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NOTE

THE DEATH PENALTY AND THE SIXTH AMENDMENT: HOW WILL THE SYSTEM LOOK AFTER *RING V. ARIZONA*?

CASEY LAFFEY†

INTRODUCTION

Throughout American legal history, there has never been a more controversial topic than the death penalty. Until recently, a capital defendant's Sixth Amendment right to a jury trial¹ did not extend to the determination of aggravating factors that would allow imposition of the death penalty under state law.² Historically, that question was decided by a judge. In *Ring v. Arizona*,³ a six-member majority of the United States Supreme Court⁴ held that the Sixth Amendment's jury trial guarantee requires that a jury must find the existence of any aggravating factor legally necessary for imposition of the death penalty beyond a reasonable doubt.⁵ This decision will significantly affect the way each state's criminal justice system addresses

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¹ See U.S. CONST. amend. VI (stating that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed").

² See *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (holding that Arizona's capital sentencing system did not violate the Sixth Amendment because the determination of aggravating circumstances did not qualify as an "element of the crime of capital murder"), *overruled in part by* *Ring v. Arizona*, 122 S.Ct. 2428 (2002).

³ 122 S. Ct. 2428 (2002); 536 U.S. 584 (2002).

⁴ *Id.* at 2432. Justices Ginsburg, Stevens, Scalia, Kennedy, Souter, and Thomas formed the majority. Justice Breyer concurred in the judgment, while Justices O'Connor and Chief Justice Rehnquist dissented. *Id.*

⁵ *Id.* at 2432 (stating that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment").

capital punishment, particularly those permitting death sentencing by judicial decision.

This Note will analyze how the *Ring* decision will affect death penalty systems in states that have judicial capital sentencing systems and will explore *Ring's* effect on the hundreds of convicted defendants sitting on death row. Part I will analyze the issue in *Ring* as well as the state and federal struggles to distinguish two prior Supreme Court decisions that addressed sentencing procedures and the reasons that the Supreme Court granted certiorari. Part II will discuss the facts and holding of *Ring* and try to clarify any ambiguity surrounding the scope of the decision. Parts III and IV will provide a more detailed discussion of the decision, its effect, the disruption of death penalty systems in nine states, and the need to resentence many convicted capital defendants under a jury system. Part V will analyze the unprecedented changes in the capital punishment system in the United States caused by *Ring*.

I. PROBLEMS LEADING UP TO *RING*

The Supreme Court granted certiorari in *Ring* to resolve the difficulty courts were having distinguishing two of its prior holdings,⁶ *Walton v. Arizona*⁷ and *Apprendi v. New Jersey*.⁸ In *Walton*, a jury convicted the defendant of first-degree felony murder⁹ under Arizona's penal code for the death of Thomas Powell.¹⁰ In accordance with Arizona's sentencing procedures,¹¹ the trial judge conducted a separate sentencing hearing without a jury. He determined that certain statutory aggravating

⁶ *Id.* at 2436 ("We granted *Ring's* petition for a writ of certiorari to allay uncertainty in the lower courts caused by the manifest tension between *Walton* and the reasoning of *Apprendi*." (internal citations omitted)).

⁷ 497 U.S. 639 (1990).

⁸ 530 U.S. 466 (2000).

⁹ See ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 2002) (outlining the elements of first-degree felony murder as "[a]cting either alone or with one or more other persons the person commits" one of certain enumerated felonies).

¹⁰ See *State v. Walton*, 769 P.2d 1017, 1022 (Ariz. 1989) (discussing how *Walton* and two accomplices robbed *Powell* at gunpoint, forced him into his car, and drove out to the desert where *Walton* forced him to lie face down on the ground and shot him in the head), *aff'd* 497 U.S. 639 (1990), *overruled in part* by *Ring v. Arizona*, 122 S.Ct. 2428 (2002).

¹¹ See ARIZ. REV. STAT. ANN. § 13-703(B) (West 2001) (providing for a separate sentencing hearing to determine whether defendants convicted of first-degree murder should be sentenced to death or life imprisonment).

circumstances were established and sentenced Walton to death.¹² After the Arizona Supreme Court affirmed Walton's conviction and sentence,¹³ the United States Supreme Court granted certiorari to determine the constitutionality of Arizona's capital sentencing system.¹⁴ Walton argued that a jury should determine every sentencing decision conditioned upon a finding of fact and that because Arizona law permitted factual determinations to be made by a judge rather than a jury, Arizona's sentencing system was unconstitutional.¹⁵ In upholding Walton's sentence, the Court held that Arizona's sentencing system did not violate the Sixth Amendment because the aggravating circumstances found by the judge qualified as sentencing considerations rather than as an element of the offense.¹⁶ The Court buttressed its decision by citing *Cabana v. Bullock*,¹⁷ which upheld an appellate court's power to determine whether a "defendant killed, attempted to kill, or intended to kill" in order to qualify a defendant for the death sentence for first-degree felony murder.¹⁸ Relying on *Cabana*, the Court noted that even though defendants convicted of felony murder could not be put to death without a finding of one of these facts, such factual findings were not "a new element of the crime of capital murder that must be found by the jury."¹⁹ The Court analogized the *Cabana* decision to Arizona's capital sentencing system in holding:

If the Constitution does not require that the *Edmund* finding be prove[n] as an element of the offense of capital murder, and does not require a jury to make [such a] finding, we cannot conclude that a State is required to denominate aggravating

¹² See *Walton v. Arizona*, 497 U.S. 639, 645 (1990) (stating that the trial judge found that Walton committed the crime "in an especially heinous, cruel or depraved manner" and that "the murder was committed for pecuniary gain," two statutorily enumerated aggravating factors qualifying a defendant for the death penalty).

¹³ See *State v. Walton*, 769 P.2d at 1038 (finding no reversible error).

¹⁴ See *Walton v. Arizona*, 493 U.S. 808 (1989).

¹⁵ See *Walton*, 497 U.S. at 647.

¹⁶ See *id.* at 649 ("[W]e cannot conclude that a State is required to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances.").

¹⁷ 474 U.S. 376 (1986).

¹⁸ See *Walton*, 497 U.S. at 648-49; *Cabana v. Bullock*, 474 U.S. 376, 385 (1986).

¹⁹ *Walton*, 497 U.S. at 649 (quoting *Cabana*, 474 U.S. at 385 n.3).

circumstances "elements" of the offense or permit only a jury to determine the existence of such circumstances.²⁰

Ten years later, the Supreme Court held in *Apprendi v. New Jersey* that a New Jersey statute that enhanced sentences for defendants committing hate crimes²¹ violated a defendant's Sixth Amendment right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."²² In *Apprendi*, a jury convicted the defendant of second-degree possession of a firearm,²³ a crime normally carrying a maximum penalty of ten years.²⁴ Under New Jersey's hate crime enhancement statute,²⁵ however, the trial judge determined that the crime was motivated by race²⁶ and sentenced the defendant to twelve years in prison.²⁷ On appeal, the United States Supreme Court held that any state-imposed increase in a defendant's authorized punishment that is conditioned upon a finding of fact is unconstitutional unless the jury finds that fact beyond a reasonable doubt.²⁸

Initially, the Court relied upon historical background and noted that the right to a trial by jury has always required that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours."²⁹ Second, "[w]here a

²⁰ *Id.* at 649. The court refers to the finding that the defendant killed, attempted to kill, or intended to kill as the "Edmund finding," citing *Edmund v. Florida*, 458 U.S. 782 (1982).

²¹ See *Apprendi v. New Jersey*, 530 U.S. 466, 468-69 (2000) (stating that hate crimes in New Jersey were those committed with the intent "to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity").

²² *Id.* at 477 (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

²³ See N.J. STAT. ANN. § 2C:39-4(a) (West 2002) (stating that "[a]ny person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree").

²⁴ See *Apprendi*, 530 U.S. at 468.

²⁵ See *id.* at 470 (discussing how New Jersey enhanced sentencing for crimes committed with "a biased purpose").

²⁶ *Id.* at 471.

²⁷ *Id.*

²⁸ *Id.* at 482-83 (pronouncing that a defendant may not be "expose[d] . . . to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone").

