Criminal Law: The Oklahoma Court of Criminal Appeals' Procedural and Substantive Application of *Ring v. Arizona* to Oklahoma's Capital Sentencing Scheme

Seth S. Branham
I. Introduction

On June 24, 2002, the United States Supreme Court decided Ring v. Arizona. In Ring, the Court examined Arizona's capital sentencing scheme, and extended the scope of Apprendi v. New Jersey to include the death penalty. Ring held that the Sixth Amendment mandates that a jury, rather than a sentencing judge, find an aggravating circumstance where it is necessary for the imposition of the death penalty. In so doing, Ring overruled well-settled Supreme Court precedent addressing the ability of a sentencing judge to make eligibility and selection decisions in the capital sentencing process.

In her dissent, Justice O'Connor predicted that Ring would add to the "severely destabilizing effect on our criminal justice system" that Apprendi has already inflicted. Justice O'Connor cited the large number of Apprendi challenges that have flooded the federal courts since that decision. According to Justice O'Connor, "[i]t is simply beyond dispute that Apprendi threw countless criminal sentences into doubt and thereby caused an enormous increase in the workload of an already overburdened judiciary."

Justice O'Connor noted that Ring effectively declared five states' capital sentencing schemes unconstitutional — states where a judge, not a jury, determines capital sentencing. Further, Ring called into question the validity of death sentences in four other states with "hybrid sentencing schemes," where


1. 536 U.S. 584 (2002).
2. 530 U.S. 466 (2000).
3. Ring, 536 U.S. at 609.
4. Id.
5. Id. (citing Walton v. Arizona, 497 U.S. 639, 647-49 (1990)). In Walton, the Court rejected a challenge to Arizona's capital sentencing scheme similar to that raised in Ring when it held that the Sixth Amendment does not require a jury to make the specific findings authorizing imposition of the death penalty.
6. Id. at 619.
7. Id. at 620.
8. Id.
9. Id. Justice O'Connor identified Colorado, Idaho, Montana, and Nebraska as having capital sentencing schemes similar to Arizona's.
the jury renders an advisory verdict but a judge makes the ultimate sentencing determination.\textsuperscript{10} According to Justice O'Connor, \textit{Ring} could conceivably affect 529 death sentences in those nine states alone.\textsuperscript{11} Although Justice O'Connor believed that many \textit{Ring} challenges would be defeated by either the harmless error standards or the rules governing collateral challenges to convictions and sentences that are based on new rules of constitutional law, she predicted that "[b]y expanding on \textit{Apprendi}, the Court today exacerbates the harm done in that case"—a case Justice O'Connor stated she would overrule.\textsuperscript{12}

In \textit{Torres v. State},\textsuperscript{13} the Oklahoma Court of Criminal Appeals reviewed a post-conviction challenge to Oklahoma's capital sentencing scheme under \textit{Ring} on the merits.\textsuperscript{14} The court's review appears premised on a finding, articulated in a previous unpublished case from the Oklahoma Court of Criminal Appeals, that \textit{Ring} represents a new substantive rule of law that applies retroactively to cases on collateral review.\textsuperscript{15} This holding is contrary to the conclusions other courts—including the Tenth Circuit Court of Appeals—have come to when reviewing the issue. In \textit{Cannon v. Mullin},\textsuperscript{16} the Tenth Circuit held that \textit{Ring} represents a new rule of criminal procedure, not a new substantive change in the law.\textsuperscript{17} As shown below, this new rule of criminal procedure does not apply to cases on collateral review under the \textit{Teague v. Lane}\textsuperscript{18} retroactivity principles.\textsuperscript{19}

This Article will explore the applicability of \textit{Ring} to Oklahoma's capital sentencing scheme and the procedural hurdles governing collateral challenges based on \textit{Ring} that Oklahoma death row inmates will face in state post-conviction actions and federal habeas proceedings. In Part II, it examines a sampling of the categories of \textit{Ring}-based claims that the Oklahoma death row inmates are launching, as well as the Oklahoma Court of Criminal Appeals' responses to these challenges. This review demonstrates that \textit{Ring} is wholly inapplicable to Oklahoma's capital sentencing scheme, and therefore has no effect on death sentences imposed under Oklahoma law. Nonetheless, in Part IV this Article outlines the potentially destabilizing effect of \textit{Ring} on Oklahoma's criminal justice system, based on the Oklahoma Court of Criminal

\begin{itemize}
  \item[10.] \textit{Id.} at 621. Justice O'Connor identified these states as Alabama, Delaware, Florida and Indiana. \textit{Id.}
  \item[11.] \textit{Id.}
  \item[12.] \textit{Id.}
  \item[13.] 2002 OK CR 35, 58 P.3d 214.
  \item[14.] \textit{Id.} ¶ 3, 58 P.3d at 215.
  \item[16.] 297 F.3d 989 (10th Cir. 2002).
  \item[17.] \textit{Id.} at 994.
  \item[18.] 489 U.S. 288 (1989).
  \item[19.] \textit{Id.}
\end{itemize}

https://digitalcommons.law.ou.edu/olr/vol56/iss2/18
Appeals' determination that *Ring* may be reviewed on the merits in a state court collateral review. The Oklahoma Court of Criminal Appeals' decision to allow a merits review of *Ring*-based issues has the potential to spawn needless litigation and delay in Oklahoma death penalty cases, despite *Ring*'s complete inapplicability to Oklahoma's capital sentencing scheme. As such, the Oklahoma Court of Criminal Appeals' ruling on this narrow procedural issue has the potential to give rise to some of the destabilizing effects predicted by Justice O'Connor in her dissent.

