  | 10     |
| Payne v. Tennessee, 501 U.S. 808, 115 L. Ed. 2d 720,<br>111 S. Ct. 2597 (1991) .....    | 14     |
| Penry v. Lynaugh, 492 U.S. 302, 106 L. Ed. 2d 256,<br>109 S. Ct. 2934 (1989) .....      | 5, 23  |

|   |                        |
|---|------------------------|
| People v. Beachem, 784 N.E.2d 285, 2002 Ill. App. LEXIS 1256<br>(Ill. App. 2002) .....  | 18                     |
| People v. Bradbury, 2002 Colo. App. LEXIS 1626<br>(Colo. Ct. App. 2002) .....           | 9                      |
| People v. Carrera, 49 Cal.3d 291, 261 Cal.Rptr. 348,<br>777 P.2d 121 (1989) .....       | 11                     |
| People v. Eastman, 85 N.Y.2d 265, 648 N.E.2d 459 (1995) .....                           | 10                     |
| People v. Flowers, 138 Ill. 2d 218, 561 N.E.2d 674 (1990) .....                         | 9                      |
| People v. Payne, 783 N.E.2d 130 (Ill. App. 2002) .....                                  | 18                     |
| Proffitt v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913,<br>96 S. Ct. 2960 (1976) .....     | 25, 26                 |
| Ring v. Arizona, 536 U.S. 584, 153 L.Ed.2d 556,<br>122 S.Ct. 2428 (2002) .....          | 16, 17, 20, 23, 25, 26 |
| Saffle v. Parks, 494 U.S. 484, 108 L. Ed. 2d 415,<br>110 S. Ct. 1257 (1990) .....       | 18                     |
| Sanders v. State, 815 So. 2d 590 (Ala. Crim. App. 2001) .....                           | 9, 17                  |
| Sattazahn v. Pennsylvania, 537 U.S. ___, 154 L.Ed.2d 588,<br>123 S.Ct. 732 (2003) ..... | 25, 26                 |
| Sawyer v. Smith, 497 U.S. 227, 111 L. Ed. 2d 193,<br>110 S. Ct. 2822 (1990) .....       | 16, 17, 18, 22         |
| Sawyer v. Whitley, 505 U.S. 333, 120 L. Ed. 2d 269,<br>112 S. Ct. 2514 (1992) .....     | 22                     |
| Schlup v. Delo, 513 U.S. 298, 130 L. Ed. 2d 808,<br>115 S. Ct. 851 (1995) .....         | 22                     |
| State ex rel. Schmelzer v. Murphy, 201 Wis. 2d 246,<br>548 N.W.2d 45 (Wis. 1996) .....  | 10                     |
| State ex rel. Taylor v. Whitley, 606 So. 2d 1292 (La. 1992) .....                       | 10                     |
| State v. Colvin, 314 Md. 1, 548 A. 2d 506 (1988) .....                                  | 7, 8                   |
| State v. Denton, 938 S.W.2d 373 (Tenn. 1996) .....                                      | 10                     |
| State v. Egelhoff, 272 Mont. 114, 900 P.2d 260 (1995) .....                             | 10                     |
| State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995) .....                           | 10                     |

|  |                         |
|--|-------------------------|
| State v. Hicks, 285 Md. 334, 403 A. 2d 356 (1979) . . . . .                                  | 7                       |
| State v. Lark, 117 N.J. 331, 567 A.2d 197 (1989) . . . . .                                   | 10                      |
| State v. Mascarenas, 129 N.M. 230, 4 P.3d 1221 (2000) . . . . .                              | 10                      |
| State v. Reeves, 234 Neb. 711, 453 N.W.2d 359 (1990) . . . . .                               | 10                      |
| State v. Tallard, 816 A.2d 977, 2003 N.H. LEXIS 23<br>(N.H. Feb. 28, 2003) . . . . .         | 10, 17                  |
| State v. Towery, 2003 Ariz. LEXIS 16 (Ariz. Feb. 26, 2003) . . . . .                         | 9                       |
| State v. Zuniga, 336 N.C. 508, 444 S.E.2d 443 (1994) . . . . .                               | 10                      |
| Stovall v. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199,<br>87 S. Ct. 1967 (1967) . . . . .        | 5                       |
| Sumner v. Shuman, 483 U.S. 66, 96 L. Ed. 2d 56,<br>107 S. Ct. 2716 (1987) . . . . .          | 23                      |
| Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334,<br>109 S. Ct. 1060 (1989) . . . . .         | 3, 5, 6, 12, 18, 19, 22 |
| Teague v. Palmateer, 184 Or. App. 577, 57 P.3d 176<br>(2002) . . . . .                       | 10, 11, 17, 19          |
| Thomas v. State, 888 P.2d 522 (Okla. Crim. App. 1994) . . . . .                              | 10                      |
| Thompson v. State, 625 A.2d 299 (Me. 1993) . . . . .   | 11                      |
| Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980) . . . . .                                | 27                      |
| Tuilaepa v. California, 512 U.S. 967, 129 L. Ed. 2d 750,<br>114 S. Ct. 2630 (1994) . . . . . | 24                      |
| Tyler v. Cain, 533 U.S. 656, 150 L. Ed. 2d 632,<br>121 S. Ct. 2478 (2001) . . . . .          | 6, 7, 16, 18, 19        |
| United States v. Mandancini, 205 F.3d 519 (2nd Cir. 2000) . . . . .                          | 18                      |
| United States v. Mora, 293 F.3d 1213 (10th Cir. 2002) . . . . .                              | 17, 19                  |
| United States v. Moss, 252 F.3d 993 (8th Cir. 2001) . . . . .                                | 17, 20, 21              |
| United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002) . . . . .                   | 17                      |
| United States v. Sanders, 247 F.3d 139 (4th Cir. 2001) . . . . .                             | 17, 21                  |
| Whisler v. State, 272 Kan. 864, 36 P.3d 290 (2001) . . . . .                                 | 10, 17                  |

|   |    |
|---|----|
| Wiggins v. State, 275 Md. 689, 344 A. 2d 80 (1975) . . . . .                    | 7  |
| Witt v. State, 387 So. 2d 922 (Fla. 1980) . . . . .                             | 11 |
| Yates v. Aiken, 484 U.S. 211, 98 L. Ed. 2d 546, 108 S. Ct. 534 (1988) . . . . . | 9  |

**United States Constitution**

|                                     |    |
|-------------------------------------|----|
| 21 U.S.C. § 841 . . . . .           | 20 |
| 21 U.S.C. § 846 . . . . .           | 20 |
| 28 U.S.C. § 2244(b)(2)(A) . . . . . | 6  |

**Rule of Court**

|                              |    |
|------------------------------|----|
| Md. Rules 4-343(h) . . . . . | 27 |
|------------------------------|----|