²⁹ *Id.* at 477 (alteration in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

statute annexes a higher degree of punishment to a . . . felony . . . in order to bring a defendant within that higher degree of punishment, [the indictment] must expressly charge it to have been committed . . . and must state the circumstances with certainty and precision.’”³⁰ The Court further emphasized that defining the requirement of racial animus as a sentence enhancement did not justify treating it differently from any other fact that must be stated in an indictment and proven to a jury beyond a reasonable doubt.³¹ In applying the historical concerns embodied in the Sixth Amendment to New Jersey’s statute, the Court held that a legislature could not “remove[] the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”³²

Subsequent courts have struggled with *Walton*’s continued applicability in light of *Apprendi*.³³ The Fourth Circuit has called it “perplexing” that a jury is required for factual findings of drug quantities while they are not essential for determining the presence or absence of aggravating factors justifying imposition of a capital sentence.³⁴ In addition, the Ninth Circuit stated that although “*Apprendi* may raise some doubt about *Walton*,” the lower courts are still required to apply *Walton* to capital cases until the Supreme Court expressly overrules it.³⁵ Similarly, in her dissent in *Apprendi*, Justice O’Connor referred to the Court’s distinction of *Walton*³⁶ as “baffling.”³⁷ She stated that *Walton* was grounded on the view that the Constitution does not require a jury to make the factual determinations required for imposition of the death penalty.³⁸ She argued that if the majority intended to hold that facts used to justify a sentencing

³⁰ *Id.* at 480 (quoting 2 M. HALE, PLEAS OF THE CROWN *170, in J. ARCHBOLD, PLEADING & EVIDENCE IN CRIMINAL CASES 51 (15th ed. 1862)).

³¹ *Id.* at 494–97.

³² *Id.* at 482–83.

³³ *Apprendi*, 530 U.S. at 482–84.

³⁴ *United States v. Promise*, 255 F.3d 150, 159–60 (4th Cir. 2001).

³⁵ *Hoffman v. Arave*, 236 F.3d 523, 542 (9th Cir. 2001).

³⁶ *See Apprendi*, 530 U.S. at 496–97 (distinguishing *Walton* on the grounds that death was the maximum sentence for first-degree murder in Arizona and judicial determination of aggravated factors was simply a determination between a maximum or lesser penalty).

³⁷ *Id.* at 538 (O’Connor, J., dissenting).

³⁸ *Id.* (O’Connor, J., dissenting).

enhancement must be found by a jury beyond a reasonable doubt, "one would be hard pressed to tell [this] from the opinion [the majority] issues [in *Walton*]." ³⁹ Accordingly, it became clear that the Supreme Court needed to clarify the constitutionality of judicial determination of so-called capital sentencing factors and overrule either *Walton* or *Apprendi*.

II. *RING V. ARIZONA*

A. *Factual Background and the Lower Courts*

In *Ring v. Arizona*, defendant Timothy Ring was accused of murdering the driver of an armored Wells Fargo van and stealing more than \$562,000 in cash and \$271,000 in checks.⁴⁰ After receiving a tip from an informant and discovering that Ring made several expensive cash purchases, the Glendale, Arizona police department placed wiretaps on the telephones of Ring, his friend James Greenham, and a third suspect, William Ferguson.⁴¹ After monitoring Ring and Greenham's phone conversations over the next couple of months and hearing Ring tell Ferguson that "[his house] contain[ed] a very large bag," the police obtained and executed a search warrant at Ring's house and recovered a duffel bag containing over \$271,000 in cash.⁴²

At trial, Ring claimed that the money seized at his house was for a construction company that he and Greenman were planning to start and that he had earned money as an informant for the Federal Bureau of Investigation (FBI), a bail bondsman, and gunsmith.⁴³ The prosecution called an FBI agent who testified that Ring had only been paid \$458 as an informant;⁴⁴ other evidence showed that Ring's income had not exceeded \$8,800 as a bondsman and gunsmith.⁴⁵ The prosecution also

³⁹ *Id.* (O'Connor, J., dissenting).

⁴⁰ *Ring v. Arizona*, 122 S. Ct. 2428, 2432–33 (2002). On November 28, 1994, the van pulled up to the Dillard's department store in Glendale, Arizona and a passenger, Dave Moss, went inside the store to pick up money. *Id.* at 2432. When he returned, the van and the driver were missing. *Id.* Later that same day, the Maricopa County Sheriff's Department found the van in a church parking lot, and the driver, John Magoch, dead inside from a single gunshot to the head. *Id.* at 2432–33.

⁴¹ *Id.* at 2433.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

introduced a note found in Ring's house with the amount \$575,995 and the letters "Y" and "T" written on it.⁴⁶ The prosecution argued that the letter "Y" stood for "Yoda," which was Greenman's nickname and that the letter "T" stood for "Timothy Ring."⁴⁷ Charged with an instruction on both first-degree premeditated murder and first-degree felony murder, the jury deadlocked on the count of premeditated murder⁴⁸ but convicted Ring of first-degree felony murder for homicide in the course of an armed robbery.⁴⁹

The Supreme Court has held that for a defendant convicted of first-degree felony murder to be eligible for the death penalty, the Eighth Amendment requires a finding that the defendant either "killed or attempted to kill"⁵⁰ or was a "major participa[nt] in the felony committed . . . [and demonstrated] reckless indifference to human life."⁵¹ To establish this, the prosecution called James Greenham, Ring's accomplice, to testify that Ring was the shooter.⁵² Relying on his testimony, the trial judge held that Ring was the shooter and was therefore eligible for the death penalty.⁵³

Under Arizona law, upon a jury conviction of first-degree murder, the trial judge must hold a sentencing hearing without a jury.⁵⁴ At the hearing, a judge determines whether specifically enumerated "aggravating circumstances"⁵⁵ and "mitigating circumstances"⁵⁶ are present. In order to sentence the defendant to death, the judge must find at least one aggravating circumstance and must conclude that "there are no mitigating

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (stating that six of twelve jurors voted to acquit Ring of premeditated murder).

⁴⁹ *Id.*

⁵⁰ *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

⁵¹ *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

⁵² *See Ring*, 122 S. Ct. at 2435. Greenham had agreed to plead guilty to second-degree murder and armed robbery in exchange for cooperation in the prosecution against Ring. *Id.*

⁵³ *Id.*

⁵⁴ ARIZ. REV. STAT. ANN. § 13-703(B) (West 2001) (explaining that the hearing must be "before the court alone").

⁵⁵ *Id.* § 13-703(F) (describing the ten enumerated aggravating circumstances that the sentencing judge can consider).

⁵⁶ *Id.* § 13-703(G) (listing five enumerated mitigating circumstances that the court can consider). However, the judge is "not limited to" only those five factors. *Id.*

circumstances sufficiently substantial to call for leniency.”⁵⁷ At Ring’s sentencing hearing, the trial judge found two statutory aggravating factors: first, that Ring committed the offense in order to receive an item of “pecuniary value,”⁵⁸ and second, that he committed the offense “in an especially heinous, cruel and depraved manner.”⁵⁹ The judge recognized one mitigating factor—Ring’s minimal criminal record⁶⁰—but stated that it did not “call for leniency”⁶¹ and concluded that Ring should be sentenced to death.⁶²

Ring appealed to the Arizona Supreme Court. He claimed that Arizona’s capital sentencing system violated the Sixth and Fourteenth Amendment’s jury trial guarantee. He cited *Apprendi* to support the argument that the system wrongfully permitted a judge to determine findings of fact necessary to raise a defendant’s maximum penalty above that which could be imposed based on the facts of the jury verdict alone.⁶³ In response, the state argued that the Supreme Court had already upheld the constitutionality of its sentencing scheme in *Walton*.⁶⁴ Although the Arizona court noted that *Apprendi* and *Jones v. United States*⁶⁵ “raise[d] some question[s] about the continued viability of *Walton*,”⁶⁶ it held that *Walton* was still binding authority and would remain so until expressly overruled by the United States Supreme Court.⁶⁷

⁵⁷ *Id.* § 13-703(E).

⁵⁸ *Ring*, 122 S. Ct. at 2435; *see also* ARIZ. REV. STAT. ANN. § 13-703(F)(5) (West 2001).

⁵⁹ *Ring*, 122 S. Ct. at 2435; *see also* ARIZ. REV. STAT. ANN. § 13-703(F)(6) (West 2001).