**II. Substantive Applicability of Ring to Oklahoma's Capital Sentencing Scheme**

A necessary departure point for this discussion is a brief overview of Oklahoma's capital sentencing scheme. Under Oklahoma law, a capital murder defendant receives a bifurcated trial.20 A judge or a jury determines guilt or innocence during the first stage of trial.21 When the judge or jury finds a defendant in a death penalty case guilty of first degree murder, the court must hold a separate penalty phase to determine the appropriate punishment.22 The punishment options for first degree murder in Oklahoma are life imprisonment, life imprisonment without possibility of parole, and death.23 The same judge or jury who found the defendant guilty also determines whether to impose the death penalty.24 A defendant becomes eligible for the death penalty only where the trier of fact finds him guilty of first degree murder and finds the existence of one or more aggravating circumstances beyond a reasonable doubt.25 Once a

21. Id. Under Oklahoma law, a capital jury trial may be waived. See Torres v. State, 2002 OK CR 35, ¶ 4, 58 P.3d 214, 215 n.12 (citing 21 OKLA. STAT. § 701.10(B) (2001)).
22. 21 OKLA. STAT. § 701.10(A) (2001).
23. Id. § 701.9(A).
24. Id. § 701.10(A), (B).
25. Brown v. State, 2003 OK CR 7, ¶¶ 7, 12, 67 P.3d 917, 919-20; Torres v. State, ¶¶ 4, 6, 58 P.3d 214, 216. Oklahoma law establishes the following aggravating circumstances: (1) [t]he defendant was previously convicted of a felony involving the use or threat of violence to the person; (2) [t]he defendant knowingly created a great risk of death to more than one person; (3) [t]he person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration; (4) [t]he murder was especially heinous, atrocious, or cruel; (5) [t]he murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; (6) [t]he murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; (7) [t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or (8) [t]he victim of the murder was a peace officer as defined by
The defendant is death eligible, the trier of fact must make its selection decision. The trier of fact may impose the death penalty only if it unanimously determines that one or more aggravating circumstances outweigh the finding of one or more mitigating circumstances presented by the defendant. The trier of fact has the option of imposing a sentence less than death, however, even if it finds the aggravating circumstance or circumstances outweigh the mitigating circumstances.

The capital sentencing scheme that the Supreme Court faced in Ring differed significantly from the scheme used in Oklahoma. In Ring, a capital-murder defendant argued that Arizona's capital sentencing scheme violated his Sixth Amendment right to jury sentencing because a trial judge, not a jury, imposed the death sentence for his crime. An Arizona jury convicted Timothy Ring of first degree felony murder for his participation in the armed robbery of a Wells Fargo armored car outside of an Arizona shopping mall. John Magoch, the driver of the armored car, died from a single gunshot wound to the head. The evidence presented during the guilt stage of Ring's trial showed that Ring and his two accomplices escaped with more than $562,000 in cash and $271,000 in checks from the armored car. The trial judge "instructed the jury on the alternative charges of felony murder and premeditated murder."

Section 99 of Title 21 of the Oklahoma Statutes, or guard of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.

26. Torres, ¶4, 4, 6, 58 P.3d at 216.
27. 21 OKLA. STAT. § 701.11 (2001). Unlike an aggravating circumstance, there is virtually no restriction on the type of evidence that a capital murder defendant may present as a mitigating circumstance. "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987). Hence, a capital sentencing jury may "not be precluded from considering, as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). The Supreme Court has recognized that while Oklahoma law allows a defendant to present evidence "as to any mitigating circumstances." Lockett requires the sentencer to listen." Eddings v. Oklahoma, 455 U.S. 104, 115 n.10 (1982) (quoting 21 OKLA. STAT. § 701.10 (Supp. 1980)).
28. See Torres, ¶4, 58 P.3d at 216; OKLA. UNIFORM JURY INSTRUCTIONS — CRIMINAL 4-80 (2d ed. 1996).
30. Id. at 589.
31. Id.
32. Id.
33. Id. at 591.

https://digitalcommons.law.ou.edu/olr/vol56/iss2/18
evidence connected Ring to the robbery’s proceeds, the evidence presented during guilt stage failed to place Ring at the scene of the crime and failed to demonstrate that he participated in, planned, or even expected the killing. 34 According to the Arizona Supreme Court, “[t]his lack of evidence no doubt explains why the jury found [Ring] guilty of felony, but not premeditated, murder.”35

After the jury found Ring guilty, the court commenced a sentencing hearing to determine the appropriate sentence. 36 Under Arizona law, the judge who presided at trial conducts the capital sentencing hearing and that judge alone makes all factual determinations required for assessing punishment. 37 The trial judge must first determine whether certain enumerated, aggravating circumstances exist. For the purpose of determining whether the death penalty may be imposed, 38 the judge also determines whether the defense has proven the existence of mitigating circumstances. 39 Arizona law authorizes the trial judge to impose the death penalty “only if there is at least one aggravating circumstance and ‘there are no mitigating circumstances sufficiently substantial to call for leniency.’ ”40

Between Ring’s trial and sentencing hearings, codefendant James Greenham cut a deal with the State and agreed to testify on behalf of the prosecution against Ring. 41 During the sentencing hearing Greenham testified that Ring masterminded the robbery. 42 Greenham further testified that when Magoch opened the door to the armored car to smoke a cigarette, Ring shot him in the head with a rifle equipped with a homemade silencer. 43 Greenham further testified that while dividing up the bounty, Ring scolded him for “forgetting to congratulate [Ring] on [his] shot.”44