**State Statutes**

|  |      |
|--|------|
| Md. Code Ann., Crim. Law § 2-303 . . . . .       | 25   |
| Md. Code Ann., Crim. Proc. 7-106(c)(2) . . . . . | 6, 8 |
| Md. Code Art. 27 § 645A(d) . . . . .             | 7    |
| Md. Code, Crim. Proc. § 7-102(b)(2) . . . . .    | 7    |

**Miscellaneous**

|   |    |
|---|----|
| California District Attorneys Association, <i>Prosecutors' Perspective on California's Death Penalty</i> (March 2003),<br><a href="http://cdaa.org/WhitePapers/DPPaper.pdf">http://cdaa.org/WhitePapers/DPPaper.pdf</a> . . . . .   | 14 |
| Cloninger & Marchesini, <i>Execution and Deterrence: A Quasi-Controlled Group Experiment</i> , 33 <i>Applied Econ.</i> 569 (2001) . . . . .   | 13 |
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| Hoffmann, <i>Violence and the Truth</i> , 76 <i>Ind. L. J.</i> 939 (2001) . . . . .   | 14 |

|   |        |
|---|--------|
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| Latzer & Cauthen, <i>Capital Appeals Revisited</i> , 84 <i>Judicature</i> 64 (2000) . . . .   | 14     |
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**SUMMARY OF FACTS AND CASE**

The defendant, Steven Oken, sexually assaulted and murdered Dawn Garvin. *Oken v. State*, 343 Md. 256, 264, 681 A.2d 30, 34 (1996). On November 1, 1987, Mrs. Garvin's father found her lying nude on her bed, with a bottle protruding from her vagina, with two contact gun shot wounds to the head. *Id.* at 265, 681 A.2d at 34. Less than two weeks later, Oken sexually assaulted and murdered his sister-in-law at his Maryland home. *Ibid.* Soon thereafter, he fled to Maine where

he murdered a motel desk clerk. *Ibid.* For the killing of Mrs. Garvin, a jury convicted Oken of first-degree murder, first-degree sexual offense, burglary, and the use of a handgun in a crime of violence. *Id.* at 267, 681 A.2d at 35. That same jury sentenced him to death. *Ibid.*

On direct appeal, all convictions, except the burglary conviction, and the death sentence were affirmed. *Oken v. State*, 327 Md. 628, 680, 612 A.2d 258, 283 (1992). The state trial court denied postconviction relief, and this Court affirmed. 343 Md. at 264, 681 A.2d at 33-34. The federal courts also heard and rejected Oken's federal habeas claims. *Oken v. Nuth*, 64 F. Supp. 2d 488, 492 (D. Md. 1999), *aff'd*, *Oken v. Corcoran*, 220 F.3d 259 (4th Cir. 2000), *cert. denied*, 531 U.S. 1165 (2001).

Despite this exhaustive, lengthy review through both the state and federal courts, the case is still not over and justice has still not been done. Instead, there have been years of litigation over additional motions. See Brief of Appellant 1-4. This litigation included this Court's rejection of substantially the same claim as the one at issue in this matter in *Oken v. State*, 367 Md. 191, 198, 786 A.2d 691, 694 (2001). The case is presently before this Court on appeal from the circuit court's denial of appellant's Motion to Correct Illegal/Irregular Sentence. Brief of Appellant 3-4.

## **SUMMARY OF ARGUMENT**

The retroactivity of new federal constitutional rules in Maryland postconviction proceedings needs to be reexamined in light of the changes to federal case law in *Teague v. Lane* and its progeny. The pre-*Teague* Maryland

cases under the Maryland Postconviction Procedure Act implicitly held that Maryland follows federal case law for the retroactivity of federal rules.

Following *Teague* would not only be consistent with precedent, it would also be good policy. Excessive retroactivity, needlessly overturning final convictions and sentences, exacts a high cost on society. In capital punishment that cost is paid in innocent lives, as the deterrent effect is diminished.

Neither *Apprendi v. New Jersey* nor *Ring v. Arizona* is retroactive on collateral review under the *Teague* standard, and almost every appellate court in the country to consider the question has so held. The second exception to *Teague* is limited to new rules essential to the fairness of the proceeding, and *Ring* itself says it is *not* based on fairness.

*Ring* only applies to the circumstances which must be found to make the defendant eligible for the death penalty. In Maryland, as in most states, that is the finding that at least one aggravating circumstance is true. The final weighing step is a pure sentencing decision, not subject to *Ring*.

## ARGUMENT

### **I. The retroactivity of federal constitutional rules of criminal procedure on state postconviction review is governed by the standard of *Teague v. Lane*.**

“A threshold question in every habeas case” is whether the defendant’s claim is defeated by the nonretroactivity of the rule he seeks to create or apply. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). For federal courts, this question is governed by the rule of *Teague v. Lane*, 489 U.S. 288 (1989), and “a threshold *Teague* analysis” is mandatory. *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam). For the reasons stated below, amicus submits that the same analysis

should be the first step in a Maryland postconviction proceeding,<sup>1</sup> at least when the rule asserted is based on federal constitutional law.

*A. The Retroactivity Revolution.*

In a prescient dissent penned a third of a century ago, Justice John Harlan examined the then-existing state of retroactivity law and found it to be arbitrary. “ ‘Retroactivity’ must be rethought.” *Desist v. United States*, 394 U.S. 244, 258 (1969) (dissenting opinion). Justice Harlan thought it was indefensible to create a new rule in the process of granting one defendant relief but then declare the rule nonretroactive so as to deny relief to other defendants whose appeals were in the same stage, and thus were similarly situated. *See id.* at 258-259. Habeas corpus proceedings are different from appeals, however, and habeas cases should be determined according to the standards prevailing “at the time the original proceedings took place,” *id.* at 263, *i.e.*, without applying new rules created since that time. *See also Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring and dissenting). In *Mackey*, Justice Harlan further refined his proposal, noting two exceptions to the general rule of nonretroactivity on habeas: rules that placed the conduct in question outside of the government’s power to punish and certain fundamental, essential protections. *See id.* at 692-694. The latter exception explained his continuing concurrence in granting relief to habeas

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1. In this brief we use the term “postconviction” generically to include any collateral attack on a criminal judgment that a state may allow after the judgment has been affirmed on direct appeal. *See Duncan v. Walker*, 533 U.S. 167, 177 (2001) (discussing “diverse terminology” in State collateral proceedings). The retroactivity rules should not vary with the form of the proceeding.

petitioners with claims under *Gideon v. Wainwright*, 372 U.S. 335 (1963), then only eight years old. *See* 401 U.S. at 694.

After Justice Harlan's death, Justice Powell picked up the banner of retroactivity reform. *See Hankerson v. North Carolina*, 432 U.S. 233, 246-248 (1977) (concurring opinion). In 1987, 18 years after the initial proposal, the Supreme Court adopted the first half of Justice Harlan's thesis and made all new rules of criminal procedure fully retroactive to all cases not yet final on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 322-323 (1987).