⁶⁰ *Ring*, 122 S. Ct. at 2435; *see also* ARIZ. REV. STAT. ANN. § 13-703(G) (West 2001) (“The court shall consider as mitigating circumstances any factors . . . including any aspect of the defendant’s character, propensities or record.”).

⁶¹ *Ring*, 122 S. Ct. at 2436.

⁶² *Id.*

⁶³ *State v. Ring*, 25 P.3d 1139, 1150 (Ariz. 2001).

⁶⁴ *Id.*

⁶⁵ 526 U.S. 227 (1999) (holding that a separate determination of serious bodily injury necessary to raise a maximum sentence must be found by a jury beyond a reasonable doubt).

⁶⁶ *State v. Ring*, 25 P.3d at 1150.

⁶⁷ *Id.* at 1152.

B. *The Case in the Supreme Court*

On appeal, in a majority opinion written by Justice Ginsburg, the United States Supreme Court overruled *Walton* and held that all defendants are “entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.”⁶⁸ In attacking the State of Arizona’s argument that their first-degree murder statute only leaves the judge a sentencing option of death or life imprisonment,⁶⁹ Justice Ginsburg reaffirmed *Apprendi*’s statement that “the relevant inquiry is not of form, but of effect”⁷⁰ and stated that “the required finding [of an aggravating circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury’s guilty verdict.”⁷¹ She found that Arizona’s first-degree murder statute “authorizes a maximum penalty of death only in a formal sense”⁷² because death cannot be awarded without a finding of fact that certain aggravating circumstances are present.⁷³ Ironically, she relied on Justice O’Connor’s dissenting opinion in *Apprendi*, emphasizing that there is “no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent.”⁷⁴ Justice Ginsburg stated that *Apprendi* was correct in holding that the characterization of a fact or circumstance as an “element” or a “sentencing factor” does not ultimately resolve the question of a judge or jury determination.⁷⁵ Further, she reasoned that if the mere characterization of a fact as a “sentencing factor” was enough to take the determination out of the hands of a jury, the rule in

⁶⁸ *Ring v. Arizona*, 122 S. Ct. 2428, 2432 (2002).

⁶⁹ *Id.* at 2440.

⁷⁰ *Id.* (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

⁷¹ *Id.* at 2440 (quoting *Apprendi*, 530 U.S. at 494 (alteration in the original)).

⁷² *Id.* (quoting *Apprendi*, 530 U.S. at 541).

⁷³ *Id.*

⁷⁴ *Id.* at 2442 (quoting *Apprendi*, 530 U.S. at 539 (O’Connor, J., dissenting)) (alteration in the original).

⁷⁵ *Id.* at 2441. Justice Ginsburg quoted *Apprendi*, 530 U.S. at 494 n.19, as stating “[W]hen the term ‘sentencing enhancement’ is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury’s guilt verdict.” *Id.*

Apprendi would “be reduced to a ‘meaningless and formalistic’ rule of statutory drafting.”⁷⁶

Arizona argued that judicial determination of aggravating factors would be a more efficient way to guarantee against the arbitrary imposition of the death penalty.⁷⁷ Justice Ginsburg replied that “[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential fact finders.”⁷⁸ She quoted Justice Scalia’s concurrence in *Apprendi*:

Entrusting to a judge the finding of facts necessary to support a death sentence might be “an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”⁷⁹

Appreciating that *Walton* and *Apprendi* could not stand together,⁸⁰ the Court overruled *Walton* and extended the holding of *Apprendi* to capital as well as non-capital determinations.⁸¹ Specifically, the Court held that the aggravating factors needed to impose a capital sentence must be found by a jury beyond a reasonable doubt because “[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it [did not] encompass the fact finding necessary . . . to put [a defendant] to death.”⁸²

In his concurring opinion, Justice Scalia applauded the holding in *Apprendi*. He reemphasized the view stated by Justice Ginsburg that “the fundamental meaning of the jury-trial guarantee . . . is that all facts essential to imposition of the level of punishment that the defendant receives—whether

⁷⁶ *Id.* (quoting *Apprendi*, 530 U.S. at 543 (O’Connor, J., dissenting)).

⁷⁷ *Id.* at 2442.

⁷⁸ *Id.*

⁷⁹ *Id.* (quoting *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring)). Ginsburg also stated that “[t]hroughout [English and American] history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations . . . [and] [b]y the time the Bill of Rights was adopted, the jury’s right to make these determinations was unquestioned.” *Id.* at 2438 (quoting *Walton v. Arizona*, 497 U.S. 639, 710–11 (1990) (Stevens, J., dissenting)).

⁸⁰ *Id.* at 2443.

⁸¹ *Id.*

⁸² *Id.*

[called] elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt.”⁸³ Justice Scalia noted that for the past twelve years, he watched as legislatures increasingly delegated sentencing factor decisions to judges, fearing that the “traditional belief in the right of trial by jury [was] in perilous decline.”⁸⁴ He explained that if a state could fashion a way to have a jury determine the existence or nonexistence of aggravating factors at the “guilt phase,” leaving the ultimate sentencing decision to the judge, then he would be inclined to uphold its constitutionality.⁸⁵ As a result of his fear that the right to a jury trial was being threatened and of his belief that all factual determinations must be found by a jury, Justice Scalia concurred in the judgment to overrule *Walton* and to apply *Apprendi* to capital, as well as non-capital, cases.⁸⁶

In a short concurring opinion, Justice Kennedy expressed his dislike for the holding in *Apprendi*. He recognized, however, that it was binding precedent and that it could not co-exist with the holding in *Walton*.⁸⁷ Justice Breyer, concurring in the judgment only, refused to accept the reasoning of *Apprendi* but asserted that judicial sentencing in capital cases violated the Eighth Amendment right to be free from cruel and unusual punishment.⁸⁸

In a dissenting opinion, Justice O’Connor, joined by Chief Justice Rehnquist, argued that *Apprendi*, and not *Walton*, should have been overruled.⁸⁹ In Justice O’Connor’s view, *Apprendi*’s holding went against prior precedent and could not be found anywhere in the Constitution.⁹⁰ In a parade of horrors argument, Justice O’Connor warned, and perhaps foreshadowed, that extending the reasoning of *Apprendi* to capital sentencing would “unleash a flood of petitions by convicted defendants” sitting on death row.⁹¹

⁸³ *Id.* at 2444 (Scalia, J., concurring).

⁸⁴ *Id.* at 2445 (Scalia, J., concurring).

⁸⁵ *Id.* (Scalia, J., concurring).

⁸⁶ *Id.* (Scalia, J., concurring).

⁸⁷ *Id.* (Kennedy, J., concurring).

⁸⁸ *Id.* at 2446 (Breyer, J., concurring). The question of whether judicial determination of capital sentencing violates the Eighth Amendment is beyond the scope of this article.

⁸⁹ *Id.* at 2448 (O’Connor, J., dissenting).

⁹⁰ *Id.* at 2449 (O’Connor, J., dissenting).

⁹¹ *Id.* (O’Connor, J., dissenting).

III. THE EFFECT OF *RING* ON STATE SYSTEMS

Although the decision in *Ring* resolved the constitutionality of Arizona's death penalty system, it created many more questions regarding capital sentencing systems in other states around the country. Several commentators have criticized the decision for not giving other state courts and legislatures a clear rule or guide to determine whether their death penalty systems are constitutional.⁹² By analyzing each state system and comparing it to the analysis and rules laid out in *Ring*, one can determine which systems will stand after the decision and which systems will be held unconstitutional and in conflict with the general principles laid down in *Ring*.