At the conclusion of the sentencing stage, the trial judge found that Ring personally committed the murder and participated significantly in the robbery. 45

34. Id.
35. Id. at 591-92 (quoting Ring v. State, 25 P.3d 1139, 1152 (Ariz. 2001) (alteration in original)).
36. Id. at 592.
37. Id.
38. Id.
39. Id.
40. Id. at 593 (quoting ARIZ. REV. STAT. ANN. § 13-703(F) (West 2001)).
41. Id.
42. Id.
43. Id.
44. Id. at 594 (alterations in original).
45. Id. These particular findings were required under the Supreme Court’s line of authority in Tison v. Arizona, 481 U.S. 137 (1987), and Enmund v. Florida, 458 U.S. 782 (1982), which address the availability of the death penalty for capital murder defendants convicted of felony murder. See Ring, 536 U.S. at 594 (citing Enmund, 458 U.S. at 797 (“Eighth Amendment
The trial judge also found two aggravating circumstances: (1) that Ring committed the murder "in expectation of receiving something of 'pecuniary value'"; and (2) that Ring committed the murder "in an especially heinous, cruel or depraved manner." The judge also found Ring's minimal criminal history to be a mitigating factor, but then determined that this sole mitigating factor "did not call for leniency." The judge, therefore, sentenced Ring to death.47

In Ring, the Supreme Court held that the Sixth Amendment requires that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt."48 The Court found that Arizona's capital sentencing scheme deprived Ring of his Sixth Amendment right to a jury determination of aggravating circumstances because the scheme placed the determination of aggravating circumstances solely in the hands of the trial judge.49

The Court acknowledged that Ring overruled Walton v. Arizona,50 a decision in which the Court rejected a similar Sixth Amendment challenge to Arizona's capital sentencing scheme.51 The Walton Court had reasoned that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."52 According to Walton, aggravating factors were not "elements of the offense" of capital murder that would require a jury finding, but rather, were mere "sentencing considerations" that governed the selection decision between life and death.53 In Ring, the Supreme Court rejected that premise, instead extending its previous holding in Apprendi that "[u]nder the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."54 Thus, under

requires finding that felony-murder defendant killed or attempted to kill") and quoting Tison, 481 U.S. at 158 ("qualifying Enmund, and holding that Eighth Amendment permits execution of felony-murder defendant, who did not kill or attempt to kill, but who was a 'major participa[nt] in the felony committed' and who demonstrated 'reckless indifference to human life'").

46. Ring, 536 U.S. at 594-95 (quoting ARIZ. REV. STAT. ANN. § 13-703 (West 2001)).
47. Id. at 595.
48. Id. at 602.
49. Id. at 609.
51. Ring, 536 U.S. at 609.
53. Id.
Ring, a jury not a judge must find aggravating circumstances to exist beyond a reasonable doubt.\textsuperscript{55}

Seizing on this new decision, Oklahoma death row inmates have launched several categories of Ring-based claims over the past several months. The Oklahoma Court of Criminal Appeals has consistently rejected these claims, finding that Oklahoma's capital sentencing scheme fully complies with Ring. In Torres v. State, the court addressed, on the merits, the defendant's claims that (1) Ring prohibited reweighing by the Oklahoma Court of Criminal Appeals after invalidating an aggravating circumstance on appeal; and (2) because the weighing process is a substantive element of capital murder, Oklahoma's capital sentencing scheme is invalid because it fails to require jurors to find that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt.\textsuperscript{56} The Oklahoma Court of Criminal Appeals rejected these claims, reasoning that:

\textit{Ring} describes a substantive element of a capital offense as one which makes an increase in authorized punishment contingent on a finding of fact. Using this description, the substantive element of capital murder in Oklahoma is the jury's finding of the aggravating circumstance necessary to support a capital sentence. It is that finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death. That is, the increase in punishment from life imprisonment without parole to the death penalty is contingent on the factual finding of an aggravating circumstance. \textit{Oklahoma's provision that jurors make the factual finding of an aggravating circumstance beyond a reasonable doubt is all that Ring requires. Once that finding is made, the substantive elements of the capital crime are satisfied}.\textsuperscript{57}

Because Oklahoma's scheme requires the jury, not the trial court, to make findings of fact as to whether an aggravating circumstance exists beyond a reasonable doubt, the Oklahoma Court of Criminal Appeals found that the

\textsuperscript{55} Ring, 536 U.S. at 609. \textit{Ring} would presumably not apply, however, in the event a defendant waived jury trial as allowed under 21 Okla. Stat. § 701.10(B). See McElmurry v. State, 2002 OK CR 40, ¶ 93, 60 P.3d 4, 25 (citing Torres v. State, 2002 OK CR 35, 58 P.3d 214, for the proposition that "existing Oklahoma death penalty procedure requiring jury, unless jury trial is waived, to unanimously find existence of at least one statutory aggravating circumstance beyond a reasonable doubt before a penalty of death may be imposed, is in accord with \textit{[Ring v. Arizona]}")


\textsuperscript{57} Id. ¶ 6-7, 58 P.3d at 216 (citation omitted) (emphasis added).
weighing process is sound and that the court did not engage in forbidden fact finding when conducting appellate reweighing. The court noted that "[t]he jury has already found the substantive facts — the existence of aggravating circumstances — and this Court does not substitute its judgment for that of the jury’s regarding that finding when reweighing." 58