Two years later, the second shoe dropped. In *Teague*, 489 U.S. at 310, a plurality abandoned the fuzzy three-factor test of *Linkletter v. Walker*, 381 U.S. 618, 636 (1965) and *Stovall v. Denno*, 388 U.S. 293, 297 (1967) and "adopt[ed] Justice Harlan's view of retroactivity for cases on collateral review." The final curtain came down on *Linkletter-Stovall* in *Penry v. Lynaugh*, 492 U.S. 302, 314 (1989), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), when a majority accepted *Teague*.

In place of the vague and arbitrary regime that prevailed before 1987, we now have a straightforward set of rules that are relatively simple to apply when they are applied properly. Substantive rules that prevent the state from punishing certain conduct at all are fully retroactive in all proceedings. *See Teague*, 489 U.S. at 307. For example, if the defendants prevail in *Lawrence v. Texas*, U.S. Supreme Court No. 02-102, and "sodomy" laws are struck down, that decision would be fully retroactive on habeas corpus. Similarly, a new rule that a given defendant cannot be given a particular punishment at all, regardless of procedure, qualifies for the same exception. *See Penry*, 492 U.S. at 330. Thus, *Atkins* is fully retroactive.

For rules of procedure, on the other hand, while *Griffith* makes them all retroactive on direct review, *Teague* makes them all, at this point in time, nonretroactive on collateral review. For reasons we will explain *infra*, at 19, the much-litigated second exception is history. The only difficulty lies in determining when a rule is “new.” See *Teague*, 489 U.S. at 301. That question must be resolved, however, under either the old *Linkletter-Stovall* approach or the modern *Griffith-Teague* approach. Once a rule is determined to be new, the modern approach yields straightforward answers on which cases it will apply to, in contrast to the nebulous questions of the old standard.

*B. Retroactivity of Federal Rules in Maryland Courts.*

Maryland Code, Criminal Procedure § 7-106(c)(2) addresses the effect that judicial decisions creating new constitutional standards have on postconviction proceedings in the context of successive and defaulted claims. That statute states,

“(2) Notwithstanding any other provision of this title, an allegation of error may not be considered to have been finally litigated or waived under this title if a court whose decisions are binding on the lower courts of the State holds that: (i) the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized; and (ii) the standard is *intended to be applied retrospectively* and would thereby affect the validity of the petitioner’s conviction or sentence.” (Emphasis added).

This statute is similar to 28 U.S.C. § 2244(b)(2)(A), the statute at issue in *Tyler v. Cain*, 533 U.S. 656 (2001). The federal statute makes an exception to the successive petition rule in federal habeas cases for petitioners relying on a “new rule of constitutional law, made retroactive to cases on collateral review . . . .” See *id.* at 662. The Maryland statute makes an exception to the “finally litigated or

waived” rule of Maryland Code, Criminal Procedure § 7-102(b)(2). Neither the federal statute nor the Maryland statute prescribes a standard of retroactivity, but instead both contemplate that the standard will be formed by case law. *See Tyler*, 533 U.S. at 665-666 (discussing *Teague* standard in applying § 2244(b)(2)(A)). Both enactments also limit their exception to rules held retroactive by a limited number of courts: the Supreme Court itself in the federal statute, see *id.* at 662, and a “court whose decisions are binding on the lower courts of the State” in the Maryland statute.

Prior to *Teague*, this Court, on several occasions, addressed the standards courts must use to determine whether a new constitutional rule is “intended to be applied retrospectively” within the meaning of the predecessor of § 7-106(c)(2), Maryland Code Art. 27 § 645A(d). In *Wiggins v. State*, 275 Md. 689, 701, 344 A.2d 80, 87 (1975), this Court held, “We glean from the Supreme Court cases that there are three circumstances in which a retrospective application is mandated, (1) where the old rule affected the integrity of the fact-finding process, (2) where no trial was constitutionally permissible, and (3) where the punishment is not constitutionally permissible. In the absence of one of those three circumstances, then the three-pronged *Linkletter* test is applicable.” (Emphasis added). A few years later, in *State v. Hicks*, 285 Md. 334, 403 A.2d 356 (1979), this Court applied the *Wiggins* criteria and again relied on federal retroactivity case law in making its decision. *See id.*, at 337, 403 A.2d at 370 (citing *Linkletter* and *Stovall v. Denno*, 388 U.S. 293 (1967)).

In *State v. Colvin*, 314 Md. 1, 548 A.2d 506 (1988), this Court had before it the issue of whether the Supreme Court opinion in *Mills v. Maryland*, 486 U.S. 367 (1988), applied retroactively on state collateral review proceedings. This Court

applied § 645A(d), and, applying the *Linkletter* test, found *Mills* applied retrospectively. *Colvin*, 314 Md. at 25, 548 A.2d at 518.

*Wiggins*, *Hicks*, and *Colvin* have both an explicit holding and an implicit holding regarding Maryland retroactivity law. The explicit holding of all three cases is that Maryland courts applying the predecessor of § 7-106(c)(2) at that time were using the standard from the *Linkletter* line of cases. However, this standard was not derived from an independent mandate of Maryland law, but rather “glean[ed] from the [United States] Supreme Court cases.” The implicit holding, then, is that Maryland courts apply federal retroactivity principles, at least as to new federal rules. The viability of *Linkletter* in Maryland must therefore be reexamined in light of its abandonment by the Supreme Court and its replacement by *Griffith* and *Teague*.

Although state courts are free to determine the standards governing the retroactivity of new rules of criminal procedure based on state law, whether a new federal constitutional pronouncement is intended to be applied retrospectively on collateral review is best analyzed under *Teague*’s principles. *Griffith* and *Teague* provide a coherent, uniform analysis for analyzing this issue and ensure consistency among the different jurisdictions.

Furthermore, in many circumstances the Supreme Court requires states to follow federal retroactivity principles when it comes to the pronouncement of new federal rules.

“The determination whether a constitutional decision of the [Supreme] Court is retroactive—that is, whether the decision applies to conduct or events that occurred before the date of the decision—is a matter of federal law. When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. The retroactive applicability of a constitutional decision of [the Supreme] Court,

however, is every bit as much a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, [the Supreme Court has] consistently required that state courts adhere to [its] retroactivity decisions.” *American Trucking Ass’n v. Smith*, 496 U.S. 167, 177-178 (1990) (citations and internal quotation marks omitted); see also *Yates v. Aiken*, 484 U.S. 211, 217-218 (1988) (a holding that a rule is not “new” is binding on state courts in habeas proceedings).