A. *Introduction to the Different Death Penalty Systems*

Of the fifty states in the United States, thirty-eight of them have capital sentencing systems in some form or another.⁹³ Of these thirty-eight states, thirty of them leave capital sentencing

⁹² See Melissa Harris, *U.S. Court Upholds Freeze on Executions; The Federal Ruling Allows Florida's Top Court Time to Review the Death Penalty*, ORLANDO SENTINEL, July 11, 2002, at A1 (quoting Bob Wesley, a Florida public defender, who stated that "[r]ight now we're all lost . . . [t]he U.S. Supreme Court hasn't given us a sufficient definition of what a constitutional death penalty is"); John Gibeaut, *States Revisit Death Sentence Cases*, 1 A.B.A. J. 25, 28 (describing Florida capital counsel Kevin Beck's belief that the *Ring* decision will cause Florida's sentencing system to "come[] to a grinding halt"); Charles Lane, *Court: Judges Can't Impose Death Penalty; Only Jury May Decide to Execute Defendant*, WASH. POST, June 25, 2002, at A1 (quoting Kent Scheidegger, the legal director of the Sacramento Criminal Justice Legal Foundation, who noted that "[e]very murderer on death row . . . will attack his sentence").

⁹³ See ARK. CODE ANN. § 5-4-602 (Michie 2001); CAL. PENAL CODE § 190.3 (Deering 2002); COLO. REV. STAT. § 16-11-103 (2001); CONN. GEN. STAT. ANN. § 53a-46a (West 2001); GA. CODE ANN. § 17-10-31.1 (2002); 720 ILL. COMP. STAT. 5/9-1 (West 2002); KAN. STAT. ANN. § 21-4624 (2001); KY. REV. STAT. ANN. § 532.025(1) (Michie 2001); LA. CODE EVID. ANN. art. 905.1 (West 2002); MD. ANN. CODE art. 27, § 413 (2001); MISS. CODE ANN. § 99-19-101 (2001); MO. ANN. STAT. §§ 565.030, 565.032 (West 2001); NEV. REV. STAT. ANN. 175.552 (Michie 2001); N.H. REV. STAT. ANN. § 630:5 (2002); N.J. STAT. ANN. § 2C:11-3 (West 2002); N.M. STAT. ANN. § 31-20A-1 (Michie 2002); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 2002); N.C. GEN. STAT. § 15-A-2000 (2002); OHIO REV. CODE ANN. § 2929.03 (Anderson 2002); OKLA. STAT. tit. 21, § 701.10 (West 2002); OR. REV. STAT. § 163.150 (2001); 42 PA. CONS. STAT. § 9711 (2001); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 2001); S.D. CODIFIED LAWS § 23A-27A-2 (Michie 2002); TENN. CODE ANN. § 39-13-204 (2001); TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 2001); UTAH CODE ANN. § 76-3-207 (2002); VA. CODE ANN. § 19.2-264.3 (Michie 2002); WASH. REV. CODE ANN. § 10.95.050 (West 2002); WYO. STAT. ANN. § 6-2-102 (Michie 2001).

decisions to the jury.⁹⁴ The remaining eight states leave the ultimate decision of life or death to judicial determination.⁹⁵ These eight states will be directly affected by the decision in *Ring*. In addition to Arizona,⁹⁶ three other states leave the finding of aggravating and mitigating factors and the ultimate sentencing decision entirely to judges.⁹⁷ The other four states have hybrid systems where the jury renders an advisory verdict of life or death but the judge makes the final sentencing determination.⁹⁸ Each of these eight states takes at least some responsibility for capital sentencing away from the jury and will be directly affected by the holding in *Ring*.

B. *Effect on States with Sole Judicial Determinations*

The capital sentencing systems in Idaho, Montana, and Nebraska all mirror that of Arizona and unconstitutionally allow a sentencing judge, without a jury, to find the statutory aggravating circumstances necessary to impose the death penalty.⁹⁹ In Montana, when a defendant is found guilty of first-degree murder, "the judge who presided at the trial . . . shall conduct a separate sentencing hearing to determine the existence or nonexistence of" aggravating circumstances.¹⁰⁰ This separate sentencing system is to be held "before the court alone."¹⁰¹ A convicted defendant's sentence cannot be raised to the death penalty without a judicial determination of the existence of aggravating circumstances. Therefore, Montana's capital sentencing system directly conflicts with the rule announced in *Ring* that "[c]apital defendants . . . are entitled to a

⁹⁴ Lane, *supra* note 93.

⁹⁵ See Adam Liptak, *A Supreme Court Ruling Roils Death Penalty Cases*, N.Y. TIMES, Sept. 16, 2002, at A14.

⁹⁶ See ARIZ. REV. STAT. ANN. § 13-703 (West 2001).

⁹⁷ See IDAHO CODE § 19-2515 (Michie 2002); MONT. CODE ANN. § 46-18-301 (2001); NEB. REV. STAT. § 29-2520 (2001).

⁹⁸ See ALA. CODE § 13A-5-46 (2002); DEL. CODE ANN. § 4209 (2002); FLA. STAT. ANN. § 921.141 (West 2002); IND. CODE ANN. § 35-50-2-9(e) (West Supp. 2002).

⁹⁹ Colorado used to allow a three-judge panel to conduct a sentencing hearing following a defendant's conviction of first-degree murder and gave the panel the power to impose the death penalty upon a finding of one aggravating factor. That statute has recently been replaced with a system under which the jury determines the presence of aggravating circumstances by a unanimous verdict. See John Sanko, *Governor Signs Death Penalty Law; Juries Will Make Life-or-Death Calls Instead of Judges*, ROCKY MOUNTAIN NEWS, July 13, 2002, at 2B.

¹⁰⁰ MONT. CODE ANN. § 46-18-301(1).

¹⁰¹ *Id.*

jury determination of any fact on which the legislature conditions an increase in their maximum punishment."¹⁰² As a result, Montana's capital sentencing system violates the Sixth Amendment, and the Montana legislature will have to create a system that leaves these factual determinations to the jury.

Similarly, in Idaho, "[a]fter a plea or verdict of [guilt for first-degree murder,] the court shall convene a hearing to receive evidence and argument in aggravation and mitigation."¹⁰³ As in Montana, a convicted defendant cannot be given a death sentence without judicial determination of aggravating circumstances. It is therefore impossible to distinguish this system from the Arizona system held unconstitutional in *Ring*. Upon the finding of at least one aggravating circumstance, the two state systems are identical. Similar to Arizona's capital sentencing system, which imposes the death penalty unless "there are . . . mitigating circumstances sufficiently substantial to call for leniency,"¹⁰⁴ Idaho requires a sentence of death unless there are mitigating circumstances "sufficiently compelling that the death penalty would be unjust."¹⁰⁵ Recently, in light of this problem, the Supreme Court of Idaho vacated a death sentence and stated that *Ring* "appears to invalidate the death penalty scheme in Idaho."¹⁰⁶ As a result of the strong similarity between both systems, it is hard to argue that Idaho's system is constitutional after *Ring*.

Nebraska's legislature leaves the determination of facts needed for imposition of a death sentence to either the presiding trial court judge; a panel of three judges, including the presiding judge and two other judges designated by the Nebraska Supreme Court; or a panel of three judges named by the chief justice of the Nebraska Supreme Court.¹⁰⁷ Although a panel of judges can determine the presence of aggravating factors, Nebraska's system unconstitutionally takes factual determinations out of the hands of a jury. When the Nebraska Supreme Court hears arguments on the validity of the state's death penalty system,¹⁰⁸

¹⁰² *Ring v. Arizona*, 122 S. Ct. 2428, 2432 (2002).

¹⁰³ See Idaho CODE § 19-2515(a) (Michie Supp. 2002).

¹⁰⁴ ARIZ. REV. STAT. ANN. § 13-703(E) (West Supp. 2002).

¹⁰⁵ IDAHO CODE § 19-2515(c).

¹⁰⁶ *State v. Fetterly*, 52 P.3d 874, 875 (Idaho. 2002).

¹⁰⁷ See NEB. REV. STAT. § 29-2520 (2001).

¹⁰⁸ See Robynn Tysver, *Death Penalty To Be Put on Trial in Nebraska; The State Supreme Court Will Hear Arguments in November on Whether the Law is*

it will be hard to distinguish their system from the one found unconstitutional in *Ring*. Justice O'Connor underscored this point when she wrote that the *Ring* decision "effectively declare[d] five States' capital sentencing schemes unconstitutional."¹⁰⁹

C. Effect on States with Hybrid Systems

At the time of the decision in *Ring*, Florida, Alabama, Indiana, and Delaware all had hybrid capital sentencing systems where the jury recommends a life sentence or the death penalty and a judge makes the final determination.¹¹⁰ As a result of the holding in *Ring*, the constitutionality of these state systems has been questioned by legal experts around the country.¹¹¹ Subsequently, some states have either stayed executions in anticipation of a ruling on the constitutionality of their systems¹¹² or redrafted their statutes to address future problems.¹¹³ Although these hybrid systems permit capital juries to weigh the aggravating and mitigating factors as a whole, they still prevent specific fact finding by a jury and allow judicial overrides of jury recommendations. Clearly, this method is inconsistent with the fundamental policies of the Sixth Amendment set forth in *Ring*.