The Oklahoma Court of Criminal Appeals rejected related post-conviction challenges in Brown v. State. 59 In Brown, the defendant challenged a jury finding of the "avoid arrest or prosecution" aggravating circumstance. 60 Under Oklahoma law, this aggravator requires proof of a predicate crime, separate from the murder, for which the defendant was attempting to avoid prosecution. 61 Brown argued that the lack of a jury finding that he committed the murder during the course of Robbery with a Dangerous Weapon beyond a reasonable doubt caused this aggravator to be constitutionally infirm. 62 The court found that "Ring does not require that we further define and increase the standards for a jury to find the ‘avoid lawful arrest or prosecution’ aggravating circumstance." 63 Rather, all that is required under Ring is that the jury make the determination whether the alleged aggravating circumstance(s) exist beyond a reasonable doubt. 64 Because Brown’s jury found the existence of the “avoid arrest or prosecution” aggravator, and because there was evidence in the record to support the jury’s finding of this aggravator, Brown was not entitled to relief under Ring. 65

The court also rejected Brown’s claim that he was entitled to relief under Ring because his jury did not make the culpability assessments required by Enmund v. Florida and Tison v. Arizona for death sentences based upon felony murder convictions. 66 The Oklahoma Court of Criminal Appeals had previously made the Enmund/Tison culpability assessments in Brown’s case on direct appeal. 67 The court found that Ring did not prohibit a court finding of the Enmund/Tison culpability requirements. 68 The court reasoned that the Supreme Court had previously described the Enmund/Tison determination as a substantive limitation on sentencing that does not make a defendant eligible for the death

58. Id.
60. Id. ¶ 2, 6, 67 P.3d at 918-19.
61. Id. ¶ 6, 67 P.3d at 919.
62. Id. ¶ 6, 8, 67 P.3d at 919.
63. Id. ¶ 7, 67 P.3d at 919.
64. Id.
65. Id. ¶ 8, 67 P.3d at 919.
66. Id. ¶ 9-13, 67 P.3d at 919-20.
67. Id. ¶ 9, 67 P.3d at 919.
68. Id. ¶ 13, 67 P.3d at 920.
penalty. Because this determination is "a limiting factor, not an enhancing factor," Ring did not prohibit a court from making the Enmund/Tison determination.

The court's substantive analysis of these Ring-based claims appears sound for the following reasons. First, Oklahoma's capital sentencing scheme, unlike Arizona's, requires a jury finding of alleged aggravating circumstances necessary to make a defendant eligible for the death penalty where jury trial is not waived. Further, Ring's claim before the Supreme Court was "tightly delineated" in that it did not make a Sixth Amendment claim with respect to mitigating circumstances, did not challenge the ability of a judge under the Sixth Amendment to make the ultimate determination whether to impose the death penalty, and did not question the ability of an appellate court to reweigh aggravating and mitigating circumstances after that court invalidated an aggravating circumstance. It is little surprise, therefore, that the Oklahoma Court of Criminal Appeals has interpreted Ring to require nothing more than a jury finding of aggravating circumstances.

The soundness of the Oklahoma Court of Criminal Appeals' adjudication of Ring-based claims is supported by the Tenth Circuit's previous rejection of habeas attacks on Oklahoma's capital sentencing scheme based on Apprendi. In Hawkins v. Mullin, a Tenth Circuit panel found that Apprendi failed to cast doubt on the validity of the court's prior decisions approving the use of "unadjudicated act evidence" to prove Oklahoma's "continuing threat" aggravator. The Tenth Circuit made its decision in Hawkins because Oklahoma law requires the prosecution to charge and prove to a jury beyond a reasonable doubt the existence of at least one aggravating factor. According to the court, "[t]hose requirements satisfy Apprendi." The court then specifically rejected Hawkins's claim that Apprendi required the State to prove, beyond a reasonable doubt, the evidence it presents in support of the "continuing threat" aggravator. Considering the Tenth Circuit's specific finding in Cannon v. Mullin that Ring is merely an extension of Apprendi to the capital sentencing

69. Id. ¶ 11-12, 67 P.3d at 919-20.
70. Id. ¶ 12, 67 P.3d at 920.
72. Ring, 536 U.S. at 597 n.4.
73. 291 F.3d 658 (10th Cir. 2002).
74. Id. at 677-78.
75. Id. at 678.
76. Id. at 678.
77. Id.
context, the soundness of the Oklahoma Court of Criminal Appeals’ substantive treatment of Ring-based challenges can hardly be denied.

III. Procedural Inapplicability of Ring to Oklahoma Post-Conviction Challenges

Less clear, however, is the Oklahoma Court of Criminal Appeals’ consistent finding that death row inmates may pursue challenges based on Ring on collateral review. The court’s approach disregards well-established principles that govern the retroactive application of new constitutional rules of criminal procedure to Oklahoma post-conviction cases. The Oklahoma Court of Criminal Appeals should not reach the merits of Ring-based claims raised for the first time in a post-conviction application. As discussed below, the court’s willingness to review these claims on the merits, as opposed to finding them barred from review, will give rise to needless litigation and delay in both state and federal death penalty proceedings. This is unnecessary considering the federal courts’ unwillingness to allow merits review of Apprendi-based claims on collateral review.