Arguably, it might be permissible for state courts to give defendants the benefit of federal retroactivity law whenever it works in their favor, as in *Yates, supra*, but apply their own state rule whenever it is more favorable. Such an approach would be awkward, to put it mildly, and would require every retroactivity question to be analyzed twice. Not surprisingly, few states have taken this path.

A great number of states have either expressly adopted or have implicitly applied the *Teague* analysis for determining the retroactivity of new federal rules of criminal procedure in state collateral review proceedings. See *Sanders v. State*, 815 So. 2d 590, 591-592 (Ala. Crim. App. 2001) (applying *Teague* analysis); *State v. Towery*, 2003 Ariz. LEXIS 16, \*8 (Ariz. Feb. 26, 2003) (expressly adopting *Teague* framework); *People v. Bradbury*, 2002 Colo. App. LEXIS 1626, \*12 (Colo. Ct. App. 2002) (same); *Larkin v. Commissioner of Correction*, 45 Conn. App. 809, 814-815, 699 A.2d 207, 210 (1997) (applying *Teague* analysis); *Flamer v. State*, 585 A.2d 736, 749 (Del. 1990) (same); *Luke v. Battle*, 275 Ga. 370, 374 & n. 25, 565 S.E.2d 816, 819 & n. 25 (2002) (same); *Gafford v. State*, 127 Idaho 472, 476, 903 P.2d 61, 65 (1995) (same); *People v. Flowers*, 138 Ill. 2d 218, 237-238, 561 N.E.2d 674, 682 (1990) (expressly adopting *Teague* framework); *Daniels v. State*, 561 N.E.2d 487, 489 (Ind. 1990) (same); *Brewer v.*

*State*, 444 N.W.2d 77, 81-82 (Iowa 1989) (applying *Teague* analysis); *Whisler v. State*, 272 Kan. 864, 878, 36 P.3d 290, 299-300 (2001) (expressly adopting *Teague* framework); *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992) (same); *Commonwealth v. Bray*, 407 Mass. 296, 299-303, 553 N.E.2d 538, 540-542 (1990) (applying *Teague* analysis); *Commonwealth v. Sullivan*, 425 Mass. 449, 454, 681 N.E.2d 1184, 1188 (1997) (same); *State v. Egelhoff*, 272 Mont. 114, 126, 900 P.2d 260, 267 (1995) (expressly adopting *Teague* framework); *State v. Reeves*, 234 Neb. 711, 747-751, 453 N.W.2d 359, 382-84 (1990), *vacated and remanded on other grounds*, 498 U.S. 964 (1990) (applying *Teague* analysis); *State v. Tallard*, 816 A.2d 977, 2003 N.H. LEXIS 23, \*7 (N.H. Feb. 28, 2003) (same); *State v. Lark*, 117 N.J. 331, 335, 567 A.2d 197, 203 (1989) (expressly following *Teague* in cases involving new federal constitutional rules only); *State v. Mascarenas*, 129 N.M. 230, 238, 4 P.3d 1221, 1229 (2000) (following *Teague* analysis); *People v. Eastman*, 85 N.Y.2d 265, 275-276, 648 N.E.2d 459, 464-465 (1995) (same); *State v. Zuniga*, 336 N.C. 508, 513, 444 S.E.2d 443, 446 (1994) (expressly adopting *Teague* framework); *Thomas v. State*, 888 P.2d 522, 527 (Okla. Crim. App. 1994) (following *Teague* analysis); *Teague v. Palmateer*, 184 Or. App. 577, 581, 57 P.3d 176, 180 (2002) (expressly adopting *Teague* framework); *Commonwealth v. Blystone*, 555 Pa. 565, 576, 725 A.2d 1197, 1202-1203 (1999) (following *Teague* analysis); *Pailin v. Vose*, 603 A.2d 738, 742 (R.I. 1992) (expressly adopting *Teague* framework); *State v. Denton*, 938 S.W.2d 373, 377 (Tenn. 1996) (applying *Teague* framework); *Mueller v. Murray*, 252 Va. 356, 361, 478 S.E.2d 542, 546 (1996) (same); *In re Pierre*, 118 Wash.2d 321, 324-327, 823 P.2d 492, 494-495 (1992) (same); *State v. Guthrie*, 194 W. Va. 657, 677, 461 S.E.2d 163, 183 (1995) (same); *State ex rel. Schmelzer v. Murphy*,

201 Wis. 2d 246, 257, 548 N.W.2d 45, 49 (Wis. 1996) (expressly adopting *Teague* framework). Some of these states have gone a step further and follow *Teague* even on issues of state constitutional law. *See, e.g., Colwell v. State*, 59 P.3d 463, 470-71 (Nev. 2002); *Teague v. Palmateer*, 184 Or. App. 577, 581, 57 P.3d 176, 180 (2002).<sup>2</sup>

Because § 7-106(c)(2) implicitly incorporates federal retroactivity principles for federal questions, amicus respectfully submits that this Court should update its case law on that issue to make it consistent with the current retroactivity jurisprudence established in *Teague*. Doing so would be consistent with the approach Maryland has taken in the past, and would be consistent with the approach of the great majority of states that have adopted the *Teague* framework for determining the retroactivity of new federal rules of constitutional procedure on state postconviction review.

### C. *The Cost of Retroactivity.*

Consistency and simplicity are important reasons to follow *Teague* on federal questions, but they are by no means the only reasons. The wisdom of *Teague* itself lies in the recognition of the enormous cost to society of open-ended relitigation based on ever-changing rules of procedure.

“These underlying considerations of finality find significant and compelling parallels in the criminal context. Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of

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2. A few states continue to adhere to the *Linkletter-Stovall* test. *See, e.g., Witt v. State*, 387 So. 2d 922, 929 (Fla. 1980); *Thompson v. State*, 625 A.2d 299, 300-301 (Me. 1993); *People v. Carrera*, 49 Cal.3d 291, 327, 261 Cal.Rptr. 348, 777 P.2d 121 (1989); *Cowell v. Leapley*, 458 N.W.2d 514, 520 (S.D. 1990).

our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions ‘shows only that “conventional notions of finality” should not have as *much* place in criminal as in civil litigation, not that they should have *none*.’ Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 150 (1970). ‘[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality.’ Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-451 (1963) (emphasis omitted). See also *Mackey*, 401 U.S., at 691 (Harlan, J., concurring in judgments in part and dissenting in part) (‘no one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation’).” *Teague*, 489 U.S. at 309.

Finality, of course, is not absolute. In a related context, the Supreme Court has recognized that finality must yield to the imperative of correcting a fundamentally unjust incarceration. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). By *no* stretch of the imagination could the sentence imposed on triple murderer-rapist Steven Oken be thought to fit that description. The people of Maryland have decided that the state will have capital punishment, and that decision is theirs to make. Given that decision, this case is beyond question the kind of case that warrants the highest punishment the law allows. From among the capital cases decided by this Court to date, it is difficult to see any where the penalty is more clearly warranted, yet the case drags on over a full decade and numerous proceedings after it became “final.”