In Florida, upon a conviction of first-degree murder, the court holds a separate sentencing hearing at which the jury determines "[w]hether sufficient aggravating circumstances

Constitutional, OMAHA WORLD-HERALD, Aug. 1, 2002, at 3B.

¹⁰⁹ *Ring v. Arizona*, 122 S. Ct. 2428, 2449 (2002) (O'Connor, J. dissenting) (speaking of Idaho; Montana; Nebraska; Colorado, which has since amended its law; and Arizona).

¹¹⁰ See ALA. CODE § 13A-5-46 (2002); DEL. CODE ANN. § 4209(d) (2002); FLA. STAT. ANN. § 921.141 (West 2002); IND. CODE ANN. § 35-50-2-9 (West Supp. 2002).

¹¹¹ See Gilbeaut, *supra* note 92, at 33 ("[P]rosecutors in Florida and Alabama wondered where questions unanswered in *Ring* would hit them."); Lane, *supra* note 93, at A1 (quoting Kent Schedegger, the legal director of the Sacramento based Criminal Justice Legal Foundation as saying, "Florida and Alabama have a difficult argument to maintain the present system").

¹¹² See Harris, *supra* note 92, at A1 (stating that there may be no executions in Florida for over a year in order to give the state's highest court time to rule on the constitutionality of their state sentencing system).

¹¹³ See IND. CODE ANN. § 35-50-2-9(e) (stating that "[f]or a defendant sentenced after June 30, 2002 . . . [i]f the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly") (emphasis added); see also Liptak, *supra* note 95, at A14 (discussing how Delaware and Indiana have enacted new laws to address *Ring*).

exist;”¹¹⁴ “[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances;”¹¹⁵ and “[b]ased on these considerations, whether the defendant should be sentenced to life imprisonment or death.”¹¹⁶ Regardless of the jury’s recommendation, the court has the authority to weigh the circumstances on its own and enter a sentence of life or death.¹¹⁷ Florida’s highest court has required that the trial judge give “great weight” to the jury’s recommendation¹¹⁸ and override that recommendation only if “the facts . . . [are] so clear and convincing that virtually no reasonable person could differ.”¹¹⁹ Despite this requirement, Florida judges have overridden jury recommendations of life imprisonment over 140 times.¹²⁰

In order to determine whether Florida’s sentencing system is constitutional in light of *Ring*, it is necessary to review prior Supreme Court decisions interpreting the constitutionality of that system. In *Proffitt v. Florida*,¹²¹ *Spaziano v. Florida*,¹²² and *Hildwin v. Florida*,¹²³ the United States Supreme Court upheld Florida’s sentencing system against several constitutional attacks. Attorneys and politicians in Florida continue to cite these decisions to support the constitutionality of Florida’s system.¹²⁴ As is the case with *Walton*, however, the principles in these cases cannot coexist with the principles laid down in *Apprendi* and *Ring*.

In *Proffitt*, the Supreme Court addressed the question of whether Florida’s capital sentencing system violates the Eighth

¹¹⁴ FLA. STAT. ANN. § 921.141(2)(a).

¹¹⁵ *Id.* § 921.141(2)(b).

¹¹⁶ *Id.* § 921.141(2)(c).

¹¹⁷ *Id.* § 921.141(3) (stating that “[n]otwithstanding the recommendation of a majority of the jury, the court . . . shall enter a sentence of life imprisonment or death”).

¹¹⁸ *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

¹¹⁹ *Id.*

¹²⁰ See Scott E. Erlich, Comment, *The Jury Override: A Blend of Politics and Death*, 45 AM. U. L. REV. 1403, 1405 (1996).

¹²¹ 428 U.S. 242, 247 (1976) (upholding Florida’s sentencing system against Eighth and Fourteenth Amendment attacks).

¹²² 468 U.S. 447, 449 (1984) (upholding Florida’s sentencing system against Eighth, Fifth, and Sixth Amendment challenges).

¹²³ 490 U.S. 638, 640 (1989) (upholding Florida’s sentencing system against an attack based on the Sixth Amendment).

¹²⁴ See Linda Kleindienst, *Court of Opinion; Attorneys Argue Before Justices Over Death Penalty and Constitution*, SUN-SENTINEL, Aug. 22, 2002, at 8B (quoting Justice Major Harding’s statement that “the Supreme Court of the United States, time after time, has said our death penalty passes muster”).

and Fourteenth Amendments.¹²⁵ In a majority opinion written by Justice Powell,¹²⁶ the Court stated that “it has never [been] suggested that jury sentencing is constitutionally required.”¹²⁷ After the holding in *Ring*, requiring that any factor necessary to increase a term of imprisonment to the death penalty must be found beyond a reasonable doubt,¹²⁸ there is strong precedent against judicial overrides of jury verdicts. Significantly, the *Proffitt* Court held that “judicial sentencing [would] lead . . . to even greater consistency in the imposition . . . of capital punishment.”¹²⁹ Justice Powell concluded that trial judges have more experience in sentencing and are better apt to impose capital sentences.¹³⁰ This argument was specifically rejected in *Ring* when the Court held that “[t]he Sixth Amendment jury trial right, however, does not turn on . . . relative rationality, fairness, or efficiency.”¹³¹ While few would dispute Justice Powell’s claim that trial judges possess greater experience and knowledge about criminal law,¹³² the founders adopted the Sixth Amendment because they feared leaving a criminal defendant’s rights and liberties in the hands of one judge.¹³³ Specifically, the founders sought to protect defendants from “a spirit of oppression and tyranny on the part of rulers.”¹³⁴ Taken together, the holding in *Proffitt* does little to support the constitutionality of Florida’s capital sentencing regime. Instead, the decision merely provides arguments about the sentencing knowledge of judges and highlights the lack of precedent against judicial

¹²⁵ *Proffitt*, 428 U.S. at 244.

¹²⁶ *Id.* at 244. Justice Powell wrote an opinion in which Justices Stewart and Stevens joined. Justice White wrote an opinion concurring in the judgment that Chief Justice Burger and Justice Rehnquist joined. Justice Blackmun concurred in the judgment in a separate opinion, while Justices Brennan and Marshall each dissented. *Id.* at 243–44.

¹²⁷ *Id.* at 252.

¹²⁸ See *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002) (noting that the Sixth Amendment’s protections would be virtually eliminated if not applied to an increase in sentence to death).

¹²⁹ *Proffitt*, 428 U.S. at 252.

¹³⁰ *Id.* (recognizing that trial judges are able to “impose sentences similar to those imposed in analogous cases”).

¹³¹ *Ring*, 122 S. Ct. at 2442.

¹³² *Proffitt*, 428 U.S. at 252.

¹³³ See Welsh S. White, Note, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant’s Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 3 (1989).

¹³⁴ 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 540–41 (4th ed. 1873).

determination of sentencing considerations. In sum, *Proffitt* is no more than a policy argument for upholding Florida's system.

In *Spaziano*, the Supreme Court again upheld Florida's system against Fifth, Sixth, and Eighth Amendment attacks. Countering the defendant's Sixth Amendment challenge,¹³⁵ the Court, in an opinion written by Justice Blackmun, held that "[t]he fact that . . . capital sentencing is like a trial . . . does not mean that it is like a trial in respects significant to the Sixth Amendment guarantee of a jury trial."¹³⁶ He concluded that no large risk exists that a state will use all of its resources to arbitrarily impose the death penalty.¹³⁷ This argument would fail today because the Sixth Amendment and the concerns embodied within it now require a jury determination of any fact that the legislature conditions an increase in sentencing upon.¹³⁸ Justice Blackmun also held that the sentencer holds responsibility for ultimately determining aggravating and mitigating circumstances because judges have traditionally determined the sentence to be imposed. *Ring* directly overruled this argument. As a result, *Spaziano*, like *Proffitt*, is outdated and in direct conflict with the fundamental holding of *Ring*.