Under Oklahoma law, post-conviction relief is clearly a form of collateral review. The terms “post-conviction review” and “collateral review” generally apply to any challenge made after a defendant’s state conviction has become final. The Supreme Court, in Teague v. Lane, held that courts cannot retroactively apply new constitutional rules of criminal procedure to collateral challenges unless they place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” or define “watershed rules” that “require[] the observance of ‘those procedures that . . . are ‘implicit in the concept of ordered liberty.’” The Tenth Circuit has noted that “[t]o qualify as a watershed rule of criminal procedure, the rule must . . . improve the accuracy with which defendants are convicted or acquitted, [and] ‘alter [the Court’s] understanding of the bedrock procedural elements essential to the fairness of a proceeding.”

78. 297 F.3d 989, 994 (10th Cir. 2002) ("It is clear, however, that Ring is simply an extension of Apprendi to the death penalty context.").
80. The Tenth Circuit has found that a state court conviction becomes final for purposes of federal habeas review “after the United States Supreme Court has denied review, or, if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed.” Locke v. Saffle, 237 F.3d 1269, 1273 (10th Cir. 2001) (quoting Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999)); see also U.S. Sup. Ct. R. 13.
82. United States v. Mora, 293 F.3d 1213, 1218-19 (10th Cir. 2002) (quoting Sawyer v.
"'watershed rules' are on the magnitude of the rule announced in *Gideon v. Wainwright*.'

In *Bousley v. United States*, however, the Supreme Court noted that "*Teague* by its terms applies only to procedural rules" and therefore did not apply to bar retroactive application of substantive interpretations of criminal statutes.

The Oklahoma Court of Criminal Appeals has adopted the *Teague* retroactivity principles as a matter of state law and, consistent with *Bousley*, has found that *Teague* does not bar retroactive application of substantive interpretations of state criminal statutes. In *Cannon v. State*, an unpublished decision, the Oklahoma Court of Criminal Appeals found that *Ring* was a new rule of constitutional law that applied retroactively to cases on post-conviction review. Citing *Bousley*, the court reasoned that "[*a]s a new substantive rule of law, *Ring* applies retroactively to this case on collateral review." To date, this constitutes the fullest explanation for the court's decision to provide merits review of *Ring*-based claims raised for the first time on post-conviction review. In *Torres*, the first published post-conviction decision from the Oklahoma Court of Criminal Appeals that squarely addresses *Ring*, the court cited only to title 22, section 1089(D)(9) of the Oklahoma Statutes to support its finding that the merits of a *Ring* claim can be reviewed on post-conviction. Section 1089(D)(9) explains when the legal basis of a claim is "previously unavailable" to a defendant such that he can raise the claim for the first time in a post-conviction relief application. In footnote 14 of *Cannon*, however, the court

---

Smith, 497 U.S. 227, 242 (1990)).

83. Id. at 1219.
85. Id. at 620.
88. Id.
90. Section 1089(D)(9) provides that the legal basis of a claim was previously unavailable if it
   (a) was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date, or (b) is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or a court of appellate jurisdiction of this state and had not been announced on or before that date.
22 OKLA. STAT. § 1089(D)(9) (2001). Under the Oklahoma Post-Conviction Procedures Act, the Oklahoma Court of Criminal Appeals may not consider the merits of a claim in either an initial or subsequent post-conviction application unless the defendant can establish that the legal
also cited section 1089(D)(9) as authority for its decision to review the merits of Cannon's *Ring* claim.\(^9\) The court followed its statutory citation with a statement that: (1) "*Ring* sets forth a new rule of law which could not have been previously formulated from either this Court’s decisions or those of the United States Supreme Court" because it overruled *Walton*; and (2) *Ring* represents a new rule of substantive law that applied retroactively to Cannon’s case on collateral review pursuant to *Bousley*.\(^9\)

The Oklahoma Court of Criminal Appeals’ statement that *Ring* represents a new rule of substantive law applicable on post-conviction review contradicts the findings of nearly every federal circuit court that has reviewed *Apprendi*- and *Ring*-based claims. For example, in *Cannon v. Mullin*,\(^9\) the Tenth Circuit rejected a habeus petitioner’s attempt to file a second or successive federal habeas petition so he could present a *Ring* claim.\(^9\) Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Cannon could only file a second or successive federal habeas petition if he met the requirements of 28 U.S.C. § 2244(b), a provision that severely restricts the ability of a state prisoner to bring second or successive federal habeas petitions attacking his or her state-court convictions and sentences.\(^9\) The Tenth Circuit specifically rejected Cannon’s claim that the Supreme Court had made *Ring* retroactive to cases on collateral review.\(^9\) The court also specifically rejected Cannon’s argument that *Ring* announced a new rule of substantive criminal law that, under *Bousley*, rendered *Ring* retroactive for purposes of collateral review.\(^9\) The court found that *Ring* merely extended *Apprendi* and, because of the court’s previous holding that

\(^9\) Id.

\(^9\) 297 F.3d 989 (10th Cir. 2002). Note that *Cannon v. Mullin* involves the same defendant who filed the state post-conviction application in *Cannon v. State*, No. PCD-2002-877, the case discussed above. Both cases were filed on the eve of Cannon’s execution in an attempt to win a stay of execution. Cannon lost both bids, however, and was executed as scheduled on July 23, 2002.

\(^9\) Id. at 992.

\(^9\) Under § 2244(b)(2), a claim presented in a second or successive habeas corpus application that is based on a new rule of constitutional law and that was not presented in a prior application "shall be dismissed" unless "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2) (2000).

\(^9\) *Cannon*, 297 F.3d at 993-94.