*Teague* noted the loss of deterrent effect from lack of finality. Nowhere is that loss more apparent or more costly than in capital punishment. Although the question is still controversial, recent scholarship provides strong support for the

belief that a death penalty which is actually enforced saves innocent lives. A study at the University of Houston found that a one-year *de facto* moratorium in Texas killed over 200 people through loss of deterrence. Cloninger & Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment*, 33 Applied Econ. 569, 575 (2001). A study at Emory University estimated that each execution saves 18 innocent people. Dezhbakhsh, Rubin, & Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-moratorium Panel Data*, Emory University Dept. of Economics Working Paper No. 01-01 (Feb. 2001), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=259538](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=259538). Another at the University of Colorado found a smaller but still powerful effect of 5 lives saved by each execution. Mocan & Gittings, *Pardons, Executions and Homicide*, Working Paper 2001-18 (Oct. 2001), [http://econ.cudenver.edu/home/workingpapers/2001\\_18.pdf](http://econ.cudenver.edu/home/workingpapers/2001_18.pdf). If these studies are anywhere close to correct,<sup>3</sup> the continued obstruction of capital punishment in Maryland is taking a horrific toll in innocent lives.

The “annually improvised” jurisprudence of capital punishment, see *Morgan v. Illinois*, 504 U.S. 719, 751 (1992) (Scalia, J., dissenting), has mercilessly whipsawed trial judges throughout the nation. Trying a capital case “correctly” is virtually impossible when the definition of “correct” is constantly changing, and trials are reviewed for 15 years after they are tried.

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3. In search of scholarly criticism or other reason to doubt them, we visited the Web site of the Death Penalty Information Center, a strongly anti-death-penalty group and the primary source of “talking points” for opponents. Their page on deterrence, <http://www.deathpenaltyinfo.org/article.php?scid=128&did=167>, listed no criticisms of these studies, and no scholarly work at all since 1999. The only more recent support for their no-deterrence claim was a newspaper article and an incomplete reference to a Web site.

Maryland has been particularly hard hit. The state's courageous, pioneering law on victim impact evidence was declared unconstitutional in *Booth v. Maryland*, 482 U.S. 496, 509 (1987), a decision we now know was wrong. See *Payne v. Tennessee*, 501 U.S. 808, 830 (1991) (overruling *Booth*). The state's standard jury instruction form, prepared in full accordance with all Supreme Court precedents until 1988, see *Mills v. State*, 310 Md. 33, 49-63, 527 A.2d 3, 10-17 (1987), was thrown out that year in the dubious 5-4 decision of *Mills v. Maryland*, 486 U.S. 367, 384 (1988).<sup>4</sup>

Professor Liebman's notorious study<sup>5</sup> claims that Maryland has a rate of "serious error" of 77%, the second worst in the nation. See J. Liebman, *et al.*, *A Broken System: Error Rates in Capital Cases 1973-1995*, Table 6 (2000), <http://www.law.columbia.edu/instructionalservices/liebman/>. Is Maryland *really* full of bumbling judges, unethical prosecutors, and "egregiously incompetent"<sup>6</sup> defense lawyers, worse than 36 of the other 37 death-penalty states? Of course

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4. For the reasons we call *Mills v. Maryland* "dubious," see this Court's decision in the same case, *supra*, Chief Justice Rehnquist's dissent, 486 U.S. at 390-398, and *Boyde v. California*, 494 U.S. 370, 379 (1990), in which the Court noted *Mills*' internal inconsistency and confusion.

5. For criticism of this study, see Hoffmann, *Violence and the Truth*, 76 Ind. L. J. 939 (2001); Latzer & Cauthen, *Capital Appeals Revisited*, 84 Judicature 64 (2000); Latzer & Cauthen, *The Meaning of Capital Appeals: A Rejoinder to Liebman, Fagan, and West*, 84 Judicature 142 (2000); California District Attorneys Association, *Prosecutors' Perspective on California's Death Penalty* 40-44 (March 2003), <http://cdaa.org/WhitePapers/DPPaper.pdf>.

6. This is the term Liebman uses to describe every attorney whose client subsequently succeeds on an ineffective assistance claim. See *id.*, text accompanying note 42.

not. The problem is the retroactive application of rules that are doubtful on their face, not essential to a fair proceeding, or, in the case of *Booth*, just plain wrong.

For direct appeal, the reversal of cases correctly tried under the law at the time of trial is the price *Griffith* holds we must pay to observe “basic norms of constitutional adjudication.” 479 U.S. at 322. The numerous reversals on direct appeal for “*Booth* error,” see, e.g., *Hunt v. State*, 312 Md. 494, 497, 540 A.2d 1125, 1126 (1988), which is not error at all, make up a portion of Maryland’s “error rate” which was beyond the control of both the State and this Court. However, the numerous reversals on state postconviction due to post-appeal changes in the rules are another matter. It was a travesty of justice that the infamous Anthony Grandison got a new sentencing hearing for his contracted-out double murder due to a change in the law after his direct appeal was final. See *Grandison v. State*, 341 Md. 175, 194, 670 A.2d 398, 407 (1995). His first sentence was determined correctly under the law in effect at the time, and it should have been carried out long ago. The Liebman study claims that Maryland has the highest rate of reversals in the country on state postconviction, at 52%. See Liebman, *supra*, Table 5. From the study’s description of the cases, though, it appears that 8 of the 14 reversals were retroactive applications of *Mills* on collateral review, see *id.* App. C-28-C-29, and hence unnecessary reversals.

In earlier proceedings in the present case, Judge Cathell noted “that because of the way the death penalty system works, it simply is not worth the aggravation it costs throughout the body politic.” *Oken v. State*, 367 Md. 618, 619, 790 A.2d 612, 613 (2002) (Cathell, J., dissenting). That is true the way system has worked, or actually not worked, in Maryland to this point. But it does not need to be that way. While the greatest care is in order to prevent execution of the innocent, it is

obvious to everyone who works in this field that the bulk of litigation concerns issues having *absolutely nothing* to do with the defendant's guilt of the murder, including the issue in the present case. There are many changes that could be made toward the goal of an effective death penalty that carries out most sentences within a reasonable time and saves innocent lives by providing a credible deterrent. Two, however, are most critical. The first is for courts to stop fabricating new rules for the penalty phase, leaving any further refinements to prospective legislation. The second is to stop applying retroactively to final judgments the new rules that have already been made.

Excessive retroactivity has imposed a terrible cost on the people of Maryland, not merely in dollars but in innocent lives. Adopting *Teague* for state postconviction proceedings in Maryland would be a large step in the right direction.