In *Hildwin*, the Supreme Court upheld Florida's sentencing system despite a claim that it violated the Sixth Amendment by permitting imposition of the death penalty without any specific findings by the jury.¹³⁹ In another short and generalized policy argument, Justice Brennan expressed the view of the majority¹⁴⁰ that Florida's sentencing system is not "significant to the Sixth Amendment's guarantee of a jury trial."¹⁴¹ Justice Brennan voiced the argument presented in *Walton*, and overruled directly

¹³⁵ The defendant also challenged Florida's statute on the grounds that it violated the Eighth Amendment prevention of "cruel and unusual punishments." *Spaziano v. Florida*, 468 U.S. 447, 457 (1984). That question is beyond the scope of this Note.

¹³⁶ *Id.* at 459.

¹³⁷ *Id.*

¹³⁸ See *Apprendi v. New Jersey*, 530 U.S. 466, 482-83 (2000) (noting judges' traditional discretion to impose sentences within a statutorily defined range based upon facts determined by the jury and the "novelty" of a statutory process that eliminated the jury's position to make factual determinations necessary to increase the sentence beyond the maximum authorized by statute).

¹³⁹ *Hildwin v. Florida*, 490 U.S. 638, 639 (1989).

¹⁴⁰ Justices Rehnquist, Blackmun, Stevens, O'Connor, Scalia, and Kennedy formed a per curiam opinion, while Justices Brennan and Marshall dissented. *Id.* at 638, 641.

¹⁴¹ *Id.* at 640 (quoting *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).

by *Ring*, that “there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.”¹⁴² As stated earlier, the Supreme Court in *Ring* overruled *Walton* to the extent that it distinguished between sentencing considerations and elements of an offense and allowed judicial fact finding of any elements necessary to increase a defendant’s sentence.¹⁴³ The arguments presented by the Court in *Proffitt*, *Spaziano*, and *Hildwin* have been attacked and rejected in *Apprendi* and *Ring*; these cases should be considered overruled to the extent that they follow the policies wrongfully laid out in *Walton*.

As with Florida, Alabama gives convicted defendants the right to have a sentencing hearing before a jury, after which the jury will return an advisory verdict based upon whether “one or more aggravating circumstances . . . exist . . . [that] outweigh [any] mitigating circumstances” present.¹⁴⁴ Alabama gives defendants even less protection under the Sixth Amendment because, unlike Florida’s system that allows a judicial override when reasonable minds could not have found as the jury did,¹⁴⁵ Alabama follows the standard that “[a] jury’s recommendation . . . is not binding upon the court” and can be overridden with complete judicial discretion.¹⁴⁶

The Supreme Court has also held Alabama’s system constitutional. In *Harris v. Alabama*,¹⁴⁷ Louise Harris appealed after she received a death sentence from a judicial override of a jury’s recommendation of life imprisonment.¹⁴⁸ Harris claimed that Alabama’s statute was unconstitutional because it failed to specify how much weight a trial judge must give an advisory verdict.¹⁴⁹ In a majority opinion written by Justice O’Connor,¹⁵⁰ the Court held that “a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is

¹⁴² *Id.* (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986)).

¹⁴³ See *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002).

¹⁴⁴ ALA. CODE § 13A-5-46(e)(2) (2002).

¹⁴⁵ See *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

¹⁴⁶ ALA. CODE § 13A-5-47(e).

¹⁴⁷ 513 U.S. 504 (1995).

¹⁴⁸ *Id.* at 507–08.

¹⁴⁹ *Id.* at 505.

¹⁵⁰ Justices O’Connor, Rehnquist, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer formed the majority, while only Justice Stevens dissented. *Id.* at 505.

[not] constitutionally required.”¹⁵¹ The Court relied on *Proffitt* and *Walton* and held that giving a trial judge discretion in imposing a sentence in a capital case is consistent with precedent.¹⁵² Like *Proffitt* and *Walton*, this case cannot stand in light of the modern Court’s holdings in *Apprendi* and *Ring*; Alabama takes the final determination of capital fact finding out of the hands of the jury. This undermines the strong principles laid down in *Ring* and leads to inconsistency among states across the country. Allowing Alabama’s sentencing system to remain would send the message that it is wrong to have judicial fact finding but not to have judicial overrides of jury fact finding.

At the time of the decision in *Ring*, Delaware and Indiana had hybrid systems as well.¹⁵³ Unlike Florida and Alabama, however, the Delaware and Indiana state legislatures enacted new statutes that will take capital fact finding out of the hands of a judge and put it into the hands of a jury.¹⁵⁴ This action was necessary in order to be consistent with the fundamental principles of the Sixth Amendment¹⁵⁵ and the rule laid down in *Ring* and *Apprendi*.¹⁵⁶ Florida politicians, such Governor Jeb Bush, have purposely ignored the Supreme Court’s message in order to further their own political views on the death penalty.¹⁵⁷ This stance, however, only enforces the policy reason in support of the Sixth Amendment: to ensure that criminal defendants’ trials are not unconstitutionally affected by political and governmental beliefs.¹⁵⁸ Additionally, many defenders of state systems like Florida’s argue that a change to a jury system “will cost taxpayers millions in ‘wasted work’ and could spawn years

¹⁵¹ *Id.* at 512 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988)).

¹⁵² *Id.* at 509–10.

¹⁵³ See DEL. CODE ANN. § 4209 (2002); IND. CODE § 35–50–2–9 (West Supp.2002).

¹⁵⁴ See Liptak, *supra* note 95, at A14 (stating that Arizona, Colorado, Delaware, Indiana, and Montana have all passed laws addressing the decision in *Ring*).

¹⁵⁵ See White, *supra* note 133, at 3.

¹⁵⁶ *Ring v. Arizona*, 122 S. Ct. 2428, 2432 (2002).

¹⁵⁷ Governor Bush tried several tactics to move up executions, including filing a notice in support of a request to move ahead with executions and signing death warrants for two inmates. His actions have been criticized as a “crass political move at a time when Mr. Bush knows that the courts will issue stays in both cases.” Kleindienst, *supra* note 124, at A1.

¹⁵⁸ See White, *supra* note 133, at 3 (noting “[f]ear of unchecked power, so typical of our State and Federal Governments” is one of the reasons for the enactment of the Sixth Amendment).

of appeals.”¹⁵⁹ This argument is flawed; civil liberties granted by the Constitution are not founded on tax dollars and court efficiency. The legislatures of Alabama and Florida should rewrite their statutes and give defendants the proper protection embedded in the Sixth Amendment and expressed in *Ring*.

In conclusion, the hybrid systems are no more constitutional than the systems with a direct judicial determination. Allowing Florida and Alabama’s systems to stand will leave inconsistency among the states and undermine the policies of the Sixth Amendment.

IV. EFFECT OF *RING* ON CONVICTED DEFENDANTS SITTING ON DEATH ROW

The holding in *Ring* and the disruption it will bring to eight state systems directly affects hundreds of convicted defendants sitting on death row. Throughout the country, there are approximately 3,700 convicted prisoners on death row.¹⁶⁰ In Arizona, Colorado, Idaho, Montana, and Nebraska, systems that allowed judicial determinations, there are 168 convicted prisoners awaiting execution—including 129 in Arizona alone.¹⁶¹ In Alabama, Florida, Delaware, and Indiana, the states with hybrid systems, there are 629 prisoners on death row.¹⁶² Of those 629, 383 are in Florida, and 187 are in Alabama.¹⁶³ The application of *Ring* to past and future death sentences will be important because most, if not all, convicted defendants will bring direct appeals¹⁶⁴ or habeas corpus petitions¹⁶⁵ in hope that the holding in *Ring* will save their lives.

¹⁵⁹ Carol Sowers & Elvia Diaz, *Death-Penalty Law Change Decried; Attorneys Complain of Extra Work*, ARIZ. REPUBLIC, Aug. 2, 2002, at 6B.

¹⁶⁰ See Lane, *supra* note 92, at A1.

¹⁶¹ *Id.* Colorado has changed its law since the *Ring* decision and no longer allows for judicial determinations. See *supra* note 100.