\(^9\) Id. at 992-95.
Apprendi announced a rule of criminal procedure governed by Teague, was therefore not a substantive rule of criminal law.98

To be sure, the federal circuit courts that have reviewed the issue agree that Apprendi sets forth a new rule of criminal procedure.99 Moreover, every circuit court that has ruled on the issue has failed to find that Apprendi applies retroactively on collateral review pursuant to Teague.100 Justice O’Connor, citing Teague in her Ring dissent, expressed her belief that “many” of the prisoners launching Ring claims would be unable to benefit from the decision because, inter alia, their convictions were final.101 It seems clear, therefore, that Ring does not involve a new rule of substantive law that would be applicable retroactively under Bousley. Ring, like Apprendi, constitutes only a procedural change in the law regarding the right to jury trial on certain elements of the capital sentencing process. While circuit precedent on the applicability of Ring to cases on collateral review is sparse, the fact that Ring merely extends Apprendi should carry the day in all future federal litigation on this procedural issue.102 In this sense, the Tenth Circuit’s approach to collateral Ring-based

98. Id. at 994-95.
99. See United States v. Swinton, 333 F.3d 481, 488-89 (3d Cir. 2003); Coleman v. United States, 329 F.3d 77, 82-88 (2d Cir. 2003); Sepulveda v. United States, 330 F.3d 55, 63 (1st Cir. 2003); United States v. Sanchez-Cervantes, 282 F.3d 664, 665 (9th Cir. 2002) (“Apprendi is a new rule of criminal procedure”); McCoy v. United States, 266 F.3d 1245, 1256 (11th Cir. 2001); In re Clemmons, 259 F.3d 489, 491 (6th Cir. 2001); Daniels v. United States, 254 F.3d 1180, 1192 (10th Cir. 2001); United States v. McCoy, 252 F.3d 993, 997-1001 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 147 (4th Cir. 2001).
100. Swinton, 333 F.3d at 491; Coleman, 329 F.3d at 88-90; Sepulveda, 330 F.3d at 59-63; United States v. Brown, 305 F.3d 304, 309 (5th Cir. 2002); Curtis v. United States, 294 F.3d 841, 842 (7th Cir. 2002); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir. 2002); McCoy, 266 F.3d at 1257; Clemmons, 259 F.3d at 492-93; Moss, 252 F.3d at 998-99; Sanders, 247 F.3d at 148; Jones v. Smith, 231 F.3d 1227, 1236 (9th Cir. 2000); see also Harris v. United States, 536 U.S. 545, 581 (2002) (“No Court of Appeals, let alone this Court, has held that Apprendi has retroactive effect.”) (Thomas, J., dissenting).
101. Ring, 536 U.S. at 621.
102. Comer v. Stewart, 312 F.3d 1157, 1158 (9th Cir. 2002) (citing Summerlin v. Stewart, 267 F.3d 926 (9th Cir. 2001)); see also Summerlin v. Stewart, 310 F.3d 1221 (9th Cir. 2002) (Order Granting En Banc Rehearing). The Eleventh Circuit has held that Ring represents a new constitutional rule of criminal procedure that does not apply retroactively under Teague to cases on collateral review. Turner v. Crosby, No. 02-14941, 2003 WL 21739734, at **33-37 (11th Cir. July 29, 2003). The court wrote that “[o]ur conclusion that Ring announces a procedural rule is bolstered by Ring’s status as an extension of Apprendi.” Id. at *34. The Fifth Circuit in dicta has stated that “[s]ince the rule in Ring is essentially an application of Apprendi, logical consistency suggests that the rule announced in Ring is not retroactively available.” In re Johnson, 334 F.3d 403, 405 n.1 (5th Cir. 2003). At press time for this article, the Tenth Circuit held in an Oklahoma death penalty case that “Ring may not be applied retroactively to cases on collateral review.” Workman v. Mullin, No. 01-6448, 2003 WL 22024965, at *13 (10th Cir. Aug. 26, 2003) (citing Cannon, 297 F.3d at 994). A week later, however, a divided en banc
claims seems far sounder than the approach taken by the Oklahoma Court of Criminal Appeals. This is important because federal courts, in federal habeas proceedings, will ultimately review the decisions of state criminal courts.

However, it should be noted that the Oklahoma Court of Criminal Appeals has not expressly repeated the Bousley retroactivity analysis applied in Cannon when reviewing subsequent Ring-based claims on post-conviction. Instead, the court has referenced that Ring announced a new rule of constitutional law that was previously unavailable and therefore review was appropriate under section 1089(D)(9). This analysis appears to focus on the requirements of section 1089(D)(9)(a), finding that review is required under this particular provision because Ring-based claims could not have been formulated from Supreme Court precedent at the time of the prisoner’s default.

In this sense, the Oklahoma court’s merits review of Ring-based claims appears driven by the court’s finding that the legal basis of Ring-based claims was previously unavailable. The court could, however, hold that the legal basis of a Ring claim in fact could have been formulated in a prior post-conviction application from Apprendi, a final decision of the Supreme Court, and therefore section 1089(D)(9)(a)’s requirements were not satisfied as a matter of state law. This approach makes sense considering that Ring is merely an extension of Apprendi, which was itself considered a new rule of constitutional law.