## **II. Neither *Apprendi* nor *Ring* is retroactive under the *Teague* standard.**

Under *Teague*, newly announced federal rules of criminal procedure apply retroactively on collateral review only in two very narrow circumstances. *See Tyler v. Cain*, 533 U.S. 656, 665 (2001). Only the second exception is at issue in this case, thereby limiting the question to whether *Apprendi v. New Jersey*, 530 U.S. 466 (2000) or *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002) announced “watershed rules of criminal procedure that are necessary to the fundamental fairness of the criminal proceeding.” *Sawyer v. Smith*, 497 U.S. 227, 241-242 (1990) (internal quotation marks omitted). Two components make up this standard. Not only must the new rule be “aimed at improving the accuracy of the trial,” but it must also “alter our understanding of the *bedrock*

*procedural elements* essential to the fairness of a proceeding.” *Id.* at 242 (emphasis in original; internal quotation marks omitted.)

There is no question that *Apprendi* and *Ring* announced a new rule of criminal procedure. See Brief for Appellant 22. *Apprendi*, a noncapital case, requires a jury, rather than a judge, to determine beyond a reasonable doubt, facts that increase the penalty for a crime beyond the statutory maximum. *Apprendi*, 530 U.S. at 490. *Ring* applied *Apprendi* to the death penalty context and concluded that a jury, not a judge, must find the existence of an aggravating factor that is required to make a defendant eligible for the death penalty. *Ring*, 153 L.Ed.2d at 577, 122 S.Ct. at 2443.

Throughout the United States, every appellate court but one to consider the retroactivity of *Apprendi* or *Ring* has resolved that question in the negative. See, e.g., *Curtis v. United States*, 294 F.3d 841, 844 (7th Cir. 2002); *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002) (*Apprendi* not retroactive); *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002) (*Ring* not retroactive); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 665 (9th Cir. 2002); *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001); *United States v. Moss*, 252 F.3d 993, 1001 (8th Cir. 2001); *McCoy v. United States*, 266 F.3d 1245, 1258 (11th Cir. 2001); *State v. Tallard*, 2003 N.H. LEXIS 23, \*12 (N.H. 2003); *Teague v. Palmateer*, 184 Or. App. 577, 581, 57 P.3d 176, 180 (2002); *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002); *Sanders v. State*, 815 So. 2d 590, 592 (Ala. Crim. App. 2001); *Whisler v. State*, 36 P.3d 290, 300 (2001). These courts have all concluded that *Apprendi* did not establish a “watershed rule of criminal procedure.” One appellate court addressing the retroactivity of *Ring* concluded it was simply an extension of *Apprendi* and that the Supreme Court’s holdings have not indicated

any intent to make *Ring* retroactive. *See Cannon*, 297 F.3d at 993-994. The single court that did find that *Apprendi* met the “watershed” standard is an intermediate appellate court in Illinois. *See People v. Beachem*, 784 N.E.2d 285, 2002 Ill. App. LEXIS 1256, \*24 (Ill. App. 2002). However, there is a split of authority among the intermediate appellate courts in Illinois on this issue, and the Illinois Supreme Court has yet to resolve that conflict. *See People v. Payne*, 783 N.E.2d 130, 142-143 (Ill. App. 2002) (holding *Apprendi* does not apply retroactively on collateral review under the *Teague* standard and noting the split of authority).

The Supreme Court was well aware in *Teague* that it was setting the bar very high for the second exception. Consequently, the Court said at the time “we believe it unlikely that many such components of basic due process have yet to emerge.” 489 U.S. at 313. The examples given by the *Teague* Court, *see ibid.*, are all rules established decades earlier. *See id.* at 313-314 (quoting *Rose v. Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting) (citing *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob violence); *Mooney v. Holohan*, 294 U.S. 103 (1935) (knowing use of perjured testimony); *Brown v. Mississippi*, 297 U.S. 278 (1936) (brutally extracted confession))). In the 14 years since *Teague*, the high court has rejected every claim that a rule created or proposed since *Teague* qualifies for the second exception. *See United States v. Mandancini*, 205 F.3d 519, 529 (2nd Cir. 2000). It has often quoted the above language, *see, e.g., Sawyer*, 497 U.S. at 243, and often noted that the new or proposed rule in question lacks the “primacy and centrality of *Gideon*” *v. Wainwright*, 372 U.S. 335 (1963). *See Saffle v. Parks*, 494 U.S. 484, 495 (1990).

Two years ago, in *Tyler v. Cain*, 533 U.S. 656 (2001), the Court said explicitly what its pattern of decisions had been saying implicitly. Altering the language of

*Teague* and *Sawyer*, Tyler said “it is unlikely that *any* of these watershed rules ‘ha[s] yet to emerge.’ ” *Id.* at 667, n.7 (emphasis added).

The second exception is history. Justice Harlan proposed it to explain his concurrence in granting relief for the remaining *Gideon* claimants. After four decades of churning out new rules more and more favorable to the defense, there are simply *no* changes to be made that come close to “the primacy and centrality of *Gideon*.”

Despite the overwhelming majority of both state and federal case law being against Oken’s position, he argues that *Apprendi* and *Ring* announced a new rule that falls within the “watershed” exception. Specifically, Oken argues that when a jury is charged with selecting an appropriate sentence from a range of penalties, which already includes death, it is a due process violation under *Apprendi* and *Ring* if the jury weighs aggravating and mitigating factors by anything less than a reasonable doubt standard. This Court rejected that argument in *Borchardt v. State*, 367 Md. 91, 786 A.2d 631 (2001) and in *Oken v. State*, 367 Md. 191, 786 A.2d 691 (2001), and it should reject that argument again in this case.

*Teague*’s “watershed” exception applies only to “those new procedures without which the likelihood of an accurate conviction is seriously diminished.” *Teague*, 489 U.S. at 313. As many of the courts finding against retroactivity have concluded, “*Apprendi*’s holding does not protect the innocent from erroneous conviction but, rather, protects the guilty from sentences beyond the statutory maximum.” *Teague v. Palmateer*, 184 Or. App. 577, 589, 57 P.3d 176, 185 (2002). Further, *Apprendi* “merely clarified and extended the scope of a preexisting right—the right to have all convictions supported by proof beyond a reasonable doubt.” *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002).

If any further confirmation were needed, we find it in the *Ring* opinion itself, where the Court expressly holds that its disapproval of the Arizona system “does not turn on the relative rationality, *fairness*, or efficiency” of that system versus the others the court has approved. 153 L.Ed.2d at 576, 122 S. Ct. at 2442 (emphasis added). In *O’Dell v. Netherland*, 521 U.S. 151 (1997), the Supreme Court rejected a claim for the second exception with these words: “It is by no means inevitable that, absent application of the rule in *Simmons*, ‘miscarriage[s] of justice’ will occur.” *Id.* at 167, n.4. Comparing this stringent criterion with *Ring*’s disclaimer that its rule is based on improving the fairness of the proceeding, it is virtually conclusive that *Ring* does not qualify for the second exception.