¹⁶² See Lane, *supra* note 92, at A1.

¹⁶³ *Id.*

¹⁶⁴ Defendants sentenced to death under the State systems, who have not exhausted their appeals, can appeal their sentences under the new holding in *Ring*.

¹⁶⁵ See ORAN’S DICTIONARY OF THE LAW 223 (3d ed. 2000) (defining habeas corpus as “[a] judicial order to someone holding a person to bring that person to court. It is most often used to get a person out of unlawful imprisonment by forcing the captor and the person being held to come to court for a decision on the legality of the imprisonment”). A state prisoner can bring federal habeas corpus petitions if:

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of

A. Rules of Retroactivity

In order for convicted defendants to successfully bring appeals or habeas corpus petitions, the courts must first determine whether the holding in *Ring* should be applied retroactively. Although a new rule cannot be applied retroactively by the lower courts until the Supreme Court grants permission,¹⁶⁶ it is possible to examine the rules the Supreme Court has created and speculate as to whether it will apply *Ring* retroactively.

In 1971, in a concurring opinion in *Mackey v. United States*,¹⁶⁷ Justice Harlan sought to clarify the federal rules for retroactivity.¹⁶⁸ Frustrated that the question of retroactivity had become a matter of judicial discretion, Harlan criticized past precedent, claiming it had become "almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim."¹⁶⁹ Justice Harlan first distinguished between matters on direct review and matters on collateral review.¹⁷⁰ He stated that new constitutional rules should always be applied to matters on direct review because "a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was."¹⁷¹ As for cases brought on collateral review, either by habeas corpus or a motion to vacate, he argued that

Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241 (2002). Federal prisoners can challenge their sentences by bringing a motion to vacate. 28 U.S.C. § 2255 (2002).

¹⁶⁶ See *Tyler v. Cain*, 533 U.S. 656, 663 (2001) ("[A] new rule is not 'made retroactive to cases on collateral review' unless the Supreme Court holds it to be retroactive.").

¹⁶⁷ 401 U.S. 667 (1971).

¹⁶⁸ *Id.* at 676-77 (proclaiming "the time ha[s] come for us to pause to consider just where [the courts] . . . might be leading us").

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 680-81.

¹⁷¹ *Id.* at 681.

there is a stronger policy toward finality.¹⁷² Accordingly, he concluded that it was better policy¹⁷³ to apply the law prevailing at the time of the conviction rather than the new law prevailing at the time of the petition.¹⁷⁴ Justice Harlan noted two important exceptions, however, to the general rule that new laws will not be applied retroactively on collateral review. First, he recognized an exception for “[n]ew ‘substantive due process’ rules, . . . those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority.”¹⁷⁵ Secondly, he noted an exception for “those procedures that . . . are ‘implicit in the concept of ordered liberty.’”¹⁷⁶ Outside of these two narrow exceptions, Justice Harlan sought to create a general premise that new rules should be applied retroactively on direct appeal but not on collateral review.

In 1989, as a result of the same concerns voiced by Justice Harlan about inconsistent application of retroactivity, the United States Supreme Court again sought to develop a clear procedure for determining when laws should be applied retroactively.¹⁷⁷ In *Teague v. Lane*,¹⁷⁸ the Court adopted and expanded the rule developed by Justice Harlan.¹⁷⁹ The Court held, in an opinion written by Justice O’Connor, that the first step in a retroactivity analysis is to determine whether the case upon which the petitioner relies on did in fact announce a new

¹⁷² *Id.* at 683. He claimed that the Supreme Court’s function in reviewing a decision on direct review is much different from reviewing a decision by habeas corpus, because there is an “interest in leaving concluded litigation in a state of repose.” *Id.* at 682–83.

¹⁷³ Justice Harlan stated, “[b]oth the individual criminal defendant and society have an interest in insuring that there will . . . be the certainty that comes with an end to litigation.” *Id.* at 690 (quoting *Sanders v. United States*, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting)).

¹⁷⁴ *Id.* at 688–89.

¹⁷⁵ *Id.* at 692.

¹⁷⁶ *Id.* at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Justice Harlan states that, over time, there may be changes that “properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction.” *Id.*

¹⁷⁷ See *Teague v. Lane*, 489 U.S. 288, 302 (1989) (stating that past precedent has led to inconsistent results).

¹⁷⁸ *Id.* at 288.

¹⁷⁹ *Id.* at 310.

rule.¹⁸⁰ Justice O'Connor stated that a case announces a new rule "when it breaks new ground or imposes a new obligation on the States or Federal Government . . . [and] was not *dictated* by precedent existing at the time the defendant's conviction became final."¹⁸¹ Thus, if the petitioner relied upon a case that did not create a new rule, retroactivity would not be an issue.¹⁸² Alternatively, if the case did enact a new rule, O'Connor endorsed Justice Harlan's approach that new rules should be applied retroactively to criminal cases on direct review but not on collateral review.¹⁸³ In addition, the Court noted and adopted Justice Harlan's two limited exceptions as the only exceptions which permit retroactive application of new rules on collateral review.¹⁸⁴ In concluding that "the costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application,"¹⁸⁵ the Court adopted Justice Harlan's general rule that new rules can be retroactively applied to cases on direct, but not collateral, review.¹⁸⁶

B. *Applying the Rule to Ring*

As stated above, the first step in a retroactivity analysis is to determine whether the case relied upon created a new rule of law.¹⁸⁷ Convicted defendants on death row will rely upon the rule established in *Ring* that "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."¹⁸⁸ As stated earlier, Justice O'Connor defined a new rule as one that "breaks new ground or imposes a new obligation on the States or Federal Government . . . [and] was not *dictated* by precedent existing at the time the defendant's conviction became final."¹⁸⁹ It is clear that the new

¹⁸⁰ *Id.* at 301.

¹⁸¹ *Id.*

¹⁸² *See id.*

¹⁸³ *Id.* at 304-05.

¹⁸⁴ *Id.* at 307.

¹⁸⁵ *Id.* at 310 (alteration in original) (quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984) (Powell, J., concurring)).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 301.

¹⁸⁸ *Ring v. Arizona*, 122 S. Ct. 2428, 2432 (2002).

¹⁸⁹ *Teague*, 489 U.S. at 301.

rule in *Ring* imposes a novel obligation on the states because it effectively overruled the capital sentencing systems in five states and threw the constitutionality of four more into question. As a result, several state legislatures had to re-write their statutes to place the determination of aggravated factors in the hands of the jury, and the courts in these states will be flooded with capital appeals for the next few years.¹⁹⁰

A more difficult question is whether the holding in *Ring* was dictated by existing precedent. Some scholars would argue that the holding was not a new rule but rather an application of the rule stated in *Apprendi*, which is that any fact upon which the legislature conditions an increase in sentencing upon must be found by a jury beyond a reasonable doubt.¹⁹¹ Justice Powell once suggested that retroactivity should not be addressed when the Court “merely has applied settled precedents to new and different factual situations.”¹⁹² The rule in *Apprendi* was not settled precedent for capital sentencing at the time that *Ring* was decided. Previously, the Supreme Court upheld the constitutionality of judicial determination of aggravating factors necessary to impose the death penalty.¹⁹³ Therefore, although *Apprendi* was the rule applied in non-capital cases, the Court still considered *Walton* precedent for capital cases. The holding of *Ring* that a defendant’s Sixth Amendment right to a jury trial extends to the determination of aggravating circumstances in capital cases was not existing precedent. Therefore, it was the enactment of a new constitutional rule for retroactivity purposes.

The second step in a retroactive analysis is to determine whether the particular case is being appealed by direct or collateral review¹⁹⁴ with the understanding that cases on direct review, but not collateral review, are entitled to retroactive

¹⁹⁰ See *Ring*, 122 S. Ct. at 2442 n.6.

¹⁹¹ Cf. *Apprendi v. New Jersey*, 530 U.S. 466, 482–83 (2000).

¹⁹² *United States v. Johnson*, 457 U.S. 537, 549 (1982).