Indeed, the dissenters in Apprendi called into question the validity of Walton v. Arizona despite the majority’s attempt to distinguish Walton. If section 1089(D)(9)(a) were deemed inapplicable under the court’s analysis, determining whether the legal basis of a Ring claim was previously available would then fall to section 1089(D)(9)(b). Because the Supreme Court has not declared Ring retroactive, the Court of Criminal Appeals could then find that Ring was not retroactive, pursuant to Teague, and deny collateral review.

panel of the Ninth Circuit held that Ring applied retroactively to cases on collateral review. Summerlin v. Stewart, 341 F.3d 1082, 1121 (9th Cir. 2003) (“We hold, both on substantive and procedural grounds, that the Supreme Court’s decision in Ring has retroactive application to cases on federal habeas review.”). Ninety-four death row inmates in Arizona and sixteen death row inmates in Idaho who have exhausted their direct appeals in state court will be impacted by this decision, as well as an undetermined number of similarly situated death row inmates in Montana. Adam Liptak, Judges' Rulings Imposing Death Are Overturned, N.Y. TIMES, Sept. 3, 2003, at A1.

103. Brown, 2003 OK CR 7, ¶ 3, 67 P.3d at 918 (“In as much as Ring established a new rule of constitutional magnitude which was previously unavailable to Brown and arguably relates to his case, we will review this claim.”); Torres, 2002 OK CR 35, ¶ 3 & n.8, 58 P.3d at 215.

104. Browning v. United States, 241 F.3d 1262, 1266 (10th Cir. 2001).

105. Apprendi, 530 U.S. at 538 (“The distinction of Walton offered by the Court today is baffling, to say the least . . . . If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.”).

106. 22 OKLA. STAT. § 1089(D)(9)(a), (b) (2001); see also Walker v. State, 1997 OK CR 3, https://digitalcommons.law.ou.edu/olr/vol56/iss2/18
The more straightforward approach, however, would be for the court to expressly apply *Teague* in its published decisions to *Ring* claims it believes meet section 1089(D)(9)(a)'s requirements for review and, consistent with the great weight of federal authority set forth above, find that *Ring* does not apply retroactively to cases on collateral review. Nothing in section 1089 prevents this analysis and the court's discussion of *Teague* and *Bousley* in *Cannon v. State* suggest an acknowledgment that *Teague* must be considered here. Applying *Teague* to these claims is consistent with section 1089's purpose, namely, to restrict collateral challenges by death row inmates based on intervening changes in the law, and would prevent the potentially uneven application of *Teague* between capital and non-capital cases.

**IV. Impact of the Oklahoma Court of Criminal Appeals' Treatment of Ring Claims**

It would be difficult to overstate the impact of the Oklahoma Court of Criminal Appeals' decision to conduct a merits review of the litany of collateral *Ring* claims now being advanced. Most significantly, the court's decision to review the substantive merits of these claims will only fuel more collateral attacks by Oklahoma death row inmates challenging various aspects of Oklahoma's capital sentencing scheme under *Ring*. Virtually every death row

¶ 34 n.48, 933 P.2d 327, 338 n.48.

107. In *Pickens v. State*, 2003 OK CR 16, ¶ 7, the court reviewed a collateral claim, based on the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), that Pickens was mentally retarded and therefore could not be executed under the Eighth and Fourteenth Amendments. The court found that "review of this claim on the merits in this subsequent post-conviction application is authorized by the plain language of Section 1089(D)(9)." *Id.* While this language makes it appear that the court is applying section 1089(D)(9)(a), without regards to *Teague* retroactivity principles, the court did find in the very next paragraph that review of an *Atkins* claim is warranted under section 1089(D)(9) because it is based on a new rule of constitutional law that, pursuant to *Penry v. Lynaugh*, 492 U.S. 302 (1989), falls outside of *Teague's* ban on retroactive application of new constitutional rules. *Pickens*, 2003 OK CR 16, ¶¶ 8-9.

108. See *Valdez v. State*, 1997 OK CR 12, ¶ 3 n.7, 933 P.2d 931, 933 n.7 (noting that "the legislature has greatly circumscribed this Court's power to apply intervening changes in the law to capital post-conviction applicants" with enactment of section 1089(D)(9)(a) & (b), comparing these subsections to *Teague's* holding that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect."); *Walker v. State*, 1997 OK CR 3, ¶ 4, 933 P.2d 229, 230 (noting that section 1089 makes it even more difficult for capital post-conviction applicants to avoid procedural bars).

109. See *Burleson*, 2002 OK CR 15, ¶ 3 n.10, 46 P.3d at 151 n.10 (noting in non-capital case that "[t]his Court has adopted *Teague* as it applies to new rules of criminal procedure").
inmate can now raise a *Ring*-based claim that the Oklahoma Court of Criminal Appeals will review on the merits.\(^{110}\) Besides substantially increasing the court’s workload, the court’s decision to review *Ring* claims on the merits has the potential to cause delay in federal habeas death penalty proceedings as federal courts stay pending federal habeas actions while state prisoners exhaust *Ring* claims in state court. Although the Tenth Circuit found in *Cannon* that *Ring* does not apply retroactively as a new rule of substantive criminal law,\(^ {111}\) and held in *United States v. Mora* that *Apprendi* does not apply retroactively to cases on collateral review,\(^ {112}\) the potential exists for courts to hold federal habeas proceedings in abeyance because relief in state court on a *Ring* claim would moot federal habeas challenges to a death sentence.\(^ {113}\)

Obviously, one of the primary objectives for death row inmates is to obtain a delay in proceedings that will postpone any future execution date. Any delay caused by the court’s merits review of *Ring*-based claims is unwarranted considering that Oklahoma’s capital sentencing scheme clearly satisfies *Ring*. The Oklahoma Court of Criminal Appeals has made clear that state post-conviction relief based on *Ring* will not be forthcoming. Nonetheless, the