Oken admits that the great majority of the case law on this issue is against him, but he claims those cases are not persuasive authority because they “do not deal with the standard of proof issue[.]” Brief for Appellant 24. On the contrary, many of the cases coming from the federal courts of appeals dealt directly with the standard of proof issue. For example, in *United States v. Moss*, 252 F.3d 993 (8th Cir. 2001), the defendant was convicted of conspiracy to possess with intent to distribute crack cocaine and possession with intent to distribute crack cocaine in violation of 21 U.S.C. § 841 and § 846. *Id.* at 995. Drug quantity under § 841 was considered a sentencing factor to be determined by a judge by a preponderance of the evidence. *See id.* at 996. The defendant claimed that the District Court judge’s finding was a violation of *Apprendi* because the judge, rather than a jury, made that finding by a preponderance of the evidence, rather than beyond a reasonable doubt. *Ibid.* Refusing to hold that *Apprendi* amounted to a “watershed” rule of criminal procedure, the court stated, it is “arguable

whether the integrity of pre-*Apprendi* criminal convictions were ‘seriously’ compromised by permitting sentences to be set based upon factors found by a judge under the preponderance standard rather than by a jury under the reasonable doubt standard.” *Id.* at 999.

Similarly, in *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001), the defendant raised the same argument as in *Moss*. The court also refused to apply *Apprendi* retroactively. “The new rule announced in *Apprendi* is dual-faceted. The Supreme Court held both that a jury, rather than a judge, must determine the facts supporting a statutory sentencing enhancement, and that this finding must be made beyond a reasonable doubt, rather than by a preponderance of the evidence. *These rules, however, are not the type of watershed rules implicating fundamental fairness that require retroactive application on collateral attack.*” *Id.* at 148 (emphasis added). Thus, several courts have addressed the precise standard of review question and still concluded that the “watershed” exception was not satisfied.

As noted earlier, the type of rule contemplated by *Teague* as coming within the “watershed” exception is that of *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Apprendi* and *Ring* are far from being on par with *Gideon*. *Gideon* applies to every felony prosecution and ensures every criminal defendant the fundamental right to be represented by counsel so as to “achieve a fair system of justice.” *Id.* at 344. Without such representation, the risk of an erroneous conviction is much higher than it would be if the defendant were represented. *See id.* at 345. *Apprendi* and *Ring*, on the other hand, involve sentencing. The defendant has already been convicted, and there is no risk of erroneous conviction after the fact. That is a far cry from the type of rule announced in *Gideon*.

The second *Teague* exception is clearly related to the “actual innocence” exception for the procedural default rule. *See Teague*, 489 U.S. at 313 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). The distinctions between guilt, death-eligibility, and selection that the Court has drawn in the *Murray* line of cases is instructive here. In *Schlup v. Delo*, 513 U.S. 298, 325-326 (1995), the Court held that, because conviction of an innocent person was a “greater injustice” than any error in sentencing of a guilty murderer, even to death, a lesser showing of actual innocence would be required, distinguishing *Sawyer v. Whitley*, 505 U.S. 333 (1992). In *Sawyer* itself, the Court limited the “actual innocence” exception to persons who could show that the eligibility decision was erroneous, *id.* at 347, thus completely excluding the selection decision from the *Murray* miscarriage of justice exception. The execution of a person who did, in fact, commit capital murder is not a fundamental miscarriage of justice, and hence the rules that regulate that final sentence choice are *never* of the same magnitude as the essential requirements which safeguard the innocent from wrongful conviction, such as *Gideon*.

Neither *Apprendi* nor *Ring* is a rule of “*Gideon* magnitude.” Neither is “essential to the fairness of a proceeding.” *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). Neither qualifies for the second *Teague* exception. Defendant’s proposed extension of *Ring* beyond the death-eligibility into the final selection step does not come even remotely close.

**III. *Ring* applies only to the factual finding needed to make the defendant eligible for the death penalty, not to the discretionary “weighing” decision.**

*Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny draw a sharp, clear distinction between “those facts setting the outer limits of a sentence, and of

the judicial power to impose it” and those used to set the sentence “[w]ithin the range authorized by the jury’s verdict . . . .” *Harris v. United States*, 536 U.S. 545, 153 L.Ed.2d 524, 544, 122 S.Ct. 2406, 2419 (2002) (plurality opinion). The latter type “need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt.” *Id.*, 153 L.Ed.2d at 545, 122 S.Ct. at 2420 (opinion of the Court). This remains true even when a statute “ ‘dictate[s] the precise weight to be given that factor.’ ” *Ibid.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 89-90 (1986)). Counsel for defendant Oken struggles mightily to pound the square peg of Maryland’s final “weighing” decision into the round hole of the ceiling-raising factors of *Apprendi* and *Ring v. Arizona*, 536 U.S. 584, 153 L.Ed.2d 556, 122 S.Ct. 2428 (2002), see Brief of Appellant 16 (claiming “unique characteristics of the Maryland statute”), but the effort fails. Maryland’s system fully complies with *Apprendi* and *Ring* because those decisions apply only to the finding of at least one aggravating circumstance and not to the final, discretionary weighing decision. This was the second of the two rationales of *Borchardt v. State*, 367 Md. 91, 126-127, 786 A.2d 631, 652 (2001). This rationale was correct when *Borchardt* was decided, and nothing in *Ring* contradicts it.

In their broad outlines, *all* of the states’ post-1976 capital sentencing statutes work in the same general way, because the Supreme Court has required that they must and struck down those that do not. *See, e.g., Sumner v. Shuman*, 483 U.S. 66, 84-85 (1987) (forbidding mandatory sentence, even for repeat murderer); *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), *overruled on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (forbidding sentence based solely on answer to “special issues,” when those issues as applied did not provide for mitigating effect of alleged retardation).

Shaped by this jurisprudence, all capital punishment systems in the United States today have “two different aspects [in their] capital decisionmaking process: the eligibility decision and the selection decision.” *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). “To render a defendant *eligible* for the death penalty in a homicide case, [the Supreme Court has] indicated that the trier of fact must convict the defendant of murder and find one ‘aggravating circumstance’ (or its equivalent) at either the guilt or penalty phase.” *Id.* at 971-972 (emphasis added). The eligibility factors must genuinely narrow the class and are scrutinized for vagueness. *See id.* at 972.

The selection decision is quite different. In contrast to the objective fact-finding of the eligibility decision, the selection decision necessarily involves broad discretion. It “must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant’s relative culpability.” *Id.* at 973. *Tuilaepa*, like *Oken*, attacked the state’s criteria for the selection decision using the requirements applicable to the eligibility decision. *See id.* at 977-978. The high court rebuffed the attempt, holding that the conflation of the two decisions “contravenes our precedents.” *Id.* at 978. A similar attack on the federal death penalty statute failed in *Jones v. United States*, 527 U.S. 373, 401-402 (1999) (plurality opinion), where the Court upheld factors used “only for selection purposes” which would surely have been struck down if they had been used for eligibility.