¹⁹³ See *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (upholding the constitutionality of a jury override); *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (holding Arizona’s sentencing system constitutional); *Hildwin v. Florida*, 490 U.S. 638, 640–41 (1989) (upholding a Sixth Amendment challenge to the jury override system); *Spaziano v. Florida*, 468 U.S. 447, 449 (1984) (stating there is no constitutional requirement that the jury’s recommendation of life be final); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (“[I]t has never [been] suggested that jury sentencing is constitutionally required.”).

¹⁹⁴ *Teague*, 489 U.S. at 304–05.

application of new rules.¹⁹⁵ In accordance with this principle, any convicted defendants on death row who have not yet exhausted their right of direct appeal will be entitled to the benefit of the holding in *Ring* and should be resentenced by a jury determination of aggravating and mitigating circumstances. Denial of the benefit of this rule on direct appeal would undermine the considerations of fairness embodied in the Due Process Clause of the Fourteenth Amendment and the jury trial right of the Sixth Amendment.

Conversely, and as stated above, new rules should not be applied retroactively to cases on collateral review.¹⁹⁶ This is unfortunate for the many defendants on death row who have exhausted their appeals and may be entitled only to habeas corpus petitions.¹⁹⁷ Although the general rule excludes retroactivity to cases on collateral review,¹⁹⁸ the next step in the analysis is to consider whether the rule laid down in *Ring* falls within one of the two exceptions created by the Court.¹⁹⁹

The first exception applies to new rules that “[place] a class of private conduct beyond the power of the State to proscribe.”²⁰⁰ In 1990, the Supreme Court held that a rule that prevented a bar on mitigating evidence in capital sentencing was not the type of rule that fell within the exception because it “would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons.”²⁰¹ A rule holding unconstitutional any attempt to exclude mitigating circumstances from capital sentencing determinations is closely paralleled to the capital sentencing rule established in *Ring*. Judicial determinations of aggravating circumstances do not impose the death penalty upon a particular class of persons, nor do they decriminalize a particular type of conduct. In *Mackey*, Justice Harlan gave two reasons for enacting this exception. First, “[t]here is little societal interest in permitting the criminal

¹⁹⁵ See *Mackey v. United States*, 401 U.S. 667, 688–89 (1971).

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* (discussing the habeas petition and judicial review generally).

¹⁹⁸ See *Lane*, *supra* note 92, at A1.

¹⁹⁹ See *Teague*, 489 U.S. at 307 (explaining Justice Harlan’s two exceptions to the general rule of nonretroactivity for cases on collateral review).

²⁰⁰ *Lambrix v. Singletary*, 520 U.S. 518, 539 (1997).

²⁰¹ *Saffle v. Parks*, 494 U.S. 484, 494–95 (1990) (holding that a new rule requiring the consideration of mitigating circumstances in capital sentencing does not meet either of the two exceptions in *Teague*).

process to rest at a point where it ought properly never to repose,"²⁰² and second, the "issuance of the writ on substantive due process grounds [brings no threat of retrial]."²⁰³ Applying the holding in *Ring* would directly contradict these policies since it does not involve abolishing particular conduct that was once illegal and it would bring about a substantial increase in appeals and resentencing, undermining the notion of finality relied upon by Justice Harlan.

The second exception allows for the retroactive application of new rules to cases on collateral review if they are "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."²⁰⁴ Justice Harlan stated that "any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair."²⁰⁵ Additionally, in *Teague*, the Court stated that there were two requirements for the retroactive application of a rule on collateral review: first the rule must be necessary to prevent an "'impermissibly large risk that the innocent will be convicted,'"²⁰⁶ second, the rule "must implicate the fundamental fairness of the trial."²⁰⁷

In the case of *Ring*, having a jury determine the existence of aggravating factors does not necessarily create a large risk that an innocent defendant will be convicted. Judicial determinations of aggravating factors, although they violate the principles of the Sixth Amendment, have certain safeguards, including full sentencing hearings where the defense can present evidence of mitigating circumstances and abuse-of-discretion reversals on appellate review. Although the Sixth Amendment was designed to place a defendant's fate in the hands of twelve citizens who reflect the voice of the community,²⁰⁸ judicial determination of aggravating circumstances does not necessarily present the kind of threat to fundamental fairness contemplated and feared by

²⁰² *Mackey*, 401 U.S. at 693.

²⁰³ *Id.*

²⁰⁴ *Lambrix*, 520 U.S. at 539 (quoting *Teague v. Lane*, 489 U.S. 288, 311 (1989)).

²⁰⁵ *Mackey*, 401 U.S. at 693.

²⁰⁶ *Teague*, 489 U.S. at 312 (quoting *Desist v. United States*, 394 U.S. 244, 262 (1969)).

²⁰⁷ *Id.*

²⁰⁸ See *White*, *supra* note 134, at 3.

Justice Harlan.²⁰⁹ In addition, having judicial determination of aggravating circumstances does not violate “the fundamental fairness of the trial”²¹⁰ because there is no implication that judges would impose a risk on a defendant’s right to fair trial. In fact, a jury might be more likely than a judge to impose the death penalty improperly based on emotion. In conclusion, although the defendant should be entitled to a jury determination of any fact beyond a reasonable doubt, a jury determination of aggravating circumstances in capital sentencing is not the type of procedure “implicit in the concept of ordered liberty”²¹¹ that the Court intended for retroactive application.

Since the new rule enacted in *Ring* fails to meet either of the exceptions laid down in *Teague*, defendants convicted by judicial determination of aggravated factors will only be able to appeal their convictions if they have not yet exhausted their direct appeals. Whether defendants have exhausted their direct appeals is a question to be determined on a case-by-case basis by each defendant’s attorney and the Court, if necessary. Because only the Supreme Court has the power to apply a new rule retroactively,²¹² the rules for retroactivity embodied in the Supreme Court’s precedent must be followed. As a result, many convicted defendants sitting on death row will not be able to take advantage of the new rule in *Ring* unless the Court decides to develop a new exception to the fundamental rules laid down in *Teague*. As more and more appeals flood the courts within the next few years, it is most likely that only those on direct review will be heard.

V. CONCLUSION

The decision in *Ring v. Arizona* was an unprecedented decision and the first decision in over thirty years to invalidate a

²⁰⁹ Justice Harlan uses the example of the deprivation of the right to counsel as one rule that would fit within the fundamental fairness exception because it brings about a substantial risk that innocent people will be convicted. See *Mackey*, 401 U.S. at 693–94. This writer believes that putting the determination of aggravating circumstances in the hands of a judge is as large a risk to the innocent as not having the right to counsel.

²¹⁰ *Teague*, 489 U.S. at 312.

²¹¹ *Mackey*, 401 U.S. at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

²¹² See *supra* note 167.

state capital sentencing system.²¹³ It is a widely controversial and monumental decision that will have extensive implications across the country. One commentator stated that the decision will at least “buy everyone on death row in these . . . states another 7.5 years of life. That’s the average length of time it takes to go from imposition of the death sentence to execution.”²¹⁴ *Ring’s* impact in Florida and Alabama, where capital sentencing is still based on a jury override system, is left to be determined by the courts. If the Supreme Court allows these systems to stand, the strong policies emphasized in *Ring* and embodied in the Sixth Amendment will be undermined. Further, state systems that permit judges to reverse fact-finding decisions by a jury will remain intact, leaving the kind of inconsistency among systems that *Ring* was designed to fix. As far as the convicted defendants on death row are concerned, the arguments brought out by Arizona prosecutors that “*Ring* doesn’t apply to . . . death row prisoners who already have exhausted their direct appeals”²¹⁵ are correct. In addition, in Florida and Alabama, those convicted defendants who have not exhausted their direct appeals will face a large hurdle if they were sentenced to death after a jury recommendation of death.

Regardless of how many death row inmates are successful in retroactivity arguments, the *Ring* case will have a large impact on the future of capital sentencing. From this point forward, every state will have to place capital fact finding in the hands of a jury, making death determinations almost entirely the voice of the community. By its holding, the Supreme Court properly advanced the fundamental right to a jury trial embodied in the Sixth Amendment and gave future defendants the full protections they deserve under the Constitution. *Ring v. Arizona* properly resolved ambiguities created by precedent, but most importantly, it upheld the protections given to the citizens of this country by the Bill of Rights.

²¹³ See Lane, *supra* note 92, at A1.

²¹⁴ *Id.*

²¹⁵ Gibeaut, *supra* note 92, at 27.