\(^{110}\) The effect of some of this litigation may be mitigated by Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2003), requiring second or subsequent capital post-conviction applications to be filed in state court within sixty days from the date the previously unavailable legal basis serving as the basis for a new issue is announced. However, application of this state procedural default rule by the Oklahoma Court of Criminal Appeals will not prevent protracted litigation on federal habeas review by death row inmates seeking to amend their habeas petitions with *Ring* claims defaulted under this rule. Federal courts do not review claims defaulted in state court on an independent and adequate state law ground. *English v. Cody*, 146 F.3d 1257, 1259 (10th Cir. 1999) (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)). Death row inmates with petitions pending in federal district court will therefore, after exhausting state remedies, simply challenge the adequacy of the Oklahoma Court of Criminal Appeals’ application of the sixty-day rule itself in an attempt to obtain review by the federal courts of any defaulted *Ring* claims. *See Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999) (describing state procedural default rule as “adequate” only if it is strictly or regularly followed and applied evenhandedly to all similar claims); *Hooks v. Ward*, 184 F.3d 1206, 1213-17 (10th Cir. 1999) (describing assignment of burdens to the parties for adequacy challenges to state procedural default rules). Of course, *Ring* claims defaulted under Oklahoma’s sixty-day rule must still meet the AEDPA’s one-year statute of limitations as discussed below.

\(^{111}\) *Cannon v. Mullin*, 297 F.3d 994 (10th Cir. 2002).

\(^{112}\) *United States v. Mora*, 293 F.3d 1213, 1219 (10th Cir. 2002).

\(^{113}\) In at least one case a federal district court has held proceedings in abeyance pending exhaustion of a *Ring* claim in Oklahoma state court. This abeyance order was entered over the State’s vehement objection. *See Young v. Mullin*, No. 00-CV-310P(C) (N.D. Okla. Oct. 24, 2002). The Oklahoma Court of Criminal Appeals denied Young’s *Ring*-based claims nearly seven months later in an unpublished decision. *See Young v. State*, No. PCD-2002-1045 (Okla. Crim. App. May 22, 2003).
Oklahoma Court of Criminal Appeals' decision to review Ring claims on the merits will spawn further litigation by Oklahoma death row inmates who seek a review of the state court's substantive adjudication of their Ring claims.\(^ {114} \)

This litigation will primarily comprise motions to amend existing habeas petitions that are pending in the various federal district courts. These attempts should largely fail because of the AEDPA's one-year limitation period that governs federal habeas actions.\(^ {115} \) The AEDPA generally grants a prisoner one year from the date his state conviction became final on direct appeal in which to file a petition for writ of habeas corpus seeking federal review of his conviction and sentence.\(^ {116} \) One pertinent exception to this rule, however, is found at 28 U.S.C. § 2244(d)(1)(C). That statute allows the limitations period to run from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."\(^ {117} \)

Most Oklahoma death row inmates with pending habeas petitions in federal district court will have exceeded the general one-year limitation. Such a prisoner will be required to satisfy § 2244(d)(1)(C)'s requirements for presentment of any Ring-based claims. It seems clear, however, that habeas petitioners will be unable to meet § 2244(d)(1)(C)'s requirements anytime soon because the Supreme Court — and for that matter the Tenth Circuit — has not made Ring retroactive to cases on collateral review.\(^ {118} \) Nor has the Supreme Court actually recognized the myriad of "constitutional right[s]" contained in the various Ring-based claims now being advanced by Oklahoma death row inmates. And finally, even if these substantial procedural hurdles were overcome, the Tenth Circuit's holdings in Cannon, that neither Apprendi nor


\(^ {115} \) Id. § 2244(d)(1).

\(^ {116} \) Id. § 2244(d)(1)(A).

\(^ {117} \) Id. § 2244(d)(1)(C).

\(^ {118} \) The same result awaits any Oklahoma death row inmate who seeks permission from the Tenth Circuit to file a second or successive habeas petition based on Ring. The AEDPA provides that any claim presented in a second or successive habeas corpus petition that was not raised in a previous petition "shall be dismissed" unless the prisoner "shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Id. § 2244(b)(2)(A). In Cannon v. Mullin, the Tenth Circuit denied Cannon's request to file a second or successive habeas petition based on Ring. Cannon v. Mullin, 297 F.3d 989, 993-94 (10th Cir. 2002); see also Moore v. Kinney, 320 F.3d 767, 771 n.3 (8th Cir. 2003) (per curiam) ("The Supreme Court did not, and has not, expressly made the ruling in Ring retroactive. Absent an express pronouncement on retroactivity from the Supreme Court, the rule from Ring is not retroactive" for § 2244 purposes).
Ring apply retroactively to cases pending on collateral review as new rules of substantive law and that Ring is merely an extension of Apprendi, now bind Oklahoma habeas cases.

All this will not, however, prevent an onslaught of litigation by death row inmates who seek more delay in their death penalty cases. Because Oklahoma’s capital sentencing scheme clearly satisfies Ring’s mandate, such delay is both unnecessary and unfortunate. Based upon the above discussion, Justice O’Connor’s prediction that Ring would only exacerbate the “severely destabilizing effect” already inflicted by Apprendi is materializing in Oklahoma.

Merits review of Ring claims by the Oklahoma Court of Criminal Appeals will undoubtedly result in delays in capital appellate proceedings. This is unfortunate considering the consensus by federal circuit courts that Apprendi should not apply retroactively to cases on collateral review, Ring is merely an extension of Apprendi and neither decision has any applicability to Oklahoma’s capital sentencing scheme. It is against this backdrop that some of the very hazards described by Justice O’Connor in her Ring dissent appear to be materializing.