Far from being unique, as defendant claims, Maryland’s system fits snugly into the national pattern. The factual finding that makes the defendant eligible for the death penalty is the finding of at least one aggravating circumstance. The jury must make this finding, make it first, and make it beyond a reasonable doubt. *See*

Md. Code, Crim. Law § 2-303(c) (jury, unless waived); *id.*, subd. (g)(1) (first, beyond a reasonable doubt). Absent this finding, the defendant cannot be sentenced to death regardless of how strongly the judge or jury believes he deserves it. *Id.*, subd. (g)(2)(ii). The “weighing” step, on the other hand, is inevitably an exercise of sentencing judgment. *See infra*, at 27.

The line of demarcation between the eligibility decision and the selection decision is not limited to the Supreme Court’s Eighth Amendment jurisprudence. We see it also in the Sixth Amendment as applied in *Ring, supra*, and in the Double Jeopardy Clause as applied in *Sattazahn v. Pennsylvania*, 537 U.S. \_\_\_, 154 L.Ed.2d 588, 123 S.Ct. 732 (2003).

In *Ring*, the jury convicted the defendant of first-degree murder on a felony-murder theory but deadlocked on premeditated murder. 153 L. Ed. 2d at 565, 122 S.Ct. at 2433. The trial judge found true the aggravating factors of pecuniary gain and depravity. *Id.* at 567, 122 S.Ct. at 2435. In the final selection decision, he found that the sole mitigating factor of minimal criminal record was insufficient to call for leniency. *Id.* at 568, 122 S.Ct. at 2435-2436. On appeal, the Arizona Supreme Court struck the depravity factor, “reweighed” the pecuniary gain factor against the mitigating factor, and affirmed. *Id.* at 568-569, 122 S.Ct. at 2436.

The United States Supreme Court’s decision in *Ring*’s favor was based solely on the eligibility portion of the sentencing process, *i.e.*, the finding that at least one aggravating factor was true. *Ring* did not argue and the Court did not hold that the Sixth Amendment applied to the final “weighing” decision, either by the trial judge or the “reweighing” by the appellate court. *See id.* at 569, n.4, 122 S.Ct. at 2437, n.4. The Court noted both *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion) and *Clemons v. Mississippi*, 494 U.S. 738, 745 (1990)

as contrary to such a claim. In both of those cases, the final sentencing decision was based on a weighing of aggravating against mitigating circumstances. *See Proffitt*, 428 U.S. at 248; *Clemons*, 494 U.S. at 745, n.2. In *Clemons* the law was so clearly contrary to the argument that the weighing could not be done by a court, rather than a jury, that the Supreme Court only devoted a single paragraph to emphatically rejecting it. *See* 494 U.S. at 745-746.

To the extent this passage of *Clemons* refers to eligibility factors, it is overruled by *Ring*. However, footnote 4 of *Ring* makes crystal clear that it does not overrule the Sixth Amendment holdings of *Proffitt* and *Clemons* as they relate to the selection decision. Those holdings therefore remain binding precedent on all the courts of the Nation, including this Court, unless and until the Supreme Court itself overrules them. *See Agostini v. Felton*, 521 U.S. 203, 237-238 (1997).

*Sattazahn* reinforces this conclusion. The Pennsylvania statute at issue in that case operates in substantially the same way as the Maryland statute. The jury must find at least one aggravating circumstance, and it must further find that the aggravating circumstance(s) outweigh any mitigating circumstances. *See* 154 L.Ed.2d at 594, 123 S.Ct. at 736. With the new light shed on capital sentencing by *Ring*, the plurality reaffirmed the holding of *Arizona v. Rumsey*, 467 U.S. 203 (1984) that a verdict of no aggravating circumstances would constitute an “acquittal,” for double jeopardy purposes, of the “offense of ‘murder plus aggravating circumstance[s].’” 154 L.Ed.2d at 599, 123 S.Ct. at 739. Defendant claims that in Maryland this would translate to “murder plus an aggravating circumstance, plus principalship, *plus a finding that aggravation outweighs mitigation.*” Brief for Appellant 13, n.9 (emphasis added). He may be right about

principalship,<sup>7</sup> but his error on “outweighs” is evident from the fact that *Sattazahn* does not say that, even though the Pennsylvania law contains substantially the same outweighing requirement as Maryland’s. Amicus agrees with defendant that *Sattazahn* is “instructive,” but its instruction points the other direction.

As noted *supra* at 24, Maryland’s statute is not at all unusual. The fact that the final, discretionary sentence selection step is framed as a finding on which set of circumstances outweighs the other does not convert this step into an objective “element” subject to *Apprendi* and *Ring*. If the final step really were mechanical and precluded the exercise of discretion regarding mitigating circumstances, it would be unconstitutional. *See Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988). The Supreme Court has allowed a state to preclude a discretionary sentencing decision only in the limited circumstance that the jury unanimously finds *no* mitigating circumstances. *See Blystone v. Pennsylvania*, 494 U.S. 299, 302-303 (1990). Given the mandatory, wide-open definition of mitigating circumstances under *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), the latter holding is itself discretionary.

This brings us full circle back to *Borchardt*, where this Court characterized the “weighing” decision under Maryland law. “The weighing process is purely a judgmental one, of balancing the mitigator(s) against the aggravator(s) to determine whether death is the appropriate punishment in the particular case.” 367 Md. at 126, 786 A.2d at 652. This is guided discretion, as this Court has understood from the very beginning. *See Tichnell v. State*, 287 Md. 695, 728-729,

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7. Maryland’s standard sentence verdict form complies with *Ring* by requiring principalship to be found by the jury beyond a reasonable doubt. *See* Md. Rules 4-343(h).

415 A.2d 830, 848 (1980). It is not an element of an offense in form or in effect, and hence it is not subject to *Apprendi* and *Ring*.

Maryland's death penalty statute meets the requirements of *Apprendi* and *Ring* and always has. The eligibility determination, that at least one aggravating circumstance exists, is made by the jury beyond a reasonable doubt. The weighing decision is the selection decision, to which the Sixth Amendment jury trial right does not apply. *Borchardt* was correctly decided, and nothing in *Ring* is contrary.

### CONCLUSION

The decision of the Circuit Court for Baltimore County should be affirmed.

April 8, 2003

Respectfully submitted,

KENT S. SCHEIDEGGER\*  
KYMBERLEE C. STAPLETON

*Attorneys for Amicus Curiae  
Criminal Justice Legal Foundation*

\*Attorney of Record